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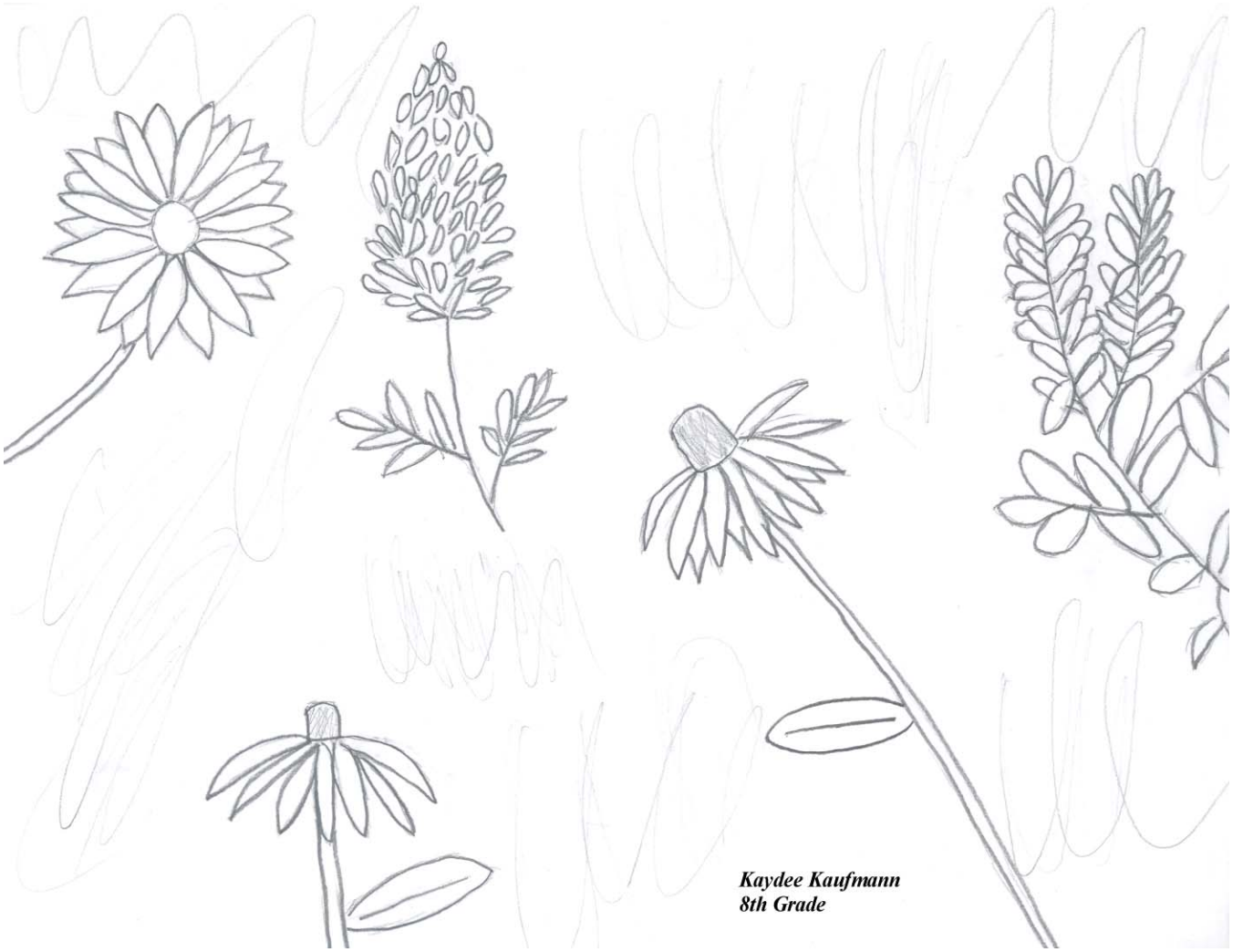

Kaydee Kaufmann
8th Grade

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

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

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IN THIS ISSUE

State Preservation Board

Public Utility Commission of Texas

Supreme Court of Texas

PROPOSED RULES

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

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

TITLE 1. ADMINISTRATION

PART 3. OFFICE OF THE ATTORNEY GENERAL

CHAPTER 55. CHILD SUPPORT ENFORCEMENT

SUBCHAPTER D. FORMS FOR CHILD SUPPORT ENFORCEMENT

1 TAC §55.120

The Office of the Attorney General, Child Support Division proposes an amendment to 1 TAC §55.120, regarding forms for child support enforcement. The proposed amendment reflects revisions made to the Request for Review of National Medical Support Notice (NMSN) concerning the time period to contest the NMSN.

Alicia G. Key, Deputy Attorney General for the Child Support Division, has determined that for the first five years the amended section as proposed is in effect, there will be no significant fiscal implications for state or local government.

Ms. Key has also determined that for each year of the first five years the amended section as proposed is in effect, the public benefit as a result of the amended section will be compliance with forms authorized by state and federal statutes.

Ms. Key has also determined that for the first five years the amended section as proposed is in effect, there will be no significant fiscal implications for small businesses or individuals. In addition, there will be no local employment impact as a result of the amended section as proposed.

Comments on the proposed amendment should be submitted to Kathy Shafer, Deputy Director, Legal Counsel Division, Child Support Division, Office of the Attorney General, (physical address) 5500 East Oltorf, Austin, Texas 78741 or (mailing address) P.O. Box 12017, Mail Code 044, Austin, Texas 78711-2017.

The proposed amendment is authorized under Texas Family Code §231.003, which provides the Office of the Attorney General with the authority to prescribe forms and procedures for the implementation of Chapter 231.

The Texas Family Code, Chapter 154 is affected by the amended section.

§55.120. National Medical Support Notice, Request for Review of National Medical Support Notice, Termination of National Medical Support Notice.

(a) The National Medical Support Notice is federally mandated for use in IV-D cases and may be used in any other suit in which an obligor is ordered to provide health insurance coverage for a child.
Figure: 1 TAC §55.120(a) (No change.)

(b) The Request for Review of National Medical Support Notice may be used by an obligor to contest the National Medical Support Notice sent to the employer.
Figure: 1 TAC §55.120(b)
[~~Figure: 1 TAC §55.120(b)~~]

(c) The Termination of National Medical Support Notice may be used in any Suit Affecting the Parent Child Relationship order to terminate medical child support.
Figure: 1 TAC §55.120(c) (No change.)

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

Filed with the Office of the Secretary of State on August 10, 2010.

TRD-201004613
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Earliest possible date of adoption: September 26, 2010
For information regarding this publication, contact Zindia Thomas, Agency Liaison, at (512) 936-9901.

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TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 19. QUARANTINES AND NOXIOUS AND INVASIVE PLANTS

SUBCHAPTER M. SWEET POTATO WEEVIL QUARANTINE

4 TAC §19.133

The Texas Department of Agriculture (the department) proposes an amendment to Chapter 19, §19.133, concerning clarification to the Sweet Potato Weevil Quarantine. The amendment provides that sweet potatoes from out-of-state sweet potato weevil quarantined areas are prohibited entry into sweet potato weevil-free areas of Texas. This clarification is necessary due to an oversight in the recently adopted amendment to §19.133, published in the June 25, 2010, issue of the *Texas Register.* The amendment to §19.133 was adopted to establish rules for the

movement of sweet potatoes exported from quarantined areas of other states to the sweet potato weevil quarantined areas of Texas under phytosanitary certification by the exporting state departments of agriculture. However, this was not clearly stated in the adopted rule. The proposed rule is to clarify that sweet potatoes grown in sweet potato quarantined areas of other states are prohibited entry into sweet potato weevil-free areas of Texas. The department believes it is necessary to take this action to prevent the spread of sweet potato weevil into sweet potato weevil-free areas of Texas. The department has published an emergency amendment identical to this proposal, published in the July 16, 2010, issue of the *Texas Register* (35 TexReg 6141).

Dr. Awinash Bhatkar, Coordinator for Plant Quality Programs, has determined there will be no fiscal implication for state or local governments or small and micro-businesses for the first five years the amendments are in effect.

Dr. Bhatkar also determined for each year of the first five years the amendments are in effect the public benefit anticipated as a result of administering the amended section will be a more efficient use of the department's resources in mitigating the pest risk from out-of-state shipments of sweet potatoes into Texas. There will be no economic cost for individuals or businesses required to comply with the amended section.

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

The amendment is proposed under the Texas Agriculture Code, §71.001, which authorizes the department to establish a quarantine against out-of-state diseases and pests; and §71.007, which authorizes the department to adopt rules as necessary to protect agricultural and horticultural interests, including rules to provide for specific treatment of a grove or orchard or of infested or infected plants, plant products, or substances.

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

§19.133. Restrictions.

(a) General. Quarantined articles are prohibited entry into Texas [~~and shall not be moved from any quarantined area into or within the free area of Texas~~], except as provided in subsection (b)(1) [~~subsections (b) and (c)~~] of this section.

(b) Exceptions.

(1) All shipments of sweet potatoes must be accompanied by a certificate or other phytosanitary document, issued by and bearing the signature of an authorized representative of the origin state's department of agriculture, certifying that such shipment was inspected and found to be free of sweet potato weevil. Quarantined articles from quarantined areas of other states are prohibited entry into sweet potato weevil-free areas of Texas.

(2) - (4) (No change.)

(c) - (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 August 11, 2010.

TRD-201004644

Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: September 26, 2010
For further information, please call: (512) 463-4075

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TITLE 19. EDUCATION

PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

CHAPTER 17. RESOURCE PLANNING
SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §17.3

The Texas Higher Education Coordinating Board proposes amendments to §17.3, concerning Definitions. Specifically, these amendments will make necessary changes to existing definitions in order to facilitate implementation of modified reporting and standard changes in regards to deferred maintenance and critical deferred maintenance.

Susan Brown, Assistant Commissioner for Planning and Accountability, Texas Higher Education Coordinating Board has determined that for each year of the first five years the section is in effect, there will not be any fiscal implications to state or local government as a result of enforcing or administering this change to the rule.

Ms. Brown has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be the more efficient and effective administration of facilities at institutions of higher education. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Gary Johnstone, Deputy Assistant Commissioner for Planning and Accountability, Texas Higher Education Coordinating Board, 1200 East Anderson Lane, Austin, Texas 78752; gary.johnstone@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The amendments are proposed under the Texas Education Code, §§61.0572, 61.058, and 61.0582.

The amendments affect Texas Education Code, §§61.0572, 61.058, and 61.0582.

§17.3. Definitions.

The following words and terms shall have the following meanings, unless the context clearly indicates otherwise.

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

(11) Campus Condition Index (CCI)--A comparative indicator of the relative condition of facilities calculated by dividing the deferred maintenance backlog by the current Campus Condition Index Value. This may be calculated for an individual building, group of buildings, or an entire campus.

(12) Campus Condition Index Value (CCIV)--The institution-wide relative value of an institution's facilities, as determined annually by the Board. The method of calculation is based on approved

Board project costs. Campus Condition Index Values are calculated for Educational and General (EGCCIV) space and Institution-Wide (IWCCIV) space. A 25 percent add-on is included to account for the cost of necessary infrastructure. These are NOT to be used for insurance purposes.

(13) Campus Condition Report (MP2)--A detailed report outlining facility maintenance needs in the areas of planned maintenance, facilities adaptation, deferred maintenance and critical deferred maintenance. Also included are the expenditures in each area for the year preceding the report as well as amounts budgeted and unbudgeted in each area for the current year.

[(11) Campus Deferred Maintenance Plan (MP2)--A detailed report of institutional programs to address deferred maintenance and critical deferred maintenance.]

(14) [(12)] Campus Master Plan--A detailed long-range plan of institutional physical plant needs, including facilities construction and/or development, land acquisitions, and campus facilities infrastructure; the plan provides long-range and strategic analyses and facilities development guidelines.

(15) [(13)] Capital Renewal--Includes capital improvements and changes to a facility in response to evolving needs. The changes may occur because of new programs or to correct functional obsolescence. Items an institution considers capital renewal should be captured in the either planned maintenance or facility adaptation. [Capital renewal needs are not part of the deferred maintenance backlog.]

(16) [(14)] Certification--Institutional attestation of reports or other submissions as being true or as represented.

(17) [(15)] Classroom--A room used for scheduled classes. These rooms may be called lecture rooms, lecture-demonstration rooms, seminar rooms, or general purpose classrooms. A classroom may contain multimedia or telecommunications equipment, such as those used for distance learning. A classroom may be furnished with special equipment (e.g., globes, maps, pianos) appropriate to a specific area of study. A classroom does not include conference rooms, meeting rooms, auditoriums, or class laboratories.

(18) [(16)] Class Laboratory--A room used primarily by regularly scheduled classes that require special-purpose equipment for student participation, experimentation, observation, or practice in a field of study. Class laboratories may be referred to as teaching laboratories, instructional shops, computer laboratories, drafting rooms, band rooms, choral rooms, group studios. Laboratories that serve as individual or independent study rooms are not included.

(19) [(17)] Clinical Facility--A facility often associated with a hospital or medical school that is devoted to the diagnosis and care of patients in the instruction of health professions and allied health professions; medical instruction may be conducted, and patients may be examined and discussed. Clinical facilities include, but are not limited to, patient examination rooms, testing rooms, and consultation rooms.

(20) [(18)] Committee or Committee on Strategic Planning--The members of the Board appointed to consider facility-related issues. This includes the Committee on Strategic Planning and its successors.

(21) [(19)] Commissioner--The chief executive officer of the Texas Higher Education Coordinating Board.

(22) Critical Deferred Maintenance--Any deferred maintenance that if not corrected in the current budget cycle places its building occupants at risk of harm or the facility at risk of not fulfilling its functions.

(23) Deferred Maintenance--The accumulation of facility components in need of repair or replacement brought about by age, use, or damage, for which remedies are postponed or considered backlogged, that is necessary to maintain and extend the life of a facility. This includes repairs postponed due to funding limitations. Deferred maintenance excludes on-going maintenance, planned maintenance performed according to schedule, and facility adaptation items.

[(20) Critical Deferred Maintenance--The physical conditions of a building or facility that places its occupants at risk of harm or the facility at risk of not fulfilling its functions.]

[(21) Deferred Maintenance--An existing or imminent building maintenance-related deficiency from prior years that needs to be corrected, or scheduled preventive maintenance tasks that were not performed because other tasks funded within the budget were perceived to have higher priority status. The accumulation of facility components in need of repair brought about by age, use, or damage for which remedies are postponed or considered backlogged. This may include those repairs postponed due to insufficient funding.]

(24) [(22)] Deputy Assistant Commissioner for Planning and Accountability--Having [having] indirect oversight of the campus facilities planning function at the Texas Higher Education Coordinating Board.

(25) [(23)] Deputy Commissioner for Academic Planning and Policy--An executive officer having indirect oversight of the campus facilities planning function at the Texas Higher Education Coordinating Board.

(26) [(24)] Diagnostic Support Laboratory--The central diagnostic service area for a health care facility. Included are pathology laboratories, pharmacy laboratories, autopsy rooms, isotope rooms, etc., providing such services as hematology, tissue chemistry, bacteriology, serology, blood banks, and basal metabolism. In veterinary facilities, this includes necropsy rooms.

(27) [(25)] Education and General (E&G)--Space used for teaching, research, or the preservation of knowledge, including the proportional share used for those activities in any building or facility used jointly with auxiliary enterprise, or space that is permanently unassigned. E&G space is supported by state appropriations.

(28) [(26)] Emergency--An unforeseen combination of circumstances that calls for immediate action and requires an urgent need for assistance or relief that, if not taken, would result in an unacceptable cost to the state; or, an urgent need for assistance or relief due to a natural disaster; or an unavoidable circumstance whereby the delay of the project approval would critically impair the institution's function.

(29) [(27)] Eminent Domain--A legal process wherein the institution takes private property for public use.

(30) [(28)] Energy Systems--Infrastructure in a building that includes facility electric, gas, heating, ventilation, air conditioning, and water systems.

(31) [(29)] Energy Savings Performance Contract--A contract for energy or water conservation measures to reduce energy or water consumption or operating costs of institutional facilities in which the estimated savings in utility costs resulting from the conservation measures is guaranteed to offset the cost of the measures over a specified period.

(32) Facility Adaptation--Includes facility improvements and changes to a facility in response to evolving needs. The changes

may occur because of new programs or to correct functional obsolescence. This category is sometimes referred to as Capital Renewal.

(33) [~~(30)~~] Facilities Audit--Comprehensive review of institutional facility development, planning activities, and reports.

(34) [~~(31)~~] Facilities Inventory--A collection of building and room records that reflects institutional space and how it is being used. The records contain codes that are uniformly defined by the Board and the United States Department of Education and reported by the institutions on an ongoing basis to reflect a current facilities inventory. The facilities inventory includes a record of property owned by or under the control of the institution.

(35) [~~(32)~~] Facilities Development Plan (MP1)--A detailed formulation of institutional programs to address facilities adaptation, deferred maintenance, critical deferred maintenance, facilities construction, demolition, property acquisitions, or physical plant development.

(36) [~~(33)~~] Financing Directly Derived from Students--Funds resulting from the collection of fees or other charges to students, such as designated tuition, student activities fees, housing revenue, bookstore or student union revenue, etc. Bond proceeds for which one or more of these sources provides debt service shall also be considered financing directly derived from students.

(37) [~~(34)~~] Financing Indirectly Derived from Students--Funds generated from funds accumulated from students, primarily interest on funds accumulated directly from students.

(38) [~~(35)~~] Gift--A donation or bequest of money or another tangible item, a pledge of a contribution, or the acquisition of real property or facilities at no cost to the state or to the institution. It may also represent a method of finance for a project.

(39) [~~(36)~~] Gross Square Feet (GSF)--The sum of all square feet of floor areas within the outside faces of a building's exterior walls. This includes the areas, finished and unfinished, on all floors of an enclosed structure, i.e., within the environmentally controlled envelope, for all stories or areas which have floor surfaces.

(40) [~~(37)~~] Housing Facility--A single- or multi-family residence used exclusively for housing or boarding students, faculty, or staff members.

(41) [~~(38)~~] Information Resource Project--Projects related to the purchase or lease-purchase of computer equipment, purchase of computer software, purchase or lease-purchase of telephones, telephone systems, and other telecommunications and video-teleconferencing equipment.

(42) [~~(39)~~] Intercollegiate Athletic Facility--Any facility used primarily to support intercollegiate athletics, including stadiums, arenas, multi-purpose centers, playing fields, locker rooms, coaches' offices, and similar facilities.

(43) Infrastructure--The basic physical structures needed for the operation of a campus to include roads, water supply, sewers, power grids, telecommunications, and so forth. Systems within five feet of a building are considered building systems and are not infrastructure.

~~[(40) Infrastructure--The underlying foundation or basic framework of a facility, including but not limited to, the utility distribution system of plumbing, heating/ventilation/air conditioning, electrical, sewage, drainage, architectural, safety and Code compliance, roads, grounds, and landscaping.]~~

(44) [~~(41)~~] Institution or institution of higher education--A Texas public institution of higher education as defined in Texas Education Code, §61.003(8), except a community/junior college.

(45) [~~(42)~~] Legislative Authority--Specific statutory authorization.

(46) [~~(43)~~] Lease--A contract by which real estate, equipment, or facilities are conveyed for a specified term and for a specified rent. Includes the transfer of the right to possession and use of goods for a term in return for consideration. Unless the context clearly indicates otherwise, the term includes a sublease.

(47) [~~(44)~~] Lease-Purchase--A lease project that includes the acquisition of real property by sale, mortgage, security interest, pledge, gift, or any other voluntary transaction at some future time.

(48) [~~(45)~~] Net Assignable Square Feet (NASF)--The sum of all areas within the interior walls of rooms on all floors of a building assigned to, or available for assignment to, an occupant or use, excluding unassigned areas. NASF includes auxiliary space and E&G space.

(49) [~~(46)~~] New Construction--The creation of a new building or facility, the addition to an existing building or facility, or new infrastructure that does not currently exist on campus. New construction would add gross square footage to an institution's existing space.

(50) [~~(47)~~] Non-student Sources--Funds generated from athletic department operations, gifts and grants, facility usage fees, related revenue, and appropriated funds.

(51) [~~(48)~~] NCAA Football Bowl Championship Series--A program of the NCAA under which certain NCAA Division I-A football universities share proceeds of college bowl games.

(52) On-going Maintenance--Routine upkeep to include, but not limited to, the lubrication of moving parts, checking electrical systems, and patching of roofs. Failure to attend to these tasks may result in accelerated deterioration of facilities and increases the likelihood of extensive emergency repairs. On-going maintenance is normally funded by an institution's operating budget.

(53) [~~(49)~~] Parking Structure--A facility or garage used for housing or storing vehicles. Included are garages, boathouses, airport hangars, and similar buildings. Barns or similar field buildings that house farm implements and surface parking lots are not included.

(54) [~~(50)~~] Phased Project--A project that has more than one part, each one having fixed beginning and ending dates, specified cost estimates, and scope. Phased projects consider future phase needs in the project plan; each phase is able to stand alone as an individual project.

(55) Planned Maintenance--A systematic approach to repairing or replacing major building subsystems including, but not limited to roofs, HVAC, electrical and plumbing systems, which have predictable life-cycles, to maintain and extend the life of the facility. This category is sometimes referred to as Facility Renewal or Capital Repair. Planned maintenance is normally funded by an institution's capital budget.

(56) [~~(51)~~] Private Funding--Gifts, grants, or other funds to be used for facilities development projects that are provided by persons or entities other than the university or institution requesting consideration of the project.

(57) [~~(52)~~] Project--The process that includes the construction, repair, renovation, addition, alteration of a campus, building, or facility, or its infrastructure, or the acquisition of real property.

(58) [~~(53)~~] Real Property--Land with or without improvements such as buildings.

(59) [~~(54)~~] Repair and Renovation (R&R)--Construction upgrades to an existing building, facility, or infrastructure that currently exists on campus; this includes the finish-out of shell space. R&R may add E&G NASF space.

~~[(55) Replacement Value--The value of an institution's overall campus facilities, as determined annually by the Board. The method of calculation is based upon recently approved Board project costs, with adjustments based upon room types and the institution's location within the state. Replacement values for public universities, the Lamar State Colleges, and the Texas State Technical Colleges are calculated only for E&G space. Replacement values for public health-related institutions are calculated for the NASF space. Replacement values are used to measure the validity of construction projects that are submitted to the Board for approval and are not recommended for insurance purposes.]~~

(60) [~~(56)~~] Research Facility--A facility used primarily for experimentation, investigation, or training in research methods, professional research and observation, or a structured creative activity within a specific program. Included are laboratories used for experiments or testing in support of instructional, research, or public service activities.

(61) [~~(57)~~] Shell Space--An area within a building with an unfinished interior designed to be converted into usable space at a later date.

(62) [~~(58)~~] Space Need--The result of the comparison of an institution's actual space to the predicted need as calculated by the Board's Space Projection Model.

(63) [~~(59)~~] Standard--Basis, criteria, or benchmark used for evaluating the merits of a project request or an institutional comparison to a benchmark.

(64) [~~(60)~~] Technical Research Building--Space used for research, testing, and training in a mechanical or scientific field. Special equipment is required for staff and/or student experimentation or observation. Included are specialized laboratories for new technologies that have stringent environmental controls on air quality, temperature, vibration, and humidity. Facilities generally include space for specialized technologies, semiconductors, biotechnology, advanced materials, quantum computing and advanced manufacturing quantum computing technology, nanoscale measurement tools, integrated microchip-level technologies for measuring individual biological molecules, and experiments in nanoscale disciplines.

(65) [~~(61)~~] Tracking Report--Institutional reports indicating the status of approved projects.

(66) [~~(62)~~] Tuition Revenue Bonds Project--A project for which an institution has legislative authority to finance a construction or land acquisition project as provided for in Texas Education Code, §§55.01 - 55.25.

(67) [~~(63)~~] Unimproved Real Property--Real property on which there are no buildings or facilities.

(68) [~~(64)~~] University System--The association of one or more public senior colleges or universities, medical or dental units, or other agencies of higher education under the policy direction of a single governing board.

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

Filed with the Office of the Secretary of State on August 12, 2010.

TRD-201004677
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: October 28, 2010
For further information, please call: (512) 427-6114

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SUBCHAPTER D. RULES APPLYING TO NEW CONSTRUCTION AND ADDITION PROJECTS

19 TAC §17.30

The Texas Higher Education Coordinating Board proposes amendments to §17.30, concerning Standards for New Construction and/or Addition Projects. Specifically, these amendments will make necessary changes to codify the Campus Condition Index and modifies the standards to facilitate implementation of new reporting and standards in regards to planned maintenance, facility adaptation, deferred maintenance and critical deferred maintenance.

Susan Brown, Assistant Commissioner for Planning and Accountability, Texas Higher Education Coordinating Board has determined that for each year of the first five years the section is in effect, there will not be any fiscal implications to state or local government as a result of enforcing or administering this change to the rule.

Ms. Brown has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be the more efficient and effective administration of facilities at institutions of higher education. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Gary Johnstone, Deputy Assistant Commissioner for Planning and Accountability, Texas Higher Education Coordinating Board, 1200 East Anderson Lane, Austin, Texas 78752; gary.johnstone@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The amendments are proposed under the Texas Education Code, §§61.0572, 61.058, and 61.0582.

The amendments affect Texas Education Code, §§61.0572, 61.058, and 61.0582.

§17.30. Standards for New Construction and/or Addition Projects.

To obtain Board approval for a new construction and/or addition project, an institution shall demonstrate that the project complies with the following standards:

(1) Institutional Standards.

(A) Deferred Maintenance.

(i) The Board standard for deferred maintenance shall be a Campus Condition Index (CCI) rating of good [~~the ratio of campus deferred maintenance costs to replacement value of 5 percent or less~~].

(ii) If the CCI score is either fair or poor [~~ratio of campus deferred maintenance costs to replacement value is more than~~

~~5 percent~~], a project may be approved if the institution demonstrates that:

(I) the project is intended to improve the CCI rating; [~~reduce the deferred maintenance on the campus,~~] or

(II) the institution has demonstrated a reduction in its CCI score of [~~deferred maintenance to replacement value ratio~~] 10 percent or more for the immediate prior three years.

(iii) Alternatively, if the CCI is either fair or poor [~~deferred maintenance to replacement value ratio is greater than 5 percent~~], a project may be approved if the institution:

(I) - (II) (No change.)

(B) (No change.)

(2) (No change.)

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

Filed with the Office of the Secretary of State on August 12, 2010.

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Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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For further information, please call: (512) 427-6114

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SUBCHAPTER G. RULES APPLYING TO AUXILIARY ENTERPRISE PROJECTS

19 TAC §17.60

The Texas Higher Education Coordinating Board proposes amendments to §17.60, concerning Standards for Auxiliary Enterprise Projects. Specifically, these amendments will make necessary changes to reflect definitional changes necessary to facilitate implementation of new reporting and standards in regards to planned maintenance, facility adaptation, deferred maintenance and critical deferred maintenance.

Susan Brown, Assistant Commissioner for Planning and Accountability, Texas Higher Education Coordinating Board has determined that for each year of the first five years the section is in effect, there will not be any fiscal implications to state or local government as a result of enforcing or administering this change to the rule.

Ms. Brown has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be the more efficient and effective administration of facilities at institutions of higher education. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Gary Johnstone, Deputy Assistant Commissioner for Planning and Accountability, Texas Higher Education Coordinating Board, 1200 East Anderson Lane, Austin, Texas 78752; gary.johnstone@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The amendments are proposed under the Texas Education Code, §§61.0572, 61.058, and 61.0582.

The amendments affect Texas Education Code, §§61.0572, 61.058, and 61.0582.

§17.60. Standards for Auxiliary Enterprise Projects.

To obtain Board approval for an auxiliary enterprise project, an institution shall demonstrate that the project complies with the following standards:

(1) Institutional Standards. The institution shall demonstrate that an auxiliary enterprise project complies with the standards required in §17.30(1)(A) and (B) of this title (relating to Standards for New Construction and/or Addition Projects) [~~§17.30(1)(A) and (B) of this title (relating to Deferred Maintenance and Critical Deferred Maintenance)~~].

(2) Project Standards. The following basic standards shall apply to all auxiliary enterprise projects considered by the Board, Committee on Strategic Planning, or the Commissioner:

(A) New construction and/or Additions--New construction of or additions to Auxiliary Enterprise Projects shall be considered under the provisions of §17.30(2) of this title [~~(relating to Project Standards)~~].

(B) Repair and Renovation--Repair or renovation of Auxiliary Enterprise Projects shall be considered under the provisions of §17.40(2) of this title (relating to Standards for Repair and Renovation Projects [~~Project Standards~~]) and §17.41 of this title (relating to Additional Requirements).

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

Filed with the Office of the Secretary of State on August 12, 2010.

TRD-201004679
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: October 28, 2010
For further information, please call: (512) 427-6114

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SUBCHAPTER H. RULES APPLYING TO INTERCOLLEGIATE ATHLETIC PROJECTS

19 TAC §17.70

The Texas Higher Education Coordinating Board proposes amendments to §17.70, concerning Standards Applying to Intercollegiate Athletic Projects. Specifically, these amendments will make necessary changes to reflect definitional changes necessary to facilitate implementation of new reporting and standards in regards to planned maintenance, facility adaptation, deferred maintenance and critical deferred maintenance.

Susan Brown, Assistant Commissioner for Planning and Accountability, Texas Higher Education Coordinating Board has determined that for each year of the first five years the section is in effect, there will not be any fiscal implications to state or local government as a result of enforcing or administering this change to the rule.

Ms. Brown has also determined that for each year of the first five years the section is in effect, the public benefit anticipated

as a result of administering the section will be the more efficient and effective administration of facilities at institutions of higher education. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Gary Johnstone, Deputy Assistant Commissioner for Planning and Accountability, Texas Higher Education Coordinating Board, 1200 East Anderson Lane, Austin, Texas 78752; gary.johnstone@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The amendments are proposed under the Texas Education Code, §§61.0572, 61.058, and 61.0582.

The amendments affect Texas Education Code §§61.0572, 61.058, and 61.0582.

§17.70. Standards Applying to Intercollegiate Athletic Projects.

To obtain Board approval for an intercollegiate athletic project, an institution must demonstrate that the project complies with the following standards:

(1) Institutional Standards. The institution shall demonstrate that an Intercollegiate Athletic Project complies with the standards required in §17.30(1)(A) and (B) of this title (relating to Standards for New Construction and/or Addition Projects) [~~§§17.30(1)(A) - 17.30(1)(B) of this title (relating to Deferred Maintenance and Critical Deferred Maintenance)~~].

(2) Project Standards. The following basic standards shall apply to all Intercollegiate Athletic Projects considered by the Board, Committee on Strategic Planning, or the Commissioner:

(A) New construction and/or Additions--New construction of or addition to an Intercollegiate Athletic Project shall be considered under the provisions of §17.30(2) of this title [~~(relating to Project Standards)~~].

(B) Repair and Renovation--Repair or renovation of an Intercollegiate Athletic Project shall be considered under the provisions of §17.40(2) of this title (relating to Standards for Repair and Renovation Projects [~~Project Standards~~]) and §17.41 of this title (relating to Additional Requirements).

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

Filed with the Office of the Secretary of State on August 12, 2010.

TRD-201004680
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: October 28, 2010
For further information, please call: (512) 427-6114

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SUBCHAPTER I. RULES APPLYING TO ENERGY SAVINGS PERFORMANCE CONTRACT PROJECTS

19 TAC §17.81

The Texas Higher Education Coordinating Board proposes amendments to §17.81, concerning Standards for Energy Savings Performance Contract Projects. Specifically, these amendments will make necessary changes to reflect definitional changes necessary to facilitate implementation of new reporting and standards in regards to planned maintenance, facility adaptation, deferred maintenance and critical deferred maintenance.

Susan Brown, Assistant Commissioner for Planning and Accountability, Texas Higher Education Coordinating Board has determined that for each year of the first five years the section is in effect, there will not be any fiscal implications to state or local government as a result of enforcing or administering this change to the rule.

Ms. Brown has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be the more efficient and effective administration of facilities at institutions of higher education. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Gary Johnstone, Deputy Assistant Commissioner for Planning and Accountability, Texas Higher Education Coordinating Board, 1200 East Anderson Lane, Austin, Texas 78752; gary.johnstone@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The amendments are proposed under the Texas Education Code, §§61.0572, 61.058, and 61.0582.

The amendments affect Texas Education Code, §§61.0572, 61.058, and 61.0582.

§17.81. Standards for Energy Savings Performance Contract Projects.

(a) Institutional Standards. The institution shall demonstrate that an Energy Savings Performance Contract project complies with the standards required in §17.30(1)(A) and (B) of this title (relating to Standards for New Construction and/or Addition Projects) [~~§§17.30(1)(A) - 17.30(1)(B) (relating to Deferred Maintenance and Critical Deferred Maintenance)~~].

(b) Project Standards. Energy Savings Performance Contract Projects shall be considered under the provisions of §17.40(2) of this title (relating to Standards for Repair and Renovation Projects [~~Project Standards~~]) and §17.41 of this title (relating to Additional Requirements).

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

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Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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For further information, please call: (512) 427-6114

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SUBCHAPTER J. RULES APPLYING TO TUITION REVENUE BOND PROJECTS

19 TAC §17.90

The Texas Higher Education Coordinating Board proposes amendments to §17.90, concerning Standards for Tuition Revenue Bond Projects. Specifically, these amendments will make necessary changes to reflect definitional changes necessary to facilitate implementation of new reporting and standards in regards to planned maintenance, facility adaptation, deferred maintenance and critical deferred maintenance.

Susan Brown, Assistant Commissioner for Planning and Accountability, Texas Higher Education Coordinating Board has determined that for each year of the first five years the section is in effect, there will not be any fiscal implications to state or local government as a result of enforcing or administering this change to the rule.

Ms. Brown has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be the more efficient and effective administration of facilities at institutions of higher education. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Gary Johnstone, Deputy Assistant Commissioner for Planning and Accountability, Texas Higher Education Coordinating Board, 1200 East Anderson Lane, Austin, Texas 78752 gary.johnstone@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The amendments are proposed under the Texas Education Code, §§61.0572, 61.058, and 61.0582.

The amendments affect Texas Education Code, §§61.0572, 61.058, and 61.0582.

§17.90. Standards for Tuition Revenue Bond Projects.

Unless specifically exempted by legislative authority, each Tuition Revenue Bond Project shall be submitted to the Board for an evaluation to determine if the project meets the following standards:

(1) Institutional Standards. The institution shall demonstrate that the Tuition Revenue Bond project complies with the standards required in §17.30(1)(A) and (B) of this title (relating to Standards for New Construction and/or Addition Projects) [~~§17.30(1)(A) - 17.30(1)(B) of this title (relating to Deferred Maintenance and Critical Deferred Maintenance)~~].

(2) Project Standards. The following basic standards shall apply to all Tuition Revenue Bond projects considered by the Board, Committee on Strategic Planning, or the Commissioner:

(A) Tuition Revenue Bond Projects for a new construction and/or addition shall be considered under the provisions of §17.30(2) of this title [~~(relating to Project Standards)~~].

(B) Tuition Revenue Bond Projects for repair and renovation shall be considered under the provisions of §17.40(2) of this title (relating to Standards for Repair and Renovation Projects) [~~Project Standards~~] Project Standards and §17.41 of this title (relating to Additional Requirements).

(3) - (6) (No change.)

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

Filed with the Office of the Secretary of State on August 12, 2010.

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Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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For further information, please call: (512) 427-6114

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SUBCHAPTER K. REPORTS

19 TAC §17.100, §17.101

The Texas Higher Education Coordinating Board (Coordinating Board) proposes amendments to §17.100 and §17.101, concerning Board Reports and Institutional Reports. Specifically, these amendments will make necessary changes to direct the reporting of information pertaining to the physical condition of facilities and infrastructure by the Coordinating Board. Further, these amendments enable the Coordinating Board staff to direct the data collection effort to fill expanded requirements for data regarding facilities and maintenance expenditures. This is essential to facilitate implementation of new reporting and standards in regards to planned maintenance, facility adaptation, deferred maintenance and critical deferred maintenance.

Susan Brown, Assistant Commissioner for Planning and Accountability, Coordinating Board has determined that for each year of the first five years the sections are in effect, there should not be any fiscal implications to state or local government as a result of enforcing or administering these changes to the rules. Institutions that have not embarked on a comprehensive facilities assessment and reporting effort may realize increased transaction costs during the implementation period.

Ms. Brown has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of administering the sections will be the more efficient and effective administration of facilities at institutions of higher education. There is no effect on small businesses. The increased economic costs to institutions required to comply with the sections as proposed should be limited to the increased transaction costs realized during the implementation period. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Gary Johnstone, Deputy Assistant Commissioner for Planning and Accountability, Texas Higher Education Coordinating Board, 1200 East Anderson Lane, Austin, Texas 78752 gary.johnstone@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The amendments are proposed under the Texas Education Code, §§61.0572, §61.058, and §61.0582.

The amendments affect Texas Education Code, §§61.0572, 61.058, and 61.0582.

§17.100. Board Reports.

The Board shall annually prepare the following reports:

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

(3) Campus Condition Index. The Board shall collect data and publish reports on institutional planned maintenance, facilities adaptation, deferred maintenance, and critical deferred maintenance designed to inform the public and other state agencies of the condition of facilities at institutions of higher education.

(A) Periodic Review. This report shall annually calculate and report a Campus Condition Index Value of E&G facilities and the overall campus facilities that is used to assess the relative effectiveness of the institutional maintenance effort, based on data gathered from recently approved projects.

(B) Use. The Board shall use the data on Campus Condition Index to determine compliance with Board standards and shall include the results in its annual report as required by Texas Education Code, §61.0582.

[(3) Deferred Maintenance and Replacement Value. The Board shall collect data and publish reports on institutional deferred maintenance designed to inform the public and other state agencies of the condition and value of facilities at institutions of higher education. This report does not include capital renewal projects.]

[(A) Periodic Review. This report shall annually calculate and report a replacement value of E&G facilities that reflects the cost to replace the function of a facility.]

[(B) Use. The Board shall use the data on deferred maintenance and replacement value to determine compliance with Board standards and shall include the results in its annual report as required by Texas Education Code, §61.0582.]

(4) (No change.)

§17.101. Institutional Reports.

Institutions of higher education shall submit current data to the Board for the following reports:

(1) Facilities Inventory.

(A) (No change.)

(B) Use. The Board shall use the data reported in the facilities inventory to evaluate project applications, perform facilities audits, to determine compliance with Board Standards, and other required or requested analyses. The facilities inventory shall be used to complete the following reports as required by this section:

(i) (No change.)

(ii) calculation of Campus Condition Index Value [replacement values]; and

(iii) (No change.)

(2) Facilities Development Reports. The Board shall consider projects that are included in the facilities development plans (MP1 and MP2). A project that is not included in the plan may be considered if the Board determines that the institution, even with careful planning, could not reasonably have foreseen the project need.

(A) Facilities Development Plan (MP1). On or before July 1 of every year, beginning in 2004, an institution shall submit an update to its Facilities Development Plan (MP1) on file with the Board, as required by Texas Education Code, §61.0582. In every even-numbered year, the Board shall provide Facilities Development Plan data to the Bond Review Board for inclusion in the Capital Expenditure Report. This report may include planned maintenance, facilities adaptation, [capital renewal,] and deferred maintenance projects. The data may be used by the Board to respond to legislative requests, predictions of future space need, and similar analyses. The report shall include projects that are planned or may be submitted to the Board within the next five years, regardless of funding source:

(i) - *(vi)* (No change.)

(B) Campus Condition Report (MP2). On or before 15 November of every year, an institution shall submit an update to its Campus Condition Report (MP2) on file with the Board. The report shall include:

(i) An institution's planned maintenance, deferred maintenance, critical deferred maintenance, and facility adaptation itemized by building and infrastructure for the previous year, current year, and the following four years;

(ii) previous year's expenditures for planned maintenance, deferred maintenance, critical deferred maintenance, and facility adaptation itemized by building;

(iii) Current year's budgeted amount for planned maintenance, deferred maintenance, critical deferred maintenance, and facility adaptation itemized by building;

(iv) Current year's unbudgeted amount for planned maintenance, deferred maintenance, critical deferred maintenance, and facility adaptation itemized by building;

(v) Total amounts reported in clauses (i) - (iv) of this subparagraph for the entire campus classified in the following categories: architectural; HVAC; plumbing and electrical; safety; legal and mandatory; and other; and

(vi) The five priority projects the institution plans to accomplish in the current year.

[(B) Campus Deferred Maintenance Plan (MP2). On or before October 15 of every year, an institution shall submit an update to its Campus Deferred Maintenance Plan (MP2) on file with the Board. This report does not include capital renewal projects. The report shall include:]

[(i) a list of an institution's facilities backlogged or deferred maintenance needs for the next five years that cost $10,000 or greater;]

[(ii) the amount the institution plans to designate each fiscal year for the next five years to address the backlogged or deferred maintenance reported in the Campus Deferred Maintenance Plan;]

[(iii) the amount of an institution's facilities critical backlogged or deferred maintenance needs for the next five years that cost $10,000 or greater;]

[(iv) a plan to address deferred maintenance if a project is delayed three years beyond its originally scheduled completion date; and]

[(v) an explanation for the delay in a project and a plan to address deferred maintenance if a project has remained on the institution's MP2 report for a third year.]

[(C) Campus Addressed Deferred Maintenance Report (MP4). On or before October 15 of every year, an institution shall submit an update to its Campus Addressed Deferred Maintenance Report (MP4) on file with the Board. The report shall include the amount of backlogged or deferred maintenance addressed in previous fiscal year.]

(3) - (5) (No change.)

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

Filed with the Office of the Secretary of State on August 12, 2010.

TRD-201004683
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: October 28, 2010
For further information, please call: (512) 427-6114

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SUBCHAPTER L. FACILITIES AUDIT

19 TAC §17.112

The Texas Higher Education Coordinating Board proposes amendments to §17.112, concerning Data Sources. Specifically, these amendments will make necessary changes to reflect definitional changes necessary to facilitate implementation of new reporting and standards in regards to planned maintenance, facility adaptation, deferred maintenance and critical deferred maintenance.

Susan Brown, Assistant Commissioner for Planning and Accountability, Texas Higher Education Coordinating Board has determined that for each year of the first five years the section is in effect, there will not be any fiscal implications to state or local government as a result of enforcing or administering this change to the rule.

Ms. Brown has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be the more efficient and effective administration of facilities at institutions of higher education. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Gary Johnstone, Deputy Assistant Commissioner for Planning and Accountability, Texas Higher Education Coordinating Board, 1200 East Anderson Lane, Austin, Texas 78752; gary.johnstone@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The amendments are proposed under the Texas Education Code, §§61.0572, 61.058, and 61.0582.

The amendments affect the Texas Education Code, §§61.0572, 61.058, and 61.0582.

§17.112. Data Sources.

As a minimum, the following Board data sources shall be used in the course of the audit:

(1) (No change.)

(2) Campus Condition Report [~~Institutional Deferred Maintenance Plans and Reports~~] (MP2 [~~, MP4~~]);

(3) - (8) (No change.)

(9) Campus Condition Index [~~Deferred Maintenance~~] and Campus Condition Index [~~Replacement~~] Value Calculations;

(10) - (13) (No change.)

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

Filed with the Office of the Secretary of State on August 12, 2010.

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Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: October 28, 2010
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PART 2. TEXAS EDUCATION AGENCY

CHAPTER 97. PLANNING AND ACCOUNTABILITY
SUBCHAPTER AA. ACCOUNTABILITY AND PERFORMANCE MONITORING

19 TAC §97.1004

(Editor's note: In accordance with Texas Government Code, §2002.014, which permits the omission of material which is "cumbersome, expensive, or otherwise inexpedient," the figure in 19 TAC §97.1004 is not included in the print version of the Texas Register. The figure is available in the on-line version of the August 27, 2010, issue of the Texas Register.)

The Texas Education Agency proposes an amendment to §97.1004, concerning adequate yearly progress (AYP). The section establishes provisions related to AYP and sets forth the process for evaluating campus and district AYP status. The section also adopts the most recently published AYP guide. The proposed amendment would adopt applicable excerpts, *Sections II-V,* of the *2010 Adequate Yearly Progress Guide.* Earlier versions of the guide will remain in effect with respect to the school years for which they were developed.

Under the accountability provisions in the federal No Child Left Behind Act, all public school campuses, school districts, and the state are evaluated for AYP. Districts, campuses, and the state are required to meet AYP criteria on three measures: reading/English language arts, mathematics, and either graduation rate (for high schools and districts) or attendance rate (for elementary and middle/junior high schools). If a campus, district, or state receiving Title I, Part A, funds fails to meet AYP for two consecutive years, that campus, district, or state is subject to certain requirements such as offering supplemental educational services, offering school choice, or taking corrective actions. To implement these requirements, the agency developed the AYP guide.

Agency legal counsel has determined that the commissioner of education should take formal rulemaking action to place into the *Texas Administrative Code* procedures related to AYP. Through 19 TAC §97.1004, adopted effective July 14, 2005, the commissioner exercised rulemaking authority to establish provisions related to AYP and set forth the process for evaluating campus and district AYP status. Portions of each AYP guide have been adopted beginning with the 2004 AYP Guide, and the intent is to annually update 19 TAC §97.1004 to refer to the most recently published AYP guide.

The proposed amendment to 19 TAC §97.1004 would update the rule to adopt applicable excerpts, *Sections II-V,* of the *2010 Adequate Yearly Progress Guide.* These excerpted sections describe specific features of the system, AYP measures and standards, and appeals. In 2010, the U.S. Department of Education (USDE) approved changes to specific components of the AYP system, including the areas addressed in the applicable excerpts of the 2010 AYP Guide. Examples of approved changes include federally required development of a statewide four-year longitudinal graduation rate goal and annual targets of improvement, including the alternative use of a five-year longitudinal graduation rate for AYP calculations; implementation of the Texas Projection Measure (TPM) for TAKS-Modified (TAKS-M) assessments in Grades 4, 7, and 10; implementation of the TAKS Alternate (TAKS-Alt) growth measure for all subjects and all grades; revised business rules for the assignment of students to the limited English proficient (LEP) student group for graduation rate calculations; and the use of uniform averaging of data across years for districts and campuses with small numbers of tested students. Other minor modifications include the removal of hurricane provisions related to the Hurricane Ike Flexibility waiver and removal of the USDE H1N1 provision.

In addition, subsection (d) would be modified to specify that the AYP guide adopted for the school years prior to 2010-2011 will remain in effect with respect to those school years.

The proposed amendment would establish in rule the specific AYP procedures for 2010. Applicable procedures would be adopted each year as annual versions of the AYP guide are published. The proposed amendment would have no locally maintained paperwork requirements.

Criss Cloudt, associate commissioner for assessment, accountability, and data quality, has determined that for the first five-year period the amendment is in effect there will be no additional costs for state or local government as a result of enforcing or administering the amendment.

Dr. Cloudt has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment will be to continue to inform the public of the AYP rating procedures for public schools by including this rule in the *Texas Administrative Code.* There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

There is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal begins August 27, 2010, and ends September 27, 2010. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on August 27, 2010.

The amendment is proposed under the Texas Education Code (TEC), §7.055(b)(32), which authorizes the commissioner to perform duties in connection with the public school accountability system as prescribed by TEC, Chapter 39; TEC, §39.073, as this section existed before amendment by House Bill 3, 81st Texas Legislature, 2009, which authorizes the commissioner to determine how all indicators adopted under TEC, §39.051(b), may be used to determine accountability ratings; and TEC, §39.075(a)(4), as this section existed before amendment by House Bill 3, 81st Texas Legislature, 2009, which authorizes the commissioner to conduct special accreditation investigations in response to state and federal program requirements.

The amendment implements the TEC, §§7.055(b)(32), 39.073, and 39.075(a)(4).

§97.1004. Adequate Yearly Progress.

(a) In accordance with the federal No Child Left Behind Act and Texas Education Code, §§7.055(b)(32), 39.073, and 39.075, as these sections existed before amendment by House Bill 3, 81st Texas Legislature, 2009, all public school campuses, school districts, and the state are evaluated for Adequate Yearly Progress (AYP). Districts, campuses, and the state are required to meet AYP criteria on three measures: reading/English language arts, mathematics, and either graduation rate (for high schools and districts) or attendance rate (for elementary and middle/junior high schools). The performance of a school district, campus, or the state is reported through indicators of AYP status established by the commissioner of education.

(b) The determination of AYP for school districts and charter schools in 2010 [~~2009~~] is based on specific criteria and calculations, which are described in excerpted sections of the 2010 [~~2009~~] AYP Guide provided in this subsection.
Figure: 19 TAC §97.1004(b)
[~~Figure: 19 TAC §97.1004(b)~~]

(c) The specific criteria and calculations used in AYP are established annually by the commissioner of education and communicated to all school districts and charter schools.

(d) The specific criteria and calculations used in the AYP guide adopted for the school years prior to 2010-2011 [~~2009-2010~~] remain in effect for all purposes, including accountability, data standards, and audits, with respect to those school years.

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

Filed with the Office of the Secretary of State on August 16, 2010.

TRD-201004725
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Earliest possible date of adoption: September 26, 2010
For further information, please call: (512) 475-1497

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TITLE 28. INSURANCE

PART 2. TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION

CHAPTER 180. MONITORING AND ENFORCEMENT

The Texas Department of Insurance (Department), Division of Workers' Compensation (Division) proposes amendments to §§180.1 - 180.3, 180.8, 180.22, 180.24, 180.25, 180.27 and 180.28 of this title (relating to Definitions; Filing a Complaint; Compliance Audits; Notices of Violation; Notices of Hearing; Default Judgments; Health Care Provider Roles and Responsibilities; Financial Disclosure; Improper Inducements, Influence and Threats; Sanctions Process/Appeals/Restoration; Peer Review Requirements, Reporting, and Sanctions; respectively) and the addition of new §180.26 of this title (relating to Criteria for Imposing, Recommending, and Determining Sanctions; Other Remedies) and new §180.50 of this title (relating to Severability). The proposed amendments and new rules conform the rules with various statutory amendments and generally concern the regulation and duties of system participants and provides an overall description of certain enforcement procedures such as filing a complaint. The proposed amendments and new rules are necessary to implement and enforce statutory provisions of House Bill 7 (HB 7), enacted by the 79th Legislature, Regular Session, effective September 1, 2005; House Bill 34 (HB 34), House Bill 1003 (HB 1003), House Bill 1006 (HB 1006), and House Bill 2004 (HB 2004) enacted by the 80th Legislature, Regular Session, effective September 1, 2007; and House Bill 4290 (HB 4290), enacted by the 81st Legislature, Regular Session, effective September 1, 2009. The amendments are necessary to implement existing statutes and update existing rules, such as the rules that pertain to the approved doctor list that expired on September 1, 2007. The Division also proposes the simultaneous repeal of existing §§180.6, 180.7, 180.10-180.18, 180.20, and 180.26 of this title (relating to guidelines for establishing evidence of patterns of practice, the schedule of administrative penalties for violations, and the Approved Doctors List (ADL)) which are published elsewhere in this issue of the *Texas Register.*

Changes to the Labor Code by HB 7 amended the Labor Code to enhance the enforcement authority of the Division. Labor Code §401.011 expands the definition of "sanction" to include penalties (fines) or other punitive actions or remedies imposed by the Commissioner of Workers' Compensation (Commissioner) for violations of decisions of the Commissioner. Labor Code §401.011 adds the definition of "violation" to mean an administrative violation subject to penalties and sanctions as provided by the Texas Workers' Compensation Act, Labor Code, Title 5, Subtitle A (Act) and expands the definition of "administrative violation" to include a violation of an order or decision of the Commissioner that is subject to penalties and sanctions as provided by the Act. Labor Code §401.011 defines "administrative violation" to include a violation of an order or decision of the Commissioner. Labor Code §401.011 replaces the definition of "commission" with a definition for "commissioner" to mean "the commissioner of workers' compensation." Labor Code §401.011 added a definition for "department" to mean "the Texas Department of Insurance." Labor Code §401.011 added a definition for "division" to mean "the division of workers' compensation of the department." Labor Code §401.011 added a definition for "health care reasonably required" to mean "health care that is clinically appropriate and considered effective for the injured employee's injury and provided in accordance with best practices consistent with evidence-based medicine; or if that evidence is not available, generally accepted standards of medical practice recognized in the medical community." Labor Code §401.021 was amended to apply to the Division. Labor Code §402.001 was amended to provide that except as provided by Labor Code §402.002, the Texas Department of Insurance is the state agency designated to oversee the workers' compensation system of this state and the Division of Workers' Compensation is established as a division within the Texas Department of Insurance to administer and operate the workers' compensation system as provided by Labor Code, Title 5.

Labor Code §402.00111 was added and describes the relationship between the Commissioner of Insurance and the Commissioner of Workers' Compensation, the separation of authority, and rulemaking authority. Labor Code §402.00128 was added and provides the general powers and duties of the Commissioner. Labor Code §402.0016 was added and describes the duties and powers of the Commissioner as the Division's chief executive and administrative officer. Labor Code §402.023 was amended and states that the Commissioner shall adopt rules regarding the filing of a complaint under the Act against an individual or entity subject to regulation under the Act; and ensure that information regarding the complaint process is available on the Division's Internet website. The Division is required to, at a minimum, ensure that the rules adopted by the Division clearly define the method for filing a complaint; and define what constitutes a frivolous complaint under the Act. The Division is also required to develop and post on the Division's Internet website a simple standardized form for filing complaints under the Act and information regarding the complaint filing process. Labor Code §402.0235 requires the Division to assign priorities to complaint investigations under the Act based on risk. In developing priorities, the Division is required to develop a formal, risk-based complaint investigation system that considers the severity of the alleged violation; whether the alleged violator showed continued or willful noncompliance; and whether a Commissioner's order has been violated. Labor Code §402.0235 also provides that the Commissioner may develop additional risk-based criteria as determined necessary.

Labor Code §402.024(b) requires the Division to comply with federal and state laws related to program and facility accessibility. Labor Code §402.061 requires the Commissioner to adopt rules as necessary for the implementation and enforcement of the Act. Labor Code §402.072 provides that the Division may impose sanctions against any person regulated by the Division under the Act and a sanction imposed by the Commissioner is binding pending appeal. Labor Code §402.073 requires that in a case in which a hearing is conducted in conjunction with Labor Code §§402.072, 407.046, or 408.023, and in other cases under the Act that are not subject to Labor Code §402.073(b), the administrative law judge who conducts the hearing for the State Office of Administrative Hearings shall propose a decision to the Commissioner for final consideration and decision by the Commissioner.

Labor Code §402.075 was added and provides the requirements for rules that pertain to incentives and performance-based oversight.

Labor Code §408.0041 provides additional requirements related to designated doctor examinations. Labor Code §408.023 applies to the Division and provides requirements for doctors who contract with workers' compensation health care networks certified under Insurance Code Chapter 1305; for the expiration of the approved doctor list effective September 1, 2007; for requirements that the Commissioner may establish by rule for doctors and other health care providers; and for requirements that doctors and insurance carriers must comply with. Labor Code §408.0231 has been amended to apply to the Division and requires the Commissioner to adopt rules regarding doctors who perform peer review functions under the Act. Labor Code

§408.0231(g) authorizes the Commissioner to adopt rules regarding doctors who perform peer review functions for insurance carriers, such as, standards for peer review, sanctions against doctors performing peer review functions (including restriction, suspension, or removal of the doctor's ability to perform peer reviews) and other issues important to the quality of peer review. Labor Code §408.1225 was amended and provides the Commissioner with additional authority to ensure the quality of designated doctor decisions and reviews through active monitoring of decisions and reviews and to take action as necessary to restrict the participation of a designated doctor or remove a doctor from inclusion on the Division's list of designated doctors. Labor Code §408.1225(a) requires the Division to develop qualification standards and administrative policies pertaining to the doctors who serve on the designated doctor list. Labor Code §408.1225(d) requires the Division to develop rules to ensure that a designated doctor has no conflict of interest in serving as a designated doctor in performing examinations.

Labor Code §413.002 requires the Division to monitor health care providers, insurance carriers, independent review organizations, and workers' compensation claimants who receive medical services, to ensure the compliance of those persons with rules adopted by the Division relating to health care, including medical policies and fee guidelines. Labor Code §413.002(b) requires that in monitoring designated doctors under Labor Code, Chapter 408, and Independent Review Organizations (IRO) who provide services described by Labor Code, Chapter 413, the Division is to evaluate compliance with the Act and with rules adopted by the Commissioner relating to medical policies, fee guidelines, treatment guidelines, return-to-work guidelines, and impairment ratings and the quality and timeliness of decision made under Labor Code §§408.0041, 408.122, or 413.031. Labor Code §413.022 has been added and provides requirements for the return to work reimbursement pilot program for small employers. Labor Code §413.031 pertains to medical dispute resolution and was amended to require that the decision of an IRO under Labor Code §413.031(d) is binding during the pendency of a dispute. Labor Code §413.032 provides requirements regarding the content of IRO decisions for reviews conducted under Labor Code, Chapter 413. Labor Code §413.041 requires Commissioner to define "financial interest" for the purpose of the section as provided by analogous federal regulations and to adopt the federal standards that prohibit the payment or acceptance of payment in exchange for health care referrals relating to fraud, abuse, and anti-kickbacks. Labor Code §413.044 provides additional sanctions that may be imposed on designated doctors. Labor Code §413.0511 requires that the Medical Advisor shall make recommendations regarding the adoption of rules and policies to monitor the quality and timelines of decisions made by designated doctors and independent review organizations, and the imposition of sanctions regarding those decisions. Labor Code §413.0512 requires that the medical quality review panel shall recommend to the Medical Advisor appropriate action regarding independent review organizations. Labor Code §413.052 requires the Commissioner to establish by rule procedures to enable the Division to compel production of documents.

Labor Code §§414.002 - 414.003 and 414.005 - 414.007 pertain to the Division's monitoring duties, compilation and maintenance of statistical and other information, investigative duties, referral of persons to appropriate authorities, medical review, and investigation of alleged violations. Labor Code §414.002 includes health care providers as persons to be monitored by the Division. Labor Code §414.003 includes the provision that the Division shall also compile and maintain statistical and other information as necessary to detect practices or patterns of conduct by persons subject to monitoring under Labor Code, Chapter 414 that violate a rule, order or decision of the Commissioner. Labor Code §414.005 includes the provision that the Division shall maintain an investigation unit to conduct investigations relating to alleged violations of a rule, order, or decision of the Commissioner. Labor Code §414.006 deletes the provision that the Division may refer persons involved in a case subject to investigation to the division of hearings. Labor Code §414.007 includes the provision that the Division shall review information concerning an alleged violation regarding the provision of medical benefits, or a rule, order or decision of the Commissioner.

The HB7 amendments to §§415.001 - 415.0035 modified various provisions related to violations under the Act. Labor Code §§415.005, 415.006, and 415.024 delete the classification of the violations as either class A, B, or C violations. Labor Code §415.021 was amended to delete the provision which stated an administrative penalty should not exceed $10,000, and Labor Code §415.021 now permits the Division to assess administrative penalties of up to $25,000 per violation in addition to any other sanctions authorized by the Act. Labor Code §415.021 also states that each day of noncompliance constitutes a separate violation and subsection (c) lists the factors the Division must use when determining penalty amounts. Labor Code §415.025 provides that a reference in the Labor Code or other law, or in rules of the former Texas Workers' Compensation Commission or the Commissioner, to a particular class of violation, administrative violation, or penalty shall be construed as a reference to an administrative penalty and, except as otherwise provided by Labor Code, Title 5, Subtitle A, an administrative penalty may not exceed $25,000 per day per occurrence and each day of noncompliance constitutes a separate violation. One example of other sanctions that may be imposed under Labor Code, Title 5, are found in Labor Code §408.0231(b). Labor Code §415.023(b) and §402.072 also provide authority for the Division to impose sanctions. Labor Code §415.024 was amended by deletion of the classification of the penalty to be imposed as a Class A violation and now provides a violation of the statute is an administrative violation. Labor Code §415.031 and §415.032 were amended to delete "director", "compliance and practices" and "commission." Labor Code §415.032 also requires that not later than the 20th day after the date on which notice of violation is received by a charged party, the charged party shall remit the amount of the penalty to the Division or submit to the Division a written request for a hearing. Labor Code §415.033 requires that if without good cause a charged party fails to respond as required under Labor Code §415.032, the penalty is due and the Division shall initiate enforcement proceedings. Labor Code §504.053 was amended to provide requirements for political subdivisions that self-insure that relate to workers' compensation.

House Bill 34 added Labor Code §415.0036 which applies to an insurance adjustor, case manager, or other person who has authority under Labor Code, Title 5 to request the performance of a service affecting the delivery of benefits to an injured employee or who actually performs such a service, including peer reviews, performance of required medical examinations, or case management. A person described by this statute commits an administrative violation if the person offers to pay, pays, solicits, or receives an improper inducement relating to the delivery of benefits to an injured employee or improperly attempts to influence

the delivery of benefits to an injured employee, including through the making of improper threats.

House Bill 1003 added Labor Code §413.031(e-2) to require that IROs that use doctors to perform reviews of health care services provided under Labor Code, Title 5 only use doctors licensed to practice in this state.

House Bill 1006 amended Labor Code §408.023(h) to require that a utilization review agent or an insurance carrier that uses a doctor to perform reviews of health care services provided under Labor Code, Title 5, Subtitle A, including utilization review, only use doctors licensed to practice in this state.

House Bill 2004 added Labor Code §408.0043. Labor Code §408.0043(a) applies to doctors, other than chiropractors or dentists, who perform health care services under Labor Code, Title 5 as doctors performing peer reviews, utilization reviews, independent reviews, required medical examinations, or who serve on the medical quality review panel or as designated doctors for the Division. Labor Code §408.0043(b) requires that a doctor described by Labor Code §408.0043(a), other than a chiropractor or dentist, who reviews a specific workers' compensation case must hold a professional certification in a health care specialty appropriate to the type of health care that the injured employee is receiving.

House Bill 2004 added Labor Code §408.0044 which pertains to dentists who perform dental services under Labor Code, Title 5 for peer reviews, utilization reviews, independent reviews, or required dental examinations. Labor Code §408.0044(b) requires that a dentist who reviews a dental service in conjunction with a specific workers' compensation case must be licensed to practice dentistry.

House Bill 2004 added Labor Code §408.0045 which pertains to chiropractors who perform chiropractic services under Labor Code, Title 5 for peer reviews, utilization reviews, independent reviews, required medical examinations, or who serve on the medical quality review panel or as designated doctors providing chiropractic services for the Division. Labor Code §408.0045(b) requires that a chiropractor who reviews a chiropractic service in conjunction with a specific workers' compensation case must be licensed to engage in the practice of chiropractic.

House Bill 2004 added Labor Code §408.0046 and states that the Commissioner may adopt rules as necessary to determine which professional health practitioner specialties are appropriate for treatment of certain compensable injuries and must require an entity requesting a peer review to obtain and provide to the doctor providing the peer review services all relevant and updated medical records.

House Bill 4290 amended Insurance Code §4201.002(13) which provides that "utilization review" includes a system for prospective, concurrent, or retrospective review of the medical necessity and appropriateness of health care services and a system for prospective, concurrent, or retrospective review to determine the experimental or investigational nature of health care services; the term does not include a review in response to an elective request for clarification of coverage. Insurance Code §4201.002(1) was amended by HB 4290 and provides that "adverse determination" means a determination by a utilization review agent that health care services provided or proposed to be provided to a patient are not medically necessary or are experimental or investigational. Insurance Code §1305.004 was amended to include within the meaning of independent review, a final review by an independent review organization of the experimental or investigational nature of health care services provided, proposed to be provided, or that have been provided to an injured employee. Insurance Code §1305.351, as amended by HB 4290, provides that a utilization review agent or insurance carrier that uses doctors to perform reviews of health care services provided under Insurance Code, Chapter 1305, including utilization review, or peer reviews under Labor Code §408.0231(g), may only use doctors licensed to practice in this state.

Necessary amendments are proposed throughout the rule text to: (i) correct typographical, grammatical and punctuation errors in the current rule text, (ii) make changes to conform rule text to the current Department drafting style, (iii) re-letter and renumber rule text, and (iv) non-substantively simplify and clarify provisions in Chapter 180. Non-substantive changes include changing the term "Rule" or "rule" to "division rule(s)", "Commission" to "division", "Texas Department of Insurance" to "department", "statutes" to "Act", and adding the word "insurance" to "carrier(s)", "injured" to "employee", and "system" to "participant(s)."

Proposed amendment of §180.1. Necessary amendments include the proposed deletion of definitions currently contained in §180.1 that are not used within the proposed amendments to Chapter 180 because they are no longer necessary. Those definitions in the section include: *abusive practice, administrative law judge, charged person, compliance, compliance category, compliance rate, compliance standard, continued noncompliance (also active noncompliance), demonstrable harm, intentionally, knowingly, matter of practice, noncompliance or noncompliant act, pattern of practice, referral violations, representative violation, uncorrected pattern of practice, violation review, violator, and willfully.* Section 180.1(24), 180.1(32), 180.1(36) are proposed to be deleted in the section to implement existing statutes that were amended by HB 7.

Proposed §180.1(a) of this section is necessary because it contains the definitions for terms used in Chapter 180. Proposed subsection (b) of this section is necessary because it clarifies that nothing in §180.1 can be construed to limit an injured employee's ability to receive health care in accordance with the Labor Code and Division rules or to limit a review of health care to only health care provided or requested prior to the date of maximum medical improvement. The purpose for the proposed language in subsection (b) of this section is to avoid inadvertent misinterpretation of the proposed definitions.

Proposed amended §180.1(a)(2) deletes the words "or statute" and clarifies that within the Division rules, the word "Act" pertains to the Texas Workers' Compensation Act, Labor Code, Title 5, Subtitle A.

Proposed §180.1(a)(3) is necessary to implement and be consistent with the change to Labor Code §401.011(2) by HB 7 which defines "administrative violation" to mean a violation of the Act, a rule adopted under the Act, or an order or decision of the Commissioner that is subject to penalties and sanctions as provided by the Act. Proposed §180.1(a)(3) is also consistent with the change to Labor Code §401.011(42-c) by HB 7 which defines "violation" to mean "an administrative violation subject to penalties and sanctions as provided by this subtitle."

Proposed amended §180.1(a)(4) is necessary to clarify that the meaning of the word "agent" may include any person with whom a system participant contracts with or utilizes to provide services or fulfill duties under the Labor Code, Title 5 and Division rules. The term "the Act" has been changed to the citation of "Labor

Code, Title 5" because Labor Code §415.0036 references "this title" which means Labor Code, Title 5 and not only Subtitle A of the title. Additionally, Labor Code §415.0036(b) provides, in part, that "This section applies to each person described by Subsection (a) who is a participant in the workers' compensation system of this state and to an agent of such a person." HB 7 added Labor Code §402.072 which provides the Division with the authority to impose sanctions against any person regulated by the Division under the Act. The language "works on behalf of" has been changed to "who contracts with" in the proposed rule to clarify that a system participant may also be responsible for the administrative violations of an agent that it contract with.

Proposed §180.1(a)(5) adds the definition for "appropriate credentials" to mean "the certification(s), education, training and experience to provide the health care that an injured employee is receiving or is requesting to receive."

The proposed definition is necessary to implement Labor Code §408.0043 and §408.0046. Labor Code §408.0046 states, in part, "The commissioner may adopt rules as necessary to determine which professional health practitioner specialties are appropriate for treatment of certain compensable injuries." The proposed definition is also necessary to implement Labor Code §408.0043, enacted by HB 2004, which requires a doctor (other than a chiropractor or a dentist) that performs peer review or utilization review of a health care service provided to an injured employee hold a professional certification in a health care specialty appropriate to the type of health care that the injured employee is receiving. Labor Code §414.002 and §414.007, amended by HB 7, require the Division to monitor health care providers for compliance with the Act, rules of the Commissioner and other laws relating to workers' compensation and review information concerning alleged violations of the Act, or a rule, order or decision of the Commissioner. The proposed definition is necessary to implement Labor Code §413.014 as amended by HB 7. Proposed amendments to §180.22 of this title (relating to Health Care Provider Roles and Responsibilities) would require that health care providers that perform required medical examinations, peer review (including utilization review), designated doctor examinations, independent reviews, and those who serve on the medical quality review panel hold the "appropriate credentials", meaning "the certification(s), education, training, and experience to provide the health care that an injured employee is receiving or is requesting to receive" to perform the review.

The definition for "audit violations" in proposed §180.1(a)(6) has been amended to be consistent with the necessary proposed simultaneous repeal of existing §§180.11, 180.12, and 180.14 - 180.18 published elsewhere in this issue of the *Texas Register.*

Proposed §180.1(a)(7) adds a definition for "commissioner" to be consistent with the addition of the definition for "commissioner" by Labor Code §401.011(8) as amended by HB 7.

Proposed §180.1(a)(8) adds a definition for "complaint" because it is required by Labor Code §402.023 and §402.0235 as amended by HB 7. Labor Code §402.023 requires the Division to adopt rules for the filing of complaints under the Act. Labor Code §402.0235 requires the Division to assign priorities to complaint investigations based on risk. Proposed §180.2 of this title contains the rules pertaining to the filing of complaints.

Proposed amendments to the definition for "controlled substances" in §180.1(a)(10) are necessary to update the statutory citations. The Texas Civil Acts, Article 4476-15 has been recodified as the Texas Health and Safety Code, Chapter 481 and the USCA §8.01 has been recodified as 21 USCS §801.

Proposed §180.1(a)(12) has been added and is necessary to be consistent with the definition for "department" added by HB 7 to Labor Code §401.011(13-a).

Proposed §180.1(a)(13) has been added and is necessary to be consistent with the definition for "division" added by HB 7 to Labor Code §401.011(16-a).

Proposed amended §180.1(a)(14) is necessary to update the rule citation for the definition of "emergency" and includes the definition for "emergency" to clarify the rule.

Proposed §180.1(a)(16) has been added and is necessary to define the meaning of "frivolous complaint" to be in compliance with §402.023 and §402.0235 of the Labor Code as amended by HB 7. Labor Code §402.023 requires the Division to adopt rules regarding the filing of a complaint against an individual or entity subject to regulation under the Act, ensure that the Division clearly defines by rule the method for filing a complaint, and define what constitutes a frivolous complaint under the Act.

Proposed §180.1(a)(18) amends the definition for "notice of violation" to mean a notice issued to a system participant by the Division when the Division has found that the person has committed an administrative violation and the Division seeks to impose a sanction in accordance with the Labor Code, Title 5 or Division rules. The proposed amendments are necessary to be consistent with HB 7 amendments to Labor Code §§401.021, 408.0231(e), 415.032, 415.023, and 415.021 and Labor Code §402.072(a) added by HB 7. Labor Code §408.0231(e) requires notice and an opportunity for a hearing before a sanction may be imposed on a doctor or insurance carrier. Labor Code §401.021, in part, provides that except as otherwise provided by the Act, enforcement of a Commissioner order, decision, or rule is governed by applicable provisions in Government Code, Chapters 2001 and 2002. Government Code §2001.051 requires that "in a contested case, each party is entitled to an opportunity for hearing after reasonable notice of not less than 10 days, and to respond and to present evidence and argument on each issue involved in the case." Labor Code §402.061, as amended by HB 7, authorizes the Commissioner to adopt rules as necessary for implementation and enforcement of the Act. The proposed amendments to the definition in §180.1(a)(18) are necessary because they provide a definition for "notice of violation" that allows, by rule, a uniform method of sending notice of all types of sanctions (both penalty fines and other types of sanctions) to charged parties for violations of the Act, or a rule, order, or decision of the Commissioner.

Proposed §180.1(a)(19) is necessary to clarify the meaning of "peer review" as the term relates to new statutory provisions to be implemented by the Division. The proposed definition defines "peer review" to mean an administrative review performed by a health care provider at the insurance carrier's request (whether or not the health care provider that performs the peer review is providing treatment) for any issue related to the health care of a workers' compensation claim without a physical examination of the injured employee. The term does not include a review performed by an independent review organization under Chapter 4202 of the Insurance Code. The proposed definition implements Labor Code §408.0043, enacted by HB 2004, which requires professional certification for a doctor (other than a chiropractor or a dentist) that performs health care services under the Act as a doctor that performs peer review or utilization review

of a health care service provided to an injured employee. Labor Code §408.0044, as added by HB 2004, requires that a dentist who performs a peer review or utilization review of a dental service in conjunction with a specific workers' compensation case must be licensed to practice dentistry. Labor Code §408.0045, as added by HB 2004, requires that a chiropractor who performs a peer review or utilization review of a chiropractic service in conjunction with a specific workers' compensation case must be licensed to engage in the practice of chiropractic. Labor Code §408.023(h), as amended by HB 1006 and HB 4290, requires that a utilization review agent or an insurance carrier that uses doctors to perform reviews of health care services provided under the Act, including utilization review, only use doctors licensed to practice in this state. Labor Code §408.0231(g), as added by HB 7, authorizes the Commissioner to adopt rules regarding doctors who perform peer review functions for insurance carriers, such as, standards for peer review, sanctions against doctors performing peer review functions (including restriction, suspension, or removal of the doctor's ability to perform peer reviews) and other issues important to the quality of peer review. Labor Code §408.0231(g) requires the Division to monitor and adopt rules regarding doctors who perform peer review. Labor Code §414.002, as amended by HB 7, requires the Division to monitor for compliance with the Act, Commissioner rules, and other laws relating to workers' compensation the conduct of persons subject to the Act. Persons to be monitored include, but are not limited to, insurance carriers and health care providers. Reviews performed by an independent review organization under Chapter 4202 of the Insurance Code are excluded from the definition because "independent review means a system for final administrative review by an independent review organization" as defined by Insurance Code §1305.004(a)(10) and amended by HB 4290. The definition is inclusive of the administrative review performed as a utilization review. HB 4290 amended the definition for "utilization review" in Insurance Code §4201.002(13) to include a system for prospective, concurrent, or retrospective review of the medical necessity and appropriateness of health care services and a system for prospective, concurrent, or retrospective review to determine the experimental or investigational nature of health care services.

Proposed amended §180.1(a)(21) contains the definition for "rules." The proposed amendments change the language "commission's Rules" to "division's rules" and "this Act" to "Labor Code, Title 5." The proposed changes are necessary to update and clarify the rule.

Proposed §180.1(a)(23) adds the definition for "sanction" to clarify the meaning of the term as used in the rules and is necessary to be consistent with Labor Code §§401.011(39) and 402.072 as amended by HB 7 and Labor Code §415.0036 as added by HB 34.

Labor Code §415.0036 clearly provides sanction authority to the Commissioner for those persons described by the section. Labor Code §402.072, amended by HB 7, further provides that the Division may impose sanctions against any person regulated by the Division under the Act.

Proposed §180.1(a)(25) amends the definition for "system participant" and is necessary to be consistent with amendments by HB 7 and HB 34 which provide further clarity to the term to mean "a person or entity subject to the Act and therefore required to comply with the Act or a rule, order, or decision of the commissioner." Labor Code §414.002, as amended by HB 7, provides that "the division shall monitor for compliance with commissioner rules, this subtitle, and other laws relating to workers' compensation the conduct of persons subject to this subtitle." Labor Code §401.011(2), as amended by HB 7, provides that "administrative violation" means "a violation of this subtitle, a rule adopted under this subtitle, or an order or decision of the commissioner that is subject to penalties and sanctions as provided by this subtitle."

Proposed §180.1(a)(26) adds the definition for "utilization review" and is necessary to be consistent with changes made by HB 4290 to the definition for "utilization review" in Insurance Code §4201.002(13). Labor Code §401.011(42-a) states that "utilization review" has the meaning assigned by Chapter 4201, Insurance Code.

Proposed §180.1(b) clarifies that nothing in §180.1 is to be construed to limit an injured employee's ability to receive health care in accordance with the Labor Code and Division rules or to limit a review of health care to only health care provided or requested prior to the date of maximum medical improvement.

Proposed amendment of §180.2. Proposed amendments change the section heading to "Filing a Complaint" and delete the word "Referrals" and are necessary to update the section heading. Proposed amendments to §180.2 are necessary to be in compliance with §402.023(a) - (d) and §402.0235 of the Labor Code as amended by HB 7. The proposed amendments outline the method for filing a complaint to the Division based on current practices and explain what constitutes a frivolous complaint.

Proposed amendment of §180.3. Proposed amendments to this section delete the word "other" in subsection (b) because it is unnecessary.

The proposed amendments to subsection (k) of this section are necessary to update the rule and clarify that the auditee shall submit payment made by check, made payable to the order of the Texas Department of Insurance, for the expenses within 25 days after receipt of the bill.

Proposed amendment of §180.8. Proposed amendments change the section title to "Notices of Violation; Notices of Hearing; Default Judgments" and delete the words "Warning Letters and Notices of Intent" and these changes are necessary to update and clarify the section title.

Proposed amendments to §180.8(a) - (c) are necessary to clarify that a notice of violation may be issued to a person by the Division in accordance with the procedure outlined in Labor Code §415.032 when the Division has found that the person has committed an administrative violation and the Division seeks to assess an administrative penalty (a fine) or other sanction against the person in accordance with the Act. Labor Code §401.011(35) defines a "penalty" to mean "a fine established by this subtitle." The Division is required by Labor Code §401.021 to provide notice of the opportunity for a hearing regarding non-penalty sanctions. Labor Code §401.021, in part, provides that except as otherwise provided by the Act, a proceeding, hearing, judicial review, or enforcement of a Commissioner order, decision, or rule is governed by applicable provisions in the Government Code, Chapter 2001 and 2002. Government Code §2001.051 requires notice of the opportunity for a hearing. Labor Code §408.0231(e) provides that the Commissioner may impose sanctions under that statute against a doctor or an insurance carrier after notice and the opportunity for a hearing. Labor Code §402.061 provides that "the commissioner shall adopt rules as necessary for the implementation and enforcement of this subtitle."

Proposed §180.8(b) has been updated to be consistent with the provisions of Labor Code §415.032 and will contain adequate notice to system participants that the Division intends to impose a penalty or non-penalty sanction.

Proposed §180.8(c) clarifies the action required by the charged party after receiving the notice of violation and that the Division will schedule a hearing and provide the party with notice of hearing if the charged party fails to respond.

Former §180.8(d) is proposed for deletion because the language is no longer necessary due to the proposed amendments to subsection (c). Proposed new §180.8(d) requires charged parties who received notices of hearing to respond to the notice within 20 days of receipt of it. Responses should be filed in accordance with the filing requirements of 1 Texas Administrative Code (TAC) §155.101 and §155.103.

Former §180.8(e) is proposed for deletion because the Division now addresses this issue in proposed new §180.26(f). Proposed new §180.8(e) describes the events that constitute default on the part of a charged party.

Former §180.8(f) is proposed for deletion because the Division now addresses warning letters in proposed new §180.26(g). Proposed new §180.8(f) describes the Division's remedy in the event that a party defaults as described by proposed new §180.8(e).

Former §180.8(g) is proposed for deletion because its requirements are now obsolete due to the amendments by HB 7 to Labor Code §408.023(k) that required the expiration of the approved doctor list effective September 1, 2007 and Labor Code §415.021(a) that removed the requirement that the Division assess administrative penalties in accordance with a schedule of specific monetary penalties for specific violations of the Act. Proposed new §180.8(g) describes the meaning of "disposition by default" and clarifies what constitutes proper notice under this section.

Former §180.8(h) is proposed for deletion because the language is not necessary. Moreover the Division addresses consent orders in proposed new §180.26(h). Proposed new §180.8(h) describes how a party may file a motion to set aside a default order and reopen the record.

Proposed amendment of §180.22. Proposed amendments to §180.22 are necessary to update and clarify the rule to be consistent with the definition for "health care reasonably required" in Labor Code §401.011(22-a), as amended by HB 7, and to be consistent with Labor Code §408.021(a).

Proposed amendments to §180.22(b) are necessary to add the word "department" to clarify and update the rule because health care providers are also required to comply with applicable provisions of the Insurance Code, such as health care providers that perform peer review, including utilization review. Subsection (b)(5) has been added to this section and is necessary because it requires all health care providers that provide services in the workers' compensation system to comply with all applicable provisions of the Americans with Disabilities Act to be consistent with the requirements of the Americans with Disabilities Act and Labor Code §402.024(b) as amended by HB 7 that requires compliance with federal and state laws related to program and facility accessibility.

The proposed amendments to §180.22(c) are necessary and add the language "reasonably required that is to be rendered" and delete the language "medically reasonable and necessary" to update and clarify the rule in accordance with the definition for "health care reasonably required" in Labor Code §401.011(22-a) that was added by HB 7. Proposed amendments to subsection (c)(4)(C) of this section change the language "'Short Form 12' outcome information (sf 12)" to "patient outcomes, return to work outcomes, functional health outcomes" to update the rule in accordance with current Division procedure and to be consistent with Labor Code §408.023(l)(1)-(3) amended by HB 7.

Proposed amendments to §180.22(f) are necessary to be consistent with amendments made to the Labor Code by HB 7, HB 2004, and HB 1006.

Proposed §180.22(f)(4)(F) has been amended to state "issues similar to those described by subparagraphs (A) - (E) of this paragraph" to be consistent with the language of Labor Code §408.0041(a)(6) as amended by HB 7 and to be responsive to informal comments received.

Proposed §180.22(f)(5) has been added to implement Labor Code §408.0043(a)(5) and (b), as added by HB 2004, that requires doctors who perform required medical examinations to hold a professional certification in a health care specialty appropriate to the type of health care that the injured employee is receiving. The proposed amendment also requires doctors that perform required medical examinations to be licensed to practice medicine in this state to implement Labor Code §408.023(h), as amended by HB 1006 and HB 4290, that requires utilization review agents and insurance carriers that use doctors to perform reviews of health care services provided under the Act to only use doctors licensed to practice in this state.

Proposed §180.22(f)(5)(A) has been added to implement Labor Code §408.0044(a)(4) and (b), added by HB 2004, that requires a dentist that performs dental services under the Act as a doctor performing a required dental examination in conjunction with a specific workers' compensation case to be licensed to practice dentistry. Labor Code §408.023(h), as amended by HB 1006 and HB 4290, further requires that the doctors to be licensed to practice in Texas.

Proposed §180.22(f)(5)(B) has been added to implement Labor Code §408.0045(a)(5) and (b), added by HB 2004, that requires a chiropractor that performs chiropractic services under the Act as a doctor performing a required medical examination in conjunction with a specific workers' compensation case to be licensed to engage in the practice of chiropractic.

Proposed §180.22(g) has been amended and is necessary to comply with legislative changes that pertain to peer review, including utilization review, and clarifies the requirements that peer reviewers are to comply with. The proposed amendments clarify that a peer reviewer is a health care provider who performs an administrative review at the insurance carrier's request (whether or not the health care provider that performs the peer review is providing treatment) for any issue related to the health care of a workers' compensation claim without a physical examination of the injured employee. The proposed amendments provide that the peer reviewer must hold the appropriate professional license issued by this state. The proposed amendments also provide that the peer reviewer must hold the appropriate credentials as defined by proposed §180.1 of this title or comply with Labor Code §408.0044 (if the doctor is a dentist) or Labor Code §408.0045 (if the doctor is a chiropractor).

Labor Code §408.023(h), as amended by HB 1006 and HB 4290, requires utilization review agents or insurance carriers that use

doctors to perform reviews of health care services provided under the Act, including utilization review, to only use doctors that are licensed to practice medicine in Texas. Further, Occupations Code §155.001 states that "a person may not practice medicine in this state unless the person holds a license issued under this subtitle."

The proposed amendments to §180.22(g) are necessary to implement legislative changes made by HB 7, HB 1006, HB 4290, and HB 2004.

Labor Code §414.002, as amended by HB 7, requires the Division to monitor for compliance with Commissioner rules, the Act, and other laws relating to workers' compensation the conduct of persons subject to the Act and provides that persons to be monitored include, but are not limited to, insurance carriers and health care providers.

Pursuant to Labor Code §408.0046, added by HB 2004, the Commissioner may adopt rules as necessary to determine which professional health practitioner specialties are appropriate for the treatment of certain compensable injuries. Labor Code §414.002(b) requires the Division to monitor conduct described by Labor Code §§415.001, 415.002, and 415.003 and refer persons engaging in that conduct to the Division. Labor Code §415.003 provides that a health care provider commits an administrative violation if the person administers improper, unreasonable, or medically unnecessary treatment or services, violates the Division's fee and treatment guidelines, violates a Commissioner rule, or fails to comply with a provision of the Act.

Labor Code §408.0043, enacted by HB 2004, requires professional certification for a doctor that performs health care services under the Act as a doctor that performs peer review or utilization review of a health care service provided to an injured employee.

Labor Code §408.0044, as added by HB 2004, requires a dentist who performs a peer review or utilization review of a dental service in conjunction with a specific workers' compensation case to be licensed to practice dentistry.

Labor Code §408.0045, as added by HB 2004, requires a chiropractor who performs a peer review or utilization review of a chiropractic service in conjunction with a specific workers' compensation case to be licensed to engage in the practice of chiropractic.

Labor Code §408.023(h), as amended by HB 1006 and HB 4290, requires that a utilization review agent or an insurance carrier that uses doctors to perform reviews of health care services provided under the Act, including utilization review, only use doctors licensed to practice in this state.

Labor Code §408.0231(g), as added by HB 7, authorizes the Commissioner to adopt rules regarding doctors who perform peer review functions for insurance carriers, such as standards for peer review, sanctions against doctors performing peer review functions (including restriction, suspension, or removal of the doctor's ability to perform peer reviews) and other issues important to the quality of peer review. Labor Code §408.0231(g) requires the Division to monitor and adopt rules regarding doctors and health care providers who perform peer review.

Reviews performed by an independent review organization under Chapter 4202 of the Insurance Code are excluded from proposed §180.22(g) because "independent review means a system for final administrative review by an independent review organization" as defined by Insurance Code §1305.004(a)(10) and amended by HB 4290. HB 4290 amended the definition for "utilization review" in Insurance Code §4201.002(13) to include a system for prospective, concurrent, or retrospective review of the medical necessity and appropriateness of health care services and a system for prospective, concurrent, or retrospective review to determine the experimental or investigational nature of health care services. Proposed amendments to §180.22(g) also update the citation within paragraph (1) to state "Insurance Code, Chapters 1305 and 4201."

Proposed amendments to §180.22(h) are necessary and add the language "At the request of an insurance carrier or an injured employee, or on the Commissioner's own order, the Commissioner may order a medical examination by a designated doctor in accordance with Labor Code §408.0041 and §408.1225" to implement Labor Code §408.0041 and §408.1225 as amended by HB 7. Proposed amendments in §180.22(h) also require designated doctors to hold the appropriate credentials as defined in proposed §180.1 of this title to be consistent with the legislative changes made by HB 2004 to Labor Code §§408.0043 - 408.0046.

Proposed amendments to subsection (i) of this section are necessary to update the rule and implement the new requirements of Labor Code §§408.0043 - 408.0046 as added by HB 2004 for doctors who serve on the Medical Quality Review Panel (MQRP).

Proposed addition of subsection (j) of this section is necessary to clarify the applicable statutes and rules that Independent Review Organizations (IROs) must comply with. Labor Code §413.031(e-2) requires independent review organizations that use doctors to perform reviews of health care services provided under Labor Code, Title 5 to only use doctors licensed to practice in this state. Labor Code §413.051(a) provides that "In this section, 'health care provider professional review organization' includes an independent review organization." Labor Code §413.0512(c)(1) requires, in part, that the medical quality review panel shall recommend to the medical advisor appropriate action regarding independent review organizations. Labor Code §413.002 contains requirements for medical reviews. Labor Code §§408.0043, 408.0044, and 408.0045 contain requirements for doctors that perform IROs. Labor Code §408.0231(e) provides, in part, that the Commissioner may impose sanctions under that statute on a doctor or insurance carrier. Labor Code §413.0511(b)(8) requires the medical advisor to make recommendations regarding the adoption of rules and policies to monitor the quality and timeless of decisions made by independent review organizations. Labor Code §414.003 requires the Division to compile and maintain statistical and other information as necessary to detect practices or patterns of conduct by persons subject to monitoring under Labor Code, Chapter 414 that violate the Act or a rule, order or decision of the Commissioner; or otherwise adversely affect the workers' compensation system of this state, and authorizes the Commissioner to use the information compiled under this section to impose appropriate penalties and other sanctions under Chapters 415 and 416. Labor Code §414.006 provides that the Division may refer persons involved in a case subject to an investigation to other appropriate authorities, including licensing agencies, district and county attorneys, or the attorney general for further investigation or the institution of appropriate proceedings. Labor Code §414.007 requires the Division to review information concerning alleged violations of Labor Code, Title 5, Subtitle A regarding the provision of medical benefits, Commissioner rules, or a Commissioner order or decision, and, under Labor Code §414.005 and §414.006 and Chapters

415 and 416, the Division may conduct investigations, make referrals to other authorities, and initiate administrative violation proceedings.

Proposed amendment of §180.24. Proposed amendments to §180.24(b)(1) are necessary and delete the word "employee" because it is unnecessary and add the language "or the health care provider that employs the health care practitioner" to be consistent with Labor Code §413.041 as amended by HB 7. Proposed amendments to §180.24(b)(1) also delete the requirement that the health care practitioner "file a disclosure with the commission within 30 days of the date the first referral is made unless the disclosure was previously made" and instead requires an annual disclosure be made to the Division by the health care practitioner to be consistent with Labor Code §415.0035(b) and (e) as amended by HB 7. Proposed amendments to §180.24(b)(1) also update a citation by deleting the citation "(b)(3)" and changing it to "(b)(2)" to clarify the rule.

Proposed amendments to §180.24(b)(2) are necessary and delete the language that pertained to the requirements to serve on the approved doctor list that expired pursuant to Labor Code §408.023(k), as amended by HB 7. The contents of subsection (b)(3) of this section are proposed to be incorporated into the language of proposed §180.24(b)(2) of thereby making subsection (b)(3) of this section unnecessary. The citation within proposed §180.24(b)(2) is updated to "(b)(1)" and the language "paragraphs (1) and (2)" is proposed for deletion because the amendments are necessary to update the rule.

Proposed amended §180.24(c) deletes the language "On or after September 1, 2003" because the language is unnecessary. Proposed amendments to §180.24(c) delete the language "when the health care practitioner had actual knowledge of the financial interest or acted in reckless disregard or deliberate ignorance as to the existence of the financial interest" and add the language "In addition to any penalties or sanctions provided by the Statute and rules, failure to disclose a financial interest by a health care provider is an administrative violation", the proposed amendments are necessary to conform with the requirements of Labor Code §415.0035(b) and (e) as amended by HB 7. Labor Code §415.0035(b) and (e) provide that a health care provider commits an administrative violation if that person fails or refuses to timely file required reports or records, or fails to file with the Division the annual disclosure statement required by Labor Code §413.041.

Proposed amendment of §180.25. Proposed amendments to §180.25 are necessary to be consistent with Labor Code §415.0036 as added by HB 34. Labor Code §415.0036(a) states "This section applies to an insurance adjuster, case manager, or other person who has authority under this title to request the performance of a service affecting the delivery of benefits to an injured employee or who actually performs such a service, including peer reviews, performance of required medical examinations, or case management." Labor Code §415.0036(b) states "A person described by subsection (a) commits an administrative violation if the person offers to pay, pays, solicits, or receives an improper inducement relating to the delivery of benefits to an injured employee or improperly attempts to influence the delivery of benefits to an injured employee, including through the making of improper threats. This section applies to each person described by subsection (a) who is a participant in the workers' compensation system of this state and to an agent of such a person."

Proposed amendments to §180.25(b) of this section add the word "attempt" and are necessary to be consistent with the language in Labor Code §415.0036 as added by HB 34. Proposed amendments to §180.25(b) also delete the elements "intentionally, knowing, or willfully" because they are not statutorily required and the update is necessary to clarify the rule.

Proposed amendments to §180.25(b)(3) delete the citation to Labor Code §408.0222 which was repealed, effective September 1, 2005 and are necessary to update the rule.

Proposed amendments to §180.25(d) delete the language that pertains to Labor Code §408.0223, which was repealed effective September 1, 2005, and is necessary to update the rule. New proposed §180.25(d) is necessary to implement Labor Code §413.041, as amended by HB 7, and provides that a violation of applicable federal standards that prohibit the payment or acceptance of payment in exchange for health care referrals relating to fraud, abuse, and anti-kickbacks is an administrative violation.

Proposed addition of new §180.26. The new rule is necessary to clarify the sanctions that may be imposed and who the various types of sanctions may be imposed against in accordance with the provisions of the Act. The proposed section heading for §180.26 is "Criteria for Imposing, Recommending and Determining Sanctions; Other Remedies."

Labor Code §402.072, as amended by HB 7, provides that "the division may impose sanctions against any person regulated by the division under this subtitle." Labor Code §415.021(a), as amended by HB 7, provides that "In addition to any other provisions in this subtitle relating to violations, a person commits an administrative violation if the person violates, fails to comply with, or refuses to comply with this subtitle or a rule, order, or decision of the commissioner." Labor Code §415.021(a) also provides, in part, that "In addition to any sanctions, administrative penalty or other remedy authorized by this subtitle, the Commissioner may assess an administrative penalty against a person who commits an administrative violation."

Proposed §180.26 reflects the HB 7 amendments to §§415.001 - 415.0035, 415.005, 415.006, 415.009, 415.010, 415.021, 415.024, and 415.025 which deleted the classification system for administrative violations (Classes A - D) and also deleted the willful, intentional, and knowing elements previously required for certain actions to constitute an administrative violation.

Proposed §180.26 clarifies that the Division may impose sanctions on any system participant that commits an administrative violation and provides the criteria for the imposition of sanctions on doctors or insurance carriers. Proposed §180.26 is consistent with the amendments made by HB 7 to Labor Code §§402.061, 402.072, 408.0231(b)(2), 408.0231(c), 408.0231(g), 413.022(e), 413.041, 413.044, 414.003(b), 415.0035(b) and (e), and 415.023; and SB 1814 to Labor Code §413.022(c-1).

Proposed §180.26(a)(1) is consistent with Labor Code §408.0231(b)(2) which provides that the Commissioner by rule shall establish criteria for imposing sanctions on a doctor or insurance carrier as provided by that section. Labor Code §408.0231(g) provides, in part, that the Commissioner shall adopt rules regarding doctors who perform peer review functions for insurance carriers and those rules may include standards for peer review and imposition of sanctions on doctors performing peer review functions. Labor Code §408.0231(b)(2) provides that the Commissioner shall establish criteria for the imposition of sanctions on a doctor or insurance carrier as provided by

the section. Labor Code §408.0231(c) provides a list of criteria that the Commissioner may use and also provides, in part, that the criteria may include anything the Commissioner considers relevant, including a sanction of the doctor by the Commissioner for a violation of Labor Code, Chapter 413 or 415. Labor Code §413.041(c) provides that "a health care provider that fails to comply with this section is subject to penalties and sanctions as provided by this subtitle, including forfeiture of the right to reimbursement for services rendered during the period of noncompliance. Labor Code §415.021 permits the Division to assess penalties of up to $25,000 per violation and subsection (c) requires the Commissioner to consider various factors. Labor Code §415.0035(b) and (e) provide that a health care provider commits an administrative violation if that person fails or refuses to timely file required reports or records, or fails to file with the Division the annual disclosure statement required by Labor Code §413.041. Labor Code §415.023(a) provides that a person who commits an administrative violation under Labor Code §§415.001, 415.002, 415.003, or 415.0035 as a matter of practice is subject to an applicable rule adopted under Labor Code §415.0035(b) in addition to the penalty assessed for the violation. Labor Code §413.044 provides that in addition to or in lieu of a penalty under Labor Code §415.021 or a sanction under Labor Code §415.023, the Commissioner may impose sanctions against a designated doctor who, after an evaluation conducted under Labor Code §413.002(b), is determined to be out of compliance with the Act or Division rules relating to medical policies, fee guidelines, impairment ratings, or the quality of decisions made under Labor Code §408.0041 or §408.122. Labor Code §414.003(b) provides that the Commissioner shall use the information compiled under the section to impose appropriate penalties and other sanctions under Labor Code, Chapters 415 and 416. Proposed §180.26(a) is consistent with Labor Code §415.021(a). Labor Code §408.0231(g) provides that the Commissioner shall adopt rules regarding doctors who perform peer review functions and those rules may include standards for peer review and imposition of sanctions on doctors performing peer review functions. Labor Code §408.0231(g) also provides requirements for doctors that perform peer reviews under the Act and requires the doctors to comply with provisions of Labor Code §§408.0043 - 408.0045, as applicable, that were added by HB 2004.

Proposed §180.26(a)(1) also describes and identifies certain administrative violations under the act.

Proposed §180.26(b) provides the sanctions that the Division may impose against a doctor or insurance carrier in accordance with Labor Code §408.0231 as amended by HB 7. Labor Code §408.0231(e) states that "The commissioner shall act on a recommendation by the medical advisor selected under Section 413.0511 and, after notice and the opportunity for a hearing, may impose sanctions under this section on a doctor or an insurance carrier or may recommend action regarding a utilization review agent." Labor Code §408.0231(f) provides that "The sanctions the commissioner may recommend or impose under this section include reduction of allowable reimbursement; mandatory preauthorization of all or certain health care services; required peer review monitoring, reporting, and audit; deletion or suspension from the approved doctor list and the designated doctor list; restrictions on appointment under this chapter; conditions or restrictions on an insurance carrier regarding actions by insurance carriers under this subtitle in accordance with the memorandum of understanding adopted under Subsection (e); and mandatory participation in training classes or other courses as established or certified by the division." Labor Code §413.044(b) also provides that "Sanctions imposed under Subsection (a) may include removal or suspension from the division list of designated doctors, or restrictions on the reviews made by the person as a designated doctor."

Proposed §180.26(c) provides a list of sanctions that may be imposed against a person in accordance with Labor Code §415.023(b) as amended by HB 7. Labor Code §415.023(b) provides that "The commissioner may adopt rules providing for a reduction or denial of fees; public or private reprimand by the commissioner, suspension from practice before the division; restriction, suspension, or revocation of the right to receive reimbursement under this subtitle; or referral and petition to the appropriate licensing authority for appropriate disciplinary action, including the restriction, suspension, or revocation of the person's license."

Proposed §180.26(d) provides the Division may impose sanctions or remedies otherwise allowed by the Act and Division rules, including an administrative penalty of up to $25,000 per violation, in addition to, or in lieu of, the sanctions listed in §180.26(b) and (c).

Proposed §180.26(e) provides examples of "other matters that justice may require" in accordance with Labor Code §415.021(c)(1)(E), as amended by HB 7, and applies to determinations regarding all sanctions. Proposed §180.26(f) is made in accordance with Labor Code §§408.0231(c), 402.021(b)(6) and 402.061, as amended by HB 7; and Labor Code §402.075 added by HB 7. Labor Code §415.021(c)(1)(E) provides that in assessing an administrative penalty the Commissioner shall consider other matters that justice may require. Proposed §180.26(f) is consistent with Labor Code §§415.021(c)(1)(E), 408.0231(c), and 402.061, as amended by HB 7. Labor Code §415.021(c)(1)(E) provides that in assessing an administrative penalty the Commissioner shall consider other matters that justice may require. Labor Code §408.0231(c) provides that the criteria for deleting a doctor from the list or for recommending or imposing sanctions may include anything the Commissioner considers relevant. Labor Code §402.061 provides that the Commissioner shall adopt rules as necessary for the implementation and enforcement of the Act.

Proposed §180.26(f) recodifies the language of proposed deleted §180.8(e). The proposed language clarifies that in an investigation where both an administrative violation and a criminal prosecution are possible, the Division may, at its discretion, postpone action on the administrative violation until the criminal prosecution is completed.

Proposed §180.26(g) clarifies that the Division may, at its discretion, send a warning letter to a system participant that an administrative violation may have occurred. Proposed §180.26(h) clarifies that the Division may, at its discretion, enter into a consent order with the system participant and a consent order may be entered into before or after the issuance of a notice of violation under §180.8 of this title.

Proposed amendment of §180.27. Proposed amendments to the section heading for §180.27 delete the word "Reinstatement" because the term is obsolete since Labor Code §408.0231(d)(1) pertains to reinstatement of doctors to the approved doctor list and the approved doctor list expired on September 1, 2007 pursuant to Labor Code §408.023(k) as added by HB 7. Proposed amendments to §180.27 are necessary to clarify the sanctions process, the appeals process, and the procedure

for a doctor, described by Labor Code §408.0231(d)(2), to request the restoration of practice privileges removed by the Division. The proposed amendments are necessary to update the rule and be consistent with changes by HB 7 to Labor Code §402.073(c), 408.0231(d)(2), 408.1225, 415.021, 402.061; and the addition by HB 7 of Labor Code §§408.023(k), 402.00111, and 402.00116.

The proposed deletion of §180.27(a) is necessary because the provisions are obsolete since the ADL expired. Proposed amended §180.8 of this title (relating to Notices of Violation and Warning Letters) contains the provisions related to issuance of notices of violation and warning letters.

Proposed amended and relettered §180.27(a) proposed changes that are necessary to provide clarity to the rule and be consistent with Labor Code §402.073(c) as amended by HB 7. Labor Code §402.073(c) provides that "In a case in which a hearing is conducted in conjunction with Section 402.072, 407.046, or 408.023, and in other cases under this subtitle that are not subject to Subsection (b), the administrative law judge who conducts the hearing for the State Office of Administrative Hearings shall propose a decision to the commissioner for final consideration and decision by the commissioner."

Proposed amended and relettered §180.27(b) is necessary to update the rule and be consistent with the legislative additions by HB 7 of Labor Code §402.00111 and §402.00116 which provide that the Division is administered by the Commissioner of workers' compensation as provided by the Act and the Commissioner shall administer and enforce the Act, other workers' compensation laws of this state, and other laws granting jurisdiction to or applicable to the Division or the Commissioner.

Proposed amended and relettered §180.27(d) is necessary and updates and clarifies the process for a doctor, other than doctors to which Labor Code §408.023(r) applies, to apply to the Division for restoration of the doctor's practice privileges that were removed by the Commissioner based on sanctions imposed under Labor Code §408.0231. Labor Code §408.023(r) sets forth certain requirements and limitations regarding doctors under the act. Labor Code §408.0231(d)(2) provides that the Commissioner by rule shall establish procedures under which a doctor may apply for restoration of doctor practice privileges removed by the Commissioner based on sanctions imposed under Labor Code §408.0231; however the statute does not require the Commissioner to restore any doctor's practice privileges and restoration of a doctor's practice privileges lies solely in the discretion of the Commissioner. Labor Code §408.0231(d)(1) no longer applies due to the expiration of the approved doctor list. Labor Code §408.023(k), added by HB 7, provided for the expiration of the approved doctor list effective September 1, 2007.

Proposed amended and relettered §180.27(d)(1)(A) and (B) are amended in accordance with the provisions of Labor Code §408.0231(d)(2) which provides that the Commissioner by rule shall establish procedures under which a doctor may apply for restoration of the doctor's practice privileges removed by the Commissioner based on sanctions imposed under Labor Code §408.0231.

Proposed amended and relettered §180.27(d)(1)(A) has been divided into clauses (i) - (iv) to provide more clarity and update the rule to be consistent with Labor Code §§408.1225, 408.0231(d)(2) and 415.021, amended by HB 7, and Labor Code §408.0231(g) added by HB 7 and amended by HB 2004. Proposed §180.27(d)(1)(A)(iii) has been added to be consistent with Labor Code §408.1225(a) and §408.0231(g) that require designated doctors and doctors that perform peer review to meet specific qualification standards of the Division. The proposed provision in §180.27(d)(1)(A)(iii) that the doctor meet all the Division's "conditions for restoration of some or all of the practice privileges removed" pertains to the doctor's ability to show that the doctor has overcome the conditions that were the reason for the imposition of the sanction(s). Proposed §180.27(d)(1)(A)(iv) has been added to be consistent with Labor Code §415.021 which provides that a person commits a violation if the person violates, fails to comply with, or refuses to comply with the Act or a rule, order, or decision of the Commissioner. Proposed §180.27(d)(1)(A)(iv) has also been added to be consistent with Labor Code §414.002, amended by HB 7, which provides that the Division shall monitor for compliance with Commissioner rules, the Act, and other laws relating to workers' compensation the conduct of persons subject to the Act.

Subsection (f) of §180.27 is proposed for deletion because it pertains to the Division's approved doctor list that expired effective September 1, 2007 pursuant to Labor Code §408.023(k) as added by HB 7.

Proposed amendment of §180.28. With regard to the proposed amendments to §180.28 Labor Code §§414.002 - 414.005 and 414.007 provide the Division's duties of monitoring, compilation and maintenance of statistical data, review of insurance carrier records, maintenance of an investigation unit, and medical review. Labor Code §§414.002 - 414.007 were amended by HB 7. Labor Code §408.0231(g), as added by HB 7, provides that the Commissioner shall adopt rules regarding doctors who perform peer review functions for insurance carriers and those rules may include standards for peer review and imposition of sanctions on doctors performing peer review functions. Labor Code §408.0231(g) further provides that a doctor who performs peer review under the Act must hold the appropriate professional license issued by this state.

Proposed §180.28(a) clarifies that a peer review report includes a report used to deny preauthorization. Therefore, a peer review report is required to be generated when there is a denial of the request for preauthorization. The Division clarifies that a peer review report and a report to deny preauthorization as required by §134.600 of this title (relating to Preauthorization, Concurrent Review, and Voluntary Certification of Health Care) may be the same report as long as the required elements of proposed §180.28(a) and §134.600 of this title are met. Insurance Code §4201.002(1) was amended by HB 4290 and defines adverse determination to mean "a determination by a utilization review agent that health care services provided or proposed to be provided to a patient are not medically necessary or are experimental or investigational." A denial of preauthorization is an adverse determination.

Proposed §180.28(a) also specifies that a peer reviewer's report shall document the objective medical findings and evidence-based medicine that supports the opinion and requires the elements listed in subsection (a)(1) - (8) to be included in the report. Proposed new subsection (a)(2), (a)(7) and (a)(8) are added to assist in Division monitoring efforts.

Under proposed subsection (a)(7) and (a)(8) a health care practitioner that does not have the appropriate credentials to treat the injury of the injured employee covered under the Act also will not have the appropriate credentials to review the treatment provided or proposed to be provided to treat the injury of the injured employee. The purpose of proposed subsection (a)(7) and

(a)(8) are for data call purposes so that the Division will be able to validate the professional certification requon requirements and appropriate credentials required under applicable provisions of the Act and the proposed rules.

Proposed §180.28(c) clarifies that the "insurance carrier shall submit a copy of a peer review report to the treating doctor and the health care provider who rendered or requested the health care" to further clarify that the generation of a peer review report following a denial of a preauthorization request is also required. Proposed §180.28(c) also clarifies that a copy of the peer review report must be sent to the treating doctor, the health care provider who rendered "or requested" the health care, the injured employee and the injured employee's representative, if any, when the insurance carrier uses the report to deny the compensability or extent of the compensable injury or reduce or deny income or medical benefits to an injured employee. This proposed language clarifies that denying compensability results in a denial of benefits and the word "reduce" includes within its meaning "no benefits or zero benefits."

Proposed §180.28(e) updates and clarifies the sanctions that may be imposed by the Commissioner pursuant to applicable provisions of the Labor Code and Division rules and is consistent with the additions of Labor Code §§408.0043 - 408.0046, as added by HB 2004, and Labor Code §415.021 amended by HB 7.

Proposed added §180.28(f) provides that an entity requesting a peer review must obtain and provide to the doctor providing peer review services all relevant and updated medical records. This language was added to provide consistency with Labor Code §408.0046 as added by HB 2004 that requires that rules adopted under Labor Code §408.0046 must require that an entity requesting a peer review to obtain and provide to the doctor providing peer review services all relevant and updated medical records.

Section 180.50 is proposed to be added as a severability clause for the chapter.

Catherine Reyer, Associate Commissioner of the Enforcement Division (Enforcement), has determined that for each year of the first five years the proposed rules will be in effect there will be minimal fiscal implications to state or local government as a result of enforcing or administering the proposed rules. There also will be no measurable effect on local employment or the local economy as a result of the proposed rules.

Ms. Reyer has also determined that the proposed rules will have no or minimal impact on the cost of the Division's enforcement process, because the proposed rules primarily codify existing procedures or implement statutory amendments enacted by HB 7, HB 34, HB 1003, HB 1006, HB 2004, and HB 4290 to the Labor Code and Insurance Code which, in respect to the workers' compensation system, were developed by the Legislature to further the goal of ensuring the prompt, high quality, appropriate, and necessary medical care for injured employees while containing system costs.

There will be no fiscal implication to local governments as a result of enforcing or administering the proposed rules.

Local government and state government as a covered entity will be impacted in the same manner as persons that are required to comply with the proposed rules as described later in the preamble.

Ms. Reyer determined that for each year of the first five years the proposed rules will be in effect the anticipated public benefit will be Division rules that reflect amendments of HB 7, HB 34, HB 1003, HB 1006, HB 2004, and HB 4290 to the Labor Code and Insurance Code which, in respect to the workers' compensation system, were developed by the Legislature to further the goal of prompt, high-quality, appropriate, and necessary medical care for injured employees while ensuring compliance and containing related system costs. The proposed rules are contemplated to provide additional clarity and guidance to system participants to comply with relevant Labor Code and Insurance Code provisions.

The vast majority of the proposed rules are a direct result of specific statutory changes and are anticipated to maintain current costs levels and to decrease costs over time for the system by increasing the uniformity and clarity of the rules to implement applicable Labor Code and Insurance Code provisions. Initially there may be some slight increases in costs for some system participants in order to comply with the revised rule requirements due to the amendments enacted by HB 7, HB 34, HB 1003, HB 1006, HB 2004, and HB 4290. However, the costs associated with compliance of the statutes associated with recently enacted amendments or new statutory provisions are typically considered costs that are anticipated with legislative implementation and are likely a component of the standard cost of ongoing business operations and are planned for and included in annual budgets. The scope of the rule proposal is to implement current statutory language which system participants should be following.

Increased costs for insurance carriers that have not budgeted nor have budgeted sufficient amounts for training needs and updates associated with implementing related statutory compliance reflected in these proposed rules, may experience some increased costs related to the update of reference and training materials for staff surrounding any revised definitions and reporting requirements; training to ensure that staff do not inadvertently submit frivolous complaints to the Division; reviewing best practices with staff to ensure no improper inducements are accepted and/or offered; identifying doctors licensed in Texas; potential reassignment of examinations and/or reviews from doctors not licensed in Texas to doctors licensed in Texas; locating a sufficient number of doctors licensed in Texas to manage case load; and potentially underwriting the Texas licensure of out of state doctors to ensure adequate and appropriate staffing. Based on varied business models and the fact that the statutory requirements primarily reflect reporting criteria, many individuals and companies were likely already utilizing business practices to address similar costs prior to the legislation. The Division is unable to estimate any specific costs associated with compliance other than those associated with the update of training material and related licensing costs for out of state doctors.

Many entities will likely experience no increase in costs in this area because the cost of updating training material, processes, and procedures are normal, expected, and budgeted for as part of the standard cost of ongoing business operations. For entities that do not budget training needs and updates, or budget insufficient amounts for such needs as part of their standard cost of ongoing business operations may experience some increased costs associated with complying with the current statutory amendments that are the primary cost drivers of these proposed rules. The Division has provided estimates on the potential costs for businesses that may not budget for or have budgeted insufficient amounts for standard and regular training needs.

The estimates on training material updates are inclusive of updates to reference training materials for staff around the definitions and requirements under the Labor Code and Insurance Code, processes to verify scheduled doctors are licensed in Texas, interim processes to potentially reassign examinations and/or reviews from doctors not licensed in Texas to doctors licensed in Texas, verifying newly hired doctors are licensed in Texas to manage case load, training to ensure staff do not inadvertently submit frivolous complaints to the Division, and reviewing practices with staff to ensure that no improper inducements are accepted or offered.

The Division estimates the cost of material involved in updating training material at a range of $6 to $300 based on an average of 10 pages of updates to training material per bill enacted, with a cost of $.10 to $5 per page; or 10 pages multiplied by six enacted bills multiplied by $.10 and $5 respectively. The low of $.10 is based on minimal updates and distribution made via established electronic means and the high of $5 is based on extensive updates, paper copy distribution, in-person training sessions, or implementation of electronic distribution and training where none had previously existed or varying combination of establishing electronic training means, in-person training sessions, etc. Again, many entities will experience no increase in costs because the cost of updating training material, processes, and procedures are normal, expected, and budgeted for as part of the standard cost of doing business. For entities that do not budget training needs and updates or budget insufficient amounts for such needs as part of their standard cost of doing business may experience some increased costs associated with complying with the statutory amendments that are the drivers of these proposed rules.

With respect to cost increases based on sanctions being assessed due to the new statutory maximum fine of $25,000 per day per occurrence, the Division has determined that it would be improper to estimate an increase in costs due to sanctions associated with the violation of statutes and the proposed rules. The Division requires that all system participants comply fully with all existing statutes and rules which predicates that increased costs in this area are entirely within the control of system participants.

Finally, the Division recognizes that the requirement under proposed §180.8(d) of this title that system participants respond to notices of hearing in an enforcement action taken against them may impose certain costs on those participants. Because, however brief, general denials are customarily filed in order to comply with similar requirements in the Department's rules, specifically under §1.88 of this title (relating to Written Response to Notice of Hearing), the Division anticipates that this practice will continue under its new §180.8(d) of this title requirement. Thus, the cost of compliance to the vast majority of system participants to which this provision may be applicable will be minimal.

As required by Government Code §2006.002(c), the Division has determined that these proposed rules will not have an adverse economic effect on small or micro businesses. The Division's analysis of any possible costs for compliance with these proposed rules that are detailed in the Public Benefit/Cost Note section of this proposal is also applicable to small and micro businesses. Because these proposed rules will not have an adverse economic effect on small or micro-businesses, Government Code §2006.002(c) does not require an economic impact statement or regulatory flexibility analysis.

The Division has determined that no private real property interests are affected by these proposed rules and that these proposed rules do not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking or require a takings impact assessment under Government Code §2007.043.

To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. CST on September 27, 2010. Comments may be submitted via the internet through the Division's internet website at www.tdi.state.tx.us/wc/rules/proposedrules/index.html, by email at rulecomments@tdi.state.tx.us or by mailing or delivering your comments to Maria Jimenez, Texas Department of Insurance, Division of Workers' Compensation, Workers' Compensation Counsel, MS-4D, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1645.

A public hearing on this proposal will be held on September 27, 2010 at 9:00 a.m. CST in the Tippy Foster Conference Room of the Texas Department of Insurance, Division of Workers' Compensation, 7551 Metro Center Drive, Austin, Texas 78744-1645. The Division provides reasonable accommodations for persons attending meetings, hearings, or educational events, as required by the Americans with Disabilities Act. If you require accommodations in order to attend the hearing please contact Idalia Salazar at (512) 804-4403 at least two business days prior to the confirmed hearing date.

The hearing will also be audio streamed; to listen to the audio stream access the Public Outreach Events /Training Calendar website at www.tdi.state.tx.us/wc/events/index.html. Audio streaming will begin approximately five minutes before the scheduled time of the hearing.

The public hearing date, time, and location should be confirmed by those interested in attending or listening via audio stream; the hearing may be confirmed by visiting the Division's Public Outreach Events/Training Calendar website at http://www.tdi.state.tx.us/wc/events/index.html. Written and oral comments presented at the hearing will be considered.

SUBCHAPTER A. GENERAL RULES FOR ENFORCEMENT

28 TAC §§180.1 - 180.3, 180.8

The amendments are proposed under Labor Code §§401.011, 401.021, 402.001, 402.00128, 402.00111, 402.00116, 402.023, 402.0235, 402.024, 402.061, 402.072, 408.0043 - 408.0046, 408.023, 408.0231, 414.002, 414.007, 415.001 - 415.0036, 415.008 - 415.010, 415.021, 415.023, 415.031, 415.032, 415.034; Government Code §§2001.051, 2001.052, and 2001.056; and Insurance Code §1305.004(a)(10) and §4201.002(13). Labor Code §401.011 defines certain terms that are used under Labor Code, Title 5, Subtitle A (the Act). Labor Code §401.021(1) provides that except as otherwise provided by Labor Code, Title 5, Subtitle A, a proceeding, hearing, judicial review, or enforcement of a Commissioner order, decision, or rule is governed by the following subchapters and sections of Government Code, Chapter 2001: Subchapters A, B, D, E, G, and H, excluding §2001.004(3) and 2001.005; Sections 2001.051, 2001.052, and 2001.053; Sections 2001.056 - 2001.062; and Section 2001.141(c). Labor Code §402.001 was amended to provide that except as provided by Labor Code §402.002, the Texas Department of Insurance is the state agency designated to oversee the workers' compensation system of this state and the Division of Workers' Compensation is established as a division within the Texas Department of Insurance to administer and operate the workers' compensation system as provided

by Labor Code, Title 5. Labor Code §402.00111 provides that except as otherwise provided by Labor Code, Title 5, the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority, under Labor Code, Title 5. Labor Code §402.00116(a) provides that the Commissioner or Workers' Compensation is the Division's chief executive and administrative officer. The Commissioner shall administer and enforce Labor Code, Title 5, other workers' compensation laws of this state, and other laws granting jurisdiction to or applicable to the division or the Commissioner, except as otherwise specifically provided by Labor Code, Title 5, a reference in Labor Code, Title 5 to the "commissioner" means the Commissioner of Workers' Compensation. Labor Code §402.00116(b) provides that the Commissioner has the powers and duties vested in the division by Labor Code, Title 5 and other workers' compensation laws of this state. Labor Code §402.00128(b) provides that the Commissioner or the Commissioner's designee may investigate misconduct; hold hearings; issue subpoenas to compel the attendance of witnesses and the production of documents; administer oaths; take testimony directly or by deposition or interrogatory; assess and enforce penalties established under this title; enter appropriate orders as authorized by this title; institute an action in the Division's name to enjoin the violation of Labor Code, Title 5; initiate an action under Labor Code §410.254 to intervene in a judicial proceeding; prescribe the form, manner, and procedure for the transmission of information to the Division; correct clerical errors in the entry of errors; and exercise other powers and perform other duties as necessary to implement and enforce Labor Code, Title 5. Labor Code §402.021(b)(6) states that it is the intent of the legislature that, in implementing the goals described by Subsection (a), the workers' compensation system of this state must promote compliance with this subtitle and rules adopted under this subtitle through performance-based incentives. Labor Code §402.023(a) provides that "[t]he commissioner shall adopt rules regarding the filing of a compliant under this Labor Code, Title 5, against an individual or entity subject to regulation under this subtitle". Labor Code §402.035 requires the Division to develop a risk based complaint investigation system and to consider the severity of the alleged violation, whether the alleged violator showed continued or willful noncompliance, whether a Commissioner order has been violated, and other necessary risk based criteria. Labor Code §402.024(b) provides that the Division shall comply with federal and state laws related to program and facility accessibility. Labor Code §402.061 provides that the Commissioner shall adopt rules as necessary for the implementation and enforcement of Labor Code, Title 5, Subtitle A. Labor Code §402.072(a) provides that the Division may impose sanctions against any person regulated by the Division under Labor Code, Title 5, Subtitle A, and Labor Code §402.072(c) states that a sanction imposed by the Division is binding pending appeal. Labor Code §408.0043(a) applies to doctors, other than chiropractors or dentists, who perform health care services under Labor Code, Title 5, as doctors performing peer reviews, utilization reviews, independent reviews, required medical examinations, or who serve on the medical quality review panel or as designated doctors for the Division. Labor Code §408.0043(b) requires that a doctor described by Labor Code §408.0043(a), other than a chiropractor or dentist, who reviews a specific workers' compensation case must hold a professional certification in a health care specialty appropriate to the type of health care that the injured employee is receiving. Labor Code §408.0044 pertains to dentists who perform dental services under Labor Code, Title 5 for peer reviews, utilization reviews, independent reviews, or required dental examinations. Labor Code §408.0044(b) requires that a dentist who reviews a dental service in conjunction with a specific workers' compensation case must be licensed to practice dentistry. Labor Code §408.0045 pertains to chiropractors who perform chiropractic services under Labor Code, Title 5 for peer reviews, utilization reviews, independent reviews, required medical examinations, or who serve on the medical quality review panel or as designated doctors providing chiropractic services for the Division. Labor Code §408.0045(b) requires that a chiropractor who reviews a chiropractic service in conjunction with a specific workers' compensation case must be licensed to engage in the practice of chiropractic. Labor Code §408.0046 states that the Commissioner may adopt rules as necessary to determine which professional health practitioner specialties are appropriate for treatment of certain compensable injuries and must require an entity requesting a peer review to obtain and provide to the doctor providing the peer review services all relevant and updated medical records. Labor Code §408.023(h) requires that a utilization review agent or an insurance carrier that uses doctors to perform reviews of health care services provided under Labor Code, Title 5, Subtitle A, including utilization review, only use doctors licensed to practice in this state. Labor Code §408.023(k) required the expiration of the approved doctor list effective September 1, 2007. Labor Code §408.023(n) and §408.0231(g) require the Division to monitor and adopt rules regarding doctors who perform peer review. Labor Code §408.0231(g) authorizes the Commissioner to adopt rules regarding doctors who perform peer review functions for insurance carriers, such as, standards for peer review, sanctions against doctors performing peer review functions (including restriction, suspension, or removal of the doctor's ability to perform peer reviews) and other issues important to the quality of peer review. Labor Code §408.0231(b) authorizes the Commissioner by rule to establish criteria for imposing sanctions on a doctor or an insurance carrier as provided by this section. Labor Code §408.0231(c) states the criteria for recommending or imposing sanctions that the Commissioner may use (which may include anything the Commissioner considers relevant) including a sanction of the doctor for a violation of Labor Code, Chapter 413 or 415; a sanction by the Medicare or Medicaid program; evidence from the Division's medical records that an insurance carrier's utilization review practices or the doctor's charges, fees, diagnoses, treatments, evaluations, or impairment ratings are substantially different from those the Commissioner finds to be fair and reasonable based on either a single determination or a pattern of practice; professional failure to practice medicine or provide health care, including chiropractic care, in an acceptable manner consistent with the public health, safety, and welfare; or a criminal conviction. Labor Code §408.0231(d) requires the Commissioner to establish rules for the restoration of doctor practice privileges removed by the Commissioner for sanctions imposed under Labor Code §408.0231. Labor Code §408.0231(f) provides the sanctions the Commissioner may recommend or impose under this section which include reduction of allowable reimbursement; mandatory preauthorization of all or certain health care services; required peer review monitoring, reporting, and audit; deletion or suspension from the designated doctor list; restrictions on appointment under this chapter; conditions or restrictions on an insurance carrier regarding actions by insurance carriers under Labor Code, Title 5, Subtitle A, in accordance with a memorandum of understanding adopted under Labor Code §408.0231(e) regarding regulation of insurance carriers and utilization review

agents; and mandatory participation in training classes or other courses as established or certified by the Division. Labor Code §413.017 states the following medical services are presumed reasonable: medical services consistent with the medical policies and fee guidelines adopted by the Commissioner; and medical services that are provided subject to prospective, concurrent, or retrospective review as required by the medical policies of the Division and that are authorized by an insurance carrier. Labor Code §414.002 provides that the Division shall monitor for compliance with Commissioner rules; Labor Code, Title 5, Subtitle A; and other laws relating to workers' compensation the conduct of persons subject to this subtitle. Persons to be monitored include persons claiming benefits under Labor Code, Title 5, Subtitle A; employers; insurance carriers; attorneys and other representatives of parties; and health care providers. Labor Code §414.003(a) provides that the Division shall compile and maintain statistical and other information as necessary to detect practices or patterns of conduct by persons subject to monitoring under Labor Code, Chapter 414, that violate Labor Code, Title 5, Subtitle A, Commissioner rules, or a Commissioner order or decision, or otherwise adversely affect the workers' compensation system of this state. Labor Code §414.003(b) provides that the Commissioner shall use the information compiled under this section to impose appropriate penalties and other sanctions under Labor Code, Chapters 415 and 416. Labor Code §414.004(a) provides that the Division shall review regularly the workers' compensation records of insurance carriers as required to ensure compliance with Labor Code, Title 5, Subtitle A. Labor Code §414.004(b) provides that each insurance carrier, the insurance carrier's agents, and those with whom the insurance carrier has contracted to provide, review, or monitor services under Labor Code, Title 5, Subtitle A, shall cooperate with the Division; make available to the Division any records or other necessary information; and allow the Division access to the information at reasonable times at the person's offices. Labor Code §414.007 provides that the Division shall review information concerning alleged violations of Labor Code, Title 5, Subtitle A regarding the provisions of medical benefits, Commissioner rules, or a Commissioner order or decision, and, under Labor Code §414.005 and §414.006 and Labor Code, Chapters 415 and 416, may conduct investigations, make referrals to other authorities, and initiate administrative violation proceedings. Amendments to Labor Code §§415.001 -415.003, 415.0035, 415.009, and 415.010 deleted the requirement that the Division prove that a violation was committed willfully, intentionally, or knowingly in an enforcement action for an administrative violation brought against a system participant under those sections. Labor Code §415.003 provides that a health care provider commits an administrative violation if the person submits a charge for health care that was not furnished, administers improper, unreasonable, or medically unnecessary treatment or services, makes an unnecessary referral, violates the Division's fee and treatment guidelines, violates a Commissioner rule, or fails to comply with a provision of this subtitle. Labor Code §415.0035(a)(3) provides that an insurance carrier or its representative commits an administrative violation if that person denies preauthorization in a manner that is not in accordance with rules adopted by the Commissioner under Labor Code §413.014. Labor Code §415.0035(b) provides that a health care provider commits an administrative violation if that person fails or refuses to timely file required reports or records, or fails to file with the Division the annual disclosure statement required by Labor Code §413.041. Labor Code §415.0035(e) provides that an insurance carrier or health care provider commits an administrative violation if that person violates Labor Code, Title 5, Subtitle A, or a rule, order, or decision of the Commissioner. Labor Code §415.0036 applies to an insurance adjustor, case manager, or other person who has authority under Labor Code, Title 5 to request the performance of a service affecting the delivery of benefits to an injured employee or who actually performs such a service, including peer reviews, performance of required medical examinations, or case management; a person described by this section commits an administrative violation if the person offers to pay, pays, solicits, or receives an improper inducement relating to the delivery of benefits to an injured employee or improperly attempts to influence the delivery of benefits to an injured employee, including through the making of improper threats. Labor Code §415.0036 applies to each person it describes who is a participant in the workers' compensation system of this state and to an agent of such a person. Labor Code §415.008(a) provides that a person commits a violation if the person, to obtain or deny a payment of a workers' compensation benefit or the provision of a benefit for the person or another, knowingly or intentionally makes a false or misleading statement, misrepresents or conceals a material fact, fabricates, alters, conceals, or destroys a document, or conspires to commit an act described by Labor Code §415.008(a)(1), (a)(2), or (a)(3). Labor Code §415.021 states that in addition to any sanctions, administrative penalty, or other remedy authorized by Labor Code, Title 5, Subtitle A, the Commissioner may assess an administrative penalty against a person who commits an administrative violation; the administrative penalty shall not exceed $25,000 per day per occurrence; each day of noncompliance constitutes a separate violation; and the authority of the Commissioner under chapter 415 is in addition to any other authority to enforce a sanction, penalty, fine, forfeiture, denial, suspension, or revocation otherwise authorized by law. Labor Code §415.023(a) provides that a person who commits an administrative violation under Labor Code §§415.001, 415.002, 415.003, or 415.0035 as a matter of practice is subject to an applicable rule adopted under Labor Code §415.023(b) in addition to the penalty assessed for the violation. Labor Code §415.023(b) provides that the Commissioner may adopt rules providing for a reduction or denial of fees; public or private reprimand by the Commissioner; suspension from practice before the Division; restriction, suspension, or revocation of the right to receive reimbursement under Labor Code, Title 5, Subtitle A; or referral and petition to the appropriate licensing authority for appropriate disciplinary action, including the restriction, suspension, or revocation of the person's license. Labor Code §415.031 provides that any person may request the initiation of administrative violation proceedings by filing a written allegation with the Division. Labor Code §415.032(a) provides that if investigation by the Division indicates that an administrative violation has occurred, the Division shall notify the person alleged to have committed the violation in writing of the charge, the proposed penalty, the right to consent to the charge and the penalty, and the right to request a hearing. Labor Code §415.032(b) provides that not later than the 20th day after the date on which notice is received by the charged party, the charged party shall remit the amount of the penalty to the Division, or submit to the Division a written request for a hearing. Government Code §2001.051 provides that in a contested case, each party is entitled to an opportunity for hearing after reasonable notice of not less than 10 days and to respond and to present evidence and argument on each issue involved in the case. Government Code §2001.056 provides that unless precluded by law, an informal disposition may be

made of a contested case by stipulation, agreed settlement, consent order, or default. Insurance Code §1305.004(a)(10) provides that "independent review" means a system for final administrative review by an independent review organization of the medical necessity and appropriateness, or the experimental or investigational nature, of health care services being provided, proposed to be provided, or that have been provided to an injured employee. Insurance Code §4201.002(13) states that "utilization review" includes a system for prospective, concurrent, or retrospective review of the medical necessity and appropriateness of health care services and a system for prospective, concurrent, or retrospective review to determine the experimental or investigational nature of health care services being provided or proposed to be provided to an individual in this state and the term does not include a review in response to an elective request for clarification of coverage. Occupations Code §155.001 states that a person may not practice medicine in this state unless the person holds a license issued under Occupations Code, Title 3, Subtitle B (relating to Physicians).

The following statutes are affected by this proposal: 28 TAC §180.1 - Labor Code §§401.011, 401.021, 402.023, 402.0235, 402.061, 402.072, 408.023, 408.0231, 408.0043 - 408.0046, 414.002, 414.007, 415.001 - 415.0035, 415.0036, 415.008 - 415.010, 415.021, 415.023, 415.032, Insurance Code §4201.002(13) and §1305.004(a)(10), and Government Code §2001.051; 28 TAC §180.2 - Labor Code §402.023 and §402.0235; 28 TAC §180.3 - Labor Code §402.001; 28 TAC §180.8 - Labor Code §§401.011, 401.021, 402.061, 408.023, 408.0231, 415.021, 415.031, 415.032, 415.034, and Government Code §§2001.051, 2001.052 and 2001.056.

§180.1. Definitions.

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

[~~(1) Abusive practice--a practice that:~~]

[~~(A) does not meet professionally recognized standards for health care or insurance claims adjusting; or~~]

[~~(B) does not meet standards required by the Act, rules, or previous notification to system participant; or~~]

[~~(C) is inconsistent with sound fiscal, business, or medical practices and that results in:~~]

[~~*(i)* unnecessary system costs or in reimbursement for services that are not medically necessary; or~~]

[~~*(ii)* improper reduction or increase of benefits.~~]

(1) [~~(2)~~] Accident Prevention Services Inspection--An [~~an~~] inspection under Chapter 166 under this title (relating to Workers' Health and Safety - Accident Prevention Services) that focuses on insurance carrier's duties to provide accident prevention services under [~~Texas~~] Labor Code Chapter 411, Subchapter E and division rule [~~Commission Rule~~].

(2) [~~(3)~~] Act--The [~~the~~] Texas Workers' Compensation Act, Labor Code Title 5, [~~V~~] Subtitle A.

[~~(4) Administrative Law Judge--an administrative law judge (ALJ) designated by the State Office of Administrative Hearings (SOAH) to preside over the hearing, or a hearing officer of a state or federal tribunal which would include commission hearing officers and appeals panel judges.~~]

(3) Administrative violation--A violation, failure to comply with, or refusal to comply with the Act, or a rule order, or decision of the commissioner. This term is synonymous with the terms "violation" or "violate."

(4) Agent--A person with whom a system participant contracts with or utilizes for the purpose of providing claims service or fulfilling duties under Labor Code, Title 5 and rules. The system participant who contracts with the agent may also be responsible for the administrative violations of that agent.

(5) Appropriate credentials--The certification(s), education, training, and experience to provide the health care that an injured employee is receiving or is requesting to receive.

(6) [~~(5)~~] Audit Violations--Violations [~~violations~~] discovered through a census or statistical sampling of the alleged violator. [~~Audit Violations are representative of overall compliance in the audited Compliance Category(s).~~]

[~~(6) Agent--a person or entity that a system participant (insurance carrier, health care provider, employer, employee, or attorney) contracts with or utilizes for the purpose of providing claims service or fulfilling duties under the Act and Rules. The system participant that the agent works on behalf of is responsible for the acts and omissions of that agent executed in performance of services for the participant.~~]

(7) Commissioner--The commissioner of workers' compensation.

(8) Complaint--A written submission to the division alleging a violation of the Workers' Compensation Act or rules by a system participant.

[~~(7) Charged Person (also Alleged Violator)--the system participant who is charged with an administrative violation or wrongful act. As used in these Rules, charged person includes both person(s) initially charged and those found guilty of an administrative violation(s).~~]

[~~(8) Compliance--a system participant is in compliance if the system participant timely and accurately fulfills his duties under the Act or and Rules in the form and manner required (does not commit a violation by an act of omission or commission) and if the system participant does not commit an act which is prohibited.~~]

(9) Compliance Audit (also Performance Review)--An audit of compliance with one or more duties under the Act and rules [~~Rules~~], other than monitoring or review activities involving the Medical Advisor or the Medical Quality Review Panel. These audits are conducted using a census or statistical sampling to ensure that the findings of the audit are representative of overall performance in the area being audited.

[~~(10) Compliance Category--a group of related duties under the Act and/or Rules.~~]

[~~(11) Compliance Rate--The percentage of duties that are met by a system participant, as reported by or on behalf of the system participant, or as validated by the commission. Compliance rates are validated using censuses or statistical sampling.~~]

[~~(12) Compliance Standard--a rate of compliance that a system participant is minimally expected to meet.~~]

[~~(13) Continued Noncompliance (also Active Noncompliance)--a system participant is in "continued noncompliance" if the system participant has committed a violation of the Act or Rules and has yet to take action to come into full compliance. For example, a system participant who fails to file a required report (or who files an incomplete report) would be in "continued noncompliance." The system participant could come into compliance by filing a properly completed~~

report (although, doing so would not eliminate the existence of a violation for failing to timely file a complete report in the first place).]

(10) [(14)] Controlled substances--"Controlled [controlled] substance" as defined by the Texas Controlled Substances Act (Health and Safety Code, Chapter 481 [Texas Civil Acts, Article 4476-15]) or its successor and the Federal Controlled Substances Act (21 USCS §801 [USCA §8.01] et seq.) or its successor.

(11) [(15)] Conviction or convicted--

(A) A system participant is considered to have been convicted when:

(i) a judgment of conviction has been entered against the system participant in a federal, state, or local court;

(ii) the system participant has been found guilty in a federal, state, or local court;

(iii) the system participant has entered a plea of guilty or nolo contendere (no contest) that has been accepted by a federal, state, or local court;

(iv) the system participant has entered a first offender or other program and judgment of conviction has been withheld; or

(v) the system participant has received probation or community supervision, including deferred adjudication.

(B) A conviction is still a conviction until and unless overturned on appeal even if:

(i) it is stayed, deferred, or probated;

(ii) an appeal is pending;

(iii) the judgment of conviction or other record related to the conduct is expunged; or

(iv) the system participant has been discharged from probation or community supervision, including deferred adjudication.

[(16) Demonstrable Harm--significant physical or emotional harm to an injured employee or significant economic harm to a system participant.]

(12) Department--Texas Department of Insurance.

(13) Division--Texas Department of Insurance, Division of Workers' Compensation.

(14) [(17)] Emergency--As [as] defined in §133.2 [§133.1] of this title [Title] (relating to Definitions [for Chapter 133]).

(15) [(18)] Frivolous--That [that] which does not have a basis in fact or is not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

(16) Frivolous complaint--A complaint that does not have a basis in fact or is not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

(17) [(19)] Immediate post-injury medical care--That [that] health care provided on the date that the injured employee first seeks medical attention for the workers' compensation injury.

[(20) Intentionally--a system participant acts intentionally with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.]

[(21) Knowingly--a system participant acts knowingly with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A system participant acts knowingly with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.]

[(22) Matter of Practice--This term is synonymous with Pattern of Practice, as defined in this section.]

[(23) Noncompliance or Noncompliant Act--a violation of the Act or Rules.]

[(24) Notice of Intent (NOI)--a notice issued by the commission to a system participant who it appears has committed a violation that allows the system participant to provide feedback so that the commission can make a final decision regarding the possible violation. The NOI is issued prior to the commission taking formal enforcement action through the issuance of a Notice of Violation or Warning Letter.]

(18) [(25)] Notice of Violation (NOV)--A [a formal] notice issued to a system participant by the division [commission under Texas Labor Code §415.032] when the division [commission] has found that the system participant has committed an administrative violation and the division [commission] seeks to impose a sanction in accordance with Labor Code, Title 5 or division rules [assess an administrative penalty].

[(26) Pattern of Practice--the acts or omissions of a participant in the workers' compensation system which are repeated. This term is synonymous with similar terms such as "business practice," "pattern of conduct," "matter of practice," "practices or patterns," and "practices and patterns."]

(19) Peer Review--An administrative review performed by a health care provider at the insurance carrier's request (whether or not the health care provider that performs the review is providing treatment) for any issue related to the health care of a workers' compensation claim without a physical examination of the injured employee.

(20) [(27)] Performance Review--This term is synonymous with Compliance Audit, as defined in this section.

[(28) Referral Violations--violations discovered outside of a Compliance Audit of the violator. These violations may or may not be representative of overall performance.]

[(29) Representative Violation--a violation may be considered "representative" if it is indicative of an overall performance problem.]

[(A) A violation caused by a procedural or programming error on the part of the violator may be considered representative.]

[(B) Audit findings using censuses or statistical sampling are representative of overall performance in the audited category(s).]

(21) [(30)] Rules--The division's rules [the commission's Rules] adopted under Labor Code, Title 5 [this Act].

(22) [(31)] Remuneration--Any [any] payment or other benefit made directly or indirectly, overtly or covertly, in cash or in kind, including, but not limited to, forgiveness of debt.

(23) Sanction--A penalty or other punitive action or remedy imposed by the commissioner on an insurance carrier, representative, injured employee, employer, or health care provider, or any other person regulated by the division under the Act, for an administrative violation.

[(32) Significant Violation--a violation which:]

[(A) arises from an action or inaction where the violator has demonstrated unwillingness or has alleged an inability to take corrective measures to avoid committing the same violation in the future;]

[(B) resulted or was likely to result in significant physical or emotional harm to an injured employee;]

[(C) resulted or was likely to result in significant economic harm to a system participant;]

[(D) was fraudulent in nature;]

[(E) involved a violation of an agreement or commission decision or order; or]

[(F) was either willfully committed or which is part of an uncorrected pattern of practice.]

(24) [(33)] SOAH--The [the] State Office of Administrative Hearings.

(25) [(34)] System Participant--A [a] person or their agent subject to the Act or a rule, order, or decision of the commissioner [or entity required to comply with the Act and Rules. This will generally be an insurance carrier (carrier), employer, health care provider (provider or HCP), attorney, injured employee (employee) or other claimant].

[(35) Uncorrected Pattern of Practice--a pattern of practice which continues even after the commission provides written notice to the system participant committing the violation(s) of the noncompliance.]

(26) Utilization review--A system for prospective, concurrent, or retrospective review of the medical necessity and appropriateness of health care services and a system for prospective, concurrent, or retrospective review to determine the experimental or investigational nature of health care services. Utilization review shall not include elective requests for clarification of coverage or prepayment guarantee.

[(36) Violation--a failure to comply with a duty established under the Act or Rules or commission of an act prohibited by the Act or Rules which can involve failing to timely fulfill a duty or failing to fulfill the duty in the manner required (whether timely or not).]

[(37) Violation Review--a review of an allegation of noncompliance conducted outside the context of a Compliance Audit. Violation Reviews are conducted upon receipt of an allegation of noncompliance (violation referral) that was made or forwarded to the commission.]

[(38) Violator--a system participant found to have committed an administrative violation or another offense.]

[(39) Warning Letter--a formal notice issued to a violator when the commission has found an administrative violation for which the commission does not plan to assess an administrative penalty or other sanction.]

[(40) Willfully--intentionally or knowingly. Also, continuing conduct after being notified by the commission or other regulatory authority. NOTE - "wilful" and" wilfully" as used in the Act are the same as "willful" and "willfully," respectively.]

(b) Nothing in this section can be construed to limit an injured employee's ability to receive health care in accordance with the Labor Code and division rules or to limit a review of health care to only health care provided or requested prior to the date of maximum medical improvement.

§180.2. Filing a Complaint [Referrals].

(a) Any person may submit a complaint [make a referral] to the division [commission:] for alleged administrative violations. [fraudulent acts or omissions by any system participant; for failure of a health care provider to provide reasonable and necessary health care; for failure of an insurance carrier to ensure that all and only reasonable and necessary health care is approved and reimbursed in accordance with the Statute and Rules; or for other violations of the Statute or Rules by any system participant.]

(b) A person may submit a complaint to the division:

(1) through the division's website;

(2) through electronic correspondence;

(3) through written correspondence;

(4) through facsimile correspondence; or

(5) in person and the complaint will be reduced to writing.

(c) A complaint submitted on the form provided by the division or in any other written format shall contain the following information as applicable:

(1) complainant's name and contact information, unless it is submitted as an anonymous complaint as described by subsection (f) of this section;

(2) name and contact information of the subject or parties of the complaint, if known;

(3) name and contact information of witnesses, if known;

(4) claim file information including, but, not limited to, the name, address, and date of injury of the injured employee, if known;

(5) the statement of the facts constituting the alleged violation including the dates or time period the alleged violation occurred;

(6) the nature of the alleged violation, including, the specific sections of the Act and division rules alleged to have been violated, if known;

(7) supporting documentation relevant to the allegation that may include, but, is not limited to, medical bills, Explanation of Benefits Statements, copy of payment invoices or checks, and medical reports as applicable;

(8) supporting documentation for alleged fraud may include photographs, video, audio, and surveillance recordings, and reports; and

(9) other sources of pertinent information, if known.

(d) Contact information may include, but, is not limited to, name, address, telephone number, facsimile number, email address, business name, business address, business telephone number, and websites.

(e) A complaint shall contain sufficient information for the division to investigate the complaint.

(f) Anonymous complaints will be accepted, but, may not be investigated unless sufficient information and evidence exist to demonstrate harm or potential harm to a system participant or a violation of the Act or division rules.

(g) Upon receipt of a complaint, the division will review, monitor and may investigate the allegation against a person or entity who may have violated the Act or division rules.

(h) The division will assign priorities to complaints being investigated based on a risk-based complaint investigation system that considers:

(1) the severity of the alleged violation;

(2) continued noncompliance of the alleged violation;

(3) whether a commissioner order has been violated; or

(4) other risk-based criteria the division determines necessary.

(i) A person commits an administrative violation if the person submits a complaint to the division that is:

(1) frivolous, as defined in §180.1 of this title (relating to Definitions);

(2) groundless or made in bad faith; or

(3) done specifically for competitive or economic advantage.

§180.3. Compliance Audits.

(a) The division [~~commission~~] shall conduct Compliance Audits of the workers' compensation records of system participants and their agents for compliance with the Act and division rules [~~Rules~~].

(b) The division [~~commission~~] may conduct such audit at the offices of a system participant, an agent, [~~the commission~~] or at any [~~other~~] location the division [~~commission~~] deems appropriate. During an audit, the division [~~commission~~] may, at its discretion, utilize persons in addition to division [~~commission~~] staff to provide additional expertise.

(c) The division [~~commission~~] shall provide reasonable notice in advance of any audit. That notice shall:

(1) be in writing;

(2) be sent at least 10 calendar days before the audit is to be performed;

(3) specify the information that must be made available;

(4) list the name and telephone number of the audit coordinator; and[~~,~~]

(5) specify the date, time, location, and conditions of the audit.

(d) The system participant being audited (auditee) shall designate a general contact person and a contact person at each relevant location to coordinate the audit. That contact person shall:

(1) provide reasonable access to requested personnel and information;

(2) respond to reasonable needs of auditors onsite or to inquiries by auditors; and[~~,~~]

(3) be familiar with the system participant's procedures and recordkeeping systems related to the scope of the audit.

(e) System participants (which may include those who are not being audited but whose records are necessary to conduct an audit of another system participant), upon request, shall make available for review claim files and other workers' compensation records in the format specified by the division [~~commission~~].

(f) Initial findings of the audit will be provided in writing to the auditee.

(g) The auditee may prepare and file with the division [~~commission~~] a management response to the initial findings. The response may include proposed corrective actions. If such a response is provided, the division [~~commission~~] shall review the response and shall adjust its findings if deemed appropriate.

(h) Final audit reports may be published on the division's [~~commission's~~] Internet website and shall be redacted to not include any confidential claim file information and shall remain on the division's [~~commission's~~] website until a subsequent audit has taken place. The division [~~commission~~] may, at its discretion, delay publishing the final audit report until a follow-up audit is performed and, should the subsequent audit find the auditee to have achieved standards, may choose to only publish the subsequent audit report. Such a delay will not be considered if the auditee fails to submit a management response that identifies appropriate corrective actions to be taken to achieve standards.

(i) The division [~~commission~~], should it deem it appropriate or upon request of a licensing or certification authority, shall provide the appropriate licensing or certification authority with a copy of all final audit reports (redacted in accordance with subsection (h) of this subsection) and the auditee's response to the final audit report, if any.

(j) To the extent permitted by the Act and/or rule, the division [~~commission~~] shall submit a bill to the auditee for the actual expenses associated with the audit, including audit staff time, additional expertise, travel and per diem expenses, and copying costs.

(k) The auditee shall submit payment by check, made payable to the order of the Texas Department of Insurance [~~commission~~], for the expenses within 25 days after receipt of the bill. [~~Payment may be delivered in person or by mail to the commission in Austin.~~]

§180.8. Notices of Violation; Notices of Hearing; Default Judgments[~~, Warning Letters, and Notices of Intent~~].

(a) A notice of violation (NOV) is a [~~formal~~] notice issued to a system participant [~~by the commission under Texas Labor Code §415.032~~] when the division finds [~~commission has found~~] that the system participant has committed an administrative violation and the division [~~commission~~] seeks to impose a sanction under the Act or division rules [~~assess an administrative penalty~~].

(b) A NOV shall be in writing and include:

(1) the provision(s) of the Act, rule, order, or decision of the commissioner that the system participant violated [~~a summary of the duty that the commission believes that the charged system participant failed to fulfill or to timely fulfill~~];

(2) a summary of the facts that establish that the violation(s) [~~a violation~~] occurred;

(3) a description of the proposed sanction [~~(such as an administrative penalty)~~] that the division [~~commission~~] intends to impose; [~~assess in accordance with the Act and this Chapter; and~~]

(4) the right to consent to the charge and the proposed sanction(s);

(5) the right to request a hearing; and

(6) [~~(4)~~] other information about the rights, obligations, and procedures for requesting [~~the charged system participant to file a written answer or request~~] a hearing.

(c) The charged system party [~~participant~~] shall file a written answer to the NOV not later than the twentieth day after the day the notice is received. The answer shall either consent to the proposed sanction, and remit the amount of the penalty, if any, or request a hearing by being filed with the commission's chief clerk of proceedings. If the charged party fails to respond to the NOV within 20 days of receipt of the notice, the division shall schedule a hearing at SOAH and provide notice of hearing to the charged party that meets the requirements of §148.5 of this title (relating to Notice of Hearing).

(d) A charged party that receives a notice of hearing under subsection (c) of this section shall, within 20 days of the date on which the notice of hearing is provided to the party, file a written answer or other responsive pleading. Such response shall be filed in accordance with 1 TAC §155.101 (relating to Filing Documents) and §155.103 (relating to Service of Documents on Parties) [~~Failure to respond to a NOV in 20 days, absent good cause, is deemed consent to the penalty~~].

(e) For purposes of this section, events described in paragraphs (1) or (2) of this subsection constitute a default on the part of a charged party who receives a notice of hearing under subsection (c) of this section: [~~In an investigation where both an administrative violation and a criminal prosecution are possible, the commission may, at its discretion, postpone action on the administrative violation until the criminal prosecution is completed~~]

(1) failure of the charged party to file a written response as provided by subsection (d) of this section; or

(2) failure of the charged party to appear in person or by legal representative on the day and at the time set for hearing in a contested case, regardless of whether a written response has been filed.

(f) In the event that a charge party defaults as described by subsection (e) of this section, the division may seek informal disposition by default from the commissioner as permitted by Government Code §2001.056 and §148.9 of this title (relating to Informal Disposition). [~~As an alternative to imposing a sanction such as an administrative penalty on a charged system participant, the commission may, at its discretion, provide formal notice of the violation through a Warning Letter. A Warning Letter shall:~~]

[~~(1) include a summary of the duty that the commission believes that the charged system participant failed to fulfill or timely fulfill;~~]

[~~(2) identify the facts that establish that a violation occurred; and~~]

[~~(3) inform the charged system participant that subsequent noncompliance of the same sort may be deemed to be a repeated administrative violation, a pattern of practice, and/or a willful violation, any of which will be subject to sanction.~~]

(g) For purposes of this subchapter, "disposition by default" shall mean the issuance of an order against the charged party in which the allegations against the party in the notice of hearing are deemed admitted as true, upon the offer of proof to the commissioner that proper notice was provided to the defaulting party. For purposes of this section, proper notice means notice sufficient to meet the provisions of the Government Code §2001.051 and §2001.052 and §148.5 of this title (relating to Notice of Hearing). [~~Prior to issuing a NOV or Warning Letter, the commission may issue a Notice of Intent (NOI) that allows a system participant, who it appears has committed a violation, to provide feedback so the commission can make a final decision regarding the possible violation. The NOI:~~]

[~~(1) shall be accompanied by a copy of the commission's penalty calculation worksheet and shall include a summary of the duty that the commission believes that the charged system participant failed to fulfill or timely fulfill.~~]

[~~(2) shall identify the facts that establish that a violation occurred; and~~]

[~~(3) may offer the system participant the opportunity to enter into a settlement agreement.~~]

(h) After informal disposition of a contested case by default, a charged party may file a written motion to set aside the default order and reopen the record. A motion by the charged party to set aside the default order and reopen the record shall be granted if the charged party establishes that the failure to file a written response or to attend the hearing was neither intentional nor the result of conscious indifference, and that such failure was due to a mistake or accident. A motion to set aside the default order and reopen the record shall be filed with the commissioner prior to the time that the order of the commissioner becomes final pursuant to the provisions of the Government Code Chapter 2001. [~~The commission may, at its discretion, enter into a settlement agreement with the violator. A settlement agreement may be entered into before or after issuance of a NOV. The settlement agreement shall require the violator to:~~]

[~~(1) waive the right to appeal either the commission's violation finding or the commission's use of the finding to increase penalty amounts of other similar violations;~~]

[~~(2) come into compliance on the violation (if the commission alleges that there was continued noncompliance);~~]

[~~(3) agree to review the causes of the violation and take action as necessary to improve compliance; and~~]

[~~(4) pay one-half the penalty calculated in accordance with this chapter.~~]

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

Filed with the Office of the Secretary of State on August 17, 2010.

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Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
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SUBCHAPTER B. MEDICAL BENEFIT REGULATION

28 TAC §§180.22, 180.24 - 180.28, 180.50

The amendments and new rules are proposed under Labor Code §§401.011, 401.021, 402.001, 402.00128, 402.00111, 402.00116, 402.021, 402.024, 402.061, 402.072, 402.073, 402.075, 408.0041, 408.0043 - 408.0046, 408.021, 408.023, 408.0231, 408.1225, 413.002, 413.022, 413.031, 413.041, 413.044, 413.051, 413.0511, 413.0512, 414.002 - 414.007, 415.001 - 415.0036, 415.005, 415.006, 415.008 - 415.010, 415.021, 415.023 - 415.025, and 504.053; Government Code, §2001.051 and §2001.056; Insurance Code §§1305.004(a)(10), 1305.351(d), 4201.002(1), and 4201.002(13); and Occupations Code §155.001. Labor Code §401.011 defines certain terms that are used under Labor Code, Title 5, Subtitle A (the Act). Labor Code §401.021(1) provides that except as otherwise provided by Labor Code, Title 5, Subtitle A, a proceeding, hearing, judicial review, or enforcement of a Commissioner order, decision, or rule is governed by the following subchapters and sections of Government Code, Chapter 2001: Subchapters A, B, D, E, G, and H, excluding §2001.004(3) and 2001.005; Sections 2001.051, 2001.052, and 2001.053; Sections 2001.056 - 2001.062; and Section 2001.141(c). Labor Code §402.001 was amended to provide that except as provided by Labor Code §402.002, the Texas Department of Insurance is the

state agency designated to oversee the workers' compensation system of this state and the Division of Workers' Compensation is established as a division within the Texas Department of Insurance to administer and operate the workers' compensation system as provided by Labor Code, Title 5. Labor Code §402.00111 provides that except as otherwise provided by Labor Code, Title 5, the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority, under Labor Code, Title 5. Labor Code §402.00116(a) provides that the Commissioner or Workers' Compensation is the Division's chief executive and administrative officer. The Commissioner shall administer and enforce Labor Code, Title 5, other workers' compensation laws of this state, and other laws granting jurisdiction to or applicable to the division or the Commissioner, except as otherwise specifically provided by Labor Code, Title 5, a reference in Labor Code, Title 5 to the "commissioner" means the Commissioner of Workers' Compensation. Labor Code §402.00116(b) provides that the Commissioner has the powers and duties vested in the division by Labor Code, Title 5 and other workers' compensation laws of this state. Labor Code §402.00128(b) provides that the Commissioner or the Commissioner's designee may investigate misconduct; hold hearings; issue subpoenas to compel the attendance of witnesses and the production of documents; administer oaths; take testimony directly or by deposition or interrogatory; assess and enforce penalties established under this title; enter appropriate orders as authorized by this title; institute an action in the Division's name to enjoin the violation of Labor Code, Title 5; initiate an action under Labor Code §410.254 to intervene in a judicial proceeding; prescribe the form, manner, and procedure for the transmission of information to the Division; correct clerical errors in the entry of errors; and exercise other powers and perform other duties as necessary to implement and enforce Labor Code, Title 5. Labor Code §402.021(b)(6) states that it is the intent of the legislature that, in implementing the goals described by Subsection (a), the workers' compensation system of this state must promote compliance with this subtitle and rules adopted under this subtitle through performance-based incentives. Labor Code §402.024(b) provides that the Division shall comply with federal and state laws related to program and facility accessibility. Labor Code §402.061 provides that the Commissioner shall adopt rules as necessary for the implementation and enforcement of Labor Code, Title 5, Subtitle A. Labor Code §402.072(a) provides that the Division may impose sanctions against any person regulated by the Division under Labor Code, Title 5, Subtitle A, and Labor Code §402.072(c) states that a sanction imposed by the Division is binding pending appeal. Labor Code §402.073(b) provides that in a case in which a hearing is conducted by the State Office of Administrative Hearings under Labor Code §§413.031, 413.055, or 415.034, the administrative law judge who conducts the hearing for the State Office of Administrative Hearings shall enter the final decision in the case after completion of the hearing. Labor Code §402.073(c) provides that in a case in which a hearing is conducted in conjunction with Labor Code §§402.072, 407.046, or 408.023, and in other cases under Labor Code, Title 5, Subtitle A, that are not subject to Labor Code §402.073(b), the administrative law judge who conducts the hearing for the State Office of Administrative Hearings shall propose a decision to the Commissioner for final consideration and decision by the Commissioner. Labor Code §402.075(a) provides that the Commissioner by rule shall adopt requirement that provide incentives for overall compliance in the workers' compensation system of this state, and emphasize performance-based oversight linked to regulatory outcomes. Labor Code §402.075(b) provides that the Commissioner shall develop key regulatory goals to be used in assessing the performance of insurance carriers and health care providers. The goals adopted under this subsection must align with the general regulatory goals of the Division under Labor Code, Title 5, Subtitle A, such as improving workplace safety and return-to-work outcomes, in addition to goals that support timely payment of benefits and increased communication. Labor Code §408.0041(b) requires that a medical examination requested under Labor Code §408.0041(a) be performed by the next available doctor on the Division's list of designated doctors whose credentials are appropriate for the issue in question and the injured employee's medical condition as determined by Commissioner rule. Labor Code §408.0043(a) applies to doctors, other than chiropractors or dentists, who perform health care services under Labor Code, Title 5, as doctors performing peer reviews, utilization reviews, independent reviews, required medical examinations, or who serve on the medical quality review panel or as designated doctors for the Division. Labor Code §408.0043(b) requires that a doctor described by Labor Code §408.0043(a), other than a chiropractor or dentist, who reviews a specific workers' compensation case must hold a professional certification in a health care specialty appropriate to the type of health care that the injured employee is receiving. Labor Code §408.0044 pertains to dentists who perform dental services under Labor Code, Title 5 for peer reviews, utilization reviews, independent reviews, or required dental examinations. Labor Code §408.0044(b) requires that a dentist who reviews a dental service in conjunction with a specific workers' compensation case must be licensed to practice dentistry. Labor Code §408.0045 pertains to chiropractors who perform chiropractic services under Labor Code, Title 5 for peer reviews, utilization reviews, independent reviews, required medical examinations, or who serve on the medical quality review panel or as designated doctors providing chiropractic services for the Division. Labor Code §408.0045(b) requires that a chiropractor who reviews a chiropractic service in conjunction with a specific workers' compensation case must be licensed to engage in the practice of chiropractic. Labor Code §408.0046 states that the Commissioner may adopt rules as necessary to determine which professional health practitioner specialties are appropriate for treatment of certain compensable injuries and must require an entity requesting a peer review to obtain and provide to the doctor providing the peer review services all relevant and updated medical records. Labor Code §408.021 describes medical benefits and health care that an injured employee is entitled to. Labor Code §408.023(h) requires that a utilization review agent or an insurance carrier that uses doctors to perform reviews of health care services provided under Labor Code, Title 5, Subtitle A, including utilization review, only use doctors licensed to practice in this state. Labor Code §408.023(k) required the expiration of the approved doctor list effective September 1, 2007. Labor Code §408.023(n) and §408.0231(g) require the Division to monitor and adopt rules regarding doctors who perform peer review. Labor Code §408.0231(g) authorizes the Commissioner to adopt rules regarding doctors who perform peer review functions for insurance carriers, such as, standards for peer review, sanctions against doctors performing peer review functions (including restriction, suspension, or removal of the doctor's ability to perform peer reviews) and other issues important to the quality of peer review. Labor Code §408.0231(b) authorizes the Commissioner by rule to establish criteria for imposing sanctions on a doctor or an insurance carrier as provided by this section. Labor Code

§408.0231(c) states the criteria for recommending or imposing sanctions that the Commissioner may use (which may include anything the Commissioner considers relevant) including a sanction of the doctor for a violation of Labor Code, Chapter 413 or 415; a sanction by the Medicare or Medicaid program; evidence from the Division's medical records that an insurance carrier's utilization review practices or the doctor's charges, fees, diagnoses, treatments, evaluations, or impairment ratings are substantially different from those the Commissioner finds to be fair and reasonable based on either a single determination or a pattern of practice; professional failure to practice medicine or provide health care, including chiropractic care, in an acceptable manner consistent with the public health, safety, and welfare; or a criminal conviction. Labor Code §408.0231(d) requires the Commissioner to establish rules for the restoration of doctor practice privileges removed by the Commissioner for sanctions imposed under Labor Code §408.0231. Labor Code §408.0231(f) provides the sanctions the Commissioner may recommend or impose under this section which include reduction of allowable reimbursement; mandatory preauthorization of all or certain health care services; required peer review monitoring, reporting, and audit; deletion or suspension from the designated doctor list; restrictions on appointment under this chapter; conditions or restrictions on an insurance carrier regarding actions by insurance carriers under Labor Code, Title 5, Subtitle A, in accordance with a memorandum of understanding adopted under Labor Code §408.0231(e) regarding regulation of insurance carriers and utilization review agents; and mandatory participation in training classes or other courses as established or certified by the Division. Labor Code §408.1225(a) requires the Division to develop qualification standards and administrative policies pertaining to the doctors who serve on the designated doctor list to implement the subsection and the Division may adopt rules as necessary. Labor Code §408.1225(b) requires the Commissioner to ensure the quality of designated doctor decisions and reviews by active monitoring of decisions and reviews and to take action as necessary to restrict the participation of a designated doctor or remove a doctor from inclusion on the Division's list of designated doctors. Labor Code §408.1225(d) requires the Division to develop rules to ensure that a designated doctor has no conflict of interest in serving as a designated doctor in performing examinations. Labor Code §413.002 requires the Division to monitor health care providers, insurance carriers, independent review organizations, and workers' compensation claimants who receive medical services to ensure the compliance of those persons with rules adopted by the Division relating to health care, including medical policies and fee guidelines. In monitoring designated doctors under Labor Code, Chapter 408, and independent review organizations who provide services described by Labor Code, Chapter 413, Labor Code §413.002(b) requires the Division to evaluate compliance with Labor Code, Title 5, Subtitle A, and with rules adopted by the Commissioner relating to medical policies, fee guidelines, treatment guidelines, return-to-work guidelines, and impairment ratings and the quality and timeliness of decisions made under Labor Code §§408.0041, 408.122, 408.151, or 413.031. Labor Code §413.017 states the following medical services are presumed reasonable: medical services consistent with the medical policies and fee guidelines adopted by the Commissioner; and medical services that are provided subject to prospective, concurrent, or retrospective review as required by the medical policies of the Division and that are authorized by an insurance carrier. Labor Code §413.022 provides requirements for the return to work reimbursement program for small employers. Labor Code §413.031(e-2) requires that independent review organizations that use doctors to perform reviews of health care services provided under Labor Code, Title 5, only use doctors licensed to practice in this state. Labor Code §413.041(a) provides that each health care practitioner shall disclose to the Division the identity of any health care provider in which the health care practitioner, or the health care provider that employs the health care practitioner, has a financial interest and the health care practitioner shall make the disclosure in the manner provided by Commissioner rule. Labor Code §413.041(c) provides that a health care provider that fails to comply with this section is subject to penalties and sanctions as provided by Labor Code, Title 5, Subtitle A, including forfeiture of the right to reimbursement for services rendered during the period of noncompliance. Labor Code §413.044 provides that in addition to or in lieu of an administrative penalty under Labor Code §415.021 or a sanction imposed under Labor Code §415.023, the Commissioner may impose sanctions against a person who serves as a designated doctor under Labor Code, Chapter 408 who, after an evaluation conducted under Labor Code §413.002(b), is determined by the Division to be out of compliance with this subtitle or with the rules adopted by the Commissioner relating to medical policies, fee guidelines, and impairment ratings, or the quality of decision made under Labor Code §408.0041 or Labor Code §408.122. Labor Code §413.044(b) provides that the sanctions imposed under Labor Code §413.044(a) may include removal or suspension from the designated doctor list, or restrictions on the reviews made by the person as a designated doctor. Labor Code §413.051(a) provides that in Labor Code §413.051, "health care provider professional review organization" includes an independent review organization. Labor Code §413.0511(b)(8) provides that the medical advisor shall make recommendation regarding the adoption of rules and policies to monitor the quality and timeliness of decision made by designated doctors and independent review organizations, and the imposition of sanctions regarding those decisions. Labor Code §413.0512(c)(1) provides that the medical quality review panel shall recommend to the medical advisor appropriate action regarding doctors, other health care providers, insurance carriers, utilization review agents, and independent review organization; and the addition or deletion of doctors from the list of approved doctors under Labor Code §408.023 or the list of designated doctors established under Labor Code §408.1225. Labor Code §414.002 provides that the Division shall monitor for compliance with Commissioner rules; Labor Code, Title 5, Subtitle A; and other laws relating to workers' compensation the conduct of persons subject to this subtitle. Persons to be monitored include persons claiming benefits under Labor Code, Title 5, Subtitle A; employers; insurance carriers; attorneys and other representatives of parties; and health care providers. Labor Code §414.003(a) provides that the Division shall compile and maintain statistical and other information as necessary to detect practices or patterns of conduct by persons subject to monitoring under Labor Code, Chapter 414, that violate Labor Code, Title 5, Subtitle A, Commissioner rules, or a Commissioner order or decision, or otherwise adversely affect the workers' compensation system of this state. Labor Code §414.003(b) provides that the Commissioner shall use the information compiled under this section to impose appropriate penalties and other sanctions under Labor Code, Chapters 415 and 416. Labor Code §414.004(a) provides that the Division shall review regularly the workers' compensation records of insurance carriers as required to ensure compliance with Labor Code, Title 5, Subtitle A. Labor

Code §414.004(b) provides that each insurance carrier, the insurance carrier's agents, and those with whom the insurance carrier has contracted to provide, review, or monitor services under Labor Code, Title 5, Subtitle A, shall cooperate with the Division; make available to the Division any records or other necessary information; and allow the Division access to the information at reasonable times at the person's offices. Labor Code §414.005 provides that the Division shall maintain an investigation unit to conduct investigations relating to alleged violations of Labor Code, Title 5, Subtitle A; Commissioner rules, or a Commissioner order or decision, with particular emphasis on violations of Labor Code, Chapters 415 and 416. Labor Code §414.006 provides that for further investigation or the institution of appropriate proceedings, the Division may refer the persons involved in a case subject to an investigation to other appropriate authorities, including licensing agencies, district and county attorneys, or the attorney general. Labor Code §414.007 provides that the Division shall review information concerning alleged violations of Labor Code, Title 5, Subtitle A regarding the provisions of medical benefits, Commissioner rules, or a Commissioner order or decision, and, under Labor Code §414.005 and §414.006 and Labor Code, Chapters 415 and 416, may conduct investigations, make referrals to other authorities, and initiate administrative violation proceedings. Amendments to Labor Code §§415.001 - 415.003, 415.0035, 415.009, and 415.010 deleted the requirement that the Division prove that a violation was committed willfully, intentionally, or knowingly in an enforcement action for an administrative violation brought against a system participant under those sections. The amendments to Labor Code §§415.005, 415.006, 415.021, 415.024, and 415.025 deleted the classification system within the sections for administrative violations (Classes A - D) and the authority and requirement that the commission (which pursuant to enactments by HB 7 is now the Texas Department of Insurance, Division of Workers' Compensation), by rule, adopt a schedule of specific monetary administrative penalties for specific violations of the Texas Workers' Compensation Act. Labor Code §415.003 provides that a health care provider commits an administrative violation if the person submits a charge for health care that was not furnished, administers improper, unreasonable, or medically unnecessary treatment or services, makes an unnecessary referral, violates the Division's fee and treatment guidelines, violates a Commissioner rule, or fails to comply with a provision of this subtitle. Labor Code §415.0035(a)(3) provides that an insurance carrier or its representative commits an administrative violation if that person denies preauthorization in a manner that is not in accordance with rules adopted by the Commissioner under Labor Code §413.014. Labor Code §415.0035(b) provides that a health care provider commits an administrative violation if that person fails or refuses to timely file required reports or records, or fails to file with the Division the annual disclosure statement required by Labor Code §413.041. Labor Code §415.0035(e) provides that an insurance carrier or health care provider commits an administrative violation if that person violates Labor Code, Title 5, Subtitle A, or a rule, order, or decision of the Commissioner. Labor Code §415.0036 applies to an insurance adjustor, case manager, or other person who has authority under Labor Code, Title 5 to request the performance of a service affecting the delivery of benefits to an injured employee or who actually performs such a service, including peer reviews, performance of required medical examinations, or case management; a person described by this section commits an administrative violation if the person offers to pay, pays, solicits, or receives an improper inducement relating to the delivery of benefits to an injured employee or improperly attempts to influence the delivery of benefits to an injured employee, including through the making of improper threats. Labor Code §415.0036 applies to each person it describes who is a participant in the workers' compensation system of this state and to an agent of such a person. Labor Code §415.008(a) provides that a person commits a violation if the person, to obtain or deny a payment of a workers' compensation benefit or the provision of a benefit for the person or another, knowingly or intentionally makes a false or misleading statement, misrepresents or conceals a material fact, fabricates, alters, conceals, or destroys a document, or conspires to commit an act described by Labor Code §415.008(a)(1), (a)(2), or (a)(3). Labor Code §415.021 states that in addition to any sanctions, administrative penalty, or other remedy authorized by Labor Code, Title 5, Subtitle A, the Commissioner may assess an administrative penalty against a person who commits an administrative violation; the administrative penalty shall not exceed $25,000 per day per occurrence; each day of noncompliance constitutes a separate violation; and the authority of the Commissioner under chapter 415 is in addition to any other authority to enforce a sanction, penalty, fine, forfeiture, denial, suspension, or revocation otherwise authorized by law. Labor Code §415.023(a) provides that a person who commits an administrative violation under Labor Code §§415.001, 415.002, 415.003, or 415.0035 as a matter of practice is subject to an applicable rule adopted under Labor Code §415.023(b) in addition to the penalty assessed for the violation. Labor Code §415.023(b) provides that the Commissioner may adopt rules providing for a reduction or denial of fees; public or private reprimand by the Commissioner; suspension from practice before the Division; restriction, suspension, or revocation of the right to receive reimbursement under Labor Code, Title 5, Subtitle A; or referral and petition to the appropriate licensing authority for appropriate disciplinary action, including the restriction, suspension, or revocation of the person's license. Labor Code §415.024 provides that a material and substantial breach of a settlement agreement that establishes a compliance plan is an administrative violation. In determining the amount of the penalty, the Commissioner shall consider the total volume of claims handled by the insurance carrier. Labor Code §415.025 provides that a reference in this code or other law, or in rules of the former Texas Workers' Compensation Commission or the Commissioner, to a particular class of violation, administrative violation, or penalty shall be construed as a reference to an administrative penalty and, except as otherwise provided by Labor Code, Title 5, Subtitle A, an administrative penalty may not exceed $25,000 per day per occurrence and each day of noncompliance constitutes a separate violation. Labor Code, Title 5, Subtitle C, §504.053(d)(3) provides that if the political subdivision or pool provides medical benefits in the manner authorized under Labor Code §504.0053(b)(2), the following standards apply - the political subdivision or pool must have an internal review process for resolving complaints relating to the manner of providing medical benefits, including an appeal to the governing body or its designee and appeal to an independent review organization. Labor Code §504.053(b)(2) provides that if a political subdivision or a pool determines that a workers' compensation health care network certified under Insurance Code, Chapter 1305, is not available or practical for the political subdivision or pool, the political subdivision or pool may provide medical benefits to its injured employees or to the injured employees of the members of the pool by directly contracting with health care providers or by contracting through

a health benefits pool established under Local Government Code, Chapter 172. Government Code §2001.051 provides that in a contested case, each party is entitled to an opportunity for hearing after reasonable notice of not less than 10 days and to respond and to present evidence and argument on each issue involved in the case. Government Code §2001.056 provides that unless precluded by law, an informal disposition may be made of a contested case by stipulation, agreed settlement, consent order, or default. Insurance Code §1305.004(a)(10) provides that "independent review" means a system for final administrative review by an independent review organization of the medical necessity and appropriateness, or the experimental or investigational nature, of health care services being provided, proposed to be provided, or that have been provided to an injured employee. Insurance Code §1305.351(d) provides that notwithstanding Insurance Code §4201.152, a utilization review agent or an insurance carrier that uses doctors to perform reviews of health care services provided under Insurance Code, Chapter 1305, including utilization review and retrospective review, or peer reviews under Labor Code §408.0231(g) may only use doctors licensed to practice in this state. Insurance Code §4201.002(1) states an "adverse determination" means a determination by a utilization review agent that health care services provided or proposed to be provided to a patient are not medically necessary or are experimental or investigational. Insurance Code §4201.002(13) states that "utilization review" includes a system for prospective, concurrent, or retrospective review of the medical necessity and appropriateness of health care services and a system for prospective, concurrent, or retrospective review to determine the experimental or investigational nature of health care services being provided or proposed to be provided to an individual in this state and the term does not include a review in response to an elective request for clarification of coverage. Occupations Code §155.001 states that a person may not practice medicine in this state unless the person holds a license issued under Occupations Code, Title 3, Subtitle B (relating to Physicians).

The following statutes are affected by this proposal: 28 TAC §180.22 - Labor Code §§401.011, 402.024, 408.0041, 408.0043 - 408.0046, 408.021, 408.023, 408.0231, 408.1225, 413.002, 413.031, 413.032, 413.051, 413.0511, 413.0512, 414.002, 414.003, 414.006, 414.007, 504.053, and Insurance Code §§1305.004, 1305.351(d), and 4201.002, and Occupations Code §155.001; 28 TAC §180.24 - Labor Code §§408.023, 413.041, and 415.0035; 28 TAC §180.25 - Labor Code §413.041 and §415.0036; 28 TAC §180.26 - Labor Code §§401.011, 401.021, 402.021, 402.061, 402.072, 402.075, 408.023, 408.0231, 408.0043 - 408.0046, 413.002, 413.017, 413.022, 413.041, 413.044, 413.0511, 414.003, 414.007, 415.001 - 415.0035, 415.005, 415.006, 415.009, 415.010, 415.021, and 415.023 - 415.025; Government Code §2001.051 and §2001.056; 28 TAC §180.27 - Labor Code §§402.00111, 402.00116, 402.061, 402.073, 408.023, 408.0231, 408.1225, 414.002, and 415.021; 28 TAC §180.28 - Labor Code §§401.011, 408.023, 408.0231, 408.0043 - 408.0046, 414.002 - 414.007, 415.003, 415.0035, 415.0036, 415.008, and Insurance Code §4201.002 and §1305.351; 28 TAC §180.50 - Labor Code §402.061.

§180.22. Health Care Provider Roles and Responsibilities.

(a) Health care providers shall provide all health care reasonably required by the nature of the injury as and when needed to [~~reasonable and necessary health care that~~]:

(1) cure [~~cures~~] or relieve [~~relieves~~] the effects naturally resulting from the compensable injury;

(2) promote [~~promotes~~] recovery; or [~~and/or~~]

(3) enhance [~~enhances~~] the ability of the injured employee to return to or retain employment.

(b) In addition to the general requirements of this section, health care providers shall timely and appropriately comply with all applicable requirements under the Act and department [~~statutes~~] and division rules, including, but not limited to:

(1) reporting required information;

(2) disclosing financial interests;

(3) impartially evaluating an injured employee's condition; [~~and~~]

(4) correctly billing for health care provided; and [~~.~~]

(5) comply with all applicable provisions of the Americans with Disabilities Act.

(c) The treating doctor is the doctor primarily responsible for the efficient management of health care and for coordinating the health care for an injured employee's [~~(employee)~~] compensable injury. The treating doctor shall:

(1) except in the case of an emergency, approve or recommend all health care reasonably required that is to be rendered to the injured employee including, but not limited to, [~~medically reasonable and necessary~~] treatment or evaluation provided through referrals to consulting and referral doctors or other health care providers, as defined in this section;

(2) maintain efficient utilization of health care;

(3) communicate with the injured employee, injured employee's representative, if any, employer, and insurance carrier [~~(carrier)~~] about the injured employee's ability to work or any work restrictions on the injured employee;

(4) make available, upon request, in the form and manner prescribed by the division [~~Division~~]:

(A) work release data;

(B) cost and utilization data; and/or

(C) patient satisfaction data, including comorbidity, patient outcomes, return to work outcomes, functional health outcomes [~~"Short Form 12" outcome information (sf 12)~~], and recovery expectations.

(d) The consulting doctor is a doctor who examines an injured employee or the injured employee's medical record in response to a request from the treating doctor, the designated doctor, or the division [~~Division~~]. The consulting doctor shall:

(1) perform unbiased evaluations of the injured employee as directed by the requestor including, but not limited to, evaluations of:

(A) the accuracy of the diagnosis and appropriateness of the treatment of the injured employee;

(B) the injured employee's work status, ability to work, and work restrictions;

(C) the injured employee's medical condition; and

(D) other similar issues;

(2) submit a narrative report to the treating doctor, the injured employee, the injured employee's representative (if any), the insurance carrier, and the division [~~Division~~] (if the requestor was the division [~~Division~~]);

(3) not make referrals without the approval of the treating doctor and when such approval is obtained, ensure that the provider to whom the consulting doctor is making an approved referral knows the identity and contact information of the treating doctor;

(4) initiate or provide treatment only if the treating doctor approves or recommends the treatment; and

(5) become a referral doctor if the doctor begins to prescribe or provide health care to an injured employee.

(e) The referral doctor is a doctor who examines and treats an injured employee in response to a request from the treating doctor. The referral doctor shall:

(1) supplement the treating doctor's care;

(2) report the injured employee's status to the treating doctor and the insurance carrier at least every 30 days; and

(3) not make referrals without the approval of the treating doctor and when such approval is obtained, ensure that the provider to whom the referral doctor is making an approved referral knows the identity and contact information of the treating doctor.

(f) The Required Medical Examination (RME) doctor is a doctor who examines the injured employee's medical condition in response to a request from the insurance carrier or the division [~~Division~~] pursuant to Labor Code §§408.004, 408.0041, or 408.151. The RME doctor shall:

(1) perform unbiased evaluations of the injured employee as directed by the RME notice issued by the division [~~Division~~];

(2) not make referrals without the approval of the treating doctor and when such approval is obtained, ensure that the provider to whom the RME doctor is making an approved referral knows the identity and contact information of the treating doctor;

(3) initiate or provide treatment only if the treating doctor approves or recommends the treatment; and

(4) not evaluate, except following an examination by a designated doctor:

(A) the impairment caused by the injured employee's compensable injury;

(B) the attainment of maximum medical improvement;

(C) the extent of the injured employee's compensable injury;

(D) whether the injured employee's disability is a direct result of the work related injury;

(E) the ability of the injured employee to return to work; or

(F) issues similar to those described by subparagraphs (A) - (E) of this paragraph; and [~~similar issues~~]

(5) be a doctor licensed to practice medicine in Texas that holds the appropriate credentials as defined in §180.1 of this title (relating to Definitions);

(A) a dentist that performs dental services under the Act may review dental services that may lawfully be performed within the scope of the dentist's license to practice dentistry; or

(B) a chiropractor that performs chiropractic services under the Act may review chiropractic services that may lawfully be performed within the scope of the chiropractor's license to engage in the practice of chiropractic.

(g) A peer reviewer is a health care provider who [~~, at the insurance carrier's request,~~] performs an administrative [~~a~~] review at the insurance carrier's request (whether or not the health care provider that performs the peer review is providing treatment) for any issue related to [~~of~~] the health care of a workers' compensation claim without a physical examination of the injured employee. The peer reviewer must not have any known conflicts of interest with the injured employee or the health care provider who has proposed or rendered any health care being reviewed.

(1) A peer reviewer who performs a prospective, concurrent, or retrospective review of the medical necessity or reasonableness of health care services (utilization review) is subject to the [~~requirements of Insurance Code Article 21.58A and Chapter 1305 and~~] applicable provisions of the Labor Code; Insurance Code, Chapters 1305 and 4201; and department and division rules. A peer reviewer who performs utilization review must [~~be~~]:

(A) be certified or registered as a utilization review agent (URA) by the department [~~Texas Department of Insurance~~] or be employed by or under contract with a certified or registered URA to perform utilization review; [~~and~~]

(B) hold the appropriate professional license issued by this state; and [~~licensed to practice in Texas or perform utilization reviews under the direction of a doctor licensed to practice in Texas.~~]

(C) hold the appropriate credentials as defined in §180.1 of this title or comply with Labor Code §408.0044 or §408.0045.

(2) A peer reviewer who performs a review for any issue other than medical necessity, such as compensability or an injured employee's ability to return to work, must:

(A) hold the appropriate professional license issued by this state; and [~~an appropriate professional license in Texas.~~]

(B) hold the appropriate credentials as defined in §180.1 of this title or comply with Labor Code §408.0044 or §408.0045.

(h) The designated doctor is a doctor assigned by the division [~~Division~~] to recommend a resolution of a dispute as to the medical condition of an injured employee. At the request of an insurance carrier or an injured employee, or on the commissioner's own order, the commissioner may order a medical examination by a designated doctor in accordance with Labor Code §408.0041 and §408.1225. The credentials, qualifications, and responsibilities of a designated doctor are governed by §180.21 of this title (relating to Division Designated Doctor List), §180.1 of this title that defines "appropriate credentials", applicable provisions of the Act, and other rules providing for use of a designated doctor.

(i) A member of the Medical Quality Review Panel (MQRP) is a health care provider chosen by the division's [~~Division's~~] Medical Advisor under [~~Texas~~] Labor Code §413.0512. All eligibilities, terms, responsibilities, and prohibitions shall be prescribed by contract, and the MQRP members shall serve on the MQRP as prescribed by contract. A provider must meet the performance standards specified in the contract to be eligible for selection by the Medical Advisor to serve on the MQRP. A member of the medical quality review panel, other than a chiropractor, who reviews a specific workers' compensation case is subject to Labor Code §413.0512 and §408.0043. Doctors seeking membership on the MQRP must hold appropriate credentials as defined in §180.1 of this title. A chiropractor who serves on the MQRP and that

reviews a chiropractic service under the Act must be licensed to engage in the practice of chiropractic pursuant to Labor Code §408.0045. A health care provider that serves on the MQRP may only review health care services or treatment that may lawfully be performed within the scope of the health care provider's license [~~are required to be on the Division's Approved Doctor List.~~]

(j) Independent review organizations (IROs) must comply with the applicable provisions of Insurance Code, Chapter 4201; Labor Code, Title 5; and Chapters 12, 133 and 180 of this title (relating to Independent Review Organizations; General Medical Provisions; and Monitoring and Enforcement, respectively). The division or the department may initiate appropriate proceedings under applicable provisions of the Insurance Code, Chapter 4201; Labor Code, Title 5; and Chapters 12, 133 and 180 of this title.

§180.24. Financial Disclosure.

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

(1) Compensation arrangement--Any [~~any~~] arrangement involving any remuneration between a health care practitioner (or a member of a health care practitioner's immediate family) and a health care provider.

(2) Financial interest means:

(A) an interest of a health care practitioner, including an interest of the health care provider who employs the health care practitioner, or an interest of an immediate family member of the health care practitioner, which constitutes a direct or indirect ownership or investment interest in a health care provider; [~~,~~] or

(B) a direct or indirect compensation arrangement between the health care practitioner, the health care provider who employs the referring health care practitioner, or an immediate family member of the health care practitioner and a health care provider.

(3) Immediate family member--Immediate family member or member of a doctor's immediate family means husband or wife; birth or adoptive parent, child, or sibling; stepparent, stepchild, stepbrother, or stepsister; father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law; grandparent or grandchild; and spouse of a grandparent or grandchild.

(b) Submission of Financial Disclosure Information to the division [~~Commission~~].

(1) If a health care practitioner refers an injured employee [~~(employee)~~] to another health care provider in which the health care practitioner, or the health care provider that employs the health care practitioner, has a financial interest, the health care practitioner shall file an annual [~~a~~] disclosure with the division [~~commission within 30 days of the date the first referral is made unless the disclosure was previously made~~]. This annual disclosure shall be filed for each health care provider to whom an injured employee is referred and shall include the information in paragraph (2) [~~subsection (b)(3)~~] of this subsection [~~section~~].

[~~(2) In addition, as a condition for a certificate of registration for the approved doctor list (ADL), the doctor shall file with the commission at the time of application for a certificate of registration for the ADL in accordance with §180.20 of this Title (relating to Commission Approved Doctor List) a disclosure of financial interests of the doctor in the form and manner prescribed by the commission. Thereafter, a doctor registered on the ADL shall report to the commission within 30 days, on the doctor's own initiative, any changes in the information the doctor previously provided when applying for registration.~~]

(2) [~~(3)~~] The health care practitioner's disclosures in paragraph [~~paragraphs~~] (1) [~~and (2)~~] of this subsection shall at a minimum include:

(A) the disclosing health care practitioner's name, business address, federal tax identification number, professional license number, and any other unique identification number;

(B) the name(s), business address(es), federal tax identification number(s), professional license number(s), and any other unique identification number of the health care provider(s) in which the disclosing health care practitioner has a financial interest as defined in subsection (a)(2) of this section; and

(C) the nature of the financial interest including, but not limited to, percentage of ownership, type of ownership (e.g., direct or indirect, equity, mortgage), type of compensation arrangement (e.g., salary, contractual arrangement, stock as part of a salary payment) and the entity with the ownership (disclosing health care practitioner, the health care provider who employs the health care practitioner, or an immediate family member of the health care practitioner).

(c) Failure to disclose. In [~~On or after September 1, 2003, in~~] addition to any sanctions [~~penalties~~] provided by the Act [~~Statute~~] and rules [~~Rules~~], failure to disclose a financial interest by a [~~when the~~] health care provider is an administrative violation and [~~practitioner had actual knowledge of the financial interest or acted in reckless disregard or deliberate ignorance as to the existence of the financial interest~~] is subject to a penalty of forfeiture of the right to reimbursement for any services rendered on the claim during the period of noncompliance, regardless of whether the circumstances of the services themselves were subject to disclosure, and regardless of whether the services were medically necessary.

(1) Limitations on billing. A health care practitioner who rendered services on a claim during a period in which the practitioner was out of compliance with the disclosure requirements under this section for that claim, regardless of whether the circumstances of the services themselves were subject to disclosure, shall not present or cause to be presented a claim or bill to any individual, third party payer, or other entity for those services (regardless of whether the services were medically necessary).

(2) Refunds. If a health care practitioner collects any amounts that were billed for services on a claim provided during a period in which the practitioner was in noncompliance with the disclosure requirements of this section for that claim, regardless of whether the circumstances of the services themselves were subject to disclosure, the practitioner shall be liable to the individual or entity for, and shall timely refund, any amounts collected (regardless of whether the services were medically necessary).

(3) Rebuttable Presumption. A referral for services to a health care provider by a health care practitioner under circumstances which required a disclosure under this section, but which was not timely disclosed as required, creates a rebuttable presumption that the services were not medically necessary unless one of the statutory and regulatory exceptions that apply to referrals in Title 42, United States Code §1395nn(b)-(e) applies to the referral in question. Whenever one of these exceptions is revised and effective, the revised exception shall be effective for referrals made on or after the effective date of the revision.

§180.25. Improper Inducements, Influence and Threats.

(a) Pursuant to Labor Code §415.0036, offering [~~Offering~~], paying, soliciting, or receiving an improper inducement relating to the [~~medical benefit~~] delivery of benefits to an injured employee is prohibited. Improper [~~as are improper~~] attempts to influence the delivery

of benefits to an injured employee [~~medical benefit delivery~~], including [~~through the making of~~] improper threats. This section applies to all system participants in the workers' compensation system who have authority under Labor Code, Title 5 to request the performance of a service affecting the delivery of benefits to an injured employee or who actually performs such a service, including peer reviews, performance of required medical examinations, or case management [~~and their agents~~].

(b) The following specific acts will be deemed to be an improper inducement, attempt to influence or threat:

(1) Soliciting [~~Intentionally, knowingly, or willfully soliciting~~] or receiving any remuneration (including, but not limited to, any kickback, bribe, or rebate) in return for referring an injured employee [~~(employee)~~] to a person (either the person soliciting or receiving the inducement or another person):

(A) for the furnishing or arranging for the furnishing of any item, treatment, or service constituting a medical benefit for which payment may be made in whole or in part under Labor Code, Title 5 [~~the Statute~~] or rules [~~Rules~~]; or

(B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, treatment or item constituting a medical benefit for which payment may be made in whole or in part under Labor Code, Title 5 [~~the Statute~~] or rules [~~Rules~~].

(2) Offering [~~Intentionally, knowingly, or willfully offering~~] or paying any remuneration (including, but not limited to, any kickback, bribe, or rebate) in return for referring an injured employee to a person (either the person offering or paying the inducement or another person):

(A) for the furnishing or arranging for the furnishing of any item, treatment or service constituting a medical benefit for which payment may be made in whole or in part under the Labor Code, Title 5 [~~Statute~~] or rules [~~Rules~~]; or

(B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, treatment, or item constituting a medical benefit for which payment may be made in whole or in part under Labor Code, Title 5 [~~the Statute~~] or rules [~~Rules~~].

(3) Providing [~~Except as provided by Texas Labor Code §408.0222, providing~~] any financial incentive or promising or threatening to provide injured employee evaluation reports or other medical opinions that could enhance or reduce the injured employee's income benefits or affect the injured employee's work release status as an inducement to have the injured employee treat with or be evaluated by the provider or comply with the provider's proposed treatment.

(4) Offering [~~Intentionally, knowingly, or willfully offering~~] or soliciting an inducement in return for selecting a particular health care provider for the furnishing or arranging for the furnishing of any item, treatment, or service (including purchasing or leasing) for which payment may be made in whole or in part under Labor Code, Title 5 [~~the Statute~~] or rules [~~Rules~~]; or [~~intentionally, knowingly, or willfully~~] offering or soliciting an inducement which may reasonably tend to cause a particular provider to be selected (excluding a convenience necessary to allow for the provision of health care, such as transportation to and from the provider's facility, translator services related to evaluation and treatment, providing claim filing forms or information on rights and responsibilities under the Labor Code, Title 5 [~~Statute~~] and rules [~~Rules~~], if generally available to all patients). Such inducement is improper whether offered directly or indirectly, overtly or covertly, in cash or in kind.

(5) Making [~~Intentionally, knowingly, or willfully making~~], presenting, filing, or threatening to make, present, or file any frivolous claim or assertion against a system participant, medical peer reviewer, or any other person performing duties arising under Labor Code, Title 5 [~~the Statute~~] or rules [~~Rules~~], with the division [~~commission~~] or any licensing, certifying, regulatory, or investigatory body.

(6) Making [~~Intentionally, knowingly, or willfully making~~] or causing to be made a threat against life, safety, or property directed to a system participant related to their performance of duties arising under Labor Code, Title 5 [~~the Statute~~] or rules [~~Rules~~].

(c) The exceptions that apply to subsections (b)(1) and (b)(2) of this section are those that apply to analogous provisions in Title 42, United States Code §1320a-7b(3). The exceptions shall apply to subsections (b)(1) and (b)(2).

(d) A violation of applicable federal standards that prohibit the payment or acceptance of payment in exchange for health care referrals relating to fraud, abuse, and antikickbacks is an administrative violation. [~~Nothing in this section prohibits an employer or carrier from offering employees an incentive to obtain health care from doctors within an insurance carrier network established under Texas Labor Code §408.0223. However, such incentives shall not:~~]

[~~(1) limit the right of the employee to request the authority to select an alternate treating doctor under Texas Labor Code §408.023 (including to change to a doctor out of the network); or~~]

[~~(2) require the employee to give up entitlement to or refund the incentive the employer or carrier offered or provided to the employee during the period that the employee's treating doctor was within the network.~~]

§180.26. Criteria for Imposing, Recommending and Determining Sanctions; Other Remedies.

(a) The division may impose sanctions on any system participant if that system participant commits an administrative violation. Additionally, the division may impose sanctions on a doctor or insurance carrier for:

(1) a sanction of the doctor or insurance carrier by the Medicare or Medicaid program for:

(A) substandard medical care;

(B) overcharging;

(C) overutilization of medical services; or

(D) any other substantive noncompliance with requirements of those programs regarding professional practice or billing;

(2) evidence from the division's medical records that the applicable insurance carrier's utilization review practices or the doctor's charges, fees, diagnoses, treatments, evaluations, or impairment ratings are substantially different from those the commissioner finds to be fair and reasonable based on either a single determination or a pattern of practice;

(3) a suspension or other relevant practice restriction of the doctor's license by an appropriate licensing authority;

(4) professional failure of a doctor to practice medicine or provide health care, including chiropractic care, in an acceptable manner consistent with the public health, safety, and welfare;

(5) the quality of designated doctor decision made under Labor Code §408.0041 or §408.122;

(6) findings of fact and conclusions of law made by a court, an administrative law judge of the State Office of Administrative Hearings, or a licensing or regulatory authority;

(7) conviction of a doctor or insurance carrier for a criminal offense; or

(8) a doctor practicing or providing any service, review or evaluation under the Act or a division rule without the appropriate credentials and in the manner required by the Act, or a rule, order or decision of the commissioner.

(b) The division may impose the following sanctions against a doctor or insurance carrier for any reason listed in subsection (a) of this section:

(1) reduction of allowable reimbursement to a doctor (such as an automatic percentage reduction on all or some types of health care);

(2) mandatory preauthorization or utilization review of all or certain health care treatments and services (such as mandatory treatment plans);

(3) required supervision or peer review monitoring, reporting, and audit (by the insurance carrier, the division, or an independent auditor/reviewer);

(4) deletion or suspension from the DDL;

(5) restrictions on appointments or reviews;

(6) conditions or restrictions on a insurance carrier regarding actions by insurance carriers under the Act and rules, that are not inconsistent with a memorandum of understanding adopted between the commissioner and the commissioner of insurance regarding the regulation of insurance carriers and utilization review agents as necessary to ensure that appropriate health care decision are reached under applicable regulations by the department and the division, the Act, and Chapter 4201, Insurance Code; and

(7) mandatory participation in training classes or other courses as established or certified by the division.

(c) In addition to a penalty or the other sanctions that may be imposed in accordance with other applicable provisions of the Act, the division may also impose the following sanctions pursuant to Labor Code §415.023(b) against an insurance carrier or its representative, a health care provider, or a representative of an injured employee or legal beneficiary if any of those parties commit an administrative violation as a matter of practice, meaning a repeated violation of the Act or a rule, order, or decision of the commissioner:

(1) a reduction or denial of fees;

(2) public or private reprimand by the commissioner;

(3) suspension from practice before the division;

(4) restriction, suspension, or revocation of the right to receive reimbursement under the Act; and

(5) referral and petition to the appropriate licensing authority for appropriate disciplinary action, including the restriction, suspension, or revocation of the person's license.

(d) In addition to, or in lieu of, the sanctions in subsections (b) and (c) of this section, the division may impose any other sanction or remedy allowed under the Act or division rules, including but not limited to assessing an administrative penalty of up to $25,000 per violation against a person who commits an administrative violation.

(e) When determining which sanction to impose against a system participant and the severity of that sanction, the division shall consider the factors listed in Labor Code §415.021(c) and other matters that justice may require, including but not limited to:

(1) Performance Based Oversight (PBO) assessment;

(2) the promptness and earnestness of actions to prevent future violations;

(3) self-report of the violation;

(4) the size of the company or practice;

(5) the effect of a sanction on the availability of health care; and

(6) history of warning letters sent to the system participant.

(f) In an investigation where both an administrative violation and a criminal prosecution are possible, the division may, at its discretion, postpone action on the administrative violation until the related criminal prosecution is completed.

(g) The division may, at its discretion, send a warning letter to a system participant that an administrative violation may have occurred.

(h) The division may, at its discretion, enter into a consent order with the system participant. A consent order may be entered into before or after issuance of a NOV is issued under §180.8 of this title (relating to Notices of Violation; Notices of Hearing; Default Judgments).

§180.27. Sanctions Process/Appeals/Restoration [~~/Reinstatement~~].

[~~(a) If the commission intends to take action under §180.26 of this title (relating to Doctor and Insurance Carrier Sanctions) or action against a designated doctor under §180.21 of this title (relating to Commission Designated Doctor List), other than in the case where a progressive disciplinary agreement under §180.26(e) of this title was entered into, the commission shall notify the person ("person" also includes a carrier) to be sanctioned by verifiable means of the commission's intent.~~]

[~~(1) Not later than 20 days after receiving the notice, a doctor may request a hearing at the State Office of Administrative Hearings by filing such a request with the Chief Clerk of Proceedings at the commission.~~]

[~~(2) If no request for hearing is filed within the time allowed, the recommendation for sanction will be reviewed by the commissioners at a public meeting and a decision made. If a hearing was held, the commissioners shall review the decision of the administrative law judge (ALJ) after the hearing is held.~~]

(a) [~~(b)~~] If a hearing was conducted in conjunction with Labor Code §§402.072, 407.046, 408.023, and in other cases under the Act that are not subject to Labor Code §402.073(b), the commissioner shall review the proposed decision of the administrative law judge (ALJ). If the commissioner [~~commission~~] modifies, amends, or changes a recommended finding of fact or conclusion of law, or order of the ALJ, the commissioner's [~~commission's~~] final order shall state the legal basis and the specific reasons for the change.

(b) [~~(c)~~] The [~~If the commissioners vote to impose the sanction, the~~] division [~~commission~~] shall notify the person by issuing an order that [~~of which~~] describes the effects of the sanction. This order shall be delivered by verifiable means with a copy to the appropriate licensing or certification authority and, if the sanction is against a doctor, copies shall be delivered to those injured employees the division [~~commission~~] is aware are being treated by that doctor.

(c) [~~(d)~~] Failure to comply with the sanction may result in further sanctioning by the division [~~commission~~].

(d) [~~(e)~~] In accordance with Labor Code §408.0231(d)(2) a doctor, other than a doctor to which Labor Code §408.023(r) applies, may apply to have a final imposed sanction that was imposed under Labor Code §408.0231 lifted by sending a letter of consideration to the Medical Advisor [~~A person who was sanctioned can apply to have the sanction lifted (whether through restoration of privileges or re-certification) by applying in the form and manner prescribed by the commission~~].

(1) The request shall be evaluated by the Medical Advisor and/or members of the Medical Quality Review Panel. The requestor shall be liable for the cost of the review, which may include an audit of the records of the requestor.

(A) If, in the Medical Advisor's opinion, the doctor: [~~person~~]

(i) has all the appropriate unrestricted licenses/certifications;[~~,~~]

(ii) has overcome the conditions that resulted in the sanction;[~~,~~]

(iii) meets all the division's qualification standards and conditions for restoration of some or all of the practice privileges removed; and

(iv) is not out of compliance with the Labor Code, Insurance Code, a department rule, or a rule, order, or decision of the commissioner [~~and should be reinstated,~~] the Medical Advisor may [~~shall~~] recommend that the commissioner [~~commissioners reinstate the doctor or~~] lift the sanction(s) or restore some or all of the privileges removed or restricted by the sanction(s)[~~sanction~~].

(B) If in the Medical Advisor's opinion, the doctor [~~person~~] has not met all the requirements for [~~reinstatement or~~] restoration of privileges, the Medical Advisor [~~commission~~] shall notify the doctor [~~person~~] by verifiable means of the intent to recommend to the commissioner [~~commissioners~~] that the sanctions not be lifted or that the privileges removed or restricted by the sanction(s) not be restored in whole or in part and the reasons for that recommendation. Within 15 days after receiving the notice, a doctor may file a response that addresses the reasons given in [~~that~~] the recommendation to deny lifting the sanction(s) or restoration of some or all of privileges removed or restricted by the sanction(s) [~~was to be made~~]. The Medical Advisor shall review the response and make a final recommendation to the commissioner [~~commissioners~~]. A copy of the requestor's response to the division [~~commission~~] shall be provided to the commissioner [~~commissioners~~] for consideration.

(2) The commissioner [~~commissioners~~] shall consider the matter [~~in a public meeting~~] and shall notify the requestor of the final decision by verifiable means, and may send [~~with~~] a copy to the appropriate licensing or certification authority. If the commissioner does [~~commissioners choose to~~] not lift the sanction, the commissioner[~~commissioners~~] may include in the [~~their~~] final decision the conditions that the doctor [~~sanctioned person~~] must meet before the division [~~commission~~] will reconsider lifting the sanctions including, but not limited to, the amount of time that the doctor [~~person~~] must wait prior to re-requesting [~~rerequesting~~] lifting the sanction(s) or restoration of some or all of the privileges removed or restricted by the sanction(s) [~~sanction~~].

[~~(f) Notwithstanding any other provision of this section, deletion from the Approved Doctor List by the Executive Director pursuant to §180.26(b) of this title shall be governed by this subsection.~~]

[~~(1) Prior to deletion, the Executive Director or designee shall notify a doctor of the intention to delete the doctor and the grounds for that action.~~]

[~~(2) Within five working days (as defined by §102.3(b) of this title (relating to Computation of Time)) after receiving the notice of intent, a doctor may file a response to the reasons given as grounds for the deletion with the Executive Director or designee.~~]

[~~(A) If a response is not received by the fifth working day after the date the doctor received the notice of intent, the doctor shall be deleted effective the following day. No subsequent notice shall be sent.~~]

[~~(B) If the response is agreement, the doctor shall be deleted effective on the earlier of the date the doctor agrees to the deletion or the day following the fifth working day after the date the doctor received the notice of intent. No subsequent notice shall be sent.~~]

[~~(C) If a response which disagrees with the grounds for deletion is timely received and after reviewing the response, the Executive Director or designee determines:~~]

[~~(i)~~ ~~that the grounds do not exist for deletion under §180.26(b) of this title, the doctor shall be notified that he was not deleted; or~~]

[~~(ii)~~ ~~that the grounds for deletion do exist under §180.26(b) of this title, the doctor shall be deleted effective the day following the date the doctor receives notice of the deletion unless otherwise specified in the notice.~~]

[~~(3) All notices under this subsection shall be delivered by a verifiable means. Date of receipt for notices shall be determined in accordance with §102.5(d) of this title (relating to General Rules for Written Communication to and from the Commission).~~]

§180.28. Peer Review Requirements, Reporting, and Sanctions.

(a) A peer reviewer's report, including a report used to deny preauthorization, shall document the objective medical findings and evidence-based medicine that supports the opinion and include:

(1) the peer reviewer's name and professional Texas license number;

(2) certification that the peer reviewer holds the appropriate credentials as defined in §180.1 of this title (relating to Definitions);

(3) [~~(2)~~] a summary of the reviewer's qualifications;

(4) [~~(3)~~] a list of all medical records and other documents reviewed by the peer reviewer, including dates of those documents;

(5) [~~(4)~~] a summary of the clinical history; [~~and~~]

(6) [~~(5)~~] an analysis and explanation for the peer review recommendation, including the findings and conclusions used to support the recommendations;[~~.~~]

(7) the name and professional license number of all health care providers whose treatment, review, or any other service related to the claim is the subject of the review; and

(8) for return to work, compensability, extent of injury, or other related issues, the name and professional license number of the injured employee's treating doctor.

(b) The insurance carrier shall not request subsequent peer reviews regarding the medical necessity of health care for dates of services for which a peer review report has already been issued unless:

(1) the review is for a different health care service requiring review by a different peer review specialty;

(2) the insurance carrier needs clarification of the peer review opinion based on new medical evidence that has not been presented to the peer reviewer;

(3) the peer reviewer failed to fully address the questions submitted by the insurance carrier; or

(4) for purposes other than determining medical necessity of the health care.

(c) The insurance carrier shall submit a copy of a peer review report to the treating doctor and the health care provider who rendered or requested the health care, as well as the injured employee and injured employee's representative, if any, when the insurance carrier uses the report to deny the compensability or extent of the compensable injury or reduce or deny income or medical benefits of an injured employee.

(d) A peer reviewer and insurance carrier shall maintain accurate records to reflect information regarding requests, reports, and results for peer reviews. The insurance carrier and peer reviewer shall submit such information at the request of the division [~~Division~~] in the form and manner proscribed by the division [~~Division~~]. The division [~~Division~~] will monitor peer review use, activity, and decisions which may result in the initiation of a medical quality review or other division [~~Division~~] action.

(e) The commissioner [~~Commissioner~~] may impose sanctions on doctors performing peer reviews pursuant to Labor Code §408.0231and §180.26 and §180.27 of this title (relating to Criteria for Imposing, Recommending and Determining Sanctions; Other Remedies; and Sanctions Process/Appeals/Restoration [~~/Reinstatement~~], respectively) and other applicable provisions of the Labor Code and division [~~Division~~] rules. The commissioner [~~Commissioner~~] may prohibit a doctor from conducting peer reviews for any of the following:

(1) non-compliance with the provisions of §180.22 of this title (relating to Health Care Provider Roles and Responsibilities), this section, or applicable provisions of the Act, or a rule, order, or decision of the commissioner;

(2) failure to consider all records provided for review;

(3) a history of improper or unjustified decisions regarding the medical necessity of health care reviewed; [~~or~~]

(4) failure to hold the appropriate professional license issued by this state;

(5) review of health care without holding the appropriate credentials, as defined in §180.1 of this title (relating to Definitions), in a health care specialty appropriate to the type of health care reviewed; or

(6) [~~(4)~~] any other violation of the Labor Code or division [~~Division~~] rules.

(f) In accordance with Labor Code §408.0046, an entity requesting a peer review must obtain and provide to the doctor providing peer review services all relevant and updated medical records.

§180.50. Severability.

Where any provisions of this chapter are determined by a court of competent jurisdiction to be inconsistent with any statutes of this state, or to be unconstitutional, the remaining provisions of this chapter shall remain in effect.

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

Filed with the Office of the Secretary of State on August 17 2010.

TRD-201004758
Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Earliest possible date of adoption: September 26, 2010
For further information, please call: (512) 804-4703

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CHAPTER 180. MONITORING AND ENFORCEMENT

The Texas Department of Insurance, Division of Workers' Compensation (Division) proposes the repeal of §§180.6, 180.7, 180.10 - 180.18, 180.20 and 180.26 of this title (relating to guidelines for establishing evidence of patterns of practice, the schedule of administrative penalties for violations, warning letters and the Approved Doctors List (ADL)). The purpose of the proposed repeal is to conform Division rules to amendments to the Labor Code made by House Bill 7, enacted by the 79th Legislature, Regular Session, effective September 1, 2005 (HB 7).

The repeals of §§180.6, 180.7, 180.10 -180.12, and 180.14 - 180.18 are proposed because the rules are superseded by HB 7 amendments to Labor Code §415.021 which replaced the specific monetary schedule for administrative penalties for specific violations and the maximum penalty of $10,000 per occurrence with a maximum penalty of $25,000 per day per occurrence and each day of non-compliance constitutes a separate violation.

The repeal of §180.13 is proposed because the rule is not necessary since existing §180.8 of this title (relating to Notices of Violation, Warning Letters, and Notices of Intent) states that the issuance of a warning letter is discretionary with the Division.

The repeal of §180.20 is proposed because the ADL expired on September 1, 2007 pursuant to Labor Code §408.023(k) as amended by HB 7.

The repeal of §180.26 is proposed because the rule is obsolete since it primarily pertains to sanctions against doctors on the ADL prior to the amendments made by HB 7 to Labor Code §408.023 and §415.021.

In addition to these proposed repeals, the Division is proposing new §180.26 and §180.50 and amendments to other sections of Chapter 180 of this title (relating to Monitoring and Enforcement) which are published elsewhere in this issue of the *Texas Register.*

Catherine Reyer, Associate Commissioner, Enforcement, TDI, has determined that for each year of the first five years the repeal of the sections will be in effect, there will be no fiscal impact to state or local governments as a result of enforcing or administering the repeal and there will be no measurable effect on local employment or the local economy as a result of the proposal.

Ms. Reyer has also determined that for each year of the first five years the repeal of the sections are in effect the public benefit anticipated as a result of the repeals will be (i) greater regulatory efficiency, (ii) elimination of obsolete regulations; and (iii) conformance of existing rules to newly enacted statutes. There will be no economic cost to any individuals, or insurers or other entities regulated by the Division, regardless of size, as a result of the proposed repeal. Any change in cost is directly attributable to

statutory changes. In addition to the proposed repeal, the Division is proposing additions and amendments to other sections of Chapter 180 of this title (relating to Monitoring and Enforcement) which are published elsewhere in this issue of the *Texas Register* and contain further analysis of possible costs.

In accordance with the Government Code §2006.002(c), the Division has determined that this proposed repeal will not have an adverse economic effect on small or micro business carriers because it is simply the repeal of obsolete rules. Therefore, in accordance with the Government Code §2006.002(c), the Division is not required to prepare a regulatory flexibility analysis.

The Division has determined that no private real property interests are affected by this proposal and this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action, and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. CST on September 27, 2010. Comments may be submitted via the internet through the Division's internet website at www.tdi.state.tx.us/wc/rules/proposedrules/index.html, by email at rulecomments@tdi.state.tx.us or by mailing or delivering your comments to Maria Jimenez, Texas Department of Insurance, Division of Workers' Compensation, Workers' Compensation Counsel, MS-4D, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1645.

A public hearing on this proposal will be held on September 27, 2010 at 9 a.m. CST in the Tippy Foster Conference Room of the Texas Department of Insurance, Division of Workers' Compensation, 7551 Metro Center Drive, Austin, Texas 78744-1645. The Division provides reasonable accommodations for persons attending meetings, hearings, or educational events, as required by the Americans with Disabilities Act. If you require accommodations in order to attend the hearing please contact Idalia Salazar at (512) 804-4403 at least two business days prior to the confirmed hearing date.

The hearing will also be audio streamed; to listen to the audio stream access the Public Outreach Events /Training Calendar website at www.tdi.state.tx.us/wc/events/index.html. Audio streaming will begin approximately five minutes before the scheduled time of the hearing.

The public hearing date, time, and location should be confirmed by those interested in attending or listening via audio stream; the hearing may be confirmed by visiting the Division's Public Outreach Events/Training Calendar website at http://www.tdi.state.tx.us/wc/events/index.html. Written and oral comments presented at the hearing will be considered.

SUBCHAPTER A. GENERAL RULES FOR ENFORCEMENT

28 TAC §§180.6, 180.7, 180.10 - 180.18

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

The repeals are proposed under Labor Code §§415.021, 402.00111, and 402.061. House Bill 7, enacted by the 79th Legislature, Regular Session, added Labor Code §402.00111 and amended Labor Code §415.021 and §402.061. Section 415.021 authorizes the Commissioner of Workers' Compensation to assess administrative penalties that shall not exceed $25,000 per day per occurrence. Section 402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority, under the Labor Code. Section 402.061 provides that the Commissioner of Workers' Compensation shall adopt rules as necessary for the implementation and enforcement of Title 5, Labor Code.

The following statutes are affected by this proposal: 28 TAC §§180.6, 180.7, and 180.13 - Labor Code §415.021; 28 TAC §§180.10, 180.11, 180.12, and 180.14 - 180.18 - Labor Code §415.021.

§180.6. Evidence of Patterns of Practice.

§180.7. Date Violation Deemed to Have Occurred; Establishing Willful Violations.

§180.10. Duration and Extent of Noncompliance.

§180.11. Compliance Categories.

§180.12. Compliance Standards and Compliance Rates.

§180.13. Warning Letter Criteria; Relevant Time Period.

§180.14. General Provisions for Penalty Calculations.

§180.15. Base Penalties.

§180.16. Review Modifiers.

§180.17. Audit Modifiers.

§180.18. Applicability.

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

Filed with the Office of the Secretary of State on August 17, 2010.

TRD-201004759
Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
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For further information, please call: (512) 804-4703

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SUBCHAPTER B. MEDICAL BENEFIT REGULATION

28 TAC §180.20, §180.26

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

The repeals are proposed under Labor Code §§415.021, 408.023, 402.00111 and 402.061. House Bill 7, enacted by the 79th Legislature, Regular Session, added Labor Code §402.00111 and amended Labor Code §§415.021, 408.023, and 402.061. Section 415.021 authorizes the Commissioner of Workers' Compensation to assess administrative penalties that shall not exceed $25,000 per day per occurrence. Section 408.023(k) states that the requirements of Subsections

(a)-(g) and Subsection (i) expire September 1, 2007. Those subsections contain the requirement that the Division develop a list of doctors licensed in this state who are approved by the Division (ADL) to provide health care services under the Act, eligibility requirements for those doctors, and rulemaking authority related to the ADL. Section 402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority, under the Labor Code. Section 402.061 provides that the Commissioner of Workers' Compensation shall adopt rules as necessary for the implementation and enforcement of Title 5, Labor Code.

The following statutes are affected by this proposal: 28 TAC §180.20 and §180.26 - Labor Code §408.023(k) and §415.021.

§180.20. Commission Approved Doctor List.

§180.26. Doctor and Insurance Carrier Sanctions.

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

Filed with the Office of the Secretary of State on August 17, 2010.

TRD-201004760

Dirk Johnson

General Counsel

Texas Department of Insurance, Division of Workers' Compensation

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For further information, please call: (512) 804-4703

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 101. GENERAL AIR QUALITY RULES

SUBCHAPTER A. GENERAL RULES

30 TAC §101.1

The Texas Commission on Environmental Quality (commission or TCEQ) proposes an amendment to §101.1.

The proposed amendment to §101.1 will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

The EPA rules implementing the 1997 eight-hour ozone standard did not require regulated entities to continue to use the more stringent major source thresholds and emission offset requirements of the one-hour ozone standard that previously applied to them when implementing New Source Review (NSR) and Title V permitting for the 1997 eight-hour ozone standard. The EPA rule (known as Phase I) was successfully challenged in *South Coast Air Quality Management District v. EPA (South Coast)* 472 F.3d 882 (D.C. Cir. 2006) reh'g denied 489 F.3d 1245 (clarifying that the vacatur was limited to the issues on which the court granted the petitions for review). The EPA has interpreted the court ruling as restoring NSR applicability thresholds and emission offset requirements under the one-hour ozone standard. The *South Coast* decision was upheld by the Supreme Court on January 14, 2008. TCEQ is proposing concurrent amendments to 30 TAC Chapter 116 that make clear that permitted facilities in areas that are nonattainment for the one-hour ozone standard are subject to major source thresholds and emission offsets of the one-hour ozone standard on the effective date of the adopted rules.

In order to prevent future confusion over designations and classifications and their related applicability thresholds and emissions offset requirements, TCEQ is proposing changes to the definitions in §101.1(54), concerning maintenance area, and §101.1(70), concerning nonattainment area. Because maintenance and nonattainment areas and their boundaries are subject to change based on federal actions, this amendment will eliminate references to specific maintenance and nonattainment areas in favor of a more general definition that indicates the federal regulations that define these areas and the federally applicable designations and classifications. In order to ensure that the public has access to up to date information regarding the specific descriptions of nonattainment and maintenance areas, the commission regularly posts information regarding the designation process for new national ambient air quality standard (NAAQS) on the TCEQ public Web site.

Staff has previously presented this rule amendment (Rule Project 2008-030-116-PR) to the commission for consideration. At the February 25, 2009, commissioner's agenda, the commission remanded the rule project to the executive director's staff in anticipation of additional direction or action by the EPA, because EPA continued to indicate in various federal notices its intent to complete rulemaking regarding NSR anti-backsliding requirements post the *South Coast* decision. EPA's proposed rule to implement the 1997 8-hour ozone NAAQS revision on subpart 1 reclassification and anti-backsliding provisions under the former 1-hour ozone standard was published in the January 16, 2009, *Federal Register,* but has not yet been finalized. This proposed rulemaking removes language regarding the exemptions from nonattainment new source review (NNSR) that were vacated by *South Coast.* On September 23, 2009, the EPA published notice of the proposed disapproval of past revisions to the Texas NNSR SIP (74 *Federal Register* 48467, September 23, 2009) that are related to this proposed amendment. In an effort to ensure that TCEQ regulatory requirements regarding the NNSR permitting program meets the requirements of the Federal Clean Air Act (FCAA) and are approvable into the SIP, the commission is proposing an amendment to eliminate any deficiencies that would prevent approval.

SECTION DISCUSSION

§101.1, Definitions

The commission proposes to amend the definition of maintenance area in §101.1(54). This amendment removes the specific descriptions of maintenance areas within the state in favor of a more general definition that makes clear that these areas are designated by federal action. Similarly, the commission proposes to amend the definition of nonattainment areas in §101.1(70) to remove all references to specific nonattainment areas in §101.1(70)(A) - (G) and retain those parts of the definition that refer to federal regulations and the *Federal Register.* These changes help ensure that when changes are made to maintenance areas and nonattainment areas as a result of federal action, these rules will not be rendered incorrect. Also, for the one-hour ozone NAAQS, the designations and classifications in 40 Code of Federal Regulations (CFR) Part 81 were retained by EPA for purposes of anti-backsliding, 70 *Federal Register* 44470 (August 3, 2005). Upon determination by EPA that

any requirement is no longer required for purposes of anti-backsliding, the requirement will no longer apply. Additionally, the definition of reportable quantity contains references to §101.1(70) in §101.1(88)(A)(i)(III)(-a-), (-c-), (-w-), (-pp-), and (-zz-) that would be incorrect based on the proposed amendment to §101.1(70). The commission is proposing an amendment to §101.1(88) that corrects these references.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rule is in effect, no fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed changes to Chapter 101.

The proposed rulemaking would amend Chapter 116 and Chapter 101 to ensure the criteria of the one-hour ozone nonattainment rules for major source emission thresholds and emission offset requirements are properly implemented according to the EPA's interpretation of recent federal court decisions. The fiscal impacts of amendments to Chapter 116 are detailed in the preamble for that proposed rule change.

This fiscal note details the fiscal impacts of the proposed amendment, which is administrative in nature. Thus, the proposed rule is not expected to have any fiscal impacts on local governments or other regulated entities that own or operate major emission sources in ozone nonattainment areas of the state. The proposed amendment to Chapter 101 amends definitions so that the chapter is updated to reflect recent federal court decisions that affect the ozone standards, thresholds, and emission offset requirements found in the proposed changes in Chapter 116. The proposed rulemaking will prevent confusion among the regulated community and ensure more clarity when determining which ozone nonattainment standards, thresholds, and emission offsets apply when facility modifications occur and permit reviews are conducted.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be clarity and consistency in the implementation of ozone standards, thresholds, and emission offset requirements.

The proposed amendment to Chapter 101 updates definitions in order to reflect standards from recent federal court decisions that affect the ozone standards, thresholds, and emission offset requirements found in the proposed changes to the companion rulemaking for Chapter 116. The amendment is administrative in nature and does not impose any new costs or generate cost savings. Large businesses that own or operate major emission sources are not expected to experience any fiscal implications as a result of the proposed amendment to Chapter 101.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rule, which is administrative in nature. Small or micro-businesses do not typically own or operate facilities that meet the criteria for major emission sources.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule is required to protect the environment and comply with federal regulations. In addition, the proposed rule is not expected to adversely affect a small or micro-business in a material way for the first five years that the proposed rule is in effect.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

DRAFT REGULATORY IMPACT ANALYSIS

The commission reviewed the proposed rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a major environmental rule as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare a regulatory impact analysis.

A major environmental rule means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the proposed revisions are to add references to federal regulations in certain definitions that are duplicative with federal regulation that the state has no authority to legally change, and to correct an inadvertent omission in the definition of Reportable quantity. These changes will not adversely affect the economy, a sector or the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state in a material way since they are administrative in nature.

Additionally, even if the rule met the definition of a major environmental rule, the rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The proposed rule would implement requirements of the FCAA. Under 42 United States Code (USC), §7410, each state is required to adopt and implement a SIP containing adequate provisions to implement, attain, maintain and enforce the NAAQS within the state. While 42 USC, §7410 generally does not require specific programs, methods, or emission reductions in order to meet the standard, state SIPs must include specific requirements as specified by 42 USC, §7410. The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, af-

fected industry, and the public, to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that their SIPS provide for implementation, attainment, maintenance, and enforcement of the NAAQS within the state. One of the requirements of 42 USC, §7410 is for states to revise their plans as necessary to take account revisions of the NAAQS. The proposed revisions will align the state rules with federal requirements that the state has no authority to change.

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

Because of the ongoing need to meet federal requirements, the commission routinely proposes and adopts rules incorporating or designed to satisfy specific federal requirements. The legislature is presumed to understand this federal scheme. If each rule proposed by the commission to meet a federal requirement was considered to be a major environmental rule that exceeds federal law, then each of those rules would require the full regulatory impact analysis (RIA) contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the proposed rule may have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA, and in fact creates no additional impacts since the proposed rule does not exceed the requirement to attain and maintain the NAAQS. For these reasons, the proposed rule falls under the exception in Texas Government Code, §2001.0225(a), because it is required by, and does not exceed, federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code, but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *(Central Power & Light Co. v. Sharp,* 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue,* 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.,* 798 S.W.2d 353, 357 (Tex. App. Austin 1990, *no writ). Cf. Humble Oil & Refining Co. v. Calvert,* 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.,* 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor,* 24 S.W.3d 581 (Tex. App. Austin 2000, *pet. denied);* and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.,* 563 S.W.2d 916 (Tex. 1978).)

The commission's interpretation of the RIA requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance" (Texas Government Code, §2001.035). The legislature specifically identified Texas Government Code, §2001.0225 as falling under this standard. As discussed in this analysis and elsewhere in this preamble, the commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

The proposed rule implements requirements of the FCAA, specifically 42 USC, §7410. The specific intent of the proposed revisions are to add references to federal regulations in certain definitions that are duplicative with federal regulation that the state has no authority to legally change, and to correct an inadvertent omission in the definition of Reportable quantity. The amendment was not developed solely under the general powers of the agency, but are authorized by specific sections of Texas Health and Safety Code, Chapter 382 (also known as the Texas Clean Air Act), and the Texas Water Code, which are cited in the STATUTORY AUTHORITY section of this proposal, including Texas Health and Safety Code, §§382.011, 382.012, and 382.017. Therefore, this proposed rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or §17 or §19, Article I, Texas Constitution; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact analysis for the proposed rulemaking action under Texas Government Code, §2007.043. The primary purpose of this proposed rulemaking action, as discussed elsewhere in this preamble, is to add

references to federal regulations in certain definitions that are duplicative with federal regulation that the state has no authority to legally change, and to correct an inadvertent omission in the definition of reportable quantity. The proposed rule will not create any additional burden on private real property. The proposed rule will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The proposal also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the proposed rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.),* and commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the CMP. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable CMP goals and policies.

The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). The proposed amendment replaces existing definitions with references to federal regulations that the state has no authority to change and correct an inadvertent omission in the definition of reportable quantity. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 CFR, to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

Written comments on the consistency of the proposed rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Chapter 101, Subchapter A is an applicable requirement of 30 TAC Chapter 122, Federal Operating Permits Program, in that the definitions in Subchapter A are relevant in defining and understanding other applicable requirements and applicability generally. If the proposed rule is adopted, owners or operators subject to the federal operating permit program must, consistent with the revision process in Chapter 122, upon the effective date of the adopted rulemaking, revise their operating permit to include any new requirements or address applicability related to the new Chapter 101 requirements.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on September 20, 2010, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Devon Ryan, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2008-030-116-PR. The comment period closes September 27, 2010. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html.* For further information, please contact Blake Stewart, Air Permits Division, (512) 239-6931.

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.102, concerning General Powers; §5.103, concerning Rules; and §5.105 concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the Texas Water Code and under Texas Health and Safety Code, Texas Clean Air Act (TCAA), §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; and §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a comprehensive plan for the proper control of the state's air.

The proposed amendment implements Texas Water Code, §5.103; and Texas Health and Safety Code, §382.017 and §382.012.

§101.1. Definitions.

Unless specifically defined in the Texas Clean Air Act (TCAA) or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms that are defined by the TCAA, the following terms, when used in the air quality rules in this title, have the following meanings, unless the context clearly indicates otherwise.

(1) Account--For those sources required to be permitted under Chapter 122 of this title (relating to Federal Operating Permits Program), all sources that are aggregated as a site. For all other sources, any combination of sources under common ownership or control and located on one or more contiguous properties, or properties contiguous except for intervening roads, railroads, rights-of-way, waterways, or similar divisions.

(2) Acid gas flare--A flare used exclusively for the incineration of hydrogen sulfide and other acidic gases derived from natural gas sweetening processes.

(3) Agency established facility identification number--For the purposes of Subchapter F of this chapter (relating to Emissions Events and Scheduled Maintenance, Startup, and Shutdown Activities), a unique alphanumeric code required to be assigned by the owner or operator of a regulated entity that the emission inventory reporting requirements of §101.10 of this title (relating to Emissions Inventory Requirements) are applicable to each facility at that regulated entity.

(4) Ambient air--That portion of the atmosphere, external to buildings, to which the general public has access.

(5) Background--Background concentration, the level of air contaminants that cannot be reduced by controlling emissions from man-made sources. It is determined by measuring levels in non-urban areas.

(6) Boiler--Any combustion equipment fired with solid, liquid, and/or gaseous fuel used to produce steam or to heat water.

(7) Capture system--All equipment (including, but not limited to, hoods, ducts, fans, booths, ovens, dryers, etc.) that contains, collects, and transports an air pollutant to a control device.

(8) Captured facility--A manufacturing or production facility that generates an industrial solid waste or hazardous waste that is routinely stored, processed, or disposed of on a shared basis in an integrated waste management unit owned, operated by, and located within a contiguous manufacturing complex.

(9) Carbon adsorber--An add-on control device that uses activated carbon to adsorb volatile organic compounds from a gas stream.

(10) Carbon adsorption system--A carbon adsorber with an inlet and outlet for exhaust gases and a system to regenerate the saturated adsorbent.

(11) Coating--A material applied onto or impregnated into a substrate for protective, decorative, or functional purposes. Such materials include, but are not limited to, paints, varnishes, sealants, adhesives, thinners, diluents, inks, maskants, and temporary protective coatings.

(12) Cold solvent cleaning--A batch process that uses liquid solvent to remove soils from the surfaces of parts or to dry the parts by spraying, brushing, flushing, and/or immersion while maintaining the solvent below its boiling point. Wipe cleaning (hand cleaning) is not included in this definition.

(13) Combustion unit--Any boiler plant, furnace, incinerator, flare, engine, or other device or system used to oxidize solid, liquid, or gaseous fuels, but excluding motors and engines used in propelling land, water, and air vehicles.

(14) Combustion turbine--Any gas turbine system that is gas and/or liquid fuel fired with or without power augmentation. This unit is either attached to a foundation or is portable equipment operated at a specific minor or major source for more than 90 days in any 12-month period. Two or more gas turbines powering one shaft will be treated as one unit.

(15) Commercial hazardous waste management facility--Any hazardous waste management facility that accepts hazardous waste or polychlorinated biphenyl compounds for a charge, except a captured facility that disposes only waste generated on-site or a facility that accepts waste only from other facilities owned or effectively controlled by the same person.

(16) Commercial incinerator--An incinerator used to dispose of waste material from retail and wholesale trade establishments.

(17) Commercial medical waste incinerator--A facility that accepts for incineration medical waste generated outside the property boundaries of the facility.

(18) Component--A piece of equipment, including, but not limited to, pumps, valves, compressors, and pressure relief valves that has the potential to leak volatile organic compounds.

(19) Condensate--Liquids that result from the cooling and/or pressure changes of produced natural gas. Once these liquids are processed at gas plants or refineries or in any other manner, they are no longer considered condensates.

(20) Construction-demolition waste--Waste resulting from construction or demolition projects.

(21) Control system or control device--Any part, chemical, machine, equipment, contrivance, or combination of same, used to destroy, eliminate, reduce, or control the emission of air contaminants to the atmosphere.

(22) Conveyorized degreasing--A solvent cleaning process that uses an automated parts handling system, typically a conveyor, to automatically provide a continuous supply of parts to be cleaned or dried using either cold solvent or vaporized solvent. A conveyorized degreasing process is fully enclosed except for the conveyor inlet and exit portals.

(23) Criteria pollutant or standard--Any pollutant for which there is a national ambient air quality standard established under 40 Code of Federal Regulations Part 50.

(24) Custody transfer--The transfer of produced crude oil and/or condensate, after processing and/or treating in the producing operations, from storage tanks or automatic transfer facilities to pipelines or any other forms of transportation.

(25) *De minimis* impact--A change in ground level concentration of an air contaminant as a result of the operation of any new major stationary source or of the operation of any existing source that has undergone a major modification that does not exceed the following specified amounts.
Figure: 30 TAC §101.1(25) (No change.)

(26) Domestic wastes--The garbage and rubbish normally resulting from the functions of life within a residence.

(27) Emissions banking--A system for recording emissions reduction credits so they may be used or transferred for future use.

(28) Emissions event--Any upset event or unscheduled maintenance, startup, or shutdown activity, from a common cause that results in unauthorized emissions of air contaminants from one or more emissions points at a regulated entity.

(29) Emissions reduction credit--Any stationary source emissions reduction that has been banked in accordance with Chapter 101, Subchapter H, Division 1 of this title (relating to Emission Credit Banking and Trading).

(30) Emissions reduction credit certificate--The certificate issued by the executive director that indicates the amount of qualified reduction available for use as offsets and the length of time the reduction is eligible for use.

(31) Emissions unit--Any part of a stationary source that emits, or would have the potential to emit, any pollutant subject to regulation under the Federal Clean Air Act.

(32) Excess opacity event--When an opacity reading is equal to or exceeds 15 additional percentage points above an applicable opacity limit, averaged over a six-minute period.

(33) Exempt solvent--Those carbon compounds or mixtures of carbon compounds used as solvents that have been excluded from the definition of volatile organic compound.

(34) External floating roof--A cover or roof in an open top tank that rests upon or is floated upon the liquid being contained and is equipped with a single or double seal to close the space between the roof edge and tank shell. A double seal consists of two complete and separate closure seals, one above the other, containing an enclosed space between them.

(35) Federal motor vehicle regulation--Control of Air Pollution from Motor Vehicles and Motor Vehicle Engines, 40 Code of Federal Regulations Part 85.

(36) Federally enforceable--All limitations and conditions that are enforceable by the United States Environmental Protection Agency administrator, including those requirements developed under 40 Code of Federal Regulations (CFR) Parts 60 and 61; requirements within any applicable state implementation plan (SIP); and any permit requirements established under 40 CFR §52.21 or under regulations approved under 40 CFR Part 51, Subpart 1, including operating permits issued under the approved program that is incorporated into the SIP and that expressly requires adherence to any permit issued under such program.

(37) Flare--An open combustion unit (i.e., lacking an enclosed combustion chamber) whose combustion air is provided by uncontrolled ambient air around the flame, and that is used as a control device. A flare may be equipped with a radiant heat shield (with or without a refractory lining), but is not equipped with a flame air control damping system to control the air/fuel mixture. In addition, a flare may also use auxiliary fuel. The combustion flame may be elevated or at ground level. A vapor combustor, as defined in this section, is not considered a flare.

(38) Fuel oil--Any oil meeting the American Society for Testing and Materials (ASTM) specifications for fuel oil in ASTM D396-01, Standard Specifications for Fuel Oils, revised 2001. This includes fuel oil grades 1, 1 (Low Sulfur), 2, 2 (Low Sulfur), 4 (Light), 4, 5 (Light), 5 (Heavy), and 6.

(39) Fugitive emission--Any gaseous or particulate contaminant entering the atmosphere that could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening designed to direct or control its flow.

(40) Garbage--Solid waste consisting of putrescible animal and vegetable waste materials resulting from the handling, preparation, cooking, and consumption of food, including waste materials from markets, storage facilities, and handling and sale of produce and other food products.

(41) Gasoline--Any petroleum distillate having a Reid vapor pressure of four pounds per square inch (27.6 kilopascals) or greater that is produced for use as a motor fuel, and is commonly called gasoline.

(42) Hazardous wastes--Any solid waste identified or listed as a hazardous waste by the administrator of the United States Environmental Protection Agency under the federal Solid Waste Disposal Act, as amended by Resource Conservation and Recovery Act, 42 United States Code, §§6901 *et seq.,* as amended.

(43) Heatset (used in offset lithographic printing)--Any operation where heat is required to evaporate ink oil from the printing ink. Hot air dryers are used to deliver the heat.

(44) High-bake coatings--Coatings designed to cure at temperatures above 194 degrees Fahrenheit.

(45) High-volume low-pressure spray guns--Equipment used to apply coatings by means of a spray gun that operates between 0.1 and 10.0 pounds per square inch gauge air pressure measured at the air cap.

(46) Incinerator--An enclosed combustion apparatus and attachments that is used in the process of burning wastes for the primary purpose of reducing its volume and weight by removing the combustibles of the waste and is equipped with a flue for conducting products of combustion to the atmosphere. Any combustion device that burns 10% or more of solid waste on a total British thermal unit (Btu) heat input basis averaged over any one-hour period is considered to be an incinerator. A combustion device without instrumentation or methodology to determine hourly flow rates of solid waste and burning 1.0% or more of solid waste on a total Btu heat input basis averaged annually is also considered to be an incinerator. An open-trench type (with closed ends) combustion unit may be considered an incinerator when approved by the executive director. Devices burning untreated wood scraps, waste wood, or sludge from the treatment of wastewater from the process mills as a primary fuel for heat recovery are not included under this definition. Combustion devices permitted under this title as combustion devices other than incinerators will not be considered incinerators for application of any rule within this title provided they are installed and operated in compliance with the condition of all applicable permits.

(47) Industrial boiler--A boiler located on the site of a facility engaged in a manufacturing process where substances are transformed into new products, including the component parts of products, by mechanical or chemical processes.

(48) Industrial furnace--Cement kilns; lime kilns; aggregate kilns; phosphate kilns; coke ovens; blast furnaces; smelting, melting, or refining furnaces, including pyrometallurgical devices such as cupolas, reverberator furnaces, sintering machines, roasters, or foundry furnaces; titanium dioxide chloride process oxidation reactors; methane reforming furnaces; pulping recovery furnaces; combustion devices used in the recovery of sulfur values from spent sulfuric acid; and other devices the commission may list.

(49) Industrial solid waste--Solid waste resulting from, or incidental to, any process of industry or manufacturing, or mining or agricultural operations, classified as follows.

(A) Class 1 industrial solid waste or Class 1 waste is any industrial solid waste designated as Class 1 by the executive director as any industrial solid waste or mixture of industrial solid wastes that because of its concentration or physical or chemical characteristics is toxic, corrosive, flammable, a strong sensitizer or irritant, a generator of sudden pressure by decomposition, heat, or other means, and may pose a substantial present or potential danger to human health or the environment when improperly processed, stored, transported, or otherwise managed, including hazardous industrial waste, as defined in §335.1 and §335.505 of this title (relating to Definitions and Class 1 Waste Determination).

(B) Class 2 industrial solid waste is any individual solid waste or combination of industrial solid wastes that cannot be described as Class 1 or Class 3, as defined in §335.506 of this title (relating to Class 2 Waste Determination).

(C) Class 3 industrial solid waste is any inert and essentially insoluble industrial solid waste, including materials such as rock, brick, glass, dirt, and certain plastics and rubber, etc., that are not readily decomposable as defined in §335.507 of this title (relating to Class 3 Waste Determination).

(50) Internal floating cover--A cover or floating roof in a fixed roof tank that rests upon or is floated upon the liquid being contained, and is equipped with a closure seal or seals to close the space between the cover edge and tank shell.

(51) Leak--A volatile organic compound concentration greater than 10,000 parts per million by volume or the amount specified by applicable rule, whichever is lower; or the dripping or exuding of process fluid based on sight, smell, or sound.

(52) Liquid fuel--A liquid combustible mixture, not derived from hazardous waste, with a heating value of at least 5,000 British thermal units per pound.

(53) Liquid-mounted seal--A primary seal mounted in continuous contact with the liquid between the tank wall and the floating roof around the circumference of the tank.

(54) Maintenance area--A geographic region of the state previously designated nonattainment under the Federal Clean Air Act Amendments of 1990 and subsequently redesignated to attainment subject to the requirement to develop a maintenance plan under 42 United States Code, §7505a, as described in 40 Code of Federal Regulations Part 81 and in pertinent *Federal Register* notices. [~~The following are the maintenance areas within the state:~~]

[~~(A) Victoria Ozone Maintenance Area 60 (Federal Register (FR) 12453) - Victoria County; and~~]

[~~(B) Collin County Lead Maintenance Area (64 FR 55421) - Portion of Collin County. Eastside: Starting at the intersection of South Fifth Street and the fence line approximately 1,000 feet south of the Exide property line going north to the intersection of South Fifth Street and Eubanks Street; Northside: Proceeding west on Eubanks to the Burlington Railroad tracks; Westside: Along the Burlington Railroad tracks to the fence line approximately 1,000 feet south of the Exide property line; Southside: Fence line approximately 1,000 feet south of the Exide property line.~~]

(55) Maintenance plan--A revision to the applicable state implementation plan, meeting the requirements of 42 United States Code, §7505a.

(56) Marine vessel--Any watercraft used, or capable of being used, as a means of transportation on water, and that is constructed or adapted to carry, or that carries, oil, gasoline, or other volatile organic liquid in bulk as a cargo or cargo residue.

(57) Mechanical shoe seal--A metal sheet that is held vertically against the storage tank wall by springs or weighted levers and is connected by braces to the floating roof. A flexible coated fabric (envelope) spans the annular space between the metal sheet and the floating roof.

(58) Medical waste--Waste materials identified by the Department of State Health Services as "special waste from health care-related facilities" and those waste materials commingled and discarded with special waste from health care-related facilities.

(59) Metropolitan Planning Organization--That organization designated as being responsible, together with the state, for conducting the continuing, cooperative, and comprehensive planning process under 23 United States Code (USC), §134 and 49 USC, §1607.

(60) Mobile emissions reduction credit--The credit obtained from an enforceable, permanent, quantifiable, and surplus (to other federal and state rules) emissions reduction generated by a mobile source as set forth in Chapter 114, Subchapter F of this title (relating to Vehicle Retirement and Mobile Emission Reduction Credits), and that has been banked in accordance with Subchapter H, Division 1 of this chapter.

(61) Motor vehicle--A self-propelled vehicle designed for transporting persons or property on a street or highway.

(62) Motor vehicle fuel dispensing facility--Any site where gasoline is dispensed to motor vehicle fuel tanks from stationary storage tanks.

(63) Municipal solid waste--Solid waste resulting from, or incidental to, municipal, community, commercial, institutional, and recreational activities, including garbage, rubbish, ashes, street cleanings, dead animals, abandoned automobiles, and all other solid waste except industrial solid waste.

(64) Municipal solid waste facility--All contiguous land, structures, other appurtenances, and improvements on the land used for processing, storing, or disposing of solid waste. A facility may be publicly or privately owned and may consist of several processing, storage, or disposal operational units, e.g., one or more landfills, surface impoundments, or combinations of them.

(65) Municipal solid waste landfill--A discrete area of land or an excavation that receives household waste and that is not a land application unit, surface impoundment, injection well, or waste pile, as those terms are defined under 40 Code of Federal Regulations §257.2. A municipal solid waste landfill (MSWLF) unit also may receive other types of Resource Conservation and Recovery Act Subtitle D wastes, such as commercial solid waste, nonhazardous sludge, conditionally exempt small-quantity generator waste, and industrial solid waste. Such a landfill may be publicly or privately owned. An MSWLF unit may be a new MSWLF unit, an existing MSWLF unit, or a lateral expansion.

(66) National ambient air quality standard--Those standards established under 42 United States Code, §7409, including standards for carbon monoxide, lead, nitrogen dioxide, ozone, inhalable particulate matter, and sulfur dioxide.

(67) Net ground-level concentration--The concentration of an air contaminant as measured at or beyond the property boundary minus the representative concentration flowing onto a property as measured at any point. Where there is no expected influence of the air contaminant flowing onto a property from other sources, the net ground level concentration may be determined by a measurement at or beyond the property boundary.

(68) New source--Any stationary source, the construction or modification of which was commenced after March 5, 1972.

(69) Nitrogen oxides (NO_x)--The sum of the nitric oxide and nitrogen dioxide in the flue gas or emission point, collectively expressed as nitrogen dioxide.

(70) Nonattainment area--A defined region within the state that is designated by the United States Environmental Protection Agency (EPA) as failing to meet the national ambient air quality standard (NAAQS or standard) for a pollutant for which a standard exists. The EPA will designate the area as nonattainment under the provisions of 42 United States Code, §7407(d). For the official list and boundaries of nonattainment areas, see 40 Code of Federal Regulations (CFR) Part 81 and pertinent *Federal Register* [~~(FR)~~] notices. The designations and classifications for the one-hour ozone NAAQS

in 40 CFR Part 81 were retained for the purpose of anti-backsliding and upon determination by the EPA that any requirement is no longer required to prevent anti-backsliding, then that requirement no longer applies. [~~The following areas comprise the nonattainment areas within the state for all national ambient air quality standards (NAAQS). EPA has indicated that it will revoke the one-hour ozone standard in full, including the associated designations and classifications, on June 15, 2005, which is one year following the effective date of the designations for the eight-hour NAAQS of June 15, 2004.~~]

[~~(A) Carbon monoxide (CO). El Paso CO nonattainment area (56 FR 56694)--Classified as a Moderate CO nonattainment area with a design value less than or equal to 12.7 parts per million. Portion of El Paso County. Portion of the city limits of El Paso: That portion of the City of El Paso bounded on the north by Highway 10 from Porfirio Diaz Street to Raynolds Street, Raynolds Street from Highway 10 to the Southern Pacific Railroad lines, the Southern Pacific Railroad lines from Raynolds Street to Highway 62, Highway 62 from the Southern Pacific Railroad lines to Highway 20, and Highway 20 from Highway 62 to Polo Inn Road. Bounded on the east by Polo Inn Road from Highway 20 to the Texas-Mexico border. Bounded on the south by the Texas-Mexico border from Polo Inn Road to Porfirio Diaz Street. Bounded on the west by Porfirio Diaz Street from the Texas-Mexico border to Highway 10.~~]

[~~(B) Inhalable particulate matter (PM_{10}). El Paso PM_{10} nonattainment area (56 FR 56694)--Classified as a Moderate PM_{10} nonattainment area. Portion of El Paso County that comprises the El Paso city limit boundaries as they existed on November 15, 1990.~~]

[~~(C) Lead. No designated nonattainment areas.~~]

[~~(D) Nitrogen dioxide. No designated nonattainment areas.~~]

[~~(E) Ozone (one-hour).~~]

~~*(i)* Houston-Galveston-Brazoria (HGB) one-hour ozone nonattainment area (56 FR 56694) - Classified as a Severe-17 ozone nonattainment area. Consists of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties.~~]

~~*(ii)* El Paso one-hour ozone nonattainment area (56 FR 56694) - Classified as a Serious ozone nonattainment area. Consists of El Paso County.~~]

~~*(iii)* Beaumont-Port Arthur (BPA) one-hour ozone nonattainment area (69 FR 16483) - Classified as a Serious ozone nonattainment area. Consists of Hardin, Jefferson, and Orange Counties.~~]

~~*(iv)* Dallas-Fort Worth one-hour ozone nonattainment area (63 FR 8128) - Classified as a Serious ozone nonattainment area. Consists of Collin, Dallas, Denton, and Tarrant Counties.~~]

[~~(F) Ozone (eight-hour).~~]

~~*(i)* HGB eight-hour ozone nonattainment area (69 FR 23936) - Classified as a Moderate ozone nonattainment area. Consists of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties.~~]

~~*(ii)* BPA eight-hour ozone nonattainment area (69 FR 23936) - Classified as a Marginal ozone nonattainment area. Consists of Hardin, Jefferson, and Orange Counties.~~]

~~*(iii)* Dallas-Fort Worth eight-hour ozone nonattainment area (69 FR 23936) - Classified as a Moderate ozone nonattainment area. Consists of Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties.~~]

~~*(iv)* San Antonio eight-hour ozone nonattainment area (69 FR 23936) - Classified under the Federal Clean Air Act, Title I, Part D, Subpart 1 (42 United States Code, §7502), nonattainment deferred to September 30, 2005, or as extended by EPA.~~]

[~~(G) Sulfur dioxide. No designated nonattainment areas.~~]

(71) Non-reportable emissions event--Any emissions event that in any 24-hour period does not result in an unauthorized emission from any emissions point equal to or in excess of the reportable quantity as defined in this section.

(72) Opacity--The degree to which an emission of air contaminants obstructs the transmission of light expressed as the percentage of light obstructed as measured by an optical instrument or trained observer.

(73) Open-top vapor degreasing--A batch solvent cleaning process that is open to the air and that uses boiling solvent to create solvent vapor used to clean or dry parts through condensation of the hot solvent vapors on the parts.

(74) Outdoor burning--Any fire or smoke-producing process that is not conducted in a combustion unit.

(75) Particulate matter--Any material, except uncombined water, that exists as a solid or liquid in the atmosphere or in a gas stream at standard conditions.

(76) Particulate matter emissions--All finely-divided solid or liquid material, other than uncombined water, emitted to the ambient air as measured by United States Environmental Protection Agency Reference Method 5, as specified at 40 Code of Federal Regulations (CFR) Part 60, Appendix A, modified to include particulate caught by an impinger train; by an equivalent or alternative method, as specified at 40 CFR Part 51; or by a test method specified in an approved state implementation plan.

(77) Petroleum refinery--Any facility engaged in producing gasoline, kerosene, distillate fuel oils, residual fuel oils, lubricants, or other products through distillation of crude oil, or through the redistillation, cracking, extraction, reforming, or other processing of unfinished petroleum derivatives.

(78) PM_{10}--Particulate matter with an aerodynamic diameter less than or equal to a nominal ten micrometers as measured by a reference method based on 40 Code of Federal Regulations (CFR) Part 50, Appendix J, and designated in accordance with 40 CFR Part 53, or by an equivalent method designated with that Part 53.

(79) PM_{10} emissions--Finely-divided solid or liquid material with an aerodynamic diameter less than or equal to a nominal ten micrometers emitted to the ambient air as measured by an applicable reference method, or an equivalent or alternative method specified in 40 Code of Federal Regulations Part 51, or by a test method specified in an approved state implementation plan.

(80) Polychlorinated biphenyl compound--A compound subject to 40 Code of Federal Regulations Part 761.

(81) Process or processes--Any action, operation, or treatment embracing chemical, commercial, industrial, or manufacturing factors such as combustion units, kilns, stills, dryers, roasters, and equipment used in connection therewith, and all other methods or forms of manufacturing or processing that may emit smoke, particulate matter, gaseous matter, or visible emissions.

(82) Process weight per hour--"Process weight" is the total weight of all materials introduced or recirculated into any specific process that may cause any discharge of air contaminants into the at-

mosphere. Solid fuels charged into the process will be considered as part of the process weight, but liquid and gaseous fuels and combustion air will not. The "process weight per hour" will be derived by dividing the total process weight by the number of hours in one complete operation from the beginning of any given process to the completion thereof, excluding any time during that the equipment used to conduct the process is idle. For continuous operation, the "process weight per hour" will be derived by dividing the total process weight for a 24-hour period by 24.

(83) Property--All land under common control or ownership coupled with all improvements on such land, and all fixed or movable objects on such land, or any vessel on the waters of this state.

(84) Reasonable further progress--Annual incremental reductions in emissions of the applicable air contaminant that are sufficient to provide for attainment of the applicable national ambient air quality standard in the designated nonattainment areas by the date required in the state implementation plan.

(85) Regulated entity--All regulated units, facilities, equipment, structures, or sources at one street address or location that are owned or operated by the same person. The term includes any property under common ownership or control identified in a permit or used in conjunction with the regulated activity at the same street address or location. Owners or operators of pipelines, gathering lines, and flowlines under common ownership or control in a particular county may be treated as a single regulated entity for purposes of assessment and regulation of emissions events.

(86) Remote reservoir cold solvent cleaning--Any cold solvent cleaning operation in which liquid solvent is pumped to a sink-like work area that drains solvent back into an enclosed container while parts are being cleaned, allowing no solvent to pool in the work area.

(87) Reportable emissions event--Any emissions event that in any 24-hour period, results in an unauthorized emission from any emissions point equal to or in excess of the reportable quantity as defined in this section.

(88) Reportable quantity (RQ)--Is as follows:

(A) for individual air contaminant compounds and specifically listed mixtures by name or Chemical Abstracts Service (CAS) number, either:

(i) the lowest of the quantities:

(I) listed in 40 Code of Federal Regulations (CFR) Part 302, Table 302.4, the column "final RQ";

(II) listed in 40 CFR Part 355, Appendix A, the column "Reportable Quantity"; or

(III) listed as follows:

(-a-) acetaldehyde - 1,000 pounds, except in the Houston-Galveston-Brazoria (HGB) and Beaumont-Port Arthur (BPA) ozone nonattainment areas as defined in paragraph (70) [~~(70)(E)(i) and (iii)~~] of this section, where the RQ must be 100 pounds;

(-b-) butanes (any isomer) - 5,000 pounds;

(-c-) butenes (any isomer, except 1,3-butadiene) - 5,000 pounds, except in the HGB and BPA ozone nonattainment areas as defined in paragraph (70) [~~(70)(E)(i) and (iii)~~] of this section, where the RQ must be 100 pounds;

(-d-) carbon monoxide - 5,000 pounds;

(-e-) 1-chloro-1,1-difluoroethane (HCFC-142b) - 5,000 pounds;

(-f-) chlorodifluoromethane (HCFC-22) - 5,000 pounds;

(-g-) 1-chloro-1-fluoroethane (HCFC-151a) - 5,000 pounds;

(-h-) chlorofluoromethane (HCFC-31) - 5,000 pounds;

(-i-) chloropentafluoroethane (CFC-115) - 5,000 pounds;

(-j-) 2-chloro-1,1,1,2-tetrafluoroethane (HCFC-124) - 5,000 pounds;

(-k-) 1-chloro-1,1,2,2 tetrafluoroethane (HCFC-124a) - 5,000 pounds;

(-l-) 1,1,1,2,3,4,4,5,5,5-decafluoropentane (HFC 43-10mee) - 5,000 pounds;

(-m-) decanes (any isomer) - 5,000 pounds;

(-n-) 1,1-dichloro-1-fluoroethane (HCFC-141b) - 5,000 pounds;

(-o-) 3,3-dichloro-1,1,2,2-pentafluoropropane (HCFC-225ca) - 5,000 pounds;

(-p-) 1,3-dichloro-1,1,2,2,3-pentafluoropropane (HCFC-225cb) - 5,000 pounds;

(-q-) 1,2-dichloro-1,1,2,2-tetrafluoroethane (CFR-114) - 5,000 pounds;

(-r-) 1,1-dichlorotetrafluoroethane (CFC-114a) - 5,000 pounds;

(-s-) 1,2-dichloro-1,1,2-trifluoroethane (HCFC-123a) - 5,000 pounds;

(-t-) 1,1-difluoroethane (HFC-152a) - 5,000 pounds;

(-u-) difluoromethane (HFC-32) - 5,000 pounds;

(-v-) ethanol - 5,000 pounds;

(-w-) ethylene - 5,000 pounds, except in the HGB and BPA ozone nonattainment areas as defined in paragraph (70) [~~(70)(E)(i) and (iii)~~] of this section, where the RQ must be 100 pounds;

(-x-) ethylfluoride (HFC-161) - 5,000 pounds;

(-y-) 1,1,1,2,3,3,3-heptafluoropropane (HFC-227ea) - 5,000 pounds;

(-z-) 1,1,1,3,3,3-hexafluoropropane (HFC-236fa) - 5,000 pounds;

(-aa-) 1,1,1,2,3,3-hexafluoropropane (HFC-236ea) - 5,000 pounds;

(-bb-) hexanes (any isomer) - 5,000 pounds;

(-cc-) isopropyl alcohol - 5,000 pounds;

(-dd-) mineral spirits - 5,000 pounds;

(-ee-) octanes (any isomer) - 5,000 pounds;

(-ff-) oxides of nitrogen - 200 pounds in ozone nonattainment, ozone maintenance, early action compact areas, Nueces County, and San Patricio County, and 5,000 pounds in all other areas of the state, which should be used instead of the RQs for nitrogen oxide and nitrogen dioxide provided in 40 CFR Part 302, Table 302.4, the column "final RQ";

(-gg-) pentachlorofluoroethane (CFR-111) - 5,000 pounds;

(-hh-) 1,1,1,3,3-pentafluorobutane (HFC-365mfc) - 5,000 pounds;

(-ii-) pentafluoroethane (HFC-125) - 5,000 pounds;

(-jj-) 1,1,2,2,3-pentafluoropropane (HFC-245ca) - 5,000 pounds;

(-kk-) 1,1,2,3,3-pentafluoropropane (HFC-245ea) - 5,000 pounds;

(-ll-) 1,1,1,2,3-pentafluoropropane (HFC-245eb) - 5,000 pounds;

(-mm-) 1,1,1,3,3-pentafluoropropane (HFC-245fa) - 5,000 pounds;

(-nn-) pentanes (any isomer) - 5,000 pounds;

(-oo-) propane - 5,000 pounds;

(-pp-) propylene - 5,000 pounds, except in the HGB and BPA ozone nonattainment areas as defined in paragraph (70) [~~(70)(E)(i) and (iii)~~] of this section, where the RQ must be 100 pounds;

(-qq-) 1,1,2,2-terachlorodifluoroethane (CFR -112) - 5,000 pounds;

(-rr-) 1,1,1,2-tetrachlorodifluoroethane (CFC-112a) - 5,000 pounds;

(-ss-) 1,1,2,2-tetrafluoroethane (HFC-134) - 5,000 pounds;

(-tt-) 1,1,1,2-tetrafluoroethane (HFC-134a) - 5,000 pounds;

(-uu-) 1,1,2-trichloro-1,2,2-trifluoroethane (CFR-113) - 5,000 pounds;

(-vv-) 1,1,1-trichloro-2,2,2-trilfloroethane (CFC-113a) - 5,000 pounds;

(-ww-) 1,1,1-trifluoro-2,2-dichloroethane (HCFC-123) - 5,000 pounds;

(-xx-) 1,1,1-trifluoroethane (HFC-143a) - 5,000 pounds;

(-yy-) trifluoromethane (HFC-23) - 5,000 pounds; or

(-zz-) toluene - 1,000 pounds, except in the HGB and BPA ozone nonattainment areas as defined in paragraph (70) [~~(70)(E)(i) and (iii)~~] of this section, where the RQ must be 100 pounds;

(ii) if not listed in clause (i) of this subparagraph, 100 pounds;

(B) for mixtures of air contaminant compounds:

(i) where the relative amount of individual air contaminant compounds is known through common process knowledge or prior engineering analysis or testing, any amount of an individual air contaminant compound that equals or exceeds the amount specified in subparagraph (A) of this paragraph;

(ii) where the relative amount of individual air contaminant compounds in subparagraph (A)(i) of this paragraph is not known, any amount of the mixture that equals or exceeds the amount for any single air contaminant compound that is present in the mixture and listed in subparagraph (A)(i) of this paragraph;

(iii) where each of the individual air contaminant compounds listed in subparagraph (A)(i) of this paragraph are known to be less than 0.02% by weight of the mixture, and each of the other individual air contaminant compounds covered by subparagraph (A)(ii) of this paragraph are known to be less than 2.0% by weight of the mixture, any total amount of the mixture of air contaminant compounds greater than or equal to 5,000 pounds; or

(iv) where natural gas excluding carbon dioxide, water, nitrogen, methane, ethane, noble gases, hydrogen, and oxygen or air emissions from crude oil are known to be in an amount greater than or equal to 5,000 pounds or the associated hydrogen sulfide and mercaptans in a total amount greater than 100 pounds, whichever occurs first;

(C) for opacity from boilers and combustion turbines as defined in this section fueled by natural gas, coal, lignite, wood, fuel oil containing hazardous air pollutants at a concentration of less than 0.02% by weight, opacity that is equal to or exceeds 15 additional percentage points above the applicable limit, averaged over a six-minute period. Opacity is the only RQ applicable to boilers and combustion turbines described in this paragraph; or

(D) for facilities where air contaminant compounds are measured directly by a continuous emission monitoring system providing updated readings at a minimum 15-minute interval an amount, approved by the executive director based on any relevant conditions and a screening model, that would be reported prior to ground level concentrations reaching at any distance beyond the closest regulated entity property line:

(i) less than one-half of any applicable ambient air standards; and

(ii) less than two times the concentration of applicable air emission limitations.

(89) Rubbish--Nonputrescible solid waste, consisting of both combustible and noncombustible waste materials. Combustible rubbish includes paper, rags, cartons, wood, excelsior, furniture, rubber, plastics, yard trimmings, leaves, and similar materials. Noncombustible rubbish includes glass, crockery, tin cans, aluminum cans, metal furniture, and like materials that will not burn at ordinary incinerator temperatures (1,600 degrees Fahrenheit to 1,800 degrees Fahrenheit).

(90) Scheduled maintenance, startup, or shutdown activity--For activities with unauthorized emissions that are expected to exceed a reportable quantity (RQ), a scheduled maintenance, startup, or shutdown activity is an activity that the owner or operator of the regulated entity whether performing or otherwise affected by the activity, provides prior notice and a final report as required by §101.211 of this title (relating to Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements); the notice or final report includes the information required in §101.211 of this title; and the actual unauthorized emissions from the activity do not exceed the emissions estimates submitted in the initial notification by more than an RQ. For activities with unauthorized emissions that are not expected to, and do not, exceed an RQ, a scheduled maintenance, startup, or shutdown activity is one that is recorded as required by §101.211 of this title. Expected excess opacity events as described in §101.201(e) of this title (relating to Emissions Event Reporting and Recordkeeping Requirements) resulting from scheduled maintenance, startup, or shutdown activities are those that provide prior notice (if required), and are recorded and reported as required by §101.211 of this title.

(91) Sludge--Any solid or semi-solid, or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant; water supply treatment plant, exclusive of the treated effluent from a wastewater treatment plant; or air pollution control equipment.

(92) Smoke--Small gas-born particles resulting from incomplete combustion consisting predominately of carbon and other combustible material and present in sufficient quantity to be visible.

(93) Solid waste--Garbage, rubbish, refuse, sludge from a waste water treatment plant, water supply treatment plant, or air pollution control equipment, and other discarded material, including solid, liquid, semisolid, or containerized gaseous material resulting from industrial, municipal, commercial, mining, and agricultural operations and from community and institutional activities. The term does not include:

(A) solid or dissolved material in domestic sewage, or solid or dissolved material in irrigation return flows, or industrial discharges subject to regulation by permit issued under the Texas Water Code, Chapter 26;

(B) soil, dirt, rock, sand, and other natural or man-made inert solid materials used to fill land, if the object of the fill is to make the land suitable for the construction of surface improvements; or

(C) waste materials that result from activities associated with the exploration, development, or production of oil or gas, or geothermal resources, and other substance or material regulated by the Railroad Commission of Texas under Natural Resources Code, §91.101, unless the waste, substance, or material results from activities associated with gasoline plants, natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants and is hazardous waste as defined by the administrator of the United States Environmental Protection Agency under the federal Solid Waste Disposal Act, as amended by Resource Conservation and Recovery Act, as amended (42 United States Code, §§6901 *et seq.).*

(94) Sour crude--A crude oil that will emit a sour gas when in equilibrium at atmospheric pressure.

(95) Sour gas--Any natural gas containing more than 1.5 grains of hydrogen sulfide per 100 cubic feet, or more than 30 grains of total sulfur per 100 cubic feet.

(96) Source--A point of origin of air contaminants, whether privately or publicly owned or operated. Upon request of a source owner, the executive director shall determine whether multiple processes emitting air contaminants from a single point of emission will be treated as a single source or as multiple sources.

(97) Special waste from health care-related facilities--A solid waste that if improperly treated or handled, may serve to transmit infectious disease(s) and that is comprised of the following: animal waste, bulk blood and blood products, microbiological waste, pathological waste, and sharps.

(98) Standard conditions--A condition at a temperature of 68 degrees Fahrenheit (20 degrees Centigrade) and a pressure of 14.7 pounds per square inch absolute (101.3 kiloPascals).

(99) Standard metropolitan statistical area--An area consisting of a county or one or more contiguous counties that is officially so designated by the United States Bureau of the Budget.

(100) Submerged fill pipe--A fill pipe that extends from the top of a tank to have a maximum clearance of six inches (15.2 centimeters) from the bottom or, when applied to a tank that is loaded from the side, that has a discharge opening entirely submerged when the pipe used to withdraw liquid from the tank can no longer withdraw liquid in normal operation.

(101) Sulfur compounds--All inorganic or organic chemicals having an atom or atoms of sulfur in their chemical structure.

(102) Sulfuric acid mist/sulfuric acid--Emissions of sulfuric acid mist and sulfuric acid are considered to be the same air contaminant calculated as $H_2 SO_4$ and must include sulfuric acid liquid mist, sulfur trioxide, and sulfuric acid vapor as measured by Test Method 8 in 40 Code of Federal Regulations Part 60, Appendix A.

(103) Sweet crude oil and gas--Those crude petroleum hydrocarbons that are not "sour" as defined in this section.

(104) Total suspended particulate--Particulate matter as measured by the method described in 40 Code of Federal Regulations Part 50, Appendix B.

(105) Transfer efficiency--The amount of coating solids deposited onto the surface or a part of product divided by the total amount of coating solids delivered to the coating application system.

(106) True vapor pressure--The absolute aggregate partial vapor pressure, measured in pounds per square inch absolute, of all volatile organic compounds at the temperature of storage, handling, or processing.

(107) Unauthorized emissions--Emissions of any air contaminant except carbon dioxide, water, nitrogen, methane, ethane, noble gases, hydrogen, and oxygen that exceed any air emission limitation in a permit, rule, or order of the commission or as authorized by Texas Clean Air Act, §382.0518(g).

(108) Unplanned maintenance, startup, or shutdown activity--For activities with unauthorized emissions that are expected to exceed a reportable quantity or with excess opacity, an unplanned maintenance, startup, or shutdown activity is:

(A) a startup or shutdown that was not part of normal or routine facility operations, is unpredictable as to timing, and is not the type of event normally authorized by permit; or

(B) a maintenance activity that arises from sudden and unforeseeable events beyond the control of the operator that requires the immediate corrective action to minimize or avoid an upset or malfunction.

(109) Upset event--An unplanned and unavoidable breakdown or excursion of a process or operation that results in unauthorized emissions. A maintenance, startup, or shutdown activity that was reported under §101.211 of this title (relating to Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements), but had emissions that exceeded the reported amount by more than a reportable quantity due to an unplanned and unavoidable breakdown or excursion of a process or operation is an upset event.

(110) Utility boiler--A boiler used to produce electric power, steam, or heated or cooled air, or other gases or fluids for sale.

(111) Vapor combustor--A partially enclosed combustion device used to destroy volatile organic compounds by smokeless combustion without extracting energy in the form of process heat or steam. The combustion flame may be partially visible, but at no time does the device operate with an uncontrolled flame. Auxiliary fuel and/or a flame air control damping system that can operate at all times to control the air/fuel mixture to the combustor's flame zone, may be required to ensure smokeless combustion during operation.

(112) Vapor-mounted seal--A primary seal mounted so there is an annular space underneath the seal. The annular vapor space is bounded by the bottom of the primary seal, the tank wall, the liquid surface, and the floating roof or cover.

(113) Vent--Any duct, stack, chimney, flue, conduit, or other device used to conduct air contaminants into the atmosphere.

(114) Visible emissions--Particulate or gaseous matter that can be detected by the human eye. The radiant energy from an open flame is not considered a visible emission under this definition.

(115) Volatile organic compound--As defined in 40 Code of Federal Regulations §51.100(s), except §51.100(s)(2) - (4), as amended on November 29, 2004 (69 FR 69290).

(116) Volatile organic compound (VOC) water separator--Any tank, box, sump, or other container in which any VOC, floating on or contained in water entering such tank, box, sump, or other container, is physically separated and removed from such water prior to outfall, drainage, or recovery of such water.

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

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CHAPTER 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION

The Texas Commission on Environmental Quality (commission or TCEQ) proposes amendments to §116.12 and §116.150.

The proposed amendments to §116.12 and §116.150 will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

On July 18, 1997, the EPA revised the ozone National Ambient Air Quality Standard (NAAQS), promulgating an ozone standard of 0.08 parts per million (ppm) measured over an eight-hour period (the eight-hour ozone NAAQS or standard) (62 *Federal Register* 38856, July 18, 1997). Different groups and states challenged the final eight-hour ozone NAAQS, and ultimately, the United States Supreme Court upheld the EPA's action setting the NAAQS, but found that the EPA had incorrectly implemented the eight-hour ozone NAAQS by classifying areas only under Part D, Subpart 1 of the Federal Clean Air Act (FCAA) Amendments of 1990 and remanding other issues to the District of Columbia (D.C.) Circuit Court of Appeals *(Whitman v. American Trucking Assoc., 121 S.Ct. 903 (2001)).* On March 26, 2002, the D.C. Circuit Court of Appeals rejected the other challenges to the eight-hour ozone NAAQS *(American Trucking Assoc. v. EPA, 283 F.3d 355 (D.C. Cir. 2002)).* The EPA then proposed and adopted implementation rules to implement the eight-hour ozone NAAQS, addressing transition issues from the one-hour ozone NAAQS, the revocation of the one-hour ozone NAAQS, classification of areas for the eight-hour ozone NAAQS, and the specification of requirements relating to SIPs. EPA finalized designations for the 1997 eight-hour ozone NAAQS effective on June 15, 2004.

FCAA, §107 requires the EPA to designate areas nonattainment, attainment, or unclassifiable no later than one year after the EPA promulgates a new or revised NAAQS. For the ozone NAAQS, FCAA, §181 further requires that each area designated nonattainment shall be classified at the time of its designation, by operation of law, in accordance with FCAA, §181, Table 1. FCAA, §181, Table 1 prescribes the area class (ranging from marginal to extreme), the design value range (measured in ppm and in measurements relating to the one-hour ozone standard), and the primary standard attainment date (ranging from three years to 20 years after November 15, 1990, the effective date of the 1990 Amendments to the FCAA). Other specifics and exceptions are also provided in FCAA, §181. The classification scheme implemented by the United States Congress provided that areas with design values closer to attaining the one-hour ozone standard would have less time to attain the standard, and additional requirements of FCAA, Part D, Subpart 2 impose specific, more stringent requirements on areas as the classifications increase from marginal to moderate (and the corresponding design values are further from attainment of the one-hour ozone standard).

The EPA rules implementing the 1997 eight-hour ozone standard were adopted in two phases: the Phase I Rule, 69 *Federal Register* 23951, April 30, 2004, addressed a number of implementation issues for the 1997 eight-hour ozone NAAQS, including how areas should be classified for the 1997 eight-hour ozone NAAQS (since the classification requirements of FCAA, §181 were based on the one-hour ozone standard, the EPA needed to propose and finalize a classification scheme appropriate for the eight-hour ozone standard in accord with FCAA, §181), and which one-hour ozone standard requirements should continue to apply under the 1997 eight-hour ozone NAAQS; and the Phase II Rule, 70 *Federal Register* 71612, November 29, 2005, which addressed additional requirements.

In EPA's Phase I Rule, one of the issues that the EPA considered was the continued applicability of control requirements that applied in areas previously designated nonattainment for the one-hour ozone standard. As part of the Phase I Rule, the EPA considered several provisions of the FCAA that it stated were evidence of Congress' intent that certain obligations continue to apply when the EPA revises a NAAQS. The EPA stated that the FCCA, §175A(d) provided that areas could not remove controls that were mandated by the FCAA, Part D, Subpart 2 even after the area attained the NAAQS and was redesignated to attainment. At most, a state could move FCAA, Part D, Subpart 2 controls to the contingency plan provisions of the SIP. Another provision that the EPA reviewed and discussed in the Phase I Rule was FCAA, §172(e), which provides that if the EPA revises a NAAQS to make it be less stringent, then the EPA must promulgate regulations applicable to areas that have not attained the original NAAQS to require controls that are no less stringent than controls that applied to areas designated nonattainment prior to such relaxation. The EPA concluded in the Phase I Rule that ". . . if Congress intended areas to remain subject to the same level of control where a NAAQS was relaxed, they also intended that such controls not be weakened where the NAAQS is made more stringent . . ." (69 *Federal Register* 23972, April 30, 2004).

Based on this premise, the EPA adopted rules that provided for certain requirements to continue to apply to areas that were designated nonattainment for the one-hour ozone standard, depending on how they were designated for the eight-hour ozone NAAQS. Areas that were designated nonattainment for both the one-hour ozone and eight-hour ozone NAAQS were required to continue to apply certain requirements that applied under the one-hour ozone standard, with specific exceptions (40 Code of Federal Regulations (CFR) §51.905(a)(1)). These requirements included reasonably available control technology (RACT), inspection and maintenance programs (I/M), major source applicability cut-offs for purposes of RACT, rate of progress reductions (ROP), stage II vapor recovery, clean fuels fleet programs, clean fuel programs for boilers, transportation control measures, enhanced ambient monitoring requirements, required transportation controls, vehicle miles traveled requirements, and nitrogen oxides requirements (40 CFR §51.900(f)). The EPA also provided that nonattainment area New Source Review (NSR) requirements required by FCAA, §172(c)(5), 173, and 182 based on the area's previous one-hour ozone NAAQS classification were no longer required elements of an approvable SIP (40 CFR §51.905(e)(4)). The EPA also provided that areas would no longer have to meet requirements for conformity, the development of maintenance plans, or the penalty fee obligation for severe areas (40 CFR §51.905).

The EPA's Phase I Rule provided that areas that were nonattainment for the one-hour ozone NAAQS were not required to

continue to use the more stringent major source thresholds and emission offset requirements of the one-hour ozone standard when implementing NSR and Title V permitting for the 1997 eight-hour ozone standard.

All areas in Texas designated nonattainment for the 1997 eight-hour ozone NAAQS that were also designated nonattainment for the one-hour ozone NAAQS were classified at a "less stringent" level. Beaumont-Port Arthur (BPA) was classified as "serious" for the one-hour ozone NAAQS, but was classified as "moderate" for the 1997 eight-hour ozone NAAQS. Houston-Galveston-Brazoria (HGB) was classified as "severe" for the one-hour ozone NAAQS and originally classified as "moderate" for the 1997 eight-hour ozone NAAQS. The EPA has since reclassified the HGB area to "severe" for the 1997 eight-hour ozone NAAQS, pursuant to a voluntary reclassification request by the Governor of Texas. The Dallas-Fort Worth (DFW) area was classified as "serious" for the one-hour ozone NAAQS, and was classified as "moderate" for the 1997 eight-hour ozone NAAQS. The El Paso area was nonattainment for the one-hour ozone NAAQS, classified as "serious," but designated attainment for the 1997 eight-hour ozone NAAQS.

So, for example, a regulated entity in the HGB area triggered nonattainment review if the potential to emit was equal to or greater than 25 tons per year (tpy) under the "severe" classification for the one-hour ozone NAAQS, but only triggered nonattainment review under the "moderate" classification for the eight-hour ozone NAAQS if the potential to emit was equal to or greater than 100 tpy. Under the existing rules, since the HGB area has been reclassified to "severe" for the 1997 eight-hour ozone NAAQS, regulated entities must again utilize the same major source threshold and emission offset requirements that previously applied under the one-hour ozone standard.

After designations for the 1997 eight-hour ozone standard and the final Phase I Rule was effective, the commission proceeded with rulemaking to implement the requirements for the 1997 eight-hour ozone standard. The commission updated Chapter 116 to implement the changes from the Phase I Rule regarding the application of the 1997 eight-hour ozone standard for nonattainment NSR. On May 25, 2005, the commission adopted changes to Chapter 116, effective June 16, 2005, to provide that for the HGB, DFW, and BPA eight-hour ozone nonattainment areas, if the EPA promulgated rules requiring NSR permit applications in those areas to be evaluated for nonattainment NSR according to that area's one-hour ozone classification, then each application would be evaluated in accordance with the area's one-hour ozone classification. "Evaluation" was specified as including both the threshold for determining if there was a modification as well as the ratio of offsets required, along with any other applicable requirement that depended upon an area's nonattainment classification. In adopting this rule, the commission noted that although the Phase I Rule provided for the application of the eight-hour ozone standard for nonattainment NSR, the EPA had granted a partial reconsideration of the Phase I Rule specifically regarding that issue, and the result of the reconsideration could be a return to the one-hour ozone standard for application of nonattainment NSR. Because of this concern, the commission adopted contingency language in §116.150, and in the table footnotes in the figure located in the definition of major modification in §116.12. This contingency language was adopted to be effective in the event that the EPA completed rulemaking to require states to return to a one-hour ozone standard trigger for federal nonattainment NSR evaluations. In this proposal, the commission is proposing to remove this previously adopted contingency language.

The EPA Phase I Rule, and particularly, the EPA's determination that areas designated as nonattainment under the one-hour ozone standard would no longer be subject to one-hour nonattainment NSR requirements, was successfully challenged in *South Coast Air Quality Management District v. Environmental Protection Agency,* 472 F.3d 882 (D.C. Cir. 2006) and the rule was partially vacated and remanded to the EPA, as made clear in its revised opinion on June 8, 2007 *(South Coast Air Quality Management District v. Environmental Protection Agency,* 489 F.3d 1245 (D.C. Cir. 2007)). The *South Coast* decision was upheld by the United States Supreme Court on January 14, 2008.

In a guidance memo issued on October 3, 2007, the EPA stated that it interpreted the *South Coast* ruling as restoring NSR applicability thresholds and emission offset requirements pursuant to classifications under the one-hour ozone standard. The EPA also noted in this guidance memo that they intended to conduct rulemaking to conform the NSR regulations to the *South Coast* decision. EPA stated that it intended to issue an immediately-effective final rule under the authority of the Good Cause provision of the Federal Administrative Procedure Act to restore the NSR applicability thresholds and emission offsets associated with designated one-hour ozone nonattainment areas, and would begin a separate notice and comment rulemaking to address longer-term applicability of one-hour ozone NSR requirements, in particular, the conditions and mechanisms under which those one-hour ozone NSR requirements would cease to apply for NSR purposes. Lastly, the EPA strongly encouraged states to comply with the *South Coast* decision as quickly as possible.

Because the one-hour ozone standard has been revoked, the EPA is no longer making redesignations or reclassifications under this standard. However, the EPA is making determinations under its Clean Data Policy that areas are currently attaining the one-hour ozone NAAQS. In its proposal to determine that the Southern New Jersey portion of the Philadelphia Metro nonattainment area attained the one-hour ozone NAAQS (73 FR 42727, July 23, 2008), the EPA discussed the effect of the D.C. Circuit Court of Appeals' decision vacating a portion of the 1997 eight-hour ozone Phase I Implementation Rule *(South Coast Air Quality Management District v. EPA,* 472 F3d 882 (2006) and 489 F3d 1295 (2007)). The EPA stated: "With respect to the challenges to the anti-backsliding provisions of the rule, the Court vacated three provisions that would have allowed States to remove from the SIP or to not adopt three one-hour obligations once the one-hour ozone NAAQS was revoked (including one-hour nonattainment NSR requirements). {T}he three provisions noted previously . . . were vacated by the Court. As a result, States must continue to meet the obligations for one-hour NSR . . . . Currently, EPA is developing two proposed rules to address the Court's vacatur and remand with respect to these three requirements. EPA will address in this proposed rule how the one-hour obligations that currently continue to apply under EPA's anti-backsliding rule (as interpreted by the Court) apply where the EPA has made a determination that the area attained the one-hour ozone NAAQS by its attainment date." One possible outcome from the EPA rulemaking on this issue may be to direct states that want to remove one-hour ozone nonattainment NSR requirements to submit SIP revisions demonstrating that removing one-hour ozone nonattainment NSR requirements will not interfere with attainment or maintenance of the ozone NAAQS.

Because the EPA has not completed any rulemaking to implement the *South Coast* decision regarding NSR anti-backsliding, states must decide how to implement, and give effect to, the court's decision. Given the uncertainty of the future EPA rulemaking, and the finality of the *South Coast* decision as of January 14, 2008, the commission is proposing to remove the previously adopted contingency language, in addition to other changes, to clarify the requirements for nonattainment NSR. Without effective and understandable guidance from the EPA, through rulemaking or otherwise, the commission is left to determine the most reasonable course of action. The *South Coast* decision, upheld by the United States Supreme Court, makes clear that areas may not ignore one-hour ozone nonattainment NSR requirements.

Since the commission had previously adopted rules specifying that sources in the BPA, HGB, and DFW nonattainment areas should apply eight-hour ozone nonattainment NSR requirements, the commission is now proposing to delete certain portions of the definition in §116.12(18)(A), concerning major modification and the requirements of §116.150(d). The commission is proposing this rulemaking to make clear that permitted facilities in areas that were designated nonattainment for the one-hour ozone standard are subject to the major source thresholds and emission offsets of the one-hour ozone standard upon the effective date of this rulemaking. Depending on the EPA's action regarding this issue, these permitted facilities may continue to be subject to the major source thresholds and emission offsets of the one-hour ozone standard until the EPA approves the removal of one-hour ozone nonattainment NSR requirements from the SIP.

Staff has previously presented these rule amendments (Rule Project 2008-030-116-PR) to the commission for consideration. At the February 25, 2009, commissioner's agenda, the commission remanded the rule project to the executive director's staff in anticipation of additional direction or action by the EPA, because EPA continued to indicate in various federal notices its intent to complete rulemaking regarding NSR anti-backsliding requirements post the *South Coast* decision. EPA's proposed rule to implement the 1997 eight-hour ozone NAAQS revision on subpart 1 reclassification and anti-backsliding provisions under the former one-hour ozone standard was published in the January 16, 2009, *Federal Register,* but has not yet been finalized. This proposed rulemaking removes language regarding the exemptions from nonattainment new source review (NNSR) that were vacated by *South Coast.* On September 23, 2009, the EPA published notice of the proposed disapproval of past revisions to the Texas NNSR SIP (74 *Federal Register* 48467) that are related to these proposed amendments. In an effort to ensure that TCEQ regulatory requirements regarding the NNSR permitting program meets the requirements of the FCAA and are approvable into the SIP, the commission is proposing the following amendments to eliminate any deficiencies that would prevent approval.

Additionally, in order to prevent future confusion over designations and classifications and their related applicability thresholds and emissions offset requirements, the commission is proposing concurrent amendments to the definitions of maintenance area, and nonattainment area in 30 TAC Chapter 101.

SECTION BY SECTION DISCUSSION

§116.12, Nonattainment and Prevention of Significant Deterioration Definitions

The commission is proposing to change footnote 1 to remove the reference to the CFR and reference the definition of "nonattainment area" in 30 TAC Chapter 101.1. This reference is no longer necessary because the definition of nonattainment is being updated and also references the appropriate part of the CFR. The commission is also proposing to change the term "major modification level" to "significant level" in footnote 2 in Table 1 in §116.12(18)(A). This will ensure that the term used in the footnote matches the heading in the third column of the table and help eliminate any confusion resulting from the use of different terms. The commission is also proposing to remove footnotes 6 and 7 from Table 1 in §116.12(18)(A). Footnote 6 indicates that the EPA must complete rulemaking before NSR applications are evaluated according to their one-hour classification. However, the EPA has stated that: the *South Coast* decision is self-implementing; did not require rulemaking by the EPA to be effective; and NSR applications should be evaluated based upon one-hour classifications, if they are more stringent than an area's eight-hour classification. Footnote 7 states that permit applications in areas designated as nonattainment for ozone under FCAA, Title I, Part D, Subpart 1 (42 United States Code (USC), §7502) will be evaluated as if that area was designated as Marginal. However, Texas does not have any areas currently designated as nonattainment for ozone under FCAA, Title I, Part D, Subpart 1. The San Antonio area was originally designated nonattainment-deferred for the 1997 eight-hour ozone NAAQS, but has since been designated attainment.

§116.150, New Major Source or Major Modification in Ozone Nonattainment Areas

The commission proposes to amend §116.150(a) by removing §116.150(a)(1) and (2). Subsection (a) would then be amended to apply the requirements of this subsection as of the date of issuance of the permit and to add a requirement for continued applicability of nonattainment NSR until the EPA has made a finding of attainment; the EPA has approved the removal of nonattainment New Source Review requirements from the area; or the EPA has determined that Prevention of Significant Deterioration requirements apply in the area. The commission also proposes to remove §116.150(d). Subsection (d) contains language similar to that in footnote 6 from Table 1 in §116.12(18)(A). This language indicates that the EPA must complete rulemaking before NSR applications are evaluated according to their one-hour classification. However, the EPA has stated that: the *South Coast* decision is self-implementing; did not require rulemaking by the EPA to be effective; and NSR applications should be evaluated based upon one-hour classifications, if they are more stringent than an area's eight-hour classification. Additionally, the netting requirement and exceptions in §116.150(d) are redundant of the same requirement and exceptions in §116.150(c) and thus, unnecessary. The commission also proposes relettering the remainder of §116.150 to reflect the removal of §116.150(d) and minor changes to references in §116.150(b) to reflect the relettering. The commission proposes a change to §116.150(e) to reflect changes proposed in a concurrent rulemaking in Chapter 101.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that for the first five-year period the proposed rules are in effect, fiscal implications, although not significant, are anticipated for the agency. The proposed rules also have a significant fiscal impact on some local governments in ozone

non-attainment areas that own or operate facilities that may qualify as major sources of air emissions.

In May 2005, the agency adopted changes to Chapter 116 that provided for the contingency of the EPA promulgating rules requiring major source NSR permit applications to be evaluated according to the one-hour ozone nonattainment designations in addition to the eight-hour ozone nonattainment designations. Recent court decisions have required that both standards be evaluated. As a result, in the DFW and BPA ozone nonattainment areas, the more stringent major source emission thresholds and emission offset requirements of the one-hour ozone standard will be applied when implementing permitting requirements for Title V permits and NSR permits. The proposed rules would amend Chapter 101 and in a concurrent rulemaking, Chapter 116 to provide clarity regarding NSR permit requirements in areas previously designated nonattainment under the one-hour standard and ensure consistency with recent federal court decisions and the EPA's position resulting from those court decisions.

The fiscal implications for the proposed changes to Chapter 101 are administrative in nature and are detailed in a separate concurrent rulemaking.

The proposed amendments to Chapter 116 clarify when nonattainment NSR requirements can be removed; eliminate a redundant definition; and specifically remove contingency language regarding EPA rulemaking for the one-hour ozone thresholds and offset emission requirements. Removal of the contingency language will require the more stringent one-hour ozone emission thresholds and offset emission requirements to apply to facilities owned or operated by local governments that apply for NSR permits. There may be as many as three electrical generating facilities owned by local governments in the DFW eight-hour ozone nonattainment area that will be required to comply with the one-hour ozone requirements if NSR permit requirements for modifications are needed. If facility modification is determined to be a major modification or a new major source is constructed, controls complying with lowest achievable emission rate (LAER) requirements, rather than best available control technology (BACT), are needed. Control costs for LAER could range from $1,000 to $5,000 per ton for volatile organic compound (VOC) and nitrogen oxide (NO_x) emissions over the costs for BACT. In addition, emission offsets will be required. Costs for emission credits to satisfy the offset requirements for NO_x sources may range from $6,000 to $8,000 per ton. Costs for VOC emission credits could range from $650 per ton to $3,000 per ton.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be more stringent NSR permitting requirements in the DFW and BPA ozone nonattainment areas, which will be protective of human health and the environment.

The proposed rules will affect facilities of major sources of air emissions in the DFW and BPA ozone nonattainment areas. These facilities may include electrical power generating stations, oil refineries, pipeline transmission facilities, petrochemical plants, incinerators, stationary engines, large boilers, and liquid or gas fired turbines. These types of facilities are typically owned by large businesses. Major sources and major modifications of these facilities in these nonattainment areas will require LAER controls, rather than BACT, when applying for NSR permits. Control costs for LAER could range from $1,000 to $5,000 per ton for VOC and NO_x emissions over the costs for BACT. Emission offsets will also be required. Costs for emission credits to satisfy the offset requirements for NO_x sources may range from $6,000 to $8,000 per ton. Costs for VOC emission credits could range from $650 per ton to $3,000 per ton.

Based on past NSR permitting activity over the past five years, staff estimates that two facilities per year will be required to comply with the proposed rules. If LAER controls cost $5,000 per ton per year for 50 tons of NO_x and emission offsets are needed for 60 tons with a cost of $8,000 per ton per year, statewide costs could be as much as $1,460,000 per year the first five years the proposed rules are in effect. Total cost increases as a result of the proposed rules for each facility will vary depending on the operating conditions and management decisions governing that facility. Depending on the unique conditions of each entity, these cost increases could have a significant fiscal impact.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. Small or micro-businesses do not typically own or operate facilities that would qualify as major sources of emissions. If a small or micro-business owns or operates a major source of emissions, it could expect to incur the same costs for LAER controls or credit offsets as those incurred by a large business.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are required to protect the environment and to comply with federal regulations. In addition, the proposed rules are not expected to adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect because small or micro-businesses do not typically own or operate facilities that would be governed by the proposed rules.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a major environmental rule as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare a regulatory impact analysis.

A major environmental rule means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the proposed revisions is to remove certain definitions that are duplicative, and to remove previously adopted contingency language that would require EPA final rulemaking before NSR applications are evaluated according to the one-hour classification

of the area where the facility is located. These changes will not adversely affect the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state in a material way since they codify the effect a federal district court ruling that has been upheld by the United States Supreme Court in *South Coast,* as discussed elsewhere in this preamble.

Additionally, even if the rules met the definition of a major environmental rule, the rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The proposed rules would implement requirements of the FCAA. Under 42 USC, §7410, each state is required to adopt and implement a SIP containing adequate provisions to implement, attain, maintain, and enforce the NAAQS within the state. While 42 USC, §7410 generally does not require specific programs, methods, or emission reductions in order to meet the standard, state SIPs must include specific requirements as specified by 42 USC, §7410. The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that their SIPs provide for implementation, attainment, maintenance, and enforcement of the NAAQS within the state. One of the requirements of 42 USC, §7410 is for states to include programs for the regulation of the modification and construction of any stationary source within the area covered by the plan as necessary to assure that the NAAQS are achieved, including a permit program as required in FCAA, Parts C and D, or NSR. Additionally, once states have developed SIPs, and those plans are approved by the EPA, the FCAA prescribes, in 42 USC, §7502(e) that the EPA, in modifying a NAAQS, shall promulgate rules that apply to all areas that have not attained the previous NAAQS that provide for controls that are no less stringent than the controls that previously applied to the area. The district court in *South Coast* found that NSR was a "control," and vacated the EPA's Phase I rules that provided that the major source thresholds and offset requirements that applied as a result of an area's designation and classification under the one-hour ozone standard were no longer necessary. Until the EPA completes rulemaking to further interpret the applicability of the NSR permitting program in the context of 42 USC, §7502(e) and revisions to the ozone NAAQS, state rules that allow NSR review to rely upon designations and classifications for the eight-hour ozone standard in areas previously designated nonattainment for the one-hour ozone standard conflict with the *South Coast* ruling.

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full analysis unless the rule was a major environmental rule that exceeded a federal law.

Because of the ongoing need to meet federal requirements, the commission routinely proposes and adopts rules incorporating or designed to satisfy specific federal requirements. The legislature is presumed to understand this federal scheme. If each rule proposed by the commission to meet a federal requirement was considered to be a major environmental rule that exceeds federal law, then each of those rules would require the full regulatory impact analysis (RIA) contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the proposed rules may have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA, and in fact creates no additional impacts since the proposed rules do not exceed the requirement to attain and maintain the NAAQS. For these reasons, the proposed rules fall under the exception in Texas Government Code, §2001.0225(a), because they are required by, and do not exceed, federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code, but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *(Central Power & Light Co. v. Sharp,* 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue,* 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.,* 798 S.W.2d 353, 357 (Tex. App. Austin 1990, *no writ). Cf. Humble Oil & Refining Co. v. Calvert,* 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.,* 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor,* 24 S.W.3d 581 (Tex. App. Austin 2000, *pet. denied);* and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.,* 563 S.W.2d 916 (Tex. 1978).)

The commission's interpretation of the RIA requirements is also supported by a change made to the Administrative Procedures Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet

these sections of the APA against the standard of "substantial compliance" (Texas Government Code, §2001.035). The legislature specifically identified Texas Government Code, §2001.0225 as falling under this standard. As discussed in this analysis and elsewhere in this preamble, the commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

The proposed rules implement requirements of the FCAA, specifically to adopt and implement SIPs to attain and maintain the NAAQS, including a requirement to adopt and implement permit programs. The specific intent of the proposed rule revisions is to remove certain definitions that are duplicative, and previously adopted contingency language that would require EPA final rulemaking before NSR applications are evaluated according to the one-hour classification of the area where the facility is located, in order to avoid conflict with the *South Coast* decision. The proposed amendments were not developed solely under the general powers of the agency, but are authorized by specific sections of Texas Health and Safety Code, Chapter 382 (also known as the Texas Clean Air Act), and the Texas Water Code, which are cited in the STATUTORY AUTHORITY section of this preamble, including Texas Health and Safety Code, §§382.011, 382.012, and 382.017. Therefore, this proposed rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or §17 or §19, Article I, Texas Constitution; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact analysis for the proposed rulemaking action under the Texas Government Code, §2007.043. The primary purpose of this proposed rulemaking action, as discussed elsewhere in this preamble, is to remove certain definitions that are duplicative, and previously adopted contingency language that would require EPA final rulemaking before NSR applications are evaluated according to the one-hour classification of the area where the facility is located.

The proposed rules will not create any additional burden on private real property. The proposed rules will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The proposal also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the proposed rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.),* and commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable CMP goals and policies.

The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). The proposed amendments will indirectly benefit the environment because reduced emissions resulting from the more stringent major source thresholds and emission offset requirements of the one-hour ozone standard ensure that there will be fewer adverse impacts to public health and the environment. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 CFR to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

Written comments on the consistency of the proposed rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Chapter 116 is an applicable requirement of 30 TAC Chapter 122, Federal Operating Permits Program. If the proposed rules are adopted, owners or operators subject to the federal operating permit program must, consistent with the revision process in Chapter 122, upon the effective date of the adopted rulemaking, revise their operating permit to include the new Chapter 116 requirements. Additionally, sources subject to the proposed rules may become subject to the federal operating permit program.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on September 20, 2010, at 2:00 p.m. in Building E Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Devon Ryan, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2008-030-116-PR. The comment period closes September 27, 2010. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html.* For further information, please contact Blake Stewart, Air Permits Division, (512) 239-6931.

SUBCHAPTER A. DEFINITIONS

30 TAC §116.12

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code §5.102, concerning General Powers, §5.103, concerning Rules, and §5.105 concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the Texas Water Code; Texas Health and Safety Code, Texas Clean Air Act (TCAA), §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a comprehensive plan for the proper control of the state's air; and §382.051, concerning Permitting Authority of the Commission, which authorizes the commission to issue permits to construct a new facility or modify an existing facility that may emit air contaminants, and authority to adopt rules necessary to comply with changes in federal law or regulations applicable to permits issued under the TCAA.

The proposed amendment implements Texas Water Code, §5.103; and Texas Health and Safety Code, §§382.017, 382.012, and 382.051.

§116.12. Nonattainment and Prevention of Significant Deterioration Review Definitions.

Unless specifically defined in the Texas Clean Air Act (TCAA) or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. The terms in this section are applicable to permit review for major source construction and major source modification in nonattainment areas. In addition to the terms that are defined by the TCAA, and in §101.1 of this title (relating to Definitions), the following words and terms, when used in Chapter 116, Subchapter B, Divisions 5 and 6 of this title (relating to Nonattainment Review Permits and Prevention of Significant Deterioration Review); and Chapter 116, Subchapter C, Division 1 of this title (relating to Plant-Wide Applicability Limits), have the following meanings, unless the context clearly indicates otherwise.

(1) Actual emissions--Actual emissions as of a particular date are equal to the average rate, in tons per year, at which the unit actually emitted the pollutant during the 24-month period that precedes the particular date and that is representative of normal source operation, except that this definition shall not apply for calculating whether a significant emissions increase has occurred, or for establishing a plant-wide applicability limit. Instead, paragraph (3) of this section relating to baseline actual emissions shall apply for this purpose. The executive director shall allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period. The executive director may presume that the source-specific allowable emissions for the unit are equivalent to the actual emissions, e.g., when the allowable limit is reflective of actual emissions. For any emissions unit that has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

(2) Allowable emissions--The emissions rate of a stationary source, calculated using the maximum rated capacity of the source (unless the source is subject to federally enforceable limits that restrict the operating rate, or hours of operation, or both), and the most stringent of the following:

(A) the applicable standards specified in 40 Code of Federal Regulations Part 60 or 61;

(B) the applicable state implementation plan emissions limitation including those with a future compliance date; or

(C) the emissions rate specified as a federally enforceable permit condition including those with a future compliance date.

(3) Baseline actual emissions--The rate of emissions, in tons per year, of a federally regulated new source review pollutant.

(A) For any existing electric utility steam generating unit, baseline actual emissions means the rate, in tons per year, at which the unit actually emitted the pollutant during any consecutive 24-month period selected by the owner or operator within the five-year period immediately preceding when the owner or operator begins actual construction of the project. The executive director shall allow the use of a different time period upon a determination that it is more representative of normal source operation.

(B) For an existing facility (other than an electric utility steam generating unit), baseline actual emissions means the rate, in tons per year, at which the facility actually emitted the pollutant during any consecutive 24-month period selected by the owner or operator within the ten-year period immediately preceding either the date the owner or operator begins actual construction of the project, or the date a complete permit application is received for a permit. The rate shall be adjusted downward to exclude any emissions that would have exceeded an emission limitation with which the major stationary source must currently comply with the exception of those required under 40 Code of Federal Regulations Part 63, had such major stationary source been required to comply with such limitations during the consecutive 24-month period.

(C) For a new facility, the baseline actual emissions for purposes of determining the emissions increase that will result from the initial construction and operation of such unit shall equal zero; and for all other purposes during the first two years following initial operation, shall equal the unit's potential to emit.

(D) The actual rate shall be adjusted downward to exclude any non-compliant emissions that occurred during the consecutive 24-month period. For each regulated new source review pollutant, when a project involves multiple facilities, only one consecutive 24-month period must be used to determine the baseline actual emissions for the facilities being changed. A different consecutive 24-month period can be used for each regulated new source review pollutant. The rate shall not be based on any consecutive 24-month period for which there is inadequate information for determining annual emissions, in tons per year, and for adjusting this amount. Baseline emissions cannot occur prior to November 15, 1990.

(E) The actual emissions rate shall include fugitive emissions to the extent quantifiable. Until March 1, 2016, emissions previously demonstrated as emissions events or historically exempted under Chapter 101 of this title (relating to General Air Quality Rules) may be included to the extent that they have been authorized, or are being authorized.

(4) Basic design parameters--For a process unit at a steam electric generating facility, the owner or operator may select as its basic design parameters either maximum hourly heat input and maximum hourly fuel consumption rate or maximum hourly electric output rate and maximum steam flow rate. When establishing fuel consumption specifications in terms of weight or volume, the minimum fuel quality based on British thermal units content shall be used for determining the basic design parameters for a coal-fired electric utility steam generating unit. The basic design parameters for any process unit that is not at a steam electric generating facility are maximum rate of fuel or heat input, maximum rate of material input, or maximum rate of product output. Combustion process units will typically use maximum rate of fuel input. For sources having multiple end products and raw materials, the owner or operator shall consider the primary product or primary raw material when selecting a basic design parameter. The owner or operator may propose an alternative basic design parameter for the source's process units to the executive director if the owner or operator believes the basic design parameter as defined in this paragraph is not appropriate for a specific industry or type of process unit. If the executive director approves of the use of an alternative basic design parameter, that basic design parameter shall be identified and compliance required in a condition in a permit that is legally enforceable.

(A) The owner or operator shall use credible information, such as results of historic maximum capability tests, design information from the manufacturer, or engineering calculations, in establishing the magnitude of the basic design parameter.

(B) If design information is not available for a process unit, the owner or operator shall determine the process unit's basic design parameter(s) using the maximum value achieved by the process unit in the five-year period immediately preceding the planned activity.

(C) Efficiency of a process unit is not a basic design parameter.

(5) Begin actual construction--In general, initiation of physical on-site construction activities on an emissions unit that are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying of underground pipework, and construction of permanent storage structures. With respect to a change in method of operation, this term refers to those on-site activities other than preparatory activities that mark the initiation of the change.

(6) Building, structure, facility, or installation--All of the pollutant-emitting activities that belong to the same industrial grouping, are located in one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities are considered to be part of the same industrial grouping if they belong to the same "major group" (i.e., that have the same two-digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 supplement.

(7) Clean coal technology--Any technology, including technologies applied at the precombustion, combustion, or post-combustion stage, at a new or existing facility that will achieve significant reductions in air emissions of sulfur dioxide or oxides of nitrogen associated with the utilization of coal in the generation of electricity, or process steam that was not in widespread use as of November 15, 1990.

(8) Clean coal technology demonstration project--A project using funds appropriated under the heading "Department of Energy-Clean Coal Technology," up to a total amount of $2.5 billion for commercial demonstration of clean coal technology, or similar projects funded through appropriations for the United States Environmental Protection Agency. The federal contribution for a qualifying project shall be at least 20% of the total cost of the demonstration project.

(9) Commence--As applied to construction of a major stationary source or major modification, means that the owner or operator has all necessary preconstruction approvals or permits and either has:

(A) begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or

(B) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.

(10) Construction--Any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) that would result in a change in actual emissions.

(11) Contemporaneous period--For major sources the period between:

(A) the date that the increase from the particular change occurs; and

(B) 60 months prior to the date that construction on the particular change commences.

(12) *De minimis* threshold test (netting)--A method of determining if a proposed emission increase will trigger nonattainment or prevention of significant deterioration review. The summation of the proposed project emission increase in tons per year with all other creditable source emission increases and decreases during the contemporaneous period is compared to the significant level for that pollutant. If the significant level is exceeded, then prevention of significant deterioration and/or nonattainment review is required.

(13) Electric utility steam generating unit--Any steam electric generating unit that is constructed for the purpose of supplying more than one-third of its potential electric output capacity and more than 25 megawatts electrical output to any utility power distribution system for sale. Any steam supplied to a steam distribution system for the purpose of providing steam to a steam-electric generator that would produce electrical energy for sale is included in determining the electrical energy output capacity of the affected facility.

(14) Federally regulated new source review pollutant--As defined in subparagraphs (A) - (D) of this paragraph:

(A) any pollutant for which a national ambient air quality standard has been promulgated and any constituents or precursors for such pollutants identified by the United States Environmental Protection Agency;

(B) any pollutant that is subject to any standard promulgated under Federal Clean Air Act (FCAA), §111;

(C) any Class I or II substance subject to a standard promulgated under or established by FCAA, Title VI; or

(D) any pollutant that otherwise is subject to regulation under the FCAA; except that any or all hazardous air pollutants either listed in FCAA, §112 or added to the list under FCAA, §112(b)(2), which have not been delisted under FCAA, §112(b)(3), are not regulated new source review pollutants unless the listed hazardous air pollutant is also regulated as a constituent or precursor of a general pollutant listed under FCAA, §108.

(15) Lowest achievable emission rate--For any emitting facility, that rate of emissions of a contaminant that does not exceed the amount allowable under applicable new source performance standards promulgated by the United States Environmental Protection Agency under 42 United States Code, §7411, and that reflects the following:

(A) the most stringent emission limitation that is contained in the rules and regulations of any approved state implementation plan for a specific class or category of facility, unless the owner or operator of the proposed facility demonstrates that such limitations are not achievable; or

(B) the most stringent emission limitation that is achieved in practice by a specific class or category of facilities, whichever is more stringent.

(16) Major facility--Any facility that emits or has the potential to emit 100 tons per year or more of the plant-wide applicability limit (PAL) pollutant in an attainment area; or any facility that emits or has the potential to emit the PAL pollutant in an amount that is equal to or greater than the major source threshold for the PAL pollutant in Table I of this section for nonattainment areas.

(17) Major stationary source--Any stationary source that emits, or has the potential to emit, a threshold quantity of emissions or more of any air contaminant (including volatile organic compounds (VOCs) for which a national ambient air quality standard has been issued. The major source thresholds are identified in Table I of this section for nonattainment pollutants and the major source thresholds for prevention of significant deterioration pollutants are identified in 40 Code of Federal Regulations (CFR) §51.166(b)(1). A source that emits, or has the potential to emit a federally regulated new source review pollutant at levels greater than those identified in 40 CFR §51.166(b)(1) is considered major for all prevention of significant deterioration pollutants. A major stationary source that is major for VOCs or nitrogen oxides is considered to be major for ozone. The fugitive emissions of a stationary source shall not be included in determining for any of the purposes of this definition whether it is a major stationary source, unless the source belongs to one of the categories of stationary sources listed in 40 CFR §51.165(a)(1)(iv)(C).

(18) Major modification--As follows.

(A) Any physical change in, or change in the method of operation of a major stationary source that causes a significant project emissions increase and a significant net emissions increase for any federally regulated new source review pollutant. At a stationary source that is not major prior to the increase, the increase by itself must equal or exceed that specified for a major source. At an existing major stationary source, the increase must equal or exceed that specified for a major modification to be significant. The major source and significant thresholds are provided in Table I of this section for nonattainment pollutants. The major source and significant thresholds for prevention of significant deterioration pollutants are identified in 40 Code of Federal Regulations §51.166(b)(1) and (23), respectively.
Figure: 30 TAC §116.12(18)(A)
[~~Figure: 30 TAC §116.12(18)(A)~~]

(B) A physical change or change in the method of operation shall not include:

(i) routine maintenance, repair, and replacement;

(ii) use of an alternative fuel or raw material by reason of an order under the Energy Supply and Environmental Coordination Act of 1974, §2(a) and (b) (or any superseding legislation) or by reason of a natural gas curtailment plan under the Federal Power Act;

(iii) use of an alternative fuel by reason of an order or rule of 42 United States Code, §7425;

(iv) use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste;

(v) use of an alternative fuel or raw material by a stationary source that the source was capable of accommodating before December 21, 1976 (unless such change would be prohibited under any federally enforceable permit condition established after December 21, 1976) or the source is approved to use under any permit issued under regulations approved under this chapter;

(vi) an increase in the hours of operation or in the production rate (unless the change is prohibited under any federally enforceable permit condition that was established after December 21, 1976);

(vii) any change in ownership at a stationary source;

(viii) any change in emissions of a pollutant at a site that occurs under an existing plant-wide applicability limit;

(ix) the installation, operation, cessation, or removal of a temporary clean coal technology demonstration project, provided that the project complies with the state implementation plan and other requirements necessary to attain and maintain the national ambient air quality standard during the project and after it is terminated;

(x) for prevention of significant deterioration review only, the installation or operation of a permanent clean coal technology demonstration project that constitutes re-powering, provided that the project does not result in an increase in the potential to emit of any regulated pollutant emitted by the unit. This exemption shall apply on a pollutant-by-pollutant basis; or

(xi) for prevention of significant deterioration review only, the reactivation of a clean coal-fired electric utility steam generating unit.

(19) Necessary preconstruction approvals or permits--Those permits or approvals required under federal air quality control laws and regulations and those air quality control laws and regulations that are part of the applicable state implementation plan.

(20) Net emissions increase--The amount by which the sum of the following exceeds zero: the project emissions increase plus any sourcewide creditable contemporaneous emission increases, minus any sourcewide creditable contemporaneous emission decreases. Baseline actual emissions shall be used to determine emissions increases and decreases.

(A) An increase or decrease in emissions is creditable only if the following conditions are met:

(i) it occurs during the contemporaneous period;

(ii) the executive director has not relied on it in issuing a federal new source review permit for the source and that permit is in effect when the increase in emissions from the particular change occurs; and

(iii) in the case of prevention of significant deterioration review only, an increase or decrease in emissions of sulfur dioxide, particulate matter, or nitrogen oxides that occurs before the appli-

cable minor source baseline date is creditable only if it is required to be considered in calculating the amount of maximum allowable increases remaining available.

(B) An increase in emissions is creditable if it is the result of a physical change in, or change in the method of operation of a stationary source only to the extent that the new level of emissions exceeds the baseline actual emission rate. Emission increases at facilities under a plant-wide applicability limit are not creditable.

(C) A decrease in emissions is creditable only to the extent that all of the following conditions are met:

(i) the baseline actual emission rate exceeds the new level of emissions;

(ii) it is enforceable at and after the time that actual construction on the particular change begins;

(iii) the executive director has not relied on it in issuing a prevention of significant deterioration or a nonattainment permit;

(iv) the decrease has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change; and

(v) in the case of nonattainment applicability analysis only, the state has not relied on the decrease to demonstrate attainment or reasonable further progress.

(D) An increase that results from a physical change at a source occurs when the emissions unit on which construction occurred becomes operational and begins to emit a particular pollutant. Any replacement unit that requires shakedown becomes operational only after a reasonable shakedown period, not to exceed 180 days.

(21) Offset ratio--For the purpose of satisfying the emissions offset reduction requirements of 42 United States Code, §7503(a)(1)(A), the emissions offset ratio is the ratio of total actual reductions of emissions to total emissions increases of such pollutants. The minimum offset ratios are included in Table I of this section under the definition of major modification. In order for a reduction to qualify as an offset, it must be certified as an emission credit under Chapter 101, Subchapter H, Division 1 or 4 of this title (relating to Emission Credit Banking and [~~or~~] Trading; or Discrete Emission Credit Banking and Trading), except as provided for in §116.170(b) of this title (relating to Applicability of Emission Reductions as Offsets). The reduction must not have been relied on in the issuance of a previous nonattainment or prevention of significant deterioration permit.

(22) Plant-wide applicability limit--An emission limitation expressed, in tons per year, for a pollutant at a major stationary source, that is enforceable and established in a plant-wide applicability limit permit under §116.186 of this title (relating to General and Special Conditions).

(23) Plant-wide applicability limit effective date--The date of issuance of the plant-wide applicability limit permit. The plant-wide applicability limit effective date for a plant-wide applicability limit established in an existing flexible permit is the date that the flexible permit was issued.

(24) Plant-wide applicability limit major modification--Any physical change in, or change in the method of operation of the plant-wide applicability limit source that causes it to emit the plant-wide applicability limit pollutant at a level equal to or greater than the plant-wide applicability limit.

(25) Plant-wide applicability limit permit--The new source review permit that establishes the plant-wide applicability limit.

(26) Plant-wide applicability limit pollutant--The pollutant for which a plant-wide applicability limit is established at a major stationary source.

(27) Potential to emit--The maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or enforceable operational limitation on the capacity of the stationary source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, may be treated as part of its design only if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions, as defined in 40 Code of Federal Regulations §51.165(a)(1)(viii), do not count in determining the potential to emit for a stationary source.

(28) Project net--The sum of the following: the project emissions increase, minus any sourcewide creditable emission decreases proposed at the source between the date of application for the modification and the date the resultant modification begins emitting. Baseline actual emissions shall be used to determine emissions increases and decreases. Increases and decreases must meet the creditability criteria listed under the definition of net emissions increase in this section.

(29) Projected actual emissions--The maximum annual rate, in tons per year, at which an existing facility is projected to emit a federally regulated new source review pollutant in any rolling 12-month period during the five years following the date the facility resumes regular operation after the project, or in any one of the ten years following that date, if the project involves increasing the facility's design capacity or its potential to emit that federally regulated new source review pollutant. In determining the projected actual emissions, the owner or operator of the major stationary source shall include fugitive emissions to the extent quantifiable and shall consider all relevant information, including, but not limited to, historical operational data, the company's own representations, the company's expected business activity and the company's highest projections of business activity, the company's filings with the state or federal regulatory authorities, and compliance plans under the approved state implementation plan.

(30) Project emissions increase--The sum of emissions increases for each modified or affected facility determined using the following methods:

(A) for existing facilities, the difference between the projected actual emissions and the baseline actual emissions. In calculating any increase in emissions that results from the project, that portion of the facility's emissions following the project that the facility could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions and that are also unrelated to the particular project, including any increased utilization due to product demand growth may be excluded from the project emission increase. The potential to emit from the facility following completion of the project may be used in lieu of the projected actual emission rate; and

(B) for new facilities, the difference between the potential to emit from the facility following completion of the project and the baseline actual emissions.

(31) Replacement facility--A facility that satisfies the following criteria:

(A) the facility is a reconstructed unit within the meaning of 40 Code of Federal Regulations §60.15(b)(1), or the facility replaces an existing facility;

(B) the facility is identical to or functionally equivalent to the replaced facility;

(C) the replacement does not alter the basic design parameters of the process unit;

(D) the replaced facility is permanently removed from the major stationary source, otherwise permanently disabled, or permanently barred from operation by a permit that is enforceable. If the replaced facility is brought back into operation, it shall constitute a new facility. No creditable emission reductions shall be generated from shutting down the existing facility that is replaced. A replacement facility is considered an existing facility for the purpose of determining federal new source review applicability.

(32) Secondary emissions--Emissions that would occur as a result of the construction or operation of a major stationary source or major modification, but do not come from the source or modification itself. Secondary emissions must be specific, well-defined, quantifiable, and impact the same general area as the stationary source or modification that causes the secondary emissions. Secondary emissions include emissions from any off-site support facility that would not be constructed or increase its emissions, except as a result of the construction or operation of the major stationary source or major modification. Secondary emissions do not include any emissions that come directly from a mobile source such as emissions from the tail pipe of a motor vehicle, from a train, or from a vessel.

(33) Significant facility--A facility that emits or has the potential to emit a plant-wide applicability limit (PAL) pollutant in an amount that is equal to or greater than the significant level for that PAL pollutant.

(34) Small facility--A facility that emits or has the potential to emit the plant-wide applicability limit (PAL) pollutant in an amount less than the significant level for that PAL pollutant.

(35) Stationary source--Any building, structure, facility, or installation that emits or may emit any air pollutant subject to regulation under 42 United States Code, §§7401 *et seq.*

(36) Temporary clean coal technology demonstration project--A clean coal technology demonstration project that is operated for a period of five years or less, and that complies with the state implementation plan and other requirements necessary to attain and maintain the national ambient air quality standards during the project and after it is terminated.

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

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Robert Martinez
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Texas Commission on Environmental Quality
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SUBCHAPTER B. NEW SOURCE REVIEW PERMITS
DIVISION 5. NONATTAINMENT REVIEW PERMITS

30 TAC §116.150

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.102, concerning General Powers, §5.103, concerning Rules, and §5.105 concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the Texas Water Code; Texas Health and Safety Code, Texas Clean Air Act (TCAA), §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a comprehensive plan for the proper control of the state's air; and §382.051, concerning Permitting Authority of the Commission, which authorizes the commission to issue permits to construct a new facility or modify an existing facility that may emit air contaminants, and authority to adopt rules necessary to comply with changes in federal law or regulations applicable to permits issued under the TCAA.

The proposed amendment implements Texas Water Code, §5.103; and Texas Health and Safety Code, §§382.017, 382.012, and 382.051.

§116.150. New Major Source or Major Modification in Ozone Nonattainment Areas.

(a) This section applies to all new source review authorizations for new construction or modification of facilities that will be located in any area designated as nonattainment for ozone under 42 United States Code (USC), §§7407 *et seq.* as of the date of issuance of the permit, unless: [~~as follows:~~]

(1) the United States Environmental Protection Agency (EPA) has made a finding of attainment;

(2) the EPA has approved the removal of nonattainment New Source Review (NSR) requirements from the area;

(3) the EPA has determined that Prevention of Significant Deterioration requirements apply in the area: or

(4) the EPA determines that nonattainment NSR is no longer required for purposes of antibacksliding.

[~~(1) for all applications for facilities that will be located in any area designated as nonattainment for ozone under 42 United States Code (USC), §§7407 *et seq.* on the effective date of this section, the issuance date of the authorization; and~~]

[~~(2) for all applications for facilities that will be located in counties for which nonattainment designation for ozone under 42 USC §§7407 *et seq.* becomes effective after the effective date of this section, the date the application is administratively complete.~~]

(b) The owner or operator of a proposed new major stationary source, as defined in §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions) of volatile organic compound (VOC) emissions or nitrogen oxides (NO_x) emissions, or the owner or operator of an existing stationary source of VOC or NO_x emissions that will undergo a major modification, as defined in §116.12 of this title with respect to VOC or NO_x, shall meet the requirements of subsection (d)(1) - (4) [~~subsection (e)(1) - (4)~~] of this section, except as provided in subsection (e) [~~(f)~~] of this section. Table I, located in the definition of major modification in §116.12 of this title, specifies the various classifications of nonattainment along with the associated emission levels that designate a major stationary source and significant level for those classifications.

(c) Except as noted in subsection (e) [~~(f)~~] of this section regarding NO_x, the de minimis threshold test (netting) is required for all modifications to existing major sources of VOC or NO_x, unless at least one of the following conditions are met:

(1) the proposed emissions increases associated with a project, without regard to decreases, is less than five tons per year (tpy) of the individual nonattainment pollutant in areas classified under Federal Clean Air Act (FCAA), Title I, Part D, Subpart 2 (42 USC, §7511) classified as Serious or Severe;

(2) the proposed emissions increases associated with a project, without regard to decreases, is less than 40 tpy of the individual nonattainment pollutant in areas classified under FCAA, Title I, Part D, Subpart 1 (42 USC, §7502) and for those under FCAA, Title I, Part D, Subpart 2 (42 USC, §7511) classified as Marginal or Moderate; or

(3) the project emissions increases are less than the significant level stated in Table I located in the definition of major modification in §116.12 of this title and when coupled with project actual emissions decreases for the same pollutant, summed as the project net, are less than or equal to zero tpy.

~~[(d) For the Houston-Galveston-Brazoria, Dallas-Fort Worth, and Beaumont-Port Arthur eight-hour ozone nonattainment areas, if the United States Environmental Protection Agency promulgates rules requiring new source review permit applications in these areas to be evaluated for nonattainment new source review according to that area's one-hour standard classification, except as noted in subsection (b) of this section regarding NO_x, the *de minimis* threshold test (netting) is required for all modifications to existing major sources of VOC or NO_x in that area, unless at least one of the following conditions is met:~~

~~[(1) the proposed emissions increases associated with a project, without regard to decreases, is less than five tpy of the individual nonattainment pollutant; or]~~

~~[(2) the project emissions increases are less than the significant level stated in Table I located in the definition of major modification in §116.12 of this title and when coupled with project actual emissions decreases for the same pollutant, summed as the project net, are less than or equal to zero tpy.]~~

(d) [~~(e)~~] In applying the *de minimis* threshold test, if the net emissions increases are greater than the significant levels stated in Table I located in the definition of major modification in §116.12 of this title, the following requirements apply.

(1) The proposed facility shall comply with the lowest achievable emission rate (LAER) as defined in §116.12 of this title for the nonattainment pollutants for which the facility is a new major source or major modification except as provided in paragraph (3)(B) of this subsection and except for existing major stationary sources that have a potential to emit (PTE) of less than 100 tpy of the applicable nonattainment pollutant. For these sources, best available control technology (BACT) can be substituted for LAER. LAER shall otherwise be applied to each new facility and to each existing facility at which the net emissions increase will occur as a result of a physical change or change in method of operation of the unit.

(2) All major stationary sources owned or operated by the applicant (or by any person controlling, controlled by, or under common control with the applicant) in the state must be in compliance or on a schedule for compliance with all applicable state and federal emission limitations and standards.

(3) At the time the new or modified facility or facilities commence operation, the emissions increases from the new or modified facility or facilities must be offset. The proposed facility shall use the offset ratio for the appropriate nonattainment classification as defined in §116.12 of this title and shown in Table I located in the definition of major modification in §116.12 of this title. Internal offsets that are generated at the source and that otherwise meet all creditability criteria can be applied as follows.

(A) Major stationary sources with a PTE of less than 100 tpy of an applicable nonattainment pollutant are not required to undergo nonattainment new source review under this section, if the project increases are offset with internal offsets at a ratio of at least 1.3 to 1.

(B) Major stationary sources with a PTE of greater than or equal to 100 tpy of an applicable nonattainment pollutant can substitute BACT for LAER, if the project increases are offset with internal offsets at a ratio of at least 1.3 to 1. Internal offsets used in this manner can also be applied to satisfy the offset requirement.

(4) In accordance with the FCAA, the permit application must contain an analysis of alternative sites, sizes, production processes, and control techniques for the proposed source. The analysis must demonstrate that the benefits of the proposed location and source configuration significantly outweigh the environmental and social costs of that location.

(e) [~~(f)~~] For sources located in the El Paso ozone nonattainment area as defined in 40 Code of Federal Regulations, Part 81 [~~§101.1 of this title (relating to Definitions)~~], the requirements of this section do not apply to NO_x emissions.

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

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CHAPTER 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION

The Texas Commission on Environmental Quality (commission or TCEQ) proposes amendments to §§116.12, 116.115, 116.180, 116.182, 116.186, 116.188, 116.190, 116.192, 116.601, and 116.617; new §116.127; and the repeal of §116.121.

The proposed amendments to §§116.12, 116.115, 116.180, 116.182, 116.186, 116.188, 116.190, 116.192, and 116.601; and new §116.127 will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the State Implementation Plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

On June 10, 2005, the TCEQ submitted the amendment to §116.12 to the EPA as a revision to the New Source Review (NSR) SIP and §116.150 as a revision to the Nonattainment New Source Review (NNSR) SIP, both adopted on May 25,

2005. On February 1, 2006, the TCEQ submitted amendments to §§116.12, 116.121, 116.150, 116.180, 116.182, 116.184, 116.186, 116.188, 116.190, and 116.617 to the EPA as revisions to the NSR SIP, amendments to §§101.1, 116.150, and 116.151 as revisions to the NNSR SIP, and the amendment to §116.160 as a revision to the Prevention of Significant Deterioration (PSD) SIP, adopted on January 11, 2006. On September 23, 2009, the EPA published notice of the proposed disapproval of these revisions to the Texas SIP (74 *Federal Register* 48467).

This rulemaking and the companion rulemaking (Rule Project No. 2008-030-116-PR) will address issues identified by the EPA in its September 23, 2009, disapproval notice and ensure that TCEQ regulatory requirements regarding the NSR permitting program meet the requirements of the Federal Clean Air Act (FCAA) and are approvable into the SIP. Specifically, those concern definitions for and other changes to the Plant-Wide Applicability Limit (PAL) rules, and other changes to the PAL rules to meet federal requirements, including the conditions for reopening PAL permits. The rulemaking would also amend §116.617, State Pollution Control Standard Permit, which is the existing standard permit rule, to limit when existing registrations can be amended or renewed, and provide the deadline for final registrations under this specific standard permit. This is intended to facilitate a smooth transition between this section and the proposed new non-rule air quality standard permit that is being concurrently proposed by the commission. The amendments would also remove obsolete references and make non-substantive administrative changes.

In the September 23, 2009 notice, EPA also proposed to take no action on §§116.400 - 116.406, which were included in the 2006 rulemaking. These sections are permit requirements for compliance with FCAA, §112(g), but they are not necessary elements of the SIP. The rulemaking proposes the withdrawal from EPA consideration as a revision to the SIP of §§116.400, 116.402, 116.404, and 116.406 as adopted by the commission on January 11, 2006, effective on February 1, 2006. No changes are proposed to the rule text or numbering of these sections.

This rulemaking is at least as stringent as the federal rules and policies being implemented because it includes the applicable elements of the major NSR and PAL permit programs. The rulemaking action also ensures that the rulemaking, if adopted, will meet the requirements of FCAA, §110 which, among other requirements, requires that the elements of the SIP be enforceable, ensure compliance, include replicable elements, and ensure accountability. The specific changes to the PAL rules meet these basic requirements.

SECTION BY SECTION DISCUSSION

§116.12, Nonattainment and Prevention of Significant Deterioration Definitions

The commission is proposing to amend the definition of the term baseline actual emissions. The EPA, in its proposed disapproval notice, commented that this definition differed from the federal rules because the definition did not specify that these emissions are meant to be calculated based on the average rate. The amendment specifying that the rate is an average rate would be included in §116.12(3)(A), (B), (D), and (E). The commission is also proposing to remove the term "exempted from" §116.12(3)(E) and replace it with "unauthorized" since emissions events were not exempt under 30 TAC Chapter 101, but required to be reported. The commission is also proposing to amend the term net emissions increase. EPA commented in the Technical Support Document related to the proposed disapproval that this definition might not match federal requirements for enforceability. Additionally, commission is proposing to amend the term projected actual emissions. EPA also commented that the term did not include emissions from startups, shutdowns, malfunctions and this amendment would be incorporated in §116.12(29). However, as stated in the original adoption preamble for this rule in 2006, the commission has excluded malfunction emissions in compliance with long-standing commission policy to exclude non-compliant emissions. Further, EPA has approved the definition of baseline emissions in other states which also exclude malfunction emissions. Therefore, the commission expects this more stringent rule to be approvable by EPA.

§116.115, General and Special Conditions

The commission proposes to amend §116.115(b)(2)(F) with a statement that emissions exceeding the maximum allowable emission rates established in a permit are not authorized and are a violation of the permit. Additionally, the commission proposes to amend §116.115 with non-substantive administrative changes in §116.115(b)(2)(B)(iii) and (H) and (c)(2)(B)(ii)II).

§116.121, Actual to Projected Actual and Emissions Exclusion Test for Emissions Increases

The commission proposes to repeal §116.121. The text of this rule would be in proposed new §116.127.

§116.127, Actual to Projected Actual and Emissions Exclusion Test for Emissions Increases

The commission proposes new §116.127 to address actual to projected actual emissions and the emissions exclusion test for emissions increases. There have been no changes to the language that was originally in §116.121.

§116.180, Applicability

The commission proposes to remove the term account site from §116.180(a)(1) and replace it with the term existing major stationary source to make this requirement more consistent with federal requirements. The commission also proposes to make similar changes to §116.180(a)(3) and (4). Additionally, because the federal term emissions unit is defined very similarly to the term facility as defined in the Texas Clean Air Act (TCAA), the commission proposes to add the language "or emissions unit" whenever the term facility is used (i.e. §116.180(a)(3), (b) and (c)). The commission also proposes to restrict the issuance of PAL permits to existing stationary sources in §116.180(a)(5). The EPA, in its September 23, 2009, proposed disapproval notice stated that the current regulation lacks a provision that limits applicability of a PAL to an existing major stationary source.

§116.182, Plant-wide Applicability Limit Permit Application

Since the federal term emissions unit is defined very similarly to the term facility as defined in the TCAA, the commission proposes to add the language "or emissions unit" when the term facility is used in §116.182(a)(1). Also the commission proposes to add the phrase "at a major stationary source" where appropriate to make clear that PALs are applicable to major sources only.

§116.186, General and Special Conditions

Since the federal term emissions unit is defined very similarly to the term facility as defined in the TCAA, the commission proposes to add the language "or emissions unit" where the term

facility is used in subsections (a) and (b)(1). Also the commission proposes to add the phrase "at a major stationary source" where appropriate to make clear that PALs are applicable to major sources only. Additionally, the commission proposes to define the term "responsible official" by referencing the definition in 30 TAC Chapter 122.

In the September 23, 2009, proposed disapproval notice, the EPA noted that TCEQ's rule lacked a mandate that failure of the monitoring system to meet the requirements of this section is a violation of the PAL permit. Consequently, the commission proposes to include this requirement in proposed §116.186(b)(9). Existing subsection (b)(9) and (10) would be redesignated as subsection (b)(10) and (11). In the notice, the EPA also stated that the specific monitoring definitions: continuous emissions monitoring system (CEMS) as defined in 40 Code of Federal Regulations (CFR) §51.165(a)(1)(xxxi) and §51.166(b)(43); continuous emissions rate monitoring system (CERMS) as defined in 40 CFR §51.165(a)(1)(xxxiv) and §51.166(b)(46); continuous parameter monitoring system (CPMS) as defined in 40 CFR §51.165(a)(1)(xxxiii) and §51.166(b)(45); and predictive emissions monitoring system (PEMS) as defined in 40 CFR §51.165(a)(1)(xxxii) and §51.166(b)(44) are essential for the enforceability of and providing the means for determining compliance with a PALs program. The commission is proposing to incorporate these definitions by reference in proposed §116.186(c)(1). Existing subsection (c)(1) and (2) would be redesignated as subsection (c)(2) and (3). Additionally, the commission proposes to amend §116.186 with non-substantive administrative changes.

§116.188, Plant-wide Applicability Limit

The commission proposes to amend §116.188 with non-substantive administrative changes.

§116.190, Federal Nonattainment and Prevention of Significant Deterioration Review

Since the federal term emissions unit is defined very similarly to the term facility as defined in the TCAA, the commission proposes to add the language "or emissions unit" where the term facility is used in subsection (a). Also the commission proposes to add the phrase "at a major stationary" source where appropriate to make clear that PALs are applicable to major sources only.

§116.192, Amendments and Alterations

In its proposed disapproval notice, the EPA requested that the state include provisions relating to the reopening of a PAL by the executive director. The commission is proposing to include a statement that acceptance of a PAL is agreement by the permit holder to reopening the permit in proposed subsection (c). Also, the commission is proposing a mandatory reopening of the permit for the purposes that are stated in §116.186(c)(1). These purposes include: the correction of typographical or calculation errors; decrease of the PAL limit to reflect creditable emissions reductions; or revision of the permit to reflect an increase in the PAL. Additionally, the commission is proposing to allow discretionary reopening of the permit for the purposes stated in §116.186(c)(2). These purposes include: revision of the PAL to reflect newly applicable federal requirements; revision to the PAL to reflect any other enforceable requirement imposed on major stationary sources under the SIP; reduction of the PAL to avoid national ambient air quality standards (NAAQS) or PSD increment violation; or reduction of the PAL to avoid an adverse impact on a federal class I area. Additionally, the commission proposes to amend §116.192 with non-substantive administrative changes.

§116.601, Types of Standard Permits

The commission is proposing to remove language referring to specific standard permits in §116.601(a)(1) in favor of a more general statement that includes those standard permits adopted into rule. This change will facilitate any future adoptions or repeals of standard permits that are part of Chapter 116.

§116.617, State Pollution Control Project Standard Permit

The commission proposes to amend §116.617(a)(4) to provide that the existing requirements of that paragraph will cease to be effective on February 17, 2011. The commission is also proposing §116.617(a)(5) which provides that, notwithstanding the requirements of §116.604, on or after February 17, 2011, no new or modified registrations will be accepted and no existing registrations will be renewed.

The EPA in its September 23, 2009, proposed disapproval noted its objections to the State Pollution Control Project Standard Permit (PCP) including: the PCP is a generic permit that can be used at any source including major sources; it is overly broad in that it does not specify the types of pollution control equipment it authorizes; and it allows for source specific review and case-by-case authorization. A non-rule standard permit that can be used for pollution control projects is concurrently proposed by the commission. Persons who wish to have authorization for pollution control equipment by a standard permit may use the new non-rule standard permit for pollution control equipment if adopted by the commission.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed rules.

In 2005 and 2006, the agency submitted new and amended rules to Chapter 116 as revisions to the NSR SIP to the EPA for approval. On September 3, 2009, EPA proposed disapproval of these SIP revisions. The proposed rules address EPA concerns identified in the proposed disapproval by: clarifying definitions; removing sections in Chapter 116 from the SIP that reference permits subject to the requirements of FCAA, §112(g) and are related to hazardous air pollutants; relocating requirements related to actual to projected actual emissions and the emissions exclusion test for emissions increases; and amending the pollution control standard permit rule to limit its use since those requirements will be proposed to become part of a non-rule standard permit. No significant fiscal implications are anticipated for any regulated entity.

State agencies or local governments that operate under an NSR permit should not experience any fiscal implications as a result of the proposed rules since despite any discrepancy between state rules which were submitted as revisions to the SIP and the federal regulations, the Air Permits Division has continued to ensure that applicants for NSR permits comply with federal requirements. The proposed rules clarify federal requirements and ensure that regulated entities are more easily able to comply with those requirements.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be consistency between federal and state requirements, assurance that state rules for the SIP NSR program are at least as stringent as federal rules, and EPA approval of the SIP.

The proposed rules are not expected to have a significant fiscal impact on individuals or large businesses because, despite any discrepancy between state rules which were submitted as revisions to the SIP and the federal regulations, the Air Permits Division has continued to ensure that applicants for NSR permits comply with federal requirements. The proposed rules clarify requirements and ensure consistency between state and federal rules. The limitations added regarding use of the pollution control standard permit rule are not expected to have any fiscal impact because the commission is expected to adopt a similar non-rule standard permit. The cost for preparing the pollution control standard permit registration is minimal, and the commission is not changing the fee structure for standard permits.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules because, despite any discrepancy between state rules which were submitted as revisions to the SIP and the federal regulations, the Air Permits Division has continued to ensure that applicants for NSR permits comply with federal requirements. The proposed rules clarify state requirements and ensure consistency with federal requirements regarding NSR permits.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are required to comply with federal regulations. The agency is required to implement the proposed rules to obtain federal approval for the SIP.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a major environmental rule as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare a regulatory impact analysis.

A major environmental rule means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the proposed revisions is to include definitions for and make other changes to the PAL rules to meet federal requirements, including the conditions for reopening PAL permits. The rulemaking would also amend §116.617, State Pollution Control Standard Permit, which is the existing standard permit rule, to limit when existing registrations can be amended or renewed, and provide the deadline for final registrations under this specific standard permit. This is intended to facilitate a smooth transition between this section and the proposed new non-rule air quality standard permit that is being concurrently proposed by the commission.

In the September 23, 2009, notice, EPA also proposed to take no action on §§116.400 - 116.406, which were included in the 2006 rulemaking. These sections are permit requirements for compliance with FCAA, §112(g), but they are not necessary elements of the SIP. The rulemaking proposes the withdrawal from EPA consideration as a revision to the SIP of §§116.400, 116.402, 116.404, and 116.406 as adopted by the commission on January 11, 2006, effective on February 1, 2006. These changes will not adversely affect the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state in a material way since they codify the effect a federal district court ruling that has been upheld by the United States Supreme Court in *South Coast,* as discussed elsewhere in this preamble.

Additionally, even if the rules met the definition of a major environmental rule, the rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The proposed rules would implement requirements of the FCAA. Under 42 United States Code (USC), §7410, each state is required to adopt and implement a SIP containing adequate provisions to implement, attain, maintain and enforce the NAAQS within the state. While 42 USC, §7410 generally does not require specific programs, methods, or emission reductions in order to meet the standard, state SIPs must include specific requirements as specified by 42 USC, §7410. The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public, to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that their SIPs provide for implementation, attainment, maintenance, and enforcement of the NAAQS within the state. One of the requirements of 42 USC, §7410 is for states to include programs for the regulation of the modification and construction of any stationary source within the area covered by the plan as necessary to assure that the NAAQS are achieved, including a permit program as required in FCAA, Parts C and D, or NSR. Additionally, once states have developed SIPs, and those plans are approved by the EPA, the FCAA prescribes, in 42 USC, §7502(e) that the EPA, in modifying a NAAQS, shall promulgate rules that apply to all areas that have not attained the

previous NAAQS that provide for controls that are no less stringent than the controls that previously applied to the area. This rulemaking will address those sections submitted as revisions to the NSR SIP and subsequently were proposed for disapproval by the EPA. Specifically, those concern definitions for and other changes to the PAL rules, and that excess emissions are violations of the permit. The rulemaking project includes propose withdrawal of sections applicable to permits required for compliance with FCAA, §112(g) from EPA consideration as a revision to the SIP, although there are no changes to rule numbering or text and thus are not open for comment.

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

Because of the ongoing need to meet federal requirements, the commission routinely proposes and adopts rules incorporating or designed to satisfy specific federal requirements. The legislature is presumed to understand this federal scheme. If each rule proposed by the commission to meet a federal requirement was considered to be a major environmental rule that exceeds federal law, then each of those rules would require the full regulatory impact analysis (RIA) contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the proposed rules may have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA, and in fact creates no additional impacts since the proposed rules do not exceed the requirement to attain and maintain the NAAQS. For these reasons, the proposed rules fall under the exception in Texas Government Code, §2001.0225(a), because they are required by, and do not exceed, federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code, but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *(Central Power & Light Co. v. Sharp,* 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue,* 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.,* 798 S.W.2d 353, 357 (Tex. App. Austin 1990, *no writ). Cf. Humble Oil & Refining Co. v. Calvert,* 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.,* 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor,* 24 S.W.3d 581 (Tex. App. Austin 2000, *pet. denied);* and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.,* 563 S.W.2d 916 (Tex. 1978).)

The commission's interpretation of the RIA requirements is also supported by a change made to the Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance" (Texas Government Code, §2001.035). The legislature specifically identified Texas Government Code, §2001.0225 as falling under this standard. As discussed in this analysis and elsewhere in this preamble, the commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

The proposed rules implement requirements of the FCAA, specifically to adopt and implement SIPs to attain and maintain the NAAQS, including a requirement to adopt and implement permit programs. The specific intent of the proposed rulemaking is to address those sections submitted as revisions to the NSR SIP and subsequently were proposed for disapproval by the EPA. Specifically, those concern definitions for and other changes to the PAL rules, and that excess emissions are violations of the permit. The rulemaking would also limit when existing pollution control standard permit registrations can be amended or renewed, and the deadline for final registrations under this specific standard permit. The proposed rules were not developed solely under the general powers of the agency, but are authorized by specific sections of Texas Health and Safety Code, Chapter 382 (also known as the Texas Clean Air Act), and the Texas Water Code, which are cited in the STATUTORY AUTHORITY section of this preamble. Therefore, this proposed rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or §17 or §19, Article I, Texas Constitution; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact analysis for the proposed rulemaking action under the Texas Government Code, §2007.043. The primary purpose of this proposed rulemaking

action, as discussed elsewhere in this preamble, is to address those sections submitted as revisions to the NSR SIP and subsequently were proposed for disapproval by the EPA. Specifically, the proposed changes concern definitions for and other changes to the PAL rules, limitations regarding use of pollution control standard permit registrations, and that excess emissions are violations of the permit.

The proposed rules will not create any additional burden on private real property. The proposed rules will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The proposal also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the proposed rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.),* and commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable CMP goals and policies.

The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). The proposed rules will indirectly benefit the environment because reduced emissions resulting from the more stringent major source thresholds and emission offset requirements of the one-hour ozone standard ensure that there will be fewer adverse impacts to public health and the environment. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 CFR to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

Written comments on the consistency of the proposed rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Chapter 116 is an applicable requirement of Chapter 122, Federal Operating Permits Program. If the proposed rules are adopted, owners or operators subject to the federal operating permit program must, consistent with the revision process in Chapter 122, upon the effective date of the adopted rulemaking, revise their operating permit to include the new Chapter 116 requirements. Additionally, sources subject to the rules may become subject to the federal operating permit program.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on September 20, 2010 at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Patricia Duron, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/,* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2010-008-116-PR. The comment period closes September 27, 2010. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html.* For further information, please contact Blake Stewart, Air Permits Division, at (512) 239-6931.

SUBCHAPTER A. DEFINITIONS

30 TAC §116.12

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe reasonable requirements for measuring and monitoring the emissions of air contaminants from a source or from an activity causing or resulting in the emission of air contaminants; THSC, §382.021, concerning Sampling Methods and Procedures, which authorizes the commission to prescribe sampling methods and procedures to be used in determining violations of and compliance with the commission's rules; THSC, §382.040,

concerning Documents; Public Property, which provides that all information, documents, and data collected by the commission in performing its duties are state property; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits for construction of new facilities or modifications to existing facilities that may emit air contaminants; THSC, §382.0511, concerning Permit Consolidation and Amendment, which authorizes the commission to consolidate various authorizations; THSC, §382.0512, concerning Modification of Existing Facility, which prescribes how the commission will evaluate modifications of existing facilities; THSC, §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions; THSC, §382.0514, concerning Sampling, Monitoring, and Certification, which authorizes the commission to require sampling and monitoring of a permitted federal source or facility; THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements; and THSC, §382.0518, concerning Preconstruction Permit, which authorizes the commission to issue preconstruction permits. The amendment is also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq.,* which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standard will be achieved and maintained within each air quality control region of the state.

The proposed amendment implements THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, 382.021, 382.040, 382.051, 382.0511- 382.0515, and 382.0518, and FCAA, 42 USC, §§7401 *et seq.*

§116.12. Nonattainment and Prevention of Significant Deterioration Review Definitions.

Unless specifically defined in the Texas Clean Air Act (TCAA) or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. The terms in this section are applicable to permit review for major source construction and major source modification in nonattainment areas. In addition to the terms that are defined by the TCAA, and in §101.1 of this title (relating to Definitions), the following words and terms, when used in Chapter 116, Subchapter B, Divisions 5 and 6 of this title (relating to Nonattainment Review Permits and Prevention of Significant Deterioration Review); and Chapter 116, Subchapter C, Division 1 of this title (relating to Plant-Wide Applicability Limits), have the following meanings, unless the context clearly indicates otherwise.

(1) Actual emissions--Actual emissions as of a particular date are equal to the average rate, in tons per year, at which the unit actually emitted the pollutant during the 24-month period that precedes the particular date and that is representative of normal source operation, except that this definition shall not apply for calculating whether a significant emissions increase has occurred, or for establishing a plant-wide applicability limit. Instead, paragraph (3) of this section relating to baseline actual emissions shall apply for this purpose. The executive director shall allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period. The executive director may presume that the source-specific allowable emissions for the unit are equivalent to the actual emissions, e.g., when the allowable limit is reflective of actual emissions. For any emissions unit that has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

(2) Allowable emissions--The emissions rate of a stationary source, calculated using the maximum rated capacity of the source (unless the source is subject to federally enforceable limits that restrict the operating rate, or hours of operation, or both), and the most stringent of the following:

(A) the applicable standards specified in 40 Code of Federal Regulations Part 60 or 61;

(B) the applicable state implementation plan emissions limitation including those with a future compliance date; or

(C) the emissions rate specified as a federally enforceable permit condition including those with a future compliance date.

(3) Baseline actual emissions--The rate of emissions, in tons per year, of a federally regulated new source review pollutant.

(A) For any existing electric utility steam generating unit, baseline actual emissions means the average rate, in tons per year, at which the unit actually emitted the pollutant during any consecutive 24-month period selected by the owner or operator within the five-year period immediately preceding when the owner or operator begins actual construction of the project. The executive director shall allow the use of a different time period upon a determination that it is more representative of normal source operation.

(B) For an existing facility (other than an electric utility steam generating unit), baseline actual emissions means the average rate, in tons per year, at which the facility actually emitted the pollutant during any consecutive 24-month period selected by the owner or operator within the ten-year period immediately preceding either the date the owner or operator begins actual construction of the project, or the date a complete permit application is received for a permit. The rate shall be adjusted downward to exclude any emissions that would have exceeded an emission limitation with which the major stationary source must currently comply with the exception of those required under 40 Code of Federal Regulations Part 63, had such major stationary source been required to comply with such limitations during the consecutive 24-month period.

(C) For a new facility, the baseline actual emissions for purposes of determining the emissions increase that will result from the initial construction and operation of such unit shall equal zero; and for all other purposes during the first two years following initial operation, shall equal the unit's potential to emit.

(D) The actual average rate shall be adjusted downward to exclude any non-compliant emissions that occurred during the consecutive 24-month period. For each regulated new source review pollutant, when a project involves multiple facilities, only one consecutive 24-month period must be used to determine the baseline actual emissions for the facilities being changed. A different consecutive 24-month period can be used for each regulated new source review pollutant. The average rate shall not be based on any consecutive 24-month period for which there is inadequate information for determining annual emissions, in tons per year, and for adjusting this amount. Baseline emissions cannot occur prior to November 15, 1990.

(E) The actual average emissions rate shall include fugitive emissions to the extent quantifiable. Until March 1, 2016, emissions previously demonstrated as emissions events or historically unauthorized and subject to reporting [~~exempted~~] under Chapter 101 of this title (relating to General Air Quality Rules) shall [~~may~~] be included to the extent that they have been authorized[~~, or are being authorized~~].

(4) Basic design parameters--For a process unit at a steam electric generating facility, the owner or operator may select as its basic design parameters either maximum hourly heat input and maximum hourly fuel consumption rate or maximum hourly electric output rate and maximum steam flow rate. When establishing fuel consumption specifications in terms of weight or volume, the minimum fuel quality based on British thermal units content shall be used for determining the basic design parameters for a coal-fired electric utility steam generating unit. The basic design parameters for any process unit that is not at a steam electric generating facility are maximum rate of fuel or heat input, maximum rate of material input, or maximum rate of product output. Combustion process units will typically use maximum rate of fuel input. For sources having multiple end products and raw materials, the owner or operator shall consider the primary product or primary raw material when selecting a basic design parameter. The owner or operator may propose an alternative basic design parameter for the source's process units to the executive director if the owner or operator believes the basic design parameter as defined in this paragraph is not appropriate for a specific industry or type of process unit. If the executive director approves of the use of an alternative basic design parameter, that basic design parameter shall be identified and compliance required in a condition in a permit that is legally enforceable.

(A) The owner or operator shall use credible information, such as results of historic maximum capability tests, design information from the manufacturer, or engineering calculations, in establishing the magnitude of the basic design parameter.

(B) If design information is not available for a process unit, the owner or operator shall determine the process unit's basic design parameter(s) using the maximum value achieved by the process unit in the five-year period immediately preceding the planned activity.

(C) Efficiency of a process unit is not a basic design parameter.

(5) Begin actual construction--In general, initiation of physical on-site construction activities on an emissions unit that are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying of underground pipework, and construction of permanent storage structures. With respect to a change in method of operation, this term refers to those on-site activities other than preparatory activities that mark the initiation of the change.

(6) Building, structure, facility, or installation--All of the pollutant-emitting activities that belong to the same industrial grouping, are located in one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities are considered to be part of the same industrial grouping if they belong to the same "major group" (i.e., that have the same two-digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 supplement.

(7) Clean coal technology--Any technology, including technologies applied at the precombustion, combustion, or post-combustion stage, at a new or existing facility that will achieve significant reductions in air emissions of sulfur dioxide or oxides of nitrogen associated with the utilization of coal in the generation of electricity, or process steam that was not in widespread use as of November 15, 1990.

(8) Clean coal technology demonstration project--A project using funds appropriated under the heading "Department of Energy-Clean Coal Technology," up to a total amount of $2.5 billion for commercial demonstration of clean coal technology, or similar projects funded through appropriations for the United States Environmental Protection Agency. The federal contribution for a qualifying project shall be at least 20% of the total cost of the demonstration project.

(9) Commence--As applied to construction of a major stationary source or major modification, means that the owner or operator has all necessary preconstruction approvals or permits and either has:

(A) begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or

(B) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.

(10) Construction--Any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) that would result in a change in actual emissions.

(11) Contemporaneous period--For major sources the period between:

(A) the date that the increase from the particular change occurs; and

(B) 60 months prior to the date that construction on the particular change commences.

(12) *De minimis* threshold test (netting)--A method of determining if a proposed emission increase will trigger nonattainment or prevention of significant deterioration review. The summation of the proposed project emission increase in tons per year with all other creditable source emission increases and decreases during the contemporaneous period is compared to the significant level for that pollutant. If the significant level is exceeded, then prevention of significant deterioration and/or nonattainment review is required.

(13) Electric utility steam generating unit--Any steam electric generating unit that is constructed for the purpose of supplying more than one-third of its potential electric output capacity and more than 25 megawatts electrical output to any utility power distribution system for sale. Any steam supplied to a steam distribution system for the purpose of providing steam to a steam-electric generator that would produce electrical energy for sale is included in determining the electrical energy output capacity of the affected facility.

(14) Federally regulated new source review pollutant--As defined in subparagraphs (A) - (D) of this paragraph:

(A) any pollutant for which a national ambient air quality standard has been promulgated and any constituents or precursors for such pollutants identified by the United States Environmental Protection Agency;

(B) any pollutant that is subject to any standard promulgated under Federal Clean Air Act (FCAA), §111;

(C) any Class I or II substance subject to a standard promulgated under or established by FCAA, Title VI; or

(D) any pollutant that otherwise is subject to regulation under the FCAA; except that any or all hazardous air pollutants either listed in FCAA, §112 or added to the list under FCAA, §112(b)(2), which have not been delisted under FCAA, §112(b)(3), are not regulated new source review pollutants unless the listed hazardous air pollutant is also regulated as a constituent or precursor of a general pollutant listed under FCAA, §108.

(15) Lowest achievable emission rate--For any emitting facility, that rate of emissions of a contaminant that does not exceed the amount allowable under applicable new source performance standards promulgated by the United States Environmental Protection Agency under 42 United States Code, §7411, and that reflects the following:

(A) the most stringent emission limitation that is contained in the rules and regulations of any approved state implementation plan for a specific class or category of facility, unless the owner or operator of the proposed facility demonstrates that such limitations are not achievable; or

(B) the most stringent emission limitation that is achieved in practice by a specific class or category of facilities, whichever is more stringent.

(16) Major facility--Any facility that emits or has the potential to emit 100 tons per year or more of the plant-wide applicability limit (PAL) pollutant in an attainment area; or any facility that emits or has the potential to emit the PAL pollutant in an amount that is equal to or greater than the major source threshold for the PAL pollutant in Table I of this section for nonattainment areas.

(17) Major stationary source--Any stationary source that emits, or has the potential to emit, a threshold quantity of emissions or more of any air contaminant (including volatile organic compounds (VOCs) for which a national ambient air quality standard has been issued. The major source thresholds are identified in Table I of this section for nonattainment pollutants and the major source thresholds for prevention of significant deterioration pollutants are identified in 40 Code of Federal Regulations (CFR) §51.166(b)(1). A source that emits, or has the potential to emit a federally regulated new source review pollutant at levels greater than those identified in 40 CFR §51.166(b)(1) is considered major for all prevention of significant deterioration pollutants. A major stationary source that is major for VOCs or nitrogen oxides is considered to be major for ozone. The fugitive emissions of a stationary source shall not be included in determining for any of the purposes of this definition whether it is a major stationary source, unless the source belongs to one of the categories of stationary sources listed in 40 CFR §51.165(a)(1)(iv)(C).

(18) Major modification--As follows.

(A) Any physical change in, or change in the method of operation of a major stationary source that causes a significant project emissions increase and a significant net emissions increase for any federally regulated new source review pollutant. At a stationary source that is not major prior to the increase, the increase by itself must equal or exceed that specified for a major source. At an existing major stationary source, the increase must equal or exceed that specified for a major modification to be significant. The major source and significant thresholds are provided in Table I of this section for nonattainment pollutants. The major source and significant thresholds for prevention of significant deterioration pollutants are identified in 40 Code of Federal Regulations §51.166(b)(1) and (23), respectively.
Figure: 30 TAC §116.12(18)(A) (No change.)

(B) A physical change or change in the method of operation shall not include:

(i) routine maintenance, repair, and replacement;

(ii) use of an alternative fuel or raw material by reason of an order under the Energy Supply and Environmental Coordination Act of 1974, §2(a) and (b) (or any superseding legislation) or by reason of a natural gas curtailment plan under the Federal Power Act;

(iii) use of an alternative fuel by reason of an order or rule of 42 United States Code, §7425;

(iv) use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste;

(v) use of an alternative fuel or raw material by a stationary source that the source was capable of accommodating before December 21, 1976 (unless such change would be prohibited under any federally enforceable permit condition established after December 21, 1976) or the source is approved to use under any permit issued under regulations approved under this chapter;

(vi) an increase in the hours of operation or in the production rate (unless the change is prohibited under any federally enforceable permit condition that was established after December 21, 1976);

(vii) any change in ownership at a stationary source;

(viii) any change in emissions of a pollutant at a site that occurs under an existing plant-wide applicability limit;

(ix) the installation, operation, cessation, or removal of a temporary clean coal technology demonstration project, provided that the project complies with the state implementation plan and other requirements necessary to attain and maintain the national ambient air quality standard during the project and after it is terminated;

(x) for prevention of significant deterioration review only, the installation or operation of a permanent clean coal technology demonstration project that constitutes re-powering, provided that the project does not result in an increase in the potential to emit of any regulated pollutant emitted by the unit. This exemption shall apply on a pollutant-by-pollutant basis; or

(xi) for prevention of significant deterioration review only, the reactivation of a clean coal-fired electric utility steam generating unit.

(19) Necessary preconstruction approvals or permits--Those permits or approvals required under federal air quality control laws and regulations and those air quality control laws and regulations that are part of the applicable state implementation plan.

(20) Net emissions increase--The amount by which the sum of the following exceeds zero: the project emissions increase plus any sourcewide creditable contemporaneous emission increases, minus any sourcewide creditable contemporaneous emission decreases. Baseline actual emissions shall be used to determine emissions increases and decreases.

(A) An increase or decrease in emissions is creditable only if the following conditions are met:

(i) it occurs during the contemporaneous period;

(ii) the executive director has not relied on it in issuing a federal new source review permit for the source and that permit is in effect when the increase in emissions from the particular change occurs; and

(iii) in the case of prevention of significant deterioration review only, an increase or decrease in emissions of sulfur dioxide, particulate matter, or nitrogen oxides that occurs before the applicable minor source baseline date is creditable only if it is required to be considered in calculating the amount of maximum allowable increases remaining available.

(B) An increase in emissions is creditable if it is the result of a physical change in, or change in the method of operation of a stationary source only to the extent that the new level of emissions exceeds the baseline actual emission rate. Emission increases at facilities under a plant-wide applicability limit are not creditable.

(C) A decrease in emissions is creditable only to the extent that all of the following conditions are met:

(i) the baseline actual emission rate exceeds the new level of emissions;

(ii) it is federally enforceable at and after the time that actual construction on the particular change begins;

(iii) the executive director has not relied on it in issuing a prevention of significant deterioration or a nonattainment permit;

(iv) the decrease has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change; and

(v) in the case of nonattainment applicability analysis only, the state has not relied on the decrease to demonstrate attainment or reasonable further progress.

(D) An increase that results from a physical change at a source occurs when the emissions unit on which construction occurred becomes operational and begins to emit a particular pollutant. Any replacement unit that requires shakedown becomes operational only after a reasonable shakedown period, not to exceed 180 days.

(21) Offset ratio--For the purpose of satisfying the emissions offset reduction requirements of 42 United States Code, §7503(a)(1)(A), the emissions offset ratio is the ratio of total actual reductions of emissions to total emissions increases of such pollutants. The minimum offset ratios are included in Table I of this section under the definition of major modification. In order for a reduction to qualify as an offset, it must be certified as an emission credit under Chapter 101, Subchapter H, Division 1 or 4 of this title (relating to Emission Credit Banking and [~~or~~] Trading; or Discrete Emission Credit Banking and Trading), except as provided for in §116.170(b) of this title (relating to Applicability of Emission Reductions as Offsets). The reduction must not have been relied on in the issuance of a previous nonattainment or prevention of significant deterioration permit.

(22) Plant-wide applicability limit--An emission limitation expressed, in tons per year, for a pollutant at a major stationary source, that is enforceable and established in a plant-wide applicability limit permit under §116.186 of this title (relating to General and Special Conditions).

(23) Plant-wide applicability limit effective date--The date of issuance of the plant-wide applicability limit permit. The plant-wide applicability limit effective date for a plant-wide applicability limit established in an existing flexible permit is the date that the flexible permit was issued.

(24) Plant-wide applicability limit major modification--Any physical change in, or change in the method of operation of the plant-wide applicability limit source that causes it to emit the plant-wide applicability limit pollutant at a level equal to or greater than the plant-wide applicability limit.

(25) Plant-wide applicability limit permit--The new source review permit that establishes the plant-wide applicability limit.

(26) Plant-wide applicability limit pollutant--The pollutant for which a plant-wide applicability limit is established at a major stationary source.

(27) Potential to emit--The maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or enforceable operational limitation on the capacity of the stationary source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, may be treated as part of its design only if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions, as defined in 40 Code of Federal Regulations §51.165(a)(1)(viii), do not count in determining the potential to emit for a stationary source.

(28) Project net--The sum of the following: the project emissions increase, minus any sourcewide creditable emission decreases proposed at the source between the date of application for the modification and the date the resultant modification begins emitting. Baseline actual emissions shall be used to determine emissions increases and decreases. Increases and decreases must meet the creditability criteria listed under the definition of net emissions increase in this section.

(29) Projected actual emissions--The maximum annual rate, in tons per year, at which an existing facility is projected to emit a federally regulated new source review pollutant in any rolling 12-month period during the five years following the date the facility resumes regular operation after the project, or in any one of the ten years following that date, if the project involves increasing the facility's design capacity or its potential to emit that federally regulated new source review pollutant. In determining the projected actual emissions, the owner or operator of the major stationary source shall include unauthorized emissions from startup and shutdown activities; and fugitive emissions to the extent quantifiable; and shall consider all relevant information, including, but not limited to, historical operational data, the company's own representations, the company's expected business activity and the company's highest projections of business activity, the company's filings with the state or federal regulatory authorities, and compliance plans under the approved state implementation plan.

(30) Project emissions increase--The sum of emissions increases for each modified or affected facility determined using the following methods:

(A) for existing facilities, the difference between the projected actual emissions and the baseline actual emissions. In calculating any increase in emissions that results from the project, that portion of the facility's emissions following the project that the facility could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions and that are also unrelated to the particular project, including any increased utilization due to product demand growth may be excluded from the project emission increase. The potential to emit from the facility following completion of the project may be used in lieu of the projected actual emission rate; and

(B) for new facilities, the difference between the potential to emit from the facility following completion of the project and the baseline actual emissions.

(31) Replacement facility--A facility that satisfies the following criteria:

(A) the facility is a reconstructed unit within the meaning of 40 Code of Federal Regulations §60.15(b)(1), or the facility replaces an existing facility;

(B) the facility is identical to or functionally equivalent to the replaced facility;

(C) the replacement does not alter the basic design parameters of the process unit;

(D) the replaced facility is permanently removed from the major stationary source, otherwise permanently disabled, or permanently barred from operation by a permit that is enforceable. If the replaced facility is brought back into operation, it shall constitute a

new facility. No creditable emission reductions shall be generated from shutting down the existing facility that is replaced. A replacement facility is considered an existing facility for the purpose of determining federal new source review applicability.

(32) Secondary emissions--Emissions that would occur as a result of the construction or operation of a major stationary source or major modification, but do not come from the source or modification itself. Secondary emissions must be specific, well-defined, quantifiable, and impact the same general area as the stationary source or modification that causes the secondary emissions. Secondary emissions include emissions from any off-site support facility that would not be constructed or increase its emissions, except as a result of the construction or operation of the major stationary source or major modification. Secondary emissions do not include any emissions that come directly from a mobile source such as emissions from the tail pipe of a motor vehicle, from a train, or from a vessel.

(33) Significant facility--A facility that emits or has the potential to emit a plant-wide applicability limit (PAL) pollutant in an amount that is equal to or greater than the significant level for that PAL pollutant.

(34) Small facility--A facility that emits or has the potential to emit the plant-wide applicability limit (PAL) pollutant in an amount less than the significant level for that PAL pollutant.

(35) Stationary source--Any building, structure, facility, or installation that emits or may emit any air pollutant subject to regulation under 42 United States Code, §§7401 *et seq.*

(36) Temporary clean coal technology demonstration project--A clean coal technology demonstration project that is operated for a period of five years or less, and that complies with the state implementation plan and other requirements necessary to attain and maintain the national ambient air quality standards during the project and after it is terminated.

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

Filed with the Office of the Secretary of State on August 13, 2010.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: September 26, 2010
For further information, please call: (512) 239-0177

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SUBCHAPTER B. NEW SOURCE REVIEW PERMITS

DIVISION 1. PERMIT APPLICATION

30 TAC §116.115, §116.127

STATUTORY AUTHORITY

The amendment and new section are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment and new section are proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe reasonable requirements for measuring and monitoring the emissions of air contaminants from a source or from an activity causing or resulting in the emission of air contaminants; THSC, §382.021, concerning Sampling Methods and Procedures, which authorizes the commission to prescribe sampling methods and procedures to be used in determining violations of and compliance with the commission's rules; THSC, §382.040, concerning Documents; Public Property, which provides that all information, documents, and data collected by the commission in performing its duties are state property; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits for construction of new facilities or modifications to existing facilities that may emit air contaminants; THSC, §382.0511, concerning Permit Consolidation and Amendment, which authorizes the commission to consolidate various authorizations; THSC, §382.0512, concerning Modification of Existing Facility, which prescribes how the commission will evaluate modifications of existing facilities; THSC, §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions; THSC, §382.0514, concerning Sampling, Monitoring, and Certification, which authorizes the commission to require sampling and monitoring of a permitted federal source or facility; THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements; and THSC, §382.0518, concerning Preconstruction Permit, which authorizes the commission to issue preconstruction permits. The amendment and new section are also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq.,* which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standard will be achieved and maintained within each air quality control region of the state.

The proposed amendment and new section implement THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, 382.021, 382.040, 382.051, 382.0511, 382.0512, 382.0513, 382.0514, and 382.0515, and 382.0518, and FCAA, 42 USC, §§7401 *et seq.*

§116.115. General and Special Conditions.

(a) General and special conditions. Permits, special permits, standard permits, and special exemptions may contain general and special conditions.

(b) General conditions. Holders of permits, special permits, standard permits, and special exemptions shall comply with the following:

(1) the general conditions contained in the permit document if issued or amended prior to August 16, 1994; or

(2) the following general conditions if the permit or amendment is issued or amended on or after August 16, 1994, regardless of whether they are specifically stated within the permit document.

(A) Report of construction progress. The permit holder shall report start of construction, construction interruptions exceeding 45 days, and completion of construction. The report shall be given to the appropriate regional office of the commission not later than 15 working days after occurrence of the event.

(B) Start-up notification.

(i) The permit holder shall notify the appropriate air program regional office of the commission prior to the commencement of operations of the facilities authorized by the permit. The notification must be made in such a manner as to allow a representative of the commission to be present at the commencement of operations.

(ii) The permit holder shall provide a separate notification for the commencement of operations for each unit of phased construction, which may involve a series of units commencing operations at different times.

(iii) Prior to operation of the facilities authorized by the permit, the permit holder shall identify to the Office of Permitting[~~, Remediation,~~] and Registration the source or sources of allowances to be utilized for compliance with Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program).

(C) Sampling requirements.

(i) If sampling is required, the permit holder shall contact the commission's Office of Compliance and Enforcement prior to sampling to obtain the proper data forms and procedures.

(ii) All sampling and testing procedures must be approved by the executive director and coordinated with the regional representatives of the commission.

(iii) The permit holder is also responsible for providing sampling facilities and conducting the sampling operations or contracting with an independent sampling consultant.

(D) Equivalency of methods. The permit holder must demonstrate or otherwise justify the equivalency of emission control methods, sampling or other emission testing methods, and monitoring methods proposed as alternatives to methods indicated in the conditions of the permit. Alternative methods shall be applied for in writing and must be reviewed and approved by the executive director prior to their use in fulfilling any requirements of the permit.

(E) Recordkeeping. The permit holder shall:

(i) maintain a copy of the permit along with records containing the information and data sufficient to demonstrate compliance with the permit, including production records and operating hours;

(ii) keep all required records in a file at the facility site. If, however, the facility site normally operates unattended, records must be maintained at an office within Texas having day-to-day operational control of the facility site;

(iii) make the records available at the request of personnel from the commission or any local air pollution control agency having jurisdiction over the site. Upon request, the commission shall make any such records of compliance available to the public in a timely manner;

(iv) comply with any additional recordkeeping requirements specified in special conditions attached to the permit;

(v) retain information in the file for at least two years following the date that the information or data is obtained; and

(vi) for persons certifying and registering a federally-enforceable emission limitation in accordance with §116.611 of this title (relating to Registration To Use a Standard Permit), retain all records demonstrating compliance for at least five years.

(F) Maximum allowable emission rates. The total emissions of air contaminants from any of the sources of emissions must not exceed the values stated on the table attached to the permit entitled "Emission Sources--Maximum Allowable Emission Rates." Emissions that exceed the maximum allowable emission rates are not authorized and are a violation of the permit.

(G) Maintenance of emission control. The permitted facilities shall not be operated unless all air pollution emission capture and abatement equipment is maintained in good working order and operating properly during normal facility operations. The permit holder shall provide notification for emissions events and maintenance in accordance with §§101.201, 101.211, and 101.221 of this title (relating to Emissions Event Reporting and Recordkeeping Requirements; Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements; and Operational Requirements).

(H) Compliance with rules.

(i) Acceptance of a permit by an applicant constitutes an acknowledgment and agreement that the permit holder will comply with all rules, regulations, and orders of the commission issued in conformity with the Texas Clean Air Act [~~TCAA~~] and the conditions precedent to the granting of the permit.

(ii) If more than one state or federal rule or regulation or permit condition are applicable, the most stringent limit or condition shall govern and be the standard by which compliance shall be demonstrated.

(iii) Acceptance includes consent to the entrance of commission employees and agents into the permitted premises at reasonable times to investigate conditions relating to the emission or concentration of air contaminants, including compliance with the permit.

(c) Special conditions. The holders of permits, special permits, standard permits, and special exemptions shall comply with all special conditions contained in the permit document.

(1) Special conditions may be attached to a permit that are more restrictive than the requirements of Title 30 of the Texas Administrative Code.

(2) Special condition for written approval.

(A) The executive director may require as a special condition that the permit holder obtain written approval before constructing a source under:

(i) a standard permit under Subchapter F of this chapter (relating to Standard Permits); or

(ii) an exemption under Chapter 106 of this title (relating to Permits by Rule).

(B) Such written approval may be required if the executive director specifically finds that an increase of a particular pollutant could either:

(i) result in a significant impact on the air environment; or

(ii) cause the facility to become subject to review under:

(I) Subchapter C of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)); or

(II) the provisions in Division 5 of this subchapter [~~§116.150 and §116.151 of this title~~] (relating to Nonattainment Review Permits) and Division 6 of this subchapter [~~§§116.160 - 116.163 of this title~~] (relating to Prevention of Significant Deterioration Review).

§116.127. Actual to Projected Actual and Emissions Exclusion Test for Emissions.

(a) If projected actual emissions are used or emissions are excluded from the emission increase resulting from the project, the owner or operator shall document and maintain a record of the following information before beginning construction, and this information must be provided as part of the notification, certification, registration, or application submitted to the executive director to claim or apply for state new source review authorization for the project. If the emissions unit is an existing electric utility steam generating unit, the owner or operator shall provide a copy of this information to the executive director before beginning actual construction:

(1) a description of the project;

(2) identification of the facilities of which emissions of a federally regulated new source review pollutant could be affected by the project; and

(3) a description of the applicability test used to determine that the project is not a major modification for any pollutant, including the baseline actual emissions, the projected actual emissions, the amount of emissions excluded from the project emissions increase and an explanation for why such amount was excluded, and any netting calculations, if applicable.

(b) If projected actual emissions are used to determine the project emission increase at a facility, the owner or operator shall monitor the emissions of any regulated new source review pollutant that could increase as a result of the project at that facility and calculate and maintain a record of the annual emissions from that facility, in tons per year, on a calendar year basis for:

(1) a period of five years following resumption of regular operations after the change; or

(2) a period of ten years following resumption of regular operations after the change if the project increases the design capacity or potential to emit of that regulated new source review pollutant at that facility.

(c) If the facility is an electric utility steam generating unit, the owner or operator shall submit a report to the executive director within 60 days after the end of each calendar year of which records must be maintained documenting the unit's annual emissions during the calendar year that preceded submission of the report.

(d) If the facility is not an electric utility steam generating unit, the owner or operator shall submit a report to the executive director if the annual emissions from the project exceed the baseline actual emissions by a significant amount for that pollutant, and the emissions exceed the preconstruction projection for any facility. The report shall be submitted to the executive director within 60 days after the end of each calendar year. The report shall contain:

(1) the name, address, and telephone number of the major stationary source; and

(2) the calculated actual annual emissions.

(e) The owner or operator of the facility shall make the information required to be documented and maintained by this section available for review upon request for inspection by the executive director, local air pollution control program, and the general public.

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

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30 TAC §116.121

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

STATUTORY AUTHORITY

The repeal is proposed under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The repeal is also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe reasonable requirements for measuring and monitoring the emissions of air contaminants from a source or from an activity causing or resulting in the emission of air contaminants; THSC, §382.021, concerning Sampling Methods and Procedures, which authorizes the commission to prescribe sampling methods and procedures to be used in determining violations of and compliance with the commission's rules; THSC, §382.040, concerning Documents; Public Property, which provides that all information, documents, and data collected by the commission in performing its duties are state property; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits for construction of new facilities or modifications to existing facilities that may emit air contaminants; THSC, §382.0511, concerning Permit

Consolidation and Amendment, which authorizes the commission to consolidate various authorizations; THSC, §382.0512, concerning Modification of Existing Facility, which prescribes how the commission will evaluate modifications of existing facilities; THSC, §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions; THSC, §382.0514, concerning Sampling, Monitoring, and Certification, which authorizes the commission to require sampling and monitoring of a permitted federal source or facility; THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements; and THSC, §382.0518, concerning Preconstruction Permit, which authorizes the commission to issue preconstruction permits. The repeal is also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq.,* which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standard will be achieved and maintained within each air quality control region of the state.

The repeal implements THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, 382.021, 382.040, 382.051, 382.0511, 382.0512, 382.0513, 382.0514, 382.0515, and 382.0518, and FCAA, 42 USC, §§7401 *et seq.*

§116.121. Actual to Projected Actual and Emissions Exclusion Test for Emissions Increases.

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

Filed with the Office of the Secretary of State on August 13, 2010.

TRD-201004715

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Earliest possible date of adoption: September 26, 2010

For further information, please call: (512) 239-0177

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SUBCHAPTER C. PLANT-WIDE APPLICABILITY LIMITS

DIVISION 1. PLANT-WIDE APPLICABILITY LIMITS

30 TAC §§116.180, 116.182, 116.186, 116.188, 116.190, 116.192

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendments are also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe reasonable requirements for measuring and monitoring the emissions of air contaminants from a source or from an activity causing or resulting in the emission of air contaminants; THSC, §382.021, concerning Sampling Methods and Procedures, which authorizes the commission to prescribe sampling methods and procedures to be used in determining violations of and compliance with the commission's rules; THSC, §382.040, concerning Documents; Public Property, which provides that all information, documents, and data collected by the commission in performing its duties are state property; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits for construction of new facilities or modifications to existing facilities that may emit air contaminants; THSC, §382.0511, concerning Permit Consolidation and Amendment, which authorizes the commission to consolidate various authorizations; THSC, §382.0512, concerning Modification of Existing Facility, which prescribes how the commission will evaluate modifications of existing facilities; THSC, §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions; THSC, §382.0514, concerning Sampling, Monitoring, and Certification, which authorizes the commission to require sampling and monitoring of a permitted federal source or facility; THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements; and THSC, §382.0518, concerning Preconstruction Permit, which authorizes the commission to issue preconstruction permits. The amendments are also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq.,* which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standard will be achieved and maintained within each air quality control region of the state.

The proposed amendments implement THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, 382.021, 382.040, 382.051, 382.0511, 382.0512, 382.0513, 382.0514, 382.0515, and 382.0518, and FCAA, 42 USC, §§7401 *et seq.*

§116.180. Applicability.

(a) The following requirements apply to a plant-wide applicability limit (PAL) permit.

(1) Only one PAL may be issued for each pollutant at an existing major stationary source [~~account site~~].

(2) A PAL permit may include more than one PAL.

(3) A PAL permit may not cover facilities or emissions units at more than one existing major stationary source.

(4) A PAL permit may be consolidated with a new source review permit at the existing major stationary source.

(5) A PAL permit can be issued only for an existing major stationary source; it may not be issued for a new major stationary source as defined in 40 Code of Federal Regulations §51.165(iv)(A).

(b) The new owner of a major stationary source shall comply with §116.110(e) of this title (relating to Applicability), provided that

all facilities or emissions units covered by a PAL permit change ownership at the same time and to the same person, or both the new owner and existing permit holder must obtain a PAL permit alteration allocating the emission prior to the transfer of the permit by the commission. After the sale of a facility or emissions unit [~~, or facilities~~], but prior to the transfer of a permit requiring a permit alteration, the original PAL permit holder remains responsible for ensuring compliance with the existing PAL permit and all rules [~~and regulations~~] of the commission.

(c) The owner of the facility, emissions unit, group of facilities, or account or the operator of the facility, emissions unit group of facilities, or account that is authorized to act for the owner is responsible for complying with this section, except as provided by subsection (b) of this section.

§116.182. Plant-wide Applicability Limit Permit Application.

Any application for a new plant-wide applicability limit (PAL) permit or PAL permit amendment must be completed and signed by an authorized representative. In order to be granted a PAL permit or PAL permit amendment, the owner or operator of the proposed facility shall submit information to the commission that demonstrates that all of the following information is submitted:

(1) a list of all facilities or emissions units at a major stationary source, including their registration or permit number to be included in the PAL, their potential to emit, and the expected maximum capacity. In addition, the owner or operator of the source shall indicate which, if any, federal or state applicable requirements, emission limitations, or work practices apply to each unit;

(2) calculations of the baseline actual emissions with supporting documentation;

(3) the calculation procedures that the permit holder proposes to use to convert the monitoring system data to monthly emissions and annual emissions based on a 12-month rolling total for each month; and

(4) the monitoring and recordkeeping proposed satisfy the requirements of §116.186 of this title (relating to General and Special Conditions) for each PAL.

§116.186. General and Special Conditions.

(a) The plant-wide applicability limit (PAL) will impose an annual emission limitation in tons per year, that is enforceable for all facilities or emissions units at a major stationary source that are included in the PAL. For each month during the PAL effective period after the first 12 months of establishing a PAL, the major stationary source owner or operator shall demonstrate that the sum of the monthly emissions from each facility under the PAL for the previous 12 consecutive months is less than the PAL (a 12-month average, rolled monthly). For each month during the first 11 months from the PAL effective date, the major stationary source owner or operator shall demonstrate that the sum of the preceding monthly emissions from the PAL effective date for each facility under the PAL is less than the PAL. Each PAL must include emissions of only one pollutant. The PAL must include all emissions, including fugitive emissions, to the extent quantifiable, from all facilities or emissions units at a major stationary source included in the PAL that emit or have the potential to emit the PAL pollutant.

(b) The following general conditions are applicable to every PAL permit.

(1) Applicability. This section does not authorize any facility to emit air pollutants but establishes an annual emissions level below which new and modified facilities or emissions units will not be subject to federal new source review for that pollutant.

(2) Sampling requirements. If sampling of stacks or process vents is required, the PAL permit holder shall contact the commission's Office of Compliance and Enforcement prior to sampling to obtain the proper data forms and procedures. All sampling and testing procedures must be approved by the executive director and coordinated with the appropriate regional office of the commission. The PAL permit holder is also responsible for providing sampling facilities and conducting the sampling operations or contracting with an independent sampling consultant.

(3) Equivalency of methods. The permit holder shall demonstrate the equivalency of emission control methods, sampling or other emission testing methods, and monitoring methods proposed as alternatives to methods indicated in the conditions of the PAL permit. Alternative methods must be applied for in writing and must be reviewed and approved by the executive director prior to their use in fulfilling any requirements of the permit.

(4) Recordkeeping and reporting.

(A) A copy of the PAL permit along with information and data sufficient to demonstrate continuous compliance with the emission caps contained in the PAL permit must be maintained in a file at the plant site and made available at the request of personnel from the commission or any air pollution control program having jurisdiction. For facilities that normally operate unattended, this information must be maintained at the nearest staffed location within Texas specified by the permit holder in the permit application. This information must include, but is not limited to, emission cap and individual emission limitation calculations based on a 12-month rolling basis and production records and operating hours. Additional recordkeeping requirements may be specified in special conditions attached to the PAL permit.

(B) The owner or operator shall retain a copy of the PAL permit application and any applications for revisions to the PAL, each annual certification of compliance under §122.146 of this title (relating to Compliance Certification Terms and Conditions), and the data relied on in certifying the compliance for the duration of the PAL plus five years.

(C) A semiannual report shall be submitted to the executive director within 30 days of the end of each reporting period that contains:

(i) the identification of owner and operator and the permit number;

(ii) total annual emissions (in tons per year) based on a 12-month rolling total for each month in the reporting period;

(iii) all data relied upon, including, but not limited to, any quality assurance or quality control data, in calculating the monthly and annual PAL pollutant emissions;

(iv) a list of any facility modified or added to the major stationary source during the preceding six-month period;

(v) the number, duration, and cause of any deviations or monitoring malfunctions (other than the time associated with zero and span calibration checks), and any corrective action taken. This may be satisfied by referencing the PAL permit number in the semiannual report for the site submitted under §122.145 of this title (relating to Reporting Terms and Conditions);

(vi) a notification of a shutdown of any monitoring system, whether the shutdown was permanent or temporary, the reason for the shutdown, the anticipated date that the monitoring system will be fully operational or replaced with another monitoring system, and whether the emissions unit monitored by the monitoring system con-

tinued to operate, and the calculation of the emissions of the pollutant or the number determined by method included in the permit; and

(vii) a signed statement by the responsible official, as defined in §122.10 of this title (relating to General Definitions), certifying the truth, accuracy, and completeness of the information provided in the report.

(D) The owner or operator shall submit the results of any revalidation test or method to the executive director within three months after completion of such test or method.

(5) Maintenance of emission control. The facilities covered by the PAL permit will not be operated unless all air pollution emission capture and abatement equipment is maintained in good working order and operating properly during normal facility operations.

(6) Compliance with rules. Acceptance of a PAL permit by a permit applicant constitutes an acknowledgment and agreement that the holder will comply with all rules and orders of the commission issued in conformity with the Texas Clean Air Act and the conditions precedent to the granting of the permit. If more than one state or federal rule or PAL permit condition is applicable, the most stringent limit or condition will govern and be the standard by which compliance must be demonstrated. Acceptance includes consent to the entrance of commission employees and agents into the permitted premises at reasonable times to investigate conditions relating to the emission or concentration of air contaminants, including compliance with the PAL permit.

(7) Effective period. A PAL is effective for ten years.

(8) Absence of monitoring data. A source owner or operator shall record and report maximum potential emissions without considering enforceable emission limitations or operational restrictions for a facility during any period of time that there is no monitoring data, unless another method for determining emissions during such periods is specified in the PAL permit special conditions.

(9) Monitoring system requirements. Failure to use a monitoring system that meets the requirements of this section is a violation of the PAL permit.

(10) [~~(9)~~] Revalidation. All data used to establish the PAL pollutant must be revalidated through performance testing or other scientifically valid means approved by the executive director. Such testing must occur at least once every five years after issuance of the PAL.

(11) [~~(10)~~] Renewal. If a PAL renewal application is submitted to the executive director in accordance with §116.196 of this title (relating to Renewal of a Plant-wide Applicability Limit Permit), the PAL shall not expire at the end of the PAL effective period. It shall remain in effect until a renewed PAL permit is issued by the executive director or the application is voided.

(c) Each PAL permit must include special conditions that satisfy the following requirements.

(1) For the purposes of this subchapter, the definitions of the following terms are the same as those provided in 40 Code of Federal Regulations §51.165.

(A) Continuous emission monitoring system (CEMS).

(B) Continuous emissions rate monitoring system (CERMS).

(C) Continuous parameter monitoring system (CPMS).

(D) Predictive emissions monitoring system (PEMS).

(2) [~~(1)~~] The PAL monitoring system must accurately determine all emissions of the PAL pollutant in terms of mass per unit of time. Any monitoring system authorized for use in the PAL permit must be based on sound science and meet generally acceptable scientific procedures for data quality and manipulation. [~~Additionally, the information generated by such a system must meet minimum legal requirements for admissibility in a judicial proceeding to enforce the PAL permit.~~]

(3) [~~(2)~~] The PAL monitoring system must employ one or more of the general monitoring approaches meeting the minimum requirements as described in subparagraphs (A) - (D) of this paragraph.

(A) An owner or operator using mass balance calculations to monitor PAL pollutant emissions from activities using coating or solvents shall meet the following requirements:

(i) provide a demonstrated means of validating the published content of the PAL pollutant that is contained in, or created by, all materials used in or at the facility;

(ii) assume that the facility emits all of the PAL pollutant that is contained in, or created by, any raw material or fuel used in or at the facility, if it cannot otherwise be accounted for in the process; and

(iii) where the vendor of a material or fuel that is used in or at the facility publishes a range of pollutant content from such material, the owner or operator shall use the highest value of the range to calculate the PAL pollutant emissions unless the executive director determines that there is site-specific data or a site-specific monitoring program to support another content within the range.

(B) An owner or operator using a CEMS [~~continuous emission monitoring system (CEMS)~~] to monitor PAL pollutant emissions shall meet the following requirements.

(i) The CEMS must comply with applicable performance specifications found in 40 Code of Federal Regulations Part 60, Appendix B.

(ii) The CEMS must sample, analyze, and record data at least every 15 minutes while the emissions unit is operating.

(C) An owner or operator using CPMS [~~continuous parameter monitoring system (CPMS)~~] or PEMS [~~predictive emission monitoring system (PEMS)~~] to monitor PAL pollutant emissions shall meet the following requirements.

(i) The CPMS or the PEMS must be based on current site-specific data demonstrating a correlation between the monitored parameter(s) and the PAL pollutant emissions across the range of operation of the facility.

(ii) Each CPMS or PEMS must sample, analyze, and record data at least every 15 minutes or at another less frequent interval approved by the executive director, while the facility is operating.

(D) An owner or operator using emission factors to monitor PAL pollutant emissions shall meet the following requirements.

(i) All emission factors must be adjusted, if appropriate, to account for the degree of uncertainty or limitations in the factors' development.

(ii) The facility must operate within the designated range of use for the emission factor, if applicable.

(iii) If technically practicable, the owner or operator of a significant facility that relies on an emission factor to calculate PAL pollutant emissions shall conduct validation testing to determine a

site-specific emission factor within six months of PAL permit issuance, unless the executive director determines that testing is not required.

(E) An alternative monitoring approach must meet the requirements in paragraph (1) of this subsection and be approved by the executive director.

(4) [~~(3)~~] Where an owner or operator of a facility cannot demonstrate a correlation between a monitored parameter(s) and the PAL pollutant emissions rate at all operating points of the facility, the executive director shall:

(A) establish default value(s) for determining compliance with the PAL based on the highest potential emissions reasonably estimated at such operating point(s); or

(B) determine that operation of the facility during operating conditions when there is no correlation between monitored parameter(s) and the PAL pollutant emissions is a violation of the PAL.

§116.188. Plant-wide Applicability Limit.

The plant-wide applicability limit (PAL) is the sum of the baseline actual emissions of the PAL pollutant for each existing facility at the source to be covered. The allowable emission rate may be used for facilities that did not exist in the baseline period. Baseline actual emissions from facilities that were permanently shut down after the baseline period must be subtracted from the baseline emissions rate.

(1) An amount equal to the applicable significant level for the PAL pollutant may be added to the baseline actual emissions when establishing the PAL.

(2) When establishing the PAL level for a PAL pollutant, only one consecutive 24-month period must be used to determine the baseline actual emissions for all existing facilities. However, a different consecutive 24-month period may be used for each different PAL pollutant.

(3) The executive director shall specify a reduced PAL level(s) in the PAL permit, to become effective on the future compliance date(s) of any applicable federal or state regulatory requirement [~~requirement(s)~~].

§116.190. Federal Nonattainment and Prevention of Significant Deterioration Review.

(a) An increase in emissions from operational or physical changes at a facility or emissions unit at a major stationary source covered by a plant-wide applicability limit (PAL) permit is insignificant, for the purposes of federal new source review under this subchapter, if the increase does not exceed the PAL.

(b) At no time are emissions reductions of a PAL pollutant that occur during the PAL effective period creditable as decreases for purposes of offsets, unless the level of the PAL is reduced by the amount of such emissions reductions and such reductions would be creditable in the absence of the PAL.

(c) A physical or operational change not causing an exceedance of a PAL is not subject to federal restrictions on relaxing enforceable emission limitations to avoid new source review.

§116.192. Amendments and Alterations.

(a) Any increase in a plant-wide applicability limit (PAL) must be made through amendment. Amendment applications must also include the information identified in §116.182 of this title (relating to Plant-wide Applicability Limit Permit Application) for new and modified facilities contributing to the increase in emissions so as to cause the major stationary source's emissions to equal or exceed its PAL and are subject to the public notice requirements under §116.194 of this title (relating to Public Notice and Comment).

(1) As part of this application, the major stationary source owner or operator shall demonstrate that the sum of the baseline actual emissions of the small facilities, plus the sum of the baseline actual emissions of the significant and major facilities assuming application of best available control technology (BACT) equivalent controls, plus the sum of the allowable emissions of the new or modified facilities exceeds the PAL. The level of control that would result from BACT equivalent controls on each significant or major facility shall be determined by conducting a new BACT analysis at the time the application is submitted, unless the facility is currently required to comply with a BACT or lowest achievable emission rate (LAER) requirement that was established within the preceding ten years. In such a case, the assumed control level for that emissions unit shall be equal to the level of BACT or LAER with which that emissions unit must currently comply.

(2) The owner or operator shall obtain a federal new source review permit for all facilities contributing to the increase in emissions so as to cause the major stationary source's emissions to equal or exceed its PAL, regardless of the magnitude of the emissions increase. These facilities shall comply with any emissions requirements resulting from the major new source review process.

(3) The PAL permit shall require that the increased PAL level be effective on the day any emission unit that is part of the PAL major modification becomes operational and begins to emit the PAL pollutant.

(4) The new PAL shall be the sum of the allowable emissions for each modified or new facility, plus the sum of the baseline actual emissions of the significant and major emissions units after the application of BACT equivalent controls as identified in paragraph (1) of this subsection, plus the sum of the baseline actual emissions of the small emissions units.

(b) Changes to PAL permits that do not require the PAL to be increased must be completed through permit alteration. Unless allowed in the PAL permit special conditions, the permit holder shall submit an alteration request prior to start of construction for physical modifications to facilities or installation of new facilities under the PAL. Approval must be received from the executive director prior to start of operation of the facilities if the emissions from the new or modified facilities may exceed 100 tons per year.

(c) Acceptance of a PAL permit is agreement by the permit holder for the executive director to reopen the PAL permit consistent with the requirements of §116.194 of this title for any actions in paragraphs (1) or (2) of this subsection.

(1) During the PAL effective period, the executive director shall reopen the PAL permit to:

(A) correct typographical or calculation errors made in setting the PAL or reflect a more accurate determination of emissions used to establish the PAL;

(B) decrease the PAL limit the owner or operator of the major stationary source creates creditable emissions reductions that meet the requirements of 40 Code of Federal Regulations (CFR) §51.165(a)(3)(ii) for use as offsets; and

(C) revise the PAL to reflect an increase in the PAL provided the owner or operator complies with the requirements of 40 CFR §52.21(aa)(11).

(2) During the PAL effective period, the executive director may reopen the PAL permit for the following:

(A) revise the PAL to reflect newly applicable federal requirements (for example, New Source Performance Standards) with compliance dates after the PAL effective date;

(B) revise the PAL to be consistent with any other requirement, that is enforceable as a practical matter, and that the State may impose on the major stationary source under the state Implementation Plan; or

(C) reduce the PAL if the reviewing authority determines that a reduction is necessary to avoid causing or contributing to a National Ambient Air Quality Standard or Prevention of Significant Deterioration increment violation, or to an adverse impact on an air quality related value that has been identified for a Federal Class I area by a federal land manager and for which information is available to the general public.

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

Filed with the Office of the Secretary of State on August 13, 2010.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: September 26, 2010
For further information, please call: (512) 239-0177

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SUBCHAPTER F. STANDARD PERMITS

30 TAC §116.601, §116.617

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendments are also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe reasonable requirements for measuring and monitoring the emissions of air contaminants from a source or from an activity causing or resulting in the emission of air contaminants; THSC, §382.021, concerning Sampling Methods and Procedures, which authorizes the commission to prescribe sampling methods and procedures to be used in determining violations of and compliance with the commission's rules; THSC, §382.040, concerning Documents; Public Property, which provides that all information, documents, and data collected by the commission in performing its duties are state property; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits for construction of new facilities or modifications to existing facilities that may emit air contaminants; THSC, §382.0511, concerning Permit Consolidation and Amendment, which authorizes the commission to consolidate various authorizations; THSC, §382.0512, concerning Modification of Existing Facility, which prescribes how the commission will evaluate modifications of existing facilities; THSC, §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions; THSC, §382.0514, concerning Sampling, Monitoring, and Certification, which authorizes the commission to require sampling and monitoring of a permitted federal source or facility; THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements; THSC, §382.0518, concerning Preconstruction Permit, which authorizes the commission to issue preconstruction permits; and THSC, §382.05195, concerning Standard Permit, which authorizes the commission to issue a standard permit for new or existing similar facilities. The amendments are also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq.,* which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standard will be achieved and maintained within each air quality control region of the state.

The proposed amendment implements THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, 382.021, 382.040, 382.051, 382.0511, 382.0512, 382.0513, 382.0514, 382.0515, 382.0518, and 382.05195, and FCAA, 42 USC, §§7401 *et seq.*

§116.601. Types of Standard Permits.

(a) For the purposes of this chapter a standard permit is either:

(1) one that was adopted by the commission in accordance with Texas Government Code, Chapter 2001, Subchapter B, into this subchapter [~~§§116.617, 116.620, and 116.621 of this title (relating to Standard Permits for Pollution Control Projects; Installation and/or Modification of Oil and Gas Facilities; and Municipal Solid Waste Landfills)~~]; or

(2) one that is issued by the commission in accordance with §116.603 of this title (relating to Public Participation in Issuance of Standard Permits).

(b) Any standard permit in this subchapter adopted by the commission shall remain in effect until it is repealed under the APA. If any adopted standard permit is repealed and replaced, facilities may continue to be authorized until the date of registration required by subsection (e) of this section.

(c) A registration to use a standard permit adopted by the commission in this subchapter shall be renewed by the applicant under the requirements of §116.604 of this title (relating to Duration and Renewal of Registrations to use Standard Permits) by the tenth anniversary of the date of the original registration.

(d) If a standard permit in this subchapter adopted by the commission is repealed and replaced, with no changes, by a standard permit issued by the commission, any existing registration to use the repealed standard permit will be automatically converted to a registration to use the new standard permit, if the facility continues to meet the requirements. An automatically converted registration to use a standard permit shall be renewed by the applicant under the requirements of §116.604 of this title by the tenth anniversary of the date of the new registration.

(e) If a standard permit adopted by the commission in this subchapter is repealed and replaced with a standard permit issued by the commission, and the requirements of the standard permit are changed

in the process, persons registered to use the repealed standard permit shall register to use the issued standard permit by the later of either the deadline established in the issued standard permit, or the tenth anniversary of the original registration. The commission shall notify, in writing, all persons registered to use the repealed standard permit of the date by which a new registration must be submitted. Persons not wishing to register for the issued standard permit shall have the option of applying for or qualifying for other applicable authorizations in this chapter or in Chapter 106 of this title (relating to Exemptions from Permitting).

§116.617. State Pollution Control Project Standard Permit.

(a) Scope and applicability.

(1) This standard permit applies to pollution control projects undertaken voluntarily or as required by any governmental standard, that reduce or maintain currently authorized emission rates for facilities authorized by a permit, standard permit, or permit by rule.

(2) The project may include:

(A) the installation or replacement of emissions control equipment;

(B) the implementation or change to control techniques; or

(C) the substitution of compounds used in manufacturing processes.

(3) This standard permit must not be used to authorize the installation of emission control equipment or the implementation of a control technique that:

(A) constitutes the complete replacement of an existing production facility or reconstruction of a production facility as defined in 40 Code of Federal Regulations §60.15(b)(1) and (c); or

(B) the executive director determines there are health effects concerns or the potential to exceed a national ambient air quality standard criteria pollutant or contaminant that results from an increase in emissions of any air contaminant until those concerns are addressed by the registrant to the satisfaction of the executive director; or

(C) returns a facility or group of facilities to compliance with an existing authorization or permit unless authorized by the executive director.

(4) Prior to February 17, 2011, [~~Only~~] new or modified pollution control projects must meet the conditions of this standard permit. All previous standard permit registrations under this section that were authorized prior to the effective date of this rule must include the increases and decreases in emissions resulting from those projects in any future netting calculation and all other conditions must be met upon the ten-year anniversary and renewal of the original registration, or until administratively incorporated into the facilities' permit, if applicable.

(5) Notwithstanding the requirements of §116.604 of this title (relating to Duration and Renewal of Registrations to Use Standard Permits), on or after February 17, 2011, no new or modified registrations will be accepted and no existing registrations will be renewed.

(b) General requirements.

(1) Any claim under this standard permit must comply with all applicable conditions of:

(A) §116.604(1) and (2) of this title (relating to Duration and Renewal of Registrations to Use Standard Permits);

(B) §116.605(d)(1) and (2) of this title (relating to Standard Permit Amendment and Revocation);

(C) §116.610 of this title (relating to Applicability);

(D) §116.611 of this title (relating to Registration to Use a Standard Permit);

(E) §116.614 of this title (relating to Standard Permit Fees); and

(F) §116.615 of this title (relating to General Conditions).

(2) Construction or implementation of the pollution control project must begin within 18 months of receiving written acceptance of the registration from the executive director, with one 18-month extension available, and must comply with §116.115(b)(2) and §116.120 of this title (relating to General and Special Conditions and Voiding of Permits). Any changes to allowable emission rates authorized by this section become effective when the project is complete and operation or implementation begins.

(3) The emissions limitations of §116.610(a)(1) of this title do not apply to this standard permit.

(4) Predictable maintenance, startup, and shutdown emissions directly associated with the pollution control projects must be included in the representations of the registration application.

(5) Any increases in actual or allowable emission rates or any increase in production capacity authorized by this section (including increases associated with recovering lost production capacity) must occur solely as a result of the project as represented in the registration application. Any increases of production associated with a pollution control project must not be utilized until an additional authorization is obtained. This paragraph is not intended to limit the owner or operator's ability to recover lost capacity caused by a derate, which may be recovered and used without any additional authorization.

(c) Replacement projects.

(1) The replacement of emissions control equipment or control technique under this standard permit is not limited to the method of control currently in place, provided that the control or technique is at least as effective as the current authorized method and all other requirements of this standard permit are met.

(2) The maintenance, startup, and shutdown emissions may be increased above currently authorized levels if the increase is necessary to implement the replacement project and maintenance, startup, and shutdown emissions were authorized for the existing control equipment or technique.

(3) Equipment installed under this section is subject to all applicable testing and recordkeeping requirements of the original control authorization. Alternate, equivalent monitoring, or records may be proposed by the applicant for review and approval of the executive director.

(d) Registration requirements.

(1) A registration must be submitted in accordance with the following.

(A) If there are no increases in authorized emissions of any air contaminant resulting from a replacement pollution control project, a registration must be submitted no later than 30 days after construction or implementation begins and the registration must be accompanied by a $900 fee.

(B) If a new control device or technique is authorized or if there are increases in authorized emissions of any air contaminant resulting from the pollution control project, a registration must be submitted no later than 30 days prior to construction or implementation.

The registration must be accompanied by a $900 fee. Construction or implementation may begin only after:

(i) no written response has been received from the executive director within 30 calendar days of receipt by the Texas Commission on Environmental Quality (TCEQ); or

(ii) written acceptance of the pollution control project has been issued by the executive director.

(C) If there are any changes in representations to a previously authorized pollution control project standard permit for which there are no increases in authorized emissions of any air contaminant, a notification or letter must be submitted no later than 30 days after construction or implementation of the change begins. No fee applies and no response will be sent from the executive director.

(D) If there are any changes in representations to a previously authorized pollution control project standard permit that also increase authorized emissions of any air contaminant resulting from the pollution control project, a registration alteration must be submitted no later than 30 days prior to the start of construction or implementation of the change. The registration must be accompanied by a $450 fee, unless received within 180 days of the original registration approval. Construction or implementation may begin only after:

(i) no written response has been received from the executive director within 30 calendar days of receipt by the TCEQ; or

(ii) written acceptance of the pollution control project has been issued by the executive director.

(2) The registration must include the following:

(A) a description of process units affected by the project;

(B) a description of the project;

(C) identification of existing permits or registrations affected by the project;

(D) quantification and basis of increases and/or decreases associated with the project, including identification of affected existing or proposed emission points, all air contaminants, and hourly and annual emissions rates;

(E) a description of proposed monitoring and recordkeeping that will demonstrate that the project decreases or maintains emission rates as represented; and

(F) a description of how the standard permit will be administratively incorporated into the existing permit(s).

(e) Operational requirements. Upon installation of the pollution control project, the owner or operator shall comply with the requirements of paragraphs (1) and (2) of this subsection.

(1) General duty. The owner or operator must operate the pollution control project in a manner consistent with good industry and engineering practices and in such a way as to minimize emissions of collateral pollutants, within the physical configuration and operational standards usually associated with the emissions control device, strategy, or technique.

(2) Recordkeeping. The owner or operator must maintain copies on site of monitoring or other emission records to prove that the pollution control project is operated consistent with the requirements in paragraph (1) of this subsection, and the conditions of this standard permit.

(f) Incorporation of the standard permit into the facility authorization.

(1) Any new facilities or changes in method of control or technique authorized by this standard permit instead of a permit amendment under §116.110 of this title (relating to Applicability) at a previously permitted or standard permitted facility must be incorporated into that facility's permit when the permit is amended or renewed.

(2) All increases in previously authorized emissions, new facilities, or changes in method of control or technique authorized by this standard permit for facilities previously authorized by a permit by rule must comply with §106.4 of this title (relating to Requirements for Permitting by Rule), except §106.4(a)(1) of this title, and §106.8 of this title (relating to Recordkeeping).

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

Filed with the Office of the Secretary of State on August 13, 2010.

TRD-201004716
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: September 26, 2010
For further information, please call: (512) 239-0177

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 12. TEXAS BOARD OF OCCUPATIONAL THERAPY EXAMINERS

CHAPTER 362. DEFINITIONS

40 TAC §362.1

The Texas Board of Occupational Therapy Examiners proposes an amendment to §362.1, concerning Definitions. The amendment will add a new definition for Continuing Competency which will be used in the rules, especially in the continuing education chapter. The amendment also restores the alphabetic listing of the definitions.

John P. Maline, Executive Director of the Executive Council of Physical Therapy and Occupational Therapy Examiners, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Maline 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 the improved general understanding for practitioners. There will be no effect on small businesses, and no economic cost to persons having to comply is anticipated.

Comments on the proposed rule may be submitted to Augusta Gelfand, OT Coordinator, Texas Board of Occupational Therapy Examiners, 333 Guadalupe St, Suite 2-510, Austin, Texas 78701, (512) 305-6900, or through email: augusta.gelfand@mail.capnet.state.tx.us

The amendment is proposed under the Occupational Therapy Practice Act, Title 3, Subtitle H, Chapter 454, Occupations Code, which provides the Texas Board of Occupational Therapy Exam-

iners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 454 of the Occupations Code is affected by this amended section.

§362.1. Definitions.

The following words, terms, and phrases, when used in this part shall have the following meaning, unless the context clearly indicates otherwise.

(1) Accredited Educational Program--An educational institution offering a course of study in occupational therapy that has been accredited or approved by the Accreditation Council for Occupational Therapy Education (ACOTE) of the American Occupational Therapy Association.

(2) [~~(1)~~] Act--The Occupational Therapy Practice Act, Title 3, Subtitle H, Chapter 454 of the Occupations Code.

(3) [~~(2)~~] AOTA--American Occupational Therapy Association.

(4) [~~(3)~~] Applicant--A person who applies for a license to the Texas Board of Occupational Therapy Examiners.

(5) [~~(4)~~] Board--The Texas Board of Occupational Therapy Examiners (TBOTE).

(6) [~~(5)~~] Certified Occupational Therapy Assistant (COTA)--An individual who uses this term must hold a regular or provisional license to practice or represent self as an occupational therapy assistant in Texas and must practice under the general supervision of an OTR or OT. An individual who uses this term is responsible for ensuring that he or she is otherwise qualified to use it.

(7) [~~(6)~~] Class A Misdemeanor--An individual adjudged guilty of a Class A misdemeanor shall be punished by:

(A) A fine not to exceed $4,000;

(B) Confinement in jail for a term not to exceed one year; or

(C) Both such fine and imprisonment (Vernon's Texas Codes Annotated Penal Code §12.21).

(8) [~~(7)~~] Client--The entity that receives occupational therapy. Clients may be individuals (including others involved in the individual's life who may also help or be served indirectly such as caregiver, teacher, parent, employer, spouse), groups, or populations (i.e., organizations, communities).

(9) [~~(8)~~] Complete Application--Application [~~Notarized application~~] form with photograph, license fee, jurisprudence examination with at least 70% of questions answered correctly and all other required documents.

(10) [~~(9)~~] Complete Renewal--Contains renewal fee, renewal form with signed continuing education affidavit, home/work address(es) and phone number(s), and jurisprudence examination with at least 70% of questions answered correctly.

(11) Continuing Competency--Includes educational activities that teach evaluation, intervention, or clinical skills which occupational therapy practitioners use with patients or clients. It also includes the ongoing or continued capacity of an occupational therapy practitioner to integrate and apply knowledge, skills and judgment required to practice safely, responsibly and ethically in his/her role/setting, which can be measured against acceptable standards.

(12) [~~(10)~~] Continuing Education Committee--Reviews and makes recommendations to the board concerning continuing education requirements and special consideration requests.

(13) [~~(11)~~] Coordinator of Occupational Therapy Program--The employee of the Executive Council who carries out the functions of the Texas Board of Occupational Therapy Examiners.

(14) [~~(12)~~] Direct Contact--Refers to contact with the client and includes face-to-face in person or via visual telecommunications.

(15) [~~(13)~~] Endorsement--The process by which the board issues a license to a person currently licensed in another state, the District of Columbia, or territory of the United States that maintains professional standards considered by the board to be substantially equivalent to those set forth in the Act, and is applying for a Texas license for the first time.

(16) [~~(14)~~] Evaluation--The process of planning, obtaining, documenting and interpreting data necessary for intervention. This process is focused on finding out what the client wants and needs to do and on identifying those factors that act as supports or barriers to performance.

(17) [~~(15)~~] Examination--The Examination as provided for in §17 [~~Section 17~~] of the Act. The current Examination is the initial certification Examination given by the National Board for Certification in Occupational Therapy (NBCOT).

(18) [~~(16)~~] Executive Council--The Executive Council of Physical Therapy and Occupational Therapy Examiners.

(19) [~~(17)~~] Executive Director--The employee of the Executive Council who functions as its agent. The Executive Council delegates implementation of certain functions to the Executive Director.

(20) [~~(18)~~] First Available Examination--Refers to the first scheduled Examination after successful completion of all educational requirements.

(21) [~~(19)~~] Intervention--The process of planning and implementing specific strategies based on the client's desired outcome, evaluation data and evidence, to effect change in the client's occupational performance leading to engagement in occupation to support participation.

(22) [~~(20)~~] Investigation Committee--Reviews and makes recommendations to the board concerning complaints and disciplinary actions regarding licensees and facilities.

(23) [~~(21)~~] Investigator--The employee of the Executive Council who conducts all phases of an investigation into a complaint filed against a licensee, an applicant, or an entity regulated by the board.

(24) [~~(22)~~] Jurisprudence Examination--An examination covering information contained in the Texas Occupational Therapy Practice Act and Texas Board of Occupational Therapy Examiners rules. This test is an open book examination with multiple choice or true-false questions. The passing score is 70%.

(25) [~~(23)~~] License--Document issued by the Texas Board of Occupational Therapy Examiners which authorizes the practice of occupational therapy in Texas.

(26) [~~(24)~~] Medical Condition--A condition of acute trauma, infection, disease process, psychiatric disorders, addictive disorders, or post surgical status Synonymous with the term health care condition.

(27) [~~(25)~~] NBCOT--National Board for Certification in Occupational Therapy.

(28) [~~(26)~~] Non-licensed Personnel--OT Aide or OT Orderly or other person not licensed by this board who provides support services to occupational therapy practitioners and whose activities require on-the-job training and close personal supervision.

(29) [~~(27)~~]Non-Medical Condition--A condition where the ability to perform occupational roles is impaired by developmental disabilities, learning disabilities, the aging process, sensory impairment, psychosocial dysfunction, or other such conditions which does not require the routine intervention of a physician.

(30) [~~(28)~~] Occupation--Activities of everyday life, named, organized, and given value and meaning by individuals and a culture. Occupation is everything people do to occupy themselves, including looking after themselves, enjoying life and contributing to the social and economic fabric of their communities.

(31) [~~(29)~~] Occupational Therapist (OT)--An individual who holds a valid regular or provisional license to practice or represent self as an Occupational Therapist in Texas. This definition includes an Occupational Therapist or one who is designated as an Occupational Therapist, Registered (OTR).

(32) [~~(30)~~] Occupational Therapist, Registered (OTR)--An individual who uses this term must hold a regular or provisional license to practice or represent self as an Occupational Therapist in Texas. An individual who uses this term is responsible for ensuring that he or she is otherwise qualified to use it.

(33) [~~(31)~~] Occupational Therapy Practice--includes:

(A) Methods or strategies selected to direct the process of interventions such as:

(i) Establishment, remediation, or restoration of a skill or ability that has not yet developed or is impaired.

(ii) Compensation, modification, or adaptation of activity or environment to enhance performance.

(iii) Maintenance and enhancement of capabilities without which performance in everyday life activities would decline.

(iv) Health promotion and wellness to enable or enhance performance in everyday life activities.

(v) Prevention of barriers to performance, including disability prevention.

(B) Evaluation of factors affecting activities of daily living (ADL) instrumental activities of daily living (IADL), education, work, play, leisure, and social participation, including:

(i) Client factors, including body functions (such as neuromuscular, sensory, visual, perceptual, cognitive) and body structures (such as cardiovascular, digestive, integumentary, genitourinary systems).

(ii) Habits, routines, roles and behavior patterns.

(iii) Cultural, physical, environmental, social, and spiritual contexts and activity demands that affect performance.

(iv) Performance skills, including motor, process, and communication/interaction skills.

(C) Interventions and procedures to promote or enhance safety and performance in activities of daily living (ADL), instrumental activities of daily living (IADL), education, work, play, leisure, and social participation, including.

(i) Therapeutic use of occupations, exercises, and activities.

(ii) Training in self-care, self-management, home management and community/work reintegration.

(iii) Development, remediation, or compensation of physical, cognitive, neuromuscular, sensory functions and behavioral skills.

(iv) Therapeutic use of self, including one's personality, insights, perceptions, and judgments, as part of the therapeutic process.

(v) Education and training of individuals, including family members, caregivers, and others.

(vi) Care coordination, case management and transition services.

(vii) Consultative services to groups, programs, organizations, or communities.

(viii) Modification of environments (home, work, school, or community) and adaptation of processes, including the application of ergonomic principles.

(ix) Assessment, design, fabrication, application, fitting and training in assistive technology, adaptive devices, and orthotic devices, and training in the use of prosthetic devices.

(x) Assessment, recommendation, and training in techniques to enhance functional mobility including wheelchair management.

(xi) Driver rehabilitation and community mobility.

(xii) Management of feeding, eating, and swallowing to enable eating and feeding performance.

(xiii) Application of physical agent modalities, and use of a range of specific therapeutic procedures (such as wound care management; techniques to enhance sensory, perceptual, and cognitive processing; manual therapy techniques) to enhance performance skills.

(34) [~~(32)~~] Occupational Therapy Assistant (OTA)--An individual who holds a valid regular or provisional license to practice or represent self as an Occupational Therapy Assistant in Texas, and who is required to be under the continuing supervision of an OT. This definition includes an individual who is designated as a Certified Occupational Therapy Assistant (COTA) or an Occupational Therapy Assistant (OTA).

(35) [~~(33)~~] Occupational Therapy Plan of Care--A written statement of the planned course of Occupational Therapy intervention for a patient/client. It must include goals, objectives and/or strategies, recommended frequency and duration, and may also include methodologies and/or recommended activities.

(36) [~~(34)~~] Occupational Therapy Practitioners--Occupational Therapists, and Occupational Therapy Assistants licensed by this board.

(37) [~~(35)~~] Outcome--The focus and targeted end objective of occupational therapy intervention. The overarching outcome of occupational therapy is engagement in occupation to support participation in context(s).

(38) [~~(36)~~] Place(s) of Business--Any facility in which a licensee practices.

(39) [~~(37)~~] Practice--Providing occupational therapy as a clinician, practitioner, educator, or consultant. Only a person holding a license from TBOTE may practice occupational therapy in Texas.

[(38) Accredited Educational Program--An educational institution offering a course of study in occupational therapy that has been accredited or approved by the Accreditation Council for Occupational Therapy Education (ACOTE) of the American Occupational Therapy Association.]

(40) [(39)] Rules--Refers to the TBOTE Rules.

(41) [(40)] Screening--A process used to determine a potential need for occupational therapy interventions, educational and/or other client needs. Screening information may be compiled using observation, client records, the interview process, self-reporting, and/or other documentation.

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

Filed with the Office of the Secretary of State on August 16, 2010.

TRD-201004724
John P. Maline
Executive Director
Texas Board of Occupational Therapy Examiners
Earliest possible date of adoption: September 26, 2010
For further information, please call: (512) 305-6900

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CHAPTER 367. CONTINUING EDUCATION AND CONTINUING COMPETENCY

40 TAC §§367.1 - 367.3

The Texas Board of Occupational Therapy Examiners proposes amendments to Chapter 367, §§367.1 - 367.3, concerning Continuing Education and Continuing Competency. The amendments will add Continuing Competency to the title and define its meaning for Type 2. It will give authority to the Texas Occupational Therapy Association to grant approval of continuing education/competency for two categories of continuing education. The amendments will also list exceptions to the approval process allowed by the Board.

John P. Maline, Executive Director of the Executive Council of Physical Therapy and Occupational Therapy Examiners, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Maline 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 rules will be the improved quality of content and ease of finding appropriate continuing education for licensees. Certain continuing education and continued competency will have to be approved so there will be a cost to the CE providers who must have their courses approved. Those licensees who submit courses attended that are not approved will have to submit to TOTA for approval and pay a fee. There will also be some categories of continuing education which will not have to be approved by TOTA and therefore will not add any cost to licensees or small businesses. Until the Memorandum of Understanding is signed, the financial implication is unknown, but expected to be minimal.

Comments on the proposed amendments may be submitted to Augusta Gelfand, OT Coordinator, Texas Board of Occupational Therapy Examiners, 333 Guadalupe St, Suite 2-510, Austin, Texas 78701, (512) 305-6900, or through email: augusta.gelfand@mail.capnet.state.tx.us

The amendments are proposed under the Occupational Therapy Practice Act, Title 3, Subtitle H, Chapter 454, Occupations Code, which provides the Texas Board of Occupational Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 454 of the Occupations Code is affected by these amended sections.

§367.1. Continuing Education/Continued Competency.

(a) The Act mandates licensee participation in a continuing education/competency program for license renewal. All continuing education/competency must be directly relevant to the profession of occupational therapy and meet the definition of Type 1 or Type 2 as outlined in this section. The licensee is solely responsible for keeping accurate documentation of all continuing education/competency requirements, which will be reported to the board on its CE Submission Form.

(b) All licensees must complete a minimum of 30 hours of continuing education/competency every two years during the period of time the license is current in order to renew the license, and provide this information as requested.

(c) Those renewing a license more than 90 days late must submit proof of continuing education/competency for the renewal on the board's CE Submission Form and with copies of the documentation as outlined in §367.3 of this title (relating to Continuing Education/Competency Audit).

(d) Types of Continuing Education/Competency.

(1) Licensees are responsible for choosing Type 1 or Type 2 CE according to the definitions in this section.

[(1) A minimum of 15 hours of continuing education must be in skills specific to occupational therapy practice with patients or clients hereafter referred to as Type 2.]

[(A) Type 2 courses teach occupational therapy treatment and intervention with patients or clients.]

[(B) All continuing education hours may be in Type 2, but no less than 15 hours of Type 2 is acceptable.]

(2) General information hereafter referred to as Type 1is defined as continuing education activities that teach general information that is related to or [is] relevant to the profession of occupational therapy. Examples include but are not limited to: supervision, education, documentation, quality improvement, administration, reimbursement, and other occupational therapy related subjects.

(3) Type 2: Continuing Competency is defined as educational activities that teach evaluation, intervention, or clinical skills which occupational therapy practitioners use with patients or clients. These are specific (though not necessarily exclusive) to occupational therapy practice. Minimum of 15 hours. No maximum.

(A) All continuing education/competency hours may be in Type 2, but no less than 15 hours of Type 2 is acceptable.

(B) Examples of Type 1 and Type 2 continuing education/competency may be found on the board's website.

(e) Specific continuing educational activities may be counted only one time in the licensee's career unless content has been updated or revised.

(f) Effective January 1, 2003, Type 1 and Type 2 educational activities approved or offered by the American Occupational Therapy

Association or the Texas Occupational Therapy Association are pre-approved by the board. The board will review its approval process and continuation thereof for educational activities by January 2005 and at least once each five-year period thereafter.

(g) The board recognizes the Texas Occupational Therapy Association as a peer review organization and gives them the authority to approve continuing education/competency except as exempted in §367.2 of this chapter (relating to Categories of Education/Competency).

(h) A Memorandum of Understanding (MOU) with the Board and the Texas Occupational Therapy Association (TOTA) shall authorize TOTA to evaluate and approve continuing education/competency programs outlined in §367.2 of this title, Categories of Education. The authority shall include granting TOTA authority to give, deny, withdraw and limit approval of programs outlined in §367.2 of this title, and to charge and collect fees as set forth in the MOU and in the statute and rules governing the Board and the practice of occupational therapy.

~~[(g) Licensees are responsible for choosing Type 1 or Type 2 CE according to the definitions in this section.]~~

§367.2. Categories of Education/Competency.

(a) All continuing education/competency must comply with Type 1 or Type 2 as outlined in §367.1 of this title (relating to Continuing Education and Continued Competency. Continuing education/competency undertaken by a licensee for renewal shall be acceptable if it falls in one or more of the following categories. The following categories do not require TOTA approval:

(1) Formal academic courses related to occupational therapy. Completion of course work at or through an accredited college or university shall be counted as follows: three CE hours for each credit hour of a course with a grade of A, B, C, and/or P (Pass). Thus a three-credit course counts for 9 credit hours of continuing education/competency. All college course work must comply with Type 1 and Type 2 as outlined in §367.1 of this title, no maximum.

(2) Educational activities approved by the American Occupational Therapy Association (AOTA) and its approved providers, which includes but is not limited to conferences, workshops, online courses, webinars, home study, institutes, are approved by the board. No maximum.

~~[(2) In-service educational programs, training programs, institutes, seminars, workshops, facility based courses, and conferences in occupational therapy. Hour for hour credit on program content only, no maximum.]~~

(3) Development of publications, media materials or research/grant activities per two year renewal period, which require a letter of approval from the board.[÷]

(A) Published scholarly work in a peer-review journal, 15 hours maximum.

(B) Principle investigator or co-principle investigator in grant or research proposals accepted for consideration. 10 hours maximum.

(C) Published book, 10 hours maximum.

(D) Second or other author, 7 hours maximum.

(E) Book chapter, 5 hours maximum.

(F) Other publications such as newsletter and trade magazines, 2 hours maximum.

(4) Educational activities approved by other state and US territory occupational therapy associations and their approved providers, which includes but is not limited to: conferences, workshops, online courses, webinars, home study, institutes, are approved by the board. No maximum.

~~[(4) Home study courses, Internet-based courses, and videotape instruction, no maximum.]~~

~~[(A) Courses must fit the criteria for continuing education for Type 1 or Type 2.]~~

~~[(B) These courses must have a post-test and give a certificate of completion.]~~

~~[(C) Internet courses must reflect a pre-determined number of credit hours.]~~

(5) Professional presentations by licensee.

(A) Professional presentation, e.g. in-services, workshops, institutes: any presentations counted only one time. Hour for hour credit. 10 hour maximum.

(B) Community/Service organization presentation: any presentation counted once. Hour for hour credit. 10 hours maximum.

(6) Fieldwork Supervision, 8 hours maximum, Type 2.

(A) A licensee may earn 2 contact hours for each Level 1 students supervised. A licensee may earn 6 contact hours for each Level 2 student supervised. A licensee may earn a maximum of 8 contact hours for student supervision per renewal period.

(B) Fieldwork supervision hours may be evenly divided between licensees, not to exceed two fieldwork educators.

(C) Fieldwork education supervision must be completed before the licensee's renewal date.

(D) Documentation shall include verification provided by the school to the fieldwork educator(s) with the name of the student, school, and dates of fieldwork or the signature page of the completed evaluation form. Evaluation scores and comments should be deleted or blocked out.

(E) Courses which teach how to be a fieldwork supervisor. 3 hours maximum, Type 1.

(7) Courses relevant or pertinent to the practice of occupational therapy that are provided by accredited colleges or universities, and international, national, state, or local associations/organizations, including but not limited to, the American Medical Association, the American Society of Hand Therapy, the American Cancer Society, the National Brain Injury Foundation, the National Stroke Foundation, the National Speech and Hearing Association. No maximum.

(8) Advanced Certification(s) used in occupational therapy will be recognized for continued competency, hour for hour. No maximum.

(9) [~~(7)~~] Any deviation from the above continuing education/competency categories will be reviewed on a case by case basis by the Coordinator of Occupational Therapy and [~~or~~] by the Continuing Education Committee. A request for special consideration must be submitted in writing a minimum of 60 days prior to expiration of the license.

(b) The following two categories require submission to TOTA for Approval:

(1) In-service educational programs, institutes, seminars, workshops, facility based courses, and conferences in occupational therapy. Hour for hour credit on program content only, no maximum.

(2) Home study courses, Internet-based courses, webinars, and videotape instruction, no maximum.

(A) Courses must fit the criteria for continuing education /competency for Type 1 or Type 2.

(B) These courses must have a post-test and give a certificate of completion.

(C) Internet courses must reflect a pre-determined number of credit hours.

(3) Active Military and licensees residing outside of the United States are exempt from the TOTA approval process.

(c) [~~(b)~~] Unacceptable Continuing Education Activities include but are not limited to:

(1) Any non-instructional time frames such as breaks, meals, introductions, and pre/post testing.

(2) Business meetings

(3) Exhibit hall attendance

(4) Reading journals

(5) Courses such as, but not limited to: grant writing, massage therapy, general management and business, social work, defensive driving, water safety, team building, GRE, GMAT, MCAT preparation, cooking for health, weight management, women's health and stress management, reading techniques, geriatric anthology, general foreign languages.

(6) Facility-based annual required courses such as, but not limited to patient abuse, disposal of hazardous waste, patient privacy, HIPAA and [~~&~~] FERPA, blood borne pathogens, and other annual facility required repetitive courses do not count toward continuing education.

(7) Program providers are prohibited from self-promotion of programs, products, and/or services during the presentation of the program.

§367.3. Continuing Education/Competency Audit.

(a) The board shall select for audit a random sample of licensees. The audit will cover a period for which the licensee has already completed the 30 hours required and has signed to that fact on the renewal form.

(b) Licensees randomly selected for the audit must provide to TBOTE appropriate documentation within 30 days of notification. Documentation submitted must specify whether they are Type 1 or Type 2.

(c) The licensee is solely responsible for keeping accurate documentation of all continuing education/competency requirements. Continuing education/competency documentation must be maintained for two years from the date of the last renewal for auditing purposes, or a total of four years.

(d) Continuing education/competency documentation includes, but is not limited to: an official transcript, AOTA self-study completion certificates, copies of official sign-in or attendance sheets, course certificates of attendance, and certificates of completion.

(e) Documentation must identify the licensee by name and license number, and must include the date and title of the course, the signature of the authorized signer, and the number of CEUs, or Continuing Competency Units (CCUs) or contact hours awarded for the course.

(f) Knowingly providing false information or failure to respond during the audit process or the renewal process is grounds for disciplinary action.

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

Filed with the Office of the Secretary of State on August 16, 2010.

TRD-201004727
John P. Maline
Executive Director
Texas Board of Occupational Therapy Examiners
Earliest possible date of adoption: September 26, 2010
For further information, please call: (512) 305-6900

CHAPTER 370. LICENSE RENEWAL

40 TAC §370.2, §370.3

The Texas Board of Occupational Therapy Examiners proposes an amendment to §370.2, concerning Late Renewal. This amendment separates the late renewal process from the restoration process and adds a new section to the chapter, §370.3, concerning Restoration of a Texas License which will clarify options for former licensees to return to licensure.

John P. Maline, Executive Director of the Executive Council of Physical Therapy and Occupational Therapy Examiners, has determined that for the first five-year period the rules are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rules.

Mr. Maline 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 rules will be a greater ability for former licensee to return to licensure in a time of increased need for occupational therapy practitioners. There will be no effect on small businesses, and no economic cost to persons having to comply is anticipated as a result of enforcing or administering the rule.

Comments on the proposed rule may be submitted to Augusta Gelfand, OT Coordinator, Texas Board of Occupational Therapy Examiners, 333 Guadalupe St, Suite 2-510, Austin, Texas 78701, (512) 305-6900, or through email: augusta.gelfand@mail.capnet.state.tx.us

The amendment and new section are proposed under the Occupational Therapy Practice Act, Title 3, Subtitle H, Chapter 454, Occupations Code, which provides the Texas Board of Occupational Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 454 of the Occupations Code is affected by the amendment and new section.

§370.2. Late Renewal.

(a) A renewal application is late if all required materials are not postmarked prior to the expiration date of the license. Licensees who do not complete the renewal process prior to the expiration date are subject to late fees as described. Likewise a renewal completed online must be date and time stamped prior to the expiration date or it is late and subject to late fees as described.

(1) If the license has been expired for 90 days or less, the person may renew the license by:

(A) submitting the renewal fee and the board approved late fee; and

(B) reporting completion of the required number of contact hours of continuing education/competency.

(2) If the license has been expired for more than 90 days, but less than one year, the person may renew the license by:

(A) submitting the renewal fee and the board approved late fee; and

(B) providing copies of continuing education/competency activities and completing the CE submission form.

~~[(B) reporting completion of the required number of contact hours of continuing education.]~~

~~[(b) If the license has been expired for longer than one year the person may not renew the license. To obtain a new license, the applicant must retake and pass the national examination and comply with the requirements and procedure for obtaining an original license set by Chapter 364 of this title (relating to Requirements for Licensure).]~~

~~[(1) If the person's Texas license has been expired two years or less, the person shall:]~~

~~[(A) make application for licensure to the board on a form prescribed by the board, which includes a recent passport type photo;]~~

~~[(B) pass the board jurisprudence examination;]~~

~~[(C) submit copies of the completed continuing education/competency showing 45 hours of continuing education/competency as per Chapter 367 of this title (relating to continuing education/competency), with a minimum of 30 hours in Type 2;]~~

~~[(D) pay the restoration fee;]~~

~~[(E) complete all requirements for licensure within one year from the date of the application.]~~

~~[(2) Or, if the person's Texas license has been expired four years or less, the person shall:]~~

~~[(A) retake the NBCOT examination for "licensure purposes only" and have a score report sent to the board; or]~~

~~[(B) complete a re-entry certificate program through an Accreditation Council for Occupational Therapy Education (ACOTE) accredited college or university, which includes instruction and fieldwork supervision, with a certificate sent to the board; or]~~

~~[(C) obtain an advanced occupational therapy degree, with a official transcript sent to the board;]~~

~~[(D) make application for licensure to the board on a form prescribed by the board, which includes a recent passport type photo;]~~

~~[(E) pass the board jurisprudence examination;]~~

~~[(F) pay the restoration fee;]~~

~~[(G) submit an official transcript;]~~

~~[(H) complete all requirements for licensure within one year from the date of the application.]~~

~~[(c) Restoration: Persons holding a license in another state, previously licensed in Texas:]~~

~~[(1) The board may issue a license to a person who was licensed in Texas, moved to another state, is currently licensed in the other state, and has not had a license that was granted by any other state suspended, revoked, canceled, surrendered or otherwise restricted for any reason if the person meets the following requirements:]~~

~~[(A) make application for licensure to the board on a form prescribed by the board which includes a recent passport type photo;]~~

~~[(B) submits to the board verification of the current and expired license(s) in good standing from the other state(s) since leaving Texas;]~~

~~[(C) passes the jurisprudence exam;]~~

~~[(D) pays the board approved fee; and]~~

~~[(E) complete all requirements for licensure within one year from the date of the application.]~~

~~[(2) The license shall expire at the last day of the month of the licensee's birth. The duration shall be at least two years, and licensees shall obtain the continuing education/competency as per Chapter 367 of this title.]~~

(b) ~~[(d)]~~ Military Service.

(1) If a reserve status licensee is called into active military service, and his or her license expires during service, the licensee may follow the requirements for renewal with no penalty if the licensee:

(A) submits the renewal within 90 days after return to reserve status;

(B) submits evidence of active service and its inclusive dates.

(2) A reserve status licensee who is called into active military service will have 6 additional months after release from active military service to submit proof of completion of the 30 required CE hours as per Chapter 367 of the this title (relating to Continuing Education and Continuing Competency).

§370.3. Restoration of a Texas License.

(a) The board may issue a license to a person who was licensed in Texas, moved to another state or US territory, is currently licensed in another US state or territory, and that license has not been suspended, revoked, cancelled, surrendered or otherwise restricted for any reason if the person shall meet the following requirements:

(1) make application for licensure to the board on a form prescribed by the board which includes a recent passport type photo;

(2) submits to the board verification of all the state licenses held since leaving Texas. At least one must be current and in good standing, and any disciplinary actions must be reported to the board.

(3) pass the jurisprudence exam;

(4) pay the restoration fee; and

(5) completes all requirements for licensure within one year from the date of application.

(b) If the person's Texas license has been expired more than one year and less than two years, the person shall:

(1) make application for licensure to the board on a form prescribed by the board, which includes a recent passport type photo;

(2) pass the board jurisprudence examination;

(3) submit copies of the completed continuing education/competency showing 45 hours of continuing education/compe-

tency as per Chapter 367 of this title (relating to Continuing Education and Continuing Competency) with a minimum of 30 hours in Type 2;

(4) pay the restoration fee; and the renewal fee; and

(5) complete all requirements for licensure within one year from the date of the application.

(c) A former licensee whose Texas license is expired and holds no current state or US territory license may return to Texas licensure by:

(1) complete a re-entry course through an accredited college or university, and submit the certificate of completion or transcript to the board; or

(2) obtain an advanced occupational therapy degree, with an official transcript sent to the board, or

(3) retake the NBCOT examination "for licensure purposes only" and the scores reported to Texas from NBCOT; and submit copies of the completed continuing education/competency showing 45 hours of continuing education/competency as per Chapter 367 of this title (relating to continuing education/competency), with a minimum of 30 hours in Type 2;

(A) submit a board approved application which includes a recent passport type photo;

(B) pass the jurisprudence exam;

(C) pay the restoration fee;

(D) complete the requirements for licensure within one year from the date of application.

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

Filed with the Office of the Secretary of State on August 16, 2010.

TRD-201004726
John P. Maline
Executive Director
Texas Board of Occupational Therapy Examiners
Earliest possible date of adoption: September 26, 2010
For further information, please call: (512) 305-6900

ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 2. TEXAS ETHICS COMMISSION

CHAPTER 22. RESTRICTIONS ON CONTRIBUTIONS AND EXPENDITURES

1 TAC §22.5

The Texas Ethics Commission (commission) adopts the repeal of §22.5, relating to direct campaign expenditures. The repeal is adopted without changes to the proposed text as published in the July 2, 2010, issue of the *Texas Register* (35 TexReg 5638) and will not be republished.

The repeal of §22.5 repeals the rule relating to restrictions on direct campaign expenditures. The rule is no longer applicable.

No written comments were received regarding the proposed rule during the comment period.

The repeal of §22.5 is adopted under Government Code, Chapter 571, §571.062, which authorizes the commission to adopt rules concerning the laws administered and enforced by the commission.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 13, 2010.

TRD-201004721
Natalia Luna Ashley
General Counsel
Texas Ethics Commission
Effective date: September 2, 2010
Proposal publication date: July 2, 2010
For further information, please call: (512) 463-5800

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1 TAC §22.6

The Texas Ethics Commission (commission) adopts new §22.6, relating to the reporting of direct campaign expenditures. The new §22.6 is adopted with the change explained in the next paragraph to the proposed text as published in the July 2, 2010, issue of the *Texas Register* (35 TexReg 5638) and will be republished.

Section 22.6 clarifies the requirement to disclose direct campaign expenditures as articulated in Ethics Advisory Opinion No. 489 (2010). The changes to subsections (b) and (c) clarify that a general-purpose committee filing monthly reports is not required to file 30 and 8 day pre-election reports. The change is consistent with the current filing requirements for this type of committee and is not a substantive change.

No written comments were received regarding the proposed rule during the comment period.

The new §22.6 is adopted under Government Code, Chapter 571, §571.062, which authorizes the commission to adopt rules concerning the laws administered and enforced by the commission.

§22.6. Reporting Direct Campaign Expenditures.

(a) A person making a direct campaign expenditure that exceeds $100:

(1) Shall comply with Chapter 253, Subchapter C of Title 15 of the Election Code as if the person were an individual; and

(2) Is not required to file a campaign treasurer appointment as a political committee, but is required to use the reporting forms and schedule prescribed by Chapter 254 of Title 15 of the Election Code as if the person were a campaign treasurer of a general-purpose committee that does not file under the monthly reporting schedule option in §254.155 of the Election Code.

(b) Except as provided by subsection (c) of this section, a person is not required to file a report as required by this section if:

(1) The person is required to disclose the expenditure in another report required by Title 15 of the Election Code; and

(2) The report is required to be filed within the time prescribed for a direct campaign expenditure required to be filed under this section.

(c) A general-purpose committee that files under the monthly reporting schedule option in §254.155 of the Election Code is not subject to the requirements to file 30-day and 8-day pre-election reports but is subject to the requirements to file special pre-election reports.

(d) A person making a direct campaign expenditure consisting of the person's personal travel expenses is not required to disclose the expenditures under this section, provided that the person receives no reimbursement for the expenditures.

(e) A political committee is subject to the restrictions in Title 15 of the Election Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 13, 2010.

TRD-201004722

Natalia Luna Ashley
General Counsel
Texas Ethics Commission
Effective date: September 2, 2010
Proposal publication date: July 2, 2010
For further information, please call: (512) 463-5800

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PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. REIMBURSEMENT RATES
SUBCHAPTER H. REIMBURSEMENT METHODOLOGY FOR 24-HOUR CHILD CARE FACILITIES

1 TAC §355.7101, §355.7103

The Texas Health and Human Services Commission (HHSC) adopts amendments to §355.7101, concerning Cost Determination Process, and §355.7103, concerning Rate-Setting Methodology for 24-Hour Residential Child-Care Reimbursements, without changes to the proposed text as published in the June 4, 2010, issue of the *Texas Register* (35 TexReg 4544) and will not be republished.

Background and Justification

These rules establish the cost determination process and the reimbursement methodology for 24-Hour Residential Child-Care Reimbursements. HHSC, under its authority and responsibility to administer and implement rates, is adopting changes to these rules in order to update and standardize the Department of Family and Protective Services (DFPS) facility-type language references in HHSC rules to current DFPS usage. DFPS changed its facility-type references in 2007, but HHSC has continued to use the old designations. This inconsistency has caused confusion amongst some contracted providers. Further, a clarification to the rules concerning who must file a cost report is necessary due to DFPS' ability to award multiple licenses to Child Placing Agencies (CPAs) under one contract. This clarification describes HHSC's intent to collect only one cost report for CPAs with multiple licenses. In addition, certain verbiage is being changed to the past tense in a paragraph that refers to a prior period. Finally, a reference to Department of Family and Protective Services levels of service is necessary in two instances in order to increase the precision of the rule language.

Public Comment

The 30-day comment period ended July 4, 2010. During this period, HHSC received no comments regarding the proposed amendments.

Statutory Authority

The amendments are adopted under Texas Government Code §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out the Commission's duties; Texas Government Code §531.055, which authorizes the Executive Commissioner to adopt rules for the operation and provision of health and human services by the health and human services agencies and to adopt or approve rates of payment required by law to be adopted or approved by a health and human services agency; and Human Resources Code §40.4004(c) and (d), which authorize the Executive Commissioner to consider fully all written and oral submissions to the DFPS Council about a proposed rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 11, 2010.

TRD-201004636
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Effective date: August 31, 2010
Proposal publication date: June 4, 2010
For further information, please call: (512) 424-6900

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CHAPTER 370. STATE CHILDREN'S HEALTH INSURANCE PROGRAM
SUBCHAPTER D. ELIGIBILITY FOR UNBORN CHILDREN

1 TAC §370.401

The Health and Human Services Commission (HHSC) adopts an amendment to §370.401, concerning Perinates, in Chapter 370, State Children's Health Insurance Program, without changes to the proposed text as published in the June 4, 2010, issue of the *Texas Register* (35 TexReg 4546), and, therefore, the section will not be republished.

Background and Justification

The amendment is adopted to provide Children's Health Insurance Program (CHIP) Perinatal coverage to newborn children whose household income is above 185% of the Federal Poverty Level (FPL). Currently, a child born to an emergency Medicaid recipient is covered under the CHIP Perinatal program. Coverage under the CHIP Perinatal program continues for the newborn until the 12-month coverage period ends. The amendment will allow continued coverage under CHIP only if the household's countable income is more than 185% of FPL and at or below 200% of FPL. Coverage to a child born to a mother who is the recipient of emergency Medicaid services, if household income is at or below 185% of FPL, will be provided through Medicaid.

The amendment is necessary for HHSC to be in full compliance with the Centers for Medicare and Medicaid Services' interpretation of federal regulations at 42 Code of Federal Regulations §435.117.

Comments

HHSC received no comments regarding adoption of the amendment, including at a public hearing held in Austin on June 21, 2010.

Legal Authority

The amendment is adopted under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 12, 2010.

TRD-201004691
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Effective date: September 1, 2010
Proposal publication date: June 4, 2010
For further information, please call: (512) 424-6900

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CHAPTER 379. FAMILY VIOLENCE PROGRAM
SUBCHAPTER B. SHELTER CENTERS

The Health and Human Services Commission (HHSC) adopts amendments to §379.502, concerning preparing, providing, and serving food to residents; and §379.716, concerning Texas Department of Family and Protective Services' (DFPS) licensing for shelter centers, in Chapter 379, Family Violence Program, without changes to the proposed text as published in the June 4, 2010, issue of the *Texas Register* (35 TexReg 4547), and, therefore, the sections will not be republished.

Background and Justification

The amendment to §379.502 is adopted to update the name of the food benefits formerly known as food stamps to reflect HHSC's current term for these benefits.

The amendment to §379.716 is adopted to implement Senate Bill (S.B.) 68, 81st Legislature, Regular Session, 2009. S.B. 68 amended Chapter 42 of the Texas Human Resources Code to require DFPS licensure of a child-care facility in a temporary shelter, including a family violence shelter center, that provides care for children temporarily residing in the shelter. DFPS's new rules and minimum standards that will govern such shelters in Title 40 of the Texas Administrative Code (TAC), Chapter 743 will be effective on September 1, 2010. HHSC's rule requires family violence shelter centers to comply with DFPS licensure rules.

Comments

HHSC received no comments regarding adoption of the amendments.

DIVISION 5. FACILITY, SAFETY, AND HEALTH REQUIREMENTS

1 TAC §379.502

The amendment is adopted under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 12, 2010.

TRD-201004692
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Effective date: September 1, 2010
Proposal publication date: June 4, 2010
For further information, please call: (512) 424-6900

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DIVISION 7. SERVICE DELIVERY

1 TAC §379.716

The amendment is adopted under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 12, 2010.

TRD-201004693
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Effective date: September 1, 2010
Proposal publication date: June 4, 2010
For further information, please call: (512) 424-6900

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TITLE 13. CULTURAL RESOURCES

PART 2. TEXAS HISTORICAL COMMISSION

CHAPTER 16. HISTORIC SITES

13 TAC §§16.1 - 16.7

The Texas Historical Commission (Commission) adopts new §§16.1, 16.2, and 16.4 - 16.7; and an amendment to §16.3, relating to Historic Sites, without changes to the proposed text as published in the May 28, 2010, issue of the *Texas Register* (35 TexReg 4291) and will not be republished.

The Commission operates a system of state historic sites as mandated by the Texas Legislature in House Bill 12 (Act of May 29, 2007, Ch. 1159, Secs. 11-12, R.S., 80th Leg.). These rules are adopted to comply with a legislative mandate that the Commission adopt rules to establish "criteria for determining the eligibility of real property donated to the commission for inclusion in the historic sites system," as well as establish rules, standards, and procedures for the operation of the sites. Texas Government Code §442.0053(a). The Commission believes that the criteria adopted are consistent with this law and the law is the rational basis for the adoption of the rules.

Section 16.1, relating to Definitions, defines terms used in the chapter. Section 16.2, relating to Historic Sites Admission and Use, delegates the authority to establish admission fees for historic sites to the Executive Director of the Commission and establishes criteria for the determination of the fees, times when fees may be reduced or waived, and fees for special events at historic sites. Section 16.4, relating to Rules of Visitor Conduct, establishes rules of appropriate behavior and conduct for visitors

to the historic sites. Section 16.5, relating to Penalties, provides that violations of the Rules of Visitor Conduct are Class C misdemeanors. Section 16.6, relating to Volunteer Services, provides for the use of volunteers to assist Commission staff in the operation and maintenance of historic sites. Section 16.7, relating to Friends Organizations, provides for the establishment, organization, and operation of nonprofit organizations to assist and support each historic site. The amendment to §16.3, relating to Addition of Historic Sites to the Texas Historical Commission Historic Sites Program, will function by providing standards and procedures that the Commission may use in objectively evaluating any land that is proposed as a new historic site or an addition to an existing historic site. This should assist in preventing ad hoc or arbitrary decisions concerning land acquisition.

No comments were received on the proposal.

The new rules and amendment are adopted under the Texas Government Code §442.005(q), which provides the Commission with authority to promulgate rules that will reasonably effect the purposes of the chapter.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 11, 2010.

TRD-201004653
Mark Wolfe
Executive Director
Texas Historical Commission
Effective date: August 31, 2010
Proposal publication date: May 28, 2010
For further information, please call: (512) 463-6323

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TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 3. OIL AND GAS DIVISION

16 TAC §3.30

The Railroad Commission of Texas adopts amendments to §3.30, relating to Memorandum of Understanding between the Railroad Commission of Texas (RRC) and the Texas Commission on Environmental Quality (TCEQ), with changes to the proposed version published in the April 9, 2010, issue of the *Texas Register* (35 TexReg 2817).

The memorandum of understanding (MOU) between the TCEQ and the RRC was last updated substantively in May 1998, and since that time, each agency has gained experience implementing the MOU; has had changes to its statutory authority; and has undergone administrative reorganizations, all of which contribute to the need to revise the MOU. For example, in 2007, the source material recovery program was transferred from the Department of State Health Services to the TCEQ by Senate Bill (SB) 1604 (80th Legislature, 2007); in 2009, SB 1387 (81st Legislature, Regular Session, 2009) was passed concerning the regulation of carbon dioxide injection wells with respect to geologic storage and specifically calls for an MOU between the TCEQ and RRC. The last MOU was amended in 2003 to make non-substantive changes to reflect the agency name change from Texas Natural Resource Conservation Commission to Texas Commission on Environmental Quality.

Both the RRC and TCEQ will adopt the amendments; the RRC adopts these amendments to §3.30, while TCEQ will adopt concurrent amendments to 30 TAC §7.117 (relating to Memorandum of Understanding between the Railroad Commission of Texas and the Texas Commission on Environmental Quality) to incorporate by reference the amendments to §3.30.

CenterPoint Energy Arkla, CenterPoint Energy Entex, and CenterPoint Energy Intrastate Pipelines, LLC (CenterPoint); Texas Carbon Capture & Storage Association (TxCCSA); the Carbon Sequestration Council (CSC) on behalf of Environmental Defense Fund, Occidental Petroleum Corporation, ConocoPhillips, Denbury Resources, Texas Oil & Gas Association, Shell Exploration & Production Company, and BP Alternative Energy North America Inc.; Texas Pipeline Association (TPA); and the Dow Chemical Company (Dow) filed comments on the proposal.

CenterPoint expressed support for the update to the MOU and the agencies' regulations to describe the current structure and scope of environmental regulation and harmonize the regulatory structure with the express provisions of statutes. CSC also expressed appreciation to the agencies for the diligent and exemplary work in developing the amendments to the MOU. The agencies appreciate the support of this rulemaking to update the MOU.

Dow commented that modifications should be made to the language regarding storm water to indicate that facilities are under the TCEQ's jurisdiction if the facilities already have been permitted by the TCEQ or if they have SIC codes designated under the TCEQ's jurisdiction. Dow recommended that §3.30(b)(1)(B)(ii) should state: "Storm water. TCEQ has jurisdiction over storm water discharges that are required to be permitted pursuant to Title 40 Code of Federal Regulations (CFR) Part 122.26, except for discharges regulated by the RRC, *not including facilities that have SIC codes that have been designated as under the TCEQ's jurisdiction."*

Dow commented that §3.30(b)(2)(B)(i) should be revised to state: "Discharges. Under Texas Natural Resources Code, Title 3, and Texas Water Code, Chapter 26, the RRC regulates discharges from activities associated with the exploration, development, or production of oil, gas, or geothermal resources, including transportation of crude oil and natural gas by pipeline, and from solution brine mining activities, *unless those facilities have SIC codes that have been designated as under the TCEQ's jurisdiction."*

Dow also suggested that §3.30(b)(2)(B)(ii)(I) should be revised to state: "Storm water associated with industrial activities. Where required by federal law, discharges of storm water associated with facilities and activities under the RRC's jurisdiction must be authorized by the EPA and the RRC, as applicable, *except for facilities that have SIC codes that have been designated as under the TCEQ's jurisdiction."*

Finally, Dow suggested that §3.30(b)(2)(B)(ii)(II) should be revised to state: "Storm water associated with construction activities. Where required by federal law, discharges of storm water associated with construction activities under the RRC's jurisdiction must be authorized by the EPA and the RRC, as applicable, *except for facilities that have SIC codes that have been designated as under the TCEQ's jurisdiction."*

The agencies decline to make the requested changes because they would not add clarity to the MOU. SIC codes are not always the determining factor for identifying which agency has jurisdiction. For example, for SIC codes 1381-1389 (oil and gas field services), jurisdiction turns on whether the regulated activity takes place "in the field," not on the SIC code itself. The RRC makes no changes in response to these comments.

CenterPoint commented that, although Texas Natural Resources Code, Chapter 91, refers to *distribution* without limitation to pipeline distribution, proposed §3.30(b)(2)(A)(i) appears to reserve jurisdiction to the RRC over natural gas waste only when it is associated with the exploration and production of gas and its transportation by *pipeline.* TPA commented that the proposed description of RRC's jurisdiction over storm water and definition of "oil and gas waste" could create an ambiguity in the implementation of the RRC's jurisdiction. TPA and CenterPoint commented that §3.30(b)(2)(A)(i) should be revised to state: "Under Texas Natural Resources Code, Title 3, and Texas Water Code, Chapter 27, wastes (both hazardous and nonhazardous) resulting from activities associated with the exploration, development, or production of oil or gas or geothermal resources, including *storage, handling, reclamation, gathering,* transportation, or *distribution* of crude oil or natural gas by pipeline, *prior to the refining of such oil or prior to the use of such gas in any manufacturing process or as a residential or industrial fuel,* and other activities regulated by the RRC are under the jurisdiction of the RRC, except as noted in clause (ii) of this subparagraph."

The RRC did not intend §3.30(b)(2)(A)(i) to limit or restrict the definition of oil and gas waste or reserve the jurisdiction of the RRC. Texas Natural Resources Code, §91.1011, defines "oil and gas waste," and Texas Natural Resources Code, §91.101, delegates authority to the RRC to adopt and enforce rules and orders and issue permits for the discharge, storage, handling, transportation, reclamation or disposal of oil and gas waste or any other substance or material associated with any operation or activity regulated by the RRC under §91.101. Section 3.30(b)(2)(A)(i) was not intended to be an exclusive or exhaustive description of oil and gas waste. However, the RRC agrees that because the rule describes statutory jurisdiction, the language should be consistent with the statutes. Therefore, the RRC adopts a clarifying change in §3.30(b)(2)(A)(i) as recommended, and deletes circular language in this clause.

CenterPoint commented that proposed §3.30(b)(2)(B)(ii)(II) appears to restrict the RRC's jurisdiction to the construction of a gathering line or transmission pipeline that will transport crude oil or natural gas, including natural gas liquids, prior to the use of the natural gas in any manufacturing process or as a residential or industrial fuel, whereas Texas Water Code, §26.131(a)(1)(F), is much broader. TPA and CenterPoint commented that §3.30(b)(2)(B)(ii)(II) should be revised to state: "Activities under RRC jurisdiction include construction of a facility that, when completed would be associated with the exploration, development, or production of oil or gas or geothermal resources, such as a well site; treatment or storage facility; underground hydrocarbon or natural gas storage facility; reclamation plant; gas processing facility; compressor station; terminal facility where crude oil is stored prior to refining and at which refined products are stored solely for use at the facility; a carbon dioxide geologic storage facility under the jurisdiction of the RRC; and a gathering, transmission, *or distribution* pipeline that will transport crude oil or natural gas, including natural gas liquids, prior to the *refining of such oil or* use of the natural gas in any manufacturing process or as a residential or industrial fuel."

The RRC did not intend the description in §3.30(b)(2)(B)(ii)(II) to be an exhaustive or exclusive list of construction activities under the RRC's jurisdiction. However, the RRC agrees that use of the complete statutory language would be appropriate, and adopts §3.30(b)(2)(B)(ii)(II) with the recommended changes.

TxCCSA recommended that the RRC revise §3.30(b)(2)(C)(iv) to be consistent with the language in Texas Water Code, §27.041, to state that the RRC has jurisdiction over a well used for the *purposes* specified in Texas Water Code, §27.041(a). The agencies agree with the comment and the RRC adopts §3.30(b)(2)(C)(iv) to include the word "purposes," consistent with the language in Texas Water Code, §27.041(c).

TPA recommended that the RRC revise proposed §3.30(d)(6)(A) to list explicitly the matters over which RRC has jurisdiction relating to pipeline safety. TPA commented that §3.30(d)(6)(A) should state: "Jurisdiction over pipeline-related activities. *All* matters related to *or affecting* pipeline safety for pipelines in Texas, *including the design, construction, operation, and maintenance of facilities or equipment subject to Railroad Commission regulation under the Pipeline Safety Rules, located in Chapters 8 and 18 of this title, are subject to the jurisdiction of the Railroad Commission,* as referenced in §8.1 of this title (relating to General Applicability and Standards), *pursuant to Chapter 121 of the Texas Utilities Code and Chapter 117 of the Texas Natural Resources Code."*

The RRC intended §3.30(d)(6)(A) to describe the authority of the agencies for some activities related to the transportation of crude oil or natural gas. The agencies do not agree with the comment that §3.30(d)(6)(A) should be revised to provide an exhaustive or exclusive list of pipeline-related activities for which the RRC has jurisdiction because that is not the purpose of the MOU. The agencies agree that §8.1 of this title (relating to General Applicability and Standards) describes the applicability of the RRC's authority over pipeline safety as conferred under the Texas Natural Resources Code and the Texas Utilities Code. However, the commenter's suggested language for §3.30(d)(6)(A) may be interpreted too broadly to cover pipeline-related activities for which the TCEQ has jurisdiction, such as regulation of air quality under Texas Health and Safety Code, Chapter 382. Or, the suggested language could be interpreted to include facilities and transportation services subject to exclusive federal regulation. For these reasons, the agencies decline to amend the MOU to provide an exclusive list of pipeline related activities for which the RRC has jurisdiction. However, the agencies do agree to add the phrase "pursuant to Chapter 121 of the Texas Utilities Code and Chapter 117 of the Texas Natural Resources Code," and the RRC adopts this clarifying change.

CSC recommended that the RRC add a new §3.30(e)(6)(F) to the MOU to state that the agencies can work together on issues beyond the determination of the proper permitting agency or the production of the letter from the TCEQ on proposed carbon dioxide projects. CSC recommended that the new subparagraph state that the agencies agree to cooperate in their respective areas of expertise and knowledge in a manner that allows the permitting process to proceed efficiently and effectively, and provided the following language: "The TCEQ and the RRC agree to work together when required to provide input to the other on applications by letters or other means so that each agency provides the benefits of its particular areas of expertise and knowledge--and relies on the existing expertise and knowledge of the other--regarding the geologic settings, circumstances and methodologies of any specific proposed project

while each agency fulfills its respective responsibilities in a manner that allows the processing of applications to proceed efficiently and effectively without unwarranted efforts or expense by either agencies or applicants, using existing documentation and submission to the permitting agency as appropriate in order to minimize required additional paperwork and processing expenses."

The agencies agree that TCEQ and RRC can and should cooperate and collaborate within their areas of expertise and knowledge to assure efficient and effective permitting of carbon dioxide storage projects under Texas Water Code §27.041 or §27.011. However, the agencies do not agree that the suggested MOU language is needed to prompt any collaboration that may be necessary and that the suggested language could be interpreted to restrict the ability of the agencies to obtain needed information from each other or from a permit applicant.

TPA recommended that the RRC revise §§3.30(d)(9), 3.30(b)(1)(A)(iv), and 3.30(b)(2)(A)(ii) to include "treatment plants" so that the MOU is not construed to omit them. TPA recommended that the introduction to §3.30(d)(9) state: "Natural gas or natural gas liquids processing plants (including gas fractionation facilities, *treatment plants,* and pressure maintenance or repressurizing plants." TPA recommended that §3.30(b)(1)(A)(iv) state: "After delegation of RCRA authority to the Railroad Commission of Texas (RRC), the definition of solid waste (which defines TCEQ's jurisdiction) will not include hazardous wastes generated at natural gas or natural gas liquids processing plants, *treatment plants,* or reservoir pressure maintenance or repressurizing plants." TPA recommended that §3.30(b)(2)(A)(ii) state: "Hazardous wastes generated at natural gas or natural gas liquids processing plants, *treatment plants,* or reservoir pressure maintenance or repressurizing plants are subject to the jurisdiction of the TCEQ until the RRC is authorized by EPA to administer RCRA."

The agencies do not agree that the MOU should be revised in §§3.30(d)(9), 3.30(b)(1)(A)(iv), and 3.30(b)(2)(A)(ii) to include "treatment plants" when referring to natural gas or natural gas liquids processing plants. The language in the MOU is consistent with statutory language in the definition of "solid waste" in Texas Health and Safety Code §361.003(34)(A)(iii), the description of authority conferred upon the RRC in Texas Natural Resources Code §91.101(b), and the definition of "oil and gas waste" in §91.1011(b). None of these cited statutory provisions refers to "treatment plants." Furthermore, the RRC considers the term "processing plant" to include treatment plants. However, the RRC agrees that the language in this section should more closely track the statutory language and revises §3.30(b)(1)(A)(iv) as follows: "After delegation of RCRA authority to the Railroad Commission of Texas (RRC), the definition of solid waste (which defines TCEQ's jurisdiction) will not include hazardous wastes *arising out of or incidental to activities associated with gasoline plants,* natural gas or natural gas liquids processing plants, or reservoir pressure maintenance or repressurizing plants." The RRC also adopts a change in §3.30(b)(2)(A)(i) to add this wording.

TPA commented that, although both the Texas Natural Resources Code and the Texas Water Code recognize that natural gas liquids (NGL) pipelines are within the jurisdiction of the RRC, several references to pipelines in the proposed MOU fail to specify that NGL pipelines are within RRC's jurisdiction. TPA recommended that the RRC revise §3.30(b)(2)(A)(i) to include "natural gas liquids or the components of natural gas liquids." TPA also recommended that the RRC revise §§3.30(b)(2)(B)(i), 3.30(b)(2)(C)(i), and 3.30(d)(6)(A) to include "natural gas liquids." TPA suggested that proposed §3.30(b)(2)(A)(i) should read: "Under Texas Natural Resources Code, Title 3, and Texas Water Code, Chapter 26, wastes (both hazardous and nonhazardous) resulting from activities associated with the exploration, development, or production of oil or gas or geothermal resources, including transportation of crude oil or natural gas, *including natural gas liquids or the components of natural gas liquids,* by pipeline, and other activities regulated by RRC are under RRC jurisdiction, except as noted in clause (ii) of this subparagraph."

For proposed §3.30(b)(2)(B)(i), TPA suggested the clause should read: "Discharges. Under Texas Natural Resources Code, Title 3, and Texas Water Code, Chapter 26, RRC regulates discharges from activities associated with the exploration, development, or production of oil, gas, or geothermal resources, including transportation of crude oil and natural gas, *including natural gas liquids,* by pipeline, and from solution brine mining activities."

For proposed §3.30(b)(2)(C)(i), TPA suggested the clause should read: "Disposal wells. The RRC has jurisdiction under Texas Water Code, Chapter 27, over injection wells used to dispose of oil and gas waste. Texas Water Code, Chapter 27, defines 'oil and gas waste' to mean 'waste arising out of or incidental to drilling for or producing of oil, gas, or geothermal resources, waste arising out of or incidental to the underground storage of hydrocarbons other than storage in artificial tanks or containers, or waste arising out of or incidental to the operation of gasoline plants, natural gas processing plants, or pressure maintenance or repressurizing plants. The term includes but is not limited to salt water, brine, sludge, drilling mud, and other liquid or semi-liquid waste material.' The term 'waste arising out of or incidental to drilling for or producing of oil, gas, or geothermal resources' includes waste associated with transportation of crude oil or natural gas, *including natural gas liquids,* by pipeline pursuant to Texas Natural Resources Code, §91.101."

Finally, in proposed §3.30(d)(6)(A), TPA suggested the subparagraph should read: "Jurisdiction over pipeline-related activities. The RRC has jurisdiction over matters related to pipeline safety for pipelines in Texas, as referenced in §8.1 of this title (relating to General Applicability and Standards). The RRC has jurisdiction over spill response and remediation of releases from pipelines transporting crude oil, natural gas, and condensate that originate from exploration and production facilities to the refinery gate. The RRC has jurisdiction over waste generated by construction and operation of pipelines used to transport crude oil, natural gas, *including natural gas liquids,* and condensate on an oil and gas lease, and from exploration and production facilities to the refinery gate. The RRC is responsible for water quality certification issues related to construction and operation of pipelines used to transport crude oil, natural gas, and condensate on an oil and gas lease, and from exploration and production facilities to the refinery gate. The RRC has jurisdiction over waste generated by construction and operation of pipelines transporting carbon dioxide."

The agencies agree that natural gas liquids pipelines are generally within the jurisdiction of the RRC but the purpose of the MOU is not to provide a complete list of regulated activities or regulatory authority. The agencies do not agree that the description of oil and gas wastes under the jurisdiction of the RRC in §3.30(b)(2)(A)(i) needs to be changed to refer to "natural gas liq-

uids or the components of natural gas liquids" because the list of examples of oil and gas waste in this description is not intended to be exclusive or exhaustive. "Oil and gas waste" is defined Texas Natural Resource Code, §91.1011, and the RRC is conferred authority to adopt and enforce rules and orders and may issue permits relating to the discharge, storage, handling, transportation, reclamation or disposal of oil and gas waste or any other any other substance or material associated with any operation or activity regulated by the RRC under §91.101. Similarly, the agencies do not agree with the suggestion to include "natural gas liquids" in §3.30(b)(2)(B)(i) because this clause is not intended to provide an exhaustive or exclusive list of the activities associated with discharges for which the RRC has regulatory authority. The agencies do not agree with the suggested change to §3.30(b)(2)(C)(i) because this clause is not intended to provide a complete list of the types of oil and gas waste that may be disposed in injection wells regulated by the RRC. And, for the same reason, the agencies do not agree that §3.30(d)(6)(A) should be revised to include natural gas liquids because the sentence is not intended to provide a complete list of activities for which the RRC is responsible for providing water quality certifications.

TPA commented that the proposed MOU language suggests that "special waste" includes wastes processed, treated, or disposed of at any type of solid waste management facility authorized by the TCEQ, while the definition of special waste in 30 TAC §330.3(148) (relating to Definitions) refers only to municipal solid waste facilities. TPA recommended that the RRC revise the last sentence of §3.30(d)(1) to state: "Wastes from oil, gas, and geothermal exploration activities subject to regulation by the RRC when those wastes are to be processed, treated, or disposed of at a solid waste management facility *authorized under 30 TAC Chapter 330* by the TCEQ are, as defined in 30 TAC §330.3(148), 'special wastes.'"

The agencies agree with the comment and the RRC adopts this clarifying change in the last sentence of §3.30(d)(1) to refer to solid waste management facilities authorized under 30 TAC Chapter 330.

TPA recommended that the RRC add language regarding the transportation of septage waste by a transporter permitted under agencies other than the RRC, including septage collected from portable toilets to allow for the use of a septage transporter that is permitted under other agencies for the transportation of this waste. TPA recommended that the RRC revise the language in §3.30(e)(3)(D) by adding the following new sentence after the first sentence, "For transportation of this waste, no specific authorization is required from the RRC if the transporter is permitted by other agencies to transport this type of waste."

Because this rulemaking is a memorandum of understanding, the RRC disagrees with the recommendation to revise the MOU to include such an "authorization," which would require amendment of §3.8 of this title (relating to Water Protection). The RRC makes no change in response to this comment.

The RRC received no comments on the remaining portions of §3.30 and the RRC adopts them as follows.

Amendments in subsection (a) discuss the need for the agreement. In particular, new subsection (a)(2) notes that Texas Health and Safety Code, §401.414, requires the RRC and TCEQ to adopt an MOU defining each agency's respective duties relating to radioactive materials and sources of radiation. Texas Health and Safety Code, §401.415, further requires the agencies to define their roles and duties with respect to naturally occurring radioactive material (NORM).

Adopted new subsection (a)(3) states that Texas Water Code, Chapters 26 and 27, require the RRC and TCEQ to collaborate on matters involving surface water and groundwater protection. Texas Water Code, §27.049, specifically calls for amendment of the current MOU or a new MOU to reflect the agencies' respective duties relating to geologic storage and associated injection of carbon dioxide.

Adopted amendments to current subsection (a)(2) and (3) include renumbering (to subsection (a)(4) and (5), respectively) and revising the dates of previous MOU amendments.

Adopted amendments in subsection (b)(1)(A) delineate TCEQ jurisdiction over solid waste and add a reference to the definition of solid waste from Texas Health and Safety Code, §361.003(34), and are adopted with changes as previously discussed.

The RRC adopts new subsection (b)(1)(B) to delineate TCEQ jurisdiction over water quality, specifically discharges; storm water discharges (storm water associated with certain industrial activities and construction activities, regulated municipal storm water systems (MS4s), and discharges under combined TCEQ and RRC jurisdiction); State water quality certification; and commercial brine extraction and evaporation. The new wording is more detailed than the current MOU on the delineation of jurisdiction over water quality matters, particularly discharges.

Adopted new subsection (b)(1)(C) delineates TCEQ jurisdiction over injection wells, pursuant to 30 TAC §311.11 (relating to Definitions), which identifies Class I, III, IV, and V wells under the jurisdiction of TCEQ.

The amendments in subsection (b)(2)(A) delineate RRC jurisdiction over oil and gas waste, including hazardous and nonhazardous oil and gas waste, while new wording in subsection (b)(2)(B) delineates RRC jurisdiction over water quality, specifically discharges; storm water discharges (storm water associated with certain industrial activities and construction activities, regulated municipal storm water systems (MS4s), and discharges under combined TCEQ and RRC jurisdiction); and State water quality certification. The new wording is more detailed than the current MOU on the delineation of jurisdiction over water quality matters, particularly discharges. The RRC adopts some changes as previously discussed.

In new subsection (b)(2)(B)(ii)(I) and (II), the RRC has revised the citation to federal law to clarify the authority limiting the ability of the Environmental Protection Agency to require a permit for storm water discharges.

New subsection (b)(2)(C) delineates RRC jurisdiction over injection wells, specifically disposal wells, enhanced recovery wells, brine mining, geologic storage of carbon dioxide, hydrocarbon storage, geothermal energy, and *in situ* tar sands. The RRC adopts some changes as previously discussed.

The RRC deletes current subsection (d) because provisions in that subsection are being moved to other subsections in this rule.

Adopted amendments to subsection (e), redesignated as subsection (d), cover jurisdiction over waste from specific activities. These amendments change the current MOU, in which this subsection addresses jurisdiction over specific disposal activities.

Adopted amendments to newly designated subsection (d)(1) provide that the RRC has jurisdiction over waste from drilling,

operation, and plugging of wells associated with the exploration, development, or production of oil, gas, or geothermal resources, and provide that wells associated with the exploration, development, or production of oil, gas, or geothermal resources include exploratory wells, cathodic protection holes, core holes, oil wells, gas wells, geothermal resource wells, fluid injection wells used for secondary or enhanced recovery of oil or gas, oil and gas waste disposal wells, and injection water source wells. The adopted language describes the types of waste materials that can be generated during the drilling, operation, and plugging of these wells. These waste materials include drilling fluids (including water-based and oil-based fluids), cuttings, produced water, produced sand, waste hydrocarbons (including used oil), fracturing fluids, spent acid, workover fluids, treating chemicals (including scale inhibitors, emulsion breakers, paraffin inhibitors, and surfactants), waste cement, filters (including used oil filters), domestic sewage (including waterborne human waste and waste from activities such as bathing and food preparation), and trash (including inert waste, barrels, dope cans, oily rags, mud sacks, and garbage). The adopted new wording states that wastes from oil, gas, and geothermal exploration activities subject to regulation by the RRC are considered "special wastes" when the wastes are processed, treated, or disposed of at a solid waste management facility authorized by the TCEQ. The RRC adopts a clarifying change as previously discussed.

Adopted amendments in subsection (d)(3) address storage of oil, and provide that tank bottoms and other wastes from the storage of crude oil (whether foreign or domestic) before it enters the refinery are under the jurisdiction of the RRC, and that waste resulting from storage of crude oil at refineries is subject to the jurisdiction of the TCEQ. Wastes generated from storage tanks that are part of the refinery and wastes resulting from the wholesale and retail marketing of refined products are subject to the jurisdiction of the TCEQ. The amendments strike references to storm water because storm water is addressed in new subsection (b)(1)(B) and (b)(2)(B).

Subsection (d)(6) addresses transportation of crude oil or natural gas. New wording addresses questions both agencies have received on a regular basis, and explains general jurisdiction over pipeline related activities. New paragraph (6)(A) provides that the RRC has jurisdiction over matters related to pipeline safety for all pipelines in Texas that transport hazardous materials as that term is defined by federal regulation. The RRC has jurisdiction over spill response and remediation of releases from pipelines transporting crude oil, natural gas, and condensate from the point of origin at exploration and production facilities to the refinery gate. The RRC has jurisdiction over waste generated by construction and operation of pipelines used to transport crude oil, natural gas, and condensate on an oil and gas lease, and from exploration and production facilities to the refinery gate. The RRC is responsible for water quality certification issues related to construction and operation of pipelines used to transport crude oil, natural gas, and condensate on an oil and gas lease and from exploration and production facilities to the refinery gate. The RRC has jurisdiction over waste generated by construction and operation of pipelines transporting carbon dioxide. The RRC adopts a clarifying change as previously discussed.

The adopted amendments to subsection (d)(6)(A) - (D) include only non-substantive clarifying changes. Amendments in subsection (d)(7) - (9) also include only minor non-substantive clarifications.

Subsection (d)(10) covers manufacturing processes. New subparagraph (C) provides that the TCEQ has jurisdiction over wastes associated with the manufacturing of biofuels and biodiesel. TCEQ Regulatory Guidance Document RG-462 contains additional information regarding biodiesel manufacturing in the State of Texas.

Subsection (d)(11) covers commercial service company facilities and training facilities. The amendments in subparagraphs (C) and (D) are non-substantive clarifying changes.

The RRC adopts new subsection (d)(12) to address mobile offshore drilling units (MODUs), a new topic for the MOU, in response to questions that have arisen since the last MOU was adopted. MODUs are vessels capable of engaging in drilling operations for exploring or exploiting subsea oil, gas, or mineral resources. New subparagraph (A) provides that the RRC and, where applicable, EPA, U.S. Coast Guard, or the Texas General Land Office (GLO) have jurisdiction over discharges from an MODU when the unit is being used in connection with activities associated with the exploration, development, or production of oil or gas or geothermal resources. New subparagraph (B) provides that the TCEQ and, where applicable, the EPA, the U.S. Coast Guard, or the GLO have jurisdiction over discharges from an MODU when the unit is being serviced at a maintenance facility. New subparagraph (C) provides that, where applicable, the EPA, the U.S. Coast Guard, or the GLO has jurisdiction over discharges from an MODU during transportation from shore to exploration, development, or production site; transportation between sites; and transportation to a maintenance facility.

Current subsection (f), redesignated as subsection (e), addresses interagency activities. Adopted amendments in newly designated subsection (e)(1)(A) and (B) are non-substantive clarifying changes and provide that the TCEQ SBEA Division and the RRC will coordinate as necessary to maintain a working relationship to enhance the efforts to share information and use resources more efficiently.

The adopted amendments in newly designated subsection (e)(2) address treatment of wastes under RRC jurisdiction at facilities authorized by the TCEQ under 30 TAC Chapter 334, Subchapter K (relating to Storage, Treatment, and Reuse Procedures for Petroleum-Substance Contaminated Soil). The MOU currently refers to the Petroleum Storage Tank Division at the TCEQ, the specific program at the TCEQ that regulates petroleum storage tanks. The amendments refer to the subchapter of the TCEQ's rules under which the storage, treatment, and disposal of petroleum-substance waste may be authorized, rather than to a specific division of the TCEQ.

Similarly, subsection (e)(2)(C), (D), and (E) provide that the RRC must specifically authorize management of contaminated soils under its jurisdiction at facilities authorized by the TCEQ under 30 TAC Chapter 334, Subchapter K, instead of referring to a division within TCEQ.

The RRC adopts amendments to subsection (e)(3) to add processing and treatment, in addition to disposal of wastes under RRC jurisdiction at other facilities authorized by the TCEQ, such as solid waste facilities regulated under 30 TAC Chapter 330 (Municipal Solid Waste) or Chapter 335 (Industrial Solid Waste and Municipal Hazardous Waste).

Adopted subsection (e)(3)(A) states that as provided in this paragraph, waste materials subject to the jurisdiction of the RRC may be managed at solid waste facilities under the jurisdiction of the TCEQ once alternatives for recycling and source reduction have

been explored. The RRC must specifically authorize management of wastes under its jurisdiction at facilities regulated by the TCEQ. The RRC may grant such authorizations by rule, or on an individual basis through permits or other written authorizations. In addition, except as provided in subparagraph (B) of this paragraph, the concurrence of the TCEQ is required to manage "special waste" under the jurisdiction of the RRC at a facility regulated by the TCEQ. The TCEQ's concurrence may be subject to specified conditions. The RRC adds the sentence, "Management and disposal of waste under the jurisdiction of the RRC is subject to TCEQ's rules governing both special waste and industrial waste" to subparagraph (B) to clarify what TCEQ may require when a person wants to manage or dispose of RRC waste at a TCEQ facility. The RRC changes the term "waste" to "special waste" for clarification. "Special waste" is the term TCEQ uses to categorize certain types of waste, including but not limited to RRC waste, that are taken to disposal facilities that TCEQ regulates.

Subsection (e)(3)(C) provides that in all other instances, individual written concurrences from the TCEQ are required to manage wastes under the jurisdiction of the RRC at TCEQ regulated facilities. (This is required only if the TCEQ regulated facility receiving the waste does not have approval to accept the waste included in its permit or other authorization provided by the TCEQ.) Recommendations for the management of special wastes associated with the exploration, development, or production of oil, gas, or geothermal resources are found in TCEQ Regulatory Guidance document RG-3.

Adopted subsection (e)(3)(D) provides that domestic septage collected from portable toilets at facilities subject to RRC jurisdiction that is not mixed with other waste materials may be managed at a facility permitted by the TCEQ for disposal, incineration, or land application for beneficial use of such domestic septage waste without specific authorization from the TCEQ or the RRC. Waste sludge subject to the jurisdiction of the RRC may not be applied to the land at a facility permitted by the TCEQ for the beneficial use of sewage sludge or water treatment sludge. The RRC moves language regarding waste sludge from the beginning to the end of subparagraph (D) to improve organization.

The RRC deletes subsection (e)(3)(E) because it is obsolete.

The amendments to adopted subsection (e)(3)(E) - (G), currently subsection (e)(3)(F) - (H), are non-substantive clarifications, including re-designation of the subparagraphs because of the deletion of existing subparagraph (E).

Adopted subsection (e)(4) addresses management of nonhazardous wastes under TCEQ jurisdiction at facilities regulated by the RRC. The RRC deletes subsection (e)(4)(D) concerning the consideration of the use of Class II injection wells during a public health, public safety, or environmental emergency because the language is unnecessary for the agencies to exercise emergency authority.

Adopted amendments to subsection (e)(4)(D), redesignated from (E), provide that under Texas Water Code, §27.0511(g), a TCEQ permit is required for injection of industrial or municipal waste as an injection fluid for enhanced recovery purposes. New wording adds that, under Texas Water Code, §27.0511(h), the RRC may authorize a person to use nonhazardous brine from a desalination operation or nonhazardous drinking water treatment residuals as an injection fluid for enhanced recovery purposes without obtaining a permit from the TCEQ. The use or disposal of radioactive material under this subparagraph is subject to the applicable requirements of Texas Health and Safety Code, Chapter 401. This implements Section 4 of House Bill 2654, 80th Legislature, 2007, which amended Texas Water Code, §27.0511(g) and (h).

The RRC deletes subsection (e)(4)(F) because it is obsolete.

Adopted subsection (e)(5) covers drilling in landfills and provides that the TCEQ will notify the Oil and Gas Division of the RRC and the landfill owner at the time a drilling application is submitted if an operator proposes to drill a well through a landfill regulated by the TCEQ. The RRC and the TCEQ will cooperate and coordinate with one another in advising the appropriate parties of measures necessary to reduce the potential for the landfill contents to cause groundwater contamination as a result of landfill disturbance associated with drilling operations. The RRC adopts new wording to assure that the appropriate measures are taken prior to drilling through previously disposed waste. The TCEQ requires prior written approval before drilling of any test borings through previously deposited municipal solid waste under 30 TAC §330.15 (relating to General Prohibitions), and before borings or other penetration of the final cover of a closed municipal solid waste landfill under 30 TAC §330.955 (relating to Miscellaneous). The installation of landfill gas recovery wells for the recovery and beneficial reuse of landfill gas is under the jurisdiction of the TCEQ in accordance with 30 TAC Chapter 330, Subchapter I (relating to Landfill Gas Management). Modification of an active or a closed solid waste management unit, corrective action management unit, hazardous waste landfill cell, or industrial waste landfill cell by drilling or penetrating into or through deposited waste may require prior written approval from TCEQ. Such approval may require a new authorization from TCEQ or modification or amendment of an existing TCEQ authorization.

Adopted subsection (e)(6) addresses coordination of actions and sharing of information. Subparagraph (B) provides that the TCEQ and the RRC agree to cooperate with one another by sharing information. Employees of either agency who receive a complaint or discover, in the course of their official duties, information that indicates a violation of a statute, regulation, order, or permit pertaining to wastes under the jurisdiction of the other agency, will notify the other agency. In addition, to facilitate enforcement actions, each agency will share information in its possession with the other agency if requested by the other agency to do so.

The RRC adopts new subparagraphs (C), (D), and (E). New subparagraph (C) provides that the TCEQ and the RRC agree to work together at allocating respective responsibilities. To the extent that jurisdiction is indeterminate or has yet to be determined, the TCEQ and the RRC agree to share information and take appropriate investigative steps to assess jurisdiction. New subparagraph (D) states that for items not covered by statute or rule, the TCEQ and the RRC will collaborate to determine respective responsibilities for each issue, project, or project type. New subparagraph (E) provides that the RRC and the TCEQ shall coordinate as necessary to attempt to resolve any disputes regarding interpretation of this MOU and disputes regarding definitions and terms of art.

The RRC adopts new subsection (e)(7) to address groundwater responsibilities of both agencies. New subsection (e)(7)(A) relates to notice of groundwater contamination required by Texas Water Code, §26.408, effective September 1, 2003, pursuant to which the RRC must submit a written notice to the TCEQ of any documented cases of groundwater contamination that may affect a drinking water well. New subsection (e)(7)(B) addresses the groundwater protection letters the TCEQ provides to RRC.

For recommendations related to normal drilling operations, shot holes for seismic surveys, and cathodic protection wells, the TCEQ provides geologic interpretation identifying fresh water zones, base of usable-quality water (generally less than 3,000 mg/L total dissolved solids, but may include higher levels of total dissolved solids if identified as currently being used or identified by the Texas Water Development Board as a source of water for desalination), and include protection depths recommended by the RRC. The geological interpretation may include groundwater protection based on potential hydrological connectivity to usable-quality water. For recommendations related to injection in a non-producing zone, the TCEQ provides geologic interpretation of the base of the underground source of drinking water as defined in 30 TAC §331.2 (relating to Definitions).

The RRC adopts new subsection (e)(8) concerning emergency and spill response. New subsection (e)(8)(A) provides that the TCEQ and the RRC are members of the state's Emergency Management Council. The TCEQ is the state's primary agency for emergency support during response to hazardous materials and oil spill incidents. The TCEQ is responsible for state-level coordination of assets and services, and will identify and coordinate staffing requirements appropriate to the incident to include investigative assignments for the primary and support agencies.

New subsection (e)(8)(B) provides that contaminated soil and other wastes that result from a spill must be managed in accordance with the governing statutes and regulations adopted by the agency responsible for the activity that resulted in the spill. Coordination of issues of spill notification, prevention, and response shall be addressed in the State of Texas Oil and Hazardous Substance Spill Contingency Plan and may be addressed further in a separate Memorandum of Understanding among these agencies and other appropriate state agencies.

New subsection (e)(8)(C) provides that the agency (TCEQ or RRC) that has jurisdiction over the activity that resulted in the spill incident will be responsible for measures necessary to monitor, document, and remediate the incident. The TCEQ has jurisdiction over certain inland oil spills, all hazardous - substance spills, and spills of other substances that may cause pollution. The RRC has jurisdiction over spills or discharges from activities associated with the exploration, development, or production, of oil, crude oil, gas, and geothermal resources, including transportation of crude oil by pipeline, and discharges from brine mining or surface mining.

New subsection (e)(8)(D) provides that the TCEQ and RRC field personnel shall refer to each other a spill notification or a report documenting improperly managed waste or contaminated environmental media resulting from a spill or discharge that is under the jurisdiction of the other agency. The agency that has jurisdiction over the activity that resulted in the improperly managed waste, spill, discharge, or contaminated environmental media will be responsible for measures necessary to monitor, document, and remediate the incident.

The RRC adopts new subsection (e)(9) to address anthropogenic carbon dioxide storage. The new paragraph provides that in determining the proper permitting agency in regard to a particular permit application for a carbon dioxide geologic storage project, the TCEQ and the RRC will coordinate by any appropriate means to review proposed locations, geologic settings, reservoir data, and other jurisdictional criteria specified in Texas Water Code, §27.041. Interagency coordination of review and processing of a permit application for injection of carbon dioxide for geologic storage under Texas Water Code, Chapter 27, Subchapter C-1, will include application review by and production of a letter from the TCEQ's executive director as specified under Texas Water Code, §27.046. This new paragraph implements SB 1387 (81st Legislature, Regular Session, 2009), which created new Texas Water Code, Chapter 27, Subchapter C-1, regarding the regulation of the geologic storage and associated injection of anthropogenic carbon dioxide and fulfills the requirement of Texas Water Code, §27.049, for the RRC and TCEQ to amend the MOU or enter a new MOU regarding the responsibilities under Subchapter C-1.

The RRC adopts new subsection (f) to address radioactive material. Subsection (f)(1) provides that under the Texas Health and Safety Code, §401.011, the TCEQ has jurisdiction to regulate and license the disposal of radioactive substances, the processing or storage of low-level radioactive waste or NORM waste from other persons, except oil and gas NORM waste, the recovery or processing of source material, the processing of by-product material as defined by Texas Health and Safety Code, §401.003(3)(B), and sites for the disposal of low-level radioactive waste, by-product material, or NORM waste.

Adopted new subsection (f)(2) addresses NORM waste, and provides that under Texas Health and Safety Code, §401.415, the RRC has jurisdiction over the disposal of NORM waste that constitutes, is contained in, or has contaminated oil and gas waste. This waste material is called "oil and gas NORM waste." Oil and gas NORM waste may be generated in connection with the exploration, development, or production of oil or gas. Subparagraph (B) provides that, under Texas Health and Safety Code, §401.412, the TCEQ has jurisdiction over the disposal of NORM that is not oil and gas NORM waste. Subparagraph (C) states that the term "disposal" does not include receipt, possession, use, processing, transfer, transport, storage, or commercial distribution of radioactive materials, including NORM. These non-disposal activities are under the jurisdiction of the Texas Department of State Health Services under Texas Health and Safety Code, §401.011(a).

Adopted new subsection (f)(3) covers drinking water residuals, and provides that a person licensed for the commercial disposal of NORM waste from public water systems may dispose of NORM waste only by injection into a Class I injection well permitted under 30 TAC Chapter 331 (relating to Underground Injection Control) that is specifically permitted for the disposal of NORM waste.

Adopted new subsection (f)(4) addresses management of radioactive tracer material, and provides in subparagraph (A) that radioactive tracer material is subject to the definition of low-level radioactive waste under Texas Health and Safety Code, §401.004, and must be handled and disposed of in accordance with the rules of the TCEQ and the Department of State Health Services. New subparagraph (B) states that under Texas Health and Safety Code, §401.106, the TCEQ may grant an exemption by rule from a licensing requirement if the TCEQ finds that the exemption will not constitute a significant risk to the public health and safety and the environment.

The RRC adopts new subsection (f)(5) to specify how the agencies will coordinate with the Texas Radiation Advisory Board. The RRC and the TCEQ will consider recommendations and advice provided by the Texas Radiation Advisory Board that concern either agency's policies or programs related to the development, use, or regulation of a source of radiation. Both agencies will provide written responses to the recommendations or advice provided by the advisory board.

Adopted new subsection (f)(6) covers uranium exploration and mining. Under Texas Natural Resources Code, Chapter 131, the RRC has jurisdiction over exploration activities and uranium mining, except for *in situ* recovery processes. Under Texas Water Code, §27.0513, the TCEQ has jurisdiction over the injection wells used for uranium mining. Under Texas Health and Safety Code, §401.2625, the TCEQ has jurisdiction over the licensing of source material recovery and processing or for storage, processing, or disposal of by-product material.

The RRC deletes subsection (g) because it does not serve a useful purpose and is therefore unnecessary. The RRC also deletes subsection (h) because the principles in this subsection are covered in subsection (e)(6), which addresses coordination of activities between the agencies.

The RRC adopts amendments to current subsection (i), re-designated as subsection (g), to change the effective date of this version of the Memorandum of Understanding from the current effective date of May 31, 1998, to August 30, 2010. The RRC adopts this subsection with a change to indicate the actual effective date.

The RRC adopts a clarifying change in subsection (b)(2)(A)(i) and subsection (e)(2)(A) and (B), (3)(C), and (3)(E)(ii) to correct the citation format where the rule language refers to another rule, chapter, title, or code. In other subsections, the RRC adopts changes to make consistent the use of defined acronyms or abbreviations, to correct punctuation or grammar, or to make other non-substantive clarifying changes.

The RRC held a public hearing on this proposal on Tuesday, May 11, 2010, at 1:30 p.m., in Room 1-100 of the William Travis Building, 1701 N. Congress Avenue, Austin, Texas 78711. The hearing was structured for the receipt of oral or written comments by interested persons. Individuals were provided the opportunity to present oral statements when called upon in order of registration, but no one commented.

The RRC adopts the amendments to §3.30 under Texas Health and Safety Code, §401.414, which requires the TCEQ, the RRC, and the Health and Human Services Commission by rule to adopt memoranda of understanding defining their respective duties under Texas Health and Safety Code, Chapter 401, relating to Radioactive Materials and Other Sources of Radiation; Texas Water Code, §26.131, which gives the RRC jurisdiction over pollution of surface or subsurface waters from oil and gas exploration, development, and production activities; Texas Water Code, Chapter 27, which authorizes the RRC to adopt and enforce rules relating to injection wells, and specifically, as amended by Senate Bill 1387 (81st Legislature, Regular Session, 2009), which added Subchapter C-1, relating to Geologic Storage and Associated Injection of Anthropogenic Carbon Dioxide, which requires the RRC by rule to amend the memorandum of understanding recorded in §3.30 to comply with Subchapter C-1; Texas Water Code, §§29.001-29.053, which authorize the RRC to regulate oil and gas waste haulers; Texas Natural Resources Code, §81.052, which authorizes the RRC to adopt all necessary rules for governing persons and their operations under the jurisdiction of the RRC under Texas Natural Resources Code, §81.051; Texas Natural Resources Code, §85.042(b), which authorizes the RRC to adopt and enforce rules for the prevention of actual waste of oil or operations in the field dangerous to life or property; Texas Natural Resources Code, §85.201, which authorizes the RRC to make and enforce rules for the conservation of oil and gas and prevention of waste of oil and gas; Texas Natural Resources Code, §85.202, which authorizes the RRC to adopt rules to prevent waste of oil and gas in producing operations; Texas Natural Resources Code, §91.101, which authorizes the RRC to adopt rules relating to the various oilfield operations, including the discharge, storage, handling, transportation, reclamation, or disposal of oil and gas waste; and Texas Natural Resources Code §91.602, which authorizes the RRC to adopt and enforce rules relating to the generation, transportation, treatment, storage, and disposal of oil and gas hazardous waste.

Texas Health and Safety Code, §401.414; Texas Water Code, §26.131, Chapter 27, and §§29.001 - 29.053; and Texas Natural Resources Code, §§81.052, 85.042(b), 85.201, 85.202, 91.101, and 91.602 are affected by the adopted amendments.

Statutory authority: Texas Health and Safety Code, §401.414; Texas Water Code, §26.131, Chapter 27, and §§29.001 - 29.053; and Texas Natural Resources Code, §§81.052, 85.042(b), 85.201, 85.202, 91.101, and 91.602.

Cross-reference to statute: Texas Health and Safety Code, §401.414; Texas Water Code, §26.131, Chapter 27, and §§29.001 - 29.053; and Texas Natural Resources Code, §§81.052, 85.042(b), 85.201, 85.202, 91.101, and 91.602.

Issued in Austin, Texas, on August 10, 2010.

§3.30. Memorandum of Understanding between the Railroad Commission of Texas (RRC) and the Texas Commission on Environmental Quality (TCEQ).

(a) Need for agreement. Several statutes cover persons and activities where the respective jurisdictions of the RRC and the TCEQ may intersect. This rule is a statement of how the agencies implement the division of jurisdiction.

(1) Section 10 of House Bill 1407, 67th Legislature, 1981, which appeared as a footnote to the Texas Solid Waste Disposal Act, Texas Civil Statutes, Article 4477-7, provides as follows: On or before January 1, 1982, the Texas Department of Water Resources, the Texas Department of Health, and the Railroad Commission of Texas shall execute a memorandum of understanding that specifies in detail these agencies' interpretation of the division of jurisdiction among the agencies over waste materials that result from or are related to activities associated with the exploration for and the development, production, and refining of oil or gas. The agencies shall amend the memorandum of understanding at any time that the agencies find it to be necessary.

(2) Texas Health and Safety Code, §401.414, relating to Memoranda of Understanding, requires the Railroad Commission of Texas and the Texas Commission on Environmental Quality to adopt a memorandum of understanding (MOU) defining the agencies' respective duties under Texas Health and Safety Code, Chapter 401, relating to radioactive materials and other sources of radiation. Texas Health and Safety Code, §401.415, relating to oil and gas naturally occurring radioactive material (NORM) waste, provides that the Railroad Commission of Texas shall issue rules on the management of oil and gas NORM waste, and in so doing shall consult with the Texas Natural Resource Conservation Commission (now TCEQ) and the Department of Health (now Department of State Health Services) regarding protection of the public health and the environment.

(3) Texas Water Code, Chapters 26 and 27, provide that the Railroad Commission and TCEQ collaborate on matters related to discharges, surface water quality, groundwater protection, underground injection control and geologic storage of carbon dioxide. Texas Water Code, §27.049, relating to Memorandum of Understanding, requires the RRC and TCEQ to adopt a new MOU or amend the existing MOU to reflect the agencies' respective duties under Texas Water

Code, Chapter 27, Subchapter C-1 (relating to Geologic Storage and Associated Injection of Anthropogenic Carbon Dioxide).

(4) The original MOU between the agencies adopted pursuant to House Bill 1407 (67th Legislature, 1981) became effective January 1, 1982. The MOU was revised effective December 1, 1987, and again on May 31, 1998, to reflect legislative clarification of the Railroad Commission's jurisdiction over oil and gas wastes and the Texas Natural Resource Conservation Commission's (the combination of the Texas Water Commission, the Texas Air Control Board, and portions of the Texas Department of Health) jurisdiction over industrial and hazardous wastes.

(5) The agencies have determined that the revised MOU that became effective on May 31, 1998, should again be revised to further clarify jurisdictional boundaries and to reflect legislative changes in agency responsibility.

(b) General agency jurisdictions.

(1) Texas Commission on Environmental Quality (TCEQ) (the successor agency to the Texas Natural Resource Conservation Commission).

(A) Solid waste. Under Texas Health and Safety Code, Chapter 361, §§361.001 - 361.754, the TCEQ has jurisdiction over solid waste. The TCEQ's jurisdiction encompasses hazardous and non-hazardous, industrial and municipal, solid wastes.

(i) Under Texas Health and Safety Code, §361.003(34), solid waste under the jurisdiction of the TCEQ is defined to include "garbage, rubbish, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility, and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, municipal, commercial, mining, and agricultural operations and from community and institutional activities."

(ii) Under Texas Health and Safety Code, §361.003(34), the definition of solid waste excludes "material which results from activities associated with the exploration, development, or production of oil or gas or geothermal resources and other substance or material regulated by the Railroad Commission of Texas pursuant to Section 91.101, Natural Resources Code. . . ."

(iii) Under Texas Health and Safety Code, §361.003(34), the definition of solid waste includes the following until the United States Environmental Protection Agency (EPA) delegates its authority under the Resource Conservation and Recovery Act, 42 United States Code (U.S.C.) §6901, et seq., (RCRA) to the RRC: "waste, substance or material that results from activities associated with gasoline plants, natural gas or natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants and is a hazardous waste as defined by the administrator of the EPA. . . ."

(iv) After delegation of RCRA authority to the RRC, the definition of solid waste (which defines TCEQ's jurisdiction) will not include hazardous wastes arising out of or incidental to activities associated with gasoline plants, natural gas or natural gas liquids processing plants, or reservoir pressure maintenance or repressurizing plants. The term natural gas or natural gas liquids processing plant refers to a plant the primary function of which is the extraction of natural gas liquids from field gas or fractionation of natural gas liquids. The term does not include a separately located natural gas treating plant for which the primary function is the removal of carbon dioxide, hydrogen sulfide, or other impurities from the natural gas stream. A separator, dehydration unit, heater treater, sweetening unit, compressor, or similar equipment is considered a part of a natural gas or natural gas liquids processing plant only if it is located at a plant the primary function of which is the extraction of natural gas liquids from field gas or fractionation of natural gas liquids. Further, a pressure maintenance or repressurizing plant is a plant for processing natural gas for reinjection (for reservoir pressure maintenance or repressurization) in a natural gas recycling project. A compressor station along a natural gas pipeline system or a pump station along a crude oil pipeline system is not a pressure maintenance or repressurizing plant.

(B) Water quality.

(i) Discharges under Texas Water Code, Chapter 26. Under the Texas Water Code, Chapter 26, the TCEQ has jurisdiction over discharges into or adjacent to water in the state, except for discharges regulated by the RRC.

(ii) Storm water. TCEQ has jurisdiction over storm water discharges that are required to be permitted pursuant to Title 40 Code of Federal Regulations (CFR) Part 122.26, except for discharges regulated by the RRC. Discharge of storm water regulated by TCEQ may be authorized by an individual Texas Pollutant Discharge Elimination System (TPDES) permit or by a general TPDES permit. These storm water permits may also include authorizations for certain minor types of non-storm water discharges.

(I) Storm water associated with industrial activities. The TCEQ regulates storm water discharges associated with certain industrial activities under individual TPDES permits and under the TPDES Multi-Sector General Permit, except for discharges associated with industrial activities under the jurisdiction of the RRC.

(II) Storm water associated with construction activities. The TCEQ regulates storm water discharges associated with construction activities, except for discharges from construction activities under the jurisdiction of the RRC.

(III) Municipal storm water discharges. The TCEQ has jurisdiction over discharges from regulated municipal storm sewer systems (MS4s).

(IV) Combined storm water. Except with regard to storage of oil, when a portion of a site is regulated by the TCEQ, and a portion of a site is regulated by the EPA and RRC, storm water authorization must be obtained from the TCEQ for the portion(s) of the site regulated by the TCEQ, and from the EPA and the RRC, as applicable, for the RRC regulated portion(s) of the site. Discharge of storm water from a facility that stores both refined products intended for off-site use and crude oil in aboveground tanks is regulated by the TCEQ.

(iii) State water quality certification. Under the Clean Water Act (CWA) Section 401 (33 U.S.C. Section 1341), the TCEQ performs state water quality certifications for activities that require a federal license or permit and that may result in a discharge to waters of the United States, except for those activities regulated by the RRC.

(iv) Commercial brine extraction and evaporation. Under Texas Water Code, §26.132, the TCEQ has jurisdiction over evaporation pits operated for the commercial production of brine water, minerals, salts, or other substances that naturally occur in groundwater and that are not regulated by the RRC.

(C) Injection wells. Under the Texas Water Code, Chapter 27, the TCEQ has jurisdiction to regulate and authorize the drilling, construction, operation, and closure of injection wells unless the activity is subject to the jurisdiction of the RRC. Injection wells under TCEQ's jurisdiction are identified in 30 TAC §331.11 (relating to Classification of Injection Wells) and include:

(i) Class I injection wells for the disposal of hazardous, radioactive, industrial or municipal waste that inject fluids below the lower-most formation which within 1/4 mile of the wellbore contains an underground source of drinking water;

(ii) Class III injection wells for the extraction of minerals including solution mining of sodium sulfate, sulfur, potash, phosphate, copper, uranium and the mining of sulfur by the Frasch process;

(iii) Class IV injection wells for the disposal of hazardous or radioactive waste which inject fluids into or above formations that contain an underground source of drinking water; and

(iv) Class V injection wells that are not under the jurisdiction of the RRC, such as aquifer remediation wells, aquifer recharge wells, aquifer storage wells, large capacity septic systems, storm water drainage wells, salt water intrusion barrier wells, and closed loop geothermal wells.

(2) Railroad Commission of Texas (RRC).

(A) Oil and gas waste.

(i) Under Texas Natural Resources Code, Title 3, and Texas Water Code, Chapter 26, wastes (both hazardous and nonhazardous) resulting from activities associated with the exploration, development, or production of oil or gas or geothermal resources, including storage, handling, reclamation, gathering, transportation, or distribution of crude oil or natural gas by pipeline, prior to the refining of such oil or prior to the use of such gas in any manufacturing process or as a residential or industrial fuel, are under the jurisdiction of the RRC, except as noted in clause (ii) of this subparagraph. These wastes are termed "oil and gas wastes." In compliance with Texas Health and Safety Code, §361.025 (relating to exempt activities), a list of activities that generate wastes that are subject to the jurisdiction of the RRC is found at §3.8(a)(30) of this title (relating to Water Protection) and at 30 TAC §335.1 (relating to Definitions), which contains a definition of "activities associated with the exploration, development, and production of oil or gas or geothermal resources." Under Texas Health and Safety Code, §401.415, the RRC has jurisdiction over the disposal of oil and gas naturally occurring radioactive material (NORM) waste that constitutes, is contained in, or has contaminated oil and gas waste.

(ii) Hazardous wastes arising out of or incidental to activities associated with gasoline plants, natural gas or natural gas liquids processing plants or reservoir pressure maintenance or repressurizing plants are subject to the jurisdiction of the TCEQ until the RRC is authorized by EPA to administer RCRA. When the RRC is authorized by EPA to administer RCRA, jurisdiction over such hazardous wastes will transfer from the TCEQ to the RRC.

(B) Water quality.

(i) Discharges. Under Texas Natural Resources Code, Title 3, and Texas Water Code, Chapter 26, the RRC regulates discharges from activities associated with the exploration, development, or production of oil, gas, or geothermal resources, including transportation of crude oil and natural gas by pipeline, and from solution brine mining activities. Discharges regulated by the RRC into or adjacent to water in the state shall not cause a violation of the water quality standards. While water quality standards are established by the TCEQ, the RRC has the responsibility for enforcing any violation of such standards resulting from activities regulated by the RRC. Texas Water Code, Chapter 26, does not require that discharges regulated by the RRC comply with regulations of the TCEQ that are not water quality standards. The TCEQ and the RRC may consult as necessary regarding application and interpretation of Texas Surface Water Quality Standards.

(ii) Storm water. When required by federal law, authorization for storm water discharges that are under the jurisdiction of the RRC must be obtained through application for a National Pollutant Discharge Elimination System (NPDES) permit with the EPA and authorization from the RRC, as applicable.

(I) Storm water associated with industrial activities. Where required by federal law, discharges of storm water associated with facilities and activities under the RRC's jurisdiction must be authorized by the EPA and the RRC, as applicable. Under 33 U.S.C. §1342(l)(2) and §1362(24), EPA cannot require a permit for discharges of storm water from "field activities or operations associated with {oil and gas} exploration, production, processing, or treatment operations, or transmission facilities" unless the discharge is contaminated by contact with any overburden, raw material, intermediate product, finished product, byproduct, or waste product located on the site of the facility. Under §3.8 of this title (relating to Water Protection), the RRC prohibits operators from causing or allowing pollution of surface or subsurface water. Operators are encouraged to implement and maintain Best Management Practices (BMPs) to minimize discharges of pollutants, including sediment, in storm water to help ensure protection of surface water quality during storm events.

(II) Storm water associated with construction activities. Where required by federal law, discharges of storm water associated with construction activities under the RRC's jurisdiction must be authorized by the EPA and the RRC, as applicable. Activities under RRC jurisdiction include construction of a facility that, when completed, would be associated with the exploration, development, or production of oil or gas or geothermal resources, such as a well site; treatment or storage facility; underground hydrocarbon or natural gas storage facility; reclamation plant; gas processing facility; compressor station; terminal facility where crude oil is stored prior to refining and at which refined products are stored solely for use at the facility; a carbon dioxide geologic storage facility under the jurisdiction of the RRC; and a gathering, transmission, or distribution pipeline that will transport crude oil or natural gas, including natural gas liquids, prior to refining of such oil or the use of the natural gas in any manufacturing process or as a residential or industrial fuel. The RRC also has jurisdiction over storm water from land disturbance associated with a site survey that is conducted prior to construction of a facility that would be regulated by the RRC. Under 33 U.S.C. §1342(l)(2) and §1362(24), EPA cannot require a permit for discharges of storm water from "field activities or operations associated with {oil and gas} exploration, production, processing, or treatment operations, or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities" unless the discharge is contaminated by contact with any overburden, raw material, intermediate product, finished product, byproduct, or waste product located on the site of the facility. Under §3.8 of this title (relating to Water Protection), the RRC prohibits operators from causing or allowing pollution of surface or subsurface water. Operators are encouraged to implement and maintain BMPs to minimize discharges of pollutants, including sediment, in storm water during construction activities to help ensure protection of surface water quality during storm events.

(III) Municipal storm water discharges. Storm water discharges from facilities regulated by the RRC located within an MS4 are not regulated by the TCEQ. However, a municipality may regulate storm water discharges from RRC sites into their MS4.

(IV) Combined storm water. Except with regard to storage of oil, when a portion of a site is regulated by the RRC and the EPA, and a portion of a site is regulated by the TCEQ, storm water

authorization must be obtained from the EPA and the RRC, as applicable, for the portion(s) of the site under RRC jurisdiction and from the TCEQ for the TCEQ regulated portion(s) of the site. Discharge of storm water from a terminal facility where crude oil is stored prior to refining and at which refined products are stored solely for use at the facility is under the jurisdiction of the RRC.

(iii) State water quality certification. The RRC performs state water quality certifications, as authorized by the Clean Water Act (CWA) Section 401 (33 U.S.C. Section 1341) for activities that require a federal license or permit and that may result in any discharge to waters of the United States for those activities regulated by the RRC.

(C) Injection wells. The RRC has jurisdiction over the drilling, construction, operation, and closure of the following injection wells.

(i) Disposal wells. The RRC has jurisdiction under Texas Water Code, Chapter 27, over injection wells used to dispose of oil and gas waste. Texas Water Code, Chapter 27, defines "oil and gas waste" to mean "waste arising out of or incidental to drilling for or producing of oil, gas, or geothermal resources, waste arising out of or incidental to the underground storage of hydrocarbons other than storage in artificial tanks or containers, or waste arising out of or incidental to the operation of gasoline plants, natural gas processing plants, or pressure maintenance or repressurizing plants. The term includes but is not limited to salt water, brine, sludge, drilling mud, and other liquid or semi-liquid waste material." The term "waste arising out of or incidental to drilling for or producing of oil, gas, or geothermal resources" includes waste associated with transportation of crude oil or natural gas by pipeline pursuant to Texas Natural Resources Code, §91.101.

(ii) Enhanced recovery wells. The RRC has jurisdiction over wells into which fluids are injected for enhanced recovery of oil or natural gas.

(iii) Brine mining. Under Texas Water Code, §27.036, the RRC has jurisdiction over brine mining and may issue permits for injection wells.

(iv) Geologic storage of carbon dioxide. Under Texas Water Code, §27.011 and §27.041, and subject to the review of the legislature based on the recommendations made in the preliminary report described by Section 10, Senate Bill No. 1387, Acts of the 81st Legislature, Regular Session (2009), the RRC has jurisdiction over geologic storage of carbon dioxide in, and the injection of carbon dioxide into, a reservoir that is initially or may be productive of oil, gas, or geothermal resources or a saline formation directly above or below that reservoir and over a well used for such injection purposes regardless of whether the well was initially completed for that purpose or was initially completed for another purpose and converted.

(v) Hydrocarbon storage. The RRC has jurisdiction over wells into which fluids are injected for storage of hydrocarbons that are liquid at standard temperature and pressure.

(vi) Geothermal energy. Under Texas Natural Resources Code, Chapter 141, the RRC has jurisdiction over injection wells for the exploration, development, and production of geothermal energy and associated resources.

(vii) *In-situ* tar sands. Under Texas Water Code, §27.035, the RRC has jurisdiction over the *in situ* recovery of tar sands and may issue permits for injection wells used for the *in situ* recovery of tar sands.

(c) Definition of hazardous waste.

(1) Under the Texas Health and Safety Code, §361.003(12), a "hazardous waste" subject to the jurisdiction of the TCEQ is defined as "solid waste identified or listed as a hazardous waste by the administrator of the United States Environmental Protection Agency under the federal Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. §6901, et seq.)." Similarly, under Texas Natural Resources Code, §91.601(1), "oil and gas hazardous waste" subject to the jurisdiction of the RRC is defined as an "oil and gas waste that is a hazardous waste as defined by the administrator of the United States Environmental Protection Agency under the federal Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (42 U.S.C. §§6901, et seq.)."

(2) Federal regulations adopted under authority of the federal Solid Waste Disposal Act, as amended by RCRA, exempt from regulation as hazardous waste certain oil and gas wastes. Under 40 Code of Federal Regulations (CFR) §261.4(b)(5), "drilling fluids, produced waters, and other wastes associated with the exploration, development, or production of crude oil, natural gas or geothermal energy" are described as wastes that are exempt from federal hazardous waste regulations.

(3) A partial list of wastes associated with oil, gas, and geothermal exploration, development, and production that are considered exempt from hazardous waste regulation under RCRA can be found in EPA's "Regulatory Determination for Oil and Gas and Geothermal Exploration, Development and Production Wastes," 53 FedReg 25,446 (July 6, 1988). A further explanation of the exemption can be found in the "Clarification of the Regulatory Determination for Wastes from the Exploration, Development and Production of Crude Oil, Natural Gas and Geothermal Energy, " 58 FedReg 15,284 (March 22, 1993). The exemption codified at 40 CFR §261.4(b)(5) and discussed in the Regulatory Determination has been, and may continue to be, clarified in subsequent guidance issued by the EPA.

(d) Jurisdiction over waste from specific activities.

(1) Drilling, operation, and plugging of wells associated with the exploration, development, or production of oil, gas, or geothermal resources. Wells associated with the exploration, development, or production of oil, gas, or geothermal resources include exploratory wells, cathodic protection holes, core holes, oil wells, gas wells, geothermal resource wells, fluid injection wells used for secondary or enhanced recovery of oil or gas, oil and gas waste disposal wells, and injection water source wells. Several types of waste materials can be generated during the drilling, operation, and plugging of these wells. These waste materials include drilling fluids (including water-based and oil-based fluids), cuttings, produced water, produced sand, waste hydrocarbons (including used oil), fracturing fluids, spent acid, workover fluids, treating chemicals (including scale inhibitors, emulsion breakers, paraffin inhibitors, and surfactants), waste cement, filters (including used oil filters), domestic sewage (including waterborne human waste and waste from activities such as bathing and food preparation), and trash (including inert waste, barrels, dope cans, oily rags, mud sacks, and garbage). Generally, these wastes, whether disposed of by discharge, landfill, land farm, evaporation, or injection, are subject to the jurisdiction of the RRC. Wastes from oil, gas, and geothermal exploration activities subject to regulation by the RRC when those wastes are to be processed, treated, or disposed of at a solid waste management facility authorized by the TCEQ under 30 TAC Chapter 330 are, as defined in 30 TAC §330.3(148) (relating to Definitions), "special wastes."

(2) Field treatment of produced fluids. Oil, gas, and water produced from oil, gas, or geothermal resource wells may be treated in the field in facilities such as separators, skimmers, heater treaters, dehydrators, and sweetening units. Waste that results from the field treatment of oil and gas include waste hydrocarbons (including used

oil), produced water, hydrogen sulfide scavengers, dehydration wastes, treating and cleaning chemicals, filters (including used oil filters), asbestos insulation, domestic sewage, and trash are subject to the jurisdiction of the RRC.

(3) Storage of oil.

(A) Tank bottoms and other wastes from the storage of crude oil (whether foreign or domestic) before it enters the refinery are under the jurisdiction of the RRC. In addition, waste resulting from storage of crude oil at refineries is subject to the jurisdiction of the TCEQ.

(B) Wastes generated from storage tanks that are part of the refinery and wastes resulting from the wholesale and retail marketing of refined products are subject to the jurisdiction of the TCEQ.

(4) Underground hydrocarbon storage. The disposal of wastes, including saltwater, resulting from the construction, creation, operation, maintenance, closure, or abandonment of an "underground hydrocarbon storage facility" is subject to the jurisdiction of the RRC, provided the terms "hydrocarbons" and "underground hydrocarbon storage facility" have the meanings set out in Texas Natural Resources Code, §91.201.

(5) Underground natural gas storage. The disposal of wastes resulting from the construction, operation, or abandonment of an "underground natural gas storage facility" is subject to the jurisdiction of the RRC, provided that the terms "natural gas" and "storage facility" have the meanings set out in Texas Natural Resources Code, §91.173.

(6) Transportation of crude oil or natural gas.

(A) Jurisdiction over pipeline-related activities. The RRC has jurisdiction over matters related to pipeline safety for pipelines in Texas, as referenced in §8.1 of this title (relating to General Applicability and Standards) pursuant to Chapter 121 of the Texas Utilities Code and Chapter 117 of the Texas Natural Resources Code. The RRC has jurisdiction over spill response and remediation of releases from pipelines transporting crude oil, natural gas, and condensate that originate from exploration and production facilities to the refinery gate. The RRC has jurisdiction over waste generated by construction and operation of pipelines used to transport crude oil, natural gas, and condensate on an oil and gas lease, and from exploration and production facilities to the refinery gate. The RRC is responsible for water quality certification issues related to construction and operation of pipelines used to transport crude oil, natural gas, and condensate on an oil and gas lease, and from exploration and production facilities to the refinery gate. The RRC has jurisdiction over waste generated by construction and operation of pipelines transporting carbon dioxide.

(B) Crude oil and natural gas are transported by railcars, tank trucks, barges, tankers, and pipelines. The RRC has jurisdiction over waste from the transportation of crude oil by pipeline, regardless of the crude oil source (foreign or domestic) prior to arrival at a refinery. The RRC also has jurisdiction over waste from the transportation by pipeline of natural gas, including natural gas liquids, prior to the use of the natural gas in any manufacturing process or as a residential or industrial fuel. The transportation wastes subject to the jurisdiction of the RRC include wastes from pipeline compressor or pressure stations and wastes from pipeline hydrostatic pressure tests and other pipeline operations. These wastes include waste hydrocarbons (including used oil), treating and cleaning chemicals, filters (including used oil filters), scraper trap sludge, trash, domestic sewage, wastes contaminated with polychlorinated biphenyls (PCBs) (including transformers, capacitors, ballasts, and soils), soils contaminated with mercury from leaking mercury meters, asbestos insulation, transite pipe, and hydrostatic test waters.

(C) The TCEQ has jurisdiction over waste from transportation of refined products by pipeline.

(D) The TCEQ also has jurisdiction over wastes associated with transportation of crude oil and natural gas, including natural gas liquids, by railcar, tank truck, barge, or tanker.

(7) Reclamation plants.

(A) The RRC has jurisdiction over wastes from reclamation plants that process wastes from activities associated with the exploration, development, or production of oil, gas, or geothermal resources, such as lease tank bottoms. Waste management activities of reclamation plants for other wastes are subject to the jurisdiction of the TCEQ.

(B) The RRC has jurisdiction over the conservation and prevention of waste of crude oil and therefore must approve all movements of crude oil-containing materials to reclamation plants. The applicable statute and regulations consist primarily of reporting requirements for accounting purposes.

(8) Refining of oil.

(A) The management of wastes resulting from oil refining operations, including spent caustics, spent catalysts, still bottoms or tars, and American Petroleum Institute (API) separator sludges, is subject to the jurisdiction of the TCEQ. The processing of light ends from the distillation and cracking of crude oil or crude oil products is considered to be a refining operation. The term "refining" does not include the processing of natural gas or natural gas liquids.

(B) The RRC has jurisdiction over refining activities for the conservation and the prevention of waste of crude oil. The RRC requires that all crude oil streams into or out of a refinery be reported for accounting purposes. In addition, the RRC requires that materials recycled and used as a fuel, such as still bottoms or waste crude oil, be reported.

(9) Natural gas or natural gas liquids processing plants (including gas fractionation facilities) and pressure maintenance or repressurizing plants. Wastes resulting from activities associated with these facilities include produced water, cooling tower water, sulfur bead, sulfides, spent caustics, sweetening agents, spent catalyst, waste hydrocarbons (including used oil), asbestos insulation, wastes contaminated with PCBs (including transformers, capacitors, ballasts, and soils), treating and cleaning chemicals, filters, trash, domestic sewage, and dehydration materials. These wastes are subject to the jurisdiction of the RRC under Texas Natural Resources Code, §1.101. Disposal of waste from activities associated with natural gas or natural gas liquids processing plants (including gas fractionation facilities), and pressure maintenance or repressurizing plants by injection is subject to the jurisdiction of the RRC under Texas Water Code, Chapter 27. However, until delegation of authority under RCRA to the RRC, the TCEQ shall have jurisdiction over wastes resulting from these activities that are not exempt from federal hazardous waste regulation under RCRA and that are considered hazardous under applicable federal rules.

(10) Manufacturing processes.

(A) Wastes that result from the use of natural gas, natural gas liquids, or products refined from crude oil in any manufacturing process, such as the production of petrochemicals or plastics, or from the manufacture of carbon black, are industrial wastes subject to the jurisdiction of the TCEQ. The term "manufacturing process" does not include the processing (including fractionation) of natural gas or natural gas liquids at natural gas or natural gas liquids processing plants.

(B) The RRC has jurisdiction under Texas Natural Resources Code, Chapter 87, to regulate the use of natural gas in the production of carbon black.

(C) Biofuels. The TCEQ has jurisdiction over wastes associated with the manufacturing of biofuels and biodiesel. TCEQ Regulatory Guidance Document RG-462 contains additional information regarding biodiesel manufacturing in the state of Texas.

(11) Commercial service company facilities and training facilities.

(A) The TCEQ has jurisdiction over wastes generated at facilities, other than actual exploration, development, or production sites (field sites), where oil and gas industry workers are trained. In addition, the TCEQ has jurisdiction over wastes generated at facilities where materials, processes, and equipment associated with oil and gas industry operations are researched, developed, designed, and manufactured. However, wastes generated from tests of materials, processes, and equipment at field sites are under the jurisdiction of the RRC.

(B) The TCEQ also has jurisdiction over waste generated at commercial service company facilities operated by persons providing equipment, materials, or services (such as drilling and work over rig rental and tank rental; equipment repair; drilling fluid supply; and acidizing, fracturing, and cementing services) to the oil and gas industry. These wastes include the following wastes when they are generated at commercial service company facilities: empty sacks, containers, and drums; drum, tank, and truck rinsate; sandblast media; painting wastes; spent solvents; spilled chemicals; waste motor oil; and unused fracturing and acidizing fluids.

(C) The term "commercial service company facility" does not include a station facility such as a warehouse, pipeyard, or equipment storage facility belonging to an oil and gas operator and used solely for the support of that operator's own activities associated with the exploration, development, or production activities.

(D) Notwithstanding subparagraphs (A) - (C) of this paragraph, the RRC has jurisdiction over disposal of oil and gas wastes, such as waste drilling fluids and NORM-contaminated pipe scale, in volumes greater than the incidental volumes usually received at such facilities, that are managed at commercial service company facilities.

(E) The RRC also has jurisdiction over wastes such as vacuum truck rinsate and tank rinsate generated at facilities operated by oil and gas waste haulers permitted by the RRC pursuant to §3.8(f) of this title (relating to Water Protection).

(12) Mobile offshore drilling units (MODUs). MODUs are vessels capable of engaging in drilling operations for exploring or exploiting subsea oil, gas, or mineral resources.

(A) The RRC and, where applicable, the EPA, the U.S. Coast Guard, or the Texas General Land Office (GLO), have jurisdiction over discharges from an MODU when the unit is being used in connection with activities associated with the exploration, development, or production of oil or gas or geothermal resources.

(B) The TCEQ and, where applicable, the EPA, the U.S. Coast Guard, or the GLO, have jurisdiction over discharges from an MODU when the unit is being serviced at a maintenance facility.

(C) Where applicable, the EPA, the U.S. Coast Guard, or the GLO has jurisdiction over discharges from an MODU during transportation from shore to exploration, development or production site, transportation between sites, and transportation to a maintenance facility.

(e) Interagency activities.

(1) Recycling and pollution prevention.

(A) The TCEQ and the RRC encourage generators to eliminate pollution at the source and recycle whenever possible to avoid disposal of solid wastes. Questions regarding source reduction and recycling may be directed to the TCEQ Small Business and Environmental Assistance (SBEA) Division, RRC. The TCEQ may require generators to explore source reduction and recycling alternatives prior to authorizing disposal of any waste under the jurisdiction of the RRC at a facility regulated by the TCEQ; similarly, the RRC may explore source reduction and recycling alternatives prior to authorizing disposal of any waste under the jurisdiction of the TCEQ at a facility regulated by the RRC.

(B) The TCEQ SBEA Division and the RRC will coordinate as necessary to maintain a working relationship to enhance the efforts to share information and use resources more efficiently. The TCEQ SBEA Division will make the proper TCEQ personnel aware of the services offered by the RRC, share information with the RRC to maximize services to oil and gas operators, and advise oil and gas operators of RRC services. The RRC will make the proper RRC personnel aware of the services offered by the TCEQ SBEA Division, share information with the TCEQ SBEA Division to maximize services to industrial operators, and advise industrial operators of the TCEQ SBEA Division services.

(2) Treatment of wastes under RRC jurisdiction at facilities authorized by the TCEQ under 30 TAC Chapter 334, Subchapter K, (relating to Storage, Treatment, and Reuse Procedures for Petroleum-Substance Contaminated Soil).

(A) Soils contaminated with constituents that are physically and chemically similar to those normally found in soils at leaking underground petroleum storage tanks from generators under the jurisdiction of the RRC are eligible for treatment at TCEQ regulated soil treatment facilities once alternatives for recycling and source reduction have been explored. For the purpose of this provision, soils containing petroleum substance(s) as defined in 30 TAC §334.481 (relating to Definitions) are considered to be similar, but drilling muds, acids, or other chemicals used in oil and gas activities are not considered similar. Generators under the jurisdiction of the RRC must meet the same requirements as generators under the jurisdiction of the TCEQ when sending their petroleum contaminated soils to soil treatment facilities under TCEQ jurisdiction. Those requirements are in 30 TAC §334.496 (relating to Shipping Procedures Applicable to Generators of Petroleum-Substance Waste), except subsection (c) which is not applicable, and 30 TAC §334.497 (relating to Recordkeeping and Reporting Procedures Applicable to Generators). RRC generators with questions on these requirements should contact the TCEQ.

(B) Generators under RRC jurisdiction should also be aware that TCEQ regulated soil treatment facilities are required by 30 TAC §334.499 (relating to Shipping Requirements Applicable to Owners or Operators of Storage, Treatment, or Disposal Facilities) to maintain documentation on the soil sampling and analytical methods, chain-of-custody, and all analytical results for the soil received at the facility and transported off-site or reused on-site.

(C) The RRC must specifically authorize management of contaminated soils under its jurisdiction at facilities authorized by the TCEQ under 30 TAC Chapter 334, Subchapter K. The RRC may grant such authorizations by rule, or on an individual basis through permits or other written authorizations.

(D) All waste, including treated waste, subject to the jurisdiction of the RRC and managed at facilities authorized by the

TCEQ under 30 TAC Chapter 334, Subchapter K will remain subject to the jurisdiction of the RRC. Such materials will be subject to RRC regulations regarding final reuse, recycling, or disposal.

(E) TCEQ waste codes and registration numbers are not required for management of wastes under the jurisdiction of the RRC at facilities authorized by the TCEQ under 30 TAC Chapter 334, Subchapter K.

(3) Processing, treatment, and disposal of wastes under RRC jurisdiction at facilities authorized by the TCEQ.

(A) As provided in this paragraph, waste materials subject to the jurisdiction of the RRC may be managed at solid waste facilities under the jurisdiction of the TCEQ once alternatives for recycling and source reduction have been explored. The RRC must specifically authorize management of wastes under its jurisdiction at facilities regulated by the TCEQ. The RRC may grant such authorizations by rule, or on an individual basis through permits or other written authorizations. In addition, except as provided in subparagraph (B) of this paragraph, the concurrence of the TCEQ is required to manage "special waste" under the jurisdiction of the RRC at a facility regulated by the TCEQ. The TCEQ's concurrence may be subject to specified conditions.

(B) A facility under the jurisdiction of the TCEQ may accept, without further individual concurrence, waste under the jurisdiction of the RRC if that facility is permitted or otherwise authorized to accept that particular type of waste. The phrase "that type of waste" does not specifically refer to waste under the jurisdiction of the RRC, but rather to the waste's physical and chemical characteristics. Management and disposal of waste under the jurisdiction of the RRC is subject to TCEQ's rules governing both special waste and industrial waste.

(C) If the TCEQ regulated facility receiving the waste does not have approval to accept the waste included in its permit or other authorization, individual written concurrences from the TCEQ shall be required to manage wastes under the jurisdiction of the RRC at TCEQ regulated facilities. Recommendations for the management of special wastes associated with the exploration, development, or production of oil, gas, or geothermal resources are found in TCEQ Regulatory Guidance document RG-3. (This is required only if the TCEQ regulated facility receiving the waste does not have approval to accept the waste included in its permit or other authorization provided by the TCEQ.) To obtain an individual concurrence, the waste generator must provide to the TCEQ sufficient information to allow the concurrence determination to be made, including the identity of the proposed waste management facility, the process generating the waste, the quantity of waste, and the physical and chemical nature of the waste involved (using process knowledge and/or laboratory analysis as defined in 30 TAC Chapter 335, Subchapter R (relating to Waste Classification)). In obtaining TCEQ approval, generators may use their existing knowledge about the process or materials entering it to characterize their wastes. Material Safety Data Sheets, manufacturer's literature, and other documentation generated in conjunction with a particular process may be used. Process knowledge must be documented and submitted with the request for approval.

(D) Domestic septage collected from portable toilets at facilities subject to RRC jurisdiction that is not mixed with other waste materials may be managed at a facility permitted by the TCEQ for disposal, incineration, or land application for beneficial use of such domestic septage waste without specific authorization from the TCEQ or the RRC. Waste sludge subject to the jurisdiction of the RRC may not be applied to the land at a facility permitted by the TCEQ for the beneficial use of sewage sludge or water treatment sludge.

(E) TCEQ waste codes and registration numbers are not required for management of wastes under the jurisdiction of the RRC at facilities under the jurisdiction of the TCEQ. If a receiving facility requires a TCEQ waste code for waste under the jurisdiction of the RRC, a code consisting of the following may be provided:

(i) the sequence number "RRCT";

(ii) the appropriate form code, as specified in 30 TAC Chapter 335, Subchapter R, §335.521, Appendix 3 (relating to Appendices); and

(iii) the waste classification code "H" if the waste is a hazardous oil and gas waste, or "R" if the waste is a nonhazardous oil and gas waste.

(F) If a facility requests or requires a TCEQ waste generator registration number for wastes under the jurisdiction of the RRC, the registration number "XXXRC" may be provided.

(G) Wastes that are under the jurisdiction of the RRC need not be reported to the TCEQ.

(4) Management of nonhazardous wastes under TCEQ jurisdiction at facilities regulated by the RRC.

(A) Once alternatives for recycling and source reduction have been explored, and with prior authorization from the RRC, the following nonhazardous wastes subject to the jurisdiction of the TCEQ may be disposed of, other than by injection into a Class II well, at a facility regulated by the RRC; bioremediated at a facility regulated by the RRC (prior to reuse, recycling, or disposal); or reclaimed at a crude oil reclamation facility regulated by the RRC: nonhazardous wastes that are chemically and physically similar to oil and gas wastes, but excluding soils, media, debris, sorbent pads, and other clean-up materials that are contaminated with refined petroleum products.

(B) To obtain an individual authorization from the RRC, the waste generator must provide the following information, in writing, to the RRC: the identity of the proposed waste management facility, the quantity of waste involved, a hazardous waste determination that addresses the process generating the waste and the physical and chemical nature of the waste, and any other information that the RRC may require. As appropriate, the RRC shall reevaluate any authorization issued pursuant to this paragraph.

(C) Once alternatives for recycling and source reduction have been explored, and subject to the RRC's individual authorization, the following wastes under the jurisdiction of the TCEQ are authorized without further TCEQ approval to be disposed of at a facility regulated by the RRC, bioremediated at a facility regulated by the RRC, or reclaimed at a crude oil reclamation facility regulated by the RRC: nonhazardous bottoms from tanks used only for crude oil storage; unused and/or reconditioned drilling and completion/workover wastes from commercial service company facilities; used and/or unused drilling and completion/workover wastes generated at facilities where workers in the oil and gas exploration, development, and production industry are trained; used and/or unused drilling and completion/workover wastes generated at facilities where materials, processes, and equipment associated with oil and gas exploration, development, and production operations are researched, developed, designed, and manufactured; unless other provisions are made in the underground injection well permit used and/or unused drilling and completion wastes (but not workover wastes) generated in connection with the drilling and completion of Class I, III, and V injection wells; wastes (such as contaminated soils, media, debris, sorbent pads, and other cleanup materials) associated with spills of crude oil and natural gas liquids if such wastes are under the jurisdiction of the TCEQ; and sludges from washout pits at commercial service company facilities.

(D) Under Texas Water Code, §27.0511(g), a TCEQ permit is required for injection of industrial or municipal waste as an injection fluid for enhanced recovery purposes. However, under §27.0511(h), the RRC may authorize a person to use nonhazardous brine from a desalination operation or nonhazardous drinking water treatment residuals as an injection fluid for enhanced recovery purposes without obtaining a permit from the TCEQ. The use or disposal of radioactive material under this subparagraph is subject to the applicable requirements of Texas Health and Safety Code, Chapter 401.

(5) Drilling in landfills. The TCEQ will notify the Oil and Gas Division of the RRC and the landfill owner at the time a drilling application is submitted if an operator proposes to drill a well through a landfill regulated by the TCEQ. The RRC and the TCEQ will cooperate and coordinate with one another in advising the appropriate parties of measures necessary to reduce the potential for the landfill contents to cause groundwater contamination as a result of landfill disturbance associated with drilling operations. The TCEQ requires prior written approval before drilling of any test borings through previously deposited municipal solid waste under 30 TAC §330.15 (relating to General Prohibitions), and before borings or other penetration of the final cover of a closed municipal solid waste landfill under 30 TAC §330.955 (relating to Miscellaneous). The installation of landfill gas recovery wells for the recovery and beneficial reuse of landfill gas is under the jurisdiction of the TCEQ in accordance with 30 TAC Chapter 330, Subchapter I (relating to Landfill Gas Management). Modification of an active or a closed solid waste management unit, corrective action management unit, hazardous waste landfill cell, or industrial waste landfill cell by drilling or penetrating into or through deposited waste may require prior written approval from TCEQ. Such approval may require a new authorization from TCEQ or modification or amendment of an existing TCEQ authorization.

(6) Coordination of actions and cooperative sharing of information.

(A) In the event that a generator or transporter disposes, without proper authorization, of wastes regulated by the TCEQ at a facility permitted by the RRC, the TCEQ is responsible for enforcement actions against the generator or transporter, and the RRC is responsible for enforcement actions against the disposal facility. In the event that a generator or transporter disposes, without proper authorization, of wastes regulated by the RRC at a facility permitted by the TCEQ, the RRC is responsible for enforcement actions against the generator or transporter, and the TCEQ is responsible for enforcement actions against the disposal facility.

(B) The TCEQ and the RRC agree to cooperate with one another by sharing information. Employees of either agency who receive a complaint or discover, in the course of their official duties, information that indicates a violation of a statute, regulation, order, or permit pertaining to wastes under the jurisdiction of the other agency, will notify the other agency. In addition, to facilitate enforcement actions, each agency will share information in its possession with the other agency if requested by the other agency to do so.

(C) The TCEQ and the RRC agree to work together at allocating respective responsibilities. To the extent that jurisdiction is indeterminate or has yet to be determined, the TCEQ and the RRC agree to share information and take appropriate investigative steps to assess jurisdiction.

(D) For items not covered by statute or rule, the TCEQ and the RRC will collaborate to determine respective responsibilities for each issue, project, or project type.

(E) The staff of the RRC and the TCEQ shall coordinate as necessary to attempt to resolve any disputes regarding interpretation of this MOU and disputes regarding definitions and terms of art.

(7) Groundwater.

(A) Notice of groundwater contamination. Under Texas Water Code, §26.408, effective September 1, 2003, the RRC must submit a written notice to the TCEQ of any documented cases of groundwater contamination that may affect a drinking water well.

(B) Groundwater protection letters. The TCEQ provides letters of recommendation concerning groundwater protection to the RRC.

(i) For recommendations related to normal drilling operations, shot holes for seismic surveys, and cathodic protection wells, the TCEQ provides geologic interpretation identifying fresh water zones, base of usable-quality water (generally less than 3,000 mg/L total dissolved solids, but may include higher levels of total dissolved solids if identified as currently being used or identified by the Texas Water Development Board as a source of water for desalination), and include protection depths recommended by the RRC. The geological interpretation may include groundwater protection based on potential hydrological connectivity to usable-quality water.

(ii) For recommendations related to injection in a non-producing zone, the TCEQ provides geologic interpretation of the base of the underground source of drinking water as defined in 30 TAC §331.2 (relating to Definitions).

(8) Emergency and spill response.

(A) The TCEQ and the RRC are members of the state's Emergency Management Council. The TCEQ is the state's primary agency for emergency support during response to hazardous materials and oil spill incidents. The TCEQ is responsible for state-level coordination of assets and services, and will identify and coordinate staffing requirements appropriate to the incident to include investigative assignments for the primary and support agencies.

(B) Contaminated soil and other wastes that result from a spill must be managed in accordance with the governing statutes and regulations adopted by the agency responsible for the activity that resulted in the spill. Coordination of issues of spill notification, prevention, and response shall be addressed in the State of Texas Oil and Hazardous Substance Spill Contingency Plan and may be addressed further in a separate Memorandum of Understanding among these agencies and other appropriate state agencies.

(C) The agency (TCEQ or RRC) that has jurisdiction over the activity that resulted in the spill incident will be responsible for measures necessary to monitor, document, and remediate the incident.

(i) The TCEQ has jurisdiction over certain inland oil spills, all hazardous-substance spills, and spills of other substances that may cause pollution.

(ii) The RRC has jurisdiction over spills or discharges from activities associated with the exploration, development, or production of crude oil, gas, and geothermal resources, and discharges from brine mining or surface mining.

(D) If TCEQ or RRC field personnel receive spill notifications or reports documenting improperly managed waste or contaminated environmental media resulting from a spill or discharge that is under the jurisdiction of the other agency, they shall refer the issue to the other agency. The agency that has jurisdiction over the activity that resulted in the improperly managed waste, spill, discharge, or contami-

nated environmental media will be responsible for measures necessary to monitor, document, and remediate the incident.

(9) Anthropogenic carbon dioxide storage. In determining the proper permitting agency in regard to a particular permit application for a carbon dioxide geologic storage project, the TCEQ and the RRC will coordinate by any appropriate means to review proposed locations, geologic settings, reservoir data, and other jurisdictional criteria specified in Texas Water Code, §27.041. Interagency coordination of review and processing of a permit application for injection of carbon dioxide for geologic storage under Texas Water Code, Chapter 27, Subchapter C-1, shall include application review by and production of a letter from the TCEQ's executive director as specified under Texas Water Code, §27.046.

(f) Radioactive material.

(1) Radioactive substances. Under the Texas Health and Safety Code, §401.011, the TCEQ has jurisdiction to regulate and license:

(A) the disposal of radioactive substances;

(B) the processing or storage of low-level radioactive waste or NORM waste from other persons, except oil and gas NORM waste;

(C) the recovery or processing of source material;

(D) the processing of by-product material as defined by Texas Health and Safety Code, §401.003(3)(B); and

(E) sites for the disposal of low-level radioactive waste, by-product material, or NORM waste.

(2) NORM waste.

(A) Under Texas Health and Safety Code, §401.415, the RRC has jurisdiction over the disposal of NORM waste that constitutes, is contained in, or has contaminated oil and gas waste. This waste material is called "oil and gas NORM waste." Oil and gas NORM waste may be generated in connection with the exploration, development, or production of oil or gas.

(B) Under Texas Health and Safety Code, §401.412, the TCEQ has jurisdiction over the disposal of NORM that is not oil and gas NORM waste.

(C) The term "disposal" does not include receipt, possession, use, processing, transfer, transport, storage, or commercial distribution of radioactive materials, including NORM. These non-disposal activities are under the jurisdiction of the Texas Department of State Health Services under Texas Health and Safety Code, §401.011(a).

(3) Drinking water residuals. A person licensed for the commercial disposal of NORM waste from public water systems may dispose of NORM waste only by injection into a Class I injection well permitted under 30 TAC Chapter 331 (relating to Underground Injection Control) that is specifically permitted for the disposal of NORM waste.

(4) Management of radioactive tracer material.

(A) Radioactive tracer material is subject to the definition of low-level radioactive waste under Texas Health and Safety Code, §401.004, and must be handled and disposed of in accordance with the rules of the TCEQ and the Department of State Health Services.

(B) Exemption. Under Texas Health and Safety Code, §401.106, the TCEQ may grant an exemption by rule from a licensing requirement if the TCEQ finds that the exemption will not constitute a significant risk to the public health and safety and the environment.

(5) Coordination with the Texas Radiation Advisory Board. The RRC and the TCEQ will consider recommendations and advice provided by the Texas Radiation Advisory Board that concern either agency's policies or programs related to the development, use, or regulation of a source of radiation. Both agencies will provide written response to the recommendations or advice provided by the advisory board.

(6) Uranium exploration and mining.

(A) Under Texas Natural Resources Code, Chapter 131, the RRC has jurisdiction over uranium exploration activities.

(B) Under Texas Natural Resources Code, Chapter 131, the RRC has jurisdiction over uranium mining, except for *in situ* recovery processes.

(C) Under Texas Water Code, §27.0513, the TCEQ has jurisdiction over injection wells used for uranium mining.

(D) Under Texas Health and Safety Code, §401.2625, the TCEQ has jurisdiction over the licensing of source material recovery and processing or for storage, processing, or disposal of by-product material.

(g) Effective date. This Memorandum of Understanding, as of its August 30, 2010, effective date, shall supersede the prior Memorandum of Understanding among the agencies, dated May 31, 1998.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 10, 2010.

TRD-201004628
Mary Ross McDonald
Managing Director
Railroad Commission of Texas
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Proposal publication date: April 9, 2010
For further information, please call: (512) 475-1295

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CHAPTER 8. PIPELINE SAFETY REGULATIONS

The Railroad Commission of Texas (Commission) adopts amendments to §§8.1, 8.5, 8.101, 8.130, 8.201, 8.235, 8.310, and 8.315, relating to General Applicability and Standards; Definitions; Pipeline Integrity Assessment and Management Plans for Natural Gas and Hazardous Liquids Pipelines; Enforcement; Pipeline Safety Program Fees; Natural Gas Pipelines Public Education and Liaison; Hazardous Liquids and Carbon Dioxide Pipelines Public Education and Liaison; and Hazardous Liquids and Carbon Dioxide Pipelines or Pipeline Facilities Located Within 1,000 Feet of a Public School Building or Facility, without changes to the versions published in the June 25, 2010, issue of the *Texas Register* (35 TexReg 5424). The amendments update federal provisions and citations, correct the name of the Safety Division to Pipeline Safety Division, and conform the rules to the statutory changes regarding community liaison activities enacted by House Bill 4300, 81st Legislative Session (Regular Session, 2009).

The Commission adopts the amendments in §8.1(b) to update the minimum safety standards and to adopt by reference the United States Department of Transportation's (USDOT) pipeline safety standards found in 49 U.S.C. §§60101, *et seq.;* 49 Code of Federal Regulations (CFR) Part 191, Transportation of Natural and Other Gas by Pipeline; Annual Reports, Incident Reports, and Safety-Related Condition Reports; 49 CFR Part 192, Transportation of Natural and Other Gas by Pipeline: Minimum Federal Safety Standards; 49 CFR Part 193, Liquefied Natural Gas Facilities: Federal Safety Standards; 49 U.S.C. §§60101, *et seq.;* 49 CFR Part 195, Transportation of Hazardous Liquids by Pipeline; and 49 CFR Part 199, Drug and Alcohol Testing. The current rule adopts the federal pipeline safety standards as of August 25, 2008; the adopted amendment changes this date to February 12, 2010. The federal safety rule amendments captured are summarized in the following paragraphs.

Docket No. PHMSA-2005-23447, published at 73 FR 62148, prescribed safety requirements for the operation of certain gas transmission pipelines at pressures based on higher operating stress levels. The result is an increase of maximum allowable operating pressure (MAOP) over that currently allowed in the regulations. Improvements in pipeline technology assessment methodology, maintenance practices, and management processes over the past 25 years have significantly reduced the risk of failure in pipelines and necessitate updating the standards that govern the MAOP. The rule will generate significant public benefits by reducing the number and consequences of potential incidents and boosting the potential capacity and efficiency of pipeline infrastructure, while promoting rigorous life-cycle maintenance and investment in improved pipe technology. The final rule was scheduled to take effect November 17, 2008. However, a stay of the final rule, published at 73 FR 72737, changed the effective date to December 22, 2008, which was 60 days after the final rule was transmitted to Congress.

Docket No. PHMSA-2005-21305, published at 73 FR 79002, amended the design factor and design pressure limits for natural gas pipelines made from new Polyamide-11 (PA-11) thermoplastic pipe. These two changes in the regulations allow pipeline operators to operate certain pipelines constructed of new PA-11 pipe at higher operating pressures than is currently allowed for other plastic pipe materials. The final rule took effect January 23, 2009.

Docket No. PHMSA-2007-0033, published at 74 FR 2889, adopted with minor modifications an interim final rule issued by PHMSA on March 28, 2008, conforming PHMSA's administrative procedures with the Pipeline Inspection, Protection, Enforcement, and Safety Act of 2006 by establishing the procedures PHMSA will follow for issuing safety orders and handling requests for special permits, including emergency special permits. The rule notifies operators about electronic docket information availability; updates addresses for filing reports, telephone numbers, and routing symbols; and clarifies the time period for processing requests for written interpretations of the regulations. The final rule makes minor amendments and technical corrections to the regulatory text in response to written public comments received after issuance of the interim final rule. The final rule took effect February 17, 2009.

Docket No. PHMSA-2008-0334, published at 74 FR 17099, incorporated by reference the most recent editions of API Specification 5L "Specification for Line Pipe" and API 1104 "Welding of Pipelines and Related Facilities." The purpose of this update is to enable pipeline operators to utilize current technology, materials, and practices to help maintain a high level of safety relative to their pipeline operations. PHMSA is not eliminating the use of the current referenced standards but simply allowing the additional use of these new standards. PHMSA may in the future propose to eliminate the incorporation of the existing referenced standards. The rule took effect April 14, 2009.

Docket No. PHMSA-2009-0265, Amendment Nos. 190-15, 192-111, 195-92, and 198-5, published at 74 FR 62503, corrected editorial errors, made minor changes in the regulatory text, reflected changes in governing laws, and clarified certain provisions in the pipeline safety regulations. The rule was intended to enhance the accuracy and reduce misunderstandings of the specified regulations. The amendments contained in the rule are non-substantive. The effective date of the final rule was January 29, 2010.

Docket No. PHMSA-2007-27954, Amendment Nos. 192-112 and 195-93, published at 74 FR 63310, addressed human factors and other aspects of control room management for pipelines where controllers use supervisory control and data acquisition (SCADA) systems. Affected pipeline operators must define the roles and responsibilities of controllers and provide controllers with the necessary information, training, and processes to fulfill these responsibilities. Operators must also implement methods to prevent controller fatigue. The final rule further requires operators to manage SCADA alarms, assure control room considerations are taken into account when changing pipeline equipment or configurations, and review reportable incidents or accidents to determine whether control room actions contributed to the event. Hazardous liquid and gas pipelines are often monitored in a control room by controllers using computer-based equipment, such as a SCADA system, that records and displays operational information about the pipeline system, such as pressures, flow rates, and valve positions. Some SCADA systems are used by controllers to operate pipeline equipment, while, in other cases, controllers may dispatch other personnel to operate equipment in the field. These monitoring and control actions, whether via SCADA system commands or direction to field personnel, are a principal means of managing pipeline operations. The rule improves the opportunities to reduce risk through more effective control of pipelines and further requires the statutorily mandated human factors management. The regulations will enhance pipeline safety by coupling strengthened control room management with improved controller training and fatigue management. The effective date of the final rule was February 1, 2010. However, at 75 FR 5536, PHMSA made corrections regarding certain dates, both in the preamble and in the amendments. The effective date of the corrections was February 1, 2010.

Docket No. PHMSA-RSPA-2004-19854, Amendment 192-113, published at 74 FR 63906, requires operators of gas distribution pipelines to develop and implement integrity management (IM) programs to enhance safety by identifying and reducing pipeline integrity risks. The IM programs required by this rule are similar to those required for gas transmission pipelines, but tailored to reflect the differences in and among distribution pipelines. Based on the required risk assessments and enhanced controls, the rule also allows for risk-based adjustment of prescribed intervals for leak detection surveys and other fixed-interval requirements in the agency's existing regulations for gas distribution pipelines. To further minimize regulatory burdens, the rule establishes simpler requirements for master meter and small liquefied petroleum gas operators, reflecting the relatively lower risk of these small pipelines. The rule also requires operators to install excess flow valves on new and replaced residential service lines, subject to

feasibility criteria outlined in the rule. The final rule addressed statutory mandates and recommendations from the USDOT's Office of the Inspector General and stakeholder groups. The final rule took effect February 2, 2010. Following that action, PHMSA corrected the effective date of the final rule and made a minor correction in terminology, published at 75 FR 5244. The revised effective date was February 12, 2010.

The adopted amendments in §8.235 and §8.310 conform these rules to the revised wording enacted in Texas Utilities Code, §121.2015(c) and (d), and in Texas Natural Resources Code, §117.012(i) and (j) by House Bill 4300 regarding the process by which the operators of natural gas, hazardous liquids, and carbon dioxide pipelines conduct community liaison activities with fire, police, and other appropriate public emergency response officials. The liaison activities must be conducted in person, except as provided by statute. The revised statutory language permits pipeline operators to dispense with having to make multiple efforts to conduct face-to-face meetings; if a pipeline operator is unable to arrange a meeting in person, the operator may conduct liaison activities either by telephone conference call or by delivering liaison information by certified mail, return receipt requested. The adopted amendments in §8.235 and §8.310 mirror the statutory wording.

The remaining amendments merely correct the name of the Pipeline Safety Division.

The Commission received one jointly-filed comment from the Texas Pipeline Association (TPA), the Texas Pipeline Safety Coalition (TPSC), and the Texas Oil and Gas Association (TxOGA) in support of the proposed amendments. The commenters state that the proposed changes will assist in aligning the Texas requirements for liaison activities with those of the Pipeline Hazardous Materials and Safety Administration (PHMSA) by providing for a specific and streamlined process to contact and exchange important information with emergency responders. The amendments will give operators clear direction as to the process that must be followed when setting up liaison activities, documenting attempted contacts, and ensuring that if an operator is unable to meet with emergency responders, a meeting may occur over the phone or information provided via certified mail.

The Commission appreciates the comments from TPA, TPSC, and TxOGA.

SUBCHAPTER A. GENERAL REQUIREMENTS AND DEFINITIONS

16 TAC §8.1, §8.5

The Commission adopts the amendments under Texas Natural Resources Code, §81.051 and §81.052, which give the Commission jurisdiction over all common carrier pipelines in Texas, persons owning or operating pipelines in Texas, and their pipelines and oil and gas wells, and authorize the Commission to adopt all necessary rules for governing and regulating persons and their operations under the jurisdiction of the Commission as set forth in §81.051, including such rules as the Commission may consider necessary and appropriate to implement state responsibility under any federal law or rules governing such persons and their operations; Texas Natural Resources Code, §§117.001 - 117.101, as amended by House Bill 4300, 81st Legislative Session (Regular Session, 2009), which give the Commission jurisdiction over all pipeline transportation of hazardous liquids or carbon dioxide and over all hazardous liquid or carbon dioxide pipeline facilities as provided by 49 U.S.C. Section 60101, *et seq.;* and Texas Utilities Code, §§121.201-121.210, as amended by House Bill 4300, 81st Legislative Session (Regular Session, 2009), which authorize the Commission to adopt safety standards and practices applicable to the transportation of gas and to associated pipeline facilities within Texas to the maximum degree permissible under, and to take any other requisite action in accordance with, 49 United States Code Annotated, §§60101, *et seq.*

Texas Natural Resources Code, §81.051, §81.052, and §§117.001-117.101, as amended by House Bill 4300, 81st Legislative Session (Regular Session, 2009); Texas Utilities Code, §§121.201-121.211, as amended by House Bill 4300, 81st Legislative Session (Regular Session, 2009); §121.251 and §121.253, §§121.5005-121.507; and 49 United States Code Annotated, §§60101, *et seq.,* are affected by the adopted amendments.

Statutory authority: Texas Natural Resources Code, §81.051, §81.052, and §§117.001 - 117.101, as amended by House Bill 4300, 81st Legislative Session (Regular Session, 2009); Texas Utilities Code, §§121.201 - 121.211, as amended by House Bill 4300, 81st Legislative Session (Regular Session, 2009); §121.251 and §121.253, §§121.5005 - 121.507; and 49 United States Code Annotated, §§60101, *et seq.*

Cross-reference to statute: Texas Natural Resources Code, Chapter 81 and Chapter 117; Texas Utilities Code, Chapter 121; and 49 United States Code Annotated, Chapter 601.

Issued in Austin, Texas, on August 10, 2010.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Mary Ross McDonald
Managing Director
Railroad Commission of Texas
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Proposal publication date: June 25, 2010
For further information, please call: (512) 475-1295

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SUBCHAPTER B. REQUIREMENTS FOR ALL PIPELINES

16 TAC §8.101, §8.130

The Commission adopts the amendments under Texas Natural Resources Code, §81.051 and §81.052, which give the Commission jurisdiction over all common carrier pipelines in Texas, persons owning or operating pipelines in Texas, and their pipelines and oil and gas wells, and authorize the Commission to adopt all necessary rules for governing and regulating persons and their operations under the jurisdiction of the Commission as set forth in §81.051, including such rules as the Commission may consider necessary and appropriate to implement state responsibility under any federal law or rules governing such persons and their operations; Texas Natural Resources Code, §§117.001 - 117.101, as amended by House Bill 4300, 81st Legislative Session (Regular Session, 2009), which give the Commission jurisdiction over all pipeline transportation of haz-

ardous liquids or carbon dioxide and over all hazardous liquid or carbon dioxide pipeline facilities as provided by 49 U.S.C. Section 60101, *et seq.;* and Texas Utilities Code, §§121.201 - 121.210, as amended by House Bill 4300, 81st Legislative Session (Regular Session, 2009), which authorize the Commission to adopt safety standards and practices applicable to the transportation of gas and to associated pipeline facilities within Texas to the maximum degree permissible under, and to take any other requisite action in accordance with, 49 United States Code Annotated, §§60101, *et seq.*

Texas Natural Resources Code, §81.051, §81.052, and §§117.001 - 117.101, as amended by House Bill 4300, 81st Legislative Session (Regular Session, 2009); Texas Utilities Code, §§121.201 - 121.211, as amended by House Bill 4300, 81st Legislative Session (Regular Session, 2009); §121.251 and §121.253, §§121.5005 - 121.507; and 49 United States Code Annotated, §§60101, *et seq.,* are affected by the adopted amendments.

Statutory authority: Texas Natural Resources Code, §81.051, §81.052, and §§117.001 - 117.101, as amended by House Bill 4300, 81st Legislative Session (Regular Session, 2009); Texas Utilities Code, §§121.201 - 121.211, as amended by House Bill 4300, 81st Legislative Session (Regular Session, 2009); §121.251 and §121.253, §§121.5005 - 121.507; and 49 United States Code Annotated, §§60101, *et seq.*

Cross-reference to statute: Texas Natural Resources Code, Chapter 81 and Chapter 117; Texas Utilities Code, Chapter 121; and 49 United States Code Annotated, Chapter 601.

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This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Mary Ross McDonald
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SUBCHAPTER C. REQUIREMENTS FOR NATURAL GAS PIPELINES ONLY

16 TAC §8.201, §8.235

The Commission adopts the amendments under Texas Natural Resources Code, §81.051 and §81.052, which give the Commission jurisdiction over all common carrier pipelines in Texas, persons owning or operating pipelines in Texas, and their pipelines and oil and gas wells, and authorize the Commission to adopt all necessary rules for governing and regulating persons and their operations under the jurisdiction of the Commission as set forth in §81.051, including such rules as the Commission may consider necessary and appropriate to implement state responsibility under any federal law or rules governing such persons and their operations; Texas Natural Resources Code, §§117.001 - 117.101, as amended by House Bill 4300, 81st Legislative Session (Regular Session, 2009), which give the Commission jurisdiction over all pipeline transportation of hazardous liquids or carbon dioxide and over all hazardous liquid or carbon dioxide pipeline facilities as provided by 49 U.S.C. Section 60101, *et seq.;* and Texas Utilities Code, §§121.201 - 121.210, as amended by House Bill 4300, 81st Legislative Session (Regular Session, 2009), which authorize the Commission to adopt safety standards and practices applicable to the transportation of gas and to associated pipeline facilities within Texas to the maximum degree permissible under, and to take any other requisite action in accordance with, 49 United States Code Annotated, §§60101, *et seq.*

Texas Natural Resources Code, §81.051, §81.052, and §§117.001 - 117.101, as amended by House Bill 4300, 81st Legislative Session (Regular Session, 2009); Texas Utilities Code, §§121.201 - 121.211, as amended by House Bill 4300, 81st Legislative Session (Regular Session, 2009); §121.251 and §121.253, §§121.5005 - 121.507; and 49 United States Code Annotated, §§60101, *et seq.,* are affected by the adopted amendments.

Statutory authority: Texas Natural Resources Code, §81.051, §81.052, and §§117.001 - 117.101, as amended by House Bill 4300, 81st Legislative Session (Regular Session, 2009); Texas Utilities Code, §§121.201 - 121.211, as amended by House Bill 4300, 81st Legislative Session (Regular Session, 2009); §121.251 and §121.253, §§121.5005 - 121.507; and 49 United States Code Annotated, §§60101, *et seq.*

Cross-reference to statute: Texas Natural Resources Code, Chapter 81 and Chapter 117; Texas Utilities Code, Chapter 121; and 49 United States Code Annotated, Chapter 601.

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SUBCHAPTER D. REQUIREMENTS FOR HAZARDOUS LIQUIDS AND CARBON DIOXIDE PIPELINES ONLY

16 TAC §8.310, §8.315

The Commission adopts the amendments under Texas Natural Resources Code, §81.051 and §81.052, which give the Commission jurisdiction over all common carrier pipelines in Texas, persons owning or operating pipelines in Texas, and their pipelines and oil and gas wells, and authorize the Commission to adopt all necessary rules for governing and regulating persons and their operations under the jurisdiction of the Commission as set forth in §81.051, including such rules as the Commission may consider necessary and appropriate to implement state responsibility under any federal law or rules governing such persons and

their operations; Texas Natural Resources Code, §§117.001 - 117.101, as amended by House Bill 4300, 81st Legislative Session (Regular Session, 2009), which give the Commission jurisdiction over all pipeline transportation of hazardous liquids or carbon dioxide and over all hazardous liquid or carbon dioxide pipeline facilities as provided by 49 U.S.C. Section 60101, *et seq.;* and Texas Utilities Code, §§121.201-121.210, as amended by House Bill 4300, 81st Legislative Session (Regular Session, 2009), which authorize the Commission to adopt safety standards and practices applicable to the transportation of gas and to associated pipeline facilities within Texas to the maximum degree permissible under, and to take any other requisite action in accordance with, 49 United States Code Annotated, §§60101, *et seq.*

Texas Natural Resources Code, §81.051, §81.052, and §§117.001 - 117.101, as amended by House Bill 4300, 81st Legislative Session (Regular Session, 2009); Texas Utilities Code, §§121.201 - 121.211, as amended by House Bill 4300, 81st Legislative Session (Regular Session, 2009); §121.251 and §121.253, §§121.5005 - 121.507; and 49 United States Code Annotated, §§60101, *et seq.,* are affected by the adopted amendments.

Statutory authority: Texas Natural Resources Code, §81.051, §81.052, and §§117.001 - 117.101, as amended by House Bill 4300, 81st Legislative Session (Regular Session, 2009); Texas Utilities Code, §§121.201 - 121.211, as amended by House Bill 4300, 81st Legislative Session (Regular Session, 2009); §121.251 and §121.253, §§121.5005 - 121.507; and 49 United States Code Annotated, §§60101, *et seq.*

Cross-reference to statute: Texas Natural Resources Code, Chapter 81 and Chapter 117; Texas Utilities Code, Chapter 121; and 49 United States Code Annotated, Chapter 601.

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PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER H. ELECTRICAL PLANNING

DIVISION 2. ENERGY EFFICIENCY AND CUSTOMER-OWNED RESOURCES

16 TAC §25.181

The Public Utility Commission of Texas (commission) adopts an amendment to §25.181 relating to Energy Efficiency Goal, with changes to the proposed text as published in the February 12, 2010, issue of the *Texas Register* (35 TexReg 983). The amendment as adopted raises an electric utility's energy efficiency goal from 20% to 25% of annual growth in the electric utility's demand of residential and commercial customers by program year 2012, and 30% of the electric utility's annual growth in demand by program year 2013. The amended rule also includes cost caps to minimize the impact of the higher goals on customers, who bear the costs of the program.

The amendment also updates the cost effectiveness standard by adjusting the avoided cost of capacity and the avoided cost of energy. In addition, the amendment modifies the calculation of a performance bonus for an electric utility that exceeds its goal. Finally, the amended rule will apply to all electric utilities, not just electric utilities that are subject to Public Utility Regulatory Act, Texas Utilities Code Annotated §39.905 (Vernon 2007 and Supplement 2009) (PURA). This amendment is adopted under Project Number 37623. This rule is a competition rule subject to judicial review as specified in PURA §39.001(e).

The commission invited comments on the proposed rule changes and the following questions:

1. Should the commission adopt a lost revenue adjustment mechanism for an electric utility's programs administered pursuant to §25.181?

2. Each utility is requested to, and other parties may, provide an estimate of the customer impact of the cost caps in the rule under subsection (f)(8), Cost Recovery.

3. Should the commission adopt a cost cap based on customer impact, rather than total program cost?

Comments

Written comments were filed on March 12, 2010 and reply comments were filed on March 29, 2010. The commission received comments on the proposed amendments from HEB, Walmart, Methodist Hospital, Historical Westside Association, Port Arthur Independent School District (Port Arthur ISD), A Better Insulation, Star Efficiency Services, EcoFactor, ClimateMaster, CLEAResult Consulting, Good Company Associates, on behalf of Consert, Good Company on behalf of a coalition of companies referred to as Efficiency Texas (consisting of the Texas Building Owners and Managers Association, Texas Hotel and Lodging Association, the Texas Restaurant Association, the Texas Retailers Association, and Texas Impact), KGRA Energy, McKinstry Company, Texas Home Energy Rating Organization (Tx HERO), Texas Renewable Energy Industries Association (TREIA), Solar Alliance, Steering Committee of Cities Served by Oncor (Cities), Texas Industrial Energy Consumers (TIEC), Texas Legal Services Center and Texas Ratepayers' Organization to Save Energy and (TLSC-Tx ROSE), Office of Public Utility Counsel (OPC), Texas Public Policy Foundation (Policy Foundation), Texas CHP Initiative (Tx CHP), Demand Response Texas (including Cirro Energy Services, CPower, Inc., and EnerNOC, Inc.), Sierra Club, American Council for an Energy-Efficient Economy (ACEEE), Environmental Defense Fund (EDF), U.S. Department of Energy Gulf Coast Clean Energy Application Center (GC-CEAC), Oncor Electric Delivery Company (Oncor), CenterPoint Energy Houston Electric LLC (CenterPoint), Entergy Texas (Entergy), Southwestern Public

Service Company (SPS), El Paso Electric Company (EPE), Representative Joseph Deshotel, Dwight Wagner, Joe Johnson, Kirk Vital, William C. Velasquez Institute, Retail Electric Provider Coalition (REP Coalition), Coalition of Regulatory Entities (CORE), Alliance of Xcel Municipalities (AXM), the City of Houston, the National Association of Energy Service Companies (NAESCO), and Electric Utility Marketing Managers of Texas (EUMMOT).

AXM membership includes Amarillo, Booker, Borger, Canadian, Canyon, Crosbyton, Dalhart, Earth, Fritch, Gruver, Happy, Hereford, Levelland, McLean, Muleshoe, Pampa, Perryton, Plainview, Post, Slaton, Spearman, Stinnett, Sunray, Tahoka, Vega and White Deer.

The coalition of individuals led by the Texas Campaign for the Environment includes Robin Schneider, Jodie Hebert, Michael Karcher, Pete Alvarado, Kristine Moore, Daniel Hurlbert, Molly Walker, Ted Blanchard, Janelle Irish, Kathryn Albee, Erica Martinez-Castro, Debbie Newman, Roy West, Claudia Reynolds, Storms Reback, Tim Chamberlain, Sarah Caldwell, Tommy Savage, Adrian Juarez, Dawn Obermoeller, Lisa Tauriac, Lana Marker, Cecilia Martin, Birdie Perkins, Claudia Hernandez, Robert Aberg, Kristmas Marron, Vaden Riggs, Jennifer Finch, Christopher Kribs Zaleta, Jen Kalt, Lynn Riddick, Raynd Lopez, Robert Klug, Larry Ketcham, Chris Sharon, Dorinda Scott, Julie Sears, Ellen Gonzalez, Bill Jacoby, Lisa Coyle, Michael Ball, P. Chen, Katherine Homan, Cynthia Stuart, Kay Bryan, Kenneth Hawley, Denzel Wiseman, Ben May, Stacy Guidry, Don Blackley, Julie Strong, Patti Arvin, Laura Beikman, Deborah Freeman, Snehal Oswal, Judy Sanchez, Karen Mercado, Richard Liebman, Steven Vaughan, Barbara Draughon, Sidney Anderson, Judy G. Ranney, Debra Maitre, Courtney Hall, Lydia Garza, Bobby Womble, Nichole Sowell, Joy Menyhert, Cecelia Ottenweller, Anne Johnson, George Mader, Tim Dreslinski, Rhonda Gudewich, Thao Dam, Daron Shiflet, Kimberly Vizurraga, James Noble, Ravi Mantena, Emmanuelle Cudennec, John Tinney, Alex DeCicco, Virginia Fugman, Jordan Michel, E. A. Davis, Helen Fosdick, Elaine Harris, Michael Hoeffner, Kambiz Kaboli, Gloria Achterberg, Jason Swiergol, Lauren Tata, Carlos Orrego, Tom Rutz, Jeffrey Jacoby, Gerald Sullivan, Daniel Reynolds, Brian Kahl, Susan Wambsganss, Jon Heffley, Frederick and Patricia Buob, Gordon Pingenot, Mary Boone, Danielle LaFleur, Lorie McCloud, Lauren Oholendt, Scott Whiting, Amber Pevey, Leslie Patout, Carol Geiger, Martha Schlott, Eric White, Dallas May, Richard Casper, Debby Patterson, Sylvana Alonzo, Ana Cardoze, Jennifer Waters, Tom Kusnierz, Germaine Swenson, Joyce Kling, Kate Dixon, Timothy Massey, Marc Dugger, Emanuel Charhon, Maggie Spillers, Chris Anger, Michelle Harvey, Margaret Reese, Tim Corder, Don Strickler, George Smith, Rainbow Di Benedetto, Evan Woodruff, Ovidio Oliveras, Richard Malnory, Kenneth Elder, Sherrill Bodie, Katina Espinoza, Patsy Gillham, Wendy Campbell, Jon Savage, James Hadden, Norman Phillips, Jan Reneau, Michael Wicker, Mildred Stone, Debra Alvarez, Melinda Page, Matilda Reeder, Joel Rahn, Marisa Luera, Debra Neel, Conrado Acevedo, Jeff Murray, Craig Railsback, Izabella Dabrowski, Fabian Solberg, Kathleen Hanson, Nicole Gruenberger, Marybell Martinez, Robert Strane, Lucy Conley, Deb Murphy, Carmen Druke, Gail Smith, Nancy Ramsay, Lynda Effertz, Liisa Pursiheimo-Marcks, Gerald L. Soliday, Elizabeth Stripling, Scott Driggs, Hall Hammond, Dean McKinnon, Karen Rasmussen, Robert Shadowen, Stephanie Rice, Robert Plsek, Julia Makkaoui, Alan B. Loud, John Knupp, Lorine Besse, Jennifer Turkyilmaz, Candace Smith, Brett St. Onge, Patricia Fall, Janet Montes-Diaz, Mark Carlson, Desiree' Webb, Daniel Vaughn, Dabney Shires, Barbara Sturgeon, Holly Hope, Rob Ganger, Susan Trahan, Sherwin Daryani, Cecely Valderrama, Susan Hansen, Deanna Van Besien-Kozacek, Brigette Yawn, Anne Burnham, Donna Ploetz, Michele May, Sonya Taft, Teresa Burr, Larry Symns, Karen Mayer, Nancie Wing, Stuart Leija, Terri Camara, Raya Miller, Jim Veach, Dwight Haas, Cynthia Claybrook, Alissa Catalano, Constantine Lau, Joseph Jensen, Nola Dean, Marisa Beck, Julia Hunt, Parth Patel, Ada Gonzalez, Philip Huffeldt, Janine Lund, Catherine McGinley, Jerry Stefani, Kathleen Delle, Toni Austin-Allen, Travis Williams, Donna Millay, John Wormuth, Gaylin Bonner, Sarah Rose, Susan Rardin, Taylor Johnson, Grace Taupo, Pete Ybarra, Elemi Brown, Devereaux Morkunas, Gilbert Starkey, Mark McKim, Timothy Adams, Dan Bedell, Mike Peters, Michael Pitre, Jeremy Johnson, Carol Bowers, Laura Utrecht, Emily Rollins, Mary Cato, Laurie Edmonds Goodin, Marti Freitag, Scotty Stevenson, Kathleen Riney, Mark Sims, Eric Fry, Shannon Brown, Robert Germain, Susanna Sharpe, Richard Maddox, Terry Niemeyer, Pat Cole, Renee Vaughan, Sandra Keiser, Pat Smiley, Tamara Houston, Melissa Litwin, Charlee Helms, Jeff Dieter, Joseph Sheldon, Mary Wilson, Deborah Young, Corin Hodder, James Penas, Hayley Wallace, Mike Durkee, Dena Mapa, Cyndy Reynolds, Lois Schafer, Donna Houston, Marti Cockrell, Chris Noland, Stephanie Galo, Leigh Hallock, Daniel Chappel, Eliz Gaylord, Gary Schweda, Josephine Garcia, William Crane, Linda Parman, Patrick Cox, Leslie LaConte, Robert Rutishauser, Patricia Stanford, Laura Keany, Cari Hooper, Ashley Smith, Gina Howington Mantsch, Roger Mathre, Carolyn Croom, Stephanie Falck, Sandra Axelrad-Boccara, Kevin Riley, Bion Pohl, Linda Didsbury, Jason Tanton, J. R. Schroder, Merrit Teddlie, Patricia Kelcher, Kimka Hesalroad, Joy Roberts, Eric Tinsley, Mark Boone, King Grossman, Chungwei Gonzales, Susan Roberts, Katharyn Reiser, Laura Lieck, John Allgair, Jim Thomas, Michael Strasser, George Rehman, Jane Hemmi, Rebecca Travis, Melissa Kohout, Jeanne Morman, Steve Lahey, Layne Duesterhaus, Nona Grieshaber, Mailand Edlin, Michael Nolan, Nakisha Nathan, Michelle Baccheschi, Barbara Gittinger, Michael Higgins, Aysha Anas, Pawan Gautam, Derek R. Gartman, Mike Wittum, Kathryn Eubank, Sherilyn Coldwell, Philip Comer, Lisa Endresen, Samuel Bean, Jeré Rodriguez, Myra Armstrong, Erika Luck, Tara Spies, Jacquelyn Welsh, Ann Hall, Lynn Gustafson, Audrey Williams, Janice Curry, Yesika Cerecedo, Kevin Schermann, Susan Wukasch, Sharon Grepares, Samuel Bean, Stan Lockett, Melanie Simpson, Jesse Brown, David Archer, Thomas Manaugh, Michelle Upchurch, Marilyn Buck, Tonya Connell, Gary Bynum, Cathy Juan, Logan Bell, Alyson Murphy, Michael A. Kravetz, Joy Abernathey, Linda Stark, Anne Freeman, Ginger Yocum, Eduardo Robles, Joslyn Carbajal, Carolyn Robinett, Milan Bender, Stephen Schlachter, Michael Melton, Cerese Buckler and Leighton Clark.

The coalition of companies filing joint comments with the REP Coalition includes the Alliance for Retail Markets (ARM), CPL Retail Energy, Reliant Energy Retail Services LLC, Texas Energy Association of Marketers (TEAM), TXU Energy Retail Company LLC, and WTU Retail Energy. The membership of ARM includes Constellation New Energy, Inc., Direct Energy LP, and Green Mountain Energy Company. The membership of TEAM includes Accent Energy, Amigo Energy, Cirro Energy, Green Mountain Energy Company, Just Energy, Hudson Energy Services, StarTex Power, Stream Energy, Tara Energy and TriEagle Energy.

The coalition of companies filing joint comments with the Coalition of Regulatory Entities (CORE) includes the Texas Coast

Utilities Coalition of Cities (TCUC), the Alliance of Oncor Cities (AOC), and the Alliance for TNMP Municipalities (ATM). The TCUC membership includes cities served by CenterPoint Energy Houston Electric, LLC (Angleton Baytown, Clute, Freeport, League City, Pearland, Shoreacres, West Columbia and Wharton). The membership of ATM includes cities served by Texas-New Mexico Power Company (Angleton, Brazoria, Gatesville, Hamilton, Hico, Kermit, League City, Olney, Pearland, Pecos, Sweeny, West Columbia and Whitney). The membership of AOC includes cities served by Oncor (Balch Springs, Blooming Grove, Commerce, Corsicana, Crockett, Denton, Diboll, Heath, Hickory Creek, Hillsboro, Jacksboro, Jacksonville, Kennedale, Kerens, Lufkin, Mart, Mexia, Pflugerville, Princeton, Riesel, Rockdale, Round Rock, Rusk, Trophy Club, Troup, and Wortham).

The coalition of utility companies filing joint comments with EUMMOT includes Oncor, CenterPoint, AEP Texas North Company, AEP Texas Central Company, Southwestern Electric Power Company, Entergy, SPS, EPE, and Texas-New Mexico Power Company (TNMP). The AEP Companies (Texas North Company, AEP Texas Central Company, and Southwestern Electric Power Company) also filed joint comment separate from the EUMMOT comments, and the other utilities also filed separate comments.

NAESCO members include Honeywell, Johnson Controls, Siemens, Trane, Comfort Systems USA Energy Services, Schneider, Duke Energy, Pacific Gas & Electric, Southern California Edison, the New York Power Authority, ConEdison Solutions, FPL Energy Services, Pepco Energy Services, Constellation Energy Projects and Services and Energy Systems Group, AECOM Energy, NORESCO, Onsite Energy, EnergySolve Companies, Ameresco, UCONS, Chevron Energy Solutions, Synergy Companies, Wendel Energy Services, Control Technologies and Solutions, Clark Realty Capital, McClure, SAIC, and Lockheed Martin.

A public hearing on the proposed rule was not requested but the commission held a hearing concerning this proposed amendment and possible changes to §25.173, relating to Goal for Renewable Energy, on June 30, 2010.

Lost Revenue Mechanism

Several parties disagreed that the commission should adopt a lost revenue adjustment mechanism (LRAM) for an electric utility's energy efficiency programs under §25.181, including ACEEE, the Sierra Club, NAESCO, CORE, Cities, the City of Houston, NAESCO, the REP Coalition, OPC, Walmart, TLSC-Tx ROSE, and TIEC. The Sierra Club, CORE, Cities, the REP Coalition, OPC, TIEC, and TLSC-Tx ROSE stated that the commission lacks the statutory authority to implement a lost revenue recovery mechanism. Several parties including Walmart, the Sierra Club, CORE, Cities, the REP Coalition, OPC, TIEC, TLSC-Tx ROSE, and NAESCO opposed LRAM, because the current rule already allows for cost recovery for energy efficiency programs. EUMMOT, CenterPoint, Entergy, and EPE argued that LRAM is both beneficial and legal.

Walmart, the Sierra Club, CORE, Cities, the REP Coalition, TLSC-Tx ROSE and TIEC noted that the current rules already allow the utilities to recover their costs through an energy-efficiency cost-recovery rider (EECRF). They argued that if LRAM were allowed in tandem with the performance bonus, it would create a windfall for the utility, shift the expense to the ratepayer, negate any cost savings for customers, and offset the energy efficiency-related savings that customers may realize. They argued that provisions in the current rule providing for a review of the EECRF every three years ensure that the utility receives the appropriate revenue recovery, and therefore LRAM is unnecessary.

Walmart stated that a general rate case is the appropriate forum for considering a utility's decrease in revenues resulting from energy efficiency initiatives. It asserted that an adjustment to recover lost revenues is a mechanism to reduce the risk of lost earnings due to reductions in sales, and the commission needs to consider the impact of the risk reduction through the rate of return for the utility. Walmart cautioned that if the commission were to adopt LRAM despite these problems, any such adjustment mechanism should be designed to target only the lost revenues attributable to the utility's promotion of energy efficiency to its customers. NAESCO also disagreed with the utilities' position that they should be allowed to recover energy efficiency "lost revenues" as a standalone adjustment to rates, because lost revenues are a very small portion of total utility revenues that can easily be tracked, and the impact of the lost revenue should be considered in the utilities' periodic rate cases, as part of their overall revenue requirements.

The Sierra Club and CORE stated that the Legislature has not approved a utility's receiving payments for electricity that is never generated, in addition to receiving performance bonuses for exceeding its goal. The REP Coalition, TIEC and TLSC-Tx ROSE argued that LRAM is inconsistent with PURA §39.905(a)(2) and the ability of customers to realize a reduction in energy costs through energy efficiency. OPC, CORE, TLSC-Tx ROSE and TIEC argued that PURA §39.905(b-1) requires that the utilities not recover more than their energy efficiency costs and any incentives that they may be granted, and also requires a comprehensive review of a utility's overall revenues. The REP Coalition stated inclusion of "lost revenues" would allow an electric utility to recover transmission and delivery charges for a level of service not actually provided. TIEC, TLSC-Tx ROSE, and Cities stated "lost revenues" are neither costs nor expenditures for the utilities; rather, they are purely hypothetical amounts that the utility *might* have collected. TIEC stated that *guaranteeing* a certain level of revenue, rather than providing a "reasonable opportunity" to earn a "reasonable return," would conflict with PURA §36.051, which requires rates be just and reasonable to both the utility and the consumer. Cities argued that a utility's rates will be adjusted for revenue changes, incorporating the actual energy efficiency impacts, when the utility's base rates are fixed in a rate case. OPC noted that PURA specifically provides for cost recovery and an incentive and, in order to authorize LRAM, PURA would need to be amended. OPC argued that an agency has only those powers expressly conferred upon it by the Legislature, which has specifically provided for cost recovery and an incentive but not LRAM.

Several parties supported the adoption of a lost revenue adjustment mechanism for an electric utility's energy efficiency programs, including Tx HERO, CLEAResult, EUMMOT, CenterPoint, Entergy and EPE. CenterPoint argued that LRAM would not be "automatic" and that in an EECRF proceeding, the commission could review a utility's filing and deny the adjustment if it were determined to be unnecessary or unreasonable. The Sierra Club and EPE urged that LRAM be studied further and evaluated in a stand-alone rulemaking or during the legislative session. In particular, policy-makers should consider whether other states that have adopted similar measures and the impact of LRAM on the utility and ratepayers. Tx HERO stated it is desirable that the profitability of utility companies not depend

upon the quantity of energy delivered or consumed. According to Tx HERO, it is reasonable to develop and use LRAM during a period of transition to a completely decoupled charge for transmission and distribution, which is probably a matter for legislation. CLEAResult supported LRAM based on its belief that the current incentives fail to make a utility whole for the investments they make in energy efficiency.

CenterPoint contended the comments of CORE, TIEC and TLSC-Tx ROSE ignore that the Legislature has already decided that costs associated with energy efficiency should be considered outside the context of a fully-contested base rate case. CenterPoint argued that the Legislature gave the commission authority to establish *annual* EECRF mechanisms, and if the Legislature had intended for costs associated with energy efficiency to be litigated in the context of base rate cases and thus subject to extended regulatory lag, it would not have created the EECRF process. According to CenterPoint, LRAM offers the opportunity to remove the financial disincentive to energy efficiency in a more efficient, lower-cost manner than through the litigation process of a fully contested base rate case. CenterPoint stated that the arguments of CORE, TIEC, the REP Coalition, and TLSC-Tx ROSE fail to recognize PURA §39.905(b-1), which states the energy efficiency cost recovery factor under subsection (b)(1) may not result in an over-recovery of costs but may be adjusted each year to change rates to enable utilities *to match revenues against energy efficiency costs* and any incentives a utility is granted.

CenterPoint stated that PURA §39.905(b-1) demonstrates the clear intent of the Legislature to keep utilities financially whole through the EECRF mechanism and, without some means of addressing the issue of lost revenue, this objective cannot be accomplished. CenterPoint cited several cases that demonstrate that, when construing statutes, a reviewing court's primary goal is to determine and give effect to the Legislature's intent, and that, to determine legislative intent, the court will look to the statute as a whole, as opposed to isolated provisions. In this vein, when all of §39.905 is considered, the commission clearly has the authority to adopt a lost revenue adjustment mechanism to carry out its express responsibility of encouraging energy efficiency in Texas. CenterPoint offered several "leading edge" example LRAM tariffs in Kentucky, Ohio, Oregon, and North Carolina. Three of the tariffs were approved within the past 12 months and include a lost revenue recovery mechanism that operates in conjunction with the recovery of direct program costs or incentives. Several of the tariffs also contain true-up components. According to CenterPoint, these models could be readily adapted to the current cost-recovery structure in Texas, and any LRAM could be reviewed and trued-up in the context of each utility's annual EECRF proceeding. CenterPoint stated that the arguments of CORE, TIEC, the REP Coalition and TLSC-Tx ROSE presuppose that adoption of LRAM would require "decoupling," which is simply not the case. Decoupling involves a broader process for adjusting utility revenues for any deviation between expected and actual sales, regardless of the reason for the deviation. LRAM, on the other hand, can be designed to target reimbursement for only those lost revenues related to the utility's direct promotion of energy efficiency measures.

CenterPoint argued that the financial disincentive that currently exists can be removed either by adopting a generic lost revenue adjustment mechanism for all utilities or allowing utilities to propose their own LRAM as a part of their annual EECRF filing. It also argued that either alternative is a better solution than the filing of a costly base rate case, the utility's only other method of addressing the revenue loss. CenterPoint stated that the energy efficiency programs impair the ability of utilities to recover commission-authorized costs, because energy efficiency programs encourage customers to reduce their consumption of electricity. CenterPoint estimated that if the commission raises the energy efficiency goals as proposed (to 30% of demand growth in 2012, 40% of demand growth in 2013, and 50% of demand growth in 2014), their goals will increase from approximately 60 megawatts (MW) in 2012 to 100 MW in 2014. Assuming that CenterPoint achieves the savings needed for the maximum performance bonus each year, its program costs will rise from approximately $44 million in 2012 to $116 million in 2014, and its revenue loss from the energy efficiency programs will increase from approximately $18 million in 2012 to $30 million in 2014. CenterPoint submitted that as the demand goal increases the performance "bonus" ceases to be an effective incentive, and the policy objective of the performance incentive to encourage energy efficiency would be undermined. It urges the commission to act in this rulemaking to implement LRAM.

EPE and Entergy supported the adoption of LRAM for similar reasons. Entergy noted that the proposed increase in energy efficiency goals and in the capacity factor for calculating the energy savings goal would further increase their revenue losses, resulting in lost margins of approximately $0.05 per kWh, as opposed to lost margins of approximately $0.02 per kWh for transmission and distribution utilities. Entergy stated that by exceeding the goals it achieved a performance bonus of about $1.7 million, but lost about $1.4 million through sales lost as a result of energy efficiency programs. Entergy identified areas of energy efficiency cost recovery that should be addressed to make the utility financially indifferent as to whether energy resource needs are met through supply-side or demand-side alternatives: (1) program cost recovery; (2) performance bonus/shared savings; and (3) recovery of lost contribution to fixed costs. Entergy concluded that if the lost revenues were recovered through LRAM, the performance bonus would then serve the purpose for which it was intended--to reward the utility for running its programs efficiently.

EUMMOT supported LRAM as a means to ensure that a utility's energy efficiency investments do not lead to financial distress, which it said is a long-standing regulatory principle. It noted that NARUC resolutions have urged regulatory commissions to "consider the loss of earnings potential connected with the use of demand-side resources; and . . . otherwise ensure that the successful implementation of a utility's least-cost plan is its most profitable course of action." EUMMOT also noted that the National Action Plan for Energy Efficiency urges regulators to remove disincentives to energy efficiency and provide utilities with incentives for successful energy efficiency programs. EUMMOT stated that, as an alternative to LRAM, the performance bonus mechanism could be modified to account for lost revenue and reward utilities for exceeding energy efficiency goals, and that modifying the existing bonus mechanism may be the simpler approach. EUMMOT noted that at least 19 states have approved a decoupling mechanism for electric utilities and another seven have decoupling mechanisms pending. Specifically, LRAMs have been introduced in Colorado, Oklahoma, Ohio, North Carolina, South Carolina, and Wyoming. A combination of performance incentives and either LRAMs or a decoupling mechanism are available in California, Colorado, Connecticut, Kentucky, Massachusetts, Michigan, Minnesota, North Carolina, Oklahoma, Rhode Island, Vermont, and Wisconsin.

EUMMOT noted the use of straight fixed/variable (SFV) rate design, which has been applied to natural gas utilities in Florida,

Ohio, Georgia, Illinois, Missouri, Nebraska, North Dakota, Oklahoma, and Texas, as an alternative approach. Recovery of costs through fixed charges allows "utilities to recover the cost of facilities that must be in place regardless of usage." EUMMOT argued that this rate design goes to the heart of the issue that an LRAM attempts to address and is an appropriate alternative methodology that the commission has at its disposal to ensure a utility's revenues are not jeopardized as a result of promoting energy efficiency.

TIEC, in response to the CenterPoint argument, reiterated that the commission has no authority to adopt LRAM under PURA §39.905(b-1). PURA allows rates to be adjusted "to enable utilities to match revenues against energy efficiency costs and any incentives to which they are granted," but does not authorize EECRFs to be adjusted to recover lost revenues, which are not costs. The discussion of LRAMs that have been implemented in other states demonstrates that the energy efficiency programs in those states are governed by different statutory language, and, in fact, the Kentucky statute cited by CenterPoint explicitly authorizes LRAMs. TLSC-Tx ROSE also urged that CenterPoint's legal argument be rejected.

ACEEE strongly recommended the use of "true symmetrical decoupling" instead of LRAM or other rate design options. CORE and TIEC disagreed with ACEEE's "true symmetrical decoupling" proposal on the basis that it is beyond the commission's authority to implement. CORE stated that a decoupling mechanism would directly violate PURA and would unjustly guarantee revenue. CORE further stated that the legislature has repeatedly rejected commission requests for additional flexibility in electric utility ratemaking. TIEC contended that decoupling would remove the utility's incentive to minimize costs in order to earn its awarded rate of return, which underlies the entire ratemaking scheme set forth in PURA §36.051. This section provides that utilities' rates be set at a level that allows a reasonable *opportunity* to earn a reasonable return on its investments. TIEC concluded that "true symmetrical decoupling" is not authorized by PURA, is inconsistent with Chapter 36, is against public policy, and should not be adopted.

Walmart recommended that any commission approved lost revenue or other adjustment mechanism should not permit a utility to recover for revenues lost due to energy efficiency measures that are implemented and funded by customers outside of the utility's programs, such as loss of revenues through customers' adoption of more efficient appliances outside of the energy efficiency program. Walmart also argued that a lost revenue mechanism should not permit an electric utility to recover revenues that are "lost" as a result of events of weather variations, force majeure, changes in the number of customers served by the utility, changes in economic conditions, and changes in building codes. Walmart concluded that the commission must ensure that rates are just and reasonable, and in doing so, must carefully balance this objective with the objective of promoting energy efficiency.

The Sierra Club noted they are not favorable to this mechanism at present due to the increased cost of the program and the impacts on ratepayers however they are not opposed to studying the issue further in future rulemaking or during the legislative session.

Commission Response

The commission concluded in Docket Number 38213 that lost revenues are not energy-efficiency costs that may be recovered through an EECRF under PURA §39.905. Consistent with that decision, the commission declines to adopt an LRAM mechanism in this rule.

Cost of Amendments

Regarding preamble question two, each utility is requested to, and other parties may, provide an estimate of the customer impact of the cost caps in the rule under subsection (f)(8), Cost Recovery.

HEB supported increased funding for the utility's incentive programs due to its long-standing frustration with the lack of adequate funding for customers' proposed projects and the common occurrence that all funds for an entire year are committed within a few minutes time. HEB noted that many of the energy projects it implemented during the past few years would not have met internal financial return hurdles without the utility incentives. HEB suggested that these programs could make a huge difference for customers of all classes to reduce energy waste.

Sierra Club recommended that the commission consider both costs and benefits when considering cost caps. Sierra Club referred to such benefits as reduced transmission congestion, less generation needed, and lower individual energy bills for program participants.

EUMMOT stated that the component of residential consumer bills used to cover the cost of energy efficiency would increase from $0.64/month in 2011 to $3.38/month (assuming 1,000 kWh per month consumption and statewide average EECRF rates) by 2014, assuming program budgets were capped at the proposed levels. As a comparison, the component of residential consumer bills used to collect energy efficiency costs would increase to $4.87/month if program budgets were not capped, but adequate funds were allotted so as to meet the proposed goals.

Thus, the proposed cost caps based on total program costs would prevent utilities from meeting the higher demand goals proposed for 2013 and 2014. Total statewide program expenditures (as included in the utilities' April 1, 2009 energy efficiency plan and report filings) totaled $112 million in 2010. Consequently, total expenditures would be capped at $280 million in 2013 and $336 million in 2014 under the proposed cost caps. Estimated program expenditures required to meet the aggressive demand goals as proposed total $293 million in 2013 and $484 million in 2014, resulting in a significant budget shortfall for both years. Itron estimated $426 million in total spending would to meet similar goals by 2014, suggesting that the proposed cap must be raised by more than 25%.

According to Entergy, the impact on customers would be significant. Currently, the program cost is around $0.94 per month for residential customers using 1000 kWh per month, but could be over $5.50 per month by 2015. EPE estimated that the customer impact of the proposed cost caps under proposed subsection (f)(8) would be significant. The projected customer impacts of the proposed caps for 2012 through 2014 for 1000 kWh would be $15.39 in 2012 and $24.53 in 2014.

The REP Coalition stated that the current version of §25.181 would allow utilities to recover up to approximately $115 million for energy efficiency program costs and accrued bonuses based on transmission and distribution service providers' (TDSP) filed 2010 budgets. The REP Coalition claimed the proposed amendments would greatly increase the amount utilities would be permitted to recover. For example, proposed subsection (f) would allow them to recover program expenditures for 2014 in an amount up to 300% of their program budgets for 2010 and

raise performance bonus caps to 40% of program expenditures. Thus, the proposed rule would permit utilities to recover almost $407 million for energy efficiency program costs and bonuses in 2014. The REP Coalition stated that the permitted level of cost recovery for utilities under the amended rule should consider the economic impact on end-use consumers, which is the group that ultimately bears these costs. Accordingly, the REP Coalition recommended the use of a $1 per MWh cost cap for residential and commercial customers to keep the level of cost recovery in check while still allowing utilities to recover sufficient funds to operate energy efficiency programs. The REP Coalition provided an estimate of revenue recovery at a $1/MWh cap with 2012 costs of $205 million; 2013 costs at $208 million; and 2014 costs at $212 million. The REP Coalition concluded a $1 per MWh cost cap for residential and commercial customers would reduce, by roughly half, the cost impact of the proposed rule for the year 2014.

OPC noted that the Itron Study estimated the potential economic savings on customers' monthly bills, calculated from reduced sales, from the utility perspective rather than from the perspective of customers' bills. As OPC understands it, the Itron Study however, does not include an estimate of the cost to customers, nor does it consider the cost of the utilities' bonuses or the proposed increases in program budgets. OPC noted that Oncor residential customers, for example, are currently paying $0.92 per month for energy efficiency, based on recovery of $53,578,615. OPC stated if the proposed rule is adopted, Oncor residential customers could reimburse Oncor in 2014 in the amount of $132,811,590 in program costs and $53,124,636 for a bonus, for a total of $185,936,226. That is over a threefold increase in four years.

TLSC-Tx ROSE recommended that the rule be amended to incorporate stronger review and approval standards to ensure program effectiveness and efficiency. TLSC-Tx ROSE argued that the proposed significant rate increases--up to almost a 500% increase over a five year period--comes with no added assurances that consumers will benefit from the energy efficiency programs. TLSC-Tx ROSE noted that, without added assurances that the statutorily-required targeted weatherization programs will be fully implemented, the neediest of low income Texas consumers will be required to pay ever-higher rates with no benefits.

TIEC agreed with the REP Coalition that a cost cap should be based on customer impact rather than total program cost. TIEC stated that the customer impact estimates provided by the REP Coalition demonstrate that the increased goals proposed by the commission could have significant rate impact on customers, especially when coupled with the potential performance bonus awards. TIEC urged the commission to be mindful of the potential impacts the increased goals may have for customers, and ensure that the ratepayer funds spent on energy efficiency programs are expended in a cost-effective manner. TIEC also argued that if cost caps are applied, they should be applied on a class-specific basis. The $1/MWh cap proposed by the REP Coalition would need to be modified for classes that pay energy efficiency costs based on different billing determinants (such as on a demand or customer basis). PURA §39.905(b)(4) provides that the costs associated with the programs under the rule should be borne by the customer classes that receive services under the programs. Because program costs are allocated on a customer-class basis, and collected through rates that reflect those class characteristics, it is appropriate to calculate and apply a cost cap on a customer-class basis. TIEC concluded the application of a specific cost cap for a given class may be more appropriately developed through each utility's EECRF proceeding than in the rule.

CORE replied that the commission should consider all factors that affect the cost of the programs, not just the energy efficiency goals, to determine how to best minimize the programs' impact on customers, while promoting energy efficiency in evaluating the economic impact on customers. CORE argued that the higher energy efficiency goal does not alone determine the customer impact, and all factors must be considered to determine what needs adjusting. CORE proposed any one of the following factors, all of which are within the discretion of the commission, may affect the economic impact of the programs on customers: deemed savings estimates; cost-effectiveness standard; marketing for programs; administration cost caps; estimates for avoided cost of capacity and avoided cost of energy; and bonus caps. CORE urged the commission to consider what factors would cause the energy efficiency programs to have significantly greater impact on the customer and keep foremost in its deliberations the impact on customers. CORE noted of particular importance is that deemed savings, avoided cost of capacity, and avoided cost of energy be properly estimated. In addition, costs related to administration and bonuses must not be excessive.

Commission Response

The commission appreciates the comments on this question. The commission has considered these comments in connection with adopting amendments to subsection (f), relating to cost recovery.

Cost Caps

Several parties opposed the adoption of a cost cap based on customer impact, rather than total program cost, including NAESCO, TLSC-Tx ROSE, Tx HERO, EPE, CLEAResult, OPC, Entergy, Sierra Club, and Cities. NAESCO urged the commission to set the energy efficiency program budgets at levels that allow the utilities to achieve the higher goals, based on utility estimates of the budgets required to meet the goals. NAESCO argued that the constraint on budgets should be the cost effectiveness of the programs, not an arbitrary per customer or total budget number. It also urged the commission to analyze the potential increases in customer bills using net analyses, which include both the increased program costs and the estimated benefits from the programs, particularly the effect of peak load reductions in a competitive supply market like Texas.

OPC was of the opinion that a total program cost cap is preferable to a customer cost cap. The programs should drive the budgets rather than available funding driving the programs. In the 2009 EECRF cases, OPC favored total program cost allocation rather than customer cost allocation, and expressed the view that a program cost cap is more appropriate, based on the nature of the benefits of energy efficiency. EPE argued that a utility is in a better position to manage its expenditures based on a cap on program costs, rather than trying to target a customer impact amount, which would vary with customer growth and consumption. Sierra Club expressed a similar view: that a cost cap based on program costs would be easier to measure and track, since it does not depend upon a changing number of customers or changing energy demand.

EUMMOT stated that it may be simpler and more efficient to apply caps on total budgets, rather than on the impact on any given customer or customer class, but it argued that the cost caps in the proposed rule would result in inadequate funding for the util-

ities to meet future demand reduction goals. It stated that the members of EUMMOT are generally indifferent as to whether caps are applied based on customer impact or total program costs. EUMMOT noted that any cost caps must be set at levels that are high enough to ensure they do not become an impediment to a utility's ability to meet higher demand goals. Caps could potentially be exceeded for reasons that have nothing to do with energy efficiency budgets-for example, a change in cost allocation or fluctuations in billing units due to the weather or the impact of economic conditions upon utility sales. It also noted that class-specific caps could have an effect on the programs offered to specific customer classes.

Entergy opposed the cost cap because it would limit funds that utilities will need in order to achieve the proposed expanded energy efficiency goals in later years. The Itron Study indicated that to achieve a 50% savings threshold, at least 600% of the 2010 budget would needed, whereas the proposed cap is around 300% of the 2010 budget. Entergy stated that for 2014 a budget of $44.734 million would be required to achieve its goal, but with the proposed budget caps, it could only spend $31.8 million. Entergy stated even if more-achievable goals are approved by the commission, budget caps should not be a part of the proposed rule, arguing that the utility's annual EECRF filings are the appropriate place to establish a utility's budget. The EECRF proceedings provide for actual goals and the costs of achieving the goals and can be reviewed on a utility-by-utility basis.

CLEAResult stated that a cost cap based on customer impact considers a narrow range of inputs and does not serve the public well in establishing long-term energy policy, since customer impact looks only at the cost to a particular customer on a monthly or annual basis and ignores the other economic realities of fuel costs. CLEAResult noted that the primary reason that electricity costs are lower today than in 2005 is due to the low cost of natural gas which serves as the fuel for 65% of the electricity generation in Texas. As the nation, and to a lesser extent Texas, was subject to a severe economic contraction in 2008 and 2009, this reduced the demand for natural gas and placed downward pressure on prices. As the nation emerges from this bitter economic situation, energy consumption will rise and this will place upward pressure on natural gas prices and, as a result, prices of other commodities, such as coal and oil, will rise. This will also have a severe impact on ratepayers, and any discussion of cost caps should take these matters into consideration. CLEAResult believed a more effective method of managing the cost of energy impacts for ratepayers is reducing energy use through the participation in the utilities energy efficiency programs. CLEAResult encouraged broader, more comprehensive programs as a method of limiting the cost impacts for customers. CLEAResult concluded that the small economic cost of expanding energy efficiency in Texas will result in public and economic benefits to both those directly participating in energy efficiency programs and, ultimately, to all business and residential ratepayers.

The REP Coalition supported a cost cap based on customer impact rather than on the program budget. The REP Coalition submitted that a $1 per MWh cost cap for residential and commercial customers is a critical component in the commission's determination of the amount of energy efficiency program costs that utilities should be allowed to recover. A $1 per MWh cost cap would serve as an appropriate marker for recoverable costs and would ensure that customers and REPs can determine the maximum financial impact that could occur, while providing an incentive to utilities to maximize the effectiveness of each program dollar spent on achieving the rule's socioeconomic goals. The cost cap in the current version of §25.181 has been successful in maintaining the impact to residential customers at below $1 per MWh, while providing utilities with adequate funding to not only meet, but also far exceed their energy efficiency goals. From a REP perspective, it is important to establish clear-cut boundaries on how much retail customers will pay for these programs. The REP Coalition noted the need for transparency; minimizing the escalation of TDSP charges because REPs bear the brunt of customer dissatisfaction and frustration from any increases in retail bills, whether such increases are due to increases in regulated utility rates or other wholesale costs. Therefore, REPs would prefer to limit increases whenever possible.

CenterPoint agreed with adoption of a cost cap based on customer impact, so long as that cost cap provides CenterPoint an adequate level of funding to meet the commission's goals and attain a performance bonus. That is, any cost cap, whether based on total program costs or customer impact, must be sufficient to allow CenterPoint to: (1) maintain the continuity of its standard offer and market transformation programs, (2) respond to changing market conditions and customer needs, (3) position CenterPoint to meet future research and development and pilot program investments, (4) increase programs that are particularly cost-effective and can be relied upon to meet future energy efficiency goals, and (5) give CenterPoint the opportunity to reach the maximum performance incentive in any given year. It agreed with other commenters that if the commission adopts the proposed demand reduction goals, the total program costs caps in the proposed rule would result in revenue that would be inadequate. Similarly, any cost cap based on customer impact that is set to recover the same level of expense would also be too low. NAESCO agreed with the utilities that the energy efficiency program budgets should be set at levels that would allow them to achieve the higher goals. NAESCO concluded that the constraint on budgets should be the cost effectiveness of the programs, not an arbitrary per customer or total budget number.

Tx HERO stated that, obviously, the commission should and will consider the impact of total program costs to customers, but the emphasis should be on maximizing benefits of and opportunities for improved efficiency and new energy services while maintaining reliability. Thus, the commission should be guided by its judgment of the total program costs that are reasonable and necessary to support a market that drives technology improvements. TLSC-Tx ROSE stated that the commission should not establish any new cost caps. Instead, the most effective and efficient method consistent with the public interest would be to set budgets on a utility-by-utility basis as part of a contested case proceeding where consumers and their representatives can review and evaluate the reasonableness and efficiency of proposed energy efficiency programs. The current procedures essentially lock the public out of the process of approving the energy efficiency plans before they are implemented. The commission's position has been to deny public participation in reviewing utility energy efficiency plans and reports before the plans are implemented. There has been at least one attempt by the public to initiate a proceeding to evaluate and shape programs for the public good before implementation but that attempt was denied. TLSC-Tx ROSE noted that there is no opportunity to question the reasonableness or effectiveness of the plans or to verify the information in the utility reports.

Consequently, the current procedures establish rates to be paid and bonuses to be calculated without public input into whether the plan is deficient or creates inefficient or ineffective programs. TLSC-Tx ROSE expressed the view that this process adversely

affects programs available to low income consumers. In almost all of the most recent utility EECRF filings substantial budget funds scheduled for the targeted weatherization programs were not spent on these programs but shifted to other programs. The result for low income consumers was that many of the most financially fragile consumers did not obtain the benefits of this program. TLSC-Tx ROSE argued that while the legislature did set certain budget parameters for the energy efficiency program, it did not establish ever increasing budget caps, as the proposed amendments would do.

In reply comments, CORE argued that the commission may not eliminate cost caps without violating PURA §39.905, which expressly provides for such caps on program costs.

Walmart supported the cost cap concept, but it took no position on whether a cap based on customer impact is superior to the current cap based on total program costs. Walmart noted that large commercial customers that engage in energy efficiency on their own can meaningfully assist in meeting energy savings goals without tapping into funds collected from customers through an EECRF. Walmart included in its comments a proposal to encourage such investment in energy efficiency that would help utilities meet their energy savings goals, without increasing the program costs that are collected from ratepayers.

Commission Response

The commission appreciates the comments on this question. The commission has considered the comments in connection with the adoption of amendments to subsection (f), relating to cost recovery.

A number of commenters submitted statements that supported the proposed amendments, including the individuals filing comments in connection with the Texas Campaign for the Environment, the Historical Westside Association, Port Arthur ISD, Representative Joe Deshotel, Dwight Wagner, Joe Johnson, Kirk Vital, the William C. Velasquez Institute, Tx CHP, Efficiency Texas, McKinstry Company, and KGRA Energy. In addition, the commission received emails from about 50 other individual supporting an energy efficiency goal of one percent of peak demand and greater transparency in the energy efficiency program.

Section 25.181(a): Purpose

EUMMOT proposed modifying §25.181(a) and urged the commission to retain some latitude to establish lower goals for specific utilities if a utility demonstrates that a lower goal would be appropriate, based on market conditions and other factors that might impact the utility's ability to meet a goal.

Commission Response

The commission agrees with EUMMOT that the commission should be able to establish lower goals or provide higher caps for a utility in certain cases. The commission modifies the amendment in subsection (e) to allow the commission to establish lower goals or higher caps if the utility demonstrates that compliance with the goal or cap is not reasonably possible and that good cause supports the lower goal or higher cap.

Application

Section 25.181(b): Application

No changes to subsection (b) were proposed by the commission.

Definitions

Section 25.181(c): Definitions

EPE supported the proposed changes to subsection (c) and proposed adding a definition for "pilot program" and clarifying whether "peak demand" in §25.181(c)(24) refers to Texas-jurisdictional retail peak demand or total company peak demand.

Tx HERO recommended deleting "incentive' from the definition of "energy efficiency incentive program."

CenterPoint proposed the addition of a new definition for lost revenues that would treat them as a program cost for purposes of the EECRF, and would calculate lost revenues as an amount equal to the forecasted reduction in revenues due to the reduction in kWh sales and demand resulting from energy efficiency programs, by multiplying the forecasted deemed savings reduction in kWh sales and demand by the applicable customer class rates.

ClimateMaster proposed modifying the definition of "renewable demand side management technologies." ClimateMaster noted certain renewable DSM measures, such as solar water heaters, are considered "generation offset technologies" under §25.173(c) of this title (relating to Goal for Renewable Energy), rather than "renewable energy resources" due to the fact that they neither generate electricity nor "exclusively" rely on renewable sources. A solar water heater does not generate electricity, but the amount of energy it offsets can be quantified and is eligible for renewable energy generation credits in certain circumstances. Additionally, a solar water heater requires some electricity to function properly so it does not "exclusively" rely on renewable sources, but the use of a renewable energy to preheat water significantly reduces the electric demand of the device as compared to a conventional water heater, so it should qualify it as a renewable DSM technology.

ClimateMaster proposed addition of a definition for "generation offset technology" to properly account for all of the renewable DSM technologies that should be eligible for incentives. It recommended that the term be defined by reference to the definition in §25.173(c).

Commission Response

The commission does not adopt EPE's recommendation to add a definition for "pilot program." The commission believes that the concept of a pilot program is well understood, and participants in the EEIP have worked to develop a template for a pilot program that would call for the utilities to report the results of these programs annually. The commission adopts EPE's recommendation to specify that "peak demand" under §25.181(c)(24) refers to Texas-jurisdictional retail peak demand. This amendment clarifies that a utility's energy efficiency requirements under this rule are based not on the utility's total peak demand, which may include load outside of Texas and wholesale load, but exclusively on Texas retail load.

The commission does not adopt Tx HERO's recommendation to delete "incentive" from the definition of "energy efficiency incentive program," because the term "incentive" differentiates this program from a "rebate" program. The commission does not adopt CenterPoint's recommendation to add a new definition for lost revenues. For the reasons explained in the response to the comments on question 1, the commission is not adopting a lost revenue mechanism, so the definition is unnecessary. The commission is not adopting the new definition proposed by ClimateMaster for renewable DSM technologies including customer-sited solar photovoltaic panels, solar water heaters, and geothermal heat pumps. Renewable technologies are already

permissible under the rule, with appropriate limits, and therefore the proposed new definition is not necessary.

Cost-effectiveness

Section 25.181(d): Cost-effectiveness standard

CORE, EUMMOT, TIEC, and the REP Coalition recommended that a target date certain be established for updating avoided cost values each year for revisions to the avoided costs of capacity and energy under subsection (d). CORE recommended posting revisions in a project specified in the rule, or posted on a website to permit stakeholders to timely file challenges. The REP Coalition recommended posting notification of the revisions on or before February 1, and EUMMOT recommended posting notification of the revisions on or before March 15 on a webpage designed for this purpose. TIEC stated that posting the revised cost of capacity and energy on a webpage does not constitute sufficient notice and would raise due process concerns. TIEC concluded the commission should publish *Texas Register* notice of the revised factors to ensure that parties have a full and fair opportunity to challenge the revisions, if necessary.

Commission Response

The comments of CORE, EUMMOT, TIEC, and the REP Coalition imply the need for notification of a target date for making changes in avoided capacity and energy costs. The commission currently requires the utilities to notify the energy efficiency service companies (ESCOs) of changes in incentive levels, because the programs depend on their participation, and the incentive levels are clearly a matter of importance to them. The incentives should be set at a level that keeps the ESCOs engaged in the utility energy efficiency programs. The commission is adopting a requirement that notification of changes be posted no later than March 15th on a webpage designed for this purpose. The commission is not adopting TIEC's proposal to publish notification of the revisions in the *Texas Register.* The commission believes that the web posting will provide better notice to persons who are interested in the energy efficiency program than notice in the *Texas Register.*

Texas Efficiency, Tx HERO and the Sierra Club supported the proposed mechanisms to determine the avoided cost of capacity and energy. The Sierra Club contended that most energy efficiency measures will cost significantly less than these avoided costs and that the proposed avoided costs are more realistic than the current calculation under the program. Sierra Club hoped these more liberal avoided costs calculations would encourage utilities to try new programs while the overall cost of the program remains low.

EPE supported the avoided cost of capacity, contingent upon the commission retaining the provisions in subsection (d)(2)(B) of the proposed rule that permit non-ERCOT utilities to petition the commission to use a different avoided cost of capacity. EPE did not support the proposed avoided cost of energy, noting that the calculation applies to ERCOT utilities, and EPE is not in ERCOT.

Cities proposed revising the method for establishing the annual avoided cost of capacity and energy under subsections (d)(2) and (3), as these provisions have become more significant in affecting rates than when the initial rule was adopted in 2001. Cities noted that the proposed rule also increases the cap on bonus payments, and that the bonus paid to utilities includes the summation of avoided energy and capacity costs, increasing the significance of the avoided cost calculation. Cities urged the commission to ensure greater accuracy in the development of avoided costs in order to avoid harm to ratepayers by adoption of programs which may not be cost-effective and through payments of excessive bonuses to utilities.

Cities and CORE recommended revising the avoided capacity costs under subsection (d)(2) to include a reasonable economic carrying charge of 8.5% and a specified fixed charge rate of 10.4% to the EIA combustion turbine investment. In their view, this method is more consistent with expected recovery of peaking capacity in competitive markets and could be used to escalate fixed charges for energy efficiency programs with differing lives, thereby recognizing the higher avoided costs associated with programs which have a longer duration. TIEC agreed with Cities and CORE that the proposed avoided capacity costs and energy costs are too high, conceptually incorrect, and that the rule provide no basis for the excessive increases that are unsupported by current market prices. TIEC noted that an inflated avoided cost would result in an incorrect evaluation of the cost effectiveness of the programs; result in utilities spending significant sums on ineffective programs; and the utilities would not achieve the demand reduction goals. TIEC stated that it is not clear that any increases are warranted, and decreases may be necessary in consideration of the current energy and demand costs in ERCOT. It asserted the commission should ensure that the avoided cost calculations reflect current, accurate cost levels, and the use of energy and capacity costs that existed in 2007 would be wholly incorrect and inconsistent with the statutory requirement of cost-effectiveness. The Policy Foundation and TLSC-Tx ROSE also opposed the proposed increases in avoided cost of capacity and energy. TLSC-Tx ROSE stated that the savings do not support an economical increase in the program and opposed the proposed increase in the avoided energy and capacity costs.

Cities and CORE recommended that avoided energy costs under subsection (d)(3) should be based on the fuel expense associated with the combustion turbine generation which is used to determine avoided capacity costs. Cities and CORE stated that EIA indicates a 10,800 heat rate for the combustion turbine, which implies an energy price of $43/MWh based on the 2009 Henry Hub gas price, or $48/MWh using the EIA forecasted 2010 Henry Hub gas price of $4.58. They suggested this method would be simpler and more straightforward, would result in an avoided energy cost consistent with the method used to develop the avoided capacity cost, and would prevent double counting the capacity component when the total avoided costs are tabulated.

Cities and CORE also argued that the proposed $100/MWh avoided energy cost is in excess of energy prices in the ERCOT market, as the 2006-2008 balancing energy price in ERCOT was $63/MWh. Cities and CORE noted that ERCOT is an energy-only market, and capacity costs are recovered through the market clearing price of energy. Thus, it is not an appropriate methodology to use the average ERCOT balancing energy price for all hours during the peak period for the previous two years as proposed. Cities and CORE claimed the proposal to double the avoided energy cost is ironic because energy prices declined significantly last year, with gas prices falling to their lowest level since 2002. Cities and CORE concluded because both capacity and energy costs are recovered through ERCOT hourly energy prices, the energy price is appropriate only for estimating *combined* avoided capacity and energy costs. In addition, confining avoiding energy costs only to peak hours is unrealistic because energy efficiency measures, such as lighting, produce avoided energy costs in *both* peak and off-peak periods.

The REP Coalition recommended that the cost-effectiveness standard in subsection (d)(2) should be modified to state that the commission may establish different avoided costs consistent with the parameters set forth in the rule. It agreed that the avoided cost of capacity should be based on information reported by the Energy Information Administration (EIA) in the Cost and Performance Characteristics of New Central Station Electricity Generating Technologies, as reported in EIA's *Annual Energy Outlook* for the base overnight cost of a new conventional combustion turbine, but it recommended that this capacity cost apply to all electric utilities, unless the commission establishes a different cost of capacity. The REP Coalition similarly recommended that subsection (d)(3) be modified to establish the avoided cost of energy at $0.10/kWh for all electric utilities, unless the commission establishes a different cost of energy.

Texas Efficiency stated that its analysis of all program costs showed these programs are highly cost effective and at the current 5.5 cents per kWh, $80 per kW, a ten year life, and a 10% discount rate, the ratio of avoided costs to actual costs over the life of the program since its inception in 2002 has been about 3.1:1. It noted that the ratio for 2008 was also 3.1:1, which suggested that the exemption of the transmission-level industrial customers in 2008 had little impact on the overall cost effectiveness of the energy efficiency programs. Texas Efficiency stated that a seven year life yields a benefit-to-cost ratio of 2.5 to 1, which is clear evidence that the current programs are cost effective. Economists would encourage the state to invest up to the point that marginal costs just equal marginal returns, in order to optimize total benefits to all customers. Efficiency Texas suggested that by investing $1 billion in energy efficiency over the next several years, even if the cost effectiveness of programs declines to 2:1, rate payers will have avoided $2 billion in power costs, based on the commission's own, conservative avoided cost estimates under the current rule. Efficiency Texas disagreed with the utilities' case that the costs of acquiring efficiency will double under the proposed rule. Texas Efficiency stated that cost will no doubt increase somewhat as program goals increase, and increased incentives may be required to increase the penetration of emerging new technologies, but that increased efficiency investments will save customers money compared to doing nothing, as long as the programs are cost effective, as required by PURA §39.905.

EPE and Entergy opposed the use of an arbitrary calculation of the avoided cost of energy as it does not reflect the utilities' actual costs. They noted these utilities are not in the ERCOT region, and there is no correlation between the market clearing price for balancing energy in ERCOT and their avoided cost of energy. Entergy further stated that it is impractical to force one single set of avoided capacity and energy numbers, as they operate in discrete markets that each have distinct avoided energy costs based on different power prices, emission allowance costs, and natural gas costs. Entergy suggested the use of modified formulae for the non-ERCOT utilities, due to these differences in market conditions. Entergy urged the commission to allow non-ERCOT utilities to seek good cause exceptions or permit other methodologies for calculating avoided costs, because of the unique assumptions and market conditions that utilities encounter. Entergy believed that using a pre-defined and transparent avoided capacity and energy cost calculation methodology would be a flexible, accurate, and unambiguous means for estimating avoided costs to evaluate energy efficiency programs. Entergy noted that it is a part of a multi-state system that operates according to the principles of security-constrained economic dispatch, and thus flexibility is needed for them to administer the energy efficiency programs in a cost-effective manner.

Cities foresaw several problems with Entergy's avoided cost proposal to allow utility-specific avoided capacity cost calculations for non-ERCOT utilities. Cities opposed the proposal because Entergy's corporate resource planning assumptions are highly sensitive and confidential, and its generation forecasts are based on confidential discussions with vendors. Cities argued that using avoided capacity costs based on confidential assumptions and data would be inappropriate. Cities stated that the use of utility-specific avoided capacity cost calculations, as opposed to a single generic calculation, would increase the potential for controversy and dispute in EECRF proceedings.

Cities took issue with the details of Entergy's proposal for calculating avoided costs for including such factors as capacity reserves, line losses and transmission-distribution costs, which the commission has chosen to exclude from the calculation in the past. Cities objected to Entergy's avoided cost of energy proposal, noting that it is wholly inappropriate to use the utilities' forecasted wholesale prices as a measure of the avoided cost of energy as the methodologies for these forecasts are generally confidential and highly sensitive information. Cities agreed with the comments of others that the energy efficiency program currently lacks transparency and utilizing utilities' highly sensitive forecasts for the cost of energy would only exacerbate the existing transparency problem. Cities suggested using current technology heat rates and gas prices to determine avoided energy costs, which would reduce potential controversy over long term energy forecasts.

The REP Coalition opposed Entergy and Cities' proposed alternative methodologies to calculate the avoided cost of energy. The REP Coalition disagreed with Cities' proposed MCPE-based method to calculate avoided energy cost with respect to utilities located within ERCOT.

EUMMOT responded to Cities' argument that the avoided capacity cost is overstated and that the avoided energy cost estimate is too high. EUMMOT concluded there are many different approaches to calculating avoided capacity costs, but the approach that has been used by the commission over the past ten years has produced reasonable results, and updates to the current approach are generally appropriate. EUMMOT supported provisions of the proposed rule that would permit a non-ERCOT utility to propose avoided costs that may differ from those calculated for the ERCOT utilities. This would allow differences in costs among power regions to be appropriately recognized.

Commission Response

The commission recognizes that the avoided costs in the proposed rule are higher than today's electricity prices. The avoided costs in the proposed rule were based on the peak-hour energy prices in the ERCOT balancing energy market in 2008 and 2009. The commission agrees with several of the commenters that the avoided energy costs in the proposed rule are too high. Prices in 2008 were higher than prior or subsequent periods, and the commission concludes that the avoided costs being adopted in this rule should not include 2008 prices. Accordingly, the commission is setting the initial avoided energy price based on 2009 peak prices only. ERCOT does not operate a long-term capacity market. ERCOT does operate various daily capacity markets (regulation, responsive reserve, non-spinning reserve, and replacement reserve services) and obtains other services from resources (voltage support, black start, reliability must-run,

out-of-merit capacity, and out-of-merit energy services). As a result, resources operating in ERCOT have the opportunity to obtain payments from a number of different services from ERCOT in addition to balancing energy services, many of which can be provided only when a resource is not providing balancing energy service. The revenues obtained by resources from the provision of these various services can vary considerably from resource to resource. In addition, energy efficiency measures can reduce transmission and distribution costs and line losses, which supply-side resources do not. These reductions in costs can vary considerably based on the particular circumstances. For this reason, the rule has relied on an Energy Information Administration estimate of capacity costs for the avoided capacity cost and ERCOT market-based prices for the avoided energy costs. The commission believes that this approach is reasonably accurate and is transparent and straight-forward. The commission believes that it is important to provide separate incentives for capacity and energy in the energy efficiency program, to provide adequate inducement for energy efficiency service providers to operate programs that save both capacity and energy. Both kinds of savings have a value for society and customers. CORE proposed that a formula be used for avoided energy costs, based on the expected cost of gas times the heat rate of a combustion turbine. The commission believes that this avoided cost is not consistent with the fact that energy prices in the ERCOT region are determined by competitive forces and may be higher or lower than the formula proposed by CORE. The avoided cost being adopted by the commission should provide higher avoided costs and the possibility of higher incentives for energy efficiency measures, when generation resources are in short supply and energy prices are high, and will provide lower avoided costs and lower incentives for energy efficiency measures, when the supply of generation resources is adequate and energy prices are low. The commission concludes that in this market environment, the price response in the rule that is being adopted is appropriate. The rule that is being adopted makes it clear that the avoided energy costs will be based on the prices in the ERCOT real-time market, unless it approves an alternate calculation of the avoided cost of energy.

The commission concludes that there is value in transparency and that avoided capacity and energy costs should be based on information that is readily accessible to persons who are interested in the energy efficiency program. For this reason, it does not agree with Entergy's request for a broad "good cause" exception that would permit the utilities to petition the commission for approval of alternative methodologies to calculate avoided costs. At the same time, the accuracy of an avoided cost calculation is also important. The commission modifies the proposed rule to permit a non-ERCOT utility to apply for an alternative calculation of the avoided cost of capacity, based on the costs of a resource acquisition or power-purchase agreement that the utility has fully disclosed in a public filing at the commission, or an alternative calculation of the avoided cost of energy, based on market-based avoided costs, if the utility operates in a region with an energy market for which prices are reported publicly. If the utility does not operate in such a region, the rule will permit it to use an avoided energy cost based on the expected heat rate of the gas-turbine generating technology specified in the rule, multiplied by a publicly reported cost of natural gas. The commission believes that such an alternative provides adequate transparency, while giving utilities an option that may better reflect their avoided costs.

The commission does not agree with Cities and CORE that confining avoided energy costs only to peak hours is unrealistic because energy efficiency measures, such as lighting, produce avoided energy costs in *both* peak and off-peak periods. It is true that some measures, such as lighting, provide energy savings in a large number of off-peak hours. On the other hand, because the rule establishes goals for reducing demand in peak hours, many of the measures that are used to meet the goals, such as measures that address air-conditioning load, will provide most of their energy savings during peak hours. To provide incentives for many of the measures that address peak consumption, higher avoided costs that reflect peak energy prices are likely to be needed. Accordingly, the commission believes that it is appropriate to use peak-hour energy costs as the avoided cost of energy.

The commission has made several proposed modifications to subsection (d) to provide more clarity to this subsection.

OPC argued that, in order to assess and evaluate the cost-effectiveness of the energy efficiency programs, the bonuses that the utilities are eligible to earn must be considered under the cost effectiveness standard. OPC noted that in the 2009 EECRF cases, each utility was awarded a bonus. OPC stated that it has been effective in the past to measure the cost effectiveness of a program by comparing the cost of the program (which includes the cost of incentives, measurement and verification, and the actual or allocated research and development and administrative costs) to the benefits of the program (which include the value of the avoided costs), but as the bonuses increase, the accuracy of the standard decreases, and the impact of the bonuses would need to be considered. OPC, TLSC-Tx ROSE and CORE proposed that subsection (d)(1) be amended to require the bonus to be included as a program cost.

Commission Response

The commission agrees with OPC, TLSC-Tx ROSE, and CORE's recommendation to include the bonus in the program cost, for the purpose of applying the cap. The commission is concerned about the costs of achieving higher energy efficiency goals, and one of the things it has done to control the costs is to make the bonus subject to the costs caps that it is adopting. The commission also notes that the higher goals in the rule will result in increased revenue losses, which the commission is not addressing at this time. While the bonus is not designed to offset such losses, it does provide a successful utility a means of offsetting revenue losses associated with the energy efficiency program.

TLSC-Tx ROSE argued that the energy efficiency program has not resulted in an economical increase in energy efficiency for residential and low-income customers, due to increasing program costs without a guaranteed increase in energy savings and program benefits. They stated that, due to approved changes in the life of energy efficiency measures, the Energy Star Home incentive is now calculated based on a 23 year life, and that revisions to deemed savings for a retrofit air conditioner has been lowered from SEER 13.00 to SEER 12.44, both resulting in an increase in payment and with *no added energy efficiency benefit to the consumer or the utility.* TLSC-Tx ROSE referenced a 2006 study by Summit Blue that recommended programs to: (1) promote installation of cost-effective measures that produce high energy savings (kWh) but that are not being heavily pursued by sponsors; (2) allow different incentive levels for different measures within the same program; and (3) promote or require the installation of multiple measures at customer sites. They ar-

gued, however, that total incentive paid per measure should be capped and not exceed incentives paid in 2008 over a ten year useful life.

Commission Response

The program changes that TLSC-Tx ROSE addressed were made for valid reasons. The use of measure lives for calculating program benefits that reflect actual measure lives is a means of improving the accuracy of the calculation of benefits and permitting additional measures to be used in the energy efficiency program. Lowering the SEER for the air conditioner replacement program was based on a study that showed that many customers were replacing parts on air conditioners, so that the efficiency of the resulting equipment was lower than the federal standard for purchase of a new air conditioner. The commission believes that historical program costs are not necessarily indicative of the costs that may be expected in the future. The utilities have argued, in fact, that significantly higher costs will be required to achieve the proposed goals, because of the expected adoption of new building codes and appliance standards. Other commenters have noted that significant funding from the American Recovery and Reinvestment Act for energy efficiency may make it more difficult and expensive in the future for utilities to meet their goals. The commission made the change in the rule relating to measure lives when it last amended the rule, to permit additional measures to be used, in light of the higher goals that the Legislature had adopted. The commission concludes that it would not be conducive to meeting higher goals to reverse its prior decision on measure lives.

Utility Goals

Section 25.181(e): Annual energy efficiency goals

NAESCO, Tx HERO and the Sierra Club proposed higher goals than the goals in the proposed amendments to §25.181. The Sierra Club also proposed increasing the proposed capacity factor. NAESCO argued that much higher goals have already been achieved in other states with new programs in states that have far less utility energy efficiency program experience than Texas. Tx HERO strongly supported the increases in annual energy efficiency goals and the inclusion of a transition to a new metric based on total demand in lieu of growth in demand, on the basis that it would provide utilities and the efficiency market a more dependable basis for planning.

Efficiency Texas submitted the utilities could meet the proposed increased goals. It argued that stimulus funds, building codes and new appliance standards will not have an appreciable impact on the utilities' ability to ramp up energy efficiency efforts for the foreseeable future, because of the large stock of existing inefficient housing and commercial buildings. Efficiency Texas claimed that other states have pursued far more aggressive goals for an extended period, which suggests that Texas utilities can achieve elevated goals. Efficiency Texas urged the commission to adopt the proposed transition to a goal based on a percentage of total load, as a more stable and predictable baseline. Efficiency Texas agreed with EUMMOT that the goals proposed are relatively aggressive and recognized the challenges faced by the utilities in meeting the proposed goals. In a spirit of collaboration, it proposed a compromise that moved the 1.0% goal to 2015, if the commission would also modify the utility plans for 2011 and 2012 to ramp the current programs up more quickly, rather than allowing the programs to languish at their current levels for two more years.

EUMMOT, EPE and Entergy concluded that not all of the utilities could meet the proposed increased goals. The Policy Foundation and TLSC-Tx ROSE stated the goals should not increase as the energy efficiency program was not cost-effective. EUMMOT recommended that the goal increase to 30% of load growth to avoid the price tag associated with the more aggressive, less feasible proposals. EUMMOT agreed with Entergy, the REP Coalition, and Cities that the commission must weigh the benefits of expanded energy efficiency programs against the rate increases that would impact consumers with adoption of the proposed aggressive goals.

EUMMOT questioned aggressively raising goals when many of the energy efficiency programs are under-subscribed. EUMMOT noted that Efficiency Texas and HEB complained that insufficient incentive funds are available and argued that greater funding is necessary to ensure that all qualifying projects can benefit from these utility programs. According to EUMMOT, the available incentive funds typically exceed the requests for standard offer program incentives, and only in several popular programs offered by some of the larger utilities are incentive funds reserved very quickly. However, this is not true for the majority of the programs. EUMMOT concluded that a driving force for those who want to significantly increase the energy efficiency goals is the misconception that incentive funds in today's programs are reserved by project sponsors within seconds of being offered. EUMMOT stated that some utilities have stirred competition among service providers to complete energy efficiency projects in a timely fashion by paying incentives on a first-invoiced basis, which is a departure from reserving funds for programs. EUMMOT stated that at the end of the program years 2006-2008, the commercial programs had more than $17.3 million remaining, or nearly 18.6% of the commercial program budgets; residential programs had more than $8.6 million remaining, or 10.5% of the program budgets; and the Hard-to-Reach programs had just under $14.5 million remaining, or 15.8% percent of the program budgets.

EUMMOT said they cannot support a demand reduction of more than 30% of load growth, which is a middle ground to those arguing for much higher goals. EUMMOT stated that, as the energy efficiency goals continue to grow, so will the adverse financial impacts of energy efficiency achievements, absent a regulatory mechanism such as a lost revenue adjustment mechanism or higher bonuses than proposed in the rule. EUMMOT noted that adverse financial impacts have become a realistic and serious concern and the utilities alone support the implementation of a regulatory mechanism to limit the adverse financial impact.

EUMMOT noted that ACEEE, the Sierra Club, Efficiency Texas, and CLEAResult Consulting recommend more aggressive goals and yet have said the least about the likely impact of such goals upon consumers' electricity rates. EUMMOT claimed there is no free lunch and if higher goals are established, higher cost must inevitably be recovered from ratepayers through rates. EUMMOT noted that several commenters voiced opposition to paying for the increased costs of higher energy efficiency goals, and, yet, they still argued in favor of the higher goals. EUMMOT stressed that the only way to constrain the rate impacts of these programs is to limit the demand reduction goals to moderate and achievable levels.

The Policy Foundation questioned whether the commission could adopt the increase in the goals without contravening specific statutory language or imposing burdens, conditions, or restrictions in excess of or inconsistent with the relevant

statutory provisions. The Policy Foundation stated that while little can be done administratively to reduce the negative impact of the current energy efficiency goals, the commission should not increase the economic costs of this program by adopting this proposed increase in the goals. The Policy Foundation stated that the commission certainly has significant authority to adopt rules to implement the program, but caution should be exercised in extending that authority to the proposed increase in the efficiency goals. The Policy Foundation stated that the utilities reduce their revenues by reducing their overall demand and are mostly compensated for the expenses of these programs. However, the utilities have a burden beyond the statutory provisions of the current 20 percent goal, because they have no means for increasing demand and the associated revenues except through the commission. The Policy Foundation concluded it is doubtful that the current language of the statute allows the commission to adopt goals beyond the specific statutory goal of 20 percent. The Policy Foundation contended that the energy efficiency programs were not cost effective and therefore the commission should not increase the economic costs of this program by adopting the proposed increase in the goals. It stated that, under the §25.181(d) cost-effectiveness standard, an energy efficiency program is deemed to be cost-effective if the cost of the program to the utility is less than or equal to the benefits of the program. The Policy Foundation stated that since the agency cannot accurately determine at this point whether or not the programs under this rule are actually cost effective, the proposed increases should not be adopted.

TLSC-Tx ROSE proposed that no action be taken by the commission, unless better program controls are in place to raise program efficiency standards and to prevent increasing program costs. TLSC-Tx ROSE stated that there are no measurable energy efficiency benefits, because of the adoption of more liberal deemed savings standards. TLSC-Tx ROSE expressed concern that the savings that are required to be achieved through programs for hard-to-reach customers (defined as household income up to 200% of the federal poverty guideline) remain unchanged at 5% of the utility's total demand reduction goal. TLSC-Tx ROSE cited statistics from the Texas Department of Housing and Community Affairs (TDHCA) that on any given day there are 14,000 households on weatherization waiting lists with close to three million households meeting the income eligibility requirements for the program. TLSC-Tx ROSE claimed the $326 million from the U.S. Department of Energy in stimulus funds being made available can weatherize about 70,000 homes and will only assist about 0.3% of the eligible population.

Entergy opposed the increased goal of a 50% increase in peak demand savings by 2015 stating it is not reasonable and suggested that a 30% increase by 2015 is the maximum that should be implemented. EPE opposed increases to the peak demand savings goals for electric utilities with peak demand of less than 3,000 MW. EPE stated that the increased goals impose an unrealistic and impracticable expectation upon some utilities to meet the goals, without adequate cost recovery. EPE stated that the median family income in El Paso is approximately $36,500, which is 31% below the state average and limits the number of residential and small commercial customers with sufficient disposable income to install energy efficiency measures in their homes or businesses. EPE further stated more than 85% of the homes in El Paso use energy-efficient, cost-effective evaporative cooling systems, which use only about a quarter of the energy used by a refrigerated air conditioning (AC) system. Therefore, many of EPE's customers do not need to install an expensive new energy efficient refrigerated AC system; the building shell and duct efficiency improvements that constitute the majority of residential efficiency savings produce little, if any, electricity savings in homes with evaporative cooling; and the addition of insulation also has little impact on electricity use in homes or businesses that use evaporative cooling. EPE noted the 2008 Itron study's two impediments to achieving the aggressive new energy efficiency goals are that (1) there has been a shift in baseline energy usage because of higher codes and standards for energy efficiency measures, and (2) a number of recently enacted, well-funded federal and state programs will compete with traditional utility programs over the next several years, in particular the American Recovery and Reinvestment Act (ARRA) funds will depress savings that typically would have been captured through EPE's energy efficiency programs. EPE stated that two ARRA programs would be in direct competition with EPE's energy efficiency programs, the $288 million received by TDHCA to weatherize 40,000 low-income homes and the ARRA funds distributed through the State Energy Conservation Office.

Commission Response

The commission believes the progressively higher goals it is adopting are appropriate and are consistent with its authority. In recognition of the impact of the higher goals on program costs and customers' bills, however, it is adopting lower goals than those that it proposed. PURA §39.905 establishes a goal of reducing growth in demand in 2009 by at least 20%, but does not set out specific goals for years after 2009. It does direct the commission to provide oversight of the energy efficiency program and adopt rules and procedures to ensure that utilities meet the goals of §39.905. The commission concludes that PURA §§14.001, 36.052, and 39.905 permit it to adopt specific demand goals for years subsequent to 2009, which may be higher than the 2009 goals. Higher goals are achievable, they provide significant benefits, and they were generally supported by legislators in the last legislative session. Several commenters have pointed out that other states have adopted higher goals than the current Texas goals, and incremental increases in the goals have resulted in the large utilities successfully meeting the goals. Increasing the demand and energy savings will reduce energy costs for program participants and air emissions from power plants. It is clear that the program has a cost that is borne by all customers and particularly by customers that do not participate in the program and obtain the reductions in consumption that efficiency measures achieve. The commission is balancing the benefits of the program with the costs to electricity customers in adopting higher goals. The commission is adopting a goal of 20% of growth in demand for 2010 and 2011, 25% of growth in demand for 2012, and 30% of growth in demand for 2013 and subsequent years. The rule that was published for comment included goals based on total peak demand, which the commission is not adopting. The goal in the proposed rule that was based on peak demand would represent a higher goal than the demand growth goal that the commission is adopting, and the commission considers that the appropriate balance of the competing interests would be to not adopt such a goal. The current rule includes a ratchet provision, so that if demand growth ceases, a utility's prior goal for demand savings (in megawatts) would not be reduced. The commission is retaining this ratchet in the rule that is being adopted.

The commission agrees with EPE that homes with evaporative cooling do not benefit from a weatherization program designed for homes with central air conditioning. In fact the commission

has previously required a separate template for climates with evaporative cooling. The commission believes that opportunities exist for EPE to meet the goals through installation of technologies other than central air conditioning and weatherization. In addition the commission has established a mechanism under subsection (e) for a utility to request a lower goal or a higher cost cap to meet the goal.

TREIA, Sierra Club and Tx HERO supported raising the capacity factor from 20% to 25%. Sierra Club stated that reducing peak demand will lower peak emissions and may prevent the need for additional generation, but reducing energy use will have greater benefits in terms of overall emissions, while saving consumers money. It argued that reducing overall energy demand is of greater importance. Sierra Club supported raising the capacity factor to 30% or even 35% and understands that for some utilities achieving these greater energy savings goals will be challenging. Sierra Club concluded that most utilities are already achieving a 25% capacity factor and, therefore, the commission should consider raising the capacity factor to 25% in 2012 and 2013 and to 30% in 2014. Sierra Club recommended establishing separate programs: a demand response program to reduce peak demand and an energy efficiency program to reduce energy use.

The Cities opposed the increase in the capacity factor for energy savings in the proposed amendment. Cities stated that the indirect effect of increasing the capacity factor would be to raise avoided energy costs and potentially increase the bonuses paid to utilities. Cities argued that the proposed increase in the capacity factor is unsupported by any evidence corresponding to changes in the types of programs which utilities should undertake, and that energy efficiency measures undertaken by utilities should be prioritized on the basis of cost effectiveness.

Commission Response

Increasing the capacity factor may increase the cost of the program. Increasing the capacity factor means that the utilities must obtain more energy savings, relative to capacity savings, so they must adopt programs that include sufficient energy-saving measures. Energy savings have clear benefits to customers who participate in the program. Residential customers, for example, are not billed for demand, only for energy, so reductions in their energy consumption reduce their bills. Energy savings have environmental benefits as well, since most sources of energy result in air emissions. However, because of its concerns about the cost of the energy efficiency program, the commission is not adopting a higher capacity factor to calculate the energy savings goal. The capacity factor in the current rule appropriately balances the benefits of energy savings with the costs to ratepayers.

TREIA and Tx HERO supported either commission-established goals for distributed renewable technologies or allowing utilities to establish set asides for distributed renewable technologies, without being limited to a particular maximum or minimum.

ClimateMaster proposed modifications to subsection (e)(3)(F) regarding distributed renewable technologies to clarify there is not an imposition or an artificial cap on incentives for geothermal heat pumps, which can be considered distributed renewable technologies. ClimateMaster recommended amending subsection (e)(3)(F) to require a minimum set-aside for distributed renewable technologies of 20% and make it clear that geothermal heat pumps are included as distributed renewable technologies.

CenterPoint asserted one type of energy efficiency measure or class of customers should not be favored over others and that utilities should retain flexibility to administer energy efficiency programs best tailored to their service territories and customers. CenterPoint stated proposals from ClimateMaster, Solar Alliance, Efficiency Texas, Walmart, the REP Coalition and TLSC-Tx ROSE ask the commission to adopt a "one size fits all" approach to the advantage of specific efficiency measures and customer classes. CenterPoint submitted that §25.181 provides a flexible framework that should not be disturbed so as to benefit any particular set of energy efficiency measures or class of customers.

Demand Response Texas, Efficiency Texas, and the Sierra Club proposed that the commission adopt a separate goal for demand response programs. Efficiency Texas noted that under the current rules, the utilities are able to use one-year load management commitments as a means to exceed their minimum demand reduction goals and achieve their maximum allowable bonus for any given level of effort. Without a specific goal for demand response, the utilities will continue to contract for the same exact load response, from the same customers, in order to reach this bonus, rather than acquiring demand response commensurate with its full inherent potential. Efficiency Texas sought a demand response goal, so that utilities would provide additional demand response opportunities for their customers, thereby reducing peak demand and benefiting all consumers. TIEC opposed the demand response mandate proposed by these commenters. TIEC stated that demand response programs are best addressed through ERCOT and utility-specific cases, rather than through the utility-mandated energy efficiency programs. TIEC also opposed a specific goal for demand response programs for the following reasons: (1) ERCOT has the most successful market-based demand response ancillary service programs in the country; (2) the commission should be exceedingly wary of creating any utility-based programs that would undermine or interfere with the current ERCOT programs, which must meet strict reliability standards before they can be implemented; and (3) the energy-only market provides incentives directly to consumers to shift loads away from high-cost periods and these market mechanisms are extremely effective and yet require no subsidies or mandates to work.

TIEC argued that establishing a separate goal for demand response programs is contrary to PURA §39.905(a)(1), which requires utilities to provide energy efficiency programs in a "market-neutral, nondiscriminatory manner." TIEC further argued that PURA §39.905(c) requires that standard-offer programs be technology neutral, and to favor a particular type of program, such as demand response, would be inconsistent with PURA. CLEAResult disagreed with TIEC's argument that demand response programs that impact system reliability, such as load balancing and peak shedding, should be addressed through ERCOT.

Cities, the REP Coalition and EUMMOT also opposed the suggestion by Demand Response Texas for a set-aside for a demand response program that would interrupt or reduce usage at times of peak demand. Cities stated that large industrial customers are the primary beneficiaries of demand side response technology, and a set-aside for demand response technology would benefit only large industrial customers. Cities noted that currently, only residential and small commercial class customers fund the EECRF.

EUMMOT opposed set-asides and special programs for special interests. EUMMOT noted various proposals for set-asides and other program mandates: the REP Coalition wants at least 25% of program funds for retail electric providers; ClimateMas-

ter and SOLAR Alliance want an additional goal for renewable energy projects; Demand Response Texas and Efficiency Texas want a special goal for demand response, and Efficiency Texas wants standard offer programs to be favored over market transformation efforts. EUMMOT stated that more granular goals and set-asides impair the utility's flexibility to allocate funds to promising efficiency opportunities to ensure that overall goals are met, and that as additional goal constraints are placed upon the utilities, these programs would become more costly and risky to administer and would compete with each other and the existing goals. EUMMOT stated that the proposed increased energy goals conflict with the proposal from the demand response program providers seeking more load management, which provides little, if any, energy savings. EUMMOT further stated that demand response goals could lead to conflicts with ERCOT's Emergency Interruptible Load Service program. EUMMOT expressed concern that the establishment of minimum goals for renewable energy technologies could lead to a violation of any budget caps or rate impact caps and take funding away from other energy efficiency measures, given the relatively high cost of achieving savings through renewable energy projects.

EUMMOT also argued that the program managers at the utilities are in the best position to determine the need for these market transformation programs, based on considerations such as the potential savings within the utility's service area, the program's likely effectiveness, the size of the utility's overall budget, the utility's ability to develop and administer additional programs within its budget constraints, program costs, the economies of scale associated with running certain programs, and compatibility with the goals established by the commission.

Walmart agreed with TIEC that large customers have sufficient incentives to respond to demand, without participating in utility-sponsored programs. The Legislature recognized this and specifically exempted industrial customers from the energy efficiency mandate however, the commission applied the exemption only to transmission-voltage customers and many industrial customers have distribution-level load and are therefore subject to the current rule. This includes industrial customers that take service directly from a substation, who are essentially the same as transmission customers but for one additional transformation.

TIEC and Walmart discussed a proposal from Walmart that would permit any customer that consumes at least one million kWh annually and demonstrates that it has proactively implemented energy efficiency or demand-side management programs to opt out of the energy efficiency program. TIEC took no position on this proposal, but noted that under PURA industrial customers are not subject to the energy efficiency mandates, and need not "opt-out." If the commission decides to implement an opt-out for certain customers, it should ensure that it does not alter the position of the industrial customers taking service at transmission voltage. TIEC concluded the commission should amend the rule to ensure that all industrial customers are properly exempted from the energy efficiency programs in the rule, consistent with the Legislature's directive.

EUMMOT opposed Walmart's proposal to permit customers to opt out of the program. EUMMOT stated that Walmart's proposal is unnecessary and overly broad because PURA already provides an opt-out for industrial customers receiving service at transmission-level voltage. EUMMOT expressed concern that Walmart's proposal would significantly reduce the number of customers and revenue over which cost recovery would occur. EUMMOT noted that the commercial sector represents 37% of the state's projected achievable energy savings as shown in the Itron Market Potential Study and that the potential for energy efficiency from any one sector depends not just on the amount of available efficiency potential, but on the number of transactions that might be required to reach that potential. EUMMOT expressed concern that Walmart's opt-out proposal would place an inappropriate burden of the cost on those fewer customers who are not permitted to opt-out of participation. EUMMOT argued that Walmart has participated in several utilities' commercial standard offer programs for the past several years, and is currently participating in some 2010 programs and has reaped the benefits of participation. EUMMOT concluded that Walmart, therefore, should be prohibited from opting-out for at least the remaining life of measures for which it has received financial incentives.

GC-CEAC stated that the 2008 CHP report by Summit Blue Consulting estimated that an additional 13,400 MW of combined heat and power (CHP) technology could be economically developed in Texas by 2023 and, therefore, the commission should focus additional attention on CHP opportunities, including emerging small-scale CHP projects under 10 MW. Tx CHP also supported additional commission attention on CHP issues.

TLCS-TxROSE recommended a larger set-aside for programs implemented for the low-income customer class, and the REP Coalition recommended a set-aside for programs implemented for by the REPs.

Commission Response

The commission agrees with Cities, TIEC, Solar Alliance, Walmart, EUMMOT, and CenterPoint that the rule should continue to avoid set-asides for specific programs, such as those proposed by GC-CEAC, Demand Response Texas, Efficiency Texas, the Sierra Club, ClimateMaster, Solar Alliance, TLSC-Tx ROSE, and the REP Coalition. Set-asides for more expensive programs would make it more difficult for the utilities to meet their goal and to achieve a bonus, resulting in a less favorable revenue position for the utilities. The rule does not prohibit the utilities from adopting programs that address the measures supported by GC-CEAC Demand Response Texas, ClimateMaster, Solar Alliance, Walmart, TLSC-Tx ROSE, or members of the REP Coalition that would assist them in meeting their goals. The utilities are required to meet the overall energy efficiency goal and other goals in the rule, such as providing programs for all customer classes. They are therefore in the best position to select programs to meet the goals. In addition, the budget limits in the rule will necessarily limit the amount that utilities will have available to develop and operate programs and provide incentives for multiple technologies. Set-asides for specific technologies and customer classes could limit the availability of funds for other potentially beneficial energy efficiency programs and limit the flexibility that the utilities need to choose cost-effective programs to achieve their goals.

The commission agrees with GC-CEAC that CHP projects of ten megawatts or less in size are eligible under the current rule. The utilities' broad latitude in the selection of programs would permit a utility to establish a program specifically for CHP options, but there is nothing in the rule that requires it to do so. The commission believes that utilities' discretion with respect to program selection should reflect factors that relate to the likelihood of achieving cost-effective savings, but CHP should not be arbitrarily rejected by utilities. CHP would appear to qualify for commercial standard offer programs, but the energy savings from a large CHP project might stress the budget limits of such a program. The commission recognizes that there may be uncertainty

about how to calculate the savings from a CHP project. This is an issue that could be explored separately, after the current rulemaking proceeding is completed.

The commission does not believe that a provision permitting an individual customer to opt out of the program is reasonable. It might be difficult for utilities to track individual customers to apply different rates, and there is a risk that a customer would opt out after obtaining the benefits of the program, so that it would not share the costs in the same way that other customers do.

EUMMOT proposed clarifying that peak demand, as used in subsections (e)(1) and (c), refers to a weather adjusted peak demand for residential and commercial customers. EPE requested clarifying language in proposed subsections (e)(2)(B) and (C) to clarify contradictory language. EPE expressed the view that the 130% minimum demand reduction requirement is inconsistent with subsections (e)(2) and (3). EPE concluded the commission should eliminate the 130% demand growth reduction requirement in subsection (e)(3)(D) or otherwise clarify this apparent discrepancy.

The REP Coalition recommended clarifying language in subsection (e) to tie the goals back to the cost cap language proposed in subsection (f)(8). The REP Coalition recommended modifying subsections (e)(1), (2), and (4) to include the phrase "subject to the cost cap specified in subsection (f)(8)."

Commission Response

The commission is not adopting the proposed changes relating to weather adjusted peak demand for residential and commercial customers, because it believes that rule provides for a weather-adjusted peak in the provisions relating to how peak demand is calculated, and that the section is clear. The commission agrees that the 130% provision may have been confusing and is deleting it. The commission does not agree with the REP Coalition's recommendation as formulated. The cost caps are clearly expressed in subsection (f)(8) and the commission finds there is no need to be duplicative.

Cost Recovery

Section 25.181(f): Cost recovery

SPS stated that PURA §39.905 and §25.181 do not apply to SPS and cited *Application of Southwestern Public Service Company for Approval of Energy Efficiency Cost Recovery Factor Rider and Related Exception,* Docket Number 35738, Preliminary Order (September 15, 2008). SPS requested the commission determine whether §25.181 applies to it and, if so, whether the cost recovery and incentive provisions apply to SPS. SPS sought assurance that it would be entitled to recovery of cost as well as a phased-in approach to higher goals should the commission find it has authority to include SPS under §25.181. SPS believed the statutory authority for the proposed amendments to §25.181 does encompass SPS, so that the rule, if adopted, would be distinguishable from the commission's decision in Docket Number 35738. SPS requested that the commission affirmatively conclude that it is encompassed within §25.181 and allow SPS the flexibility to obtain the increased goals.

The Association of Xcel Municipalities (AXM) requested that the commission deny SPS's request for an "affirmative declaration" that the cost recovery and performance incentives of the proposed amendments to the rule would apply to SPS. AXM requested that the commission delete the statement in the preamble that the rule will apply to all utilities. However, should the commission ultimately apply §25.181 to SPS, it should apply all provisions of §25.181 to SPS so that SPS is required to meet the State's energy efficiency goals and also be subject to penalties as set forth in the rule. AXM made the following arguments: (1) nothing in PURA §14.002 gives the commission the rulemaking authority to apply §25.181 to SPS; (2) PURA §36.204 does not give the commission the authority to apply cost recovery and performance bonus mechanisms established by §39.905 to SPS; (3) the commission does not have the implied authority to apply §25.181 or the cost recovery and performance bonus mechanisms of §39.905 to SPS; (4) the Legislature has not amended §39.905 to make it applicable to all utilities; (5) in amending limited provisions of a rule, the commission may not retroactively undo the statute pursuant to which provisions established by the initial rule were adopted; (6) SPS cannot "cherry pick" provisions of §39.905 or §25.181 that apply to it; (7) advisory opinions are prohibited as set forth in the federal Declaratory Judgment Act, so that the commission lacks jurisdiction to issue §2001.038 declaratory judgments; (8) the cost recovery and performance bonus mechanisms in §25.181 may not be applied to SPS; (9) the EECRF implemented by rule 25.181 is exclusively established by PURA §39.905; (10) PURA §39.905 more clearly expresses the legislative intent regarding the cost recovery of energy efficiency expenses; (11) PURA §39.905's limited application is an exception to PURA §36.204; (12) applying the EECRF to SPS violates PURA §39.204; (13) the commission may not rely on §14.001 to apply energy efficiency provisions established under §39.905 to SPS; (14) the commission's broad rulemaking authority under §14.002 does not permit it to adopt amended §25.181 so that all of its provisions apply to all utilities; (15) the commission may not reverse the Legislature exclusion of SPS from §39.905; and (16) the commission cannot undo the adoption of §25.181 relying on PURA §39.905 through an amendment.

Commission Response

The commission disagrees with AXM that PURA does not allow the commission to apply §25.181 to utilities that are not subject to PURA §39.905. PURA §14.001 gives the commission the general power to regulate and supervise the business of each public utility within its jurisdiction, PURA §36.052 reflects a state policy in favor of energy conservation, and PURA §36.204 gives the commission authority to allow timely recovery of the reasonable costs of conservation and to authorize additional incentives for conservation. These provisions give the commission authority to apply §25.181 to utilities not subject to PURA §39.905. Through this amendment, the commission is making it clear that §25.181 applies to all electric utilities, including SPS. The commission also concludes that the procedural issues cited by AXM are not an obstacle to the adoption of a rule that applies §25.181 to SPS. This proceeding is not a request for a declaratory order; rather, it is a rulemaking proceeding under the Texas Administrative Procedure Act. The commission has included in its proposed rule explicit provisions applying the amended rule to SPS, and the amended rule was published for comment by interested persons. The commission has complied with the procedural requirements for a rulemaking proceeding, and it has the authority to adopt the amendments applying this section to SPS. The policy reasons that support the application of the rule to other utilities are not different for SPS, and the commission concludes that this utility should be subject to the same rules as the other utilities that are under the commission's jurisdiction.

Cities supported cost recovery caps at 250% through 2014. Cities expressed concern that without a cap on recovery, utilities will be free to spend unlimited amounts of ratepayer money,

all in the name of "energy efficiency," and the cost recovery caps are crucial to maintaining the cost effectiveness of the program. Cities stated that cost caps do not deter spending on energy efficiency programs and noted EPE's position that "cost caps" are truly "recovery caps." Cities concluded that utilities may choose to spend additional amounts on energy efficiency measures to increase the likelihood that the utility will exceed its goal and receive a bonus under §25.181(h) and that the cost-caps contained at §25.181(f)(8) merely limit the amount a utility may recover through the EECRF. Cities argued that it is necessary to avoid spending cap "creep" in order to incentivize utilities to efficiently administer their programs and to ensure true load growth decrease. Cities proposed cost caps as follows: recovery of program expenditures for 2012 may not exceed 175% of the utility's program budget for 2010, as included in its April 1, 2009 filing; for 2013 may not exceed 250% of the budget for 2010; and for 2014 may not exceed 250% of the budget for 2010.

Tx HERO supported the proposed caps on program expenditures for program years 2012 through 2014 as a transition mechanism, and would support higher caps because ultimately efficiency is the cleanest, cheapest and most dependable resource in our mix of alternatives for energizing sustainable economic growth and, as such, should not be capped. Tx HERO concluded that utility charges should allow cost recovery to obtain maximum practical efficiency improvement. The Solar Alliance supported higher cost caps, as a way of allowing utilities to respond to more customers' requests for support of solar distributed generation.

The Sierra Club supported the cost caps as utilities moved forward to meet the doubling of the energy efficiency goal from 10 percent to 20 percent of load growth. The legislation contemplated in 2009 also contained cost caps. Sierra Club believed the Legislature clearly indicated the desire to have cost caps. Sierra Club noted that the proposed caps would allow a particular utility to spend up to, but not more than, three times its 2010 program expenditures to meet its 2014 goals. Since the goals in 2010 are at 20 percent of growth and the goals in 2014 are at 50 percent of growth, a 300 percent limit should be reasonable. Sierra Club stated that some utilities have indicated that the future cost of energy efficiency may increase as the lowest hanging fruit in energy efficiency is already being taken advantage of. Sierra Club commented that with minimum energy codes for new construction increasing throughout the state as cities like Waco, Weslaco, Dallas and Houston approve codes that meet or exceed the 2009 international codes, programs like energy star homes become more costly and may require higher incentives. Sierra Club concluded that, because of ARRA, there are significant dollars that will be spent in 2011 that may take care of many homes that could have been targeted by the utilities. Sierra Club proposed increasing the caps slightly to reflect higher costs to achieve energy savings, suggesting for 2012 a cap of 200% of the 2010 program budget; for 2013 a cap of 300% of the 2010 program budget, and for 2014 a cap of 400% of the program budget. Sierra Club concluded if a utility actually reached the proposed cap, the monthly impact might rise from approximately $1 dollar per month today to $5 dollars per month in 2014.

TLSC-Tx ROSE stated neither the current nor the proposed rule promote rational decision making. TLSC-Tx ROSE opposed the budget caps set out in subsection (f)(8).

The REP Coalition does not believe it is prudent to have ambiguity as proposed under subsection (f)(8) which sets forth limits such that a utility may not recover program expenditures for 2012 that exceed 175% of the utility's 2010 budget, or expenditures for 2013 that exceed 250% of the utility's program budget for 2010, or expenditures for 2014 that exceed 300% of the utility's program budget for 2010, yet the proposed rule does not expressly designate a cost cap for the years following 2014. This ambiguity can be interpreted in two ways: there is no limit on utility expenditures starting in 2015, or the limit specified for 2014 will apply to subsequent years until expressly changed by the Legislature or the commission. The REP Coalition also argued that the proposed cost cap in subsection (f)(8) is not a true cap on the amount the electric utility can recover through its EECRF. The REP Coalition stated that even if one calculates "300% times the program budget," that calculation would not include the amount attributable to any performance bonus rewarded to the utility. The proposed rule includes language in subsection (h) that allows for bonus payments based on a percentage of the net benefits for every 1-2% that the demand reduction exceeds a certain percentage of the goal. When taking into account the 10% additional Hard-To-Reach bonus available to TDSPs, these bonus payments may be as high as 44% of the utility's program costs by 2014, resulting in the true limit of customer's cost exposure reaching 436% of the 2010 program budget by 2014. The REP Coalition stated even with this information, this provides customers with no practical upfront awareness of how much will be charged to customers for the program.

The REP Coalition recommended that subsection (f)(8) be replaced in its entirety with new cost cap language, which would impose more transparent boundaries around the utility's recovery of energy efficiency costs. This transparent cost cap would allow the commission to specify the level of costs that customers will pay on the front end, so there is a clear understanding of how much money may be spent. Of course, the commission would maintain discretion to delineate a different amount of money to spend on the energy efficiency programs, but the REP Coalition believes that its proposed $1/MWh cost cap for each non-transmission level customer class places a reasonable limitation on the level of the utility's recoverable energy efficiency costs, including any performance bonus and administrative costs. (By comparison, the system benefit fund, established in PURA §39.903 as one of the critical elements of the original SB 7 market structure, may not exceed $0.65/MWh.) The REP Coalition believed that the commission should take a measured approach to cost recovery for utility-funded energy efficiency programs and establish this cost limitation at the outset in a manner that provides transparency to the public.

Entergy, EPE and EUMMOT opposed the cost recovery caps under §25.181(f). Entergy argued that the proposed cost cap does provide utilities sufficient funds for the energy efficiency programs to achieve the proposed goals in later years. The Itron Study indicates that, to achieve a 50% savings threshold, at least 600% of ETI's 2010 energy efficiency budget would need to be invested, whereas the proposed cap is around 300% of ETI's 2010 budget. Thus, the proposed rule would not provide ETI sufficient funds to meet the mandated increased demand goals. EPE and EUMMOT recommended elimination of the proposed cost caps included in subsection (f)(8). EPE claimed the proposed caps would constrain EPE's ability to recover reasonable costs necessary to meet the increased energy efficiency goals, which is contrary to PURA §39.905(b) and §25.181(f). These sections of the statute and rule expressly provide that utilities should be allowed to recover their reasonable expenditures to meet the goal in an EECRF proceeding. EPE stated that the proposed cost caps are not truly "cost" caps; they are "recov-

ery" caps that pre-determine the upper limit of a utility's reasonable costs for meeting the commission's new goals without giving the utility the opportunity to prove the reasonableness of those costs. EPE contended that it must develop new programs, expand current programs and probably increase incentives paid to its EESPs and project sponsors to meet the increased energy efficiency goals. EPE concluded that it is only speculative at this point what a reasonable budget for making these investments would be, but it is certain that the cost to meet the 40% and 50% demand reduction goals in 2013 and 2014 would be considerably higher than EPE' costs to meet the current goals.

EUMMOT recommended that the proposed budget caps be removed or at least modified to a level commensurate with the proposed higher energy efficiency goals, or even lower more reasonable goals, so that reasonable budgets can be established in each utility's EECRF proceeding, based upon updated information pertaining to costs and program opportunities. EUMMOT asserted that the proposed budget cap levels would prevent many utilities from meeting more aggressive goals for energy efficiency. EUMMOT stated that the annual EECRF proceedings are the appropriate place to establish utility budgets, wherein actual goals and the cost of achieving those goals could be examined on a utility-specific basis annually. In EUMMOT's view, the goal based on a percent of peak load would lead to high costs, far in excess of the proposed budget cap. EUMMOT noted that to meet the peak load goals would require statewide budget expenditures approximately 44% higher than the proposed budget caps, resulting in residential rate impacts exceeding those calculated under the proposed budget cap by $1.50/month (assuming 1,000 kWh per month consumption).

EUMMOT noted that the costs incurred by the utilities in meeting the current goals vary among the utilities, and if this differential persists, the residential bill impacts would range from $2.51/month to $9.06/month in 2014, under the proposed goals. As a comparison, rate impacts for residential customers in 2011 under today's energy efficiency goals are estimated between $0.35/month and $1.75/month. EUMMOT stressed that the proposed budget caps will prevent utilities from meeting the proposed higher goals and would necessitate very large increases in program budgets. The Itron report estimated that the cost per kW of demand reduction would have to double by 2014 in order to meet demand goals similar to those proposed by the commission. The Itron report stated that, in order for utilities to reduce demand by 541 MW in 2014, program funding would have to reach an estimated $426 million. EUMMOT stated their calculations using updated data on program costs were similar to Itron's: the total statewide demand reduction goal for 2014 would be 537 MW and cost approximately $484 million. EUMMOT asserted that even if lower, more achievable goals were approved by the commission, budget caps should be removed from the proposed rule.

Texas Efficiency surmised that EUMMOT over-estimated the cost of additional efficiency. Texas Efficiency expressed skepticism of EUMMOT's claims that the proposed budget cap levels would prevent many utilities from meeting more aggressive goals for energy efficiency. Texas Efficiency stated that there has not been a comprehensive study of how the cost of efficiency programs change as efficiency gains are accumulated over time, and the assumption by EUMMOT is unsubstantiated that the cost of energy efficiency would double (per kW saved) over the next five years to meet the more aggressive goals proposed by the commission. Texas Efficiency stated that increased energy efficiency spending would save money for Texas consumers, and the increase in costs due to expansion of the energy efficiency programs would not be as dramatic as projected by EUMMOT. Texas Efficiency argued that raising the energy efficiency goal and the resulting higher overall cost for savings achieved is still much better than the alternative, so long as the cost remains well below avoided costs. NAESCO urged the commission to establish program budgets, through separate proceedings for that purpose, that are sufficient for the utilities to meet their goals.

The REP Coalition stated that knowledge and certainty about the level of TDSP non-bypassable charges is critical. The REP Coalition said it understands that the EECRF will change based on the level of energy efficiency expenditures, recovery of accrued performance bonuses, and changing sizes of the EECRF billing determinants each year, and REPs need to understand the extent to which those changes will occur so communications with customers are productive and meaningful. The REP Coalition stated that there is no way to predict the magnitude of future EECRFs with any certainty, and, at best, the REPs can only predict that EECRFs will increase each year as utility spending increases and larger performance bonuses may be achieved.

Commission Response

The commission has considered comments discussing the proposed budget caps under preamble questions two and three in evaluating proposals for this subsection. The commission adopts caps for residential customers based on the impact on customers' bills, because of its concern for the impact of the cost of the program on customers. The commercial customers fall into several different rate classes, and the commission concludes that it is not practical to adopt a rate cap for them in this rule. It is instead adopting a cost cap that is based on specified rates times the level of energy consumption of the commercial customers that are assessed a charge for energy efficiency. As is noted in connection with the discussion of higher goals, energy efficiency provides direct benefits to program participants in lower consumption and lower energy costs and results in lower air emissions. These benefits warrant the higher goals and, in order to reach higher goals, utilities will have to conduct more extensive programs. For these reasons, the commission believes that the budget caps must increase as the goals increase. The utilities argue that each megawatt of savings will be more expensive, as the goals increase and other efforts to improve the State's energy efficiency are implemented. However, the commission agrees with the comments that argue that there will still be many opportunities for cost-effective energy efficiency during the period for which this amendment prescribes goals and budget caps. In view of the lower goals that are being established, the commission believes that the cost of achieving the goals is less likely to dramatically increase, and the levels of the caps reflect this expectation. The commission has specified an effective date of December 1, 2010 to clarify that the amendments to the rule do not apply to pending EECRF dockets.

Higher caps than those specified in this section might be appropriate to reach the goals under subsection (e), and lower goals than those specified in this section may be appropriate for utilities that face specific problems in meeting the goals in this section. The commission has, therefore, amended the section to permit utilities to request such modifications. The commission is adopting a rate cap for residential customers, because it should be more effective in controlling the costs of the program to customers. The alternative, using a budget cap, would provide less certainty concerning costs for REPs and customers.

CORE recommended amending subsection (f)(5) to require a utility seeking to establish its initial EECRF to do so in a general rate proceeding; to permit a utility to adjust an existing EECRF in an EECRF proceeding; and to require a utility filing general rate proceedings to include review of its EECRF for possible adjustment in that general rate proceeding. CORE stated that a utility recovering energy efficiency costs through base rates does not have an EECRF to "change" in a general rate proceeding, or any other proceeding. CORE contended that the appropriate proceeding to remove expenses from base rates and to establish a rider is a general rate proceeding. CORE and TIEC stated that the amended rule should not preclude a utility from adjusting its EECRF in a general rate case. TIEC submitted that it is appropriate for all of a utility's riders, including the EECRF, to be reviewed and adjusted in a general rate proceeding.

TLSC-Tx ROSE stated the proposed subsection (f)(13) calls for an EECRF filing separate from the utility's reconciliation filing, even if both are filed on the same day. TLSC-Tx ROSE claimed that this process encourages the continuation of inefficient and ineffective programs and the utilities failure to properly implement their targeted weatherization programs under PURA §39.905(f). TLSC-Tx ROSE argued that the commission approved the EECRFs without any direction to address their failures to implement these much-needed and statutorily-required weatherization programs; §25.181 does not allow for this type of energy efficiency plan review; the utility can apparently fail to provide the weatherization programs until the reconciliation, which is to be held every three years; and since there has not been a reconciliation proceeding yet, plan deficiencies such as this one will not be addressed. TLSC-Tx ROSE claimed that the required program is not being enforced; and neither the current nor the proposed rule promotes the public interest, because the legislative intent that the neediest of Texas consumers actually benefit from targeted weatherization programs is not being met.

Cities proposed that subsection (f)(13) require a yearly reconciliation proceeding which would coincide with the utilities' EECRF filing on May 1. The current rule provides for reconciliation every three years under §25.181(f)(13). Reconciliation of the prior year's expenditures would allow a better review of the effectiveness and reasonableness of the programs. Allowing reconciliation of the prior year's expenditures would provide context for a review of the prospective program costs as submitted on May 1. Combining the review with the filing provides the added benefit of preventing surcharges and credits from accumulating into excessive balances. Because the review will cover only one year, the scope of issues should be small and, therefore, would not delay setting the EECRF. Cities concluded that combining the reconciliation proceeding with the EECRF filing makes sense logically and provides a better review of the effectiveness of the programs. As Texas is a load growth state, it only makes sense to review the effectiveness of the program yearly in order to best address energy efficiency in the most cost effective manner possible.

CenterPoint urged the commission to reject proposal to complicate the annual energy efficiency cost recovery process. CenterPoint and Entergy opposed CORE and TLSC-Tx ROSE's recommendation to establish annual reconciliation proceedings that would require a review of all costs, expenditures and budgets using traditional ratemaking principles.

CenterPoint noted that the commission rejected similar arguments from TLSC-Tx ROSE and the Association of Retail Marketers when it last amended §25.181 and specifically determined that the extensive review contemplated by CORE and TLSC-Tx ROSE" would impede the objectives of timely cost recovery and higher program goals." CenterPoint submitted that nothing has changed since the commission's decision in Project Number 33487, and parties have the opportunity to fully explore and contest issues in the triennial reconciliation proceedings established by the rule. Entergy also argued that for a utility that has no energy efficiency costs in its base rates, it makes no sense to have an EECRF implemented in a base rate case, as certain parties suggested. Entergy stated that the purpose of the EECRF is to timely implement the EECRF to allow the programs to go forward, and if a utility's programs meet the requirements of the rule, the EECRF should be implemented. Entergy concluded that an annual reconciliation of the energy efficiency program costs is not necessary or required, and a reconciliation proceeding every three years to determine the prudence of energy efficiency costs is sufficient.

Commission Response

The commission disagrees with CORE that an EECRF should be established only in a base rate proceeding. Such a requirement could prevent a utility from timely recovering energy efficiency expenditures as required by PURA §39.905(b)(1) and allowed by PURA §36.204(1). CORE did not expressly state the reason for this position, but presumably it is based on avoiding double recovery. Energy efficiency revenues are typically identified in a rate order, so that the commission may avoid double recovery in a rate proceeding that is not a base rate case by setting an EECRF that allows the utility to recover only energy efficiency expenses that exceed the energy efficiency expenses being recovered through base rates. The commission also notes that it has approved EECRFs for several utilities outside of base rate proceedings under the current version of §25.181.

The commission disagrees with CORE and TIEC that the commission should require review of an existing EECRF in every base rate proceeding. Section 25.181 requires a utility to file an application to adjust its EECRF on May 1 of each year so that the commission may approve the EECRF sufficiently in advance of the January 1 beginning of the utility's next energy efficiency program year. Because a base rate proceeding will not necessarily be conducted along a similar timeline, the commission declines to require review of an EECRF in every utility base rate proceeding. The commission disagrees with TLSC-Tx ROSE's suggestion that a reconciliation proceeding should not be separate from a utility's annual EECRF adjustment proceeding. The current rule contemplates that the EECRF proceeding is expedited, so that the EECRF may be approved before the next energy efficiency program year begins. Combining a reconciliation proceeding with the annual EECRF adjustment proceeding would add issues to the proceeding and make it difficult for the commission to approve an EECRF on a timely basis. The commission disagrees with Cities' comment that the reconciliation proceeding should be conducted annually. Reconciliation every three years appropriately balances the need to reconcile costs recovered through an EECRF with the time and resources required for such a proceeding, particularly in view of the number of utilities for which such reconciliations will be required.

Performance Bonuses

Section 25.181(h): Energy efficiency performance bonus

Terminology for bonuses

CenterPoint proposed substituting "performance incentive" for "performance bonus" in describing the calculation of a bonus

for meeting the demand reduction goal. TIEC opposed CenterPoint's recommendation because "incentive" is used throughout the rule to describe the payment made by a utility to an energy efficiency service provider under an energy-efficiency program, and CenterPoint's proposed change would create confusion. TIEC concluded that a bonus is something that is in addition to what is expected and the performance bonus paid to utilities under the rule meets this definition.

Commission Response

The commission agrees with TIEC that the term incentive is used throughout the rule to describe payments from a utility to an energy efficiency service provider for implementing programs and that CenterPoint's proposal could create confusion. The commission believes that performance bonus is a very descriptive term for what PURA §39.905(b)(2) describes as an incentive for exceeding the statutory goals.

How to calculate bonus

CenterPoint stated that the parties in Docket Number 36952 argued that subsection (h) of the rule did not permit CenterPoint to include in the calculation of its performance bonus the savings achieved through spending $10 million, pursuant to a settlement agreement, and based on a strict interpretation of §25.181(h), the commission agreed. CenterPoint proposed clarifying subsection (h) to establish that the exclusion in the bonus calculation of demand or energy savings of programs other than programs implemented under this section was meant to refer to legacy DSM programs, which are no longer offered by the ERCOT utilities, only by non-ERCOT utilities. CenterPoint argued that eliminating this language would remove a disincentive to settlements.

CORE, Cities, and TIEC stated that only programs implemented under §25.181 should count towards the goal and performance bonus and thus opposed CenterPoint's request to include savings from a settlement agreement in the calculation of the performance bonus. TIEC concluded that the rule is not ambiguous and that rejecting CenterPoint's suggested language would ensure that energy efficiency programs funded by customers outside of the rule will not be subject to a performance bonus.

Commission Response

The purpose of a performance bonus under the rule is to provide incentives to utilities to meet certain objectives established by the rule. The commission therefore believes that energy efficiency programs funded by customers outside of the rule, such as the CenterPoint settlement program, should not be subject to a performance bonus. The commission has made such determination already in Docket Number 36952, and the commission concludes that sound policy supports those decisions. Rate case settlements have various components that are inextricably interrelated, and therefore settlement provisions addressing energy efficiency cannot be viewed in isolation from the costs and benefits of provisions that have nothing directly to do with energy efficiency. Thus, obligations that a utility takes on through a settlement do not have the same status as those established as commission policy in a rule.

Level of bonus--substitute for LRAM

OPC expressed concern that the bonuses are being increased by such a large amount that it is almost lost revenue recovery, which the Legislature has not provided authority for. ACEEE noted that a performance incentive mechanism is in place in 19 states, including Texas and that the proposed bonus levels especially for years 2012 - 2015 are higher than any currently in place in other states. ACEEE commented that although states vary, performance incentives are capped at between 8% (in Connecticut) and 20% (in Colorado) of total energy efficiency program costs. Arizona and Michigan represent more typical incentives with bonus payments capped at 10% and 15% of energy efficiency program expenditures, respectively. ACEEE stated that, while performance bonuses can provide an effective motivation for increased energy efficiency, it is important that such incentives not be so high as to trigger public opposition to the energy efficiency policy. A typical utility rate of return is somewhere in the neighborhood of 10%, so a bonus level in the range of 30% to 40% may be perceived as excessive.

The Sierra Club and OPC supported bonus payments to utilities if they exceed their goal only if the companies meet both their demand and energy goals. The Sierra Club also recommended an increase in the potential bonus from 20 percent to 40 percent for utilities that exceed their goals; and another additional bonus for companies relying to a greater extent on Hard-to-Reach programs, up to the bonus cap; and another additional performance bonus of 1% to 10% for companies exceeding 100% of their demand reduction goal through distributed renewables. The Sierra Club and OPC opposed the proposed 108 percent requirement for a one for one bonus and suggested that utilities achieve 120 percent of the goal in order to be eligible for such a bonus. Sierra Club favored providing an extra bonus to utilities that achieve a certain percentage of their demand and energy savings goals through solar and other distributed renewable technologies.

Cities agreed with the concerns of ACEEE, the REP Coalition, and TLSC-Tx ROSE that the proposed bonuses are too high. Cities stated that bonuses that are too high unfairly penalize consumers for conserving energy; allow the utility to receive excessive rewards for performance that is ordinary rather than extraordinary; and there is no statutory authority to award lost revenue through a bonus mechanism. While energy efficiency should be encouraged, Cities objected to utilities receiving a dramatic increase in their bonuses, because this is not cost effective from the perspective of ratepayers. While utility companies should be incentivized to administer energy efficiency programs, the proposed doubling of the potential bonus is grossly disproportionate in regard to the savings seen by ratepayers. As utilities are allowed to spend increasingly more and more on energy efficiency programs, their bonuses would also increase, as bonuses are tied to spending. Nothing in the proposed rules raises the standards for what types of measures are eligible to be considered energy efficiency measures; the proposed changes simply allow for increased spending without any guarantee of increased results. Cities actively supported the conservation of electricity through increased efficiency. However, the energy efficiency implementation program should be done in a cost effective manner. Cites opposed the proposed 2% escalation rate as it is higher than the current rate of inflation and will not accurately measure cost escalation. Cities suggested using a more accurate measure of inflation, such as the Producers' Price Index, as reported for the prior year.

The REP Coalition stated that the proposed performance bonus levels are excessive and therefore would undermine the benefit of energy efficiency. The REP Coalition noted that the 20% limit was high enough for the 2008 program year for Oncor to achieve a bonus of $9,308,085; CenterPoint to achieve a bonus of $2,854,336; and AEP Central to achieve a bonus of $1,462,753. It stated there does not appear to be a sound justification for raising the percentage cap to the 30% and 40% levels proposed. The REP Coalition opposed a decrease in

the bonus calculation's ratio between net benefits and demand reduction for utilities that exceed 108% of their demand goals and recommended maintaining the current ratio equal to 1% of the net benefits for every 2% that the demand reduction goal is exceeded. It stated the proposed rule lowers the threshold to increase bonuses for utilities that overachieve despite the fact that there has been no showing that the current rule's calculation for the performance bonus is insufficient to get utilities to pursue energy efficiency that will result in performance bonuses. The REP Coalition suggested that subsection (h) of the proposed rule be revised to retain the net benefit/demand reduction goal percentages in the bonus formula used in the current rule.

CenterPoint stated they are troubled by stakeholder's assertions that the "performance bonus" mechanism somehow serves to compensate utilities for lost revenues. It further stated the bonus mechanism is not automatic, is not excessive, does not serve to compensate utilities for lost revenues, and is only achieved where the utility can: (a) exceed its demand reduction goal, and (b) manage its energy efficiency programs in a cost-effective manner. It noted that PURA §39.905(b)(2) speaks only in terms of "rewarding" utilities, and thus the performance bonus mechanism provides an incentive for utilities to exceed the demand goals and to reward exceptional performance in the area of energy efficiency. CenterPoint and Entergy stated that utilities continue to lose revenue even as they exceed their demand goals, and for each kWh by which a utility exceeds its demand goal that permits it to qualify for a "performance bonus," there is also a corresponding loss of revenue. This revenue loss could reach approximately $33 million by 2014. CenterPoint contended that if they were kept financially whole, customers would avoid potential "rate shock" in a subsequent base rate case.

Entergy supported the new bonus structure but recommended that it be used in conjunction with LRAM. Entergy commented that the implementation of energy efficiency programs should not lead to undue financial burden to the utility. It noted that only utilities that exceed their energy efficiency goals are provided a bonus, and even with the bonus enhancements proposed in the rule, utilities will still remain in a negative financial situation due to the proposed increases to the current energy efficiency goals. Entergy argued that the proposed increase in the goals will only exacerbate the situation; and that the bonus structure was designed to reward the utility for energy efficiency programs that exceed the minimum goals, and not to bridge the financial gap resulting from running the energy efficiency programs. Entergy contended that the proposed changes to the bonus rule penalize a utility that is close to achieving its goal but falls short.

EUMMOT expressed concern that the proposed bonus would be insufficient to compensate utilities for their revenue losses for 2010-2013. EUMMOT opposed the proposal that only utilities that exceeded their goals would be provided a bonus, thus providing no compensation for utilities unable to meet goals if they are set at unattainable levels. EUMMOT proposed to provide compensation for utilities that exceed 80% of its demand reduction goal, equal to 1% of the net benefits for every 1% that the demand reduction goal has been exceeded, with a maximum of 20% of the utility's program costs. EUMMOT argued when a utility does not exceed its goal for energy efficiency and only meets 99% of its goal due to insufficient participation in the utility's programs, as commonly occurs during economic downturns or when federal government actions change the baselines from which savings are calculated, the utility would receive no bonus, and thus no compensation for lost revenues. EUMMOT proposed a solution to raise the bonus cap to 40% of program cost beginning in 2011, arguing that this change would compensate the utilities for the revenues foregone as a result of their energy efficiency programs. EUMMOT noted, however, that this proposal would do little to help utilities that failed to meet their minimum goals due to insufficient participation. EUMMOT stated the present bonus structure worked well when the goals for energy efficiency were set at 10% or 20% of load growth, but with higher goals the bonus will not be sufficient to compensate the utilities for lost revenues. Such a result would be inconsistent with the principle that a utility should be not be left financially worse off as a result of its investment in energy efficiency.

TLSC-Tx ROSE stated that the bonus provided by the current rule language is excessive. TLSC-Tx ROSE questioned the need for an increase in the level of bonus and the rule's exemption of amounts paid in bonus from the PUC Assessment as there is no justification for the substantial increase in the level of bonus opportunity. It summarized bonuses approved by the commission for six utilities' 2008 program year results, which totaled $14.6 million for expenditures of $91.3 million. The bonuses added 16% to costs, for a grand total of $107.3 million for the 2008 program year. That means that for every ten dollars consumers paid in their rates for energy efficiency programs in 2008, they are now paying an additional $1.60 in rates in 2010 to cover the cost of bonuses earned in 2008. TLSC-Tx ROSE argued that bonuses are being paid even though the utilities already had developed energy efficiency programs that exceeded the statutory goals even before the Legislature added a bonus provision in PURA §39.905. TLSC-Tx ROSE argued that the incentives provided the utilities were too high or the performance standards were too low under the current rule, as a performance bonus should be a tool to achieve goals that would not otherwise be met. TLSC-Tx ROSE stated that the proposed bonus increases are an added cost of questionable benefit to consumers, and the money would be better spent on energy efficiency programs or as consumers' disposable income. TLSC-Tx ROSE recommended that 30% of all savings be obtained through savings from programs serving hard-to reach customers and that the performance bonus provisions of the rule require 40% of savings be achieved through hard-to-reach programs in order for a utility to qualify for the bonus. TLSC-Tx ROSE further stated that DOE's $326 million for weatherizing low-income homes will only assist about 70,000 homes or 0.3% of the eligible population.

CORE disagreed with the arguments by utility companies that current performance bonuses are insufficient to make up for the revenue that they are "losing" as a result of the energy efficiency programs. CORE opposed EUMMOT's suggestion that a bonus be permitted for a utility that achieves 80% of its goal. CORE stated that EUMMOT's proposal to "reward" utilities for achieving 80% of the energy efficiency goals--*that is,* underperforming by 20%--is contrary to the plain language in §39.905. CORE concluded that bonuses should not be available to utilities that do not exceed the energy efficiency goals.

CenterPoint submitted a response to TLSC-Tx ROSE's claim that utilities are somehow being overcompensated under the current bonus mechanism. CenterPoint charged that TLSC-Tx ROSE were attempting to mislead the commission by comparing total program expenditures and performance bonus amounts awarded, yet they failed to note the net savings provided to customers through implementation of these energy efficiency programs. CenterPoint stated that in 2008 the net benefit from energy efficiency programs to customers in CenterPoint's service area was over $83 million; their 2008 costs were $24.2 million;

the bonus $2.8 million; the net program benefits were $83 million and the bonus as a percent of 2008 net savings was 3.7%.

Commission Response

The commission agrees with the Sierra Club and OPC that a performance bonus should be allowed only for utilities that meet both demand and energy goals. The energy goal reflects that energy savings are important measures of the value of the program to customers and are important for the reduction of air emissions from power plants. The energy goal also precludes utilities from over-emphasizing short-term demand response measures that may be achieved with minimal effort.

The commission disagrees with the Sierra Club and OPC that a utility must exceed 120% of its demand goal in order to receive a bonus. The proposed rule would have allowed a bonus of 1% of the net benefits for each 2% by which the utility exceeded its demand goal. If a utility exceeded its goal by more than 8%, it would earn a bonus of 1% of net benefits for each additional 1% of savings. The proposed bonus was graduated, with a lower bonus amount available for exceeding the goal by a small amount and a higher bonus available for exceeding the goal by a larger amount. The commission is not adopting this proposed bonus structure. Instead, the commission is adopting a bonus formula that is essentially the formula in the current rule. The formula that is being adopted does not include an additional bonus for a utility that reaches 120% of its demand goal and achieves 10% of the goal from hard-to-reach programs. In addition, the bonus provisions that are being adopted will make the bonus subject to the caps on costs to customers set out in subsection (e). The reasons for these changes are explained below. The commission is not adopting goals that are significantly more difficult for the utilities to reach, which was the rationale for the modified bonus formula. The commission believes that it is more likely that costs will not be significantly higher, so that the bonus formula should be essentially the same. The commission does not agree with the Sierra Club's proposals for additional performance bonuses of 20 percent to 40 percent for utilities that exceed their goals through specific measures related to technologies, programs, or customer groups. Elsewhere, the commission rejects proposals for set asides for specific programs. A bonus for specific programs could operate the same way as set asides, providing a utility an inducement to adopt and stress the specific programs for which there is a bonus multiplier. Because the commission is declining to adopt set asides, it believes that program-specific bonuses should also not be adopted.

The current bonus provision under subsection (h) permits a utility that achieves its goal to be awarded a bonus and a utility that achieves at least 120% of its goal to be awarded a bonus at a higher level. There is also an additional 10% bonus for achieving at least 10% of a utility's goal through HTR programs. The cap on the bonuses, rather than utility achievements, was what capped some of the bonuses that were awarded for performance in 2008. The proposed rule would cap the bonuses initially at 20% of program costs, but this cap would increase to 30% in 2012 and 40% in 2014. The commission is adopting goals in the rule that are somewhat more modest than the goals in the proposed rule. The utilities commented that the proposed goals would be difficult and expensive, and in response to these concerns, the commission is modifying them to some degree. With goals that are less difficult, the commission believes it is appropriate to establish caps on the bonuses that will result in smaller bonuses. As several parties have commented, the amount that could be awarded as a bonus will increase as the program costs and caps on program costs increase. These parties argued that there was no need to also increase the percentage amount applied to program costs to calculate the cap on the bonus. Accordingly, the commission is setting the cap on the bonuses at the same level as in the current rule, 20% of program costs. This will still permit utilities to earn a significant bonus, if the performance warrants it, as program costs increase. The commission is making it clear that the bonus is subject to the overall cost caps in subsection (f), in order to maintain control over the costs that are charged to customers.

The commission appreciates EUMMOT's concern that the proposed rule would provide no compensation for lost revenues for utilities that are unable to meet goals set at unattainable levels, but the commission does not agree with EUMMOT's suggestion that the bonus should be awarded for performance of less than 100% of the goal. The bonus is meant to reward utilities that meet or exceed the goal and should be awarded only to those utilities that do so. The bonuses are intended to reward exemplary performance in the area of energy efficiency, and the commission believes that predictable incentives will provide a real inducement for exemplary performance.

The commission believes that TLSC-Tx ROSE's recommendation to require the utilities to achieve 30% of all savings thorough HTR programs is not appropriate. The HTR programs are already given special emphasis through a set aside, which no other programs have. The energy efficiency program is intended to serve all customer classes, and a larger set aside or larger multiplier could reduce opportunities for customers in other classes. The set aside would also make programs more expensive, because programs for HTR customers are typically more expensive than for other customers. The commission recognizes that the U.S. DOE is providing $326 million for low-income programs in Texas, an amount that is in excess of the utilities' cumulative budgets. While it is unlikely that the program funded by the DOE and the utilities' HTR programs will serve all of the eligible customers, the same is true of programs to serve other customer classes. During the June 30 hearing, a representative of the Texas Department of Housing and Community Affairs discussed the large amount of DOE funding that will be available for low-income programs in the next couple of years. The commission believes that the utilities should be given somewhat greater latitude with respect to the HTR and low-income weatherization programs, because of this additional federal funding for similar programs. For this reason, the commission is eliminating the additional bonus for meeting 10% of savings from the HTR program. The commission is retaining the 5% goal for the HTR program, but it is modifying the bonus calculation to permit the commission to reduce the bonus if a utility does not meet the goal for the HTR program. The programs for low-income customers are important, so the commission believes that the 5% goal should be retained, and that the possibility of reducing the bonus for failure to meet the goal will provide an incentive for the utilities to pursue the HTR program. The additional funding from DOE, which may be a relatively short-term measure, may result in difficulties for energy-efficiency service providers implementing these programs, so the commission is preserving the latitude to consider the circumstances that the utility and the service providers encounter in deciding whether to reduce a bonus, if a utility fails to meet the goal.

Penalties

Walmart suggested that the proposal concerning the performance bonus should be considered in the context of the

adoption of a punitive measure for utilities that fail to meet the energy savings targets. The proposed increased performance bonus, which would enable a utility to earn an even larger return, should be balanced by the inclusion of some downside risk if electric utilities fail to meet the goal. The lack of a punitive measure in the performance bonus provision is a problem, because an energy utility that does not face the risk of a punitive measure does not have a full incentive to efficiently and cost-effectively pursue energy efficiency. Walmart concluded that the addition of a punitive measure when energy utilities fail to meet the energy savings target would introduce a full range of incentives for the utilities to efficiently and cost-effectively pursue energy savings.

Commission Response

The commission does not agree with Walmart's suggestion that specifically awarding a bonus necessarily means that there should be corresponding penalties for poor performance. The commission notes that §25.181(u) permits the commission to provide a discretionary administrative penalty and believes that this possibility suffices to ensure that utilities are held accountable for poor performance.

Allocation of costs

TIEC submitted that the rule should specify that the performance bonus is to be allocated only to those customers that participate in the underlying energy efficiency programs. Both program costs and the performance bonus are costs associated with the energy efficiency programs, and should be allocated to customers in the same manner. PURA §39.905(b)(2) directly ties the performance bonus to the energy efficiency programs by providing that the commission shall establish "an incentive. . . to reward utilities administering programs under this section that exceed the minimum goals established by this section." Similarly, current subsection (h) states that a utility shall be eligible to earn a performance bonus based on meeting the demand reduction goals established in the rule. Additionally, the rule directs that the calculation of the performance bonus cannot include demand or energy savings that result from programs other than programs implemented under the rule. Thus, the performance bonus is directly tied to the demand reductions achieved through the programs implemented pursuant to PURA and the rule. Thus, it is reasonable--and consistent with PURA and cost-causation principles--for the performance bonus to follow program costs.

CORE and Cities opposed TIEC's proposal that performance bonuses be allocated only to customer classes who participate in the energy efficiency programs, as such an allocation inaccurately assumes that only customers participating in energy efficiency programs receive the benefits of such programs. CORE and Cities concluded rather that all customers benefit from the programs' demand reductions and energy savings, including industrial customers. By reducing demand, utilities can avoid incremental power construction or purchases, creating savings for all customer classes. Cities stated that all consumers benefit from lowered demand resulting in decreased demand for generation investment, reduced wholesale generation prices and lower rates for all consumers. CORE further stated that, contrary to TIEC's claims, §39.905 does not require that only customers participating in the energy efficiency programs pay for the performance bonuses. Section 39.905 distinguishes "cost" from bonuses by referring to bonuses as "performance incentives." Thus, pursuant to the cost-causation principles that TIEC relies on in its own comments, and consistent with §39.905, CORE contends that the cost of the energy efficiency programs should be borne by all customer classes. In comments filed in connection with the June 30 hearing, Sierra Club suggested that the provision of the rule relating to allocation of costs is more restrictive than the statute, and that the commission should modify the rule to more closely track the statute.

Commission Response

The commission is not adopting TIEC's proposal. To the extent that the commission has the latitude to allocate costs of the performance bonuses differently, there may be valid reasons to do so, which may be considered in an EECRF proceeding. The arguments of CORE and Cities suggest that there are policy reasons for a different allocation. The commission also notes that it rejected in Docket Number 36958 the position urged by TIEC here. The commission is adopting Sierra Club's proposal on conforming the provision on cost to the statute to provide additional latitude in allocating costs.

Administration

Section 25.181(i): Utility administration

Other issues

The Sierra Club suggested modifying proposed subsection (i)(6) to encourage cooperation between the commission's utility programs and other energy efficiency programs offered through other entities. The Sierra Club noted that this should help utilities avoid wasting resources where resources are already available and to better coordinate resources. The Sierra Club also proposed that each individual utility and the commission provide clear information on a website on energy efficiency. A Better Insulation and Star Efficiency Services expressed concern that utilities continue to outsource their energy efficiency program, making the amount of the funds spent on administration hard to track. They concluded that the rule needs to limit these costs, whether spent by the utility or their contractors. They also argued that the current funding for standard offer programs is not sufficient to allow all ratepayers, especially many low-income multi-family properties, to participate in the programs.

Commission Response

The commission believes that cooperation among utilities and coordination of programs is generally appropriate, and it believes that the utilities are aware of other programs being offered by each other and by other organizations in their service areas. It does not believe that mandating cooperation is needed. The commission agrees with the Sierra Club that it is desirable for clear information to be available on a website regarding the energy efficiency program, but the commission believes that the rule need not set out the requirements for such a website. Rather, it is appropriate for the commission to work with the utilities and others who are interested in energy efficiency to improve the Texas Efficiency website and the commission's website.

Administrative Cost Caps

Cities and OPC opposed increasing the available costs of administration to 20%. The costs of administration are fixed and unlikely to change, even as programs expand because utilities already have these programs and the infrastructure to administer the programs. Cities concluded that allowing any administrative cost recovery may allow the utility double recovery, since some administrative costs are also recovered in a utility's base rates. Cities also argued that the utilities' administrative costs typically recover allocated corporate overhead expenses, such as board of director and executive compensation, general con-

sultant and law firm expense, and charitable contributions, which are items unrelated to the direct provision of energy efficiency programs. According to Cities, little or no evidence exists to demonstrate that increasing administrative costs is cost effective, and the cap should not be increased unless it is accompanied by a rigorous examination of the reasonableness and necessity of the expenses. OPC also concluded that because administrative costs are a percentage of the total costs, they increase as the costs of the programs increase. OPC stated that there is no need to siphon off a larger portion of the money that would otherwise be used directly for a program to apply towards administrative expenses. CORE stated that under subsection (i) a 15% administrative cost allowance would be an excessive increase of 5% from what is currently allowed, arguing that the utilities did not provide any justification for the proposed increase of administrative costs to 15% of a utility's total program cost. CORE expressed concern that the utilities may essentially spend what they are currently spending on administration expenses plus take half of what may be spent on research and development for administration, which will hinder growth of new programs rather than encourage more efficient operations. CORE recommended that the current caps on spending for program administration and for research and development be maintained. CORE concluded that if a utility requires additional funds for administration, the utility may prove up those expenses as reasonable and necessary in its next EECRF or general rate proceeding.

TLSC-Tx ROSE and CORE opposed the proposed amendment to subsection (i) that would allow utilities to increase the administrative cost allowance to 15% of a utility's total program costs, provided that the total costs designated for both administration and research and development do not exceed 20% of total program costs. A similar proposal was made in the rule amendments proposed in Project Number 33487 in 2007 and was rejected by the commission. The commission should take similar action in this rulemaking. TLSC-Tx ROSE urged the commission to maintain the 10% cap on program administration and require all utilities to operate within that cap to be eligible for a performance bonus. The REP Coalition also opposed increasing the current rule's cap for the cost of administration from 10% to 15% of program costs. The REP Coalition supported an increased cost cap of 15% only for electric utilities with peak demands less than 3,000 MW, as they understood that electric utilities with peak demands less than 3,000 MW may require a higher percentage of administrative costs to reach the proposed energy efficiency goals. The REP Coalition argued that unnecessarily high administrative costs could devour too much of the resources that would otherwise be devoted directly to the energy efficiency programs, and that the larger utilities have yet to demonstrate that the current cap of 10% is insufficient. CORE argued that allowing the utilities to apply funds that should be used on research and development to administration would hinder growth of new programs, rather than encourage more efficient operations. CORE recommended that the current caps on spending for program administration and for research and development be maintained, but would permit a utility that requires additional funds for administration to prove the need for those expenses in its next EECRF adjustment or general rate proceeding.

AEP urged the commission to raise the utility administration cost cap from 10% to 15% of total program costs, arguing that this increase would be necessary in order for utilities to meet the higher goals proposed in the rule. AEP and EUMMOT countered Cities' assertion that raising the administrative cost cap to 15% is not necessary. They noted that Cities failed to take into consideration that the higher goals would require the design and administration of new programs, and, as new programs are added, hiring and training of additional utility staff to manage them. AEP noted that this view is in concert with the national emphasis on job creation through energy efficiency. AEP noted that a standard offer program with multiple project sponsors requires a contract for each sponsor, involving far more time than a market transformation program with a single implementer. AEP commented that the numbers of site inspections that must be performed by utility personnel to verify measures have been installed and are capable of performing intended functions increases as the goal increases, just as the number of project sponsors must increase in order to deliver the additional savings. CenterPoint also argued that, in order to pay for further program enhancements and process changes that will make achievement of the higher goals possible, higher administrative costs must necessarily be incurred and utilities must be allowed to conduct programs to communicate and encourage participation. New programs and the ability to communicate what these programs entail will be needed to assist in achieving the goals. Tx HERO supported increased flexibility for utilities with respect to administrative and research and development costs.

AEP disagreed with TLSC-Tx ROSE's assertions that program changes do not support the modest 5% increase to the administrative cost cap in the proposed rule. AEP noted that SWEPCO and TNC are indicative of smaller Texas utilities that struggle to contain administrative costs within the existing 10% of total costs cap. AEP explained that the proposed amendment would not require a utility to spend 15% of its program costs for administrative functions, only allow expenditures up to that amount. APE and CenterPoint argued that significant obstacles would arise to achieving the increasing goals for energy efficiency. Energy efficiency for each successive year must tap more deeply, requiring more effort, as well as additional costs. Obstacles will also emerge as major code and standards changes are enacted in the next two years and measures that currently qualify for incentive payments will no longer qualify. For example, many of the new motor efficiency standards established by the National Electrical Manufacturers Association will go into effect in December 2010. In addition, beginning January 1, 2011, the baseline for linear fluorescent commercial fixtures will become the standard electronic T-8 fluorescent fixture. In addition, federally-funded energy efficiency programs are to be carried out at levels well beyond historical levels. Some of the smaller utilities such as SWEPCO and TNC have less dense customer populations and more rural service territories which makes it more difficult to attract potential energy efficiency service providers.

AEP agreed with the REP Coalition and Tx HERO's proposal to allow greater utility flexibility with respect to administration costs for smaller utilities. AEP stated that, in addition to resources that will need to be expanded to administer programs, the magnitude of regulatory filing activities alone have more than doubled in the past two years with the advent of the EECRF, and with heightened activity of the commission's EEIP. AEP stated that, in many instances, the EECRF proceedings have been fully litigated, involving extensive expenditure of time and resources for responding to discovery, preparing testimony and trying the matters through contested hearings. These activities are in addition to the yearly Energy Efficiency Plans and Reports filings, which are time-consuming projects that require intensive, detailed preparation to provide the commission and other stakeholders with the most accurate report and plan information. The

commission held numerous EEIP meetings in 2009 to discuss potential changes to §25.181, the subject of this project. The EUMMOT utilities have the responsibility for filing petitions to update and add deemed savings values. The modification and addition of deemed savings requires substantial communication between the EUMMOT utilities, their contractors, as well as other EEIP stakeholders. The workload pertaining to these regulatory compliance activities has fallen on the utilities' energy efficiency staffs due to their expertise, consuming time otherwise spent managing programs. EUMMOT also expressed the view that some of the opposition to increasing utility administrative budgets may be due to a misunderstanding of administrative budgets. In addition to activities normally considered to be "administrative" in nature (such as processing applications for incentives, program design, maintaining program databases, contracting, working with the project sponsors), other types of costs are categorized as administrative. Under the commission's rules, any costs that are not program incentives or research and development are categorized as administrative costs. Consequently, a large share of administrative costs are actually associated with the measurement and verification of reported savings, on-site inspections, the development of new programs, reporting savings to the commission, regulatory proceedings, and studies ordered by the commission.

AEP characterized TLSC-Tx ROSE's recommendation that a utility should be ineligible for a performance bonus if its administration costs exceed 10% of total program costs as unreasonable and punitive. AEP said this recommendation would unfairly penalize smaller utilities like AEP TNC and SWEPCO that must make higher administrative expenditures to meet the higher goals and that larger utilities may be able to achieve such goals more easily. AEP strongly supported the adoption of amendments that would raise the administration cost cap from 10% to 15%.

Commission Response

The commission believes that the utilities' higher goals clearly will require the utilities to design new programs, hire and train additional staff to manage the new programs, and verify savings from the new programs. The amount allowed for administrative costs and research and development will increase as total program budgets increase, and the commission is not changing the percentage of program costs that may be used for these purposes. The amendments to the section will permit utilities more latitude in using funds for research and development or administration. The commission believes that the higher goals in the amended section are achievable, but they are likely to be a challenge for at least some of the utilities, and flexibility in applying funds to research and development or other administrative tasks should assist the utilities in meeting the goals. The commission is not adopting the proposal to disqualify a utility from receiving a bonus if its administration costs exceed 10%. As AEP pointed out, the small utilities may face special challenges in meeting their goals, even with the greater flexibility provided by the amended section in applying funds to administration and research and development needs. The bonuses should be achievable by any utility that meets the goals specified in the section, and the provisions on administrative and research and development costs should not arbitrarily impose obstacles on their qualifying for bonuses.

Allocation of costs

TLSC-Tx ROSE suggested that administrative costs to facilitate REP participation in energy efficiency programs should be assigned to the REPs participating in the programs. The REP Coalition opposed this suggestion, stating that PURA §39.905(a)(4) requires that electric utilities in the ERCOT region use best efforts to encourage and facilitate the involvement of REPs in the delivery of energy efficiency and demand response programs. The proposed rule, as modified through amendments proposed by the REP Coalition, would provide REPs with better opportunities to provide more substantial programs to retail customers. Further, to actually carry out any programs that might come about from changes to the rule, REPs will be required to make substantial investments of their own. The REP Coalition concluded that it would be inappropriate to hamstring such programs by assessing REPs and their customers additional charges for those services.

Commission Response

The commission agrees with the REP Coalition that PURA §39.905(a)(4) requires that electric utilities in the ERCOT region use their best efforts to encourage and facilitate the involvement of REPs in the delivery of energy efficiency programs and that it would be inappropriate to assess REPs and their customers additional charges for those services. REPs participating in the energy efficiency program will be expected to achieve verifiable demand and energy savings, in the same way that ESCOs participating in the program are required to do. The program works by developing programs that will permit individual customers or groups of customers to improve the efficiency of their energy use, with the efficiency measures funded by the general body of customers and customers' investments in more efficient equipment. There is not any reason why participation by REPs in the program should be funded any differently, particularly where the legislature has required utilities to encourage their participation.

Program set-aside

The REP Coalition recommended subsection (i)(5) include a set-aside of 25% of the utility's budget for programs delivered by REPs, although no individual REP would be able to request more than a third of the aggregated amount of the set-aside, unless funds remain available as of April 1. The REP Coalition also suggested that the REP set-asides include provisions for long-term funding for multi-year programs, and that program rules and schedules give retail electric providers sufficient time to plan, advertise, and conduct energy efficiency programs, while preserving the utility's ability to meet their goals. The REP Coalition suggested establishing programs facilitated by advanced meters, where retail electric providers may provide time-of-use prices, home-area network devices such as in home displays, premise energy/load management equipment and other retail service offerings, if reduction in demand and energy consumption can be quantified and verified. Good Company argued that the demand response provision in subsection (i)(5) should not be limited to REPs but should be open to other energy efficiency service providers.

Tx HERO supported the participation of REPs in utility programs, but stated that it is possible to misread the proposed language in subsection (i)(5) to require specific programs for REPs, which does not seem necessary nor what was originally intended. Tx HERO stated that the limited funds is the most significant deterrent to REP participation, and requiring REP-only programs or establishing a preference for REP participation in all efficiency programs, either of which might be construed as the intention of the proposed rule, would only eliminate smaller players in the market, without increasing the amount of efficiency achieved. Tx

HERO proposed a review of program rules and contracts to eliminate specific barriers to REP participation.

Commission Response

The commission has addressed many of these comments in subsection (e). It is adopting Good Company's suggestion that the demand response provision apply to both REPs and energy efficiency service providers. Demand response options could be provided by either a REP or an energy efficiency service provider that is not a REP, and the commission concludes that, while it should encourage demand response programs, it should not suggest that eligibility to provide such programs would be limited to REPs.

Standard Offer and Market Transformation Programs

Section 25.181(l): Requirements for standard offer and market transformation programs

OPC discussed two bills that were introduced in the 81st Regular Legislative Session, HB 280 and SB 546, and suggested several amendments to incorporate concepts that were included in these bills. OPC noted that if either of the bills had been enacted, they would have limited the length of time that a market transformation pilot program could continue without review by the commission. OPC suggested amending subsection (b) to limit pilot programs to three years, unless the commission determines that a pilot program is appropriate to address special market barriers. OPC also recommended a requirement that program incentives be passed on to end-use customers through rebates, discounts on products and services, and other direct benefits that reduce the costs of the products and services to the end-use customer, a concept that was included in HB 280 and SB 546. OPC suggested that the rule require energy service companies to disclose the incentive that they receive, which would add credibility to the utility programs and perhaps allow the incentives to be passed directly to end-use customers as contemplated by the bills. If a company is required to disclose that they are going to receive an incentive for installing a measure for an end-use customer, it only stands to reason from a marketing or competitive standpoint that the company would pass some of that incentive on to the customer.

Commission Response

The commission does not adopt OPC's recommendation, as formulated. The energy efficiency program relies on competition, with multiple ESCOs providing service to customers, and the value of the incentive paid by the utility to an ESCO should be reflected in the price and the services to the customer. One factor in the success of the program is that the commission does not over-regulate the energy efficiency services market. The incentives should support an ESCO's providing the customer efficiency enhancements that result in a tangible reduction in consumption and cost that are valuable for the customer. The commission adopts the recommendation that allows an ESCO to identify that it is operating under a utility program, because that information is valuable to the customer. The ESCOs are approved by the utility to implement the program, and therefore it is reasonable that they be able to provide that information to customers.

Tx HERO supported proposed amendments to subsection (l)(4) that would require competitive procedures for selecting implementers of market transformation programs and for reporting a justification for any sole-source selections.

TLSC-Tx ROSE noted that proposed subsection (l) adds language allowing a utility to conduct information and advertising campaigns to foster participation in standard offer and market transformation programs. TLSC-Tx ROSE referred to Project Number 21074, where administrative and other program costs were to be lower than for programs under the old regulated system because the service providers would be responsible for marketing the programs. In past rulemaking proceedings, TLSC-Tx ROSE have recommended that a third party administrator be hired to serve as a central contact statewide for energy efficiency program information. TLSC-Tx ROSE commented that utility ratepayers should not be responsible for paying for advertising in a competitive energy services market. This is clearly a role that is the responsibility of the service providers and the proposed rule does not address solutions to this potential problem. TLSC-Tx ROSE noted that proposed subsection (l)(4) adds language that requires a utility to use fair and competitive procedures to select a market transformation program provider while still permitting sole source providers, but commented that, as written, the rule provides no assurance that the utility will select the program service providers through a competitive process.

TLSC-Tx ROSE noted that information provided in discussions at commission workshops indicates that the utilities review market transformation program proposals that are brought to them by individual entities for their consideration. They expressed the view that moving forward with more efficient technologies is the most important aspect of energy efficiency program planning, and that all ideas should be considered, not just those brought forth by a handful of providers. If the energy efficiency industry had a process available for introducing new programs, it is likely that utilities would be approached with many ideas and would be able to choose the best programs from among the multiple submissions. Under such a competitive procedure, even if only one company submits a market transformation program concept, the utility would have the duty and the advantage of being able to compare that single source proposal with others in a fair and objective manner. TLSC-Tx ROSE commented that an annual solicitation would make the process more open and ensure that the utility is informed of all the ideas for market transformation available in the market.

The REP Coalition proposed modifying subsection (l) to permit a utility to conduct information and advertising campaigns to foster participation in standard offer and market transformation programs only in areas that are not open to retail competition. The REP Coalition expressed a concern that having the utility advertise creates unnecessary expense for the utilities, which reduces funding for the actual delivery of energy efficiency programs.

EUMMOT disagreed with TLSC-Tx ROSE and the REP Coalition's with respect to enabling utilities to better promote their programs. EUMMOT referred to the comments of Texas Campaign for the Environment, Sierra Club, and EDF, who all saw a need for the commission or the utilities to increase the public's awareness of energy efficiency opportunities. Despite the impacts that unbundling has had on the relationships between the utilities that serve in the ERCOT power market and retail consumers, the utilities remain a trusted and market-neutral source of information about the energy efficiency programs they administer. EUMMOT stated their experience with appliance recycling programs in recent years has highlighted the importance of promotional efforts in some programs' success. An appliance recycling program in the SWEPCO service area, where the commission has eased restrictions on the utility's ability to promote its programs, has proven successful. In the ERCOT utilities' service areas, sim-

ilar programs have proven unsuccessful due to the restrictions placed on utilities' promotion of their programs through bill inserts and other means. In short, increasing the flexibility of the utilities in promoting their programs is essential to attaining higher goals.

EPE also supported the provision of proposed subsection (l) permitting utilities to conduct information and advertising campaigns to foster participation in standard offer and market transformation programs. EPE noted it has struggled in the past to generate participation by energy efficiency companies in its programs, particularly in programs aimed at residential and small commercial customers. It noted that participation in the Residential Standard Offer Program or Hard to Reach Standard Offer Program consisted of nine companies in 2006, two in 2007, five in 2008, and one in 2009. EPE commented that the limited participation in its programs and limited competition among energy service companies has been a major factor in its struggles to meet the energy efficiency goals. EPE also encouraged the commission to provide additional guidance as to what constitutes fair and competitive procedures and what the effect will be on utilities that cannot generate competition among energy service companies in their service areas. CenterPoint also disagreed with the REP Coalition's argument that utilities in competitive areas should not be allowed to conduct marketing and advertising campaigns, because the REPs are not held responsible for meeting the commission's energy savings goals. CenterPoint believed that it has both a need and a duty to spend program funds on marketing that educates customers about energy efficiency and advertising that promotes its programs. CenterPoint also recommended that the proposed revisions to §25.181 allowing increased administrative costs be adopted.

Commission Response

The commission does not agree with the suggestion of TLSC-Tx ROSE for an annual solicitation for market transformation programs. The commission is amending subsection (l) to require competitive procedures to select service providers to carry out market transformation programs, but it does not believe that it has sufficient information to adopt more specific requirements relating to competitive procedures. Experience in implementing this new provision may result in suggestions for improvement. The commission is not adopting the proposal of the REP Coalition to limit utility information activities to areas "only where retail customer choice is not available" in subsection (l) or subsection (m)(2)(J). The bigger goals in the program will be more difficult to achieve if the utilities cannot conduct programs to call the attention of consumers to the program.

OPC supported the utilities' use of pilot programs as a means to explore new technologies for a period of three years. OPC therefore proposed that a new pilot program continue for no longer than three years as a pilot program. After three years the program would have to be discontinued or comply with the requirements of subsection (l). OPC concluded that during the 81st Regular Legislative Session (2009), HB 280 was introduced by Representative Anchia and a similar bill, SB 546, was introduced by Senator Fraser. If either of the bills had been enacted, they would have limited the length of time that a market transformation pilot program could continue without review by the commission. OPC believed this is a valuable provision, and suggested that the rule reflect this limitation.

ClimateMaster agreed with the technology-neutral requirement for the energy efficiency programs and supported programs available to the broadest number of consumers and technologies. ClimateMaster urged the commission to take every action possible to ensure incentives under the programs are made available to all technologies that can provide similar demand and energy reductions as the pilot programs and market transformation programs launched recently to provide incentives for specific technologies, such as solar photovoltaics.

Walmart proposed that customers that invest in energy efficiency measures, including investments made in conjunction with a utility standard offer program, should own any "environmental attributes" associated with the measure. The REP Coalition disagreed with this suggestion, because the broad policy considerations were beyond the scope of this rulemaking.

EDF, Sierra Club and the Texas Campaign for the Environment proposed that the utilities create an energy efficiency portal to provide consumers with information and documents about energy efficiency programs and opportunities. EUMMOT agreed with this proposal and noted that the utilities are planning to add features to www.texasefficiency.com that are expected to be completed by the end of 2010. With these changes in the efficiency website, it will provide much of the information recommended by these parties.

The REP Coalition suggested that the rule permit the use of various behavioral measures (for example, devices that control equipment usage and consumer responses to home energy displays and innovative pricing programs) in programs that could result in energy savings. Consert also suggested incentives for in-home energy displays. EUMMOT agreed that such measures should play a greater role in energy efficiency programs, provided the proper measurement and verification is conducted by the service providers.

Commission Response

The commission is not adopting OPC's suggestion concerning pilot programs. Participants in the EEIP have worked to develop a template for a pilot program that would call for the utilities to report the results of these programs annually. The opportunity to review information on pilots is a more flexible approach than a fixed limit on the duration of a pilot. The commission is not addressing the issue of environmental attributes. This issue should be the subject of broader public comment to warrant the adoption of substantive rules. As is noted above, the enhancement of the utilities' energy efficiency website does not require a specific provision in this rule. The commission agrees with inclusion of the use of various behavioral measures when conducted in concert with a pilot program or with a rigorous measurement and verification, which would be required in order for an incentive to be paid for such a program.

Plans and Reports

Section 25.181(m): Energy efficiency plans and reports

The REP Coalition proposed modifying subsection (m)(2)(J) to reflect their view that utility informational activities should be limited to areas where retail customer choice is not available.

Sierra Club expressed concern that while the rules offer an improvement on transparency and oversight of the programs and utility plans, they are not specific enough. The Sierra Club recommended additional language to allow the public more access to documents and more ability to make comments and require utilities to consider those comments when designing programs and plans. Sierra Club proposed procedures for the review of plans and reports under new subsection (m)(3). This proposal calls for an energy efficiency plan and report to be subject to review, which could be initiated by the commission Staff or through

the EEIP process, and would require a utility to respond to the commission in writing within 30 days to any substantive comment filed by a member of the public or commission Staff. The utility response would include a statement whether the utility would change its energy efficiency plan or report as a result of the comment.

Commission Response

For the reasons discussed in subsection (l) above, the commission does not agree with the proposal of the REP Coalition to limit informational activities to areas where retail customer choice is not available.

There are several opportunities for interested persons to obtain information about the energy efficiency program, beyond the annual reports filed by the utilities, which are available on the commission's website. The commission is adopting a requirement that a utility must respond in writing to questions raised by a participant in the EEIP on a timely basis. The commission recognizes that the utilities will file their EECRFs by May 1, which may be followed by extensive discovery. In addition, questions may be posed on an informal basis by stakeholders during the EEIP relating to the utilities' programs.

TLSC-Tx ROSE claimed there is no formal approval process and this obviously means that the plan can be implemented without approval under subsections (m) and (n). TLSC-Tx ROSE commented that contracts can be signed, foreclosing the opportunity to consider options without increasing costs. TLSC-Tx ROSE expressed concern with program accountability, program standards, deemed savings and the lack of a regular review process to ensure that the best energy efficiency investments are being made with ratepayer dollars. EDF, the Sierra Club, TLSC-Tx ROSE, OPC, Cities and CORE claimed a lack of overall oversight, transparency, accountability and the need to adopt specific procedures for the review of energy efficiency plans and reports.

TLSC-Tx ROSE opposed EUMMOT's recommendation that the proposed budget caps be removed and that reasonable budgets be established through the EECRF process. TLSC-Tx ROSE claimed EUMMOT's recommendation is made in the absence of any modification to the current process to assure that the budgets are reasonable. TLSC-Tx ROSE argued in favor of a prior review of programs and budgets, arguing that once the energy efficiency funds are collected and spent, it is difficult to determine the amount of overcharges and how they can be fairly refunded to consumers. TLSC-Tx ROSE stated the rule should include a provision for an annual staff report for each utility and statement on the content of the energy efficiency plans and reports and EECRF levels, as there is no official source of information for parties to access except for the individual utility filings. TLSC-Tx ROSE supported the recommendation of EDF that a mechanism be established for commission staff to communicate program goals and incentives to other state agencies that manage efficiency programs to avoid duplication of effort.

Commission Response

The energy efficiency rule is structured to provide incentives to utilities to carry out their programs efficiently and cost-effectively. The commission believes that the performance bonus provision in subsection (h) encourages utilities to choose the most cost-effective programs to assist in reaching and exceeding their goal and thus receiving a bonus. The program is not designed, however, to provide review and pre-approval of utilities' commitments to ESCOs that are conducting market-transformation programs. Adopting a pre-approval process might obviate expensive contracts with an ESCO, but adopting such a process would increase the administrative costs for the utilities and could lead to litigation over contracts by a competitor of the ESCO that the utility has selected for a project. The commission concludes that the possible detriment of a pre-approval process outweighs the possible benefit. The commission agrees with TLSC-Tx ROSE and EDF that the utilities should take steps to avoid duplication of effort among different energy efficiency programs that are being funded by the utilities or taxpayers. The utilities already take such steps, and the scope of their current activities may be appropriate for further review. The commission does not believe that the rule needs to require an additional formal mechanism to avoid duplication. The commission believes that additional information about the utility program should be provided, but it does not believe that including a requirement to do so in the rule is necessary.

EE Implementation Project

Section 25.181(q): Energy Efficiency Implementation Project - EEIP

EUMMOT recommended modifying proposed subsection (q) in order to ensure a fair exchange of information in the EEIP. EUMMOT suggested that any entity participating in the EEIP be required to provide timely responses to questions posed by other participants that are relevant to the tasks of the EEIP. EUMMOT recommended exploring the draft processes developed through the EEIP in 2008, as the EEIP remains the appropriate forum for discussions about program plans and activities. EUMMOT stated the website (www.texasefficiency.com) would also further improve the transparency of the program planning process.

Entergy stated that it should be allowed to develop and offer the energy efficiency programs of its choosing, without interference from others, as long as the programs meet the guidelines prescribed in §25.181. Entergy said that it remains open to suggestions for new program offerings or enhancements to current program from energy efficiency service providers, energy service companies, or any other entity that provides a viable program that reduces demand and energy usage in a cost-effective manner. Entergy said that it is willing to visit with interested parties at any time to discuss its energy efficiency programs, but a review of its programs should not be permitted to occur that would interfere with the preparation of its annual plan and report or its EECRF filing. Moreover, Entergy expressed a strong preference that energy efficiency programs be chosen by the utility, considering all relevant factors and depending on what the utility believes is reasonable and consistent with the commission's rules. Entergy opposed the portions of the proposed rule that would require utilities alone to respond to data requests. The EEIP process should be a collaborative process used by all participants, and all participants, not just utilities, should be obligated to provide data in the EEIP. EPE supported an open process under subsection (q) by which interested entities may offer their assessments of its programs and suggest effective new programs. EPE commented that the changes in subsections (n) and (q) should not be used to foster litigation to force utilities to adopt the particular energy efficiency programs being promoted by a litigant. EPE supported a reasonable process that does not perpetuate endless litigation or impose delays on its energy efficiency cost recovery.

GC-CEAC stated that the EEIP is an excellent tool to promote energy efficiency and to enhance deployment of these technologies, but it needs to be improved in the following ways: (1) an evaluation of the benefits of expanding the program, while re-

maining consistent with market needs, should be conducted; (2) the commission should work to identify and secure additional sources of funding to allow the program to be expanded; (3) goals and tracking mechanisms should be established for each of the three technology groups, traditional passive energy efficiency technologies, on-site renewable technologies, and combined heat and power technologies; (4) incentives should be provided for the TDSPs to actively seek opportunities for on-site renewable energy and combined heat and power projects; and (5) the EEIP should evaluate opportunities for TDSPs to adjust incentive levels by technology group, thereby providing incentive funding at the level required to stimulate adoption.

NAESCO urged the commission to order the utilities to implement periodic program design reviews, open to all stakeholders, and to incorporate their successful program design and implementation experience from other jurisdictions in Texas programs, and expand the roster of program designs to allow direct install programs, which have proven to be more successful in certain customer classes than standard offer programs.

Commission Response

The commission agrees with Entergy that the EEIP process should be a collaborative process with an open exchange of information by all participants. It is questionable, however, whether the commission could require, as EUMMOT has proposed, that participants in the EEIP respond to questions from utilities or other participants. The commission has authority to oversee the utilities' programs, but it is less clear that it could enforce such a requirement with respect to an entity other than a utility. A number of parties have suggested that the program needs more transparency, and the commission is adopting a requirement that utilities provide timely responses to questions from EEIP participants to address this suggestion. In view of the magnitude of the programs and their impact on customers' rates and bills, this additional obligation is reasonable. The commission agrees with EPE and supports a reasonable process to strike a balance with more transparency while avoiding litigation or delays on energy efficiency cost recovery.

The GC-CEAC recommendations appear to contemplate significant changes in the energy efficiency program that other commenters have not addressed in their comments. The commission does not believe that it is appropriate to adopt such changes without broader public comment. The commission agrees with NAESCO's recommendation to implement a periodic review process, and the commission plans to host three EEIP stakeholder workshops annually. Ordinarily, the first EEIP meeting will be held in May, following the utilities' April 1st filings, to discuss results of their previous year's program and highlight their future plans. The second EEIP will be held in June to review the midcourse progress by each utility. The third EEIP will be held in September prior to development of the utilities' program manuals required by ESCOs in order to learn the rules prior to implementing the utilities' energy efficiency plans.

Retail Providers

Section 25.181(r): Retail providers

CenterPoint and the Sierra Club supported the proposed rule to encourage utilities to work with retail electric providers and access to the programs.

Other Issues

Section 25.181(s): Customer protection

No changes were proposed to this subsection. Tx HERO stated that one issue not addressed in the proposed rule that it would like to see included relates to information and advertising campaigns. Tx HERO proposed a requirement that utility bill "information" but not the bill itself be available in a standardized format. Tx HERO recommended that any residential customer be able to access, and permit a designated home energy auditor to receive or access, a utility bill history of at least 12 months that includes at least monthly energy consumption (kWh) and demand (kW) and average effective cost. Tx HERO further recommended that residential customers be able to access a history and current average residential consumption and demand by zip code.

Commission Response

The commission appreciates this thoughtful comment in support of guiding homeowners to reduce their electric consumption and for energy efficiency auditors to guide homeowners in the selection of the most cost-effective measures to do so. PURA §39.107 provides that, in areas where retail competition has been introduced, customers own the meter data and may authorize its release to a REP. Utilities in competitive areas do not have billing information, however. The commission would like to further explore through the EEIP the development of a standardized format that would facilitate the provision of detailed customer electric consumption data. Different information would be available from the utilities, depending on whether the area is one that is open to retail competition.

Section 25.181(u): Administrative penalty

EPE recommended including a "safe harbor" provision to exempt a utility from any sanction for which the utility would have been responsible if it had failed to meet the energy efficiency goals, if the failure to meet the goal were caused factors outside of the utility's control. EPE recommended copying language from PURA §39.905(g) in subsection (u).

Commission Response

The commission agrees with EPE that the language in the rule should conform to the language in PURA to avoid confusion. The commission does not agree that additional language is necessary to create a safe harbor because the rule already gives the commission discretion not to impose an administrative penalty.

Opt out of EECRF

Walmart proposed that the rule be amended to permit industrial or large commercial customers to opt out of an obligation to pay an Energy Efficiency Cost Recovery Factor (EECRF). Walmart suggested that opt out provisions would create greater opportunities for those customers that wish to proactively invest in their own energy efficiency programs. Given that large commercial customers are already creating their own additional energy efficiency programs to maintain competitiveness, no additional incentive is needed. Additionally, Walmart argues that, through their investments in energy efficiency, large commercial customers create "network benefits." The REP Coalition opposed this suggestion, noting that PURA §39.905 establishes the criteria for which customer groups are eligible for and pay for the energy efficiency program, and that the programs are for "residential and commercial customers." In the REP Coalition's view, allowing an opt-out provision for specific customers would be contrary to PURA §39.905 and should not be adopted. The REP Coalition also argued that there is no compelling policy reason for the commission to create an EECRF opt-out provision for

individual customers like Walmart. The REP Coalition noted the Legislature has established the parameters of the State's energy efficiency program, and the commission cannot, by rule, modify the terms of the program established in PURA.

Commission Response

The commission does not believe that a provision permitting an individual customer to opt out of the program is reasonable. It might be difficult for utilities to track individual customers to apply different rates, and there is a risk that a customer would opt out after obtaining the benefits of the program, so that it would not share the costs in the same way that other customers do.

The amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §§14.001, 14.002, 36.052, 36.204, and 39.905 (Vernon 2007 and Supplement 2009) (PURA). Section 14.001 provides the commission the general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by PURA that is necessary and convenient to the exercise of that power and jurisdiction; §14.002 provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; §36.052 reflects a state policy in favor of energy conservation; §36.204 authorizes the commission to establish rates for an electric utility that allow timely recovery of the reasonable costs for conservation and load management and that include additional incentives for conservation and load management; and §39.905 requires the commission to provide oversight of energy efficiency programs of electric utilities subject to that section and adopt rules and procedures to ensure that electric utilities subject to that section can achieve their energy efficiency goals, including rules establishing an energy efficiency cost recovery factor and an incentive for electric utilities that meet the energy efficiency goals.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.001, 14.002, 36.052, 36.204, and 39.905.

§25.181. Energy Efficiency Goal.

(a) Purpose. The purpose of this section is to ensure that:

(1) electric utilities administer energy efficiency incentive programs in a market-neutral, nondiscriminatory manner and do not offer competitive services, except as permitted in §25.343 of this title (relating to Competitive Energy Services) or this section;

(2) all customers, in all eligible customer classes and all areas of an electric utility's service area, have a choice of and access to energy efficiency alternatives that allow each customer to reduce energy consumption, peak demand, or energy costs; and

(3) each electric utility provides, through market-based standard offer programs or limited, targeted, market-transformation programs, incentives sufficient for retail electric providers and competitive energy service providers to acquire additional cost-effective energy efficiency for residential and commercial customers to achieve the goals in subsection (e) of this section.

(b) Application. This section applies to electric utilities.

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

(1) Affiliate--

(A) a person who directly or indirectly owns or holds at least 5.0% of the voting securities of an energy efficiency service provider;

(B) a person in a chain of successive ownership of at least 5.0% of the voting securities of an energy efficiency service provider;

(C) a corporation that has at least 5.0% of its voting securities owned or controlled, directly or indirectly, by an energy efficiency service provider;

(D) a corporation that has at least 5.0% of its voting securities owned or controlled, directly or indirectly, by:

(i) a person who directly or indirectly owns or controls at least 5.0% of the voting securities of an energy efficiency service provider; or

(ii) a person in a chain of successive ownership of at least 5.0% of the voting securities of an energy efficiency service provider; or

(E) a person who is an officer or director of an energy efficiency service provider or of a corporation in a chain of successive ownership of at least 5.0% of the voting securities of an energy efficiency service provider;

(F) a person who actually exercises substantial influence or control over the policies and actions of an energy efficiency service provider;

(G) a person over which the energy efficiency service provider exercises the control described in subparagraph (F) of this paragraph;

(H) a person who exercises common control over an energy efficiency service provider, where "exercising common control over an energy efficiency service provider" means having the power, either directly or indirectly, to direct or cause the direction of the management or policies of an energy efficiency service provider, without regard to whether that power is established through ownership or voting of securities or any other direct or indirect means; or

(I) a person who, together with one or more persons with whom the person is related by ownership, marriage or blood relationship, or by action in concert, actually exercises substantial influence over the policies and actions of an energy efficiency service provider even though neither person may qualify as an affiliate individually.

(2) Capacity factor--The ratio of the annual energy savings goal, in kWh, to the peak demand goal for the year, measured in kW, multiplied by the number of hours in the year; or the ratio of the actual annual energy savings, in kWh, to the actual peak demand reduction for the year, measured in kW, multiplied by the number of hours in the year.

(3) Commercial customer--A non-residential customer taking service at a metered point of delivery at a distribution voltage under an electric utility's tariff during the prior calendar year and a non-profit customer or government entity, including an educational institution. For purposes of this section, each metered point of delivery shall be considered a separate customer.

(4) Competitive energy efficiency services--Energy efficiency services that are defined as competitive under §25.341 of this title (relating to Definitions).

(5) Deemed savings--A pre-determined, validated estimate of energy and peak demand savings attributable to an energy efficiency

measure in a particular type of application that an electric utility may use instead of energy and peak demand savings determined through measurement and verification activities.

(6) Demand--The rate at which electric energy is used at a given instant, or averaged over a designated period, usually expressed in kilowatts (kW) or megawatts (MW).

(7) Demand savings--A quantifiable reduction in demand.

(8) Eligible customers--Residential and commercial customers. In addition, to the extent that they meet the criteria for participation in load management standard offer programs developed for industrial customers and implemented prior to May 1, 2007, industrial customers are eligible customers solely for the purpose of participating in such programs.

(9) Energy efficiency--Improvements in the use of electricity that are achieved through facility or equipment improvements, devices, or processes that produce reductions in demand or energy consumption with the same or higher level of end-use service and that do not materially degrade existing levels of comfort, convenience, and productivity.

(10) Energy efficiency measures--Equipment, materials, and practices at a customer's site that result in a reduction in electric energy consumption, measured in kilowatt-hours (kWh), or peak demand, measured in kilowatts (kWs), or both. These measures may include thermal energy storage and removal of an inefficient appliance so long as the customer need satisfied by the appliance is still met.

(11) Energy efficiency program--The aggregate of the energy efficiency activities carried out by an electric utility under this section or a set of energy efficiency projects carried out by an electric utility under the same name and operating rules.

(12) Energy efficiency project--An energy efficiency measure or combination of measures undertaken in accordance with a standard offer or market transformation program.

(13) Energy efficiency service provider--A person who installs energy efficiency measures or performs other energy efficiency services under this section. An energy efficiency service provider may be a retail electric provider or commercial customer, provided that the commercial customer has a peak load equal to or greater than 50kW.

(14) Energy savings--A quantifiable reduction in a customer's consumption of energy that is attributable to energy efficiency measures.

(15) Growth in demand--The annual increase in demand in the Texas portion of an electric utility's service area at time of peak demand, as measured in accordance with this section.

(16) Hard-to-reach customers--Residential customers with an annual household income at or below 200% of the federal poverty guidelines.

(17) Incentive payment--Payment made by a utility to an energy efficiency service provider under an energy-efficiency program.

(18) Inspection--Examination of a project to verify that an energy efficiency measure has been installed, is capable of performing its intended function, and is producing an energy saving or demand reduction.

(19) Load control--Activities that place the operation of electricity-consuming equipment under the control or dispatch of an energy efficiency service provider, an independent system operator or other transmission organization or that are controlled by the customer, with the objective of producing energy or demand savings.

(20) Load management--Load control activities that result in a reduction in peak demand on an electric utility system or a shifting of energy usage from a peak to an off-peak period or from high-price periods to lower price periods.

(21) Market transformation program--Strategic programs intended to induce lasting structural or behavioral changes in the market that result in increased adoption of energy efficient technologies, services, and practices, as described in this section.

(22) Measurement and verification--Activities intended to determine the actual energy and demand savings resulting from energy efficiency projects as described in this section.

(23) Off-peak period--Period during which the demand on an electric utility system is not at or near its maximum. For the purpose of this section, the off-peak period includes all hours that are not in the peak period.

(24) Peak demand--Electrical demand at the times of highest annual demand on the utility's system. Peak demand refers to Texas retail peak demand and, therefore, does not include demand of retail customers in other states or wholesale customers.

(25) Peak demand reduction--Reduction in demand on the utility system throughout the utility system's peak period.

(26) Peak period--For the purpose of this section, the peak period consists of the hours from one p.m. to seven p.m., during the months of June, July, August, and September, excluding weekends and Federal holidays.

(27) Program year--A year in which an energy efficiency incentive program is implemented, beginning January 1 and ending December 31.

(28) Renewable demand side management (DSM) technologies--Equipment that uses a renewable energy resource (renewable resource), as defined in §25.173(c) of this title (relating to Goal for Renewable Energy) that, when installed at a customer site, reduces the customer's net purchases of energy, demand, or both.

(29) Standard offer contract--A contract between an energy efficiency service provider and a participating utility specifying standard payments based upon the amount of energy and peak demand savings achieved through energy efficiency measures, the measurement and verification protocols, and other terms and conditions, consistent with this section.

(30) Standard offer program--A program under which a utility administers standard offer contracts between the utility and energy efficiency service providers.

(d) Cost-effectiveness standard. An energy efficiency program is deemed to be cost-effective if the cost of the program to the utility is less than or equal to the benefits of the program.

(1) The cost of a program includes the cost of incentives, measurement and verification, and actual or allocated research and development and administrative costs. The benefits of the program consist of the value of the demand reductions and energy savings, measured in accordance with the avoided costs prescribed in this subsection. The present value of the program benefits shall be calculated over the projected life of the measures installed under the program.

(2) The avoided cost of capacity is $80 per kW-year for all electric utilities, unless the commission establishes a different avoided cost of capacity in accordance with this paragraph. The avoided cost of capacity shall be revised beginning with program year 2012, in accordance with this paragraph.

(A) By March 15 of each year, commission staff shall post a notice of a revised avoided cost of capacity on the commission's website, on a webpage designated for this purpose, effective for the next program year. If the avoided cost of capacity has not changed, staff shall post a notice that the avoided cost of capacity remains the same.

(i) Staff shall calculate the avoided cost of capacity from the base overnight cost of a new conventional combustion turbine as reported by the United States Department of Energy's Energy Information Administration's (EIA) Cost and Performance Characteristics of New Central Station Electricity Generating Technologies associated with EIA's *Annual Energy Outlook.* If EIA cost data that reflects current conditions in the industry does not exist, staff may establish an avoided cost of capacity using another data source.

(ii) If the EIA base overnight cost of a new conventional combustion turbine is less than $650 per kW, the avoided cost of capacity shall be $80 per kW. If the base overnight cost of a new conventional combustion turbine is at or between $650 and $800 per kW, the avoided cost of capacity shall be $100 per kW. If the base overnight cost of a new conventional combustion turbine is greater than $800 per kW, the avoided cost of capacity shall be $120 per kW.

(iii) The avoided cost of capacity calculated by staff may be challenged only by the filing of a petition within 45 days of the date the avoided cost of capacity is posted on the commission's website on a webpage designated for that purpose.

(B) A non-ERCOT utility may petition the commission for authorization to use an avoided cost of capacity different from the avoided cost determined according to subparagraph (A) of this paragraph by filing a petition no later than 45 days after the date the avoided cost of capacity calculated by staff is posted on the commission's website on a webpage designated for that purpose. The avoided cost of capacity proposed by the utility shall be based on a generating resource or purchase in the utility's resource acquisition plan and the terms of the purchase or the cost of the resource shall be disclosed in the filing.

(3) The avoided cost of energy is $0.064 per kWh for all electric utilities, unless the commission establishes a different avoided cost of energy in accordance with this paragraph. The avoided cost of energy shall be revised beginning with program year 2012, in accordance with this paragraph.

(A) Commission staff shall post a notice of a revised avoided cost of energy each year on the commission's website, on a webpage designated for this purpose, effective for the next program year. If the cost of energy has not changed, staff shall post a notice that the cost of energy remains the same. Staff shall calculate the avoided cost of energy using the simple average of the market clearing price in ERCOT for balancing energy for all hours during the peak period for the previous two calendar years. When ERCOT nodal prices are available, the avoided energy price shall be adjusted to the zonal average of nodal prices in the real-time market for all hours during the peak period.

(B) A non-ERCOT utility may petition the commission for authorization to use an avoided cost of energy other than that otherwise determined according to this paragraph. The avoided cost of energy may be based on peak period energy prices in an energy market operated by a regional transmission organization if the utility participates in that market and the prices are reported publicly. If the utility does not participate in such a market, the avoided cost of energy may be based on the expected heat rate of the gas-turbine generating technology specified in this subsection, multiplied by a publicly reported cost of natural gas.

(e) Annual energy efficiency goals.

(1) An electric utility shall administer energy efficiency programs to achieve the following minimum goals:

(A) 20% reduction of the electric utility's annual growth in demand of residential and commercial customers for the 2010 and 2011 program years;

(B) 25% reduction of the electric utility's annual growth in demand of residential and commercial customers for the 2012 program year; and

(C) 30% reduction of the electric utility's annual growth in demand of residential and commercial customers for the 2013 program year and for subsequent program years.

(2) The commission may establish for a utility a lower goal than the goal specified in paragraph (1) of this subsection or a higher budget cap than the cap specified in subsection (f) of this section if the utility demonstrates that compliance with that goal or cap is not reasonably possible and that good cause supports the lower goal or higher cap.

(3) Each utility's demand-reduction goal shall be calculated as follows:

(A) Each year's historical demand for residential and commercial customers shall be adjusted for weather fluctuations, using weather data for the most recent ten years. The utility's growth in residential and commercial demand is based on the average growth in retail load in the Texas portion of the utility's service area, measured at the utility's annual system peak. The utility shall calculate the average growth rate for the prior five years.

(B) The demand goal for energy-efficiency savings for a year is calculated by applying the percentage goal, prescribed in paragraphs (1) and (2) of this subsection, to the average growth in demand, calculated in accordance with subparagraph (A) of this paragraph. Unless the commission establishes a goal for a utility under paragraph (2) of this subsection, a utility's demand goal in any year shall not be lower than its goal for the prior year.

(C) A utility may submit for commission approval an alternative method to calculate its growth in demand, for good cause.

(D) Savings achieved through programs for hard-to-reach customers shall be no less than 5.0% of the utility's total demand reduction goal.

(4) An electric utility shall administer an energy efficiency program designed to meet an energy savings goal calculated from its demand savings goal, using a 20% capacity factor.

(5) Electric utilities shall administer energy efficiency programs to effectively and efficiently achieve the goals set out in this section.

(A) Incentive payments may be made under standard offer contracts or market transformation contracts, for energy savings and demand reductions. Each electric utility shall establish standard incentive payments to achieve the objectives of this section.

(B) Projects or measures under either the standard offer or market transformation programs are not eligible for incentive payments or compensation if:

(i) A project would achieve demand or energy reduction by eliminating an existing function, shutting down a facility or operation, or would result in building vacancies or the re-location of existing operations to a location outside of the area served by the util-

ity conducting the program, except for an appliance recycling program consistent with this section.

(ii) A measure would be adopted even in the absence of the energy efficiency service provider's proposed energy efficiency project, except in special cases, such as hard-to-reach and weatherization programs, or where free riders are accounted for using a net to gross adjustment of the avoided costs, or another method that achieves the same result.

(iii) A project results in negative environmental or health effects, including effects that result from improper disposal of equipment and materials.

(f) Cost recovery. A utility shall establish an energy efficiency cost recovery factor (EECRF) that complies with this subsection to timely recover the reasonable costs of providing energy efficiency programs pursuant to this section.

(1) A utility may request that an EECRF be established to recover all of the utility's forecasted annual energy efficiency program costs, if the commission order establishing the utility's base rates does not expressly include an amount for energy efficiency program costs and any bonus earned under subsection (h). If a utility's existing base rate order expressly includes an amount for energy efficiency program costs, the utility may request that an EECRF be established to recover forecasted annual energy efficiency program costs and any bonus earned under subsection (h) in excess of the costs recovered through base rates.

(2) Base rates shall not be set to recover energy efficiency costs.

(3) The EECRF shall be calculated to recover the costs associated with programs under this section from the customer classes that receive services under the programs.

(4) Not later than May 1 of each year, a utility with an EECRF shall apply to adjust the EECRF effective in January of the following year. An application filed pursuant to this paragraph shall reflect changes in program costs and bonuses and shall minimize any over- or under-collection of energy efficiency costs resulting from the use of the EECRF. The EECRF shall be designed to permit the utility to recover any under-recovery of energy efficiency program costs or return any over-recovery of costs.

(5) If a utility is recovering energy efficiency costs through base rates, the EECRF may be changed in a general rate proceeding. If a utility is not recovering energy efficiency costs through base rates, the EECRF must be adjusted in an EECRF proceeding pursuant to this section.

(6) The commission may approve an energy charge or a monthly customer charge for the EECRF. The EECRF shall be set at a rate that will give the utility the opportunity to earn revenues equal to the sum of the utility's forecasted energy efficiency costs, net of energy efficiency costs included in base rates, the energy efficiency performance bonus amount that it earned for the prior year under subsection (h) of this section and any adjustment for past over- or under-recovery of energy efficiency revenues.

(7) A utility that is unable to establish an EECRF due to a rate freeze may defer the costs of complying with this section and recover the deferred costs through an energy efficiency cost recovery factor on the expiration of the rate freeze period. Any deferral of costs that are not being recovered in rates shall bear interest at the utility's commission approved cost of capital from the time the costs are incurred until the commission approves an EECRF for the recovery of the costs. A utility that seeks to defer its costs shall file an application for approval of the deferral.

(8) The EECRF for a utility that is recovering energy efficiency costs exclusively through its EECRF shall not exceed the amounts prescribed in this paragraph. If a utility is recovering energy efficiency costs through an identified amount in base rates, the sum of the base rate recovery of energy efficiency costs and the EECRF shall not exceed the amounts prescribed in this paragraph.

(A) For residential customers for program years 2011 and 2012, $1.30 if the EECRF is charged on a monthly basis or $0.001 per kWh if it is charged on an energy basis, or the amount previously authorized by the commission; and

(B) For residential customers for program years 2013 and thereafter, $1.60 if the EECRF is charged on a monthly basis or $0.0012 per kWh if it is charged on an energy basis, or the amount previously authorized by the commission;

(C) For non-residential customers for program years 2011 and 2012, rates designed to recover $0.0005 per kWh for consumption of non-residential customer classes that are charged an EECRF or a base rate to cover energy efficiency costs; and

(D) For non-residential customers for program year 2013 and thereafter, rates designed to recover $0.00075 per kWh for consumption of non-residential customer classes that are charged an EECRF or a base rate to cover energy efficiency costs.

(9) A utility's application to establish or adjust an EECRF shall include the information and schedules in any commission approved EECRF filing package. If the commission has not approved an EECRF filing package, an application to establish or adjust an EECRF shall include testimony and schedules showing the utility's forecasted energy efficiency costs, energy efficiency costs included in base rates, the Energy Efficiency Performance Bonus amount that it earned for the prior year, any adjustment for past over- or under-recovery of energy efficiency revenues, information concerning the calculation of billing determinants, information from its last base rate case concerning the allocation of energy efficiency costs to customer classes, and the following:

(A) the incentive payments by the utility, by program; the utility's administrative costs for its energy efficiency programs for the most recent year and for the year in which the EECRF is expected to be in effect, including costs for the dissemination of information and outreach; and other major administrative costs, and the basis for the projection;

(B) billing determinants for the most recent year and for the year in which the EECRF is expected to be in effect;

(C) the actual revenues attributable to the EECRF for any period for which the utility seeks to adjust the EECRF for an under- or over-recovery of EECRF revenues; and

(D) any other information that supports the determination of the EECRF.

(10) Upon a utility's filing of an application to establish or adjust an EECRF, the presiding officer shall set a procedural schedule that will enable the commission to issue a final order in the proceeding as follows, except where good cause supports a different procedural schedule:

(A) within 60 days after a sufficient application was filed if no hearing is requested within 30 days of the filing of the application; or

(B) within 120 days after a sufficient application was filed, if a timely request for a hearing is made. If a hearing is requested, the hearing will be held no earlier than the first working day after the 45th day after a sufficient application is filed.

(11) In any proceeding to establish or adjust an EECRF, the utility must show that:

(A) the costs to be recovered through the EECRF are reasonable estimates of the costs necessary to provide energy efficiency programs and to meet the utility's goals under this section;

(B) calculations of any under- or over-recovery of EECRF revenues is consistent with this section;

(C) any energy efficiency performance bonus for which recovery is being sought is consistent with this section;

(D) the costs assigned or allocated to customer classes are reasonable and consistent with this section;

(E) the estimate of billing determinants for the period for which the EECRF is to be in effect is reasonable; and

(F) any calculations or estimates of system losses and line losses used in calculating the charges are reasonable.

(12) The scope of a proceeding to establish or adjust an EECRF is limited to the issues of whether the utility's cost estimates are reasonable, calculations of under- or over-recoveries are consistent with this section, the calculation of any energy efficiency performance bonus is consistent with this section, the assignments and allocations to the classes are appropriate, and the calculation of the EECRF is in accordance with this subsection. The commission shall make a final determination of the reasonableness of the costs and performance bonuses that the utility recovered through the EECRF.

(13) A utility shall file an application at least every three calendar years to reconcile costs recovered through its EECRF. An application filed pursuant to this paragraph shall be separate from the annual EECRF adjustment application required by paragraph (4) of this subsection. The commission may establish a schedule and form for such applications.

(g) Incentive payments. The incentive payments for each customer class shall not exceed 100% of avoided cost, as determined in accordance with this section. The incentive payments shall be set by each utility with the objective of achieving its energy and demand savings goals at the lowest reasonable cost per program. Different incentive levels may be established for areas that have historically been underserved by the utility's energy efficiency program or for other appropriate reasons. Utilities may adjust incentive payments during the program year, but such adjustments must be clearly publicized in the materials used by the utility to set out the program rules and describe the program to participating energy efficiency service providers.

(h) Energy efficiency performance bonus. A utility that exceeds its demand and energy reduction goals established in this section at a cost that does not exceed the limit established in this section shall be awarded a performance bonus. The performance bonus shall be based on the utility's energy efficiency achievements for the previous calendar year. The bonus calculation shall not include demand or energy savings that result from programs other than programs implemented under this section.

(1) The performance bonus shall entitle the utility to receive a share of the net benefits realized in meeting its demand reduction goal established in this section.

(2) Net benefits shall be calculated as the sum of total avoided cost associated with the eligible programs administered by the utility minus the sum of all program costs. Total avoided costs shall be calculated in accordance with this section.

(3) A utility that exceeds 100% of its demand and energy reduction goals shall receive a bonus equal to 1% of the net benefits for every 2% that the demand reduction goal has been exceeded, with a maximum of 20% of the utility's program costs.

(4) The commission may reduce the bonus otherwise permitted under this subsection for a utility that fails to meet the goal for its under subsection (e) of this section.

(5) In calculating net benefits to determine a performance bonus, a discount rate equal to the utility's weighted average cost of capital of the utility and an escalation rate of two percent shall be used.

(6) A bonus earned under this section shall not be included in the utility's revenues or net income for the purpose of establishing a utility's rates or commission assessment of its earnings.

(7) The amendments to this subsection adopted in 2010 are effective for any bonus requested for performance in program year 2010 or thereafter.

(i) Utility administration. The cost of administration shall not exceed 15% of a utility's total program costs. The cost of research and development shall not exceed 10% of a utility's total program costs. The cumulative cost of administration and research and development shall not exceed 20% of a utility's total program costs. Any bonus awarded by the commission shall not be included in program costs for the purpose of applying these limits.

(1) Administrative costs include all reasonable and necessary costs incurred by a utility in carrying out its responsibilities under this section, including:

(A) conducting informational activities designed to explain the standard offer programs and market transformation programs to energy efficiency service providers, retail electric providers, and vendors;

(B) providing informational programs to improve customer awareness of energy efficiency programs and measures;

(C) reviewing and selecting energy efficiency programs in accordance with this section;

(D) providing regular and special reports to the commission, including reports of energy and demand savings; and

(E) any other activities that are necessary and appropriate for successful program implementation.

(2) A utility shall adopt measures to foster competition among energy service providers, such as limiting the number of projects or level of incentives that a single energy service provider and its affiliates is eligible for and establishing funding set-asides for small projects.

(3) A utility may establish funding set-asides or other program rules to foster participation in energy efficiency programs by municipalities and other governmental entities.

(4) Electric utilities shall use standardized forms, procedures, deemed savings estimates and program templates. The electric utility shall file any standardized materials, or any change to it, with the commission at least 60 days prior to its use. In filing such materials, the utility shall provide an explanation of changes from the version of the materials that was previously used. The utility shall provide relevant documents to REPs and EESPs and work collaboratively with them when it changes program documents, to the extent that such changes

are not considered in the Energy Efficiency Implementation Project described in subsection (q) of this section.

(5) Each electric utility in an area in which customer choice is offered shall conduct programs to encourage and facilitate the participation of retail electric providers and energy efficiency service providers in the delivery of efficiency and demand response programs, including:

(A) Coordinating program rules, contracts, and incentives to facilitate the statewide marketing and delivery of the same or similar programs by retail electric providers;

(B) Setting aside amounts for programs to be delivered to customers by retail electric providers and establishing program rules and schedules that will give retail electric providers sufficient time to plan, advertise, and conduct energy efficiency programs, while preserving the utility's ability to meet the goals in this section; and

(C) Working with retail electric providers and energy efficiency service providers to evaluate the demand reductions and energy savings resulting from time-of-use prices, home-area network devices, such as in home displays, and other programs facilitated by advanced meters to determine the demand and energy savings from such programs.

(j) Standard offer programs. A utility's standard offer program shall be implemented through program rules and standard offer contracts that are consistent with this section. Standard offer contracts will be available to any energy efficiency service provider that satisfies the contract requirements prescribed by the utility under this section and demonstrates that it is capable of managing energy efficiency projects under an electric utility's energy efficiency program.

(k) Market transformation programs. Market transformation programs are strategic efforts, including, but not limited to, incentives and education designed to reduce market barriers for energy efficient technologies and practices. Market transformation programs may be designed to obtain energy savings or peak demand reductions beyond savings that would be achieved through compliance with existing building codes and equipment efficiency standards or standard offer programs. Utilities should cooperate with the REPs, and, where possible, leverage existing industry-recognized programs that have the potential to reduce demand and energy consumption in Texas and consider statewide administration where appropriate. Market transformation programs may operate over a period of more than one year and may demonstrate cost-effectiveness over a period longer than one year.

(l) Requirements for standard offer and market transformation programs. A utility's standard offer and market transformation programs shall meet the requirements of this subsection. A utility may conduct information and advertizing campaigns to foster participation in standard offer and market transformation programs.

(1) Standard offer and market transformation programs:

(A) shall describe the eligible customer classes and allocate funding among the classes on an equitable basis;

(B) may offer standard incentive payments and specify a schedule of payments that are sufficient to meet the goals of the program, which shall be consistent with this section, or any revised payment formula adopted by the commission. The incentive payments may include both payments for energy and demand savings, as appropriate;

(C) shall not permit the provision of any product, service, pricing benefit, or alternative terms or conditions to be conditioned upon the purchase of any other good or service from the utility, except that only customers taking transmission and distribution services from a utility can participate in its energy efficiency programs;

(D) shall provide for a complaint process that allows:

(i) an energy efficiency service provider to file a complaint with the commission against a utility; and

(ii) a customer to file a complaint with the utility against an energy efficiency service provider;

(E) may permit the use of renewable DSM and combined heat and power technologies, involving installations of ten megawatts or less; and

(F) may require energy efficiency service providers to provide the following:

(i) a description of how the value of any incentive will be passed on to customers;

(ii) evidence of experience and good credit rating;

(iii) a list of references;

(iv) all applicable licenses required under state law and local building codes;

(v) evidence of all building permits required by governing jurisdictions; and

(vi) evidence of all necessary insurance.

(2) Standard offer programs:

(A) shall require energy efficiency service providers to identify peak demand and energy savings for each project in the proposals they submit to the utility;

(B) shall be neutral with respect to specific technologies, equipment, or fuels. Energy efficiency projects may lead to switching from electricity to another energy source, provided that the energy efficiency project results in overall lower energy costs, lower energy consumption, and the installation of high efficiency equipment. Utilities may not pay incentives for a customer to switch from gas appliances to electric appliances except in connection with the installation of high efficiency combined heating and air conditioning systems;

(C) shall require that all projects result in a reduction in purchased energy consumption, or peak demand, or a reduction in energy costs for the end-use customer;

(D) shall encourage comprehensive projects incorporating more than one energy efficiency measure;

(E) shall be limited to projects that result in consistent and predictable energy or peak demand savings over an appropriate period of time based on the life of the measure; and

(F) may permit a utility to use poor performance, including customer complaints, as a criterion to limit or disqualify an energy efficiency service provider or its affiliate from participating in a program.

(3) A market transformation program shall identify:

(A) program goals;

(B) market barriers the program is designed to overcome;

(C) key intervention strategies for overcoming those barriers;

(D) estimated costs and projected energy and capacity savings;

(E) a baseline study that is appropriate in time and geographic region. In establishing a baseline, the study shall consider the level of regional implementation and enforcement of any applicable energy code;

(F) program implementation timeline and milestones;

(G) a description of how the program will achieve the transition from extensive market intervention activities toward a largely self-sustaining market;

(H) a method for measuring and verifying savings; and

(I) the period over which savings shall be considered to accrue, including a projected date by which the market will be sufficiently transformed so that the program should be discontinued.

(4) A market transformation program shall be designed to achieve energy or peak demand savings, or both, and lasting changes in the way energy efficient goods or services are distributed, purchased, installed, or used over a defined period of time. A utility shall use fair competitive procedures to select EESPs to conduct a market transformation program, and shall include in its annual report the justification for the selection of an EESP to conduct a market transformation program on a sole-source basis.

(5) A load-control standard-offer program shall not permit an energy efficiency service provider to receive incentives under the utility program for the same demand reduction for which it is compensated under a demand response program conducted by an independent organization, independent system operator, or regional transmission operator.

(m) Energy efficiency plans and reports. Each electric utility shall file by April 1 of each year an energy efficiency plan and report, as described in this subsection. The plan and report shall be filed as a single document.

(1) Each electric utility's energy efficiency plan and report shall describe how the utility intends to achieve the goals set forth in this section and comply with the other requirements of this section. The plan and report shall be based on calendar years. The plan and report shall propose an annual budget sufficient to reach the goals specified in this section.

(2) Each electric utility's plan and report shall include:

(A) the utility's total actual and weather-adjusted peak demand and actual and weather-adjusted peak demand for residential and commercial customers for the previous five years;

(B) the demand goal calculated in accordance with this section for the current year and the following year, including documentation of the demand, weather adjustments, and the calculation of the goal;

(C) the utility's customers' total actual and weather-adjusted energy consumption and actual and weather-adjusted energy consumption for residential and commercial customers for the previous five years;

(D) the energy goal calculated in accordance with this section, including documentation of the energy consumption, weather adjustments, and the calculation of the goal;

(E) a description of existing energy efficiency programs and an explanation of the extent to which these programs will be used to meet the utility's energy efficiency goals;

(F) a description of each of the utility's energy efficiency programs that were not included in the previous year's plan, including measurement and verification plans if appropriate, and any baseline studies and research reports or analyses supporting the value of the new programs;

(G) an estimate of the energy and peak demand savings to be obtained through each separate energy efficiency program;

(H) a description of the customer classes targeted by the utility's energy efficiency programs, specifying the size of the hard-to-reach, residential, and commercial classes, and the methodology used for estimating the size of each customer class;

(I) the proposed annual budget required to implement the utility's energy efficiency programs, broken out by program for each customer class, including hard-to-reach customers, and any set-asides or budget restrictions adopted or proposed in accordance with this section. The proposed budget shall detail the incentive payments and utility administrative costs, including specific items for research and information and outreach to energy efficiency service providers, and other major administrative costs, and the basis for estimating the proposed expenditures;

(J) a discussion of the types of informational activities the utility plans to use to encourage participation by customers, energy efficiency service providers, and retail electric providers to participate in energy efficiency programs, including the manner in which the utility will provide notice of energy efficiency programs, and any other facts that may be considered when evaluating a program;

(K) the utility's energy goal and demand goal for the prior five years, as reported in annual energy efficiency reports filed in accordance with this section;

(L) a comparison of projected savings (energy and demand), reported savings, and verified savings for each of the utility's energy efficiency programs for the prior two years;

(M) a description of the results of any market transformation program, including a comparison of the baseline and actual results and any adjustments to the milestones for a market transformation program;

(N) expenditures for the prior five years for energy and demand incentive payments and program administration, by program and customer class;

(O) funds that were committed but not spent during the prior year, by program;

(P) a comparison of actual and budgeted program costs, including an explanation of any increase or decreases of more than 10% in the cost of a program;

(Q) information relating to energy and demand savings achieved and the number of customers served by each program by customer class;

(R) the utility's most recent EECRF, the revenue collected through the EECRF, energy efficiency revenue collected through base rates, and the control number under which the most recent EECRF was established;

(S) the amount of any over- or under-recovery energy efficiency program costs whether collected through base rates or the EECRF;

(T) a list of any counties that in the prior year were under-served by the energy efficiency program;

(U) a calculation showing whether the utility qualifies for a performance bonus and the amount of any bonus; and

(V) a description of new or discontinued programs, including pilot programs that are planned to be continued as full programs. For programs that are to be introduced or pilot programs that are to be continued as full programs, the description shall include the budget and projected demand and energy savings.

(n) Review of programs. Commission staff may initiate a proceeding to review a utility's energy efficiency programs. In addition, an interested entity may request that the commission initiate a proceeding to review a utility's energy efficiency programs.

(o) Inspection, measurement and verification. Each standard offer program shall include an industry-accepted measurement and verification protocol, such as the International Performance Measurement and Verification Protocol, to measure and verify energy and peak demand savings to ensure that the goals of this section are achieved. An energy efficiency service provider shall not receive final compensation until it establishes that the work is complete and measurement and verification in accordance with the protocol verifies that the savings will be achieved. If inspection of one or more measures is a part of the protocol, an energy efficiency service provider shall not receive final compensation until the utility has conducted its inspection on the sample of measures and the inspections confirm that the work has been done.

(1) The energy efficiency service provider is responsible for the measurement of energy and peak demand savings using the approved measurement and verification protocol, and may utilize the services of an independent third party for such purposes.

(2) Commission-approved deemed energy and peak demand savings may be used in lieu of the energy efficiency service provider's measurement and verification, where applicable. The deemed savings approved by the commission before December 31, 2007 are continued in effect, unless superseded by commission action.

(3) An energy efficiency service provider shall verify that the measures contracted for were installed before final payment is made to the energy efficiency service provider, by obtaining the customer's signature certifying that the measures were installed, or by other reasonably reliable means approved by the utility.

(4) For projects involving over 30 installations, a statistically significant sample of installations will be subject to on-site inspection in accordance with the protocol for the project to verify that measures are installed and capable of performing their intended function. Inspection shall occur within 30 days of notification of measure installation.

(5) Projects of less than 30 installations may be aggregated and a statistically significant sample of the aggregate installations will be subject to on-site inspection in accordance with the protocol for the projects to ensure that measures are installed and capable of performing their intended function. Inspection shall occur within 30 days of notification of measure installation.

(6) The sample size for on-site inspections may be adjusted for an energy efficiency service provider under a particular contract, based on the results of prior inspections.

(p) Targeted energy efficiency program. Unless funding is provided under PURA §39.903, each unbundled transmission and distribution utility shall include in its energy efficiency plan a targeted low-income energy efficiency program as described by PURA §39.903(f)(2). Savings achieved by the program shall count toward the transmission and distribution utility's energy efficiency goal. Each utility shall include a proposed funding level for the weatherization program in its energy efficiency plan.

(q) Energy Efficiency Implementation Project - EEIP. The commission may use an implementation project involving input by interested persons to make recommendations to the commission with regard to best practices in standard offer programs and market transformation programs, modifications to programs, standardized forms and procedures, deemed savings estimates, program templates, and the overall direction of the energy efficiency program established by this section. Utilities shall provide timely responses to questions posed by participants in the EEIP that are relevant to the tasks of the EEIP. The following functions may also be undertaken in the energy efficiency implementation project:

(1) development, discussion, and review of new statewide standard offer programs;

(2) identification, discussion, design, and review of new market transformation programs;

(3) determination of measures for which deemed savings are appropriate and participation in the development of deemed savings estimates for those measures;

(4) review of and recommendations on an independent measurement and verification expert's report;

(5) review of and recommendations on incentive payment levels and their adequacy to induce the desired level of participation by energy efficiency service providers and customers;

(6) review of and recommendations on the utility annual energy efficiency plans and reports; EEIP meetings may be scheduled by commission staff for review of the most recent historical year's utility reports, for review of proposals for changes to a utility's energy efficiency plans for a future year, and for midcourse review;

(7) periodic reviews of the cost effectiveness methodology; and

(8) other activities as requested by the commission.

(r) Retail providers. Each utility in an area in which customer choice is offered shall conduct outreach and information programs and otherwise use its best efforts to encourage and facilitate the involvement of retail electric providers as energy efficiency service companies in the delivery of efficiency and demand response programs.

(s) Customer protection. Each energy efficiency service provider that provides energy efficiency services to end-use customers under this section shall provide the disclosures and include the contractual provisions required by this subsection, except for commercial customers with a peak load exceeding 50 kW.

(1) Clear disclosure to the customer shall be made of the following:

(A) the customer's right to a cooling-off period of three business days, in which the contract may be canceled, if applicable under law;

(B) the name, telephone number, and street address of the energy efficiency services provider and any subcontractor that will be performing services at the customer's home or business;

(C) the fact that incentives are made available to the energy efficiency services provider through a program funded by utility customers, manufacturers or other entities and the amount of any incentives provided by the utility;

(D) the amount of any incentives that will be provided to the customer;

(E) notice of provisions that will be included in the customer's contract, including warranties;

(F) the fact that the energy efficiency service provider must measure and report to the utility the energy and peak demand savings from installed energy efficiency measures;

(G) the liability insurance to cover property damage carried by the energy efficiency service provider and any subcontractor;

(H) the financial arrangement between the energy efficiency service provider and customer, including an explanation of the total customer payments, the total expected interest charged, all possible penalties for non-payment, and whether the customer's installment sales agreement may be sold;

(I) the fact that the energy efficiency service provider is not part of or endorsed by the commission or the utility; and

(J) a description of the complaint procedure established by the utility under this section, and toll free numbers for the Office of Customer Protection of the Public Utility Commission of Texas, and the Office of Attorney General's Consumer Protection Hotline.

(2) The energy efficiency service provider's contract with the customer shall include:

(A) work activities, completion dates, and the terms and conditions that protect residential customers in the event of non-performance by the energy efficiency service provider;

(B) provisions prohibiting the waiver of consumer protection statutes, performance warranties, false claims of energy savings and reductions in energy costs; and

(C) a complaint procedure to address performance issues by the energy efficiency service provider or a subcontractor.

(3) When an energy efficiency service provider completes the installation of measures for a customer, it shall provide the customer an "All Bills Paid" affidavit to protect against claims of subcontractors.

(t) Grandfathered programs. An electric utility that offered a load management standard offer programs for industrial customers prior to May 1, 2007 shall continue to make the program available, at 2007 funding and participation levels, and may include additional customers in the program to maintain these funding and participation levels. Notwithstanding subsection (c)(8) of this section, an industrial customer may be considered an eligible customer for programs that will be completed no later than December 31, 2008.

(u) Administrative penalty. The commission may impose an administrative penalty or other sanction if the utility fails to meet a goal for energy efficiency under this section. Factors that may be considered in determining whether to impose a sanction for the utility's failure to meet the goal include:

(1) the level of demand by retail electric providers and competitive energy service providers for program incentive funds made available by the utility through its programs;

(2) changes in building energy codes;

(3) changes in government-imposed appliance or equipment efficiency standards;

(4) any actions taken by the utility to identify and correct any deficiencies in its energy efficiency program; and

(5) the utility's effectiveness in administering its energy efficiency program.

(v) Effective date. The effective date of this section is December 1, 2010.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2010.

TRD-201004609
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
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Proposal publication date: February 12, 2010
For further information, please call: (512) 936-7223

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PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 72. STAFF LEASING SERVICES

16 TAC §§72.24, 72.25, 72.100

The Texas Commission of Licensing and Regulation ("Commission") adopts new rules at 16 Texas Administrative Code ("TAC") Chapter 72, §§72.24, 72.25, and 72.100, regarding approved assurance organizations in the staff leasing services program. Sections 72.24 and 72.25 are adopted with changes to the proposed text as published in the May 7, 2010, issue of the *Texas Register* (35 TexReg 3582) and are republished. Section 72.100 is adopted without changes to the proposed text as published in the May 7, 2010, issue of the *Texas Register* (35 TexReg 3582) and is not republished. The adoption takes effect September 1, 2010.

The new rules are necessary to implement changes in law enacted by House Bill 2249 ("HB 2249") which, among other provisions, authorized assurance organizations that are approved by the Commission to provide services to a staff leasing company during initial licensing and renewal and to provide ongoing compliance with the statute and rules. HB 2249 additionally provided for a new method of defining a staff leasing company's solvency (working capital), which will replace the current method (net worth). The provisions of HB 2249 relating to solvency and the related changes will go into effect December 31, 2011. The provisions relating to assurance organizations went into effect September 1, 2009. This adoption addresses only those changes with respect to the assurance organizations. A detailed summary of the proposed new rules was included in the notice of proposed rules published in the May 7, 2010, issue of the *Texas Register* (35 TexReg 3582).

The Department drafted and distributed the proposed new rules to persons internal and external to the agency. The proposed rules were published in the *Texas Register* on May 7, 2010. The 30-day public comment period closed on June 7, 2010. The Department received public comments from the following interested parties: (1) Employer Services Assurance Corporation (ESAC) and (2) National Association of Professional Employer Organizations (NAPEO). The comments regarding specific rules and the Department's responses are summarized below.

§72.25 - Use of Assurance Organizations by Applicant or License Holder.

Provision: Section 72.25(b) sets forth criteria which should be contained in a prescribed Department form which will be used when a staff leasing services applicant or licensee utilizes the services of an approved assurance organization, and which will communicate to the Department that the applicant or license holder is in compliance with the assurance organization's and the Department's rules and statutory requirements.

Public Comments: Both ESAC and NAPEO request that the criteria be expanded so that the form includes not only a certification by the assurance organization that the applicant or licensee is in compliance, but also the certification by the applicant or license holder.

Department Response: The Department agrees that the proposed change would be appropriate, and the rule has been changed. The form will also be changed accordingly.

Provision: Section 72.25(e) requires an approved assurance organization to notify the Department within ten days of the assurance organization receiving a complaint or becoming aware of information indicating that an applicant or license holder is not in compliance with its obligations to the assurance organization, or to the Department.

Public Comments: Both ESAC and NAPEO request that the rule be amended to distinguish between the license holder or applicant's failure to comply with the assurance organization's regulations and its failure to comply with the statute or rules. ESAC proposed specifically that notices of violations of assurance organization standards be delivered to the Department within two days of the assurance organization becoming aware of the issue, and that the notification exclude (a) attorney/client privileged information and (b) information generated internally by the assurance organization to assess the merits of the violation.

Department Response: The Department agrees that the failures or violations are distinguishable but would not agree that the time frames for the assurance organization to notify the Department should be different. The Department amended the rule so that there is no requirement for the assurance organization to notify the Department of a violation of the assurance organization's standards if the violation would not also be a violation of the license law or rules.

Public Comments: Both ESAC and NAPEO request that a new subsection be added to §72.25, which would require the Department to notify an assurance organization 30 days prior to taking action against any bond made available by the assurance organization for the staff leasing company's violation of the licensing law or rules. This would allow the assurance organization to cure the default or pay the claim before a claim is filed against any bond(s) made available through an assurance organization. This would not affect the duty of the assurance organization to notify the Department of violations, nor would it impair the Department's enforcement division when processing a complaint or assessing a penalty.

Department Response: The Department believes that the request set forth in the rule is reasonable in light of the financial impact to the assurance organization if the claim is made on the bond to pay a large sum. The Department has amended the rule accordingly to add subsection (g) and include the thirty day prior notification obligation.

At its July 19, 2010, meeting the Commission requested changes be made to §72.24(e) regarding annual written changes in standards. An assurance organization's approval is based on the standards and policies represented to the Commission at the time of its approval. There is no required periodic renewal of those standards. Therefore, the Commission believes that requiring the annual writing is necessary to ensure that the assurance organization's standards have not changed such that its approval would no longer be appropriate. The Department has made the change accordingly as reflected in §72.24(g).

The Commission also requested changes be made to §72.25 regarding notification of violation of assurance organization's standards. The Commission is of the opinion that information regarding a licensed staff leasing company's violation of the assurance organization's standards is important in order to thoroughly provide regulatory oversight. A violation of those standards could be indicative of other problems within the licensed organization. The Department has made the change accordingly.

The new rules are adopted under Texas Labor Code, Chapter 91 and Texas Occupations Code, Chapter 51, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Labor Code, Chapter 91 and Texas Occupations Code, Chapter 51.

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

§72.24. Approval of Assurance Organization.

(a) An applicant or license holder may enter into an agreement with a commission-approved assurance organization to act on behalf of an applicant or license holder in accomplishing the provisions of this chapter and the Code.

(b) The authorization of an assurance organization to act on its behalf does not relieve an applicant or license holder from the applicant or license holder's ultimate responsibility to comply with each of its obligations pursuant to this chapter and the Code.

(c) An assurance organization desiring to become approved by the commission shall submit to the department:

(1) a letter requesting approval by the commission;

(2) evidence that the assurance organization meets the qualifications set forth in Texas Labor Code, §91.001(2-a); and

(3) an explanation of how the assurance organization will certify each of the criteria and obligations required of applicants and license holders in this chapter and the Code.

(d) No later than 30 days after the assurance organization submits all of the required information to the department, the department shall notify the assurance organization in writing whether or not the assurance organization has been approved.

(e) If the department recommends not approving the assurance organization, it shall detail the deficiencies in the writing referenced in §72.24(d). The assurance organization may correct the deficiencies.

(f) The assurance organization's approval shall remain in effect until such time as either the department, after written notice, terminates the approval, or until such time as the assurance organization, after written notice, withdraws or terminates its status as a commission-approved assurance organization.

(g) For so long as the assurance organization is approved, the assurance organization shall notify the department annually, in writing, on the anniversary of its approval date, whether any of its standards of accreditation have changed during the previous year.

(h) The department shall make available to the public a current list of all commission-approved assurance organizations.

(i) The department shall notify the assurance organization in writing if the department becomes aware of information which indicates that the assurance organization is failing to adequately monitor or provide compliance assistance as intended by the Code and this chapter. The department shall include such deficiencies in its written notification.

(j) The assurance organization shall respond to the department within 30 days of its receipt of the notification in §72.24(h), and both shall attempt to resolve the matters of concern. If the matters are not resolved within a reasonable time, the department may elect to recommend that the assurance organization's approval be terminated.

(k) If the assurance organization desires to withdraw or terminate its status as an approved assurance organization in Texas, it shall give the department not less than 60 days written notification of said intent, and shall agree to cooperate with the department and any license holders or applicants that have an agreement with the assurance organization in the termination process.

(l) In all matters concerning the relationship between the commission and either a commission-approved assurance organization, or an assurance organization desiring to become approved, including disputed matters, the decision of the executive director shall be binding on all parties.

§72.25. Use of Assurance Organization by Applicant or License Holder.

(a) The department shall accept an approved assurance organization's written certification as evidence that an applicant or license holder has met and continues to meet the criteria and obligations set forth in this chapter and the Code. The department retains the right to independently verify any information or certification provided by the assurance organization, including the ability to verify information contained in the assurance organization's databases.

(b) An applicant or licensee wishing to utilize the services of an assurance organization shall execute, and the assurance organization shall submit to the department, together with any fees, the appropriate application form prescribed by the executive director which includes a certification by the assurance organization that the license holder or applicant is in compliance with the assurance organization's standards which meet the requirements of the Code and the rules and a certification by the licensee or applicant that the applicant is in full compliance with all requirements of the Code and the rules, together with the license holder or applicant's authorization for the department to accept information provided by the assurance organization on behalf of the applicant or licensee.

(c) Two or more applicants or license holders using the services of an approved assurance organization and desiring to apply or renew as a group, may do so provided that the applicants or license holders apply or renew on a form prescribed by the executive director and demonstrate that they have at least two of the following criteria in common:

(1) financial statement;

(2) controlling person;

(3) insurance coverage; or

(4) ownership.

(d) Though qualified applicants may apply as a group, the department will issue licenses only to qualified applicants having unique federal employment identification numbers.

(e) An approved assurance organization shall notify the department in writing no later than 10 days after it receives a complaint, or becomes aware of information indicating that an applicant or license holder utilizing its services is not in compliance with its obligations under this chapter or the Code. The notification shall include the originals or a certified copy of all such information in the assurance organization's possession.

(f) An approved assurance organization shall notify the department in writing no later than 10 days after the assurance organization has made a determination that an accredited staff leasing company has violated any of the standards of accreditation of the assurance organization.

(g) Should the department elect to take action against any bond made available to it by an assurance organization because of a license holder or applicant's violation of this chapter or the Code as determined by the department, the department shall provide the assurance organization thirty (30) days written notice prior to taking action against the bond. This notification requirement shall neither affect the department's enforcement procedures nor affect the department's ability to take appropriate disciplinary action against a licensee or applicant.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 12, 2010.

TRD-201004694
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
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For further information, please call: (512) 463-7348

CHAPTER 85. VEHICLE STORAGE FACILITIES

16 TAC §85.710, §85.1003

The Texas Commission of Licensing and Regulation ("Commission") adopts amendments to existing rules at 16 Texas Administrative Code ("TAC") Chapter 85, §85.710 and §85.1003, regarding the vehicle storage facilities program. Section 85.710 is adopted with changes to the proposed text as published in the June 25, 2010, issue of the *Texas Register* (35 TexReg 5431), and is republished. Section 85.1003 is adopted without changes to the proposed text as published in the June 25, 2010, issue of the *Texas Register* (35 TexReg 5431), and is not republished. The adoption takes effect September 1, 2010.

The amended rules are necessary to clarify which documents vehicle storage facilities are required to accept and make available to vehicle owners for the release of vehicles towed and stored at the facilities. A detailed summary of the proposed amendments was included in the notice of proposed rules published in the June 25, 2010, issue of the *Texas Register* (35 TexReg 5431).

The Department drafted and distributed the proposed rules to persons internal and external to the agency. The proposed rules were published in the *Texas Register* June 25, 2010. The 30-day public comment period closed on July 27, 2010. The Department received two written comments from the Southwest Tow Operators in support of the proposed changes to §85.710 and §85.1003.

During public comment at the August 3, 2010, meeting of the Towing, Storage, and Booting Advisory Board, the insurance industry expressed concern about the inability to submit release documents to vehicle storage facilities electronically using an electronic signature. In response to this concern, the Advisory Board recommended that §85.710 be changed to provide for electronic signatures. The Commission believes the use of electronic signatures is reasonable and amends the rule to reflect this change.

The amendments are adopted under Texas Occupations Code, Chapters 51 and 2303, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51.

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

§85.710. Responsibilities of Licensee--Release of Vehicles.

(a) Release of vehicles. The VSF must comply with the following requirements when releasing vehicles.

(1) The VSF shall comply with all provisions of Texas Occupations Code, Chapter 2308, Subchapter J, relating to the rights of the owner of a stored vehicle, including providing the name, address, and telephone number of:

(A) the justice court that has jurisdiction in the precinct in which the vehicle is towed; and

(B) the name, address and telephone number of the person or law enforcement agency that authorized the tow.

(2) The VSF shall provide the owner or the owner's representative with a tow ticket. The tow ticket may be combined with a VSF Invoice; provided, the combined tow ticket and VSF Invoice comply with the following requirements:

(A) tow charges must be separated from VSF storage charges and each category of charges must be preceded by a heading or label identifying the charges as "Tow Charges" or "Storage Charges";

(B) tow charges must appear on the combined statement of charges exactly as stated on the tow ticket prepared by the tow operator and provided to the VSF at the time the vehicle is presented for storage; and

(C) the combined statement of charges meet and contain all required elements of a separate VSF invoice and tow ticket; provided the license number and name of the tow operator may be excluded.

(3) The VSF shall allow the vehicle owner or authorized representative to obtain possession of the vehicle at any time between the hours listed on the facility information sign posted as described in §85.1003, upon payment of all fees due, presentation of valid identification (Texas drivers license or other state or federally issued photo identification), and upon presentation of:

(A) a notarized power-of-attorney;

(B) a court order;

(C) a certificate of title;

(D) a tax collector's receipt and a vehicle registration renewal card accompanied by a conforming identification;

(E) name and address information corresponding to that contained in the files of the Texas Department of Motor Vehicles;

(F) a current automobile lease or rental agreement executed by the operator of the vehicle or a person holding a power of attorney executed by the person named in the lease agreement;

(G) appropriate identification of any state or federal law enforcement agency representative; or

(H) the most recent version of a department-approved form or electronic version of a department-approved form published on the department's website, www.license.state.tx.us; which the VSF must make available to the vehicle owner or person seeking possession of or access to the vehicle.

(4) A VSF may not refuse to release a vehicle to the owner or operator of the vehicle or require a sworn affidavit of the owner or operator of the vehicle solely because the owner or operator presents valid photo identification issued by this state, another state, or a federal agency that includes a different address than the address contained in the title and registration records of the vehicle.

(5) A VSF must accept evidence of financial responsibility (insurance card), as required by §601.051, Transportation Code, as an additional form of identification that establishes ownership or right of possession or control of the vehicle.

(6) Paragraph (3) does not require a VSF to release a vehicle to the owner or operator of the vehicle if the owner or operator of the vehicle does not:

(A) pay the charges associated with delivery or storage of the vehicle; and

(B) present valid photo identification issued by this state, another state, or a federal agency.

(7) If it accepts vehicles 24 hours a day, all VSFs shall have vehicles available for release 24 hours a day within one hour's notice.

(8) If a VSF does not accept vehicles 24 hours a day, such facility must have vehicles available for release within one hour between the hours of 8:00 a.m. and midnight Monday-Saturday and from 8:00 a.m. to 5:00 p.m. on Sundays except for nationally recognized holidays. It is not the intent of this section to require release of vehicles after midnight, and refusal to release after that time, even with notice after 11:00 p.m., is not a violation of this section.

(9) For purposes of determining when the one hour for release of a vehicle starts, the VSF must clearly note on the receipt the time of the call requesting vehicle release and have the person requesting release separately initial the notation.

(b) A VSF may not require an owner, operator or agent of an owner or operator of a vehicle to sign an authorization or release form to release the vehicle from the VSF if that form:

(1) changes the status of the law enforcement initiated tow from a nonconsent status to a consent tow status;

(2) changes the status of the storage resulting from a nonconsent tow from a nonconsent storage status to a consent storage status; or

(3) imposes any additional charges not regulated by the department.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
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For further information, please call: (512) 463-7348

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CHAPTER 86. VEHICLE TOWING AND BOOTING

16 TAC §86.455, §86.500

The Texas Commission of Licensing and Regulation ("Commission") adopts a new rule at 16 Texas Administrative Code ("TAC") Chapter 86, §86.455 and adopts amendments to an existing rule at 16 TAC §86.500 regarding the vehicle towing and booting program with changes to the proposed text as published in the June 25, 2010, issue of the *Texas Register* (35 TexReg 5432), and is republished. The adoption takes effect September 1, 2010.

The new rule and amendments are necessary to implement House Bill 2571, 81st Legislature, Regular Session (2009), which requires the Commission to adopt rules establishing the maximum amount that may be charged for private property tows and the maximum amount that may be charged for other non-tow related fees. A detailed summary of the proposed new rule and amendments was included in the notice of proposed rules published in the June 25, 2010, issue of the *Texas Register* (35 TexReg 5432).

The Department drafted and distributed the proposed rules to persons internal and external to the agency. The proposed rules were published in the *Texas Register* on June 25, 2010. The 30-day public comment period closed on July 27, 2010. The Department received public comments from seven interested parties: Fuller's Towing and Recovery Service; Southwest Tow Operators (2 comments); Statewide Wrecker Service; STRAW-K, Inc., dba AAArlington Abandoned Vehicle; Texas Motor Transportation Association; and Texas Towing and Storage Association. The specific comments and the Commission and Department's responses are summarized below.

§86.455

Several commenters complained that the Morningside rate study was fundamentally flawed because it failed to include all direct costs related to the towing company. Specifically, they asserted the study failed to include costs related to: (1) towing operator licenses, drug testing, training and employee benefits; (2) vehicle related costs such as permits, inspections registration, truck purchases, and other regulatory compliance costs related to truck emissions; (3) taxes and fees, and TDLR licensing fees; (4) office expenses, such as mortgage/rent, utilities, telephone, office equipment and security; (5) professional fees such as legal and accounting; and (6) owner compensation. They recommend that the maximum rates be increased to include expenses omitted by the Morningside study. These commenters also believe that the profit margin used in the Morningside study was inadequate.

The Commission disagrees with these commenters and does not believe the Morningside study is fundamentally flawed. First, as a general observation, the Commission believes that any perceived flaws in the Morningside study is the direct result of the industry as a whole failing to participate in the rate study required by Texas Occupations Code §2308.0575. While §2308.0575 provides complete anonymity to tow companies and protects the financial data of study participants, the industry as a whole failed to provide expense data. Each licensed tow company received an invitation to submit cost data to support the setting of maximum rates. Over the course of several months, the Department sent bi-weekly reminders and requests for companies to submit this data. Despite these extraordinary efforts, very few companies elected to participate in the study.

Presumably, if more companies had elected to participate in the rate study, the costs related to each of the six cost categories discussed in comments would have included specific dollar amounts associated with the six cost categories. In the absence of that cost data, nothing in Texas Occupations Code §2308.0575 requires the Commission to include speculative, unsubstantiated, and un-quantified costs in setting the maximum rates in this proceeding.

Notwithstanding the industry's failure to participate in the rate study, the Commission notes on June 17, 2010, expense data was revised to include costs related to employee benefits, owner's compensation, and rent. After the June 17th revision, the Department discussed the issue of utilities with the contractor and determined that fifty cents per tow represented a reasonable recovery for utilities and included that amount in its cost calculation.

The Commission concludes by observing that nothing in the record of this rulemaking shows that future emission standards require the retrofitting of any or all tow trucks in service. Moreover, assuming the purchase of trucks or the retrofitting of the existing fleet of tow trucks, nothing in the record demonstrates whether those costs would be capitalized and expensed annually or what amount should be included in the maximum rate cap.

After considering the cost components in the Morningside study, the municipal rate ordinances, and the previous application of the 150% rule applied to those municipal rates, the Commission finds that the maximum rates established in the adopted rule represents a reasonable rate cap based on a balancing of each of the statutory factors.

Several commenters object to the requirement that tow operators notify vehicle owners or operators of the right to pay a drop fee instead of being towed to the storage facility where they will incur additional storage fees. Because of the potential confrontation between the tow operator and disgruntled vehicle operators, these commenters also oppose the requirement that tow operators accept credit cards as payment for the drop fee.

The Commission finds these objections without merit. First, while sensitive to the safety of tow operators, the Commission believes that informing the public about the right to pay a lesser charge instead of the full price of a tow outweighs the anecdotal perceptions of potential confrontations. Second, the Commission believes that in an era of electronic commerce, most people do not carry cash in amounts sufficient to pay the drop charge. In this era of electronic commerce, the Commission finds that

requiring the acceptance of credit cards and debit cards (which function similar to credit cards) balances the rights of vehicle operators to pay the lesser charges with the rights of the tow operators. Without payment flexibility, vehicle owners would be required to get transportation to the storage facility to make payment for the vehicle's release with the same credit or debit card refused by the tow operator, imposing additional cost on the vehicle owner including higher tow fees as well as storage fees. The Commissions finds this outcome unreasonable and clarifies that credit cards and debit cards which function as credit cards, must be accepted in addition to cash payments.

§86.500

One commenter suggested deletion of the phrase "fee schedules for all tow companies." Instead, the commenter suggests the rule state "fee schedules for all nonconsent tow companies." Another commenter suggest that "consent tow companies" be excluded from the requirement.

The Commission notes that a tow company license authorizes a person to engage in all three types of tows (incident management, private property and consent tows). As such, the phrase "nonconsent tow companies" has no meaning in statute or rule and the Commission is without statutory authority to create a new license type.

One commenter suggested deletion of §86.500(e) as proposed because it referred to geographic rates. The Commission agrees with this comment and deletes subsection (e) from the adopted rule because the rules adopted in this section are statewide and not based on geographic areas.

Therefore, except for the deletion of subsection (e), the Commission adopts §86.500 without additional change from the proposed text published in the *Texas Register.*

The new rule and amendment are adopted under Texas Occupations Code, Chapters 51 and 2308, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51 and 2308.

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

§86.455. Private Property Tow Fees.

(a) For purposes of this section:

(1) light-duty means the tows of motor vehicles with a gross weight rating of 10,000 pounds or less;

(2) medium-duty means the tows of motor vehicles with a gross weight rating of more than 10,000 pounds, but less than 25,000 pounds; and

(3) heavy-duty means the tows of motor vehicles with a gross weight rating that exceeds 25,000 pounds; and

(4) drop charge means the maximum that may be charged for the release of the vehicle before its removal from the property or parked location.

(b) The maximum amount that may be charged for private property tows is as follows:

(1) light duty tows--$250;

(2) medium duty tows--$350; and

(3) heavy duty tows--$450 per unit or a maximum of $900.

(c) If the owner, authorized operator, or authorized agent of the owner of a motor vehicle that is parked without the authorization of the property owner attempts to retrieve the motor vehicle before its removal from the property or parked location, the maximum amount that may be charged for a drop charge (if the motor vehicle is hooked up) is:

(1) light duty tows--$125;

(2) medium duty tows--$175; and

(3) heavy duty tows--$225.

(d) If an owner, authorized operator, or authorized agent of the owner of a motor vehicle is present before the removal from the property or parked location the tow operator shall advise the owner, authorized operator, or authorized agent of the owner of a motor vehicle that he or she may offer payment of the towing drop charge.

(e) For purposes of this section, a tow company must accept cash, credit cards and debit cards as payment for the drop charge.

§86.500. Reporting Requirements--Towing Company.

(a) Fee Schedules all tow companies. Before January 31 of each year, a towing company must submit to the department a schedule showing each towing fee the towing company charges or collects in connection with nonconsent towing. The filing required by this section must clearly separate fees for incident management tows from the fees charged for private property tows.

(1) The fee schedule must be clearly legible, using black ink and in 12-point font and include:

(A) the name and license number of the towing company on file with the department; and

(B) the effective date(s) of the fees.

(2) If different fees are assessed for different geographic areas, a clear delineation between fees assessed for one area and fees assessed for another.

(b) If a political subdivision begins regulating nonconsent tow fees, the towing company must report the fees to the department before the 30th day after the municipal ordinance goes into effect.

(c) Any changes in nonconsent tow fees regulated by a political subdivision must be reported to the department by the towing company before the 30th day after the effective date of the change.

(d) Complete lists required. Each time a towing company files a nonconsent towing fee schedule, the towing company must include a complete list of all nonconsent towing fees charged by the towing company. Partial towing fee schedules are not acceptable. Each filing is a complete schedule of all nonconsent towing fees of the company.

(e) If a municipality establishes private property tow fees that are less than the private property tow fees authorized by §86.455, the fee schedule must separately identify those municipalities and list each authorized fee.

(f) If a municipality establishes private property tow fees that are greater than the private property tow fees authorized by this section, the private property tow fee schedule may not exceed each fee authorized by §86.455.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-201004696

William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
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For further information, please call: (512) 463-7348

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PART 9. TEXAS LOTTERY COMMISSION

CHAPTER 401. ADMINISTRATION OF STATE LOTTERY ACT

SUBCHAPTER D. LOTTERY GAME RULES

16 TAC §401.315

The Texas Lottery Commission (Commission) adopts amendments to 16 TAC §401.315 ("Mega Millions" On-Line Game Rule) with changes to the proposed text as published in the June 11, 2010, issue of the *Texas Register* (35 TexReg 4827). Specifically, upon further consideration, the Commission has withdrawn proposed changes to the second tier guaranteed prize amount when a Megaplier option is purchased. Therefore, the adopted version of the rule deletes the provisions to authorize a non-multiplied guaranteed second tier prize when a Megaplier option is purchased in subsections (b)(7) and (e)(4).

The purposes of the amendments are to clarify existing provisions; to have the rule comply with the understanding of the multijurisdictional participants on the operation of the game; to delete obsolete or redundant provisions; and to authorize a special Megaplier promotion. Specifically, the multijurisdictional participants have agreed that the initial grand/jackpot prize will be a guaranteed $12 million and thereafter, subsequent grand/jackpot prizes will be estimated and the payments will be based on actual sales. Once the agreement is signed by all Mega Millions party lotteries, the Executive Director has the authority to implement. The amendments will also provide for a special Megaplier promotion, to be implemented periodically, at the discretion of the executive director, when the multijurisdictional participants agree. The amendments will make the language of the rule consistent with the Megaplier drawing being moved to the State of Georgia, to be conducted with the Mega Millions drawing, should that move occur.

No public comments were received during the public comment period.

The amendments are adopted under the authority of Texas Government Code §466.015, which provides the Commission with the authority to adopt rules governing the operation of the lottery and are also adopted under the authority of Texas Government Code §467.102, which provides the Commission with the authority to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction.

Texas Government Code, Chapter 466, is affected by these amendments.

§401.315. "Mega Millions" On-Line Game Rule.

(a) Mega Millions. A Texas Lottery on-line game to be known as "Mega Millions" is authorized to be conducted by the executive director under the following rules and under such further instructions and directives as the executive director may issue in furtherance thereof, and pursuant to the requirements of the multijurisdiction agreement between all participating party lotteries. Consistent with this rule, the executive director is specifically authorized to issue all such further instructions and directives as the executive director may deem necessary or prudent, to implement these rules and to comply with the multijurisdictional games. If a conflict arises between this section and §401.304 of this title (relating to On-Line Game Rules (General)), this section shall have precedence. The purpose of the Mega Millions game is the generation of revenue for party lotteries through the operation of a specially-designed multijurisdiction lottery game that will award prizes to ticket holders matching specified combinations of numbers randomly selected in regularly scheduled drawings.

(b) Definitions. In addition to the definitions provided in §401.301 of this title (relating to General Definitions), and unless the context in this section otherwise requires, the following definitions apply.

(1) Advertised jackpot--The estimated annuitized grand/jackpot amount the Mega Millions directors establish for each Mega Millions drawing. The advertised estimated annuitized grand/jackpot is an amount that would be paid in 26 annual installments.

(2) Annual payment option--The option to receive annual installment payments that can be selected by the player at the time of ticket purchase. This option is chosen automatically for the player if no payment option is selected by the player at time of ticket purchase. The option is to be paid in 26 annual payments, in the event the player has a valid winning grand/jackpot ticket and consistent with the provisions of the rule. The term "annual payment option" is synonymous with the terms "annual option", "annuitized option", and "annuity option".

(3) Cash value option--An election a player must make at the time the player purchases a ticket in order to be paid a single payment of the player's share of the grand/jackpot amount, in the event the player has a valid winning grand/jackpot ticket and consistent with the provisions of the rule. The term "cash value option" is synonymous with the terms "cash option" and "net present value option".

(4) Executive director--The executive director of the Texas Lottery Commission. The term "executive director" is synonymous with the term "director".

(5) Grand/jackpot prize amount--The amount awarded for matching, for one play, all of the numbers drawn from both fields. If more than one player from all participating lottery jurisdictions has selected all of the numbers drawn, the grand/jackpot prize amount shall be divided among those players. The amount actually paid will depend on the payment option elected at the time of purchase, consistent with the provisions of the rule.

(6) Multijurisdiction agreement--The amended and restated multijurisdiction agreement regarding the Mega Millions game, or any subsequent amended agreement, signed by the party lotteries and including the finance and operations procedures for Mega Millions, and on-line drawing procedures for Mega Millions.

(7) Multiplier feature--A Mega Millions game feature, known as "Megaplier", by which a player, for an additional wager of $1 per play, can increase the guaranteed prize amount or pari-mutuel prize amount, as applicable, excluding the grand/jackpot prize by a factor of two, three, or four times depending upon the multiplier number that is drawn prior to the Mega Millions drawing.

(8) Number--Any play integer from one through 56.

(9) Party lotteries--One or more of the lotteries established and operated pursuant to the laws of the jurisdictions participating in

Mega Millions or any other lottery which becomes a signatory to the Mega Millions agreement.

(10) Play--The six numbers selected on each playboard and printed on the ticket. Five numbers are selected from the first field of 56 numbers and one number is selected from the second field of 46 numbers.

(11) Playboard--Two fields, the first field of 56 numbers and the second field of 46 numbers, each found on the playslip.

(12) Playslip--An optically readable card issued by the commission used by players of Mega Millions to select plays and to elect to participate in the multiplier feature. There shall be five playboards on each playslip identified at A, B, C, D, and E. A playslip has no pecuniary value and shall not constitute evidence of ticket purchase or of numbers selected.

(c) Price of ticket. The price of each Mega Millions play shall be $1. A player may purchase up to five plays on one ticket. Multiple draws are available for up to 10 consecutive draws beginning with the current draw. From time to time, the executive director may authorize the sale of Mega Millions tickets at a discount for promotional purposes. Additionally, a multiplier feature, Megaplier, is available for an additional $1 per play.

(d) Play for Mega Millions.

(1) Type of play. A Mega Millions player must select five numbers from the first field of numbers from 1 through 56 and an additional one number from the second field of numbers from 1 through 46 in each play or allow number selection by a random number generator operated by the terminal, referred to as Quick Pick.

(2) Method of play. The player may use playslips to make number selections. The terminal will read the playslip and issue ticket(s) with corresponding plays. If a playslip is not available or if a player is unable to complete a playslip, the retailer may enter the selected numbers via the keyboard. However, the retailer shall not accept telephone or mail-in requests to issue a ticket. The use of mechanical, electronic, computer generated or any other non-manual method of marking a playslip is prohibited. A player may leave all play selections to a random number generator operated by the terminal, referred to as Quick Pick.

(3) One prize per play. The holder of a winning ticket may win only one prize per play in connection with the winning numbers drawn and shall be entitled only to the highest prize category won by those numbers.

(e) Multiplier Feature.

(1) Type of play. A Mega Millions player may elect to participate in the multiplier feature, known as "Megaplier", by wagering an additional $1.00 per play at the time of his/her Mega Millions ticket purchase.

(2) Multiplier drawing. A random drawing will occur before every Mega Millions drawing to determine one multiplier number for that drawing. The multiplier number that will be selected will be either a 2, 3, or 4. In the event the multiplier drawing does not occur prior to the Mega Millions drawing, the multiplier number will be a 4.

(3) Multiplier number frequency. The one multiplier number will be selected from a field of numbers according to the following relative frequencies:
Figure: 16 TAC §401.315(e)(3) (No change.)

(4) Selection of multiplier number. The multiplier number selected is the number that is used to increase the prize amount, other than the grand/jackpot prize. A prize winner who chose to participate in the multiplier feature by wagering an additional $1 per play at the time of the player's Mega Millions ticket purchase is paid a prize in the amount of the guaranteed prize amount or the pari-mutuel prize amount, as applicable, other than the grand/jackpot prize multiplied by the multiplier number for that drawing.

(5) Special Megaplier Promotions. The Mega Millions Group may periodically agree to change one or more of the Megaplier numbers in order to conduct special Megaplier promotions during specified time periods. The relative frequency of the numbers may be changed and/or additional numbers may be added at the discretion of the executive director from time to time for promotional purposes. Such change shall be announced by public notice. The executive director will announce the promotion by publication on the agency web site and any other means deemed appropriate to inform the public.

(f) Prizes for Mega Millions.

(1) Prize amounts. The prize amounts, for each drawing, paid to each Mega Millions winner who selects matching combinations of numbers, with the exception of the grand/jackpot prize, are guaranteed prizes or pari-mutuel prize amounts in accordance with paragraph (3)(H) of this subsection.

(2) Prize fund. The prize fund for Mega Millions prizes is estimated to be 50% of Mega Millions sales, but may be higher or lower based upon the number of winners at each guaranteed prize level, as well as the funding required to be contributed to the starting advertised annuitized guaranteed grand/jackpot of $12 million.

(3) Prize categories.

(A) Matrix of 5/56 and 1/46 with 50 percent estimated prize fund.
Figure: 16 TAC §401.315(f)(3)(A) (No change.)

(B) Grand/jackpot prize payments.

(i) The portion of the prize money allocated from the current Mega Millions prize fund for the grand/jackpot prize, plus any previous portions of prize money allocated to the grand/jackpot prize category in which no matching tickets were sold and money from any other available source pursuant to a guaranteed or estimated first prize amount announcement will be divided equally among all grand/jackpot prize winners in all participating lotteries matching all five of five Mega Millions winning numbers drawn for field 1 and the one Mega Millions number drawn for field 2. Prior to each drawing, the Mega Millions grand/jackpot prize amount that would be paid in 26 annual installments will be advertised. The advertised annuitized grand/jackpot prize amount shall be estimated and established based upon sales and the annuity factor established for the drawing. The annuitized grand/jackpot prize to be awarded for each Mega Millions play matching all five (5) of the five (5) Mega Millions winning numbers draw for field 1 and the one (1) Mega Millions winning number drawn for field two (2) shall be the amount equivalent to the highest whole $1 million annuity that is funded by the amount in that portion of the prize fund allocated to the grand/jackpot prize category. In no event, however, shall the annuitized grand/jackpot prize be less than $12 million.

(ii) If in any Mega Millions drawing there are no Mega Millions plays which qualify for the grand/jackpot prize category, the portion of the prize fund allocated to such grand/jackpot prize category shall remain in the grand/jackpot prize category and be added to the amount allocated for the grand/jackpot prize category in the next consecutive Mega Millions drawing.

(iii) If there are multiple matching tickets sold of the Mega Millions grand/jackpot prize from among all participating lotteries, then the prize winner(s) in Texas will be paid in accordance with

their selection of cash option or annual payment option made at the time of ticket purchase.

(iv) In the event of a prize winner who selects the cash value option, the prize winner's share will be paid in a single payment upon completion of internal validation procedures. The player in Texas must make the election of the cash value option at the time of ticket purchase. If the player does not make the election at the time of ticket purchase, the share will be paid in accordance with clause (vi) of this subparagraph. The cash value of the grand/jackpot prize will be the amount determined by the highest $1 million annuity that is funded by the amount of that portion of the prize fund allocated to the grand/jackpot prize category, divided by the annuity factor established for the draw date divided by the number of grand/jackpot prize winners.

(v) Funds for the initial payment of an annuitized option prize or the cash value option prize will be made available to the Texas Lottery from all participating party lotteries as soon as practicable on the business day falling fourteen (14) calendar days after the date of the winning drawing.

(vi) Annual payment option grand/jackpot prizes shall be paid in 26 annual installments upon completion of internal validation procedures. The initial payment shall be paid upon completion of internal validation procedures. The subsequent 25 payments shall be paid annually to coincide with the month of the Federal auction date at which the bonds were purchased to fund the annuity. All of the twenty-five (25) remaining payments shall be equal and must be in $1,000 denominations to facilitate the securities purchase. The full cash equivalent prize shall be awarded to the prize winner, such that the prize winner receives equal payments in $1,000 increments for installments 2 through 26, and any residual cash shall be added to the first annual payment. In no event shall the first cash payment exceed the remaining equal installments by more than $25,000. The total of the first payment, plus the cost of investments shall equal the total cash equivalent amount in clause (iv) of this subparagraph. All such payments shall be made within seven days of the anniversary of the annual auction date.

(vii) The grand/jackpot prize must be claimed at the Austin claim center regardless of the prize amount.

(C) Second through ninth level prizes.

(i) Second Prize: Mega Millions plays matching five of the five Mega Millions winning numbers drawn for field 1 (in any order), but not matching the Mega Millions winning number drawn for field 2 shall be entitled to receive a second prize of $250,000.

(ii) Third Prize: Mega Millions plays matching four of the five Mega Millions winning numbers drawn for field 1 (in any order) and the Mega Millions winning number drawn for field 2 shall be entitled to receive a third prize of $10,000.

(iii) Fourth Prize: Mega Millions plays matching four of the five Mega Millions winning numbers drawn for field 1 (in any order) but not matching the Mega Millions winning number drawn for field 2 shall be entitled to receive a fourth prize of $150.

(iv) Fifth Prize: Mega Millions plays matching three of the five Mega Millions winning numbers drawn for field 1 (in any order) and the Mega Millions winning number drawn for field 2 shall be entitled to receive a fifth prize of $150.

(v) Sixth Prize: Mega Millions plays matching two of the five Mega Millions winning numbers drawn for field 1 (in any order) and the Mega Millions winning number drawn for field 2 shall be entitled to receive a sixth prize of $10.

(vi) Seventh Prize: Mega Millions plays matching three of the five Mega Millions winning numbers drawn for field 1 (in any order) and not matching the Mega Millions winning number drawn for field 2 shall be entitled to receive a seventh prize of $7.

(vii) Eighth Prize: Mega Millions plays matching one of the five Mega Millions winning numbers drawn for field 1 and the Mega Millions winning number drawn for field 2 shall be entitled to receive an eighth prize of $3.

(viii) Ninth Prize: Mega Millions plays matching no numbers of the five Mega Millions winning numbers drawn for field 1 but matching the Mega Millions winning number drawn for field 2 shall be entitled to receive a ninth prize of $2.

(ix) Each Mega Millions second through ninth prize shall be paid in one payment.

(D) In a single drawing, a player may win in only one prize category per single Mega Millions play in connection with Mega Millions winning numbers, and shall be entitled only to the highest prize.

(E) For purpose of prize calculation with respect to any Mega Millions pari-mutuel prize, the calculation shall be rounded down so that prizes shall be paid in multiples of one dollar.

(F) With respect to the Mega Millions annuitized grand/jackpot prize, the prize amount paid shall be the highest fully funded multiple of one million dollars based solely on the cash option grand/jackpot prize amount as determined by subparagraph (B)(iv) of this paragraph.

(G) Subject to the laws and rules governing each party lottery, the number of prize categories and the allocation of the prize fund among the prize categories may be changed at the discretion of the directors, for promotional purposes. Such change shall be announced by public notice.

(H) Prize liability cap. Notwithstanding any provision in the rule to the contrary, should total prize liability (exclusive of grand/jackpot prize carry forward) exceed 300 percent of draw sales or 50 percent of draw sales plus $50,000,000, whichever is less, (both hereinafter referred to as the "liability cap"), the second through fifth prizes shall be paid on a pari-mutuel rather than guaranteed prize basis, provided, however, that in no event shall the pari-mutuel prize be greater than the guaranteed prize. The amount to be used for the allocation of such pari-mutuel prizes (two through five) shall be the liability cap less the amount paid for the grand/jackpot prize and prize levels six through nine.

(g) Subscription sales. A subscription sales program may be offered, at the discretion of the executive director.

(h) Ticket purchases.

(1) Mega Millions tickets may be purchased in Texas only at a licensed location from a Texas Lottery retailer authorized by the lottery operations director to sell on-line tickets. No Mega Millions ticket purchased outside Texas may be presented to a Texas Lottery retailer for payment within Texas.

(2) Mega Millions tickets shall show the player's selection of numbers or Quick Pick (QP) numbers, election of the multiplier feature, Megaplier boards played, drawing date, grand/jackpot payment option, and validation and reference numbers.

(3) It shall be the exclusive responsibility of the player to verify the accuracy of the player's selection(s) and other data printed on the ticket. A ticket is a bearer instrument until signed. Neither a

party lottery nor its sales agents shall be responsible for lost or stolen tickets.

(4) Except as provided in subsection (d)(2) of this section, Mega Millions tickets must be purchased using official Mega Millions playslips. Playslips which have been mechanically completed are not valid. Mega Millions tickets must be printed on official Texas Lottery paper stock and purchased at a licensed location through an authorized Texas Lottery retailer's terminal.

(5) In purchasing a ticket issued for Mega Millions, the player agrees to comply with and be bound by all applicable statutes, administrative rules and regulations, and procedures of the party lottery of the state in which the Mega Millions ticket is issued, and by directives and determinations of the director of that party lottery. Additionally, the player shall be bound to all applicable provisions in the Mega Millions Finance and Operations Procedures. The player agrees, as its sole and exclusive remedy, that claims arising out of a Mega Millions ticket can only be pursued against the party lottery of ticket purchase. Litigation, if any, shall only be maintained within the state in which the Mega Millions ticket was purchased and only against the party lottery that issued the ticket. Nothing in this rule shall be construed as a waiver of any defense or claim the Texas Lottery may have in the event a player pursues litigation against the Texas Lottery, its officers, or employees.

(i) Drawings.

(1) The Mega Millions drawings shall be held at the time(s) and location set out in the multijurisdiction agreement.

(2) Each drawing shall determine, at random, the six winning numbers in accordance with the Mega Millions drawing procedures. Any numbers drawn are not declared winning numbers until the drawing is certified by the Commission in accordance with the drawing procedures. The winning numbers shall be used in determining all Mega Millions winners for that drawing.

(3) Each drawing shall be witnessed by an independent certified public accountant. All drawing equipment used shall be examined immediately prior to a drawing and immediately after the drawing.

(j) Prize winners. The name and city of the winner of the grand/jackpot prize, or second prize, will be disclosed in a news conference or in a news release and the winner may be requested to participate in a news conference. If a winner claims a Mega Millions grand/jackpot or second prize as a legal entity, the entity shall provide the name of a natural person who is a principal of the legal entity. This natural person may be required to be available for appearance at any news conference regarding the prize and may be featured in any party lottery's releases.

(k) Unclaimed Prizes for winning Mega Millions tickets for which no claim or redemption is made within the specified claim period for each respective party lottery, the corresponding prize monies shall be returned to the other party lotteries in accordance with procedures for the reconciliation of prize liability pursuant to the multijurisdiction agreement and as may be agreed to from time to time by the directors of the party lotteries.

(l) Announcement of incentive or bonus program. The executive director shall announce each incentive or bonus program prior to its commencement. The announcement shall specify the beginning and ending time, if applicable, of the incentive or bonus program and the value for the award(s).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 10, 2010.

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For further information, please call: (512) 344-5275

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16 TAC §401.318

The Texas Lottery Commission (Commission) adopts new 16 TAC §401.318 (Withholding of Delinquent Child-Support Payments from Lump-sum and Periodic Installment Payments of Lottery Winnings in Excess of Six Hundred Dollars), without changes to the proposed text as published in the June 11, 2010, issue of the *Texas Register* (35 TexReg 4831).

The purpose of the new rule is to provide a mechanism to collect delinquent child support payments as provided for by Texas Government Code, §466.4075, added by Acts 1997, 75th Legislature, Chapter 135, §2, effective September 1, 1997. Specifically, subsection (a) provides for a court order and a notice of child support lien for delinquent child support to be filed with the commission; subsection (b) provides that if such order and notice are on file for 10 business days before the scheduled payment date, the funds described in the order will be withheld and transmitted to the person entitled to the child support, or, if they can't be found, to the court which ordered the payments; subsection (c) provides that any overage will be paid to the prize winner; subsection (d) limits this withholding only to delinquent child support amounts; subsection (e) provides that in the case of a conflicting claim, the prize will be interpleaded into a court of competent jurisdiction; and, subsection (f) provides for the tax payment to be made to the IRS after a resolution of conflicting claims is made by the court.

No public comments were received during the public comment period.

The new rule is adopted under the specific requirement of Texas Government Code Chapter 466, §466.4075, added by Acts 1997, 75th Legislature, Chapter 135, §2, effective September 1, 1997, and the authority of Texas Government Code §466.015, which provides the Commission with the authority to adopt rules governing the operation of the lottery. The new rule is also adopted under the authority of Texas Government Code §467.102, which provides the Commission with the authority to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction.

This adoption is intended to implement Texas Government Code, §466.4075, added by Acts 1997, 75th Legislature, Chapter 135, §2, effective September 1, 1997.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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16 TAC §401.319

The Texas Lottery Commission (Commission) adopts new 16 TAC §401.319 (Withholding of Child-Support Payments from Periodic Installment Payments of Lottery Winnings), without changes to the proposed text as published in the June 11, 2010, issue of the *Texas Register* (35 TexReg 4832).

The purpose of the new rule is to provide a mechanism to collect child support payment as provided for by Texas Government Code, §466.4075, added by Acts 1997, 75th Legislature, Chapter 1104, §1, effective September 1, 1997. Specifically, subsection (a) provides for a court order, a writ of withholding, or a notice of child support lien for delinquent child support to be filed with the commission; subsection (b) provides that if such order, writ or notice are on file for 10 business days before the scheduled payment date, the funds described in the order will be withheld and transmitted to the person entitled to the child support, or, if they can't be found, to the court which ordered the payments; subsection (c) provides that the court order, writ, or notice must direct that the payments be made in the same payment increments as those in which the prize will be made, and provides that the order, writ, or notice may not be filed before there is a determination that there is a periodic installment prize payment to which the prize winner is entitled; subsection (d) provides that any overage will be paid to the prize winner, and that the child support payments will be transferred to the court of continuing jurisdiction of the child; subsection (e) provides that the commission will keep an index of child support orders filed with the commission and check the index before making prize payments; subsection (f) provides that in the case of a conflicting claim, the prize will be interpleaded into a court of competent jurisdiction; and subsection (g) provides for the tax payment to the IRS after a resolution to conflicting claims is made by the court.

No public comments were received during the public comment period.

The new rule is adopted under the specific requirement of Texas Government Code Chapter 466, §466.4075, added by Acts 1997, 75th Legislature, Chapter 1104, §1, effective September 1, 1997, and the authority of Texas Government Code §466.015, which provides the Commission with the authority to adopt rules governing the operation of the lottery. The new rule is also adopted under the authority of Texas Government Code §467.102, which provides the Commission with the authority to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction.

This adoption is intended to implement Texas Government Code, §466.4075, added by Acts 1997, 75th Legislature, Chapter 1104, §1, effective September 1, 1997.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER E. RETAILER RULES

16 TAC §401.371

The Texas Lottery Commission (Commission) adopts new 16 TAC §401.371 (Collection of Delinquent Obligations for Lottery Retailer Related Accounts), with changes to the proposed text as published in the June 11, 2010, issue of the *Texas Register* (35 TexReg 4833). Specifically, in the adopted version of the rule, in subsection (b)(2), the language "address correction requested" has been replaced with "Return Service Requested".

The purpose of the adopted new rule is to comply with Texas Government Code, §2107.002, which requires that a state agency that collects delinquent obligations owed to the agency, shall establish procedures by rule for collecting a delinquent obligations and a reasonable period for collection. The rules are required to, and do, conform to the guidelines established by the attorney general. Specifically, for the benefit and use of the attorney general in making collections, the rule defines terms used in the rule; requires the commission to identify all persons with liability; it provides for demand letters; it provides for the filing of liens; verify addresses and phone numbers; to notify the attorney general of bankruptcy, expiration of limitations, forfeiture of corporate existence, and of out-of-state and deceased debtors; make and act on jeopardy determinations; the rule establishes a 180 day period during which the commission shall utilize its statutory powers to collect delinquent obligations owed on Lottery accounts, before referring the accounts to the attorney general. The rules specify what information the commission will attempt to provide to the Office of the Attorney General for use in its Lottery Retailer related collection efforts.

No public comments were received during the public comment period.

The new rule is adopted under the specific requirement of Texas Government Code §2107.002, and the authority of Texas Government Code §466.015, which provides the commission with the authority to adopt rules governing the operation of the lottery. The new rule is also adopted under the authority of Texas Government Code §467.102, which provides the commission with the authority to adopt rules for the enforcement and administration of the laws under the commission's jurisdiction.

This adoption is intended to implement Texas Government Code, §2107.002.

§401.371. Collection of Delinquent Obligations for Lottery Retailer Related Accounts.

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

(1) Debtor--Any person or entity liable or potentially liable for an obligation owed to the commission or against whom a claim or demand for payment has been made, for Lottery Retailer related obligations.

(2) Delinquent--Payment is past due by law or by customary business practice, and all conditions precedent to payment have occurred or been performed.

(3) Make demand--To deliver or cause to be delivered by United States mail, first class, a writing setting forth the nature and amount of the obligation owed to the commission. A writing making demand is a "demand letter."

(4) Obligation--Any debt, judgment, claim, account, fee, fine, tax, penalty, interest.

(5) Security--Any right to have property owned by an entity with an obligation to the commission, for Lottery Retailer related obligations, sold or forfeited in satisfaction of the obligation; and any instrument granting a cause of action in favor of the State of Texas and/or the commission against another entity and/or that entity's property, typically, certificates of deposits and agency agreements pursuant to assignments of certificates of deposit, but, could include other security such as a bond, letter of credit, or other collateral that has been pledged to the commission to secure an obligation.

(b) Before referring any obligation to the attorney general the commission will:

(1) Attempt to determine the liability of each person responsible for the obligation, whether that liability can be established by statutory or common law. Provide the attorney general with the name of the registered agent, and the address of the registered office of any business organization for which a registered agent is required, and, if known, the name and address of the principal officers of the business entity. If the debtor is an individual, the commission will provide the attorney general with the name and last known business address and residence address of the individual.

(2) All demand letters will be mailed in an envelope bearing the notation "Return Service Requested" in conformity with 39 Code of Federal Regulations, Chapter III, Subchapter A, Part 3001, Subpart C, Appendix A, §911. If an address correction is provided by the United States Postal Service, the demand letter will be re-sent to that address prior to the referral to the attorney general. Demand will be made upon every debtor prior to referral of the account to the attorney general. The final demand letter will include a statement, where practical, that the debt, if not paid, will be referred to the attorney general.

(3) If state law allows the commission to record a lien securing the obligation, the commission will file the lien in the appropriate records of the county where the debtor's principal place of business, or, where appropriate, the debtor's residence, is located or in such county as may be required by law. The lien will be filed as soon as practicable after determining that the account is delinquent. After referral of the delinquency to the attorney general, any lien securing the indebtedness will not be released, except on full payment of the obligation, without the approval of the assistant attorney general representing the commission in the matter.

(4) Where practicable, the commission will maintain individual collection histories of each account in order to document attempted contacts with the debtor, the substance of communications with the debtor, efforts to locate the debtor and his assets, and other information pertinent to collection of the delinquent account.

(5) Prior to referral of the obligation to the attorney general, the commission will (except in the case where a jeopardy determination has been made):

(A) verify the debtor's address and telephone number;

(B) transmit no more than two demand letters to the debtor at the debtor's verified address. The first demand letter will be sent no later than 30 days after the obligation becomes delinquent. The second demand letter will be sent no sooner than 30 days, but not more than 60 days, after the first demand letter;

(C) verify that the obligation is not legally uncollectible or uncollectible as a practical matter. The commission will use it best efforts to ensure that referred obligations are not uncollectible, including but not limited to actions in the following circumstances:

(i) Bankruptcy. The commission will prepare and timely file a proof of claim, when appropriate, in the bankruptcy case of each debtor, subject to reasonable tolerances adopted by the commission. Copies of all such proofs of claims filed should be sent to the attorney general absent direction by the attorney general to the contrary. The commission will maintain records of notices of bankruptcy filings, dismissals and discharge orders received from the United States bankruptcy courts to enable the commission to ascertain whether the collection of the claim is subject to the automatic stay provisions of the bankruptcy code or whether the debt has been discharged. The commission will seek the assistance of the attorney general in bankruptcy collection matters where necessary, including the filing of a notice of appearance and preparation of a proof of claim.

(ii) Limitations. If the obligation is subject to an applicable limitations provision that would prevent suit as a matter of law, the obligation will not be referred unless circumstances indicate that limitations has been tolled or is otherwise inapplicable.

(iii) Corporations. If a corporation has been dissolved, has been in liquidation under Chapter 7 of the United States Bankruptcy Code, or has forfeited its corporate privileges or charter, or, in the case of a foreign corporation, had its certificate of authority revoked, the obligation will be referred unless circumstances indicate that the account is clearly uncollectible.

(iv) Out-of-state debtors. If the debtor is an individual and is located out-of-state, or outside the United States, the matter will not be referred unless a determination is made that the domestication of a Texas judgment in the foreign forum would more likely than not result in collection of the obligation, or that the expenditure of commission funds to retain foreign counsel to domesticate the judgment and proceed with collection attempts is justified.

(v) Deceased debtors. If the debtor is deceased, the commission will file a claim in each probate proceeding administering the decedent's estate. If such probate proceeding has concluded, and there are no remaining assets of the decedent available for distribution, the delinquent obligation will be classified as uncollectible and will not be referred. In cases where a probate administration is pending, or where no administration has been opened, all referred obligations will include an explanation of any circumstances indicating that the decedent has assets available to apply toward satisfaction of the obligation.

(6) In the case, where factors come to the attention of the commission, which indicate that the collection of the debt due to the state is jeopardized, or where the property and assets of the commission entrusted to the debtor are in jeopardy, the commission may issue a jeopardy determination stating the amount due and that the collection is in jeopardy, and that the amount due the commission is immediately due and payable.

(7) Not later than the 180th day after the date an obligation becomes delinquent, the commission will report the uncollected and delinquent obligation to the attorney general for further collection efforts as hereinafter provided.

(8) In the case of a jeopardy determination, the account may be referred to the attorney general at any time after the expiration of 20 days after service by personal service or by mail.

(9) The commission will adopt reasonable tolerances, in consultation with the attorney general, below which an obligation shall not be referred. Factors to be considered in establishing tolerances include: the size of the debt; the existence of any security; the likelihood of collection through passive means such as the filing of a lien where applicable; expense to the commission and to the attorney general in attempting to collect the obligation; and the availability of resources both within the commission and within the Office of the Attorney General to devote to the collection of the obligation.

(10) The commission will utilize the "warrant hold" procedures of the Comptroller of Public Accounts authorized by the Texas Government Code, §403.055, to ensure that no treasury warrants are issued to debtors until the debt is paid. (See Accounting Policy Statement 28, "Reporting of Debts and Certain Tax Delinquencies to the State," issued April 16, 1999 and reissued October 6, 2000 available on the Comptroller of Public Accounts' website at (www.cpa.state.tx.us.)).

(c) Referral to the attorney general.

(1) The commission will refer individual accounts to the attorney general after the procedures set forth in subsection (a)(6) - (8) of this section have been exhausted and an obligation remains. Individual accounts referred to the attorney general will include the following:

(A) copies of all correspondence between the commission and the debtor;

(B) a log sheet (see subsection (a)(5) of this section) documenting all attempted contacts with the debtor and the result of such attempts;

(C) a record of all payments made by the debtor and, where practicable, copies of all checks tendered as payment;

(D) any information pertaining to the debtor's residence and his assets; and

(E) copies of any permit application, security, final orders, contracts, grants, or instrument giving rise to the obligation.

(2) Delinquent accounts upon which an uncollected bond or other security is held shall be referred to the attorney general no later than 180 days after becoming delinquent. All such accounts where the principal has filed for relief under federal bankruptcy laws will be referred to the attorney general immediately.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 10, 2010.

TRD-201004617
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Effective date: August 30, 2010
Proposal publication date: June 11, 2010
For further information, please call: (512) 344-5275

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 61. SCHOOL DISTRICTS
SUBCHAPTER CC. COMMISSIONER'S RULES CONCERNING SCHOOL FACILITIES

19 TAC §61.1037

The Texas Education Agency (TEA) adopts an amendment to §61.1037, concerning the Science Laboratory Grant Program. The amendment is adopted with no changes to the proposed text as published in the June 18, 2010, issue of the *Texas Register* (35 TexReg 5136) and will not be republished. The section implements the requirements of the Texas Education Code (TEC), §7.062, that charges the commissioner to adopt rules necessary to implement the Science Laboratory Grant Program. The adopted amendment allows open-enrollment charter schools to apply for grants under the program and modifies the rule to reflect statutory changes.

The TEC, §7.062, requires the commissioner by rule to establish procedures and adopt guidelines for the administration of the Science Laboratory Grant Program. Through 19 TAC §61.1037, adopted to be effective July 6, 2008, the commissioner exercised rulemaking authority to establish procedures and adopt guidelines for the program's administration.

The TEC, §7.062(c), provides for the funding of the Science Laboratory Grant Program from any surplus funds available from funds appropriated for the Instructional Facilities Allotment (IFA) and Existing Debt Allotment (EDA) programs for a fiscal year, not to exceed $20 million. Because IFA and EDA program funds are not available to open-enrollment charter schools, the Science Laboratory Grant Program also has not been available to open-enrollment charter schools. The General Appropriations Act, Senate Bill (SB) 1, Article III, Rider 73, 81st Texas Legislature, 2009, for the first time made a direct appropriation for the Science Laboratory Grant Program. The TEA has determined that, since funds were directly appropriated and no longer come from surplus IFA and EDA funds available only for school districts, open-enrollment charter schools are now eligible for program grants.

The adopted amendment to 19 TAC §61.1037 modifies the rule to allow open-enrollment charter schools to apply for Science Laboratory Grant Program grants. A definition for the term "school district" has been added in subsection (a) to explain that the term, for purposes of §61.1037, includes open-enrollment charter schools. The adopted amendment also specifies in subsection (c) how a charter school's property wealth is determined. Subsection (e)(6) has been amended to remove outdated language relating to contracts for construction or renovation. A new subsection (e)(6)(D) has been added to specify that a school district may not apply for additional Science Laboratory Grant Program funds for a campus after receiving grant funds for that same campus until three subsequent cycles have passed. The adopted amendment also deletes language in subsection (f)(1) that references a method of program funding other than the current direct appropriation. Minor technical edits and changes in word usage have been made throughout the rule.

The current rule requires a school district that wishes to receive a grant under the Science Laboratory Grant Program to complete and submit an application requesting funding. The adopted amendment requires an open-enrollment charter school that wishes to receive a grant under the Science Laboratory Grant Program to follow the same process. The application must contain a description of each high school campus for which funds

are being requested, the campus's enrollment, the number of science laboratories on the campus, a certification that the existing laboratories are insufficient to comply with curriculum requirements, the number of laboratories to be constructed or renovated, and a timeline for the proposed construction or renovation projects.

Any locally maintained paperwork requirements resulting from the adopted amendment correspond with and support the stated procedural and reporting implications.

The TEA determined that there is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal began June 18, 2010, and ended July 19, 2010. No public comments were received.

The amendment is adopted under the TEC, §7.062, which authorizes the commissioner to adopt rules necessary to implement the Science Laboratory Grant Program, including rules addressing eligibility, application procedures, and accountability for use of grant funds. The General Appropriations Act, SB 1, Article III, Rider 73, 81st Texas Legislature, 2009, made a direct appropriation for the Science Laboratory Grant Program, which allows open-enrollment charter schools to be eligible for program grants.

The adopted amendment implements the TEC, §7.062, and the General Appropriations Act, SB 1, Article III, Rider 73, 81st Texas Legislature, 2009.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 12, 2010.

TRD-201004685
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Effective date: September 1, 2010
Proposal publication date: June 18, 2010
For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 23. TEXAS REAL ESTATE COMMISSION

CHAPTER 531. CANONS OF PROFESSIONAL ETHICS AND CONDUCT

22 TAC §531.18

The Texas Real Estate Commission (TREC) adopts an amendment to 22 TAC §531.18 concerning Consumer Information Form 1-1 without changes to the proposed text as published in the June 11, 2010, issue of the *Texas Register* (35 TexReg 4848) and will not be republished. The amendment would add a reference to the TREC website to download the form.

The reasoned justification for the amendment is clarification of where consumers and licensees may obtain information provided by the agency.

No comments were received on the amendment to the rule as proposed.

The amendment is adopted under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statute affected by this adoption is Texas Occupations Code, Chapter 1101. No other statute, code or article is affected by the amendment to the rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 12, 2010.

TRD-201004669
Loretta R. DeHay
General Counsel
Texas Real Estate Commission
Effective date: September 1, 2010
Proposal publication date: June 11, 2010
For further information, please call: (512) 465-3926

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CHAPTER 533. PRACTICE AND PROCEDURE

22 TAC §§533.1, 533.3, 533.4, 533.8, 533.20, 533.31, 533.34

The Texas Real Estate Commission (TREC) adopts amendments to 22 TAC §533.1, Definitions; §533.3, Filing and Notice; §533.4, Failure to Answer; Failure to Attend Hearing and Default; §533.8, Final Orders, Motions for Rehearing, and Emergency Orders; §533.20, Informal Proceedings; §533.31, Referral of Contested Matter for Alternative Dispute Resolution Procedures; and §533.34, Commencement of ADR. Sections 533.1, 533.3, 533.4, 533.8, 533.31 and 533.34 are adopted without changes to the proposed text as published in the June 11, 2010, issue of the *Texas Register* (35 TexReg 4848) and will not be republished. Section 533.20 is adopted with changes and will be republished.

The amendment to §533.1 adds the definition of "last known mailing address" to the list of definitions. The amendment to §533.3 clarifies that the Notice of Alleged Violation required by Texas Occupations Code §1101.703 will be mailed to the respondent's last known mailing address, corrects typographical errors, and makes conforming changes to the rule. The amendment to §533.4 corrects typographical errors and makes conforming changes to the rule. The amendment to §533.8 provides a procedure for motions for rehearing before the commission, and provides that a person appealing a decision of the commission is responsible for paying for the costs of preparation of an original or certified copy of the transcript of the proceedings required by a reviewing court. The amendments to §533.20 and §533.31 make conforming changes. The amendments to §533.34 delete the procedures for alternative dispute resolution of employment

matters as those matters are provided for in the TREC employee handbook.

The reasoned justification for the amendments is clarification of the practice and procedure before the commission and the State Office of Administrative Hearings.

No comments were received on the amendments to the rules as proposed.

The amendments are adopted under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this adoption are Texas Occupations Code, Chapters 1101, 1102, 1303, and Texas Property Code, Chapter 221. No other statute, code or article is affected by the amendments.

§533.20. Informal Proceedings.

(a) Informal disposition of any contested case involving a respondent may be made through an informal conference pursuant to Texas Occupations Code §1101.660.

(b) The commission and the respondent may enter into an agreed order without first engaging in an informal conference under this chapter.

(c) A respondent may request an informal conference; however, the decision to hold a conference shall be made by the Director of Standards and Enforcement Services.

(d) An informal conference shall be voluntary and shall not be a prerequisite to a formal hearing.

(e) An informal conference may be conducted in person, or by electronic, telephonic, or written communication.

(f) The Director of Standards and Enforcement Services or the director's designee shall decide upon the time, date and place of the informal conference, and provide written notice to the respondent. Notice shall be provided by certified mail no less than ten days prior to the date of the conference to the last known mailing address of the respondent. The ten days shall begin on the date of mailing. The respondent may waive the ten-day notice requirement.

(g) A copy of the commission's rules concerning informal conferences shall be enclosed with the notice of the informal conference. The notice shall inform the respondent of the following:

(1) that the respondent may be represented by legal counsel;

(2) that the respondent may offer documentary evidence as may be appropriate;

(3) that at least one public member of the commission shall be present;

(4) that two staff members, including the staff attorney assigned to the case, with experience in the regulatory area that is the subject of the proceedings shall be present;

(5) that the respondent's attendance and participation is voluntary; and

(6) that the complainant involved in the alleged violations may be present.

(h) The notice of the informal conference shall be sent to the complainant at his or her last known mailing address. The complainant shall be informed that he or she may appear in person or may submit a written statement for consideration at the informal conference.

(i) The conference shall be informal and need not follow the procedures established in this chapter for contested cases and formal hearings.

(j) The respondent, the respondent's attorney, the commission member, and the staff members may question the respondent or complainant, make relevant statements, present statements of persons not in attendance, and present such other evidence as may be appropriate.

(k) The staff attorney assigned to the case shall attend each informal conference. The commission member or other staff member may call upon the attorney at any time for assistance in the informal conference.

(l) No formal record of the proceedings of the informal conference shall be made or maintained.

(m) The complainant may be excluded from the informal conference except during the complainant's oral presentation. The respondent, the respondent's attorney, and commission staff may remain for all portions of the informal conference, except for consultation between the commission member and commission staff.

(n) The complainant shall not be considered a party in the informal conference but shall be given the opportunity to be heard if the complainant attends. Any written statement submitted by the complainant shall be reviewed at the conference.

(o) At the conclusion of the informal conference, the commission member or staff members may propose an informal settlement of the contested case. The proposed settlement may include administrative penalties or any disciplinary action authorized by the Act. The commission member or staff members may also recommend that no further action be taken.

(p) The respondent may either accept or reject the proposed settlement recommendations at the conference. If the proposed settlement recommendations are accepted, a proposed agreed order shall be prepared by the staff attorney and forwarded to the respondent. The order shall contain agreed findings of fact and conclusions of law. The respondent shall execute the proposed agreed order and return the executed order to the commission within ten days of his or her receipt of the proposed agreed order. If respondent fails to sign and return the executed proposed agreed order within the stated time period, the inaction shall constitute rejection of the proposed settlement recommendation.

(q) If the respondent rejects the proposed settlement recommendation, the matter shall be referred to the Director of Standards and Enforcement Services for appropriate action.

(r) If the respondent signs and accepts the proposed agreed order, it shall be signed by the staff attorney and submitted to the administrator for approval.

(s) If the administrator does not approve a proposed agreed order, the respondent shall be so informed and the matter shall be referred to the Director of Standards and Enforcement Services for other appropriate action.

(t) A licensee's opportunity for an informal conference under this subchapter shall satisfy the requirement of the APA, §2001.054(c).

(u) The commission may order a license holder to pay a refund to a consumer as provided in an agreement resulting from an informal conference instead of or in addition to imposing an administrative penalty pursuant to Texas Occupations Code §1101.659. The amount

of a refund ordered as provided in an agreement resulting from an informal conference may not exceed the amount the consumer paid to the license holder for a service regulated by the Act and this title. The commission may not require payment of other damages or estimate harm in a refund order.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 12, 2010.

TRD-201004670
Loretta R. DeHay
General Counsel
Texas Real Estate Commission
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For further information, please call: (512) 465-3926

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CHAPTER 535. GENERAL PROVISIONS
SUBCHAPTER E. REQUIREMENTS FOR LICENSURE

22 TAC §535.51

The Texas Real Estate Commission (TREC) adopts amendments to 22 TAC §535.51 concerning General Requirements for a License without changes to the proposed text as published in the June 11, 2010, issue of the *Texas Register* (35 TexReg 4852) and will not be republished. The amendments to §535.51 delete the requirement that an applicant must submit an education evaluation and receive a notice from the commission that the applicant has satisfied all education requirements for a license prior to submitting an application for a license. The amendments also delete the signature requirement, change from 60 to 20 days the time in which an applicant must submit a payment after the commission has requested such payment, and delete the adoption by reference of all application forms. For efficiency and consistency purposes, the application forms will no longer be adopted by reference in the rules but they will continue to be approved by the commission before staff makes the forms available for use by applicants for a license. The changes are part of the enhancements being made to the TREC licensing system as it is upgraded.

The reasoned justification for the amendments is enhanced efficiency and consistency as the application process will be streamlined. In addition, applicants will be able to submit education evaluations electronically as part of an application for a license.

No comments were received on the amendments to the rule as proposed.

The amendments are adopted under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statute affected by this adoption is Texas Occupations Code, Chapter 1101. No other statute, code or article is affected by the amendments.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Loretta R. DeHay
General Counsel
Texas Real Estate Commission
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Proposal publication date: June 11, 2010
For further information, please call: (512) 465-3926

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SUBCHAPTER J. FEES

22 TAC §535.101

The Texas Real Estate Commission (TREC) adopts amendments to 22 TAC §535.101 concerning Fees without changes to the proposed text as published in the June 11, 2010, issue of the *Texas Register* (35 TexReg 4853) and will not be republished. The amendments to §535.101: (1) delete the reference to a specific fee for an education evaluation, (2) add the fee to the relevant application fees, and (3) add an additional fee of $20 to submit a paper form in cases where the commission has established an online process for submitting the same form. For efficiency and consistency purposes, the changes to the fees are included as part of the upgrades and enhancements to the TREC licensing system.

The reasoned justification for the amendments is enhanced efficiency and consistency as the application process will be streamlined. In addition, applicants will be able to submit education evaluations electronically as part of an application for a license.

No comments were received on the amendments to the rule as proposed.

The amendments are adopted under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statute affected by this adoption is Texas Occupations Code, Chapter 1101. No other statute, code or article is affected by the amendments.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-201004673
Loretta R. DeHay
General Counsel
Texas Real Estate Commission
Effective date: September 1, 2010
Proposal publication date: June 11, 2010
For further information, please call: (512) 465-3926

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SUBCHAPTER R. REAL ESTATE INSPECTORS

22 TAC §535.208, §535.210

The Texas Real Estate Commission (TREC) adopts amendments to 22 TAC §535.208 concerning Application for a License and §535.210 concerning Fees without changes to proposed text as published in the June 11, 2010, issue of the *Texas Register* (35 TexReg 4854) and will not be republished.

The amendments as proposed to §535.208 delete the requirement that an applicant must submit an education evaluation and receive a notice from the commission that the applicant has satisfied all education requirements for a license prior to submitting an application for a license. The amendments also delete the signature requirement, change from 60 to 20 days the time in which an applicant must submit a payment after the commission has requested such payment, and delete the adoption by reference of all application forms. For efficiency and consistency purposes, the application forms will no longer be adopted by reference in the rules but they will continue to be approved by the commission before staff makes the forms available for use by applicants for a license. The changes are part of the upgrades and enhancements being made to the TREC licensing system. The amendments to §535.208(e) as proposed corrects the title of referenced §533.34 from "Disapproval of an Application for a License or Registration" to the current title "Commencement of ADR."

The amendments to §535.210: (1) delete the reference to a specific fee for an education evaluation, (2) add the fee to the relevant application fees, and (3) add an additional fee of $20 to submit a paper form in cases where the commission has established an online process for submitting the same form.

The reasoned justification for the amendments is enhanced efficiency and consistency as the application process will be streamlined. In addition, applicants will be able to submit education evaluations electronically as part of an application for a license.

No comments were received on the amendments to the rules as proposed.

The amendments are adopted under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statute affected by this adoption is Texas Occupations Code, Chapters 1101 and 1102. No other statute, code or article is affected by the amendments.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Loretta R. DeHay
General Counsel
Texas Real Estate Commission
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For further information, please call: (512) 465-3926

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CHAPTER 537. PROFESSIONAL AGREEMENTS AND STANDARD CONTRACTS

22 TAC §537.11

The Texas Real Estate Commission (TREC) adopts amendments to 22 TAC §537.11 concerning Professional Agreements and Standard Contracts without changes to the proposed text as published in the June 11, 2010, issue of the *Texas Register* (35 TexReg 4856) and will not be republished. The amendments are nonsubstantive and break down existing paragraphs into subsections to provide structure to each subsection for readability and clarity.

Texas real estate licensees are generally required to use forms promulgated by TREC when negotiating contacts for the sale of real property. These forms are drafted by the Texas Real Estate Broker-Lawyer Committee, an advisory body consisting of six attorneys appointed by the President of the State Bar of Texas, six brokers appointed by TREC, and a public member appointed by the governor.

The reasoned justification for the amendments is clarification of the rules regarding use of forms promulgated by TREC when negotiating contacts for the sale of real property.

No comments were received on the amendments to the rule as proposed.

The amendments are adopted under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statute affected by this adoption is Texas Occupations Code, Chapter 1101. No other statute, code or article is affected by the amendments.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 12, 2010.

TRD-201004675
Loretta R. DeHay
General Counsel
Texas Real Estate Commission
Effective date: September 1, 2010
Proposal publication date: June 11, 2010
For further information, please call: (512) 465-3926

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CHAPTER 541. RULES RELATING TO THE PROVISIONS OF TEXAS OCCUPATIONS CODE, CHAPTER 53

22 TAC §541.1, §541.2

The Texas Real Estate Commission (TREC) adopts amendments to 22 TAC §541.1 concerning Criminal Offense Guidelines and new 22 TAC §541.2 concerning Criminal History Evaluation Letters without changes to the proposed text as published in the

June 11, 2010, issue of the *Texas Register* (35 TexReg 4857) and will not be republished.

House Bills 963, and 2808, 81st Legislature, Regular Session (2009) amended Texas Occupations Code Chapter 53. These bills changed the license eligibility requirements for persons with criminal histories and changed TREC's authority to review and consider a person's criminal history information. The amendments and new rule clarify license eligibility for persons with criminal histories, and outline the process by which a person may request and receive a criminal history evaluation letter under Chapter 53.

The amendments to §541.1 clarify that the commission considers convictions and deferred adjudications of the offenses listed in the rule to be directly related to the duties and responsibilities of the licenses issued by the commission for the reasons articulated in the rule. The amendments clarify that the commission has determined that multiple violations which evidence a disregard for or inability to comply with the law and felony offenses involving driving while intoxicated or under the influence directly relate to the duties and responsibilities of a license issued by the commission.

The new rule implements the new statutory requirements under Occupations Code Chapter 53. The new statutory provisions require the commission to establish a process that will allow a person to submit a request for a criminal history evaluation. Under Chapter 1101, §1101.353, the commission is already authorized to issue a moral character determination of an applicant. Under the new rule, the commission will review the person's criminal history under Chapter 53 using the same process it currently uses to conduct a moral character determination under Chapter 1101. The intent of both statutes is to provide information about potential license ineligibility based on criminal history before a person spends time and money pursuing an education or training, taking an examination, or applying for a particular license. New §541.2 clarifies that a person may request an eligibility letter from the commission under Chapter 53 using the same form and paying the same fee required of persons applying for a moral character determination under §1101.353.

The reasoned justification for the amendments and new rule is greater clarity regarding license eligibility for persons with criminal histories.

No comments were received on the amendments and new rule as proposed.

The amendments and new rule are adopted under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this adoption are Texas Occupations Code, Chapter 1101 and 1102. No other statute, code or article is affected by the amendments and new rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 12, 2010.

TRD-201004676

Loretta R. DeHay
General Counsel
Texas Real Estate Commission
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Proposal publication date: June 11, 2010
For further information, please call: (512) 465-3926

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PART 30. TEXAS STATE BOARD OF EXAMINERS OF PROFESSIONAL COUNSELORS

CHAPTER 681. PROFESSIONAL COUNSELORS

The Texas State Board of Examiners of Professional Counselors (board) adopts amendments to §§681.14, 681.41, 681.42, 681.48, 681.49, 681.52, 681.72, 681.83, 681.92, 681.93, 681.111, 681.125, 681.142, and 681.164 and new §681.17, concerning the licensing and regulation of professional counselors without changes to the proposed text as published in the June 4, 2010, issue of the *Texas Register* (35 TexReg 4562), and the sections will not be republished.

The amendments and new rule ensure that the rules reflect current legal, policy, and operational considerations; improve draftsmanship; and make the rules more accessible, understandable, and usable. The amendments and new rule are also necessary to clarify the meaning of non-therapeutic relationships, to provide information to prospective applicants in accordance with Occupations Code, §53.102, to clarify how an LPC-Intern should advertise, to clarify that a course in each core area of study must be taken as a requirement for licensure, and to allow for supervision via live internet webcam.

Government Code, §2001.039, requires that each state agency review and consider for re-adoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 681.14, 681.41, 681.42, 681.48, 681.49, 681.52, 681.72, 681.82, 681.83, 681.92, 681.93, 681.111, 681.125, 681.142, and 681.164 have been reviewed and the board has determined that the reasons for adopting the sections continue to exist in that rules concerning the licensing and regulation of professional counselors are still needed.

SECTION-BY-SECTION SUMMARY

Section 681.14(a)(10) has been added to authorize the board to charge a fee of $50 for pre-evaluation of a criminal history for future licensure.

Section 681.17 is added to authorize the board to pre-evaluate a criminal history for future licensure.

Section 681.41(e)(6) is amended to require LPC-Interns to provide their supervisor's name, address, and phone number on all documentation.

Section 681.41(j) is amended to allow LPC's to promote and sell products to clients as long as it is for a therapeutic purpose and does not hamper the counseling relationship.

Section 681.41(l) is amended to clarify the meaning of a non-therapeutic relationship.

Sections 681.42(e)(2) and 681.93(e)(2), (4), and (5) reflect editorial changes clarifying rule intent and removal of unnecessary language.

Section 681.48(a) was amended to require LPC interns to provide their supervisor's name on all documentation. The addition of subsection (e) to the section requires LPC interns to inform clients of their supervisor's name, telephone number, and address.

Section 681.49(d) is amended to ensure the understanding that all degrees must be accepted and reported by the American Association of Collegiate Registrars and Admissions Officers.

Section 681.52(e) is amended to require LPC-Interns to provide their supervisor's name, address, and phone number on all documentation.

Section 681.72(d) is amended to require the renewal card to be submitted with the supervisor agreement form.

Section 681.83(a) is amended to clarify that an applicant must take at least one course in each of the core areas of study required for licensure.

Section 681.92(g) is amended to allow supervision over the internet using live internet webcam.

Section 681.93(k) is amended to clarify the requirement for repayment of supervision fees.

Section 681.111(g) is amended to ensure the understanding that all degrees must be accepted and reported by the American Association of Collegiate Registrars and Admissions Officers.

Section 681.125(e) removes repetitive language.

Section 681.142(b) is deleted to disallow carry over of continuing education credit.

Section 681.164(d)(6) is amended to clarify the rule.

COMMENTS

The board received the following comments from individuals on the proposed rules during the comment period. The board's response follows each comment.

Comment: Concerning §681.142, three commenters opposed the deletion of carryover of continuing education hours to the next cycle.

Response: The board disagrees. Since the licensees are on a two-year renewal allowing carryover could mean that a licensee could go three years without completing continuing education. The board believes that each licensee should complete 24 hours in each two-year cycle. No change was made to the rule as a result of these comments.

SUBCHAPTER A. THE BOARD

22 TAC §681.14, §681.17

STATUTORY AUTHORITY

The amendment and new rule are authorized by Occupations Code, §503.203, which authorizes the board to adopt rules necessary for the performance of the board's duties. The review of the rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Glynda Corley
Chair
Texas State Board of Examiners of Professional Counselors
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For further information, please call: (512) 458-7111 x6972

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SUBCHAPTER C. CODE OF ETHICS

22 TAC §§681.41, 681.42, 681.48, 681.49, 681.52

STATUTORY AUTHORITY

The amendments are authorized by Occupations Code, §503.203, which authorizes the board to adopt rules necessary for the performance of the board's duties. The review of the rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER D. APPLICATION PROCEDURES

22 TAC §681.72

STATUTORY AUTHORITY

The amendment is authorized by Occupations Code, §503.203, which authorizes the board to adopt rules necessary for the performance of the board's duties. The review of the rules implements Government Code, §2001.039.

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SUBCHAPTER E. ACADEMIC REQUIREMENTS FOR LICENSURE

22 TAC §681.83

STATUTORY AUTHORITY

The amendment is authorized by Occupations Code, §503.203, which authorizes the board to adopt rules necessary for the performance of the board's duties. The review of the rules implements Government Code, §2001.039.

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SUBCHAPTER F. EXPERIENCE REQUIREMENTS FOR LICENSURE

22 TAC §681.92, §681.93

STATUTORY AUTHORITY

The amendments are authorized by Occupations Code, §503.203, which authorizes the board to adopt rules necessary for the performance of the board's duties. The review of the rules implements Government Code, §2001.039.

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SUBCHAPTER H. LICENSING

22 TAC §681.111

STATUTORY AUTHORITY

The amendment is authorized by Occupations Code, §503.203, which authorizes the board to adopt rules necessary for the performance of the board's duties. The review of the rules implements Government Code, §2001.039.

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SUBCHAPTER I. REGULAR LICENSE RENEWAL; INACTIVE AND RETIREMENT STATUS

22 TAC §681.125

STATUTORY AUTHORITY

The amendment is authorized by Occupations Code, §503.203, which authorizes the board to adopt rules necessary for the performance of the board's duties. The review of the rules implements Government Code, §2001.039.

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SUBCHAPTER J. CONTINUING EDUCATION REQUIREMENTS

22 TAC §681.142

STATUTORY AUTHORITY

The amendment is authorized by Occupations Code, §503.203, which authorizes the board to adopt rules necessary for the performance of the board's duties. The review of the rules implements Government Code, §2001.039.

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SUBCHAPTER K. COMPLAINTS AND VIOLATIONS

22 TAC §681.164

STATUTORY AUTHORITY

The amendment is authorized by Occupations Code, §503.203, which authorizes the board to adopt rules necessary for the performance of the board's duties. The review of the rules implements Government Code, §2001.039.

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 289. RADIATION CONTROL
SUBCHAPTER G. REGISTRATION REGULATIONS

25 TAC §289.302

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department) adopts new §289.302, concerning registration and radiation safety requirements for use of laser hair removal (LHR) devices with changes to the proposed text as published in the February 19, 2010, issue of the *Texas Register* (35 TexReg 1419).

BACKGROUND AND PURPOSE

The new rule is developed to implement House Bill (HB) 449 that adds a new Subchapter M to Health and Safety Code, Chapter 401, and Appropriations Bill §17.32 Contingency Rider of the 81st Legislature, Regular Session, 2009, relating to registration and radiation safety requirements for use of LHR devices.

SECTION-BY-SECTION SUMMARY

The new rule establishes requirements for the registration of LHR facilities and the certification of persons who perform or attempt to perform LHR procedures. HB 449 requires all LHR facilities and individuals who perform LHR procedures to be registered and certified by the department by September 1, 2010. In addition, the new rule establishes requirements for LHR facility operations, training of persons performing LHR procedures, customer notification, use of a consulting physician, enforcement, penalties, fees for certificates of laser registration, fees for individual LHR certificates, and responsibilities of the registrant, laser safety officer (LSO), consulting physician, and certified individuals. To facilitate a sufficient number of certified persons in the LHR field during the first four months of the program, the department has modified the application requirements for certification for those who meet the requirements outlined in §289.302(j)(8), (12), and (16), prior to September 1, 2010, and apply not later than December 31, 2010.

COMMENTS

The department, on behalf of the commission, has reviewed and prepared responses to the comments received regarding the proposed rules during the comment period, which the commission has reviewed and accepts. The commenters were individuals, associations, and/or groups, including the following: National Laser Institute; Texas Association for Cosmetic Laser Education and Regulation; Texas Medical Association; ATI Career Training Center; Texas Association for Cosmetic Laser Education and Regulation; Alite Laser; Elements Laser Spa; Rockwell Laser Industries, Inc.; McMichael & Company, LLC; Capitol Alliance; Medical Laser Dynamics; Med Spa Resources; Laser & Electrolysis Studio, Inc.; and the Texas Dermatological Society. The commenters were in favor of the rule; however, they suggested recommendations for change as discussed in the summary of comments.

Numerous comments were received requesting clarification of §289.301 of this title relating to registration and radiation safety requirements for lasers and intense-pulsed light devices; however, this rulemaking concerns only §289.302 and suggested changes to §289.301 are outside the scope of this rulemaking. Comments will be considered in a future revision of §289.301.

COMMENT: Concerning §289.302, a commenter asked if the department is expecting facilities to have professionals in place by September 1, 2010, since the LHR rule is not becoming effective until June 1, 2010.

RESPONSE: The department acknowledges the comment and continues to work towards implementation of the LHR program. The department will adjust the September 1, 2010, deadline if necessary. No change was made to the rule as a result of the inquiry.

COMMENT: Concerning §289.302, a commenter inquired if aestheticians are already certified through another entity, do these individuals still need to provide proof of their 40 hours of training.

RESPONSE: The department acknowledges the comment. Depending on which level of individual LHR certification that a person applies for, the individual will have to provide documentation of the specific applicable requirements in order for the agency to issue the LHR certificate. No change was made to the rule as a result of the inquiry.

COMMENT: A commenter asked whether LHR devices still have to be registered under §289.301.

RESPONSE: The department acknowledges the comment. LHR devices will be required to be registered only in accordance with new §289.302 if used only for LHR. No change was made to the rule as a result of the inquiry.

COMMENT: A commenter suggested that the department add a reference in §289.301 and §289.302 to other rules that may apply to laser users, like medical devices rules.

RESPONSE: The department agrees with the comment. Other rules that also apply to LHR device users, such as medical devices rules, are referenced in the rule. The department made further clarifications regarding the applicability of federal medi-

cal devices rules in §289.302(b)(10) concerning prescription devices and §289.302(q)(2) concerning adulteration or misbranding of a LHR device. However, suggested changes to §289.301 are outside the scope of this rulemaking. The comment will be considered in a future revision of §289.301.

COMMENT: Concerning §289.302, a commenter asked what the immediate barriers for online, self-paced training are.

RESPONSE: The department acknowledges the comment and added new §289.302(r)(4) to provide certified LHR individuals the option to obtain the continuing education units by web-based online training or a home-study training program.

COMMENT: Concerning §289.302, a commenter asked what the law is regarding owning a laser and working out of a salon.

RESPONSE: The department acknowledges the comment. A doctor's order is required to purchase a LHR device, which is categorized by the U.S. Food and Drug Administration (FDA) as a prescription device. A LHR device may be owned by a facility and used by an individual at a facility including a salon that meets the requirements of §289.302. If a laser device is used for procedures other than LHR procedures, the laser device is required to be registered in accordance with §289.301. The department added clarifying language concerning purchase of a LHR device to §289.302(b)(10).

COMMENT: Concerning §289.302, a commenter asked if each LHR procedure requires a prescription.

RESPONSE: The department acknowledges the comment. A prescription is not required for each LHR procedure. The protocols established by the consulting physician suffice for a prescription for each LHR procedure. The department added language to §289.302(b)(10) to clarify the intent of the rule.

COMMENT: Concerning §289.302, a commenter inquired if a doctor has to write an order for a facility to purchase a LHR device, and if the facility can possess and/or use the LHR device. In addition, two commenters requested that the department include in the LHR rule what the order should specifically state.

RESPONSE: The department acknowledges the comment. A doctor's order is required to purchase a LHR device, which is categorized by the FDA as a prescription device. A LHR device may be owned by a facility and used by an individual who meets the requirements of §289.302. The department added language in §289.302(b)(10) to clarify the requirements concerning purchase of a LHR device. Language is added in §289.302(q)(2) to specify the content of a physician's prescription or order.

COMMENT: Two commenters noted that in §289.302, a laser cannot be purchased unless the purchaser is a doctor and asked if the department would allow the option for a LHR professional to purchase a LHR device even if not a doctor.

RESPONSE: The department acknowledges the comment. Health and Safety Code, §483.001(12), enumerates practitioners and a LHR professional is not included. Therefore, a LHR device must be purchased by a physician (such as the consulting physician) or may be purchased by a facility using an order of a physician. The department added language in §289.302(b)(10) to clarify this position.

COMMENT: Eleven commenters opposed a rule that would allow non-physicians to purchase and own lasers even with a prescription from a physician. The commenters also expressed that this option was not the intent of the proposed legislation. According to the commenters, allowing non-physicians to own or purchase a laser violates federal law.

RESPONSE: The department acknowledges the comments. Health and Safety Code, §483.001(12), enumerates practitioners and a LHR professional is not included. Therefore, a LHR device must be purchased by a physician (such as the consulting physician) or may be purchased by a facility using an order of a physician as is currently allowed under federal law. The department added language in §289.302(b)(10) to clarify this position which is consistent with existing federal law. The rule requires specific training and experience for use of a LHR device by a non-physician.

COMMENT: Concerning §289.302, a commenter requested that the proposed rule be revised to include a provision that all devices registered under §289.301 as of the effective date of these rules will not be required to meet any requirements regarding who ordered and who purchased the devices. The commenter added that those devices purchased prior to the implementation of the rules and the manner, by which they were purchased, should not be regulated in these rules.

RESPONSE: The department acknowledges the comment. Health and Safety Code, §483.001(12), enumerates practitioners and a LHR professional is not included. Therefore, a LHR device must be purchased by a physician (such as the consulting physician) or may be purchased by a LHR facility using an order of a physician. The department added language in §289.302(b)(10) to clarify this position. The federal requirement for prescription device use in Title 21, CFR, §801.109, also applies to laser devices purchased prior to the implementation of HB 449 and the proposal of §289.302.

COMMENT: A commenter asked if the department's position under §289.302 is that a prescription is not needed for each client, and if so, based on what rationale. The commenter asked how other professions are dealing with the issue if they use prescription devices and they do not obtain prescriptions from a physician for each client. In the view of the commenter, all users of lasers should be held to the same standards regarding a prescription for each use.

RESPONSE: The department acknowledges the comment. In this rule, a valid contract with a consulting physician satisfies the supervision requirement of Title 21, CFR, §801.109 and the protocols developed by the physician under that contract satisfies the requirement for a prescription for each use specified in Title 21, CFR, §801.109. The department added language in §289.302(b)(10) to clarify this position. The new §289.302 only concerns LHR devices. Other prescriptive devices are outside the scope of this rulemaking.

COMMENT: Concerning §289.302, a commenter expressed that most manufacturers in the state of Texas are not aware of this new rule and inquired about the methods the department is using to reach this industry.

RESPONSE: The department acknowledges the comment and will mail notices of the new rule to laser manufacturers. No change was made to the rule as a result of the comment.

COMMENT: Concerning §289.302, a commenter stated that she thought intense pulsed light (IPL) devices do not require registration under §289.301. The commenter asked if these devices are required to be registered under §289.302 for LHR and if so, will devices which perform multiple procedures have to be registered under both §289.301 and §289.302.

RESPONSE: The department acknowledges the comment. An intense pulsed light device and a laser are both considered a LHR device and are defined in §289.302(d)(21). LHR devices will be required to be registered in accordance with new §289.302. If a laser is used for procedures other than LHR procedures, the laser is required to also be registered in accordance with §289.301. No change was made to the rule as a result of the inquiry.

COMMENT: A commenter noted that only approximately 20% of the LHR industry is aware of the new LHR program. The commenter expressed concern that there will be many unregulated LHR facilities and requested that the department make efforts to publicize the new rule.

RESPONSE: The department acknowledges the comment and continues to update LHR facility mailing lists as new facilities are identified. In addition, the department has developed a communication plan, which includes mail-outs, the department website, coordination with various professional organizations, and possible use of social networking media. No change was made to the rule as a result of the comment.

COMMENT: Concerning §289.302, a commenter stated that although a physician can delegate to staff, the Board of Nursing does not allow registered nurses to use lasers. The commenter asked which statute controls.

RESPONSE: The department acknowledges the comment. Section 289.302(b)(7) states that an individual LHR certificate is not required for a licensed health professional if the performance of LHR procedures is within the scope of that professional's practice as determined by the professional's licensing board. The Texas Board of Nursing Position Statement 115.9, Performance of Laser Therapy by RNs or LVNs, states that it is not within the scope of nursing practice to perform the delivery of laser energy on a patient as an independent nursing function. Nurses who elect to accept physician delegation must meet certain criteria specified in the position statement. In this situation, the professional licensing board has determined under what conditions a nurse can accept physician delegation. No change was made to the rule as a result of the comment.

COMMENT: A commenter stated that the costs of certification listed in the §289.302 proposed preamble are approximately $3500 to $4500 and asked where these numbers came from.

RESPONSE: The department acknowledges the inquiry. The department conducted internet searches of multiple laser training programs to determine the cost range stated in the preamble. No change was made to the rule as a result of the comment.

COMMENT: Concerning §289.302(b), a commenter expressed that the section specified that a health professional may practice LHR if doing so is within the scope of that professional's practice as determined by that professional's licensing board. The commenter asked if a licensed health professional had to be a certified LHR professional in order to train and supervise others. If so, this would require double licensure and double fees for those with the most training.

RESPONSE: The department added language in §289.302(j)(21) to clarify that a physician or other licensed health professional shall not perform the direct supervision activities of a LHR professional or senior LHR technician required in §289.302(j)(14)(B) unless that individual meets the requirements of §289.302(j)(6) or (10). Per Health and Safety Code, Subchapter M, §401.508(b), only a LHR senior technician or professional can perform this specific supervision activity. Since physicians are exempt from Health and Safety Code, Subchapter M and its rules as stated in §401.504(d), they cannot bestow the credentialing privileges of those rules they are exempt from.

COMMENT: Concerning §289.302(b) and (i), a commenter asked if a facialist licensed through the State of Texas and working under 5 dermatologists will have to be certified. In addition, the commenter inquired if a dermatology practice that performs LHR in the same office is exempt from registration.

RESPONSE: The department acknowledges the inquiry. Under §289.302(b)(3) and (b)(7), a dermatology office performing laser procedures that are the practice of medicine and also performing LHR procedures is not required to be registered under §289.302, but is required to be registered under §289.301 for lasers used on humans. A facialist working in the dermatologist's office where medical procedures are also performed is not required to have an individual certification under §289.302 to work in that office. No change was made to the rule as a result of the comment.

COMMENT: Concerning §289.302(b), (c), and (d), a commenter expressed support of these subsections as they set out appropriate scope and prohibitions and these parameters are particularly important to the remainder of the rule.

RESPONSE: The department agrees with the comment and made no change to the rule.

COMMENT: A commenter stated that it is unclear what the department considers to be a significant threat or endangerment to health and safety as stated in §289.302(c)(1). Additionally, the commenter asked who within the department would make the decision to prohibit use of a device and if the criteria for such a decision would be clearly defined in department policy and procedures available for public inspection.

RESPONSE: The department disagrees with the comment. This requirement is consistent with similar rules for other sources of radiation. As the rule states, prohibition of the use of LHR devices would be performed in accordance with §289.302(z) and (ee). These subsections address compliance procedures and emergency orders, including the issuance of a notice of violation to a person who commits a violation of the rule and due process procedures for emergency orders. Therefore, criteria for the process of prohibiting the use of a LHR device is defined in §289.302. No change was made to the rule as a result of the comment.

COMMENT: Regarding §289.302(c)(4), a commenter stated that lasers used for hair removal are also approved by the FDA for other non-ablative uses such as tattoo removal, pigmented lesion removal, spider vein removal, wrinkle reduction, etc. In addition, the commenter added that these cosmetic laser procedures are not the treatment of "an illness, disease, injury, or physical defect or deformity" and therefore, in his view, may be performed by a non-physician and without a physician's order. The commenter asked if the department shares this view. The commenter also noted that §289.301(b)(1) requires only physician supervision to use a laser, but no requirement for an order from a physician.

RESPONSE: The department acknowledges the comment. However, new §289.302 only concerns LHR devices for the purpose of LHR. Other prescriptive devices and uses are outside the scope of this rulemaking. The federal requirements for

prescription device use in Title 21, CFR, §801.109 existed prior to the implementation of HB 449 and apply to lasers that are prescription devices and used for procedures other than LHR procedures. No change was made to the rule as a result of the comment.

COMMENT: Regarding §289.302(c)(4)(B), a commenter noted that HB 449 and the rules do not define a "physician's order." The commenter asked if the department agrees that a standing delegation order under the Occupations Code, Chapter 157, would meet the physician's order requirement in §289.302(c)(4)(B).

RESPONSE: The department acknowledges the comment. The term "physician's order" is used in HB 449 and §289.302, with regard to use of LHR devices. For use of LHR devices, a standing delegation order would be equivalent to a physician's order used in §289.302(c)(4)(B). Uses of other types of lasers or prescription devices and uses for anything other than hair removal are outside the scope of this rulemaking. No change was made to the rule as a result of the comment.

COMMENT: Concerning §289.302(c)(4), a commenter stated that since it has been the long held position of the department that a prescription device could not be used by a non-physician without an order from a physician for each client, the requirement should be clearly stated in appropriate regulations open to public comment.

RESPONSE: The department acknowledges the comment. A LHR device must be purchased by a physician (such as the consulting physician) or by using an order of a physician. A valid contract with a consulting physician satisfies the supervision requirement of Title 21, CFR, §801.109 and the protocols developed by the physician under that contract satisfies the requirement for a prescription for each use specified in Title 21, CFR, §801.109. The department added language in §289.302(b)(10) to clarify this position.

COMMENT: A commenter noted that HB 449 did not impose a requirement that a LHR technician be directly supervised and the phrase "LHR technician" should be removed from proposed §289.302(d)(11).

RESPONSE: The department agrees with the comment and made the suggested change in new §289.302(d)(12).

COMMENT: Regarding "direct supervision" in proposed §289.302(d)(11) and (j)(10)(B), a commenter stated that this requirement is too restrictive. In the commenter's view, the supervisor should be allowed to leave the room once the setting and skin type have been determined.

RESPONSE: The department acknowledges the comment. However, Health and Safety Code, Subchapter M, §401.507(2), requires that a LHR apprentice-in-training must work under the direct supervision of a senior LHR technician or a certified LHR professional. No change was made to the rule as a result of the comment.

COMMENT: Concerning proposed §289.302(d)(19), several commenters requested that the definition of "LHR procedure" be revised so that more than one procedure could be performed on a client's body during one appointment with a LHR facility.

RESPONSE: The department agrees with the comment and deleted the proposed definition and replaced it with a new definition in §289.302(d)(20) to include four specified body areas. Each specified area is considered one procedure, regardless of how many individual body parts are treated within that area. For example, if an operator performs LHR on the upper lip and eyebrows, then this counts as 1 procedure. If an operator performs LHR on both arms and both legs, then this counts as 2 procedures because the LHR was performed in two of the defined areas.

COMMENT: Concerning proposed §289.302(d)(31), a commenter requested that doctors of chiropractic be classified as a physician for purposes of the LHR rules.

RESPONSE: The department acknowledges the comment. Health and Safety Code, §483.001(12), enumerates practitioners and a doctor of chiropractic is not included. No change was made to the rule as a result of the comment.

COMMENT: Concerning §289.302(i)(2)(A), a commenter noted that a certificate of registration is not required to be obtained for a facility where a physician practices medicine and uses a laser as part of the practice of medicine. The commenter stated that an individual should not be able to obtain an exemption based on physician ownership alone.

RESPONSE: The department acknowledges the comment. Health and Safety Code, Subchapter M, §401.510(c), states that a facility registration is not required for a facility owned or operated by a physician for the practice of medicine so that ownership alone does exempt the facility from a registration. No change was made to the rule as a result of the comment.

COMMENT: A commenter stated that the requirements in §289.302(i)(2) and (3) are too vague. Section 289.302(i)(2) states that if the facility for the practice of medicine is owned by a doctor then that facility does not have to register, but §289.302(i)(3) states that if the facility is owned by physician who only does LHR procedures then it does have to register. The commenter suggested that the rule should specify a percentage of the LHR procedures performed by a doctor to be exempt from registration.

RESPONSE: The department acknowledges the comment. Health and Safety Code, Subchapter M, §401.510(c), states that this section does not apply to a facility owned or operated by a physician for the practice of medicine. A physician's office performing procedures that are the practice of medicine and performing LHR procedures is not required to be registered under §289.302, but is required to be registered under §289.301 for lasers used on humans. No change was made to the rule as a result of the comment.

COMMENT: A commenter stated that since the entities in §289.302(i)(2)(A) - (C) are not required to obtain a certificate of registration under §289.302, then they would need to register lasers under §289.301 even if only for LHR. The commenter requested that the words "for purposes other than LHR" be removed in §289.302(i)(4).

RESPONSE: The department disagrees with the comment and made no change to the rule as a result of the comment. Section 289.302(i)(4) serves as notification to those facilities specified in §289.302(i)(2)(A) - (C) that they must have their laser registered in accordance with §289.301 if they own, possess, or use lasers for purposes other than LHR.

COMMENT: Concerning §289.302(i)(13), a commenter requested that language be added to the rules to allow companies with multiple registered locations to be able to have one physician designated as the consulting physician for all of the locations, with the requirement that each of the locations have a designated physician available for an emergency consultation.

RESPONSE: The department acknowledges the comment. A certificate of laser registration is required for each LHR facility and each application for a certificate of LHR registration must be accompanied by a copy of a written contract with a consulting physician. The rule does not prohibit the same physician from being the contractual consulting physician for more than one certificate of laser registration, providing the physician can fulfill the responsibilities of the consulting physician specified in §289.302(m). Likewise, the rule does not prohibit a different backup physician from being designated for each registered LHR location. No change was made to the rule as a result of the comment.

COMMENT: Regarding the requirement in §289.302(i)(13)(D) that a physician be designated in case the consulting physician is unavailable, the commenter expressed there is no need to have another doctor available during a LHR procedure.

RESPONSE: The department disagrees with the comment. Health and Safety Code, Subchapter M, §401.519(c), stipulates that if the consulting physician is unavailable for an emergency consultation, then another designated physician must be available for the consultation with the facility relating to care for the client. No change was made to the rule as a result of the comment.

COMMENT: A commenter inquired if students can be compensated during the period that these procedures are performed under §289.302(j).

RESPONSE: The department acknowledges the comment. Health and Safety Code, Subchapter M, Chapter 401, does not prohibit students from being compensated during the period that LHR procedures are performed. No change was made to the rule as a result of the comment.

COMMENT: Concerning §289.302(j), a commenter asked how a training facility should validate procedures for students if students are doing procedures on site, but then elect to go to another facility. The commenter also inquired about what the training facility should submit to validate that students obtain their 100 procedures if not all procedures were performed on site. Additionally, the commenter wanted to know how a training facility can obtain those records to substantiate those procedures.

RESPONSE: The department acknowledges the comments. Language was added in §289.302(q)(22) to require that a registrant provide the pertinent procedure record to a person submitting a written request to the registrant for documentation of LHR procedures performed by an individual.

COMMENT: Concerning §289.302(j), a commenter asked if the rule should state that hands-on training is not required nor is it accepted.

RESPONSE: The department acknowledges the inquiry. The rule does not require hands-on training as a part of the training required in §289.302(j)(18)(A) and (B). The training required by §289.302(j)(10)(B) and §289.302(j)(14)(B) is considered on-the-job training. No change was made to the rule as a result of the comment.

COMMENT: Concerning §289.302(j), two commenters expressed concern about meeting the training certification requirements by September 1, 2010.

RESPONSE: The department acknowledges the comments and continues to work toward implementation of the LHR program, so that individuals may apply for and receive LHR professional certifications expeditiously. However, the department may adjust the September 1, 2010 deadline, if deemed necessary. No change was made to the rule as a result of the comment.

COMMENT: Concerning §289.302(j)(6)(C), a commenter inquired what the method will be to retake an exam if an individual fails their certification exam, how many times the exam can be retaken and if there are any time constraints as to when the exam can be taken.

RESPONSE: The department acknowledges the inquiry. Since the exam required by §289.302(j)(6)(C) is part of the certification process, the certifying entity must have procedures that describe all aspects of the certification program in accordance with §289.302(mm)(1)(I). This would include exam re-takes. No change was made to the rule as a result of the comment.

COMMENT: Concerning §289.302(j)(6) and (10), two commenters said the supervision requirements to progress from a LHR technician to a senior LHR technician make it impossible for a technician to advance in a small facility. The commenter requested that provisions should be made for small operators who have only a LHR professional and a LHR technician on staff.

RESPONSE: The department acknowledges the comment. New §289.302 does not prohibit individuals from supervising each other. The supervision does not have to be by a person with a higher level of certification of an individual at a lower level. Supervision can also include supervision of individuals with higher levels of individual LHR certification by persons at a lower certification level. No change was made to the rule as a result of the comments.

COMMENT: Concerning §289.302(j)(6), (10), and (14), a commenter inquired how the department will track the documented number of cases to be performed for certification.

RESPONSE: The department acknowledges the inquiry. The responsibility of tracking the documented number of cases to be performed for certification lies with the individual seeking the individual LHR certification and the facility or training program in which the LHR procedures are being performed. The documentation must be submitted to the department with an application for individual LHR certification. No change was made to the rule as a result of the comment.

COMMENT: Concerning §289.302(j)(6) - (9), a commenter asked if a physician can be designated as the LHR professional and perform the duties of observing the esthetician performing LHR to obtain the required 100 supervised procedures.

RESPONSE: The department acknowledges the inquiry. The department added language in §289.302(j)(21) to clarify that a physician or other licensed health professional shall not perform the direct supervision activities of a LHR professional or senior LHR technician required in §289.302(j)(14)(B) unless that individual meets the requirements of §289.302(j)(6) or (10). Under Health and Safety Code, Subchapter M, §401.508(b), only a LHR senior technician or professional can perform this specific supervision activity. Since physicians are exempt from Health and Safety Code, Subchapter M, and its rules as stated in §401.504(d), they cannot bestow the credentialing privileges of those rules they are exempt from.

COMMENT: A commenter expressed opposition to §289.302(j)(6) - (17) requiring 100 procedures be monitored, but instead recommended that only 10 procedures be monitored. The commenter added that LHR procedures are not

complicated, that the new devices have "safe settings" and it is a waste of the physician's time to watch a simple procedure be performed 100 times.

RESPONSE: The department acknowledges the comment. However, Health and Safety Code, Subchapter M, §401.506(2), specifies that an applicant for a senior LHR technician certificate must have supervised at least 100 LHR procedures, as audited by a certified LHR professional. In addition, Health and Safety Code, §401.507(2), requires that an applicant for a LHR technician certificate must have performed at least 100 LHR procedures under the direct supervision of a senior LHR technician or a certified LHR professional. No change was made to the rule as a result of the comment.

COMMENT: A commenter stated that there is not a need for the various levels of technicians required in §289.302(j)(6), (10), (14), and (18).

RESPONSE: The department acknowledges the comment. Health and Safety Code, §§401.505 - 401.508, specifies the requirements for the four levels of individual LHR certifications. No change was made to the rule as a result of the comment.

COMMENT: A commenter inquired if individuals obtained certification by September 1, 2010, do they need to demonstrate the 100 procedures required in §289.302(j)(8), (12), and (16).

RESPONSE: The department acknowledges the inquiry. Prior to September 1, 2010, the requirements for a specified number of procedures under supervision of a senior LHR technician or LHR professional did not exist, therefore it is impossible to have met that requirement prior to implementation of this rule. If the applicant demonstrates to the department that 100 procedures or supervision of 100 procedures, as required by §289.302(j)(8), (12), and (16), have been completed and submits evidence of that to the department prior to December 31, 2010, then the applicant does not have to document that the procedures were performed under the supervision of an individual with the required certification from the department. No change was made to the rule as a result of the comment.

COMMENT: A commenter stated that §289.302(j)(9) allowed an exception to the supervision requirement for applicants for a LHR professional certificate if all training and examination requirements are completed by September 1, 2010 which is too little time. The commenter asked if the department has approved testing and certification entities. Additionally, the commenter inquired if interested applicants and/or existing facilities will be notified of these approved entities.

RESPONSE: The department acknowledges the comment. The September 1, 2010, deadline was stipulated by HB 449. The department has not approved any testing and certification entities as the requirements for the entities are in new §289.302. After the effective date of the new §289.302, the department will post the list of registered training programs and approved certifying entities on the Radiation Control's Laser Hair Removal web site at: www.dshs.state.tx.us/radiation/laserhair.shtm. No change was made to the rule as a result of the comment.

COMMENT: Concerning §289.302(j)(9), (13), and (17), a commenter inquired if the department will accept prior experience as "grandfathering" documentation for the individual LHR certifications.

RESPONSE: The department acknowledges the inquiry. To facilitate a sufficient number of certified persons in the LHR field during the first four months of the program, the department has modified the application requirements for certification for those who already meet the requirements outlined in §289.302(j)(8), (12), and (16). These individuals must submit documentation prior to December 31, 2010. After that, all individuals must meet the applicable requirements in §289.302(j)(6), (10), and (14). No change was made as a result of the comment.

COMMENT: Concerning §289.302(j)(9), (13), and (17), a commenter expressed concern about not enough time for individuals to complete some training, for example, cardio-pulmonary resuscitation (CPR) by September 1, 2010.

RESPONSE: The department acknowledges the comment and continues to work toward implementation of the LHR program, so that individuals may apply for and receive LHR professional certifications expeditiously. However, the department may adjust the September 1, 2010 deadline, if deemed necessary. No change was made to the rule as a result of the comment.

COMMENT: Concerning §289.302(j)(10), a commenter requested clarification regarding how an individual will audit supervision.

RESPONSE: The department acknowledges the comment. Section 289.302(q)(7) states that the audit shall ensure that the requirements of this rule, the conditions of the certificate of LHR registration, and protocols are followed by individuals performing LHR procedures. Section 289.302(q)(20) specifies that a record shall be made of each audit conducted and provides a list of items that shall be included. No change was made to the rule as a result of the comment.

COMMENT: Concerning §289.302(j)(12) and (16), a commenter stated that if individuals applying for certification for senior LHR technician and LHR technician have met the performance and supervision requirements prior to September 1, 2010, and have not had the 40 hours of additional training, then these individuals should be allowed to receive their certifications.

RESPONSE: The department acknowledges the comment. Section 289.302(j)(9), (13), and (17) contain provisions that allow individuals who have met the essential elements described in those paragraphs prior to September 1, 2010 to submit documentation of that to the department not later than December 31, 2010. No change was made to the rule as a result of the comment.

COMMENT: A commenter requested that the senior LHR technician certificate requirement in §289.302(j)(12)(B) be changed to "supervised 100 LHR procedures or 100 additional performed LHR procedures."

RESPONSE: The department disagrees with the comment. The senior LHR technician supervision requirements are stipulated by Health and Safety Code, Subchapter M, §401.506(a)(2), and are intended to require that experience in supervising others be obtained, not just additional experience in performing procedures. No change was made to the rule as a result of the comment.

COMMENT: Concerning §289.302(j)(12)(C), a commenter stated that the 40 total hours of training for a senior LHR technician is burdensome, too time consuming, and expensive.

RESPONSE: The department disagrees with the comment. The 24 hours of training required in §289.302(j)(18)(A) are specified by Health and Safety Code, Subchapter M, §401.508(a). The additional 16 hours of training were added because the department determined that these are necessary health and safety training

requirements that are in the best interest of clients and the citizens of Texas. No change was made to the rule as a result of the comment.

COMMENT: Regarding §289.302(j)(14)(B), a commenter stated that it is a useless position, if a technician has to be directly supervised forever.

RESPONSE: The department disagrees with the comment. Section 289.302(j)(14)(B) does not require direct supervision of LHR technician after they complete their 100 procedures. No change was made as a result of the comment.

COMMENT: Concerning §289.302(j)(18), a commenter questioned if the training on laser devices in general is acceptable or if the applicants need specific training on the device used in the facility they work in.

RESPONSE: The department acknowledges the comment. The training required in §289.302(j)(18) is specific to LHR devices. The department recognizes that various LHR devices may be used at different facilities. The training requirements in §289.302(j)(10)(B) concerning 100 LHR procedures provides a means to obtain familiarity with various types of LHR devices. No change was made to the rule as a result of the comment.

COMMENT: Several commenters thought the training hour requirements for licensure were excessive in §289.302(j)(18).

RESPONSE: The department disagrees with the comment. The 24 hours of training required in §289.302(j)(18)(A) are specified by Health and Safety Code, Subchapter M, §401.508(a). The additional 16 hours of training were added because the department determined that these are necessary health and safety training requirements that are in the best interest of clients and the citizens of Texas. No change was made to the rule as a result of the comments.

COMMENT: A commenter asked if the department was going to specify how many hours of training is required for each topic stated in §289.302(j)(18)(A) and (B) or if this was to be determined by each training institution.

RESPONSE: The department acknowledges the inquiry. The department added language in §289.302(j)(18)(B)(i) to specify that a valid cardio-pulmonary resuscitation certificate may be used to satisfy up to 8 hours of the required training. Otherwise, the department does not intend to require a specific time period for each required topic.

COMMENT: Concerning §289.302(j)(18)(B), a commenter expressed support of the addition of 16 hours of training for technicians, totaling 40 hours of instruction.

RESPONSE: The department agrees with the comment and made no change to the rule as a result of the comment.

COMMENT: Regarding §289.302(j)(18)(B), a commenter asked if CPR training is acceptable or is a CPR certification required.

RESPONSE: The department acknowledges the comment. The rule requires training, but language has been added to §289.302(j)(18)(B)(i) to clarify that a valid CPR certificate may be used to satisfy up to eight hours of the training required by §289.302(j)(18)(B).

COMMENT: Regarding §289.302(j)(18)(B), the commenter requested clarification on making an assessment of preexisting conditions to avoid making a medical diagnosis. Regarding assessment of client's current medications, the commenter asked for clarification of the medication review.

RESPONSE: The department agrees with the commenter and added language in §289.302(j)(18)(B)(ii) to clarify that an assessment is not a diagnosis. In §289.302(j)(18)(B)(iv), the department deleted the word "assessment" and replaced it with "review" to clarify what is expected. For consistency, the department made the same change to §289.302(j)(18)(B)(ii) and (iii).

COMMENT: Concerning §289.302(j)(18)(B)(i), a commenter objected to the inclusion of the CPR training requirement as part of the required hours for certification of individuals.

RESPONSE: The department disagrees with the comment. The CPR training requirement was added because the department determined that this is a necessary health and safety training requirement that is in the best interest of clients and the citizens of Texas. The department added language in §289.302(j)(18)(B)(i) to specify that a valid cardio-pulmonary resuscitation certificate may be used to satisfy up to 8 hours of the required training.

COMMENT: Concerning §289.302(j)(20), commenters inquired where the training for operators can be obtained to meet the individual LHR certification requirements, who offers the agency-accepted programs, and the requirements to become an agency-accepted training program and how to apply.

RESPONSE: The department acknowledges the inquiry. Agency-accepted training programs will be registered with the department in accordance with the requirements specified in §289.302(j)(20). The department will post the list of registered agency-accepted training programs on the Radiation Control's Laser Hair Removal web site at: www.dshs.state.tx.us/radiation/laserhair.shtm. No change was made to the rule as a result of the comments.

COMMENT: Concerning §289.302(j)(20), a commenter inquired when the department will begin accepting applications for the agency-accepted training programs.

RESPONSE: The department acknowledges the inquiry. The department is in the process of developing the LHR program and will begin accepting applications for the agency-accepted training programs after the effective date of this rule. No change was made to the rule as a result of the inquiry.

COMMENT: A commenter expressed strong support of §289.302(k) that clearly addresses a public safety issue. The commenter added that any device that may harm an individual (consumer or patient) should be subject to regulation by the department and this rule sets reasonable requirements on the approval of applications and upon the possession, use, and transfer of LHR devices.

RESPONSE: The department agrees with the comment and made no change to the rule as a result of the comment.

COMMENT: Concerning §289.302(k)(2), a commenter stated that the department should not have the authority to interfere with the transfer of lasers between individuals. A better way to deal with the transactions would be a requirement that the department be notified of a transfer or sale by the seller within 30 days or so.

RESPONSE: The department acknowledges the comment. The language is §289.302(k)(2) is standard language in all radiation control rules concerning licensure and registration. The rule allows the department to amend a certificate of registration to incorporate conditions to address previously unforeseen issues that may arise and that may negatively impact public health and safety. It is the department's responsibility to ensure that an in-

dividual's possession, use, and transfer of radiation-producing devices is completed in a way that minimizes danger to occupational and public health and safety. No change was made to the rule as a result of the comment.

COMMENT: Concerning §289.302(k)(2) and (p)(4), a commenter expressed that it is not clear whether a device owner needs department permission to sell a device.

RESPONSE: The department acknowledges the comment. The rule does not require that a person receive approval from the department prior to selling a LHR device. However, if a LHR device is sold and put into use, it must meet the requirements of this section. The seller or transferor has an obligation to ensure the LHR device is sold or transferred to a person who also meets the requirements of this section. No change was made to the rule as a result of the comment.

COMMENT: Concerning §289.302(l)(3), a commenter requested that some language be added to allow facilities with multiple locations to move their registered devices around to any of those locations when necessary. In addition, the commenter questioned why a facility can't lend a laser system to a registered facility owned by another with a LHR professional at the facility.

RESPONSE: The department agrees with the comment and added language to clarify that if a LHR facility operator owns multiple LHR facilities, then the operator may transfer a LHR device from facility to facility that the operator owns if each facility is registered in accordance with subsection (k) of this section. The loan of a LHR device is considered a transfer. If a LHR device is transferred to another LHR facility, the requirements of §289.302(p)(4) and (6) must be met.

COMMENT: A commenter stated that §289.302(l)(3) appears to restrict the laser use to LHR only. In addition, the commenter asked how this requirement affects a laser that is also registered under §289.301.

RESPONSE: The department acknowledges the comment. A laser may require registration in accordance with §289.301 if it is used for other than LHR procedures and the requirements of §289.301 would apply. However, new §289.302 only concerns LHR devices for the purpose of LHR. No change was made to the rule as a result of the comment.

COMMENT: Concerning §289.302(l)(4), two commenters expressed concern that what is considered an "agency action" and should be better defined.

RESPONSE: The department disagrees with the comment. An agency action is explained in §289.302(l)(4) as a final enforcement action that assesses administrative or civil penalties or revocation or suspension of the certificate of laser registration or individual LHR certificate. The department added the words "final enforcement" before "actions" for clarification.

COMMENT: Concerning §289.302(m)(1), two commenters stated that the Medical Practice Act of Texas, Occupations Code, §157.0541, specifies that the delegation for prescriptive authority is 75 miles within the physician's primary practice site yet the department's rule specifies within 60 miles of the LHR facility. The commenter suggests that the department change their rule to be consistent with statute.

RESPONSE: The department acknowledges the comments and made the suggested change from 60 to 75 miles.

COMMENT: Concerning §289.302(m)(1), a commenter stated support of a policy that there must be arrangements for a physician (or physician assistant (PA) or nurse practitioner (NP)) to see a client if the physician is unable to see the client for an emergency consultation. Another alternative could be that the consulting physician and the facility enter into some type of agreement with another physician located near the facility to deal with emergencies or other possible medical matters related to the facility.

RESPONSE: The department disagrees with the comment. The Medical Practice Act of Texas, Occupations Code, §157.0541, specifies that the delegation for prescriptive authority is 75 miles within the physician's primary practice site. A physician may delegate duties in accordance with the Medical Practice Act of Texas. HB 449 specifies that the consulting physician must have a contractual relationship with the LHR facility and the responsibility for emergency consultations must be addressed in that contract. No change was made to the rule as a result of the comment.

COMMENT: Concerning §289.302(m)(2), a commenter inquired if the audits of the facility could be made annually instead of quarterly. In addition, the commenter stated that such audits be allowed to be conducted by a PA or registered nurse delegated by the consulting physician to perform the audits. Several commenters also requested that the audits be announced. Scheduling an audit would assure that the necessary employees are present at the audit.

RESPONSE: The department acknowledges the comment and added language to §289.302(m)(2) to allow that audits may be scheduled in advance if the consulting physician determines that advance notice will not compromise the ability to determine that operations are being conducted in accordance with established protocols. In addition, the department added language to allow the audits to be conducted by the consulting physician, another designated physician or an advanced practice nurse or physician's assistant acting under the consulting physician's delegated authority. Language was also added to require that if the audit was conducted by an advanced practice nurse or physician's assistant, then the consulting physician must sign the audit. No change was made to the requirement for quarterly audits.

COMMENT: Concerning §289.302(m)(2), a commenter expressed strong support of quarterly, unannounced audits as an important regulatory tool. To permit only announced audits defeats the purpose of gaining a true insight into the operation of a LHR.

RESPONSE: The department acknowledges the comment. Language was added to §289.302(m)(2) to clarify that the audit may be scheduled in advance only under certain conditions.

COMMENT: A commenter expressed strong support of a consulting physician reviewing all adverse events as required by §289.302(m)(4). The commenter further expressed that the purpose of physician involvement is to not only address immediate consumer harm (an adverse result), but also to assure an ongoing quality assurance program at the LHR by not allowing a LHR to "select" the adverse events to submit for review to its physician.

RESPONSE: The department agrees with the comment and made no change to the rule as a result of the comment.

COMMENT: A commenter expressed strong support of §289.302(n) and (o) that address important requirements and responsibilities of the LSOs. The department has set standards that are appropriate and necessary.

RESPONSE: The department agrees with the comment and made no change to the rule as a result of the comment.

COMMENT: Concerning §289.302(n) and (o), a commenter expressed that the ANSI National Laser Standards 136.3 regarding LSOs should be followed with regard to LSOs in Texas in order to not have conflicts and to avoid confusion regarding the standards to follow. In addition, the commenter asked how the department will deal with grandfathering existing LSOs and how they would be required to be re-certified.

RESPONSE: The department disagrees with the comment. The new rule establishes minimum qualifications for an individual wishing to be designated as the LSO. Facilities may choose to designate an individual who also meets the ANSI standards. Individuals who are designated as the LSO on a certificate of laser registration issued in accordance with §289.301 may also serve as a LSO on a certificate of registration issued in accordance with new §289.302. However, that individual's name and credentials must be submitted with a facility's application for a certificate of laser registration issued in accordance with §289.302. LSOs are not required to be certified. Instead, their qualifications are reviewed at the time of application by the facility. No change was made to the rule as a result of the comment.

COMMENT: Concerning §289.302(p)(3), two commenters stated that the new rule requiring that each facility have a consulting physician and if the services of that consulting physician are lost, then the facility must cease operations until the services of another consulting physician are obtained is too restrictive. One commenter requested that the facilities have at least 60 days to establish a new relationship. Another commenter requested 30 - 90 days. Since HB 449 requires each facility to designate a physician for consultation if the consulting physician is unavailable, the facility should be able to continue its operations with that designated physician. The protocols will still be in place for the facilities operations.

RESPONSE: The department acknowledges the comments and added language to allow the registrant to use another physician(s) who has been designated in the contract, if the registrant loses the services of the consulting physician. In addition, the department added language that states that if the registrant loses the services of the consulting physician and the other physician(s) designated in the contract, then the registrant shall immediately cease LHR procedures.

COMMENT: Concerning §289.302(p)(4), a commenter questioned if this requirement means that someone cannot sell a laser.

RESPONSE: The department clarifies the comment. The rule does not require that a person receive approval from the department prior to selling a LHR device. However, if a LHR device is sold and put into use, it must meet the requirements of this section. The seller or transferor has an obligation to ensure the LHR device is sold or transferred to a person who also meets the requirements of this section. No change was made to the rule as a result of the comment.

COMMENT: Regarding the requirement in §289.302(p)(9), a commenter expressed that if a facility advertises this procedure as "LHR," then this is a false statement because it is truly only "LHR."

RESPONSE: The department disagrees with the comment. The definition of LHR in §289.302(d)(18) specifies that for purposes of this new rule, LHR and laser hair reduction are equivalent terms.

COMMENT: Concerning §289.302(p)(10), two commenters requested that specific language be included in the rules to constitute what is false and misleading advertising.

RESPONSE: The department agrees with the comment. Language was added to clarify that an advertisement of services using lasers for hair removal shall be deemed to be false or misleading if it is inaccurate or misleading in any particular regarding representations made or suggested or failure to reveal material facts with respect to consequences which may result from the use of such services. In addition, the department added a new definition of "advertising" in §289.302(d)(4) to provide further clarification. Subsequent definitions were renumbered and are reflected in new §289.302(d)(5) - (39).

COMMENT: Concerning §289.302(p)(10), two commenters stated that they thought if a user doesn't have a prescription for each client then they would have a violation for false advertising which carries a high penalty of $25,000/violation.

RESPONSE: The department acknowledges the comment. A valid contract with a consulting physician and the protocols developed by the physician under that contract satisfies the requirement for a prescription for each use specified in Title 21, CFR, §801.109. The department added language in §289.302(b)(10) to clarify this position.

COMMENT: A commenter expressed support of §289.302(q) which sets the standard for the operating requirements for the devices. In particular, the commenter thinks the warning signage for potential customers is accurate, straightforward and follows the format of other such signs in Texas.

RESPONSE: The department agrees with the comment and made no change to the rule as a result of the comment.

COMMENT: Concerning §289.302(q)(1), two commenters inquired if each LHR procedure requires a prescription for each client prior to treatment.

RESPONSE: The department acknowledges the inquiry. A prescription is not required for each LHR procedure. A valid contract with a consulting physician and the protocols developed by the physician under that contract satisfies the requirement for a prescription for each use specified in Title 21, CFR, §801.109. The department added language to §289.302(b)(10) to clarify the intent of the rule.

COMMENT: Concerning §289.302(q)(2), a commenter requested that the terms "misbrand" or "adulterate" be defined. The commenter gave several examples and asked if they were violations.

RESPONSE: The department acknowledges the comment. HB 449 amended Health and Safety Code, Chapter 401, the Radiation Control Act. The requirement in §289.302(q)(2) references another statute, Health and Safety Code, §431.111 and §431.112, with regard to adulterating or misbranding. The reference is included to make persons aware that they may be subject to statutory requirements other than those in Radiation Control Act. It is impracticable to list all potential instances of adulterating or misbranding in §289.302 and the department believes that doing so could be misleading if a specific example was omitted. No change was made to the rule as a result of the comment.

COMMENT: Regarding §289.302(q)(2), a commenter stated that the legislature in HB 449 did not intend for LHR operators to ob-

tain an order from a practitioner for each client and failure to do so is not "adulteration" or "misbranding." A physician's order would only be required for those laser procedures considered to be the practice of medicine. The commenter suggested that in order to avoid any future confusion on this issue, any department regulations dealing with prescription devices should state explicitly that the use of prescription devices without an order from a physician for each use is not a violation of federal regulations and therefore does not adulterate or misbrand a prescription device.

RESPONSE: The department acknowledges the comment. HB 449 amended Health and Safety Code, Chapter 401, the Radiation Control Act. The requirement in §289.302(q)(2) references another statute, Health and Safety Code, §431.111 and §431.112, with regard to adulterating or misbranding. The reference is included to make persons aware that they may be subject to statutory requirements other than those in Radiation Control Act. A valid contract with a consulting physician satisfies the supervision requirement of Title 21, CFR, §801.109 and the protocols developed by the physician under that contract satisfies the requirement for a prescription for each use specified in Title 21, CFR, §801.109. The department added language in §289.302(b)(10) to clarify this position. The new §289.302 only concerns LHR devices. Other prescriptive devices are outside the scope of this rulemaking.

COMMENT: Concerning §289.302(q)(3), a commenter noted that the regulations state the LHR device will be operated only at the settings expected to safely remove hair and asked who determines what the settings will be.

RESPONSE: The department acknowledges the comment and added language in §289.302(q)(3)(B) to clarify that the LHR device is to be operated only at the settings expected to safely remove hair in accordance with the manufacturer's instructions and protocols established by the consulting physician.

COMMENT: Two commenters stated that Health and Safety Code, §401.508, only requires direct supervision of an apprentice-in-training, not a LHR technician, and requested that the word "direct" be removed in §289.302(q)(4), (6), (6)(C), and (7).

RESPONSE: The department acknowledges the comments and deleted "direct" in §289.302(q)(4). In addition, the words "LHR technician or a" were deleted from §289.302(q)(6) and "LHR technician or" were deleted from §289.302(q)(6)(C). Language was added to §289.302(q)(7) to clarify the intent of the rule.

COMMENT: Concerning §289.302(q)(5), a commenter requested that the rule be revised to allow for more time on a case-by-case basis if the facility can prove they are working with due diligence to replace their LHR professional.

RESPONSE: The department acknowledges the comment. However, Health and Safety Code, Subchapter M, §401.517(b), specifies that not later than the 45th day after the date the facility's certified LHR professional leaves the facility: (1) the facility's senior LHR technician must become certified as a LHR professional under §401.505; or (2) the facility must hire a new certified LHR professional. No changes was made to the rule as a result of the comment.

COMMENT: Concerning §289.302(q)(6), a commenter expressed opposition to the use of the term "direct" supervision. The term "direct supervision" as it applies to the supervision required by a LHR professional or a senior LHR technician should not mean physical presence in the room with the individual being supervised while that individual performs a procedure. The commenter added that it would be reasonable to have the supervisor in the room to ensure that the device is properly set to perform the procedure and to give guidance to the individual performing the procedure. That supervisor would be available to assist or to respond to any situation that may arise. This will allow the facility to operate without its senior LHR technician and/or its LHR professional being tied up directly supervising procedures.

RESPONSE: The department acknowledges the comment. Only the LHR apprentice-in-training requires the direct supervision of a senior LHR technician or a LHR professional. Language has been modified in §289.302(q)(6) to clarify this intent. The department believes it is important for a LHR apprentice-in-training to be directly supervised while obtaining experience with 100 LHR procedures during on-the-job training.

COMMENT: Concerning §289.302(q)(7), a commenter stated that it is unclear as to what is being audited in this requirement.

RESPONSE: The department disagrees with the comment. Section 289.302(q)(7) states that the audit shall ensure that the rule requirements, conditions of the certificate of laser registration and the protocols are being followed by individuals performing LHR procedures. Further, §289.302(q)(7) addresses documentation of these audits and specifies what items must be included in the documentation. No change to the rule was made as a result of the comment.

COMMENT: A commenter suggested that the department use ANSI standards for the requirement in §289.302(q)(9). The rule states " in any room" but it should be "within a room."

RESPONSE: The department agrees with the comment and made the suggested change.

COMMENT: A commenter stated that the sign requirements in §289.302(q)(17) should include the specific laser and/or intense-pulsed light device being used.

RESPONSE: The department disagrees with the comment. The intent of the warning sign in §289.302(q)(17) is to provide notice of potential hazards to electromagnetic radiation emitted by LHR devices. It is not intended to provide specifics on the various types of LHR devices in use in a facility. No change was made to the rule as a result of the comment.

COMMENT: Concerning §289.302(q)(17)(C)(i), a commenter stated that the required signage seems unreasonable and will scare clients. The commenter added that the procedures are beneficial and do not cause adverse health effects.

RESPONSE: The department disagrees with the comment. The intent of the warning sign in §289.302(q)(17) is to provide notice of potential hazards from electromagnetic radiation emitted by LHR devices. No change was made to the rule as a result of the comment.

COMMENT: Concerning §289.302(q)(21), a commenter stated that it is too burdensome to require a record for every procedure performed in an audit. The commenter added that it would be better to audit a percentage of procedures. The required record-keeping is overly burdensome.

RESPONSE: The department disagrees with the comment. The department believes the records are necessary because they provide written evidence of how procedures and protocols are being followed. These records also provide additional informa-

tion in the event of an adverse event. No change was made to the rule as a result of the comment.

COMMENT: Concerning §289.302(q)(21), a commenter asked for clarification regarding the reporting requirements for the procedures.

RESPONSE: The department acknowledges the inquiry. Section 289.302(q)(21) specifies the items to be included in the record, but does not require reporting of this information to the department. The records will be reviewed at the time of inspection by the department. No change was made to the rule as a result of the inquiry.

COMMENT: A commenter stated that it is not necessary to have to list the manufacturer, model number, and serial number after each use as required in §289.302(q)(21). Instead, the commenter suggested that the rule require listing what device was used and the settings used.

RESPONSE: The department acknowledges the comment. The manufacturer, model number and serial number of the LHR device provide a unique identification for the device. The department agrees that the settings used to perform a LHR procedure are important and has added the language "and the settings" to §289.302(q)(21)(G).

COMMENT: Concerning §289.302(r), a commenter requested that the department add language to the rule to allow for all or some of the continuing education hours to be home-study or online, rather than live, to keep the costs for continuing education down.

RESPONSE: The department agrees with the comment and added language in new §289.302(r)(4) to provide the option for the continuing education units to be obtained by web-based online training or a home-study training program.

COMMENT: Concerning §289.302(t)(4)(B) and (u)(2), a commenter stated that the owner of the devices should be allowed to maintain ownership of the devices until used in the future in a registered facility or sold to another certified individual. Some type of recordkeeping requirement would be more reasonable.

RESPONSE: The department disagrees with the comment. In the situation described in §289.302(t)(4)(B), the LHR facility does not have a valid certificate of laser registration because it has expired without being renewed. If the LHR facility maintains possession of the LHR device, this is a violation of the rule. In the situation described in §289.302(u)(2), the registrant must terminate the registration if the facility decides to terminate use of the LHR device. If the LHR facility wishes to maintain the LHR device, whether the LHR device is actively used for LHR procedures or not, the certificate of laser registration must remain valid. No change was made to the rule as a result of the comment.

COMMENT: Concerning §289.302(w), a commenter asked how inspections will be performed.

RESPONSE: The department acknowledges the comment. The department intends to conduct on-site inspections at an interval of two years. No change was made to the rule as a result of the comment.

COMMENT: A commenter stated that the requirement in §289.302(z)(5) is not clear and asked for department clarification.

RESPONSE: The department acknowledges the inquiry. If another state or federal entity that has rules similar to new §289.302 takes an action described in §289.302(z)(5), the department may choose to take a similar action against the LHR facility or a certified LHR individual. No change was made to the rule as a result of the comment.

COMMENT: A commenter expressed support of §289.302(bb) and (cc), concerning assessment of administrative penalties because these subsections are an important part of the rule and the enforcement of the act is in the best interest of the health and safety of the public. The due process provisions governing the imposition of an administrative penalty are numerous and follow the pattern and format of many state agencies which have such authority. The commenter also expressed that these subsections provide adequate notice of the authority, risk, and severity of an administrative penalty and provide direction and guidance.

RESPONSE: The department agrees with the comment and made no change to the rule as a result of the comment.

COMMENT: Concerning §289.302(bb) and (cc), a commenter stated that the assessment of administrative penalties and the severity of the violations language are vague and subject to different interpretations. The commenter also noted that although §289.302(cc)(3) states that examples of severity levels are "available upon request to the agency" and although there is a table of percentages, the maximum penalty can't be determined.

RESPONSE: The department disagrees with the comment. Severity levels are described in §289.302(cc). The maximum amount of an administrative penalty is $5,000. The table in §289.302(bb)(3)(C) explains the percentage of the maximum penalty amount, based on the severity level of the violation. For example, a severity level I violation is 100% of the maximum amount, or $5,000. A severity level II violation is 80% or $4,000. No change was made to the rule as a result of the comment.

COMMENT: A commenter expressed support of §289.302(dd) and (ee), concerning impoundment of a LHR device and emergency orders. The commenter stated that when public safety matters most, the department must be able to take immediate action to protect the public. These two subsections set out the authority and provide the due process to the owner of a LHR device if an action is taken under the authority of either of these two subsections.

RESPONSE: The department agrees with the comment and made no change to the rule as a result of the comment.

COMMENT: Concerning §289.302(dd)(1), a commenter expressed that all of the language is vague and subject to interpretation by the department. In addition, the commenter added that no prior notice would be given to the owner or possessor of the device. Two commenters asked what would constitute an emergency that would allow the department to impound a device.

RESPONSE: The department disagrees with the comment. Section 289.302(dd) describes the department's authority and due process for impoundment of a LHR device. Section 289.302(dd)(1) describes the department's authority to impound a LHR device and describes under what conditions that may occur. Section 289.302(dd)(3) describes the department's authority to impound a LHR device without prior notice if it is necessary to protect public health and safety. Failure of a LHR facility to have a valid contract with a consulting physician is an example of a situation that may justify impoundment of a LHR device. No change was made to the rule as a result of the comment.

COMMENT: Concerning §289.302(dd)(2), a commenter stated that disposition of property, other than return of the property to its owner, should be by court order, not department discretion.

RESPONSE: The department disagrees with the comment. Section 289.302(dd) describes the department's authority and due process for impoundment of a LHR device. Section 289.302(dd)(1) describes the department's authority to impound a LHR device and describes under what conditions that may occur. Section 289.302(dd)(2) describes the actions the department may take with regard to the impounded LHR device. These requirements are consistent with similar requirements for other sources of radiation. No change was made to the rule as a result of the comment.

COMMENT: A commenter expressed that there are very limited circumstances under which governmental agencies may take such summary action as specified in §289.302(dd)(3). The commenter added that the department should not assume that it has the authority to impound property without due process and without compelling evidence of an imminent and significant threat to public health and safety. Additionally, the commenter stated that the phrase "to protect the public health and safety" is a highly subjective measure that misapplied could result in unconstitutional seizures by the department.

RESPONSE: The department acknowledges the comment. Section 289.302(dd) describes the department's authority and due process for impoundment of a LHR device. Section 289.302(dd)(1) describes the department's authority to impound a LHR device and describes under what conditions that may occur. Section 289.302(dd)(3) describes the department's authority to impound a LHR device without prior notice if it is necessary to protect public health and safety and is consistent with statutory authority given the agency in Health and Safety Code, Chapter 401. No change was made to the rule as a result of the comment.

COMMENT: Concerning §289.302(dd)(4), a commenter stated that the department should be required to reimburse the property owner for any losses suffered as a result of wrongful impoundment.

RESPONSE: The department disagrees with the comment. A LHR device referred to in §289.302(dd)(4) is a device that has been impounded by the department in an emergency because the person in possession of the device has failed to observe the rules, the statute, any conditions of the LHR certificate of registration, or order of the department. Consistent with the department's obligation to protect public health and safety, the LHR device may be disposed of by the department and the responsible person may be requested to reimburse the state for the costs of disposing of the device. No change was made to the rule as a result of the comment.

COMMENT: Concerning §289.302(ee), a commenter stated that the emergency orders section is too vague.

RESPONSE: The department disagrees with the comment. Section 289.302(ee) describes the department's authority and due process for impoundment of a LHR device and is consistent with statutory authority given the agency in Health and Safety Code, Chapter 401. No change was made to the rule as a result of the comment.

COMMENT: A commenter suggested that rather than just citing the existence of an emergency, the department should state in §289.302(ee)(1), the laws allegedly violated and the specific threats to public health and safety.

RESPONSE: The department acknowledges the comment. Orders issued in accordance with §289.302(ee) contain the violations of rule, agency order, and/or registration condition that are the basis for the emergency order. No change was made to the rule as a result of the comment.

COMMENT: A commenter expressed support of §289.302(gg), concerning reports of stolen, lost, or missing LHR devices. The commenter expressed that as these devices are regulated devices and capable of causing harm to individuals when used incorrectly, it is appropriate that the department be notified of such an event.

RESPONSE: The department agrees with the comment and made no change to the rule as a result of the comment.

COMMENT: Concerning §289.302(ii) and (jj), a commenter stated that these sections about workers seem unnecessary. In addition, the commenter added that there is not similar language like this in the current §289.301 laser registration rule, especially about inspections and representation.

RESPONSE: The department disagrees with the comment. It is appropriate to include in the rule provisions for worker notice and representation during the course of an inspection and at other times. The requirements in §289.302(ii) and (jj) are consistent with requirements for other sources of radiation, including the current laser rules in §289.301. No change was made to the rule as a result of the comment.

COMMENT: Concerning §289.302(mm), a commenter stated that the rule should ensure that a training program in Texas meets the qualifications of a third party licensing board to verify they are legitimate institutions. The commenter recommended that any certifying entity or program meet the following additional criteria: (1) the institution is licensed as a post secondary school or a provider of continuing education credits to physicians and nurses; (2) the management/upper level educators have a minimum of 3 years documented experience as instructors in the field; and (3) the guest lecturers or assistant teachers in a program have a minimum of 2 years work experience in the field.

RESPONSE: The department disagrees with the comment. The criteria for a certifying entity are similar to the criteria for certifying entities with regard to industrial radiation certification. This criteria has been successfully used by radiation control programs nationwide for over 20 years. The department believes that similar rules for LHR certifying entities are appropriate. No change was made to the rule as a result of the comment.

COMMENT: Concerning §289.302(mm), a commenter expressed uncertainty as to what the certifying entity is and asked if this is a national organization or a state organization that meets the criteria listed. Additionally, the commenter noted that this entity appeared to be separate from the certification programs to be approved by the department. The requirement for some other entity to certify someone before the department will certify concerns the commenter. For example, if someone sets up a training program at their company and meets all the requirements to establish a senior LHR technician certification and if they want that person to become a professional, then all they should need to do is to have them pass a certifying exam.

RESPONSE: The department acknowledges the comment. HB 449 and §289.302 specify several training and certification

requirements. The initial 40-hour training course required by §289.302(j)(18) must be obtained from a training course that is registered with the department. To comply with the requirements for a LHR professional, the individual must meet specified training and experience requirements, pass an examination and be certified by a certifying entity. Any entity that can meet the requirements in §289.302(mm) and be approved by the department may give the exam and certify an individual. That certification indicates that the individual has successfully completed the training and experience requirements of the rule and passed the exam. The individual must then submit this documentation to the agency as evidence of meeting the requirements for a LHR professional. The department then issues an individual LHR professional certificate, which is a regulatory permit subject to the provisions of §289.302. No change was made to the rule as a result of the comment.

COMMENT: Concerning §289.302(mm), a commenter asked if the certifying entity will have to be a membership organization or if it could be a school or business (such as National Laser Institute) with a committee that allows the community to participate and meets all the remaining criteria in subsection (mm).

RESPONSE: The department acknowledges the comment and added language in §289.302(mm)(1)(A) to clarify that a certifying entity may also be a business or school that has an interest in or whose members participate in, or have an interest in, the field of LHR. In addition, the words "if a society or association" were added to §289.302(mm)(1)(B) and (C) for clarification. In §289.302(mm)(1)(D), the word "organization" was replaced with "entity" to more appropriately reflect the intent of the rule.

COMMENT: Concerning §289.302(mm), a commenter asked why the rule requires a separate proctor for testing. In addition, the commenter asked what is meant by "nonmembers" and "members."

RESPONSE: The department acknowledges the inquiry. Section 289.302(mm)(1)(K) contains specific requirements for proctoring exams to ensure that exams are administered in such a way as to eliminate the appearance of bias by an entity that may have a vested interest in an individual's successful completion of the exam. In the case of a society or association, certain activities may be limited to members. It is the department's intent that to be approved as a certifying entity, the society or association must open its LHR professional certification to both members and nonmembers. No change was made to the rules as a result of the comment.

COMMENT: A commenter questioned if the department was going to provide a list of the certifying entities approved by the department in §289.302(mm).

RESPONSE: The department will post the list of agency-approved certifying entities on the LHR web site at: www.dshs.state.tx.us/radiation/laserhair.shtm. No change was made to the rule as a result of the inquiry.

COMMENT: Concerning §289.302, a commenter asked if more than one certification entity will be approved by the department.

RESPONSE: The department anticipates that more than one certification entity will be approved. No change was made to the rule as a result of the inquiry.

COMMENT: Concerning §289.302(mm)(2)(E), a commenter stated that re-certification is an unnecessary expense and is not a statutory requirement.

RESPONSE: The department disagrees with the comment. Re-certification of individuals performing LHR procedures ensures that the individual is kept up-to-date with LHR technology and use, applicable regulatory changes, and other health and safety related topics. No change was made to the rule as a result of the comment.

COMMENT: Regarding the application fees in §289.302(ff)(6), a commenter asked if the department would consider allowing facilities that have multiple locations in close proximity to pay one fee for several locations.

RESPONSE: The department acknowledges the comment but no change was made to the rule as a result of the comment. Under Health and Safety Code, §401.510(b), each LHR facility is required to have a separate registration. No change was made to the rule as a result of the comment.

COMMENT: Concerning §289.302(ff)(7), a commenter asked if fees can be prorated for those who will have, for example, an apprentice-in-training certification and then within 5 months apply for a technician certification.

RESPONSE: The department acknowledges the comment. However, the department is required to recover regulatory costs of implementing the program. Individuals are required to be certified and inspections will be conducted to ensure individuals are performing LHR procedures in accordance with the rules and the individual certificates. Regulatory costs are incurred with those activities. No change was made to the rule as a result of the comment.

Minor changes maintain consistency with Health and Safety Code, Chapter 401, throughout the section; revise outdated references for electronic processing; and clarify the intent of the section with minor grammatical changes.

To maintain the intent of Health and Safety Code, Subchapter M, §289.302(j)(10)(B)(ii) and (11), were revised to "senior LHR technician," §289.302(j)(15) was revised to "LHR technician," and §289.302(j)(19) was revised to "LHR apprentice-in-training," and the word "professional" was deleted in each reference.

Section 289.302(m)(6)(E) and (F) added new text to specify that protocols shall include designated settings for a LHR device in accordance with the manufacturer's instructions, and a list of medications taken by the client.

Rule text was moved from §289.302(q)(2) to (q)(1) to distinguish that persons who adulterate or misbrand a LHR device under Health and Safety Code, Chapter 401, aware that they may be subject to statutory requirements other than those in the Radiation Control Act.

Concerning §289.302(ff)(5), the references for electronic transactions were revised to "texas.gov;" and the graphic in §289.302(hh)(3) was reformatted for consistency.

LEGAL CERTIFICATION

The Department of State Health Services Acting General Counsel, Linda Wiegman, certifies that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The new section is adopted under the Health and Safety Code, Chapter 401, Subchapter M, which establishes the LHR regulatory program; §401.301, which allows the department to collect fees for radiation control licenses and registrations that it issues;

Health and Safety Code, §401.051, which provides the Executive Commissioner of the Health and Human Services Commission with authority to adopt rules and guidelines relating to the control of radiation; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

§289.302. Registration and Radiation Safety Requirements for Use of Laser Hair Removal Devices.

(a) Purpose.

(1) This section establishes requirements for radiation safety in the use of lasers or pulsed light devices for hair removal procedures. This section includes requirements for laser hair removal (LHR) facility operations, training and qualifications for persons performing LHR procedures, customer notification, consulting physicians, enforcement, penalties, and responsibilities of the registrant, laser safety officer (LSO), certified individuals, and consulting physicians.

(2) This section establishes requirements for the registration of LHR facilities and the certification of individuals who perform or attempt to perform LHR procedures. No person may operate a LHR facility except as authorized in a certificate of LHR registration issued by the agency in accordance with the requirements of this section. No person may perform or attempt to perform LHR except as authorized in a certificate issued by the agency in accordance with this section.

(3) This section establishes fees and fee payment requirements for certificates of LHR registration for LHR facilities and individual LHR certificates for individuals who perform or attempt to perform LHR procedures. The fees and fee payment requirements apply to applications and renewals of certificates of LHR registration and individual LHR certificates.

(b) Scope.

(1) Except as otherwise specifically provided, this section applies to all persons who operate a location that provides LHR procedures using LHR devices and to all persons who perform or attempt to perform LHR procedures using LHR devices. This section does not apply to the manufacture of LHR devices.

(2) A LHR device used for nonablative hair removal procedures shall meet the applicable performance standards for light-emitting products specified in Title 21, Code of Federal Regulations (CFR), §1040.10 and §1040.11.

(3) Except for consulting physicians, this section does not apply to a physician or to a physician's employee or delegate acting under Occupations Code, Chapter 157.

(4) A certificate issued in accordance with subsection (k) of this section only authorizes a person to perform nonablative cosmetic LHR. The certificate issued in accordance with subsection (k) of this section does not authorize an individual to diagnose, treat, or offer to treat any client for any illness, disease, injury, defect or deformity of the human body.

(5) This section applies only to LHR devices used for nonablative hair removal. Lasers or pulsed light devices used for any other purpose shall comply with the requirements of §289.301 of this title (relating to Registration and Radiation Safety Requirements for Lasers and Intense-Pulsed Light Devices).

(6) A person who receives, possesses, uses, owns, or acquires LHR devices prior to receiving a certificate of LHR registration is subject to the requirements of this section.

(7) A health professional licensed under another law is not required to hold a certificate to perform laser hair removal procedures issued in accordance with this section if the performance of laser hair removal is within the scope of that professional's practice as determined by the professional's licensing board.

(8) The qualifications for eligibility for an applicant for a senior LHR technician certificate who is a licensed health professional shall be established by the entity that issues licenses for that health profession.

(9) Training programs complying with the requirements of subsection (j)(20) of this section are also subject to certain requirements of §289.226 of this title (relating to Registration of Radiation Machine Use and Services).

(10) A LHR device categorized by the United States Food and Drug Administration (FDA) as a prescription device shall meet the requirements for prescription use specified in Title 21, CFR, §801.109. For purposes of this section, the requirements for a consulting physician specified in subsection (i)(13) of this section shall satisfy the requirement for supervision by a physician specified in Title 21, CFR, §801.109. For purposes of this section, the requirement for a consulting physician to establish protocols for a LHR facility in accordance with subsection (i)(13) of this section shall satisfy the requirement for a prescription for use as specified in Title 21, CFR, §801.109. A LHR device shall be purchased by or on the order of a physician, in accordance with Title 21, CFR, §801.109 and subsection (q)(2) of this section.

(c) Prohibitions.

(1) The agency may prohibit the use of LHR devices that pose a significant threat or endanger occupational or public health and safety, in accordance with subsections (z) and (ee) of this section.

(2) A person shall not operate a LHR facility unless the person holds a certificate of LHR registration issued by the agency in accordance with subsection (k) of this section.

(3) An individual shall not use LHR devices to perform or attempt to perform LHR procedures unless the person holds the individual LHR certificate issued by the agency in accordance with subsection (k) of this section.

(4) An individual shall not operate a laser hair removal device with the intent to treat an illness, disease, injury, or physical defect or deformity unless the individual is:

(A) a physician;

(B) acting under a physician's order; or

(C) authorized under other law to treat the illness, disease, injury, or physical defect or deformity in that manner.

(5) A person who violates paragraph (4) of this subsection is practicing medicine in violation of Occupations Code, Title 3, Subtitle B, and is subject to the penalties under that subtitle and under Health and Safety Code, §401.522.

(6) A person shall not operate a LHR facility from a person's living quarters. A LHR facility shall be separated from living quarters by complete floor to ceiling partitioning and shall contain no access to living quarters.

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

(1) Act--Texas Radiation Control Act, Health and Safety Code, Chapter 401.

(2) Administrative penalty--Monetary penalty assessed by the agency in accordance with the Texas Radiation Control Act (Act), §401.384 and §401.522, to emphasize the need for lasting remedial action and to deter future violations.

(3) Adverse event--Any death or serious injury, as that term is defined in Title 21, CFR, §803.3, to a client or employee of a LHR facility that is a result of use, misuse, or failure of LHR devices or LHR safety equipment.

(4) Advertising--All representations disseminated in any manner or by any means for the purpose of inducing, or that are likely to induce, directly or indirectly, the purchase of laser hair removal services.

(5) Agency--The Department of State Health Services or its successor.

(6) Applicant--A person seeking a certificate of LHR registration or individual LHR certificate, issued in accordance with the provisions of the Act and the requirements in this section.

(7) Certificate of LHR registration--A form of permission given by the agency to a LHR facility applicant who has met the requirements for LHR registration certification set out in the Act and this section. For purposes of this section, "certificate of LHR registration" is an equivalent term for "facility license" as specified in Health and Safety Code, §401.510.

(8) Certified individual--Any individual issued an individual LHR certificate by the agency in accordance with the Act and this section.

(9) Commissioner--The commissioner of the Department of State Health Services.

(10) Consulting physician--A physician who has a contract with a LHR facility in accordance with subsection (i)(13) of this section.

(11) Contract--A written legal document between a consulting physician and the operator of a LHR facility.

(12) Direct supervision--Direct observation by a senior LHR technician or a LHR professional of LHR procedures performed by a LHR apprentice-in-training. The senior LHR technician or LHR professional shall be available to give immediate assistance if required.

(13) Director--The director of the radiation control program in accordance with the agency's jurisdiction.

(14) Hearing--A proceeding to examine an application or other matter before the agency in order to adjudicate rights, duties, or privileges.

(15) Informal conference--A meeting held by the agency with a person to discuss the following:

(A) safety, safeguards, or environmental problems;

(B) compliance with regulatory or certificate of LHR registration condition requirements;

(C) proposed corrective measures including, but not limited to, schedules for implementation; and

(D) enforcement options available to the agency.

(16) Individual LHR certificate--A form of permission given by the agency to an individual applicant who has met the requirements for individual LHR certification set out in the Act and this section. The term includes certificates issued by the agency for a LHR professional, a senior LHR technician, a LHR technician, and a LHR apprentice-in-training.

(17) Inspection--An official examination and/or observation by the agency that includes, but is not limited to, records, tests, surveys, photographs, and monitoring to determine compliance with the Act and rules, orders, requirements, and conditions of the agency.

(18) Laser hair removal--The use of a laser or pulsed light device for nonablative hair removal procedures. For purposes of this section, "laser hair reduction" is an equivalent term.

(19) Laser hair removal facility--A business location that provides laser hair removal.

(20) Laser hair removal procedure--The removal of hair from one of the four body areas specified below, conducted during the same or separate appointment. Each area is considered one procedure, regardless of how many individual body parts are treated within that area.

(A) head and neck;

(B) upper extremities, to include hands, arms (including armpits), and shoulders;

(C) torso, to include front and back (including pelvic region and buttocks); or

(D) lower extremities, to include legs and feet.

(21) Laser or pulsed light device--A device approved by the FDA for laser hair removal or reduction. For purposes of this section, "LHR device" is an equivalent term.

(22) Laser safety officer (LSO)--An individual who has knowledge of and the authority and responsibility to apply appropriate laser radiation protection rules, standards, and practices, and who shall be specifically authorized on a certificate of LHR registration.

(23) LHR--An acronym for laser hair removal.

(24) Licensed health professional--An individual licensed in accordance with Occupations Code, Title 3.

(25) Living quarters--Any area used as a place of abode with provisions for sleeping, cooking, and sanitation.

(26) Mobile LHR facility--A business location self-contained within a vehicle that provides LHR procedures within the vehicle and meets all the requirements of this section.

(27) Nonablative hair removal procedure--A hair removal procedure using a LHR device that does not remove the epidermis.

(28) Notice of violation--A written statement prepared by the agency of one or more alleged infringements of a legally binding requirement.

(29) Operator--The owner of a LHR facility, an agent of an owner, or an independent contractor of a LHR facility.

(30) Order--A specific directive contained in a legal document issued by the agency.

(31) Person--Any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, agency, local government, any other state or political subdivision or agency thereof, or any other legal entity, and any legal successor, representative, agent, or agency of the foregoing.

(32) Physician--An individual who meets the definition in Occupations Code, Title 3, Subtitle B, Chapter 151.

(33) Preliminary report--A document prepared by the agency containing the following:

(A) a statement of facts on which the agency bases the conclusion that a violation has occurred;

(B) recommendations that an administrative penalty be imposed on the person charged;

(C) recommendations for the amount of that proposed penalty; and

(D) a statement that the person charged has a right to a hearing on the occurrence of the violation, the amount of the penalty, or both.

(34) Registrant--Any facility issued a certificate of LHR registration by the agency in accordance with the Act and this section. For purposes of this section, "certificate of LHR registration" is an equivalent term for "facility license" as specified in Health and Safety Code, §401.510.

(35) Rule--Any agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the procedure or practice requirements of an agency. The term includes the amendment or repeal of a prior section but does not include statements concerning only the internal management or organization of any agency and not affecting private rights or procedures.

(36) Severity level--A classification of violations based on relative seriousness of each violation and the significance of the effect of the violation on the occupational or public health or safety or the environment.

(37) Supervision--The physical presence of a senior LHR technician or LHR professional at the LHR facility.

(38) Termination--A release by the agency of the obligations and authorizations of the LHR registrant or certified LHR individual under the terms of the certificate of LHR registration or the individual LHR certificate. It does not relieve a person of duties and responsibilities imposed by law.

(39) Violation--An infringement of any rule, registration, or individual certificate condition, order of the agency, or any provision of the Act.

(e) Additional requirements. The agency may, by rule, order, or condition of certificate of laser registration, impose upon any registrant such requirements in addition to those established in this chapter as it deems appropriate or necessary to minimize danger to public health and safety or property or the environment.

(f) Communications.

(1) Except where otherwise specified, all communications and reports concerning this section and applications filed under it should be addressed to the Radiation Control Program, Department of State Health Services, Mail Code 1987, P.O. Box 149347, Austin, Texas, 78714-9347. Communications, reports, and applications may be delivered in person to the agency's office located at 8407 Wall Street, Austin, Texas.

(2) Documents transmitted to the agency will be deemed submitted on the date sent according to the postmark, telegram, telefacsimile, or electronic media transmission.

(g) Interpretations. Except as specifically authorized by the agency in writing, no interpretation of the meaning of this section by any officer or employee of the agency other than a written legal interpretation by the agency, will be considered binding upon the agency.

(h) Open records. All records are subject to the requirements of the Texas Public Information Act, Government Code, Chapter 552.

(i) Application requirements for a certificate of LHR registration.

(1) A separate LHR application shall be submitted for each LHR facility. A separate certificate of LHR registration is required for each LHR facility.

(2) A certificate of LHR registration for a LHR facility, issued in accordance with subsection (k) of this section, is not required for the following:

(A) a facility owned or operated by a physician for the practice of medicine;

(B) a licensed hospital; or

(C) a clinic owned or operated by a licensed hospital.

(3) A certificate of LHR registration, issued in accordance with subsection (k) of this section, is required for a facility owned or operated by a physician that performs only LHR procedures. A certificate of LHR registration, issued in accordance with subsection (k) of this section, is not required for a facility owned or operated by a physician for both the practice of medicine and LHR procedures.

(4) A certificate of laser registration issued in accordance with §289.301 of this title may be required for the entities specified in paragraph (2)(A) - (C) of this subsection that own, possess, or use lasers for purposes other than LHR.

(5) Application for a certificate of LHR registration shall be completed on forms prescribed by the agency and shall contain all the information required by the form and accompanying instructions.

(6) A LSO shall be designated on each application form. The qualifications of that individual shall be submitted to the agency with the application. The LSO shall meet the requirements of subsection (n) of this section and carry out the responsibilities of subsection (o) of this section.

(7) A LHR professional(s) shall be designated on each application form. The LHR professional shall meet the applicable requirements of subsection (j)(6) of this section and carry out the responsibilities of subsection (q)(4) of this section.

(8) Each application shall be accompanied by a completed RC Form 226-1 (Business Information Form).

(9) Each application for a certificate of LHR registration shall be accompanied by the appropriate fee prescribed in subsection (ff) of this section.

(10) The agency may, at any time after filing of the original application, require further statements in order to enable the agency to determine whether the certificate of LHR registration should be granted or denied.

(11) Applications and documents submitted to the agency may be made available for public inspection, except that the agency may withhold any document or part thereof from public inspection in accordance with subsection (h) of this section.

(12) An application for a LHR facility shall be signed by an operator. The LHR application shall also be signed by the LSO if the LSO is someone other than the operator.

(13) Each application for a certificate of LHR registration shall be accompanied by copy of a written contract with a consulting physician. The contract shall be between the LHR facility applicant and the consulting physician and shall include the following:

(A) proper protocols for the services provided by the consulting physician at the facility as specified in subsection (m)(5) and (6) of this section;

(B) a provision for the consulting physician to audit the LHR facility's protocols and operations in accordance with subsection (m)(2) of this section;

(C) a commitment that the consulting physician shall be available for emergency consultation with the LHR facility as appropriate to the circumstances, including, if the physician considers it necessary, an emergency appointment with the client; and

(D) a designated physician who shall be available for the consultation with the LHR facility relating to care for the client if the consulting physician is unavailable.

(j) Application requirements for an individual LHR certificate.

(1) Application for an individual LHR certificate shall be completed on forms prescribed by the agency and shall contain all the information required by the form and accompanying instructions.

(2) Each application for an individual LHR certificate shall be accompanied by the appropriate fee prescribed in subsection (ff) of this section.

(3) The agency may, at any time after filing of the original application, require further statements in order to enable the agency to determine whether the individual LHR certificate should be granted or denied.

(4) Applications and documents submitted to the agency may be made available for public inspection except that the agency may withhold any document or part thereof from public inspection in accordance with subsection (h) of this section.

(5) An application for an individual LHR certificate shall be signed by the individual seeking certification.

(6) An applicant for a LHR professional certificate shall meet the following requirements:

(A) be certified by a certification entity approved by the agency;

(B) meet the requirements for a senior LHR technician certificate in accordance with paragraph (10) of this subsection; and

(C) pass an examination approved by the agency.

(7) Written documentation of completion of the requirements in paragraph (6)(A) - (C) of this subsection shall be submitted with each LHR professional certificate application.

(8) An applicant for a LHR professional certificate who has met the requirements of paragraph (6)(A) and (C) of this subsection prior to September 1, 2010, is not required to meet the requirements of paragraph (6)(B) of this subsection.

(9) Written documentation of the requirements in paragraph (6)(A) and (C) of this subsection completed prior to September 1, 2010, shall be submitted to the agency with each LHR professional certificate application. Written documentation submitted in accordance with this paragraph will be accepted by the agency if postmarked, hand-delivered, or electronically submitted by December 31, 2010.

(10) An applicant for a senior LHR technician certificate shall meet the following requirements:

(A) meet the requirements for a LHR technician certificate in accordance with paragraph (14) of this subsection; and

(B) have directly supervised at least 100 LHR procedures within 12 months, as audited by a LHR professional. An individual shall not supervise LHR procedures without audit by a LHR professional until:

(i) 100 LHR procedures within 12 months have been directly supervised, as audited by a LHR professional; and

(ii) an individual senior LHR technician certificate has been issued by the agency in accordance with subsection (k) of this section.

(11) Written documentation of completion of the requirements in paragraph (10)(A) and (B) of this subsection shall be submitted with each senior LHR technician certificate application.

(12) An applicant for a senior LHR technician certificate who has met the following requirements prior to September 1, 2010, is not required to meet the requirements of paragraph (10) of this subsection:

(A) performed 100 LHR procedures within 12 months;

(B) supervised 100 LHR procedures within 12 months; and

(C) has met the requirements of paragraph (18)(A), (B), and (D) of this subsection.

(13) Written documentation of the requirements in paragraph (12) of this subsection completed prior to September 1, 2010, shall be submitted to the agency with each senior LHR technician certificate application. Written documentation submitted in accordance with this paragraph will be accepted by the agency if postmarked, hand-delivered, or electronically submitted by December 31, 2010.

(14) An applicant for a LHR technician certificate shall meet the following requirements:

(A) meet the requirements for a LHR apprentice-in-training certificate in accordance with paragraph (18) of this subsection; and

(B) have performed at least 100 LHR procedures within 12 months under the direct supervision of a senior LHR technician or a LHR professional. An individual shall not perform LHR procedures unsupervised until:

(i) 100 LHR procedures within 12 months have been performed under the direct supervision of a senior LHR technician or LHR professional; and

(ii) an individual LHR technician certificate has been issued by the agency in accordance with subsection (k) of this section.

(15) Written documentation of completion of the requirements in paragraph (14)(A) and (B) of this subsection shall be submitted with each LHR technician certificate application.

(16) An applicant for a LHR technician certificate who has met the following requirements prior to September 1, 2010, is not required to meet the requirements of paragraph (14) of this subsection:

(A) performed 100 LHR procedures within 12 months; and

(B) has met the requirements of paragraph (18)(A), (B), and (D) of this subsection.

(17) Written documentation of the requirements in paragraph (16) of this subsection completed prior to September 1, 2010, shall be submitted to the agency with each LHR technician certificate application. Written documentation submitted in accordance with this paragraph will be accepted by the agency if postmarked, hand-delivered, or electronically submitted by December 31, 2010.

(18) An applicant for a LHR apprentice-in-training certificate shall meet the following requirements:

(A) have at least 24 hours of training in:

(i) LHR device safety;

(ii) laser physics;

(iii) skin typing;

(iv) skin reactions;

(v) treatment protocols;

(vi) burns;

(vii) eye protection;

(viii) emergencies; and

(ix) post-treatment protocols;

(B) have an additional 16 hours of training in:

(i) cardio-pulmonary resuscitation (a valid cardio-pulmonary resuscitation certificate may be used to satisfy up to 8 hours of the training required by this subparagraph);

(ii) review of client's pre-existing conditions to determine if consultation with a consulting physician is needed for possible diagnosis or treatment;

(iii) review of client's previous hair removal procedures by another modality;

(iv) review of client's current medications to determine if any medications need to be brought to the attention of the consulting physician based on established protocols;

(v) proper signage and posting;

(vi) use of a LHR device; and

(vii) anesthesia used in conjunction with LHR procedures.

(C) shall work under the direct supervision of a senior LHR technician or a LHR professional; and

(D) shall be at least 18 years of age.

(19) Written documentation of completion of the requirements in paragraph (18)(A) - (D) of this subsection shall be submitted with each LHR apprentice-in-training certificate application.

(20) Training required by paragraph (18)(A) and (B) of this subsection shall be obtained from an agency-accepted training program registered with the agency in accordance with the following.

(A) An agency-accepted training program is defined as a radiation service in accordance with §289.226(b)(10)(D) of this title. A radiation service shall be registered in accordance with §289.226(j) of this title. A training program specified in this paragraph shall meet the requirements of §289.226(a), (j)(1), (j)(2), (j)(3)(C), (k), (l), (m)(1)(A), (m)(4) - (7), (o) - (r), and (t)(1)(A) of this title. For purposes of this section, the responsibilities of a radiation safety officer specified in §289.226(j) of this title may be fulfilled by a LSO.

(B) An application submitted to the agency for an agency-accepted training program shall include the following:

(i) course syllabus, including topics covered and time allotted for each topic;

(ii) qualifications of instructors;

(iii) verification that exam(s) are administered to assess the student's knowledge of material presented;

(iv) the criteria for successful completion of the course;

(v) a copy of the certificate that will be issued upon successful completion of the training program; and

(vi) verification that the training program is in compliance with applicable state laws, including Texas Education Code, Chapter 132.

(21) A physician or other licensed health professional shall not perform the auditing activities of a LHR professional in accordance with paragraph (10)(B) of this subsection unless that individual meets the requirements for a LHR professional specified in paragraph (6) of this subsection. A physician or other licensed health professional shall not perform the direct supervision activities of a LHR professional or senior LHR technician in accordance with paragraph (14)(B) of this subsection unless that individual meets the requirements of paragraph (6) or (10) of this subsection.

(k) Issuance of a certificate of LHR registration and an individual LHR certificate.

(1) A certificate of LHR registration application or individual LHR certificate application will be approved if the agency determines that the application meets the requirements of the Act and this section. A certificate of LHR registration and an individual LHR certificate authorizes the activity in such form and contains such conditions and limitations as the agency deems appropriate or necessary.

(2) The agency may incorporate in the certificate of LHR registration or individual LHR certificate at the time of issuance, or thereafter by amendment, such additional requirements and conditions with respect to the registrant's or individual's possession, use, and transfer of LHR devices subject to this section as it deems appropriate or necessary in order to:

(A) minimize danger to occupational and public health and safety;

(B) require additional reports and the keeping of additional records as may be appropriate or necessary; and

(C) prevent loss or theft of LHR devices subject to this section.

(3) The agency may request, and the registrant or certified individual shall provide, additional information after the certificate of LHR registration or individual LHR certificate has been issued to enable the agency to determine whether the certificate of LHR registration or individual LHR certificate should be modified in accordance with subsection (z) of this section.

(l) Specific terms and conditions of certificates of LHR registration and individual LHR certificates.

(1) Each certificate of LHR registration and individual LHR certificate issued in accordance with this section shall be subject

to the applicable provisions of the Act, now or hereafter in effect, and to the applicable rules and orders of the agency.

(2) No certificate of LHR registration or individual LHR certificate issued or granted under this section shall be transferred, assigned, or in any manner disposed of, either voluntarily or involuntarily, to any person unless the agency authorizes the transfer in writing.

(3) Each person registered by the agency for use of LHR devices in accordance with this section shall confine use and possession of the LHR devices to the location and purpose authorized in the certificate of LHR registration. If a LHR facility operator owns multiple LHR facilities, the operator may transfer a LHR device from facility to facility that the operator owns if each facility is registered in accordance with subsection (k) of this section.

(4) In making a determination whether to grant, deny, amend, renew, revoke, suspend, or restrict a certificate of LHR registration or individual LHR certificate, the agency may consider the technical competence and compliance history of an applicant or holder of a certificate of LHR registration or individual LHR certificate. After an opportunity for a hearing, the agency shall deny an application for, an amendment to, or a renewal of a certificate of LHR registration or individual LHR certificate if the applicant's compliance history reveals that at least three agency final enforcement actions have been issued against the applicant, within the previous six years, that assess administrative or civil penalties against the applicant, or that revoke or suspend the certificate of laser registration or individual laser hair removal certificate. An exception to this requirement may be made by the agency if it finds that the recurring pattern of conduct does not demonstrate a consistent disregard for the regulatory process because the applicant's overall conduct shows steady and significant improvement.

(m) Responsibilities of a consulting physician.

(1) The consulting physician shall be available for emergency consultation with the facility as appropriate to the circumstances, including, if the physician considers it necessary, an emergency appointment with the client. If the consulting physician is unavailable for an emergency consultation, another designated physician shall be available for the consultation with the facility relating to care for the client. The consulting physician and designated physician shall have a primary practice site located within 75 miles of the LHR facility that the physician has contracted with.

(2) The consulting physician shall conduct audits of the registrant's LHR facility to ensure that operations are being conducted in accordance with the protocols established by the contract specified in subsection (i)(13) of this section. The audits shall be unannounced, shall be conducted at the physical site of the LHR facility, and shall be conducted at least quarterly. The audits may be scheduled in advance if the consulting physician determines that advance notice does not compromise the ability to determine that operations are being conducted in accordance with established protocols. The audits may be conducted by the consulting physician, another designated physician or an advanced practice nurse or physician's assistant acting under the consulting physician's delegated authority. If the audit is conducted by an advanced practice nurse or physician's assistant, the consulting physician shall sign the audit as required by paragraph (3)(D) of this subsection.

(3) The consulting physician shall make records of audits conducted under the terms of the contract. The consulting physician audit records shall be maintained in accordance with subsection (nn) of this section for inspection by the agency. The record of the audit shall include at least the following:

(A) date audit was performed;

(B) name of the LHR facility audited;

(C) assessment of the LHR facility's performance of the protocols established by the written contract; and

(D) signature of the consulting physician and the LHR facility operator.

(4) The consulting physician shall be responsible for reviewing all adverse events and for determining whether such events are reportable in accordance with Title 21, CFR, Part 803.

(5) The protocols required in accordance with subsection (i)(13) of this section shall be:

(A) written instructions agreed upon and signed and dated by the consulting physician and the LHR facility operator;

(B) maintained at the LHR facility; and

(C) reviewed and signed by the consulting physician and LHR operator at least annually.

(6) The protocols required in accordance with subsection (i)(13) of this section shall include at least the following:

(A) which LHR procedures require a particular level of individual LHR certification;

(B) the circumstances or conditions under which each procedure is to be performed;

(C) specific instructions to be followed for individual LHR certificate holders who are working under direct supervision or who are giving direct supervision;

(D) conditions under which emergency consultation is required;

(E) designated settings, in accordance with the manufacturer's instructions, at which the LHR device can be expected to safely remove hair; and

(F) list of medications taken by the client that should be reported to the consulting physician before LHR services are provided or that, if taken by the client, preclude a LHR procedure from being performed.

(7) The requirements in paragraph (1) of this subsection do not relieve a consulting physician or another health care professional from complying with applicable regulations prescribed by a state or federal agency.

(n) Requirements for LSOs. LSO qualifications shall be submitted to the agency with the application and shall include at least the following:

(1) educational courses related to laser radiation safety or a LSO course; or

(2) familiarity with and experience in the use of LHR devices; and

(3) knowledge of potential laser radiation hazards and laser emergency situations.

(o) Responsibilities of LSOs. Specific duties of the LSO include, but are not limited to, the following:

(1) ensuring that users of LHR devices are trained in laser safety;

(2) assuming control and having the authority to institute corrective actions, including shutdown of operations when necessary, in emergency situations or if unsafe conditions exist;

(3) ensuring that maintenance and other practices required for safe operation of the LHR devices are performed;

(4) ensuring the proper use of protective eyewear and other safety measures;

(5) ensuring compliance with the requirements in this section and with protocols specified by the registrant;

(6) ensuring audits required in accordance with subsections (m)(2) and (q)(7) of this section are conducted;

(7) maintaining records as required by this section; and

(8) ensuring that personnel are adequately trained, certified, and complying with this chapter, the conditions of the certificate of LHR registration, and the protocols of the registrant.

(p) Responsibilities of LHR facility registrant.

(1) The registrant shall notify the agency in writing of any changes that would render the information contained in the application for LHR registration or the certificate of LHR registration inaccurate. Notification is required within 30 days of the following:

(A) change in business name of the LHR facility;

(B) change in physical location of the LHR facility;

(C) change in street address where LHR devices will be used;

(D) change in LSO;

(E) loss or change of the LHR facility's LHR professional; or

(F) loss or change of the LHR facility's consulting physician.

(2) The registrant shall comply with the adverse reporting requirements for device user facilities in Title 21, CFR, Part 803 - Medical Device Reporting. Copies of all reports of adverse events submitted in accordance with Title 21, CFR, Part 803 shall be submitted to the agency within 24 hours of their initial submission to the manufacturer, FDA or both as determined by the consulting physician in accordance with subsection (m)(4) of this section.

(3) If the registrant loses the services of the consulting physician, the registrant may use another physician(s) who has been designated in the contract in accordance with subsection (i)(13)(D) of this section. If the registrant loses the services of the consulting physician and the other physician(s) designated in accordance with subsection (i)(13)(D) of this section, the registrant shall immediately cease LHR procedures until the registrant establishes a contractual relationship with a consulting physician as required by subsection (i)(13) of this section.

(4) No person shall make, sell, lease, transfer, or lend laser hair removal devices unless such devices, when properly placed in operation and use, meet the applicable requirements of this section.

(5) Each registrant shall conduct a physical inventory of all LHR devices in its possession at an interval not to exceed 1 year. Records of the inventories shall be made and maintained in accordance with subsection (nn) of this section for inspection by the agency, and shall include:

(A) LHR device manufacturer's name;

(B) model and serial number of the LHR device;

(C) specific location of the LHR device (for example, room number);

(D) name, title, and signature of the person performing the inventory; and

(E) date the inventory was performed.

(6) Each registrant shall maintain records of receipt, transfer, and disposal for each LHR device in accordance with subsection (nn) of this section, for inspection by the agency. The records shall include the following information:

(A) LHR manufacturer's name;

(B) model and serial number of the LHR device;

(C) date of the receipt, transfer, or disposal;

(D) name and address of person LHR devices were received from, transferred to, or disposed of with; and

(E) name of the individual recording the information.

(7) The following applies to voluntary or involuntary petitions for bankruptcy.

(A) Each registrant shall notify the agency, in writing, immediately following the filing with the court of a voluntary or involuntary petition for bankruptcy by the registrant or its parent company.

(B) A copy of the petition for bankruptcy, as filed with the court, shall be submitted to the agency along with the written notification.

(8) A LHR facility operator is responsible for maintaining the LHR facility's compliance with the requirements of this Act and the rules of this section relating to LHR devices used for hair removal procedures.

(9) A LHR facility operator shall not claim, advertise, or distribute promotional materials that claim that laser hair removal is free from risk or provides any medical benefit.

(10) A LHR facility operator shall not produce false or misleading advertising regarding the services offered at the facility. An advertisement of services using lasers for hair removal shall be deemed to be false or misleading if it is inaccurate or misleading in any particular regarding representations made or suggested or failure to reveal material facts with respect to consequences which may result from the use of such services.

(q) Operating requirements.

(1) A LHR device used in a LHR facility shall comply with all applicable federal and state laws and regulations. A person who adulterates or misbrands a LHR device under Health and Safety Code, §431.111 or §431.112 violates Health and Safety Code, Chapter 431. The agency may investigate a person accused of adulterating or misbranding a LHR device.

(2) A LHR device used by a LHR facility may be purchased either by a physician (such as the consulting physician or other designated physician for emergencies) or by a LHR facility pursuant to a written prescription or other order of a licensed physician in Texas. A prescription or other order from a licensed physician for the purchase of a LHR device must include at a minimum:

(A) the date of the order's issue;

(B) the name and quantity of the LHR device(s) authorized to be purchased;

(C) the name, address, and telephone number of the registered LHR facility authorized to purchase and own the laser;

(D) the intended use of the device is limited to nonablative laser hair removal;

(E) the name, address, and telephone number of the physician at the physician's usual place of business, legibly printed or stamped;

(F) a statement that the prescription is valid up to 12 months from the date of issue; and

(G) the signature of the authorizing physician.

(3) A LHR device shall not be used for LHR procedures unless:

(A) the LHR device is approved for laser hair removal or reduction by the FDA for that purpose; and

(B) the LHR device is operated only at the settings expected to safely remove hair, in accordance with the manufacturer's instructions and protocols established by the consulting physician in accordance with subsection (m)(5) and (6) of this section.

(4) Except as provided by paragraph (5) of this subsection, a LHR facility shall have a LHR professional or a licensed health professional present to provide supervision of the LHR procedures performed at the facility during the facility's operating hours.

(5) A LHR facility may continue to perform LHR procedures after the facility's LHR professional leaves the facility or is continuously absent for up to 44 days if a senior LHR technician is present to perform or directly supervise each procedure. Not later than the 45th day after the date the facility's LHR professional leaves or is continuously absent from the facility:

(A) the facility's senior LHR technician shall become certified as a LHR professional in accordance with subsection (j) of this section; or

(B) the facility shall hire a new LHR professional.

(6) A LHR apprentice-in-training shall not perform LHR procedures unless under the direct supervision of a senior LHR technician or a LHR professional. Direct supervision shall include the following:

(A) the physical presence of senior LHR technician or LHR professional at the LHR facility;

(B) the availability of the senior LHR technician or LHR professional to give immediate assistance if required; and

(C) the direct observation by the senior LHR technician or LHR professional of LHR procedures performed by a LHR apprentice-in-training.

(7) The registrant shall ensure that the direct supervision of 100 LHR procedures performed by a LHR technician while obtaining the requirements of subsection (j)(10)(B)(i) of this section is audited by a LHR professional. The audit shall ensure that the requirements of this section, the conditions of the certificate of LHR registration, and protocols are followed by individuals performing LHR procedures.

(8) Individuals operating each laser presently being used or listed on the registrant's current inventory, shall be provided with written instructions for safe use, including clear warnings and precautions to be taken when using the LHR device. Each individual receiving the instructions shall document that they have read and understand the instructions. The instructions and the documentation that each individual has read and understands the instructions shall be maintained in accordance with subsection (nn) of this section for inspection by the agency.

(9) A controlled area shall be established within a room in which LHR devices are used. The controlled area shall be posted as required by paragraphs (17) and (18) of this subsection.

(10) Each LHR device shall incorporate a key-actuated or computer-actuated master control. The key shall be removable and the LHR device shall not be operable when the key is removed. When the LHR device is not being prepared for operation or is unattended, the controlled area shall be secured to prevent unauthorized access.

(11) Protective eyewear shall be worn by all individuals using a LHR device or all individual present, including clients, in the room where a LHR device is being used. Protective eyewear devices shall meet the following requirements:

(A) provide a comfortable and appropriate fit all around the area of the eye;

(B) be in proper condition to ensure the optical filter(s) and frame provide the required optical density or greater at the desired wavelengths, and retain all protective properties during its use;

(C) be suitable for the specific wavelength of the laser and be of optical density adequate for the energy involved;

(D) have the optical density or densities and associated wavelength(s) permanently labeled on the filters or eyewear; and

(E) be examined, at intervals not to exceed 12 months, to ensure the reliability of the protective filters and integrity of the protective filter frames. Unreliable eyewear shall be discarded. Documentation of the examination shall be made and maintained in accordance with subsection (nn) of this section for inspection by the agency.

(12) The registrant shall secure LHR devices from unauthorized removal.

(13) The registrant shall give each client a written statement outlining the relevant risks associated with LHR procedures, including a warning that failure to use the eye protection provided to the client by the LHR facility may result in damage to the eyes.

(14) Compliance with the written statement requirement specified in paragraph (13) of this subsection does not affect the liability of the LHR facility operator or a manufacturer of a LHR device.

(15) The registrant shall display the certificate of LHR registration issued in accordance with subsection (k) of this section in an open public area of the LHR facility.

(16) Each certified individual shall display the individual LHR certificate issued in accordance with subsection (k) of this section in an open public area of the LHR facility. Copies of an individual's certification document issued by the agency may be made for display in multiple facilities.

(17) The registrant shall post a warning sign in a conspicuous location that is readily visible to a person entering the LHR facility. The warning sign shall meet the following requirements:

(A) be of a size with dimensions at least 8 and 1/2 inches by 11 inches;

(B) contain wording with a font size no smaller than size 26;

(C) contain at least the following wording:

(i) Laser hair removal devices emit electromagnetic radiation that is considered to be an acute hazard to the skin and eyes

from direct and scattered radiation. Laser hair removal procedures provide no medical benefit and may result in adverse effects.

(ii) To make a complaint, contact the Department of State Health Services at this toll-free number: 1-888-899-6688.

(18) The LHR controlled area shall be conspicuously posted with signs or labels as designated by the following:

(A) Title 21, CFR, §1040.10;

(B) ANSI Z136.1-2000, Safe Use of Lasers; and

(C) IEC standards 60825-1 and 60601-2-22.

(19) Signs required by paragraphs (17) and (18) of this subsection shall be clearly visible, legible, and securely attached to the facility.

(20) Records shall be made of each audit conducted as specified in paragraph (7) of this subsection. The records shall be maintained in accordance with subsection (nn) of this section for inspection by the agency. The records shall include, but not be limited to, the following:

(A) name of the LHR professional;

(B) name(s) of the individual(s) being audited;

(C) date of the procedure; and

(D) evaluation of the items specified in paragraph (7) of this subsection.

(21) Records shall be made of each LHR procedure and maintained in accordance with subsection (nn) of this section for inspection by the agency. Each record shall include, but not be limited to, the following:

(A) client identification;

(B) date of the LHR procedure;

(C) indication that the client was given the notification specified in paragraph (4) of this subsection;

(D) name of the individual performing the LHR procedure;

(E) type of individual LHR certificate possessed by the individual performing the LHR procedure;

(F) name of the senior LHR technician or LHR professional providing direct supervision, if applicable; and

(G) manufacturer, model number, and serial number of the LHR device and the settings used to perform the procedure.

(22) If a person submits a written request to the registrant for documentation of LHR procedures that an individual performed at the facility to satisfy training requirements specified in subsection (j)(10)(B)(i) or (j)(14)(B)(i) of this section, the registrant shall provide the pertinent procedure record required by paragraph (21) of this subsection to that person.

(r) Continuing education requirements.

(1) Each individual who holds an individual LHR certificate issued by the agency shall obtain continuing education.

(2) The certified individual shall obtain 8 hours of continuing education units to include, but not be limited to, the following:

(A) refresher training in the topics specified in subsection (j)(18)(A) and (B) of this section;

(B) LHR technology updates;

(C) applicable regulatory changes; and

(D) other health and safety related topics.

(3) The continuing education units shall be obtained within the two-year period beginning with the issuance date of the individual LHR certificate and ending with the expiration date specified in the individual LHR certificate. The requirements for continuing education units specified in paragraph (2) of this subsection shall be met for each two-year period for which the individual LHR certificate is renewed. For certificates issued for 1 year in accordance with subsection (t)(1)(A) of this section, 4 hours of continuing education units shall be obtained within the one-year period beginning with the issuance of the individual LHR certificate and ending with the expiration date specified in the individual LHR certificate.

(4) The continuing education units required by this subsection may be obtained by web-based online training or a home-study training program.

(s) General provisions for records.

(1) All records required by this chapter shall be current, accurate, and factual. These records shall be maintained by the registrant in accordance with subsection (nn) of this section for inspection by the agency.

(2) Records are only valid if stamped, initialed, or signed and dated by authorized personnel or otherwise authenticated.

(3) Each record required by this chapter shall be legible throughout the specified retention period.

(4) The record shall be the original or a reproduced copy or a microform, provided that the copy or microform is authenticated by authorized personnel and that the microform is capable of producing a clear copy throughout the required retention period.

(5) The record may also be stored in electronic media with the capability for producing legible, accurate, and complete records during the required retention period.

(6) The registrant shall maintain adequate safeguards against tampering with and loss of records.

(7) Except as provided by paragraph (8) of this subsection, the registrant or any other person may not disclose a client record required to be kept by the agency.

(8) The registrant or any other person may disclose a client record if:

(A) the client or a person authorized to act on behalf of the client requests the record;

(B) the agency, the Texas Medical Board, a health authority, or an authorized agency requests the record;

(C) the client consents in writing to disclosure of the record to another person;

(D) the client is a victim, witness, or defendant in a criminal proceeding and the record is relevant to that proceeding;

(E) the record is requested in a criminal or civil proceeding by court order or subpoena; or

(F) disclosure is otherwise prohibited by law.

(t) Expiration of certificates of LHR registration and individual LHR certificates.

(1) A certificate of LHR registration or individual LHR certificate issued between the effective date of these rules and August 31, 2011, is valid for:

(A) 1 year and expires on the expiration date specified on the certificate of LHR registration or individual LHR certificate, if the birth year of the applicant (or the birth year of the LHR facility operator if the applicant is not an individual) is an odd number; or

(B) 2 years and expires on the expiration date specified on the certificate of LHR registration or individual LHR certificate, if the birth year of the applicant (or the birth year of the LHR facility operator if the applicant is not an individual) is an even number.

(2) Each certificate of LHR registration or individual LHR certificate issued on or after September 1, 2011, is valid for 2 years and expires on the expiration date specified on the certificate of LHR registration or individual LHR certificate.

(3) Each application for renewal of a certificate of LHR registration or individual LHR certificate shall be accompanied by the renewal fee specified in subsection (ff) of this section. A certificate of LHR registration or individual LHR certificate issued in accordance with paragraph (1)(A) of this subsection shall submit one-half of the appropriate fee as specified in subsection (ff) of this section. A certificate of LHR registration or individual LHR certificate issued in accordance with paragraphs (1)(B) or (2) of this subsection shall submit the full amount of the appropriate fee as specified in subsection (ff) of this section.

(4) If a registrant does not submit an application for renewal of the certificate of LHR registration in accordance with subsection (v) of this section, the registrant shall on or before the expiration date specified in the certificate of LHR registration:

(A) terminate use of all LHR devices; and

(B) submit to the agency a record of the disposition of the LHR devices, and if transferred, to whom the devices were transferred.

(5) Expiration of the certificate of LHR registration does not relieve the registrant of the requirements of this section. Expiration of the individual LHR certificate does not relieve the individual of the requirements of this section.

(u) Termination of certificates of LHR registration. When a registrant decides to terminate all activities involving LHR devices authorized under the certificate of LHR registration, the registrant shall immediately do the following:

(1) request termination of the certificate of LHR registration in writing; and

(2) submit to the agency a record of the disposition of the LHR devices, and if transferred, to whom the devices were transferred.

(v) Renewal of certificate of LHR registration and individual LHR certificates.

(1) An application for renewal of a certificate of LHR registration shall be filed in accordance with subsection (i) of this section. An application for renewal of an individual LHR certificate shall be filed in accordance with subsection (j) of this section.

(2) Written documentation of successful completion of the continuing education requirements in subsection (r) of this subsection shall be submitted with each application for renewal of an individual LHR certificate.

(3) If a registrant or an individual files an application for a renewal in proper form before the existing certificate of LHR registration or individual LHR certificate expires, such existing certificate of LHR registration or individual LHR certificate shall not expire until the application status has been determined by the agency.

(w) Inspections.

(1) The agency may enter public or private property at reasonable times to determine whether, in a matter under the agency's jurisdiction, there is compliance with the Act, the agency's rules, certificate of LHR registration conditions, and orders issued by the agency.

(2) Each registrant shall afford the agency, at all reasonable times, opportunity to inspect LHR devices and the premises and facilities wherein such LHR devices are used or stored.

(3) Each registrant shall make available to the agency for inspection, upon reasonable notice, records made and maintained in accordance with this section.

(4) Inspection of LHR facilities.

(A) Routine inspections by agency personnel will be made no more frequently than every 2 years.

(B) Notwithstanding the inspection intervals specified in subparagraph (A) of this paragraph, the agency may inspect registrants more frequently due to:

(i) the persistence or severity of violations found during an inspection;

(ii) investigation of an incident or complaint concerning the facility;

(iii) a request for an inspection by a worker(s) in accordance with subsection (ll) of this section; or

(iv) a mutual agreement between the agency and registrant.

(x) Training for agency inspectors of LHR devices and facilities. A person who inspects LHR devices and facilities will have training in the design and uses of the devices.

(y) Denial of an application for a LHR certificate or individual LHR.

(1) When the agency contemplates denial of an application for a LHR certificate of registration or individual LHR certificate, the applicant, LHR registrant, or individual LHR certificate holder shall be afforded the opportunity for a hearing. Notice of the denial shall be delivered by personal service or certified mail, addressed to the last known address, to the applicant, LHR registrant, or individual LHR certificate holder.

(2) Any applicant, LHR registrant, or individual LHR certificate holder against whom the agency contemplates an action described in paragraph (1) of this subsection may request a hearing by submitting a written request to the director within 30 days of service of the notice.

(A) The written request for a hearing shall contain the following:

(i) statement requesting a hearing; and

(ii) name and address of the applicant, LHR registrant, or individual LHR certificate holder.

(B) Failure to submit a written request for a hearing within 30 days will render the agency action final.

(z) Compliance procedures for LHR facility registrants, individual LHR certificate holders, and other persons.

(1) A LHR registrant, individual LHR certificate holder, or other person who commits a violation(s) will be issued a notice of violation. The person receiving the notice shall provide the agency with a written statement and supporting documentation. The agency may require responses to notices of violation to be under oath. The written statement and supporting documentation shall be submitted to the agency by the date stated in the notice, describing the following:

(A) steps taken by the person and the results achieved;

(B) corrective steps to be taken to prevent recurrence; and

(C) the date when full compliance was or is expected to be achieved.

(2) The terms and conditions of all certificates of LHR registration and individual LHR certificates shall be subject to amendment or modification. A certificate of LHR registration, or individual LHR certificate may be modified, suspended, or revoked by reason of amendments to the Act, or for violation of the Act, the requirements of this section, a condition of the certificate of LHR registration or individual LHR certificate, or an order of the agency.

(3) Any certificate of LHR registration, or individual LHR certificate may be modified, suspended, or revoked in whole or in part, for any of the following:

(A) any material false statement in the application or any statement of fact required in accordance with provisions of the Act;

(B) conditions revealed by such application or statement of fact or any report, record, or inspection, or other means that would warrant the agency to refuse to grant a certificate of LHR registration, or individual LHR certificate on an original application;

(C) violation of, or failure to observe any of the terms and conditions of the Act, this section, or of the certificate of LHR registration, or individual LHR certificate or order of the agency; or

(D) existing conditions that constitute a substantial threat to the public health or safety or the environment.

(4) Each certificate of LHR registration or individual LHR certificate revoked by the agency ends at the end of the day on the date of the agency's final determination to revoke the certificate of LHR registration or individual LHR certificate, or on the revocation date stated in the determination, or as otherwise provided by the agency order.

(5) If another state or federal entity takes an action such as modification, revocation, or suspension of the certificate of LHR registration or individual LHR certificate, the agency may take a similar action against the LHR registrant, or certified LHR individual.

(6) When the agency determines that the action provided for in paragraph (9) of this subsection or subsection (bb) of this section is not to be taken immediately, the agency may offer the LHR registrant, or certified LHR individual an opportunity to attend an informal conference to discuss the following with the agency:

(A) methods and schedules for correcting the violation(s); or

(B) methods and schedules for showing compliance with applicable provisions of the Act, the rules, LHR registration or individual LHR certificate conditions, or any orders of the agency.

(7) Notice of any informal conference shall be delivered by personal service, or certified mail, addressed to the last known address. An informal conference is not a prerequisite for the action to be taken in accordance with paragraph (9) of this subsection or subsection (bb) of this section.

(8) Except in cases in which the occupational and public health, or safety requires otherwise, no certificate of LHR registration or individual LHR certificate shall be modified, suspended, or revoked unless, prior to the institution of proceedings, facts or conduct that may warrant such action shall have been called to the attention of the LHR registrant, or certified LHR individual in writing, and the LHR registrant or certified LHR individual shall have been afforded an opportunity to demonstrate compliance with all lawful requirements.

(9) When the agency contemplates modification, suspension, or revocation of the certificate of LHR registration or individual LHR certificate, the LHR registrant or certified LHR individual shall be afforded the opportunity for a hearing. Notice of the contemplated action, along with a notice of violation, shall be given to the LHR registrant or certified LHR individual by personal service or certified mail, addressed to the last known address.

(10) Any applicant, LHR registrant, or certified LHR individual against whom the agency contemplates an action described in paragraph (9) of this subsection or subsection (bb) of this section may request a hearing by submitting a written request to the director within 30 days of service of the notice.

(A) The written request for a hearing shall contain the following:

(i) statement requesting a hearing; and

(ii) name, address, and identification number of the LHR registrant or certified LHR individual against whom the action is being taken.

(B) Failure to submit a written request for a hearing within 30 days will render the agency action final.

(aa) Violations. A court injunction or agency order may be issued prohibiting any violation of any provision of the Act or any rule or order issued thereunder. Any person who violates any provision of the Act or any rule or order issued thereunder may be subject to civil and/or administrative penalties. A person who intentionally or knowingly violates any provision of the Act or any rule or order issued thereunder may also be guilty of a misdemeanor and upon conviction, may be punished by fine or imprisonment or both, as provided by law.

(bb) Assessment of administrative penalties.

(1) When the agency determines that monetary penalties are appropriate, proposals for assessment of and hearings on administrative penalties shall be made in accordance with the Act, §401.384 and §401.522, applicable provisions of the Administrative Procedure Act, Government Code, Chapter 2001, 1 Texas Administrative Code (TAC) Chapter 155, and applicable sections of the Formal Hearing Procedures, §§1.21, 1.23, 1.25, and 1.27 of this title (relating to the Texas Board of Health).

(2) Assessment of administrative penalties shall be based on the following criteria:

(A) the seriousness of the violation(s);

(B) previous compliance history;

(C) the amount necessary to deter future violations;

(D) efforts to correct the violation; and

(E) any other mitigating or enhancing factors.

(3) Application of administrative penalties. The agency may impose differing levels of penalties for different severity level violations.

(A) Administrative penalties may be imposed for severity level I and II violations. Administrative penalties may be imposed for severity level III, IV, and V violations when they are combined with those of higher severity level(s) or for repeated violations.

(B) The maximum amount for an administrative penalty per violation is $5,000.

(C) The following table shows the percentages of the maximum amount that may be used by the agency in making adjustments in accordance with subparagraph (D) of this paragraph.
Figure: 25 TAC §289.302(bb)(3)(C)

(D) Adjustments to the percentages of base amount in the table of subparagraph (C) of this paragraph may be made for the presence or absence of the following factors:

(i) prompt identification and reporting;

(ii) corrective action to prevent recurrence;

(iii) compliance history;

(iv) prior notice of similar event;

(v) multiple occurrences; and

(vi) negligence that resulted in or increased adverse effects.

(4) The department may conduct settlement negotiations.

(cc) Severity levels of violations for LHR registrants, certified LHR individuals, or other persons.

(1) Violations for LHR registrants, certified LHR individuals, or other persons shall be categorized by one of the following severity levels.

(A) Severity level I are violations that are most significant and may have a significant negative impact on occupational and/or public health and safety or on the environment.

(B) Severity level II are violations that are very significant and may have a negative impact on occupational and/or public health and safety or on the environment.

(C) Severity level III are violations that are significant and which, if not corrected, could threaten occupational and/or public health and safety or the environment.

(D) Severity level IV are violations that are of more than minor significance, but if left uncorrected, could lead to more serious circumstances.

(E) Severity level V are violations that are of minor safety or environmental significance.

(2) Criteria to elevate or reduce severity levels.

(A) Severity levels may be elevated to a higher severity level for the following reasons:

(i) more than one violation resulted from the same underlying cause;

(ii) a violation contributed to or was the consequence of the underlying cause, such as a management breakdown or breakdown in the control of LHR activities;

(iii) a violation occurred multiple times between inspections;

(iv) a violation was willful or grossly negligent;

(v) compliance history; or

(vi) other mitigating factors.

(B) Severity levels may be reduced to a lower level for the following reasons:

(i) the LHR registrant or certified LHR individual identified and corrected the violation prior to the agency inspection;

(ii) the LHR registrant's or certified LHR individual's actions corrected the violation and prevented recurrence; or

(iii) other mitigating factors.

(3) Examples of severity levels. Examples of severity levels are available upon request to the agency.

(dd) Impoundment of a LHR device.

(1) In the event of an emergency, the agency shall have the authority to impound or order the impounding of LHR devices possessed by any person not equipped to observe or failing to observe the provisions of the Act, or any rules, LHR registration or individual certification conditions, or orders issued by the agency. The agency shall submit notice of the action to be published in the *Texas Register* no later than 30 days following the end of the month in which the action was taken.

(2) At the agency's discretion, the impounded LHR devices may be disposed of by:

(A) returning the LHR devices to a properly registered facility operator, who did not cause the emergency, upon proof of LHR facility ownership;

(B) releasing the LHR devices as evidence to police or courts;

(C) returning the LHR devices to a LHR registrant after the emergency is over and any compliance action is settled; or

(D) sale, destruction or other disposition within the agency's authority.

(3) If agency action is necessary to protect the public health and safety, no prior notice need be given the owner or possessor. If agency action is not necessary to protect the public health and safety, the agency will give written notice to the owner and/or the possessor of the impounded LHR device of the intention to dispose of the LHR device. Notice shall be the same as provided in subsection (z)(9) of this section. The owner or possessor shall have 30 days from the date of personal service or mailing to request a hearing in accordance with Government Code, Chapter 2001, 1 TAC Chapter 155, and the Formal Hearing Procedures, §§1.21, 1.23, 1.25, and 1.27 of this title, and in accordance with subsection (z)(10) of this section, concerning the intention of the agency. If no hearing is requested within that period of time, the agency may take the contemplated action, and such action is final.

(4) Upon agency disposition of a LHR device, the agency may notify the owner and/or possessor of any expense the agency may have incurred during the impoundment and/or disposition and request reimbursement. If the amount is not paid within 60 days from the date of notice, the agency may request the Attorney General to file suit against the owner/possessor for the amount requested.

(5) If the agency determines from the facts available to the agency that an impounded LHR device is abandoned, with no reasonable evidence showing its owner or possessor, the agency may make such disposition of the LHR device as it sees fit.

(ee) Emergency orders.

(1) When an emergency exists requiring immediate action to protect the public health or safety or the environment, the agency may, without notice or hearing, issue an order citing the existence of such emergency and require that certain actions be taken as it shall direct to meet the emergency. The agency shall, no later than 30 days following the end of the month in which the action was taken, submit notice of the action for publication in the *Texas Register.* The action taken will remain in full force and effect unless and until modified by subsequent action of the agency.

(2) An emergency order takes effect immediately upon service.

(3) Any person receiving an emergency order shall comply immediately.

(4) The person receiving the order shall be afforded the opportunity for a hearing on an emergency order. Notice of the action, along with a complaint, shall be given to the person by personal service or certified mail, addressed to the last known address. A hearing shall be held on an emergency order if the person receiving the order submits a written request to the director within 30 days of the date of the order.

(A) The hearing shall be held not less than 10 days nor more than 20 days after receipt of the written application for hearing.

(B) At the conclusion of the hearing and after the proposal for decision is made as provided in the Texas Administrative Procedure Act, Texas Government Code, Chapter 2001, the commissioner shall take one of the following actions:

(i) determine that no further action is warranted;

(ii) amend the certificate of LHR registration or individual LHR certification;

(iii) revoke or suspend the certificate of LHR registration, or individual LHR certification;

(iv) rescind the emergency order; or

(v) issue such other order as is appropriate.

(C) The application and hearing shall not delay compliance with the emergency order.

(ff) Fees.

(1) Each application for a certificate of LHR certification shall be accompanied by a nonrefundable fee specified in paragraph (6) of this subsection. Each application for an individual LHR certificate shall be accompanied by a nonrefundable fee specified in paragraph (7) of this subsection.

(2) No application will be accepted for filing or processed prior to payment of the full fee amount specified.

(3) A nonrefundable renewal fee for a certificate of LHR registration, as specified in paragraph (6) of this subsection, shall be paid every 2 years, based on the month listed as the expiration month on the certificate of LHR registration, and shall be paid in full on or before the last day of the expiration month. A nonrefundable renewal fee for an individual LHR certificate, as specified in paragraph (7) of this subsection, shall be paid every 2 years based on the month listed as the expiration month on the certificate, and shall be paid in full on or before the last day of the expiration month.

(4) Fee payments may be made by cash, by check, or by money order made payable to the Department of State Health Services. The payments may be made by personal delivery to the Exchange Building, Radiation Control, Department of State Health Services, 8407 Wall Street, Austin, Texas or to the central office, 1100 West 49th Street, Austin, Texas, or mailed to Radiation Control, Department of State Health Services, Mail Code 2003, P.O. Box 149347, Austin, Texas, 78714-9347.

(5) Renewal payments may be processed through texas.gov or another electronic payment system specified by the agency. For all types of electronic fee payments, the agency will collect additional fees, in amounts determined by texas.gov or the agency, to recover costs associated with electronic payment processing.

(6) The two-year application fee and two-year renewal fee for a certificate of LHR registration is $1,260.

(7) The two-year application fees and two-year renewal fees for an individual LHR certificate are as follows:

(A) LHR professional--$150;

(B) senior LHR technician--$100;

(C) LHR technician--$70; and

(D) LHR apprentice-in-training--$50.

(gg) Reports of stolen, lost, or missing LHR devices.

(1) Each registrant shall report to the agency by telephone a stolen, lost, or missing LHR device within 72 hours after its occurrence becomes known to the registrant.

(2) Each person required to make a report in accordance with paragraph (1) of this subsection shall, within 30 days after making the telephone report, make a written report to the agency that includes the following information:

(A) a description of the LHR device involved, including the manufacturer, model, serial number, and class;

(B) a description of the circumstances under which the loss or theft occurred;

(C) a statement of disposition, or probable disposition, of the LHR device involved;

(D) actions that have been taken, or will be taken, to recover the LHR device; and

(E) procedures or measures that have been taken to prevent the loss or theft of LHR devices in the future.

(3) Subsequent to filing the written report, the registrant shall also report additional substantive information on the loss or theft within 30 days after the registrant learns of such information.

(hh) Posting of notices to workers.

(1) Each laser registrant shall post current copies of the following documents:

(A) the requirements in this section;

(B) the certificate of LHR registration, the individual's LHR certificate of registration, conditions or documents incorporated into the certificate of LHR registration by reference, and amendments thereto;

(C) any notice of violation involving radiological working conditions associated with use of a LHR device issued in accordance with subsection (z)(1) of this section or order issued in accordance with subsection (ee) of this section.

(2) If posting of a document specified in paragraph (1) of this subsection is not practicable, the registrant shall post a notice that describes the document and states where it may be examined.

(3) The following form, Radiation Control (RC) Form 302-1, "Notice to Employees," or an equivalent document containing at least the same wording as RC Form 302-1, shall be posted by each registrant as required by this section.
Figure: 25 TAC §289.302(hh)(3)

(4) Documents, notices, or forms posted in accordance with this subsection shall:

(A) contain current information;

(B) appear in a sufficient number of places to permit individuals engaged in work under the certificate of LHR registration to observe them on the way to or from any particular work location to which the document applies;

(C) be conspicuous; and

(D) be replaced if defaced or altered.

(ii) Presence of representatives of LHR registrants and workers during inspection.

(1) Each registrant shall afford to the agency at all reasonable times an opportunity to inspect LHR devices, activities, facilities, premises, and records in accordance with this section.

(2) During an inspection, agency inspectors may consult privately with workers as specified in subsection (jj) of this section. The registrant may accompany agency inspectors during other phases of an inspection.

(3) If, at the time of inspection, an individual has been authorized by the workers to represent them during agency inspections, the registrant shall notify the inspectors of such authorization and shall give the workers' representative an opportunity to accompany the inspectors during the inspection of physical working conditions.

(4) Each workers' representative shall be routinely engaged in work under control of the registrant.

(5) Different representatives of registrants and workers may accompany inspectors during different phases of an inspection if there is no resulting interference with the conduct of the inspection. However, only one registrant's and one workers' representative at a time may accompany the inspectors.

(6) With the approval of the registrant's and the workers' representative, an individual who is not routinely engaged in work under control of the registrant, for example, a consultant to the registrant or to the workers' representative, shall be afforded the opportunity to accompany agency inspectors during the inspection of physical working conditions.

(7) Notwithstanding the other provisions of this section, agency inspectors are authorized to refuse to permit accompaniment by any individual who deliberately interferes with a fair and orderly inspection. With regard to any area containing proprietary information, the workers' representative for that area shall be an individual previously authorized by the registrant to enter that area.

(jj) Consultation with workers during inspections.

(1) Agency inspectors may consult privately with workers concerning matters of occupational laser safety and protection and other matters related to applicable provisions of agency regulations and certificates of LHR registration to the extent the inspectors deem necessary for the conduct of an effective and thorough inspection.

(2) During the course of an inspection any worker may bring privately to the attention of the inspectors, either orally or in writing, any past or present condition which that individual has reason to believe may have contributed to or caused any violation of the Act, the requirements in this section, or certificate of LHR registration conditions. Any such notice in writing shall comply with the requirements of subsection (kk)(1) of this section.

(kk) Requests by workers for inspections.

(1) Any worker or representative of workers who believes that a violation of the Act, the requirements of this section, or certificate of LHR registration conditions exists or has occurred in work under a certificate of LHR registration with regard to working conditions in which the worker is engaged, may request an inspection by giving notice of the alleged violation to the agency. Any such notice shall be in writing, shall set forth the specific grounds for the notice, and shall be signed by the worker or representative of the workers. A copy shall be provided to the registrant by the agency no later than at the time of inspection. Upon the request of the worker giving such notice, the agency will evaluate whether the worker's name and the name(s) of individual(s) referred to in such copy or on any record published, released, or made available by the agency, may be withheld.

(2) If, upon receipt of such notice, the agency determines that the request meets the requirements set forth in paragraph (1) of this subsection, and that there are reasonable grounds to believe that the alleged violation exists or has occurred, an inspection shall be made as soon as practicable to determine if such alleged violation exists or has occurred. Inspections performed in accordance with this section need not be limited to matters referred to in the request.

(3) No registrant, contractor or subcontractor of a registrant shall discharge or in any manner discriminate against any worker because such worker:

(A) has filed any request or instituted or caused to be instituted any proceeding under this section;

(B) has testified or is about to testify in any such proceeding; or

(C) on behalf of that individual or others, has exercised any option afforded by this section.

(ll) Inspections not warranted.

(1) If the agency determines, with respect to a request made in accordance with subsection (kk)(1) of this section, that an inspection is not warranted because there are no reasonable grounds to believe that a violation exists or has occurred, the agency shall notify the requestor in writing of such determination.

(2) If the agency determines that an inspection is not warranted because the procedural requirements of subsection (kk)(1) of this section have not been met, the agency shall notify the requestor in writing of such determination. Such determination shall be without prejudice to the filing of a new request meeting the requirements of subsection (kk)(1) of this section.

(mm) Criteria for certifying entities, certification programs, and examinations.

(1) To be approved by the agency, a certifying entity shall meet the following requirements:

(A) be a non-governmental organization such as a society, association, business, or school that has an interest in or whose members participate in, or have an interest in, the field of laser hair removal;

(B) if a society or association, make its membership available to the general public nationwide that is not restricted because of race, color, religion, age, national origin or disability;

(C) if a society or association, have a certification program open to nonmembers, as well as members;

(D) be an incorporated, nationally recognized entity in good standing, that is involved in setting national standards of practice within its fields of expertise;

(E) have an adequate staff, a viable system for financing its operations, and a policy- and decision-making review board;

(F) have a set of written organizational by-laws and policies that provide adequate assurance of lack of conflict of interest and a system for monitoring and enforcing those by-laws and policies;

(G) have a committee, whose members can carry out their responsibilities impartially, to review and approve their certification guidelines and procedures, and to advise the organization's staff in implementing the certification program;

(H) have a committee, whose members can carry out their responsibilities impartially, to review complaints against certified individuals and to determine appropriate sanctions;

(I) have written procedures describing all aspects of its certification program, maintain records of the current status of an individual's certification and the administration of its certification program;

(J) have procedures to ensure that certified individuals are provided due process with respect to the administration of a certification program, including the process of becoming certified and any sanctions imposed against certified individuals;

(K) have procedures for proctoring examinations, including qualifications for proctors. These procedures shall ensure that the individuals proctoring each examination are not employed by the same company or corporation (or a wholly-owned subsidiary of such company or corporation) as any of the examinees;

(L) exchange information about certified individuals with the agency and other certifying entities and allow periodic review of its certification program and related records by the agency; and

(M) provide a description to the agency of its procedures for choosing examination sites and for providing an appropriate examination environment.

(2) To be approved by the agency, a certification program shall meet the following requirements:

(A) require applicants for certification to:

(i) receive training in the topics specified in subsection (j)(18) of this section; and

(ii) satisfactorily complete a written examination covering these topics.

(B) require applicants for certification to provide documentation that demonstrates that the applicant has:

(i) received training in the topics specified in subsection (j)(18) of this section; and

(ii) satisfactorily completed a minimum period of on-the-job training.

(C) include procedures to ensure that all examination questions are protected from disclosure;

(D) include procedures for denying an application and revoking, suspending, and reinstating a certificate;

(E) provide a certification period of not less than 3 years nor more than 5 years;

(F) include procedures for renewing certifications and, if the procedures allow renewals without examination, require evidence of recent full-time employment and continuing education units as specified in subsection (r) of this section;

(G) provide a timely response to inquiries, by telephone or letter, from members of the public, about an individual's certification status.

(3) To be approved by the agency, an examination administered or used by a certifying entity shall be designed to test an individual's knowledge and understanding of at least the topics specified in subsection (j)(18) of this section.

(4) Documentation shall be submitted to the agency showing how the certifying entity meets the requirements of paragraphs (1) - (3) of this subsection.

(nn) Time requirements for record keeping. The following are time requirements for record keeping.
Figure: 25 TAC §289.302(nn)

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Linda Wiegman
Acting General Counsel
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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 7. CORPORATE AND FINANCIAL REGULATION

SUBCHAPTER A. EXAMINATION AND FINANCIAL ANALYSIS

28 TAC §7.84

The Commissioner of Insurance (Commissioner) adopts the repeal of §7.84, concerning the frequency of carrier examinations conducted by the Department of Insurance. The repeal of the section is adopted without changes to the proposal published in the June 25, 2010, issue of the *Texas Register* (35 TexReg 5478).

REASONED JUSTIFICATION. The repeal of the section is necessary to permit the simultaneous adoption of a new §7.84 that is published elsewhere in this issue of the *Texas Register*. The new §7.84 is necessary to implement the Insurance Code §401.052 which requires the Department to examine carriers

as often as the Department considers necessary, but not less frequently than once every five years. Amended §401.052(b) further directs the Commissioner to adopt rules governing the frequency of examinations of carriers that have been organized or incorporated for less than five years.

HOW THE SECTION WILL FUNCTION. The adoption of the repeal will result in the updating of the Texas Administrative Code to remove an obsolete section.

SUMMARY OF COMMENTS. The Department did not receive any comments on the published proposal.

STATUTORY AUTHORITY. The repeal of the section is adopted under the Insurance Code §401.052 and §36.001. Section 401.052(a) permits the Department to examine carriers as often as the Department considers necessary, but not less frequently than once every five years, and §401.052(b) requires the Commissioner to adopt rules governing the frequency of examinations of carriers that have been organized or incorporated for less than five years. Section 36.001 authorizes the Commissioner of Insurance to adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 11, 2010.

TRD-201004651
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
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Proposal publication date: June 25, 2010
For further information, please call: (512) 463-6327

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28 TAC §7.84

The Commissioner of Insurance (Commissioner) adopts new §7.84, concerning the frequency of carrier examinations conducted by the Department of Insurance under the Insurance Code §401.052. The new section is adopted without changes to the proposed text published in the June 25, 2010, issue of the *Texas Register* (35 TexReg 5478).

REASONED JUSTIFICATION. New §7.84 is necessary to implement Senate Bill (SB) 1253, 80th Legislature, Regular Session, which amended the Insurance Code §401.052. Section 401.052(a) permits the Department to examine carriers as often as the Department considers necessary, but not less frequently than once every five years. Section 401.052(b) directs the Commissioner to adopt rules governing the frequency of examinations of carriers that have been organized or incorporated for less than five years. Simultaneously with the adoption of this new section, the Department is adopting the repeal of existing §7.84, which is also published in this issue of the *Texas Register.* Prior to the enactment of SB 1253, 80th Legislature, Regular Session, the Department was required by the Insurance Code §401.052 to examine newly licensed Texas domestic carriers each year for their first three years of existence and then once every three years thereafter. The repealed version of §7.84 only addresses the frequency of examinations applicable to carriers that have been organized for more than three years and does not apply to health maintenance organizations (HMOs). New §7.84 is necessary to state the exam frequency rule generally applicable to all carriers, including HMOs, that have been organized for less than five years, in comportment with §401.052(b). The Insurance Code §401.052(a) will continue to apply to all carriers organized for more than five years.

Pursuant to the Insurance Code §843.156(h), the financial examination provisions of the Insurance Code §401.052 continue to apply to HMOs. Section 401.052, prior to its amendment by SB 1253, required a minimum examination frequency of three years for all carriers organized for more than three years and annually in their first, second, and third years. The purpose of repealed §7.84 is to implement a rule pursuant to §401.052(b) to provide a deferment of up to two years for regular examinations for carriers meeting certain requirements (i.e., some carriers would qualify for a five-year examination frequency). Repealed §7.84(d) specifically excluded HMOs because the Department determined that HMOs should not be eligible for the deferment of regular examination specified in §7.84(c). This was based on §401.052(a) which then as now includes authority for the Department to examine carriers as frequently as the Department considers necessary. As a result of SB 1253, §401.052 now requires a minimum examination frequency of five years for all carriers, but directs the Commissioner to adopt rules governing the frequency of examinations of carriers that have been organized or incorporated for less than five years. As the deferment provisions and the HMO exclusion from the deferment are no longer relevant, the purpose of new §7.84 is to adopt rules governing the frequency of examinations of all carriers that have been organized or incorporated for less than five years pursuant to §401.052(b). Based on modern insurance industry regulatory practices, the Department has determined that HMOs organized or incorporated for less than five years should be examined on the same minimum frequency as other carriers. Under new §7.84, the Department is required to conduct financial examinations of all carriers organized for less than five years no less than in the carrier's first, third, and fifth years.

The Labor Code §407A.252 states the examination frequency for workers compensation self-insurance groups as once annually during the first three years of the group's operation and no more frequently than once every three years thereafter unless the Commissioner makes certain findings. New §7.84 specifies that its provisions do not apply to self-insurance groups governed by the Labor Code Chapter 407A.

HOW THE SECTION WILL FUNCTION. Adopted new §7.84 will govern the minimum frequency of carrier examinations conducted under the Insurance Code §401.052. New §7.84(a) states the purpose of the rule; new §7.84(b) addresses the applicability of the section, providing that the section applies only to examinations commenced after the effective date of this section; and new §7.84(c) defines certain terms used in the section, including "carrier" which is broadly defined to include any insurance entity subject to examination under the Insurance Code §401.051, and "self-insurance groups," which are subject to the exclusion stated in §7.84(g). New §7.84(d) cites the general carrier examination frequency requirement of the Insurance Code §401.052(a) governing carriers organized for five years or more, noting the exception for self-insurance groups and HMOs. New §7.84(e) states the general examination frequency requirement for carriers organized for less than five years, providing that the Department shall conduct such examinations in the carrier's first, third, and fifth years, and further provides

that the first year examination for a domestic carrier that receives a certificate of authority or other authorization from the Department on or before June 30, shall be the calendar year in which the carrier received the certificate of authority or other authorization from the Department. For a domestic carrier that receives a certificate of authority or other authorization after June 30, the first year to be examined shall be the calendar year immediately following the calendar year in which the carrier received the certificate of authority or other authorization from the Department and will include the first partial year. New §7.84(e) also provides that if a Texas domestic carrier organized for less than five years under the laws of this state is a member of an insurance holding company system with one or more affiliated Texas domestic carriers, the Department may, under certain circumstances, conduct an examination of the Texas domestic carrier at the same time it conducts the examination of the affiliated Texas domestic carrier or carriers. New §7.84(f) provides that the Department shall conduct an examination of a redomesticated carrier no later than five years from the carrier's last examination by a prior state of domicile or three years from the date the carrier redomesticates to Texas, whichever is less. New §7.84(g) notes that the Labor Code §407A.252 governs the frequency of examinations for self-insurance groups. New §7.84(h) reserves the Commissioner's broad examination authority, providing that the section does not in any way limit the Commissioner's authority under the Insurance Code Chapters 401 and 843, including the authority to visit or examine a carrier as often as the Commissioner considers necessary. New §7.84(i) provides that, in the event of a conflict between this section and the Insurance Code or the Labor Code, the provisions of the Insurance Code or the Labor Code prevail.

SUMMARY OF COMMENTS. The Department did not receive any comments on the published proposal.

STATUTORY AUTHORITY. The new section is adopted under the Insurance Code §401.052 and §36.001. Section 401.052(a) permits the Department to examine carriers as often as the Department considers necessary, but not less frequently than once every five years, and §401.052(b) requires the Commissioner to adopt rules governing the frequency of examinations of carriers that have been organized or incorporated for less than five years. Several chapters of the Insurance Code continue to adopt by reference the examination authority of the Department. The following statutes specifically adopt by reference §401.052 for the noted carriers: the Insurance Code §842.209 adopts by reference §401.052 for group hospital service plans; the Insurance Code §843.156(h) specifies that Chapter 401, Subchapter B applies to health maintenance organizations except to the extent that the Commissioner determines the nature of the organization renders the applicability of those provisions clearly inappropriate; the Insurance Code §846.003 adopts by reference §401.052 for multiple employer welfare arrangements; the Insurance Code §861.257 adopts by reference §401.052 for general casualty companies; the Insurance Code §882.002 adopts by reference §401.052 for mutual life insurance companies; the Insurance Code §884.002 adopts by reference §401.052 for stipulated premium insurance companies; the Insurance Code §885.410 adopts by reference §401.052 for fraternal benefit societies; the Insurance Code §887.062 adopts by reference §401.052 for certain mutual assessment companies; the Insurance Code §911.001 adopts by reference, except to the extent of any conflict with Chapter 911, §401.052 for farm mutual companies; the Insurance Code §912.002 adopts by reference §401.052 for county mutual insurance companies; the Insurance Code §942.003 adopts by reference §401.052 for reciprocal and interinsurance exchanges; the Insurance Code §961.002 adopts by reference §401.052 for nonprofit legal services corporations; the Insurance Code §982.255 adopts by reference §401.052 for foreign and alien insurance companies; the Insurance Code §2201.156 adopts by reference §401.052 for risk retention groups and purchasing groups; the Insurance Code §2203.004 adopts by reference §401.052 for medical liability insurance joint underwriters; and the Insurance Code §2551.001 adopts by reference Chapter 401 for title insurers. Section 36.001 authorizes the Commissioner of Insurance to adopt any rules necessary and appropriate to implement the powers and duties of the Department under the Insurance Code and other laws of this state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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For further information, please call: (512) 463-6327

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28 TAC §7.88

The Commissioner of Insurance (Commissioner) adopts new §7.88, concerning independent annual audits of insurer and health maintenance organization (HMO) financial statements. The section is adopted with changes to the proposed text published in the May 28, 2010, issue of the *Texas Register* (35 TexReg 4305).

REASONED JUSTIFICATION. New §7.88 is necessary to improve the Department's surveillance of the financial condition of insurers and HMOs by (i) specifying the requirements of an annual audit of the financial statements reporting the financial condition and the results of operations of each insurer or HMO by an independent certified public accountant or accounting firm that meets the requirements of the Insurance Code §401.011 (independent accountant); (ii) requiring communication of internal control related matters noted in an audit; (iii) requiring each insurer or HMO that is required to file an annual audited financial report under the Insurance Code Chapter 401, Subchapter A, to have an audit committee; and (iv) requiring certain insurer or HMO management to prepare and file a report of the insurer's or HMO's or group of insurers' or HMOs' internal control over financial reporting. The phrase *group of insurers or HMOs* is defined in new §7.88(c)(5) as "Those authorized insurers or HMOs included in the reporting requirements of the Insurance Code Chapter 823, or a set of insurers or HMOs as identified by management, for the purpose of assessing the effectiveness of internal control over financial reporting." The Insurance Code Chapter 401, Subchapter A, requires an annual audit by an independent accountant of the financial statements reporting the financial condition and the results of operations of each insurer or HMO, subject to certain specified requirements and exemptions. The provisions of Chapter 401, Subchapter A, are based primarily upon the independent annual audit requirements spec-

ified in the *Model Regulation Requiring Annual Audited Financial Reports* (Model Audit Rule or MAR), which was originally adopted by the National Association of Insurance Commissioners (NAIC) in 1980. This new rule is necessary to adopt significant updates to the MAR. These updates were adopted by the NAIC and the American Institute of Certified Public Accountants (AICPA) Working Group in June of 2006. The revised MAR, titled the *Annual Financial Reporting Model Regulation,* incorporates best practice standards and elements of the Sarbanes-Oxley Act of 2002 (SOX) for both non-public and public insurers and HMOs relating to accountant qualifications and independence, corporate governance, and internal control over financial reporting.

The new rule is necessary to adopt these updated standards and requirements in order to (i) improve the Department's surveillance of the financial condition of insurers and HMOs; (ii) clarify, implement, and augment the independent audit requirements of the Insurance Code Chapter 401, Subchapter A; (iii) enable the Department to detect and take appropriate action to address situations in which an insurer or HMO is in a financial condition or is operating or conducting business in a manner that would render further transaction of business in this state hazardous to the policyholders, enrollees, or creditors of the insurer or HMO or to the public, as contemplated under the Insurance Code Chapters 404, 441, and 843; (iv) ensure the qualifications and independence of the accountant, as contemplated under the Insurance Code §§401.011 - 401.013; and (v) improve corporate governance, internal controls and risk management, which may result in benefits to operating performance, corporate culture, and financial returns. The new requirements are designed to enhance regulatory oversight without undue burden on the insurance industry and to obtain the biggest public benefit at the lowest cost of compliance. As a result, small, medium, and certain large insurers and HMOs (those with less than $500 million in premium) are not subject to some of the new requirements. The new requirements are the end result of several years of continued research, input, discussion, and collaboration by financial regulators, industry members, NAIC staff, public accountants, and trade associations' representatives. Additionally, adoption of the 2006 updates is an NAIC accreditation requirement for each state, effective in calendar year 2010. Therefore, adoption of the 2006 updates is required for the Department to maintain its NAIC accreditation after January 1, 2010. Recent polls of the various state insurance regulators indicate that all fifty states have adopted or plan to adopt substantially similar requirements to the 2006 updates prior to or during calendar year 2010. Therefore, the Department anticipates that insurers and HMOs authorized to conduct business in Texas as well as in another state or states likely will be subject to the substantially similar model audit laws in the other state or states, beginning in calendar year 2010. Moreover, the NAIC/AICPA Working Group, in collaboration with industry representatives, has drafted an implementation guide to help in the application of and compliance with the new requirements. The implementation guide is an informational appendix to the NAIC Accounting Practices and Procedures Manual (Manual). The Manual with updates is adopted by reference under §7.18 of Title 28 of the Administrative Code, with certain specified exceptions or additions. The implementation guide is expected to reduce the costs and time of implementation by insurers and HMOs subject to the requirements in the new rule.

The effective date for compliance with the new audit committee requirements in §7.88(b)(3) and (n)(1) is changed from the proposed date of August 1, 2010, to September 1, 2010. This change is necessary to provide an applicability date that is subsequent to the effective date of the new rule.

New Requirements Clarify, Implement, and Augment Statutory Requirements

Because the new requirements clarify, implement, and augment the statutory independent audit provisions of the Insurance Code Chapter 401, Subchapter A, it is necessary to read the requirements in new §7.88 in conjunction with the statutory requirements specified in Chapter 401, Subchapter A, and Department rules adopted in Chapters 3, 7, and 11 of Title 28 of the Administrative Code. These Chapters 3, 7, and 11 rules include, but are not limited to, §§3.1501 - 3.1505, 3.1601 - 3.1608, 3.4505(f), 3.6101, 3.6102, 3.7001 - 3.7009, 3.9101 - 3.9106, 3.9401 - 3.9404, 7.7, 7.18, 7.85, and 11.803 (relating, respectively, to Annuity Mortality Tables; Actuarial Opinion and Memorandum Regulation; General Calculation Requirements for Basic Reserves and Premium Deficiency Reserves; Policy Reserves; Claims Reserves; Minimum Reserve Standards for Individual and Group Accident and Health Insurance; 2001 CSO Mortality Table; Preferred Mortality Tables; Subordinated Indebtedness, Surplus Debentures, Surplus Notes, Premium Income Notes, Bonds, or Debentures, and Other Contingent Evidences of Indebtedness; National Association of Insurance Commissioners Accounting Practices and Procedures Manual; Audited Financial Reports; and Investments, Loans, and Other Assets). For example, §7.85 (relating to Audited Financial Reports) specifically implements the Insurance Code §401.009(d). Section 401.009(d) provides that the Commissioner shall adopt rules governing the information to be included in the audited financial report under the Insurance Code §401.009(a)(3)(H). New §7.88(b)(1) specifies that except as otherwise specified in the Insurance Code Chapter 401, Subchapter A, and in §7.88, the §7.88 requirements apply to insurers and HMOs and takes effect beginning with the annual reporting period ending December 31, 2010, which period is reflected in reports and communications required to be filed with the Commissioner during calendar year 2011, and continues in effect each year thereafter. Chapter 401, Subchapter A, enumerates several exemptions from the various independent audit requirements. Therefore, new §7.88 must be read in conjunction with certain exemptions specified in Chapter 401, Subchapter A, including an exemption provided under §401.006 for certain small insurers or HMOs and an exemption provided under §401.007 for certain foreign or alien insurers or HMOs. Section 401.006(a) provides that an insurer or HMO that has less than $1 million in direct premiums written in this state during a calendar year is exempt from the requirement to file an audited financial report under §401.004 if the insurer or HMO also has less than $1 million in nationwide assumed premiums under reinsurance agreements during a calendar year and submits an affidavit, made under oath by one of the insurer's or HMO's officers, that specifies the amount of direct premiums written in this state during that period. Section 401.006(b) provides that notwithstanding §401.006(a), the Commissioner may require an insurer or HMO, other than a fraternal benefit society that does not have any direct premiums written in this state for accident and health insurance during a calendar year, to comply with Chapter 401, Subchapter A, if the Commissioner finds that the insurer's or HMO's compliance is necessary for the Commissioner to fulfill the Commissioner's statutory responsibilities. Therefore, an insurer or HMO that has been granted an exemption under the Insurance Code §401.006(a) is also exempt from the independent audit requirements in new §7.88. Also, the Insurance

Code §401.007(a) and new §7.88(e)(1) exempt a foreign or alien insurer or HMO that files an audited financial report in another state in accordance with that state's audited financial report requirements from filing the audited financial report under Chapter 401, Subchapter A, if the Commissioner finds that the other state's requirements are substantially similar to the requirements prescribed in Chapter 401, Subchapter A. Therefore, an insurer or HMO that has been granted an exemption under the Insurance Code §401.007(a) and new §7.88(e)(1) is exempt from all of the new §7.88 requirements, except for the new §7.88(e)(1) requirements relating to the submission to the Commissioner of copies of certain filings made in other states. Additionally, for example, the Insurance Code §401.008 provides that an insurer or HMO may apply to the Commissioner for an exemption from compliance with the requirements of Chapter 401, Subchapter A, based upon a finding that compliance would constitute a severe financial or organizational hardship, except under certain specified circumstances, such as the insurer or HMO being placed under supervision, conservatorship, or receivership during the five-year period preceding the date the application for the exemption is made. An exemption under §401.008 also provides an exemption that extends to the requirements specified in new §7.88. Additionally, for example, new §7.88(f) specifically describes the requirements for the financial statements in the audited financial report, but the new rule does not otherwise specifically address the content of the audited financial report. The Insurance Code §401.009, however, does expressly describe the requirements governing the content of audited financial reports. Moreover, pursuant to §401.009(a)(3)(H) and (d), §7.85 addresses the information that must be included in the audited financial reports in order for the Department to conduct insurer or HMO examinations under the Insurance Code Chapter 401, Subchapter B. Section 7.18 adopts the NAIC Manual as the guideline for statutory accounting principles in Texas to the extent the Manual does not conflict with provisions of the Insurance Code or rules of the Department, including those rules specifically listed in §7.18(a).

The Impact on the Regulator's Financial Condition Examinations

The new requirements are important in identifying insurers' or HMOs' potentially hazardous financial conditions so that corrective actions, if necessary, may be taken by the Department or by the insurers or HMOs at the earliest point in time to alleviate or prevent harm to the public and insurance consumers of this state. The new requirements mandate that certain insurers and HMOs generate, maintain, and report financial information that is necessary for the Department to conduct the insurer's or HMO's examination under the Insurance Code Chapter 401, Subchapter B. Specifically, new §7.88(m)(1) and (7) require the management of certain insurers or HMOs (i.e., those that have $500 million or more of annual direct written and assumed premium, excluding premiums reinsured with the Federal Crop Insurance Corporation and the National Flood Insurance Program) to annually prepare and file a management's report of internal control of financial reporting with the Commissioner and to document and make available upon financial condition examination, the basis of management's opinions required under new §7.88(m)(5). The term *internal control over financial reporting* that is required in new §7.88(m)(1) is defined in new §7.88(c)(8) as "A process implemented by an entity's board of directors, management, and other personnel designed to provide reasonable assurance regarding the reliability of the entity's financial statements. The term includes policies and procedures that: (A) relate to the maintenance of records that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of assets; (B) provide reasonable assurance that: (i) transactions are recorded as necessary to permit preparation of the financial statements; and (ii) receipts and expenditures are made only in accordance with authorizations of management and directors; and (C) provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use, or disposition of assets that could have a material effect on the financial statements." Additionally, new §7.88(j) requires each insurer or HMO to provide to the Commissioner, not later than the 60th day after the date the annual audit report required by the Insurance Code Chapter 401, Subchapter A (audited financial report), is filed with the Commissioner, an annual written communication prepared by an independent accountant that describes any unremediated material weaknesses in its internal controls over financial reporting noted during the audit. Also, new §7.88(k)(11) directs the insurer's or HMO's audit committee to require the independent accountant who performs an audit required by the Insurance Code Chapter 401, Subchapter A, and §7.88 to report to the audit committee in accordance with the requirements of Statement on Auditing Standards No. 114, "The Auditor's Communication With Those Charged With Governance," or a successor document. Further, in accordance with the Insurance Code §401.013(a)(3)(D) and §401.020, an insurer or HMO required to file an audited financial report must require its accountant, who is qualified and independent in accordance with the requirements in the Insurance Code §401.011 and in new §7.88(h), to retain and make available for review by the Department's examiners the independent accountant's work papers and any record of communications between the independent accountant and insurer or HMO relating to the independent accountant's audit that were prepared in conducting the audit. As a result of these new requirements, the Department will have access to insurers' and HMOs' audited financial reporting documentation, including the independent accountant's work papers and related or supporting communications. This access will enable the Department to properly regulate and monitor the financial condition and operations of insurers and HMOs, including any unremediated material weaknesses in their internal control structures. Such unremediated material weaknesses may potentially impair the reliability, accuracy and usefulness of the financial statements prepared by those insurers and HMOs, filed with the Department, and relied upon by the Department for solvency regulation. More specifically, the Department's receipt of the information required by the new §7.88(g), (j), and (k)(11) requirements will enable the Department to identify those insurers and HMOs that either are: (i) taking timely, appropriate, and reasonable action to address and correct financial problems, including unremediated material weaknesses in their internal controls, or (ii) not taking timely, appropriate, and reasonable action to address these concerns, which may result in a potentially hazardous financial condition. The Department anticipates encouraging insurers and HMOs in the latter category to take action voluntarily to address any financial condition issues, including internal control deficiencies. The Department may require that such action be taken in certain instances when potentially hazardous conditions exist. Thus, the Department anticipates that the information required in new §7.88(g), (j), and (k)(11) will reduce the incidences of future or ongoing financial problems, including unremediated material weaknesses in internal controls, and by extension, will reduce the risk of future insurer and HMO solvency concerns.

Audit Committee Requirements and Management Internal Control Reporting Requirements

Two of the most significant provisions in the new section are the audit committee requirements and the management internal control over financial reporting requirements. Some of the more significant changes relating to these two areas are summarized in this paragraph. New §7.88(b)(3), (c)(3), (d)(5), (h)(7) - (9), (k), and (n)(1) address the new audit committee requirements for certain insurers and HMOs that are not completely exempt from the new §7.88 requirements pursuant to the Insurance Code §401.006 or §401.008, or under §401.007 and new §7.88(e)(1). These audit committee requirements are expected to enhance corporate governance and internal controls over financial reporting for the benefit of policyholders, enrollees, creditors, and the public generally. Specifically, new §7.88(c)(3) and (d)(5) require all non-exempt insurers and HMOs to designate a group of individuals to serve as its audit committee, and if such a group is not designated, the insurer's or HMO's entire board of directors constitute the audit committee. New §7.88(d)(5) also provides that the audit committee of an entity that controls an insurer or HMO may, at the election of the controlling person, be deemed to be the insurer's or HMO's audit committee for purposes of §7.88. Section 7.88(b)(3) provides that the specific audit committee requirements in §7.88(k) take effect on September 1, 2010, whereas the due date for filing the management's report of internal control over financial report required under new §7.88(m)(1) will be in calendar year 2011 for the 2010 reporting period. New §7.88(k)(1) exempts the following types of insurers and HMOs from the new audit committee requirements in §7.88(k)(2) and (4) - (12): (i) a foreign or alien insurer or HMO; (ii) an insurer or HMO that is a SOX-compliant entity as defined in new §7.88(c)(13); (iii) an insurer or HMO that is a direct or indirect wholly owned subsidiary of a SOX-compliant entity; and (iv) a non-stock insurer that is under the direct or indirect control of a SOX-compliant entity, including pursuant to the terms of an exclusive management contract. The NAIC implementation guide explains that the exception in new §7.88(k)(1) is included in the revised MAR to avoid conflicts between the independence requirements of the revised MAR and those required of public companies under Section 301 of the SOX. The expectation of the Department in including this exception is that the same independent audit committee required of public companies under Section 301 would be deemed to be the insurer's or HMO's audit committee for purposes of this regulation or would participate in the oversight of the insurers or HMOs within the group. Therefore, if material weaknesses, significant deficiencies, and/or significant solvency concerns are identified at the legal entity level, the independent audit committee should be involved in addressing these issues, regardless of their materiality, at the consolidated, parent company level. New §7.88(c)(13) defines a *SOX-compliant entity* as an entity that is required to comply with or voluntarily complies with: (A) the pre-approval requirements provided by 15 U.S.C. §78j-1(i); (B) the audit committee independence requirements provided by 15 U.S.C. §78j-1(m)(3); and (C) the internal control over financial reporting requirements provided by 15 U.S.C. §7262(b) and Item 308, SEC Regulation S - K. New §7.88(k)(2)(A), (5), and (8) require non-exempt insurers or HMOs with over $500 million in direct written and assumed premiums for the preceding calendar year to have a supermajority (75 percent or more) of independent audit committee members. New §7.88(k)(2)(B), (5), and (8) require non-exempt insurers or HMOs with $300 million to $500 million in direct written and assumed premiums for the preceding calendar year to have a majority (50 percent or more) of independent audit committee members. Whether any audit committee member is "independent" for purposes of §7.88(k) is a case-by-case, fact-specific determination, and depends generally on whether, under §7.88(k)(8), an audit committee member (i) other than in his or her capacity as a member of the audit committee, the board of directors, or any other board committee, accepts any consulting, advisory, or other compensatory fee from the entity; or (ii) is an affiliate of the entity or an affiliate of any subsidiary of the entity. New §7.88(k)(2)(C) and (5) provide that except as provided in §7.88(k)(3), a non-exempt insurer or HMO with less than $300 million in direct and assumed premiums for the preceding calendar year is not required to comply with the §7.88(k)(2) independence requirements for its audit committees. The insurers and HMOs subject to the §7.88(k)(3) requirement are those insurers and HMOs for which the Commissioner requires the insurer's or HMO's board to enact improvements to the independence of the audit committee membership if the insurer or HMO (i) is in a risk-based capital action level event; (ii) meets one or more of the standards of an insurer or HMO considered to be in hazardous financial condition; or (iii) otherwise exhibits qualities of a troubled insurer or HMO. New §7.88(k)(4) authorizes an insurer or HMO with less than $500 million in direct written and assumed premiums, excluding premiums reinsured with the Federal Crop Insurance Corporation and the National Flood Insurance Corporation, to apply to the Commissioner for a hardship waiver from the independence requirements of new §7.88(k)(1), (2), and (5) - (12). New §7.88(k)(5) provides that the terminology "direct written and assumed premiums for the preceding calendar year" when used in subsection (k) of §7.88 means the combined total of direct premiums and assumed premiums from non-affiliates for the reporting entities. New §7.88(k)(6) provides that the audit committee of the insurer or HMO is directly responsible for the appointment, compensation, and oversight of the work of any independent accountant and that each independent accountant shall report directly to the audit committee. New §7.88(k)(7) requires that each member of the audit committee be a member of the board of directors of the insurer or HMO or a member of the board or directors of an entity elected under new §7.88(k)(10) and described under new §7.88(c)(3). New §7.88(k)(6), (11), and (12) require each independent accountant to report certain specified information directly to the audit committee. New §7.88(k)(10), in conjunction with new §7.88(c)(3), provides that the audit committee of an entity that controls an insurer or HMO may, at the election of the controlling person, be the insurer's or HMO's audit committee.

New §7.88(m)(1) requires certain large insurers or HMOs required to file an audited financial report under the Insurance Code Chapter 401, Subchapter A, and new §7.88 to prepare an annual management report of the insurer's or HMO's internal control over financial reporting and submit that report annually to the Commissioner. The insurers and HMOs subject to new §7.88(m)(1) have $500 million or more in annual direct written and assumed premiums, excluding premiums reinsured with the Federal Crop Insurance Corporation and the National Flood Insurance Program, and have not been granted an exemption under §401.006 or §401.008, or under §401.007 and new §7.88(e)(1). New §7.88(m)(3) and (4) allows, under certain specified conditions, an insurer or HMO or a group of insurers or HMOs to file with the Commissioner the insurer's or HMO's or the insurer's or HMO's parent's Section 404 report, as that term is defined in new §7.88(c)(11), and an addendum, as described in new §7.88(m)(4), if the insurer or HMO or group of insurers or HMOs is (A) directly subject to Section 404, (B) part of a holding company system whose parent is directly subject to Section 404, (C) not directly subject to Section 404 but is a SOX-compliant entity, or (D) a member of a holding company system whose par-

ent is not directly subject to Section 404 but is a SOX-compliant entity. The Section 404 report is required by Section 404 of the SOX. The conditions specified in new §7.88(m)(4) are: (i) a Section 404 report must include those internal controls of the insurer or HMO or group of insurers or HMOs that have a material impact on the preparation of the insurer's or HMO's or group of insurers' or HMOs' audited statutory financial statements, including those items specified in the Insurance Code §401.009(a)(3)(B) - (H) and (b); and (ii) the addendum required to be filed under new §7.88(m)(3) must be a positive statement that there are no material processes excluded from the Section 404 report with respect to the preparation of the insurer's or HMO's or group of insurers' or HMOs' audited statutory financial statements, including those items specified in the Insurance Code §401.009(a)(3)(B) - (H) and (b). New §7.88(m)(4) further requires that if there are internal controls of the insurer or HMO or group of insurers or HMOs that have a material impact on the preparation of the insurer's or HMO's or group of insurers' or HMOs' audited statutory financial statements and those internal controls are not included in the Section 404 report, the insurer or HMO or group of insurers or HMOs may either file a management report under §7.88(m)(1) or the Section 404 report and a report under §7.88(m)(1) for those internal controls that have a material impact on the preparation of the insurer's or HMO's or group of insurers' or HMOs' audited statutory financial statements not covered by the Section 404 report. New §7.88(m)(5) - (8) specifies management's responsibilities for internal control over financial reporting. New §7.88(m)(7) requires the management of an insurer or HMO to document and make available upon financial condition examination, the basis of the opinions required by §7.88(m)(5). These internal controls over financial reporting requirements provide the Department with additional assurances of the effectiveness of an insurer's or HMO's internal control practices in a cost effective manner. Management's assertions about the effectiveness of the company's internal controls over financial reporting enhance oversight and understanding of insurer and HMO solvency by enabling the Department to have greater confidence in the accuracy and reliability of financial reporting. This, in turn, benefits policyholders, enrollees, creditors, and the public generally. An additional expected benefit of this enhancement, where internal controls over financial reporting are effective, is that financial examinations will become more efficient and risk-focused. Additionally, similar to SOX Section 404, the new requirements prohibit management from determining that internal controls over financial reporting are effective if one or more unremediated material weaknesses exist as of the balance sheet date. Unlike SOX Section 404, new §7.88(m) does not require that an insurer's or HMO's independent accountant provide an attestation report on the effectiveness of internal controls over financial reporting.

New Lead Audit Partner Limitation

New §7.88(h) specifies the accountant qualifications and independence standards and requirements relating to the Commissioner's acceptance of audited financial reports from an independent accountant. New §7.88(h)(1) provides certain limitations on the number of years that an audit partner may serve in the capacity of lead audit partner or other person responsible for rendering an audited financial report for an insurer or HMO. Under §7.88(b)(2), these limitations go into effect for audits of the year beginning January 1, 2010, which audits are reflected in reports and communications required to be filed with the Commissioner during calendar year 2011, and continues in effect each year thereafter. These limitations are modeled after and consistent with the limitations in the revised NAIC Model Rule. Under the Insurance Code §401.011(c), a partner or other person responsible for rendering an audit report for an insurer or HMO for seven consecutive years may not, during the two-year period after that seventh year, render an audit report for the insurer or HMO or for a subsidiary or affiliate of the insurer or HMO that is engaged in the business of insurance. Section 401.011(c) further provides that the Commissioner may determine that this limitation does not apply to an accountant for a particular insurer or health maintenance organization if the insurer or HMO demonstrates to the satisfaction of the Commissioner that the application of the limitation to the insurer or HMO would be unfair because of unusual circumstances. In making the determination, the Commissioner may consider: (i) the number of partners or individuals the accountant employs, the expertise of the partners or individuals the accountant employs, or the number of the accountant's insurance clients; (ii) the premium volume of the insurer or health maintenance organization; and (iii) the number of jurisdictions in which the insurer or HMO engages in business. Under new §7.88(h)(1), the lead audit partner or other person responsible for rendering an audited financial report for an insurer or HMO may not act in that capacity for more than five consecutive years and may not, during the five-year period following that fifth year, render a report for the insurer or HMO or for a subsidiary or affiliate of the insurer or HMO that is engaged in the business of insurance unless the insurer or HMO requests an exemption. Under new §7.88(h)(1), the insurer or HMO may submit a written application to the Commissioner at least 30 days before the end of the calendar year for an exemption from the new §7.88(h)(1) accountant qualifications and independence requirement. The Commissioner may determine that the limitation does not apply for a particular insurer or HMO if the insurer or HMO demonstrates to the satisfaction of the Commissioner that the application of the limitation to the insurer or HMO would be unfair because of unusual circumstances. In making the determination, the Commissioner may consider: (i) the number of partners or individuals the accountant employs, the expertise of the partners or individuals the accountant employs, or the number of the accountant's insurance clients; (ii) the premium volume of the insurer or HMO; and (iii) the number of jurisdictions in which the insurer or HMO engages in business. The five-year limitation under new §7.88(h)(1) is necessary for the following reasons. First, it is part of the 2006 updates necessary for the Department to maintain its NAIC accreditation after January 1, 2010. The provisions of the Insurance Code Chapter 401, Subchapter A, including §401.011(c) that specifies the seven-year limitation for a partner or other person responsible for rendering an audited financial report for an insurer or HMO, are based primarily upon the independent annual audit requirements specified in the MAR, which was originally adopted by the NAIC in 1980. Significant updates to the MAR, including the five-year limitation for independent accountants in §7.88(h)(1), were adopted by the NAIC and the AICPA Working Group in June of 2006. The revised MAR incorporates best practice standards and elements of SOX for both non-public and public insurers and HMOs relating to accountant qualifications and independence, corporate governance, and internal control over financial reporting. The five-year limitation in §7.88(h)(1) is consistent with the new rotation limitation prescribed under the NAIC's revised MAR, which is to be effective beginning with audits of the 2010 financial statements and is expected to be substantially adopted by other states prior to or during calendar year 2010. Thus, insurers and HMOs that are licensed or authorized to conduct the business of insurance in another state will be expected to meet the five-year limitation in calendar year 2010 in order

to comply with the other state's laws. Second, it is necessary to effectuate the accountant independence requirements in the Insurance Code §§401.011 - 401.014. Pursuant to §§401.011 - 401.014, the Commissioner has the responsibility to ensure the independence and qualifications of accountants engaged by insurers and HMOs to prepare the statutorily required annual audited financial reports. The Department anticipates a number of benefits will result from increasing the independent accountant rotation frequency, including, but not limited to, that a lead auditor partner will (i) be less prone to become overly comfortable with an insurer's or HMO's methods of operations, internal controls and accounting systems, thereby decreasing the risk that the independent accountant will place unwarranted reliance on the accuracy of the insurer's or HMO's financial reports; (ii) be less prone to become overly comfortable with the insurer's or HMO's staff, officers and directors, thereby decreasing the risk that the lead audit partner will fail to exhibit appropriate impartiality or independent judgment, and/or adequately question and investigate the veracity of representations made to the lead audit partner during the course of the audit; and (iii) be more likely to exhibit a tendency to ask probing questions that ultimately relate to the reliability of the insurer's or HMO's accounting systems and internal controls and the accuracy of the insurer's or HMO's reported financial condition. Accordingly, the limitation will help to ensure the independence of the lead audit partner from the insurer or HMO being audited. Third, the limitation under new §7.88(h)(1) is necessary to implement and/or supplement several financial solvency regulatory statutes, including the Insurance Code (i) §32.041, concerning statement blanks and other reporting forms necessary for companies to comply with the filing requirements; (ii) Chapters 404 and 843, concerning an insurer's or HMO's hazardous financial condition; (iii) Chapters 441 and 843, concerning the rehabilitation and conservation of insurers and HMOs; (iv) §421.001, concerning the adoption of each current NAIC formula for establishing reserves applicable to each line of insurance; and (v) §§802.001 - 802.003 and 802.051 - 802.056, concerning the Commissioner's authority to make changes in the forms of the annual statements required of insurance companies of any kind, as necessary to obtain an accurate indication of the company's condition and method of transacting business, and to require certain insurers to make filings with the NAIC. Fourth, the Commissioner is required to protect insureds, enrollees or creditors, and the public against an insurer or HMO becoming insolvent, delinquent, or in a condition that renders the continuance of its business hazardous to its insureds, enrollees or creditors, or to the public, as contemplated under Chapters 404, 441, and 843. New §7.88(h)(1) provides an important tool for the Commissioner to accomplish this responsibility. The increased minimum rotation of lead audit partners will result in improvements in the qualifications and independence of the lead audit partner, which the Department believes will result in financial books and records, financial statements, and audited financial reports that are more likely to be complete, current, reliable, and reflect the true and correct financial condition and operational results of the insurer or HMO being audited. An accountant that is more highly qualified and truly independent will be more likely to conclude in an audited financial report, when appropriate, that an insurer or HMO is operating in a hazardous financial condition as compared to an accountant that is less qualified and independent. Conversely, allowing a lead audit partner to be less qualified or independent, or allowing a lead audit partner that has a potential conflict of interest, will increase the risk that the accountant will give a clean audited financial report in circumstances where a clean audited financial report is not appropriate, or will understate the severity of issues found during the audit, for insurers or HMOs that may be operating in a hazardous financial conditions. The Commissioner relies on the audited financial report and the accountant's opinion in monitoring and regulating the insurer's or HMO's financial position and operations. Thus, it is crucial that the accountant be completely independent from the insurer or HMO in expressing an opinion on the financial statement in an audited financial report filed under Chapter 401, Subchapter A. New §7.88(h)(1) will help to ensure this independence and impartiality, and therefore, enhance the ability of the Department to actively monitor and regulate the financial condition and operations of insurers and HMOs. Therefore, although new §7.88(h)(1) provides a more restrictive limitation on lead audit partners than the statutory limitation specified in §401.011(c), the five-year limitation is not only necessary, as previously explained, to update the obsolete seven-year limitation in §401.011(c) in order to bring the Department into consistency with the updated revised NAIC MAR so that the Department may maintain its NAIC accreditation after January 1, 2010, it is also necessary to more effectively implement the purpose of §401.011(c) of the Insurance Code. Therefore, the two limitations can be harmonized. Both new §7.88(h)(1) and existing §401.011(c) serve to ensure the independence of accountants to thereby protect against insurer or HMO insolvencies. Both are necessary for consistency with the revised NAIC MAR at the time of their implementation by the Department. Significantly, both also allow insurers and HMOs to petition the Commissioner to authorize another alternative limitation if the requisite criteria are met. This includes petition under new §7.88(h)(1) to use the seven-year limitation in §401.011(c). The §7.88(h)(1) criteria for the Commissioner to make such an authorization are the same as the criteria specified in §401.011(c). This ability of the insurers and HMOs to petition for an exemption from the §7.88(h)(1) limitation reflects the intent of the Commissioner to accept, consider, and grant such petitions when the requisite criteria are met. This intent is further supported by the fact that the criteria for the Commissioner's determination are the same criteria as the existing statutory criteria for the Commissioner's determination that an alternative to the seven-year limitation should be granted.

History of the Proposal

On September 16, 2009, the Department posted a draft rule for informal comment, concerning requirements for annual independent audits of insurer and HMO financial statements and insurer and HMO internal controls. The informal comment period ended on September 30, 2009. The Department held a meeting on October 1, 2009, for stakeholder comments. On May 14, 2010, the Department filed the proposed rule for publication in the *Texas Register* for comment. The proposed rule was published in the May 28, 2010, issue of the *Texas Register* (35 TexReg 4305). On June 24, 2010, the Department held a public hearing for public input and comment. The proposal comment period ended on June 28, 2010.

Changes to the Proposal

In response to comments received on the published proposal, the Department has revised §7.88(k)(8) and (n) as proposed. The Department has also made non-substantive clarification changes to §7.88(h)(10) and (m)(8) as proposed. Additionally, the Department has made a clarification change to §7.88(k)(8) as proposed that is in addition to the clarification changes made in response to comments. In addition, as previously discussed, the Department has revised §7.88(b)(3) and (n)(1) as proposed to change the effective date for compliance with the new audit

committee requirements from August 1, 2010 to September 1, 2010. However, none of these changes materially alter issues raised in the proposal, introduce new subject matter, or affect persons other than those previously on notice.

The following changes are made to the proposed text. The Department made a non-substantive change to new §7.88(k)(8) to replace the term "affiliated person" with the term "affiliate," which is defined in §7.88(c)(2). The Department made another non-substantive change to new §7.88(k)(8) to add the words "an affiliate of" before the phrase "any subsidiary of the entity." These changes are made in response to a commenter asking what the term "affiliated person" in proposed §7.88(k)(8) means. The changes are necessary for clarification and to remove ambiguity about the meaning of the terms "independent" and "affiliate" in §7.88(k)(8) as adopted. Additionally, §7.88(k)(8) as proposed is revised to change the term "person's" to "his or her" to clarify that only a natural person is referenced in this particular part of the provision. Proposed §7.88(k)(8) as adopted reads "To be independent for purposes of this subsection, a member of the audit committee may not, other than in *his or her* capacity as a member of the audit committee, the board of directors, or any other board committee, accept any consulting, advisory, or other compensatory fee from the entity or be an *affiliate* of the entity or *an affiliate* of any subsidiary of the entity. To the extent of any conflict with a statute requiring an otherwise non-independent board member to participate in the audit committee, the other statute prevails and controls, and the member may participate in the audit committee unless the member is an officer or employee of the insurer or HMO or an affiliate of the insurer or HMO." (italics indicates revised language)

New §7.88(n)(2) is added in response to comments from several Medicaid and CHIP HMOs that asked for clarification of the transition period in proposed §7.88(n)(2) and that raised concerns with the cost of complying with the requirement in §7.88(m) to prepare and file a management's report of internal control over financial reporting. As adopted, §7.88(n) contains a new paragraph (2) and proposed paragraph (2) is re-designated as paragraph (3) with one nonsubstantive change to the proposed text. Section 7.88(n)(2) as adopted provides that "An insurer or HMO required to file an audited financial report under the Insurance Code Chapter 401, Subchapter A, and this section that has annual direct written and assumed premiums, excluding premiums reinsured with the Federal Crop Insurance Corporation and the National Flood Insurance Program, of $500 million or more for the reporting period ending December 31, 2010, and that has not had total written premium at the $500 million or more premium threshold amount in any prior calendar year reporting periods must comply with the reporting requirements in subsection (m) of this section no later than two years after the year in which the written premium exceeds the threshold amount required to file a report." The addition of new §7.88(n)(2) is necessary to clarify the transition period for compliance with §7.88(m) so that insurers and HMOs that reach the required $500 million premium transition threshold for the first time for the reporting period ending December 31, 2010, will have a two-year transition period. In the second sentence of §7.88(n)(3) as adopted, the word "required" is added between the word "amount" and the phrase "to file a report" for purposes of clarification. Section 7.88(n)(3) as adopted provides, in pertinent part, that "An insurer or HMO or group of insurers or HMOs that is not required by subsection (m)(1) of this section to file a report beginning with the reporting period ending December 31, 2010, because the total written premium is below the threshold amount, and that later becomes subject to the reporting requirements, has two years after the year in which the written premium exceeds the threshold amount required to file a report." (italics indicates revised language)

Section 7.88(h)(10) as proposed is revised to change the term "person" to "individual" to clarify that only a natural person is referenced in this provision. Section 7.88(h)(10) as adopted reads in pertinent part: "The commissioner may not recognize an accountant as qualified or independent for a particular insurer or HMO if a member of the board, the president, chief executive officer, controller, chief financial officer, chief accounting officer, or any *individual* serving in an equivalent position for the insurer or HMO, was employed by the accountant and participated in the audit of that insurer or HMO during the one-year period preceding the date on which the most current statutory opinion is due." (italics indicates revised language)

Section 7.88(m)(8) as proposed is revised to change the phrase "as to" to "about" for purposes of proper grammar. Section 7.88(m)(8) as adopted reads: (8) Management has discretion about the nature of the internal control framework used, and the nature and extent of the documentation required by paragraph (7) of this subsection, in order to form its opinions in a cost-effective manner and may include an assembly of or reference to existing documentation." (italics indicates revised language)

HOW THE SECTION WILL FUNCTION.

§7.88(a), Purpose. Section 7.88(a) states the purpose of the new section.

§7.88(b), Applicability. Section 7.88(b) sets forth the applicability of the new section. Section 7.88(b)(1) specifies that except as otherwise specified in that section and in the Insurance Code Chapter 401, Subchapter A, this section applies to insurers and HMOs and takes effect beginning with the annual reporting period ending December 31, 2010, which period is reflected in reports and communications required to be filed with the Commissioner during calendar year 2011, and continues in effect each year thereafter. Section 7.88(b)(2) specifies that the lead audit partner independence requirements in §7.88(h)(1) are in effect for audits of the year beginning January 1, 2010, which audits are reflected in reports and communications required to be filed with the Commissioner during calendar year 2011, and continues in effect each year thereafter. Under §7.88(b)(3), the audit committee requirements in §7.88(k) take effect September 1, 2010.

§7.88(c), Definitions. Section 7.88(c) specifies definitions of certain terms or phrases when used in the section, including the terms or phrases *"accountant, affiliate, audit committee, group of insurers or HMOs, insurer, Section 404, and Section 404 report."* Section 7.88(c)(7) defines the term "insurer" to explain which insurers, in addition to HMOs, are subject to the new requirements in this adoption. These insurers are any insurer authorized to engage in business in this state, including: (i) a life, health, or accident insurance company; (ii) a fire and marine insurance company; (iii) a general casualty company; (iv) a title insurance company; (v) a fraternal benefit society; (vi) a mutual life insurance company; (vii) a local mutual aid association; (viii) a statewide mutual assessment company; (ix) a mutual insurance company other than a mutual life insurance company; (x) a farm mutual insurance company; (K) a county mutual insurance company; (xi) a Lloyd's plan; (xii) a reciprocal or interinsurance exchange; (xiii) a group hospital service corporation; (xiv) a stipulated premium company; and (xv) a nonprofit legal services corporation. The term "accountant" in this section refers to an independent certified public accountant or accounting firm that meets the re-

quirements of the Insurance Code §401.011. Section 7.88(c)(2) defines the term "affiliate" as having the meaning assigned by the Insurance Code §823.003. Section 7.88(c)(3) defines the term "audit committee" and specifies certain circumstances that affect the constitution or designation of the audit committee. The term "audit committee" means a committee established by the board of directors of an insurer or HMO for the purpose of overseeing (i) the accounting and financial reporting processes of an insurer or HMO or group of insurers or HMOs; and (ii) the audits of financial statements of the insurer or HMO or group of insurers or HMOs. The definition further provides that at the election of the controlling person, the audit committee of an entity that controls a group of insurers or HMOs may be the audit committee for one or more of the controlled insurers or HMOs solely for the purposes of §7.88. Also, under the definition, if an audit committee is not designated by the insurer or HMO, the insurer's or HMO's entire board of directors constitutes the audit committee. Section 7.88(c)(5) defines the phrase "group of insurers or HMOs" as "Those authorized insurers or HMOs included in the reporting requirements of the Insurance Code Chapter 823, or a set of insurers or HMOs as identified by management, for the purpose of assessing the effectiveness of internal control over financial reporting." Section 7.88(c)(11) defines the term "Section 404" as "Section 404, Sarbanes-Oxley Act of 2002 (15 U.S.C. §7262), and rules adopted under that section." Section 7.88(c)(12) defines the phrase "Section 404 report" as "Management's report on internal control over financial reporting as determined by the SEC and the related attestation report of an accountant."

§7.88(d), Filing and Extensions for Filing of Audited Financial Report. Section 7.88(d)(1) - (4) sets out requirements for filing the annual audited financial reports, including a requirement that insurers and HMOs file the audited financial reports with the Commissioner on or before June 1 for the preceding calendar year, except as otherwise provided. This requirement is a change from the current requirement of filing on or before June 30. Thus, insurers and HMOs will need to file their audited financial reports for calendar year 2010 on or before June 1, 2011, unless otherwise provided under the new section. Section 7.88(d)(5) requires an insurer or HMO required to file an annual audited financial report under the Insurance Code Chapter 401, Subchapter A and the new section to designate a group of individuals to serve as its audit committee. Section 7.88(d)(5) further provides that the audit committee of an entity that controls an insurer or HMO may, at the election of the controlling person, be the insurer's or HMO's audit committee for purposes of §7.88.

§7.88(e), Exemption for Certain Foreign or Alien Insurers or HMOs. Section 7.88(e)(1) sets forth certain filing requirements for foreign or alien insurers or HMOs found by the Commissioner to meet the exemption provisions in the Insurance Code §401.007. Section 7.88(e)(2) specifies that a foreign or alien insurer or HMO required to file management's report of internal control over financial reporting in another state is exempt from filing the report in this state under §7.88(m)(1) if the other state has substantially similar reporting requirements and the report is filed with the commissioner in that state in the time specified.

§7.88(f), Requirements for Financial Statements in Audited Financial Report. Section 7.88(f) specifies certain requirements for financial statements included in the audited financial report.

§7.88(g), Scope of Audit and Report of Accountant. Section 7.88(g) sets forth the scope of the annual audited financial report, which includes certain new requirements related to internal control over financial reporting.

§7.88(h), Qualifications and Independence of Accountant; Acceptance of Audited Financial Report. Section 7.88(h) specifies the accountant qualifications and independence standards and requirements of the audited financial report from an independent accountant that is required to be filed with the Commissioner. Section 7.88(h)(1) provides certain limitations on the number of years that an audit partner may serve in the capacity of lead audit partner or other person responsible for rendering an audited financial report for an insurer or HMO. These limitations are modeled after and consistent with the limitations in the revised NAIC Model Audit Rule. Under current requirements, the lead audit partner is permitted to serve for seven consecutive years in that capacity with a mandatory two-year break in service before being eligible to serve another seven consecutive years. Under the revised requirements in §7.88(h)(1), the lead audit partner (or other person having primary responsibility for the audit) may not act in that capacity for more than five consecutive years followed by a five-year break in service before being eligible to serve another five consecutive years. An insurer or HMO, however, may apply to the Commissioner for an exemption from this new limitation. The insurer or HMO may submit a written application to the Commissioner at least 30 days before the end of the calendar year for exemption from the limitation. Based on a specified list of factors that may be considered by the Commissioner, the Commissioner may determine that the §7.88(h)(1) limitation requirement does not apply to an accountant for a particular insurer or HMO if the insurer or HMO demonstrates to the satisfaction of the Commissioner that the limitation's application to the insurer or HMO would be unfair because of unusual circumstances. Under §7.88(h)(2), an insurer or HMO for which the Commissioner has approved an exemption under §7.88(h)(1) is required to file the approval with the states in which it is doing or is authorized to do business and with the NAIC. Pursuant to §7.88(h)(3), an accountant that provides audit services to an insurer or HMO is prohibited from functioning in the role of management, auditing the accountant's own work, or serving in an advocacy role for the insurer or HMO; or directly or indirectly entering into an agreement of indemnity or release from liability regarding the audit of the insurer or HMO. The Commissioner pursuant to §7.88(h)(4) may not recognize as qualified or independent an accountant, or accept an annual audited financial report that was prepared wholly or partly by an accountant, who provides an insurer or HMO at the time of the audit certain specified non-audit services that, if performed by the accountant, would impact the accountant's independence in relation to the insurer or HMO, subject to the exemption specified in §7.88(h)(6). Section 7.88(h)(5) provides that notwithstanding §7.88(4)(D), an independent accountant and the independent accountant's actuary, under certain specified conditions, may provide certain actuarially oriented advisory services involving the determination of amounts recorded in the financial statements. Section 7.88(h)(6) allows certain insurers and HMOs with direct written and assumed premiums of less than $100 million in any calendar year to apply for an exemption to the §7.88(h)(4) prohibitions relating to the types of services or functions that the independent accountant is not allowed to provide to the insurer or HMO. Such insurers and HMOs may request an exemption from the requirements of §7.88(h)(4) by filing with the Commissioner a written statement explaining why the insurer or HMO should be exempt. Under §7.88(h)(6), the Commissioner may grant the exemption if the Commissioner finds that compliance would impose an undue financial or organizational hardship on the insurer or HMO. Section 7.88(h)(7) -

(9) requires pre-approval by the audit committee of all auditing and non-audit services performed by the accountant, except as otherwise provided under §7.88(h)(7) - (9). The Commissioner pursuant to §7.88(h)(10) may not recognize an accountant as qualified or independent for a particular insurer or HMO if a member of the board, the president, chief executive officer, controller, chief financial officer, chief accounting officer, or any other person serving in an equivalent position for the insurer or HMO was employed by the accountant and participated in the audit of the insurer or HMO within the one-year prior to the due date of the most current statutory opinion. Also, under §7.88(h)(10), an insurer or HMO may apply to the Commissioner for an exemption from the requirements of §7.88(h)(10) on the basis of unusual circumstances. The Commissioner pursuant to §7.88(h)(11) shall not accept an audited financial report prepared wholly or partially by an individual or firm who the Commissioner finds: (i) has been convicted of fraud, bribery, a violation of the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. §1961 et seq.), or a state or federal criminal offense involving dishonest conduct; (ii) has violated the insurance laws of this state with respect to a report filed under the Insurance Code Chapter 401, Subchapter A, or this section; (iii) has demonstrated a pattern or practice of failing to detect or disclose material information in reports filed under the Insurance Code Chapter 401, Subchapter A, or §7.88; or (iv) has directly or indirectly entered into an agreement of indemnity or release of liability regarding an audit of an insurer. Under §7.88(h)(12), the insurer or HMO must file, with its annual statement filing, the approval of an exemption granted under §7.88(h)(6) or (10) with the states in which it does or is authorized to do business and with the NAIC. An insurer or HMO must comply with the independent accountant registration requirements in the Insurance Code §401.014 in addition to the independent accountant requirements specified in §7.88(h).

§7.88(i), Accountant's Letter of Qualifications. Section 7.88(i) requires that the audited financial report required under the Insurance Code §401.004 be accompanied by a letter, provided by the accountant who performed the audit, that includes the representations and statements required under the Insurance Code §401.013, and a representation that the accountant is in compliance with the requirements specified in §7.88(h).

§7.88(j), Communication of Internal Control Matters Noted in Audit. Under §7.88(j), each insurer or HMO is required to provide to the Commissioner, not later than the 60th day after the date the audited financial report is filed, an annual written communication prepared by an accountant that describes any unremediated material weaknesses in its internal controls over financial reporting noted during the audit. Also, under §7.88(j) each insurer or HMO must provide the Commissioner with a description of remedial actions taken, or proposed, to correct unremediated material weaknesses if these actions are not described in the accountant's communication.

§7.88(k), Requirements for Audit Committees. Section 7.88(k), in conjunction with §7.88(b)(3), (c)(3), (d)(5), (h)(7) - (9), and (n)(1), addresses the audit committee requirements for certain insurers or HMOs that are not completely exempt from the §7.88 requirements pursuant to the Insurance Code §401.006 or §401.008, or under §401.007 and §7.88(e)(1). As previously explained, §7.88(c)(3) defines the term "audit committee" as a committee established by the board of directors of an entity for the purpose of overseeing (i) the accounting and financial reporting processes of an insurer or HMO or group of insurers or HMOs; and (ii) the audits of financial statements of the insurer or HMO or group of insurers or HMOs. Under §7.88(c)(3), (d)(5), and (h)(7) - (9), all non-exempt insurers or HMOs are required to have an audit committee charged with the appointment, compensation, and supervision of the insurer or HMO's independent accountant. If a non-exempt insurer or HMO does not designate an audit committee, then §7.88(b)(3) provides that the non-exempt insurer or HMO's entire board of directors shall constitute the audit committee. Section 7.88(k)(1) exempts the following types of insurers and HMOs from the §7.88(k)(2) and (4) - (12) audit committee requirements: (i) a foreign or alien insurer or HMO; (ii) an insurer or HMO that is a SOX-compliant entity as defined in §7.88(c)(13); (iii) an insurer or HMO that is a direct or indirect wholly owned subsidiary of a SOX-compliant entity; or (iv) a non-stock insurer that is under the direct or indirect control of a SOX-compliant entity, including pursuant to the terms of an exclusive management contract. Section 7.88(k)(2) and (3) address the independence requirements for audit committee membership. Under §7.88(k)(2)(B), non-exempt insurers or HMOs with $300 million to $500 million in preceding calendar year direct written and assumed premiums must have a majority (50 percent or more) of audit committee members that are independent. Under §7.88(k)(2)(A), non-exempt insurers or HMOs with over $500 million of preceding calendar year direct written and assumed premiums must have a supermajority (75 percent or more) of audit committee members that are independent. Section 7.88(k)(2)(C) provides that except as provided in §7.88(k)(3), a non-exempt insurer or HMO with less than $300 million in direct and assumed premiums for the preceding calendar year is not required to comply with the §7.88(k)(2) independence requirements for its audit committee members. The insurers or HMOs subject to the §7.88(k)(3) requirement are those insurers and HMOs for which the Commissioner requires an insurer's or HMO's board to enact improvements to the independence of its audit committee membership if the insurer or HMO meets certain specified circumstances. Under §7.88(k)(4), an insurer or HMO with less than $500 million in direct written and assumed premiums (subject to certain exclusions in determining the amount of direct written and assumed premiums specified in §7.88(k)(4) and (5)) may apply to the Commissioner for a hardship waiver from the independence requirements of §7.88(k)(1), (2), and (5) - (12). Section 7.88(k)(5) provides that in §7.88(k), direct written and assumed premiums for the preceding calendar year shall be the combined total of direct premiums and assumed premiums from non-affiliates for the reporting entities. Section 7.88(k)(6) specifies certain responsibilities of insurer or HMO audit committees that relate to the independent accountant for the non-exempt insurer or HMO. Section 7.88(k)(7) requires each member of the audit committee to be a member of the board of directors of the insurer or HMO or, at the election of the controlling person, a member of the board of directors of an entity that controls the group of insurers or HMOs as provided under §7.88(k)(10). Section 7.88(k)(8) specifies what constitutes "independence" for a member of the audit committee for purposes of §7.88(k). Pursuant to §7.88(k)(9), if an audit committee member ceases to be independent for reasons outside the member's reasonable control, the member may remain an audit committee member until the earlier of: (i) the next annual meeting of the responsible entity; or (ii) the first anniversary of the occurrence of the event that caused the member to be no longer independent. The responsible entity, however, must provide notice to the Commissioner as specified in §7.88(k)(9)(A) and (B). Section 7.88(k)(10), in conjunction with §7.88(c)(3) and (k)(7), describes the process for the controlling person to exercise its election to designate an audit committee of an entity that controls an insurer

or HMO solely for purposes of §7.88. Section 7.88(k)(11) and (12) specify independent accountant reporting requirements to the audit committee. Under §7.88(b)(3), the audit committee requirements in §7.88(k) take effect September 1, 2010.

§7.88(l), Prohibited Conduct in Connection with Preparation of Required Reports and Documents. Section 7.88(l) specifies prohibited conduct in connection with preparation of required reports and documents. Section 7.88(l) prohibits directors or officers of an insurer or HMO from making materially false or misleading statements, or omitting material facts in statements made to independent accountants in connection with an audit, review, or communication required by the Insurance Code, Chapter 401, Subchapter A, or the new section.

§7.88(m), Report of Internal Control over Financial Reporting. Section 7.88(m)(1) requires an insurer or HMO with greater than $500 million in direct written and assumed premium, excluding premiums reinsured with the Federal Crop Insurance Corporation and the National Flood Insurance Program, to prepare and file a management report of internal control over financial reporting with the Commissioner, unless the insurer or HMO meets an exemption provided under §401.006 or §401.008, or under §401.007 and §7.88(e)(2). Pursuant to §7.88(m)(2), the Commissioner may require an insurer or HMO regardless of the amount of the annual direct written and assumed premiums to file the management's report of internal control over financial reporting if the insurer or HMO is in any risk-based capital level event or meets one or more of the statutory hazardous financial condition standards. The requirements and process for preparing and filing the management report are specified in detail in §7.88(m)(1) - (8). Section 7.88(m)(3) and (4) specify certain options for complying with the management report requirements in §7.88(m)(1) or (2) for certain insurers or HMOs or a group of insurers or HMOs that file the insurer's or HMO's or the insurer's or HMO's parent's Section 404 report and an addendum with the Commissioner.

§7.88(n), Transition Dates. Section 7.88(n)(1) sets forth certain transition dates for certain insurers or HMOs whose audit committee as of September 1, 2010, is not subject to the independence requirements of §7.88(k)(2)(A) or (B) because the total premium is below the threshold specified in that subsection, and that later becomes subject to one of the independence requirements because of increases in the amount of premium. Under §7.88(n)(2), an insurer or HMO that reaches the $500 million premium transition threshold for the first time for the reporting period ending December 31, 2010, may have a two-year transition period after the year in which the written premium exceeds the threshold amount required to file a report in compliance with §7.88(m). Section 7.88(n)(3) requires an insurer or HMO or group of insurers or HMOs that is not required by §7.88(m)(1) to file a report beginning with the reporting period ending December 31, 2010, because the total written premium is below the required threshold amount, to file a report no later than two years after the year in which the written premium exceeds the required threshold amount to file a report.

§7.88(o), Severability. Section 7.88(o) sets forth the severability provisions for the new section.

SUMMARY OF COMMENTS AND AGENCY RESPONSE.

General Comment

Comment: One commenter supports the proposed rule published in the *Texas Register* and commends the Department's efforts in adopting the rule.

Agency Response: The Department appreciates the comment.

§7.88(d)(1) - (4). Extension for Filing Audited Financial Report.

Comment: One commenter inquires whether there is a mechanism by which a company that is a Texas only company and has an affiliate company that is licensed in more than one state can delay their filing of the audited financial report to June 30th.

Agency Response: An insurer or HMO required to file an audited financial report with the Commissioner under the Insurance Code, Chapter 401, Subchapter A, may request an extension of the filing date in accordance with the Insurance Code §401.004(c). Section 7.88(d)(4) provides that the Commissioner may grant an extension of the filing date for the audited financial report in accordance with the Insurance Code §401.004(c). Under §401.004(c), an insurer or HMO may request an extension of the filing date by submitting the request in writing before the 10th day preceding the filing date and including sufficient detail for the Commissioner to make an informed decision on the requested extension. Section 401.004(c) authorizes the Commissioner to grant a written extension request for good cause based on a showing by the insurer or HMO or the insurer's or HMO's accountant of the reasons for requesting the extension. Therefore, an insurer or HMO required to file an audited financial report with the Commissioner under the Insurance Code, Chapter 401, Subchapter A, has the option of either complying with the June 1 filing date in §7.88(d)(1) or seeking an extension of the filing date under §7.88(d)(4) and §401.004(c). The Department's response relates to the Department's filing requirements only. Companies that do business in other states should check with those other states to determine the date that audited financial reports are required to be filed in those other states.

§7.88(c)(3) and (k). Audit Committee Requirements.

Comment: One commenter asks if under proposed §7.88(c)(3) and (k)(7), the default provision is for the insurer's or HMO's entire board of directors to constitute the audit committee if an audit committee is not otherwise selected, then what happens to the independent audit committee member requirement where there are not outside directors on the board of directors.

Agency Response: The audit committee member independence requirements in §7.88(k)(2), relating to the establishment of an audit committee by an insurer or HMO with over $500 million in direct written and assumed premiums for the preceding calendar year and by an insurer or HMO with $300 million to $500 million in direct written and assumed premiums for the preceding calendar and in §7.88(k)(3), relating to the insurer's or HMO's board being required by the Commissioner to enact improvements to the independence of the audit committee membership under certain adverse financial condition circumstances, are distinct and independent requirements from the requirements in §7.88(c)(3) and (k)(7). Section 7.88(c)(3) defines the term "audit committee" as "A committee established by the board of directors of an entity for the purpose of overseeing the accounting and financial reporting processes of an insurer or HMO or group of insurers or HMOs and audits of financial statements of the insurer or HMO or group of insurers or HMOs. At the election of the controlling person, the audit committee of an entity that controls a group of insurers or HMOs may be the audit committee for one or more of the controlled insurers or HMOs solely for the purposes of this section. *If an audit committee is not designated by the insurer or HMO, the insurer's or HMO's entire board of directors constitutes the audit committee."* [emphasis added] Section 7.88(k)(7) requires each member of the audit committee to be a member of the board of

directors of the insurer or HMO or, at the election of the controlling person, a member of the board of directors of an entity that controls the group of insurers or HMOs as provided under §7.88(k)(10) and described under §7.88(c)(3). Because these are separate and independent requirements from the audit committee member independence requirements in §7.88(k)(2) or (3), insurers and HMOs are required to take all necessary steps to comply with the independence requirements in §7.88(k)(2) or (3), as applicable, regardless of whether the audit committee provisions in §7.88(c)(3) and (k)(7) are also applicable to a specific insurer or HMO.

Comment: One commenter asks what the term "affiliated person" means in proposed §7.88(k)(8). This commenter further inquires whether the following parties can be "independent" for purposes of being a director/audit committee member under proposed §7.88(k)(8): (i) An equity owner if that owner receives dividends on the stocks owned; (ii) shareholders of 10 percent or greater; (iii) shareholders of less than 10 percent; (iv) any shareholder of preferred stock that pays a dividend; and (v) any policyholder or member that gets paid a dividend.

Agency Response: As a result of the commenter's question about the meaning of the term "affiliated person" in proposed §7.88(k)(8), the Department for purposes of clarification has replaced in §7.88(k)(8) as adopted the term "affiliated person" with "affiliate", replaced the word "person's" with "his or her" and added the words "an affiliate of" before the phrase "any subsidiary of the entity." Proposed §7.88(k)(8) as adopted reads in pertinent part: "To be independent for purposes of this subsection, a member of the audit committee may not, other than in the his or her capacity as a member of the audit committee, the board of directors, or any other board committee, accept any consulting, advisory, or other compensatory fee from the entity or be an affiliate of the entity or an affiliate of any subsidiary of the entity." Whether an equity owner, policyholder, or member of an insurer or HMO, is "independent" for purposes of §7.88(k) is a case-by-case, fact-specific determination, and depends generally on whether, under §7.88(k)(8), an audit committee member (i) other than in his or her capacity as a member of the audit committee, the board of directors or any other board committee, accepts any consulting, advisory, or other compensatory fee from the entity; or (ii) is an affiliate of the entity or an affiliate of any subsidiary of the entity. Section 7.88(c)(2) defines the term "affiliate" as used in §7.88 as having the meaning assigned by the Insurance Code §823.003. Section 7.88(c)(2) is modeled after and consistent with the Insurance Code §401.001(2) and Section 3B of the NAIC Model Audit Regulation. Under §823.003(a) of the Insurance Code, a person is an affiliate of another if the person directly or indirectly through one or more intermediaries controls, is controlled by, or is under common control with the other person. In general, an equity owner that directly or indirectly owns more than 10 percent of the voting securities or authority of an entity is presumed to be an affiliate of the entity. Also, a person may be considered an affiliate of an entity as the result of another basis for determining that an affiliate relationship with the entity exists. For example, a person may (i) own less than 10 percent of the voting securities or authority of an entity, and (ii) also have a management contract and power of attorney that gives the person the power to direct the management and policies of the entity. In this example, an affiliate relationship generally does not exist based solely on the person's investment in the voting securities of the entity. Nevertheless, the person is considered an affiliate of the entity because the person has the power to direct the management and policies of the entity. Furthermore, in order to be independent under §7.88(k)(8), a person may not be an affiliate of any subsidiary of that entity. Section §7.88(c)(14) defines the term "subsidiary" as used in §7.88 as having the meaning assigned by the Insurance Code §823.003. Section 823.003(b) provides that a person is a subsidiary of another if the person is an affiliate of and is controlled by the other person directly or indirectly through one or more intermediaries. Also, under §823.003(c), a subsidiary or holding company of a person is an affiliate of that person. The Insurance Code Chapter 823, including §§823.003, 823.005 and 823.151, and rules adopted thereunder, provide the criteria upon which to determine whether a particular audit committee member is an "affiliate" of an entity or an "affiliate of a subsidiary" of an entity for purposes of §7.88. These statutes and rules may be consulted to properly ascertain compliance with §7.88(k).

Furthermore, §7.88(k) is modeled after and consistent with Section 14 of the NAIC Model Audit Rule, as updated in 2006. As discussed in the Introduction of the published proposal, the NAIC has adopted an implementation guide as an informational appendix to the NAIC Accountant Practices and Procedures Manual to help in the application of and compliance with the model audit requirements. Page G-10 of the current NAIC implementation guide contains some additional guidance on whether certain parties would be considered "independent." This guide indicates that a policyholder is considered "independent" unless the policyholder receives direct compensation from the insurer for other unrelated services.

§7.88(m). Management's Report of Internal Control over Financial Reporting.

Comment: One commenter contends that there is not enough guidance to implement specific internal controls over financial reporting and that more details are needed in the proposed rule.

Agency Response: The Department disagrees and declines to make the requested change. One of the Department's overarching objectives in adopting the new rule is to address certain regulatory concerns relating to ensuring the adequacy of insurers' and HMOs' internal control structures while at the same time keeping the costs of regulatory compliance relatively low for the industry over-all. This Department objective was a driving force in the drafting of §7.88(m). Although the Department could have proposed very prescriptive requirements in §7.88(m), including a specific framework for management's review and evaluation of internal controls, doing so would have significantly increased the costs of regulatory compliance for those insurers and HMOs required to comply with §7.88(m). Section 7.88(m) does not mandate a specific framework for management's review and evaluation of internal controls. Instead, §7.88(m) provides flexibility in meeting the management report requirements imposed in the subsection in the most cost effective means and is modeled after and consistent with Section 16 of the NAIC Model Audit Rule, as updated in 2006. Under §7.88(m)(8), management, when making its assessment and preparing its report, has discretion and flexibility about the nature of the internal control framework used. Certain guidance, however, is provided in the NAIC implementation guide to the 2006 revised Model Audit Rule. As explained on page G-14 of the implementation guide, (i) insurers and HMOs have discretion and flexibility under §7.88(m) about the frequency and scope of testing activities; and (ii) the controls included in the scope of management's report should only include those controls deemed significant or critical by management. Page G-14 also includes a non-exhaustive, illustrative list

of examples of aspects and components of internal control that insurers and HMOs may want to consider when making assertions and determining relevant documentary evidence; the list of examples is not intended to serve as requirements. Page G-15 of the NAIC implementation guide further provides that management may also consider diligent inquiry of key process owners throughout the organization to provide additional assurance on the operating effectiveness of its internal control over financial reporting. For purposes of filing the report, "diligent inquiry" means conducting a search and thorough review of relevant documents that are reasonably likely to contain significant information with regard to internal control over financial reporting and the making of reasonable inquiries of current employees and agents whose duties include responsibility for internal control over financial reporting.

Furthermore, to allow insurers and HMOs to comply with §7.88(m) in a cost effective manner, §7.88(m)(7) provides that management may base its assertions, in part, upon its review, monitoring, and testing processes performed in the normal course of its activities. Also, as explained in the Introduction of the published proposal, new §7.88(m)(7) and (8) do not expressly require that an insurer's or HMO's management follow a specific or prescribed protocol in documenting the basis for management's opinions, but do expressly acknowledge and authorize an insurer's or HMO's management to exercise discretion and flexibility about the nature and extent of the §7.88(m)(7) documentation. This approach will enable the insurer or HMO management to form its opinions in a cost-effective manner, including an assembly of or reference to existing documentation.

Comment: Three commenters raise concerns related to the cost to comply with proposed §7.88(m). These commenters request that TDI and the Texas Health and Human Services Commission (HHSC) exempt Medicaid and Children's Health Insurance Program (CHIP) health maintenance organizations (HMOs) from complying with the requirement in §7.88(m) to prepare and file a management's report of internal control over financial reporting. Two of these commenters disagree with the Department's fiscal note for the published proposal, which states, in relevant part, that ". . .there will be no fiscal implications for state or local government as a result of this section. . . ." These commenters contend that while the fiscal note may be true for TDI in overseeing and administering this new requirement, it is not true for HHSC which is responsible for funding and payment of Medicaid and CHIP premiums to its contracted HMOs. These commenters argue that the incremental cost of implementing the new reporting requirement will ultimately be incurred by the State of Texas since the premiums they receive from the State of Texas must cover all of their admitted administrative costs. These two commenters also contend that the incremental cost of implementing the reporting requirement would be outside consulting firm costs and management and employee time. One of these two commenters estimates it could incur $144,000 - 184,000 in consulting costs in the initial year to comply and invest 3,300 - 4,475 hours of management and employee time in the first year of this initiative, for a total expected first year cost of $471,000 - $620,000. The second commenter states that based on estimates from outside consulting firms, it believes it would incur over $100,000 in consulting costs in the initial year to comply and invest 2,000 - 3,300 hours of management and employee time in the first year of this initiative, for a total expected first year implementation cost of $200,000 - $400,000. These commenters further state that if the exemption cannot be granted, that HHSC reconsider the $1 per member per month administrative cost reduction that was applied in State Fiscal Year 2011 rating setting methodology so that Medicaid and CHIP plans have adequate premium to cover the anticipated administrative cost to implement these new regulations. Two of these commenters also request that the two-year transition period in §7.88(n)(2) for filing the management report on internal control be clarified to apply to insurers and HMOs that exceed the $500 million premium threshold for the first time in 2010. One of these commenters requests clarification as to the exact date that the first management report on internal control would be required to be filed with the Department, assuming that the Department agrees to make the requested clarification to §7.88(n)(2).

Agency Response: The Department disagrees that its fiscal note for the proposal incorrectly estimates the fiscal implications for the state or local governments, and declines to adopt the commenters' suggested change to add an exemption in §7.88(m) for Medicaid and CHIP HMOs for several reasons. In order to explain the Department's reasons for declining to add the suggested exemption to §7.88(m) for Medicaid and CHIP HMOs, it is necessary to review the Department's cost note. First, the Department's published cost note clearly and unambiguously points out that any elective costs, such as outside consulting costs, are not required to implement the §7.88(m) reporting requirements. The cost note states that while the Department anticipates that some insurers or HMOs may elect at their option to utilize external accounting firms to assist in preparing the management reports required by proposed new §7.88(m)(1) or (2) and (3), (4), (5), (6), and (8), these rule provisions, unlike SOX Section 404, do not require that an insurer's or HMO's external accountant assist in either preparing the management report or in providing an attestation report on the effectiveness of the internal controls over financial reporting. Section 7.88(m) specifically requires management to prepare the report. Because the §7.88(m) reporting requirements do not require an insurer or HMO to use an external accounting firm in preparing the management report, any insurer or HMO that uses an external accounting firm would do so at its option, and any such costs incurred by the insurer or HMO would be elective costs. Such costs would not be considered a required cost to comply with §7.88(m). Therefore, to the extent HHSC ever increased premium payments to Medicare and CHIP HMOs based upon any incurred elective consulting costs to prepare the §7.88(m) management report, the resulting costs to state government would not be incurred as a result of enforcing or administering adopted §7.88 but would rather result from the election by the Medicare and CHIP HMOs to employ an external accounting firm. Second, the Department's cost note states that the probable costs of compliance with proposed §7.88(m) typically can be implemented with existing staff. The cost note points out that because management is directly responsible for preparing the report and making the attestation in the report, the Department anticipates that most insurers or HMOs typically will utilize their own staff to prepare the §7.88(m) management report on internal controls. The cost note further explains that although the project may require a substantial amount of time for completion, the Department anticipates that the insurer's or HMO's staff will typically be able to concurrently engage in their routine functions and prepare the required report. Therefore, an insurer or HMO, including a Medicaid or CHIP HMO, is not expected to incur additional expenses to hire additional staff to comply with the proposed §7.88(m) reporting requirements. Third, the Department's cost note explains that prudently operated insurers or HMOs often will incur comparatively less costs to comply with

proposed new §7.88(m)(1) or (2), and (3), (4), (5), (6), and (8) compared to less prudently operated insurers or HMOs. Prudently operated entities typically will already have an adequate system of internal controls in place and will therefore not need to incur substantial costs for compliance with the proposed new §7.88(m)(1) or (2) and (3) - (8) internal control requirements. Therefore, any prudently operated insurer or HMO, including Medicaid and CHIP HMOs, should not incur substantial costs to prepare and file the management report of internal control over financial reporting. Fourth, the Department's cost note states that proposed new §7.88(m)(8) expressly acknowledges and authorizes an insurer's or HMO's management to utilize its discretion about the nature of the internal control framework used and the nature and extent of the §7.88(m)(7) documentation to enable the insurer or HMO management to form its opinions in a cost-effective manner. Section 7.88(m)(7) and (8) together allow an insurer or HMO to exercise discretion and flexibility in determining its means of compliance, including the most cost-effective means for that particular insurer or HMO. Fifth, insurers and HMOs, including CHIP or Medicaid HMOs, that are subject to the §7.88(m) reporting requirements could make written application to the Commissioner for a hardship exemption to the §7.88(m) reporting requirement in accordance with the provisions of the Insurance Code §401.008. Section 401.008(b) provides that subject to §401.008(c), the Commissioner may grant an exemption if the Commissioner finds, after reviewing the application, that compliance with this subchapter would constitute a severe financial or organizational hardship for the insurer or health maintenance organization. Whether a particular insurer or HMO is granted an exemption under §401.008(b) is a case-by-case, fact specific determination. Because §401.008(b) already provides a means for an insurer or HMO to apply to the Commissioner for a hardship exemption to the §7.88(m) reporting requirements, it is not necessary to exempt all Medicare or CHIP HMOs from the §7.88(m) reporting requirements.

With regard to the commenters' estimated costs for compliance with the proposed §7.88(m) requirement to prepare and file a management's report of internal control over financial reporting, the Department disagrees that an insurer or HMO is required to incur such costs to comply with the §7.88(m) reporting requirement. As previously explained, the §7.88(m) reporting requirements do not require an insurer or HMO to use an external accounting firm in preparing the management report; any insurer or HMO that uses an external accounting firm would do so at its option, and any such costs incurred by the insurer or HMO would be elective costs. In addition, as previously explained in detail, the Department anticipates that the insurer's or HMO's staff will typically be able to concurrently engage in their routine functions and prepare the required report at no additional expense to the insurer or HMO.

Therefore, because an insurer or HMO, including a CHIP or Medicaid HMO, can use existing staff and resources to comply with the proposed §7.88(m) reporting requirements in the most cost-effective, prudent manner for that particular insurer and HMO, and because the rules provide for the application for a hardship exemption to the 7.88(m) requirements, the Department declines to adopt the commenters' suggested change to add an exemption in §7.88(m) for Medicaid and CHIP HMOs.

In order to address the questions and concerns raised by the commenters relating to the cost to comply with proposed §7.88(m) and the applicability of the two-year transition period in proposed §7.88(n)(2) for filing the management report on internal control, the Department has changed the transition period in proposed §7.88(n) to provide that insurers and HMOs that reach the $500 million premium transition threshold for the first time for the reporting period ending December 31, 2010, will have a two-year transition period to comply with §7.88(m). Section 7.88(n)(2) as adopted provides that "An insurer or HMO required to file an audited financial report under the Insurance Code Chapter 401, Subchapter A, and this section that has annual direct written and assumed premiums, excluding premiums reinsured with the Federal Crop Insurance Corporation and the National Flood Insurance Program, of $500 million or more for the reporting period ending December 31, 2010, and that has not had total written premium at the $500 million or more premium threshold amount in any prior calendar year reporting periods must comply with the reporting requirements in subsection (m) of this section no later than two years after the year in which the written premium exceeds the threshold amount required to file a report." As a result, if an insurer or HMO required to file an audited financial report reaches the requisite $500 million premium threshold for the first time for the reporting period ending December 31, 2010, and the insurer or HMO continues to meet the premium threshold for the reporting periods ending December 31, 2011, and December 31, 2012, the insurer or HMO will be required to file a report effective December 31, 2012, with the §7.88(j) communication of internal control matters noted in the audit not later than the 60th day after the date the audited financial report is filed. Assuming that the insurer or HMO is required to file the audited financial report no later than June 30, 2013, pursuant to §7.88(d)(2), the report would be due no later than August 29, 2013.

Section 7.88(n)(2) as proposed is re-designated as §7.88(n)(3) in this adoption as a result of this change in the transition period with one nonsubstantive change to the proposed text to add the word "required" between the word "amount" and the phrase "to file the report." Section 7.88(n)(3) as adopted specifies the transition period for an insurer or HMO or group of insurers or HMOs with less than the requisite premium threshold amount for the reporting period ending December 31, 2010, but that exceeds the required premium threshold amount in a subsequent reporting period.

NAMES OF THOSE COMMENTING FOR AND AGAINST THE PROPOSAL.

For: American Council of Life Insurers.

Neither for nor against: Texas Association of Life and Health Insurers and Mitchell, Williams, Long, Burner.

Neither for nor against, with changes: Cook Children's Health Plan, Texas Children's Health Plan, Inc., and Parkland Community Health Plan, Inc.

STATUTORY AUTHORITY. The new section is adopted under the Insurance Code Chapters 32, 401, 404, 421, 441, 541, 801, 802, 822, 823, 841, 843, and 884, and §36.001. Section 32.041 requires the Department to furnish to the companies required to report to the Department the statement blanks and other reporting forms necessary for companies to comply with the filing requirements.

Chapter 401 regulates solvency. Section 401.001 defines the terms "accountant," "affiliate," "health maintenance organization," "insurer," and "subsidiary" that are used in the Insurance Chapter 401, Subchapter A. Section 401.004(a) provides that unless exempt under the Insurance Code §§401.006, 401.007, or 401.008 and except as otherwise provided by §401.005 and §401.016, an insurer or health maintenance organization must

have an annual audit performed by an accountant and must file an audited financial report for the preceding calendar year with the Commissioner on or before June 30. Section 401.004(b) authorizes the Commissioner to require an insurer or health maintenance organization to file an audited financial report on a date that precedes June 30 and requires the Commissioner to notify the insurer or health maintenance organization of the filing date not later than the 90th day before that filing date. Section 401.004(c) authorizes an insurer or health maintenance organization to request an extension of the filing date for the audited financial report, under certain specified conditions, including submitting the request in writing before the 10th day preceding the filing date. Section 401.005 provides that an insurer or health maintenance organization domiciled in Canada or the United Kingdom may file the insurer's or health maintenance organization's annual statement of total business on the form filed by the insurer or health maintenance organization with the appropriate regulatory authority in the country of domicile; this is in lieu of filing the audited financial report required by the Insurance Code §401.004 and only if certain specified conditions are met. Section 401.006 provides exemptions from the requirement to file an audited financial report for insurers or health maintenance organizations that have less than $1 million in direct premiums written in this state during a calendar year and that meet certain specified conditions. Section 401.007 provides exemptions from the requirement to file an audited financial report under the Insurance Code Chapter 401, Subchapter A, for an alien or foreign insurer or health maintenance organization that files an audited financial report in another state in accordance with that state's requirements for audited financial reports if the Commissioner finds that the other state's requirements are substantially similar to the requirements prescribed by Chapter 401, Subchapter A. Section 401.008 allows an insurer or health maintenance organization that is not eligible for an exemption under the Insurance Code §401.006 or §401.007 to apply to the Commissioner for a hardship exemption and authorizes the Commissioner to grant the application under certain specified conditions. Section 401.009(a) - (c) specifies the contents of an audited financial report required under the Insurance Code §401.004. The contents must include (i) a description of the financial condition of the insurer or health maintenance organization as of the end of the most recent calendar year and the results of the insurer's or health maintenance organization's operations, changes in financial position, and changes in capital and surplus for that year; (ii) the report of an accountant; (iii) a balance sheet that reports admitted assets, liabilities, capital, and surplus; (iv) a statement of gain or loss from operations; (v) a statement of cash flows; (vi) a statement of changes in capital and surplus; (vii) any notes to financial statements; (viii) supplementary data and information, including any additional data or information required by the Commissioner; and (ix) information required by the Department to conduct the insurer's or health maintenance organization's examination under the Insurance Code Chapter 401, Subchapter B. Section 401.009(b) specifies the contents of the notes to financial statements required by §401.009(a)(3)(F), including (i) a reconciliation of any differences between the filed audited statutory financial statements and the annual statements with a written description of the nature of those differences; (ii) any notes required by the appropriate National Association of Insurance Commissioners annual statement instructions or by generally accepted accounting principles; and (iii) a summary of the ownership of the insurer or health maintenance organization and that entity's relationship to any affiliated company. Section 401.009(d) requires the Commissioner to adopt rules governing the information required to be included in the audited financial report under the Insurance Code §401.009(a)(3)(H). Section 401.010(a) requires an accountant to audit the financial reports provided by an insurer or health maintenance organization for purposes of an audit under the Insurance Code Chapter 401, Subchapter A. Section 401.010(a) further requires the accountant who audits the reports to conduct the audit in accordance with generally accepted auditing standards or with standards adopted by the Public Company Accounting Oversight Board, as applicable. The accountant is required to consider the standards specified in the Financial Condition Examiner's Handbook adopted by the National Association of Insurance Commissioners or other analogous nationally recognized standards adopted by Commissioner rule. Section 401.010(b) requires the financial statements included in the audited financial report to be prepared in a form and using language and groupings substantially the same as those of the relevant sections of the insurer's or health maintenance organization's annual statement filed with the Commissioner. Section 401.010(b) further requires that beginning in the second year in which an insurer or health maintenance organization is required to file an audited financial report, the financial statements must also be comparative, presenting the amounts as of December 31 of the reported year and the amounts as of December 31 of the preceding year. Section 401.011(a) provides that except as provided by §401.011(c) and (d), the Commissioner shall accept an audited financial report from an independent certified public accountant or accounting firm that (1) is a member in good standing of the American Institute of Certified Public Accountants and is in good standing with all states in which the accountant or firm is licensed to practice, as applicable; and (2) conforms to the American Institute of Certified Public Accountants Code of Professional Conduct and to the rules of professional conduct and other rules of the Texas State Board of Public Accountancy or a similar code. Section 401.011(d) provides that the Commissioner may not accept an audited financial report prepared wholly or partly by an individual or firm that the Commissioner finds (1) has been convicted of fraud, bribery, a violation of the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. §1961 et seq.), or a state or federal criminal offense involving dishonest conduct; (2) has violated the insurance laws of this state with respect to a report filed under the Insurance Code Chapter 401, Subchapter A; (3) has demonstrated a pattern or practice of failing to detect or disclose material information in reports filed under this subchapter; or (4) has directly or indirectly entered into an agreement of indemnity or release of liability regarding an audit of an insurer. Section 401.012 provides that the Commissioner may hold a hearing to determine if an accountant is qualified and independent. Section 401.012 further provides that if, after considering the evidence presented, the Commissioner determines that an accountant is not qualified and independent for purposes of expressing an opinion on the financial statements in an audited financial report filed under this subchapter, the Commissioner shall issue an order directing the insurer or health maintenance organization to replace the accountant with a qualified and independent accountant. Section 401.013 mandates that the audited financial report required under the Insurance Code §401.004 must be accompanied by a letter provided by the accountant who performed the audit stating (1) the accountant's general background and experience; (2) the experience of each individual assigned to prepare the audit in auditing insurers or health maintenance organizations and whether the individual is an independent certified public

accountant; and (3) that the accountant (A) is properly licensed by an appropriate state licensing authority, is a member in good standing of the American Institute of Certified Public Accountants, and is otherwise qualified under the Insurance Code §401.011; (B) is independent from the insurer or health maintenance organization and conforms to the standards of the profession contained in the American Institute of Certified Public Accountants Code of Professional Conduct, the statements of that institute, and the rules of professional conduct adopted by the Texas State Board of Public Accountancy, or a similar code; (C) understands that (i) the audited financial report and the accountant's opinion on the report will be filed in compliance with the Insurance Code Chapter 401, Subchapter A; and (ii) the Commissioner will rely on the report and opinion in monitoring and regulating the insurer's or health maintenance organization's financial position; and (D) consents to the requirements of the Insurance Code §401.020 and agrees to make the accountant's work papers available for review by the Department or the Department's designee. Section 401.014(a) requires an insurer or health maintenance organization to register in writing with the Commissioner the name and address of the accountant retained to prepare the audited financial report for the insurer or health maintenance organization. Section 401.014(d) provides that the Commissioner may not accept the registration of a person who does not qualify under the Insurance Code §401.011 or does not comply with the other requirements of the Insurance Code Chapter 401, Subchapter A. Section 401.016 provides that an insurer or health maintenance organization described by §401.001(3) or (4) that is required to file an audited financial report may apply in writing to the Commissioner for approval to file audited combined or consolidated financial statements instead of separate audited financial reports if the insurer or health maintenance organization meets certain statutorily specified conditions. Section 401.017(a) requires an insurer or health maintenance organization required to file an audited financial report under the Insurance Code Chapter 401, Subchapter A, to require the insurer's or health maintenance organization's accountant to immediately notify the board of directors of the insurer or health maintenance organization or the insurer's or health maintenance organization's audit committee in writing of any determination by that accountant that the insurer or health maintenance organization has materially misstated the insurer's or health maintenance organization's financial condition as reported to the Commissioner as of the balance sheet date being audited, or that the insurer or health maintenance organization does not meet the minimum capital and surplus requirements prescribed by the Insurance Code for the insurer or health maintenance organization as of that date. Section 401.018 provides that if, after the date of an audited financial report filed under the Insurance Code Chapter 401, Subchapter A, the accountant becomes aware of facts that might have affected the report, the accountant must take action as prescribed in Volume 1, AU Section 561, Professional Standards of the American Institute of Certified Public Accountants. Section 401.019 provides that in addition to the audited financial report required by the Insurance Code Chapter 401, Subchapter A, each insurer or health maintenance organization shall provide to the Commissioner a written report of significant deficiencies required and prepared by an accountant in accordance with the Professional Standards of the American Institute of Certified Public Accountants; and shall annually file with the Commissioner the report required by this section not later than the 60th day after the date the audited financial report is filed. Section 401.019 further provides that the insurer or health maintenance organization shall provide a description of remedial actions taken or proposed to be taken to correct significant deficiencies, if the actions are not described in the accountant's report. Section 401.019 further requires that the report must follow generally the form for communication of internal control structure matters noted in an audit described in Statement on Auditing Standard (SAS) No. 60, AU Section 325, Professional Standards of the American Institute of Certified Public Accountants. New §7.88(j) is consistent with the new SAS No. 112 which supersedes SAS No. 60. Section 401.020(b) requires an insurer or health maintenance organization required to file an audited financial report under the Insurance Code Chapter 401, Subchapter A, to require the insurer's or health maintenance organization's accountant to make available for review by the Department's examiners the work papers and any record of communications between the accountant and the insurer or health maintenance organization relating to the accountant's audit that were prepared in conducting the audit. Section 401.020(b) further mandates the time periods for the retention of the accountant's work papers and records of communication. Section 401.020(c) authorizes the Department to copy and retain the copies of pertinent work papers when the Department's examiners conduct a review under §401.020(b). Section 401.020(c) also provides that the review is considered an investigation, and work papers obtained during that investigation may be made confidential by the Commissioner, unless the work papers are admitted as evidence in a hearing before a governmental agency or in a court. Section 401.021 provides that if an insurer or health maintenance organization fails to comply with the Insurance Code Chapter 401, Subchapter A, the Commissioner shall order that the insurer's or health maintenance organization's annual audit be performed by a qualified independent certified public accountant and authorizes the Commissioner to assess against the insurer or health maintenance organization the cost of auditing the insurer's or health maintenance organization's financial statement. Sections 401.051 and 401.056 mandate that the Department examine the financial condition of each insurer or health maintenance organization organized under the laws of Texas or authorized to transact the business of insurance in Texas. Section 401.056 requires the Commissioner to adopt rules relating to procedures governing the filing and adoption of an examination report and hearings to be held under the Insurance Code, Chapter 401, Subchapter B (Examination of Insurers or HMOs).

Chapter 404 addresses the duties of the Department when an insurer's condition might indicate it is in a hazardous condition or when an insurer's solvency is impaired. Chapter 404 authorizes the Commissioner to set standards for evaluating the financial condition of an insurer. Section 404.003(a) authorizes the Commissioner to order an insurer, after notice and hearing, to take action reasonably necessary to remedy the condition if the financial condition of an insurer, when reviewed as provided by §404.003(b), indicates a condition that might make the insurer's continued operation hazardous to the insurer's policyholders or creditors or to the public. Section 404.005(a) authorizes the Commissioner to establish uniform standards and criteria for early warning that the continued operation of an insurer might be hazardous to the insurer's policyholders or creditors or to the public; and standards for evaluating the financial condition of an insurer. Section 404.005(b) requires the standards established by the Commissioner under §404.005(a) to be consistent with the purposes of §404.003. Section 404.053(a) provides that if the Commissioner determines that any of the circumstances described in §404.053(a)(1)(A) or (B) or (a)(2)(A) or (B) exist,

the Commissioner shall order an insurer to remedy an impairment of the insurer's surplus, aggregate surplus, or aggregate of guaranty fund and surplus, as applicable, by bringing the surplus to an acceptable level specified by the Commissioner. Section 404.053(b) requires that, after issuing an order described in §404.053(a), the Commissioner immediately institute any proceeding necessary to determine what further actions the Commissioner will take in relation to the matter.

Chapter 421 addresses the reserves required for an insurer. Section 421.001(c) requires the Commissioner to adopt each current formula recommended by the National Association of Insurance Commissioners for establishing reserves applicable to each line of insurance.

Chapter 441 addresses the prevention of insurer delinquencies. Section 441.001(e) sets forth the purpose of Chapter 441: (i) provide for the rehabilitation and conservation of insurers by authorizing and requiring supervision and conservatorship by the commissioner; (ii) authorize action to determine whether an attempt should be made to rehabilitate and conserve an insurer; (iii) avoid, if possible and feasible, the necessity of placing an insurer under temporary or permanent receivership; (iv) provide for the protection of an insurer's assets pending determination of whether the insurer may be successfully rehabilitated; and (v) alleviate concerns regarding insurance and insurers. Section 441.005 authorizes the Commissioner to adopt reasonable rules as necessary to implement and supplement Chapter 441 of the Insurance Code (Supervision and Conservatorship). Section 441.051 specifies "the circumstances in which an insurer is considered insolvent, delinquent, or threatened with delinquency" and includes certain statutorily specified conditions, including if an insurer's required surplus, capital, or capital stock is impaired to an extent prohibited by law. Section 441.052 specifies the circumstances in which an insurer is considered to have exceeded the insurer's powers, including circumstances in which the insurer is in a condition that makes the insurer's continuation in business hazardous to the public or to the insurer's policyholders or certificate holders. Section 441.053 provides that if at any time the Commissioner determines that an insurer is insolvent, has exceeded the insurer's powers, or has otherwise failed to comply with the law, the Commissioner shall: (i) notify the insurer of that determination; (ii) provide to the insurer a written list of the Commissioner's requirements to abate the conditions on which that determination was based; and (iii) if the Commissioner determines that the insurer requires supervision, notify the insurer that the insurer is under Commissioner's supervision and that the Commissioner is invoking Chapter 441. Section 441.102 requires an insurer under supervision to comply with the Commissioner's requirements under §441.053 not later than the 180th day after the date of the Commissioner's notice of supervision.

Chapter 541 of the Insurance Code addresses unfair methods of competition and unfair or deceptive acts or practices. Section 541.051(3) provides that it is an unfair method of competition or an unfair or deceptive act or practice in the business of insurance to make a misleading representation or misrepresentation regarding the financial condition of an insurer, or the legal reserve system on which a life insurer operates. Section 541.055(a) provides that it is an unfair method of competition or an unfair or deceptive act or practice in the business of insurance to, with intent to deceive, file with a supervisory or other public official a false statement of financial condition of an insurer; or make, publish, disseminate, circulate, deliver to any person, or place before the public or directly or indirectly cause to be made, published, disseminated, circulated, delivered to any person, or placed before the public a false statement of financial condition of an insurer. Section 541.055(b) provides that it is an unfair method of competition or an unfair or deceptive act or practice in the business of insurance to make a false entry in an insurer's book, report, or statement or willfully omit to make a true entry of a material fact relating to the insurer's business in the insurer's book, report, or statement with intent to deceive an agent or examiner lawfully appointed to examine the insurer's condition or affairs, or a public official to whom the insurer is required by law to report or who has authority by law to examine the insurer's condition or affairs. Section 541.401 authorizes the Commissioner to adopt reasonable rules necessary to accomplish the purposes of trade practices regulation in Chapter 541. Chapter 801 of the Insurance Code addresses regulations related to the certificate of authority of insurers and related entities. Section 801.101 authorizes the Commissioner to inquire into the competence, fitness, or reputation of (i) an officer or director of an insurer; or (ii) a person having control of an insurer. Section 801.102 provides that if after conducting an inquiry under §801.101 the Department determines that, based on substantial evidence, the person who is the subject of the inquiry is not worthy of public confidence, the Department shall, after written notice and hearing (i) deny the application for a certificate of authority; or (ii) revoke the insurer's certificate of authority.

Chapter 802 of the Insurance Code regulates the annual statements of insurers and related entities. Section 802.001 authorizes the Commissioner, as necessary, to obtain an accurate indication of the company's condition and method of transacting business, to change the form of any annual statement required to be filed by any kind of insurance company, and to require certain insurers to make filings with the National Association of Insurance Commissioners. Section 802.002 provides that an insurance company's annual statement must include a statement of a qualified actuary titled "Statement of Actuarial Opinion" that (i) is located on or attached on the first page of the annual statement; and (2) provides the opinion of the actuary relating to policy reserves and other actuarial items for life insurance, accident and health insurance, and annuities, or loss and loss adjustment expense reserves for property and casualty risks as described in the annual statement instructions of the National Association of Insurance Commissioners as appropriate for the types of risks insured. Section 802.052(a) requires each domestic, foreign, or alien insurance company authorized to engage in the business of insurance in this state to file a copy of the company's annual statement with the National Association of Insurance Commissioners at the time the company files the statement with the Commissioner. Section 802.052(b) requires the statement required by §802.052(a) to (1) meet the requirements adopted by the Commissioner, including: (A) a change in substance or form; (B) an additional filing; and (C) any requirement that the statement be in a computer compatible format; and (2) include the signed jurat page and the actuarial opinion, as required by the jurisdiction in which the insurance company is domiciled. Section 802.053 authorizes the Commissioner to exempt any class of insurance companies from the requirements of Chapter 802, Subchapter B, if the Commissioner believes the information required under Subchapter B will not be useful for regulatory purposes. Section 802.054 provides that the Commissioner may consider a foreign insurance company to be in compliance with the requirements of 802.052 if the company is domiciled in a state with a law substantially similar to that section.

Section 822.210 (Commissioner May Require Larger Capital and Surplus Amounts for Insurance Companies Other than Life,

Health, or Accident Insurance Companies), §841.205 (Commissioner May Require Larger Capital and Surplus Amounts for Life, Health, or Accident Insurance Companies), §843.404 (Additional Net Worth Requirements for Health Maintenance Organizations), and §884.206 (Commissioner May Require Larger Capital and Surplus Amounts for Stipulated Premium Insurance Companies) authorize the Commissioner to adopt rules to require an insurer to maintain capital and surplus levels in excess of statutory minimum levels or an HMO to maintain a specified net worth to assure financial solvency of insurers or HMOs for the protection of policyholders and insurers or enrollees and HMOs, as applicable. Section 822.211 provides that if an insurance company does not comply with the capital and surplus requirements of Chapter 822, the Commissioner may (i) enter an order prohibiting the company from writing new business and placing the company under state supervision or conservatorship; (ii) declare the company to be in a hazardous condition as provided by Subchapter A, Chapter 404; (iii) declare the company to be impaired as provided by Subchapter B, Chapter 404; or (iv) apply to the company any other applicable sanction as provided by the Insurance Code. Section 841.207 provides that if an insurance company does not comply with the capital and surplus requirements of Chapter 841, the Commissioner may (i) enter an order prohibiting the company from writing new business and placing the company under state supervision or conservatorship; (ii) declare the company to be in a hazardous condition as provided by Subchapter A, Chapter 404; (iii) declare the company to be impaired as provided by Subchapter B, Chapter 404; or (iv) apply to the company any other applicable sanction as provided by the Insurance Code. Section 841.206 provides that if the Commissioner determines that an insurance company's capital or surplus is impaired in violation of §841.206, the Commissioner shall order the insurer to immediately reduce the level of impairment to an acceptable level of impairment as specified by the Commissioner or prohibit the company from engaging in the business of insurance in this state, and begin proceedings as necessary to determine any further actions with respect to the impairment.

Section 823.157 (Approval of Acquisition of Control of Holding Company Systems) requires the Commissioner to consider, in determining whether to approve or deny an acquisition for change of control for which a Subchapter E statement is filed under §823.154, whether (i) immediately on the acquisition or change of control, the domestic insurer would not be able to satisfy the requirements for the issuance of a new certificate of authority to write the line or lines of insurance for which the insurer holds a certificate of authority; (ii) the effect of the acquisition or change of control would be to substantially lessen competition in any line or sub-classification lines of insurance in this state or tend to create a monopoly in a line or sub-classification lines of insurance in this state; (iii) the financial condition of the acquiring person may jeopardize the financial stability of the domestic insurer or prejudice the interest of its policyholders; (iv) the acquiring person has any plan or proposal to liquidate the domestic insurer or cause the insurer to declare dividends or make other distributions, sell any of its assets, consolidate or merge with any person, make a material change in its business or corporate structure or management, or enter into any material agreement, arrangement, or transaction of any kind with any person, and that the plan or proposal is unfair, prejudicial, hazardous, or unreasonable to the domestic insurer's policyholders and not in the public interest; (v) due to a lack of competence, trustworthiness, experience and integrity of the persons who would control the operations of the domestic insurer, the acquisition or change of control would not be in the interest of the insurer's policyholders and of the public; or (vi) the acquisition or change of control would violate the law of this state or another state or the United States.

Chapter 843 of the Insurance Code regulates health maintenance organizations. Section 843.151 authorizes the Commissioner to adopt reasonable rules as necessary to carry out the provisions of Chapter 843, §1367.053 (related to Coverage Required for Childhood Immunization), Subchapter A of Chapter 1452 (Physicians and Provider Credentials); Subchapter B of Chapter 1507 (Health Benefit Plans for Children), Chapters 222 (Life, Health, and Accident Insurance Premium Tax), 251 (General Provisions), and 258 (Health Maintenance Organizations) as applicable to a health maintenance organization, and Chapters 1271 (Benefits Provided by Health Maintenance Organizations; Evidence of Coverage; Charges) and 1272 (Delegation of Certain Functions by Health Maintenance Organizations). Section 843.155 requires HMOs to file annual reports with the Commissioner, which include a financial statement of the HMO, verified by at least two principal officers and certified by an independent public accountant. Section 843.157 provides that the rehabilitation, liquidation, supervision, or conservation of a health maintenance organization shall be treated as a rehabilitation, liquidation, supervision, or conservation of an insurer and be conducted under the supervision of the Commissioner under Chapter 441 or 443, as appropriate. Section 843.406 authorizes the Commissioner to establish, in a manner consistent with the purposes of §843.406, uniform standards and criteria for early warning that the continued operation of a health maintenance organization could be hazardous to the health maintenance organization's enrollees or creditors or the public and standards for evaluating the financial condition of a health maintenance organization.

Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Department under the Insurance Code and other laws of this state.

§7.88. Independent Audits of Insurer and HMO Financial Statements and Insurer and HMO Internal Control over Financial Reporting.

(a) Purpose. The purpose of this section is to improve the Texas Department of Insurance's surveillance of the financial condition of insurers and HMOs by:

(1) specifying the requirements of an annual audit by an accountant of the financial statements reporting the financial condition and the results of operations of each insurer or HMO;

(2) requiring communication of internal control related matters noted in an audit;

(3) requiring an insurer or HMO that is required to file an annual audited financial report under the Insurance Code Chapter 401, Subchapter A, to have an audit committee; and

(4) requiring certain insurer or HMO management to report on internal control over financial reporting.

(b) Applicability.

(1) Except as otherwise specified in this section and in the Insurance Code Chapter 401, Subchapter A, this section applies to insurers and HMOs and takes effect beginning with the annual reporting period ending December 31, 2010, which period is reflected in reports and communications required to be filed with the commissioner during calendar year 2011, and continues in effect each year thereafter.

(2) Subsection (h)(1) of this section, relating to lead audit partner limitation, shall be in effect for audits of the year beginning January 1, 2010, which audits are reflected in reports and communications required to be filed with the commissioner during calendar year 2011, and continues in effect each year thereafter.

(3) Subsection (k) of this section, relating to audit committee requirements, takes effect on September 1, 2010.

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

(1) Accountant--An independent certified public accountant or accounting firm that meets the requirements of the Insurance Code §401.011.

(2) Affiliate--Has the meaning assigned by the Insurance Code §823.003.

(3) Audit committee--A committee established by the board of directors of an entity for the purpose of overseeing the accounting and financial reporting processes of an insurer or HMO or group of insurers or HMOs and audits of financial statements of the insurer or HMO or group of insurers or HMOs. At the election of the controlling person, the audit committee of an entity that controls a group of insurers or HMOs may be the audit committee for one or more of the controlled insurers or HMOs solely for the purposes of this section. If an audit committee is not designated by the insurer or HMO, the insurer's or HMO's entire board of directors constitutes the audit committee.

(4) Audited financial report--The annual audit report required by the Insurance Code Chapter 401, Subchapter A.

(5) Group of insurers or HMOs--Those authorized insurers or HMOs included in the reporting requirements of the Insurance Code Chapter 823, or a set of insurers or HMOs as identified by management, for the purpose of assessing the effectiveness of internal control over financial reporting.

(6) Health maintenance organization (HMO)--A health maintenance organization authorized to engage in business in this state.

(7) Insurer--An insurer authorized to engage in business in this state, including:

(A) a life, health, or accident insurance company;

(B) a fire and marine insurance company;

(C) a general casualty company;

(D) a title insurance company;

(E) a fraternal benefit society;

(F) a mutual life insurance company;

(G) a local mutual aid association;

(H) a statewide mutual assessment company;

(I) a mutual insurance company other than a mutual life insurance company;

(J) a farm mutual insurance company;

(K) a county mutual insurance company;

(L) a Lloyd's plan;

(M) a reciprocal or interinsurance exchange;

(N) a group hospital service corporation;

(O) a stipulated premium company; and

(P) a nonprofit legal services corporation.

(8) Internal control over financial reporting--A process implemented by an entity's board of directors, management, and other personnel designed to provide reasonable assurance regarding the reliability of the entity's financial statements. The term includes policies and procedures that:

(A) relate to the maintenance of records that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of assets;

(B) provide reasonable assurance that:

(i) transactions are recorded as necessary to permit preparation of the financial statements; and

(ii) receipts and expenditures are made only in accordance with authorizations of management and directors; and

(C) provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use, or disposition of assets that could have a material effect on the financial statements.

(9) Management--The management of an insurer or HMO or group of insurers or HMOs subject to this section.

(10) SEC--The United States Securities and Exchange Commission.

(11) Section 404--Section 404, Sarbanes-Oxley Act of 2002 (15 U.S.C. §7262), and rules adopted under that section.

(12) Section 404 report--Management's report on internal control over financial reporting as determined by the SEC and the related attestation report of an accountant.

(13) SOX-compliant entity--An entity that is required to comply with or voluntarily complies with:

(A) the preapproval requirements provided by 15 U.S.C. §78j-1(i);

(B) the audit committee independence requirements provided by 15 U.S.C. §78j-1(m)(3); and

(C) the internal control over financial reporting requirements provided by 15 U.S.C. §7262(b) and Item 308, SEC Regulation S-K.

(14) Subsidiary--Has the meaning assigned by the Insurance Code §823.003.

(d) Filing and Extensions for Filing of Audited Financial Report.

(1) Except as provided in paragraphs (2), (3), and (4) of this subsection, an insurer or HMO that is required to have an annual audit performed by an accountant and to file an audited financial report with the commissioner under the Insurance Code Chapter 401, Subchapter A, shall file the audited financial report with the commissioner on or before June 1 for the preceding calendar year.

(2) Except as provided in paragraphs (3) and (4) of this subsection, an insurer or HMO that, along with any affiliated insurers or HMOs, is licensed in and does business only in Texas shall file the audited financial report with the commissioner on or before June 30 for the preceding calendar year. This paragraph does not apply to an insurer or HMO that is a member of a group comprised of one or more insurers or HMOs authorized and actually doing the business of insurance in another state that requires that an audited financial report be filed on or before June 1 for the preceding calendar year.

(3) In accordance with the Insurance Code §401.004(b), the commissioner may require an insurer or HMO to file an audited financial report on a date that precedes the June 1 deadline in paragraph (1) of this subsection or the June 30 deadline in paragraph (2) of this subsection. The commissioner must notify the insurer or HMO of the filing date not later than the 90th day before that date.

(4) The commissioner may grant an extension of the filing date in accordance with the Insurance Code §401.004(c). An extension granted under the Insurance Code §401.004(c), relating to the filing date for an audited financial report, also applies to the filing of management's report on internal control over financial reporting required under subsection (m) of this section.

(5) An insurer or HMO required to file an annual audited financial report under the Insurance Code Chapter 401, Subchapter A, and this section shall designate a group of individuals to serve as its audit committee. The audit committee of an entity that controls an insurer or HMO may, at the election of the controlling person, be the insurer's or HMO's audit committee for purposes of this section.

(e) Exemption for Certain Foreign or Alien Insurers or HMOs.

(1) A foreign or alien insurer or HMO exempt under the Insurance Code §401.007(a) shall file with the commissioner a copy of:

(A) the audited financial report and the accountant's letter of qualifications filed with the insurer's or HMO's state of domicile at the same time these documents are filed with the state of domicile;

(B) the communication of internal control-related matters noted in the audit that is substantially similar to the communication required under subsection (j) of this section, not later than the 60th day after the date the copy of the audited financial report and accountant's letter of qualifications are filed with the commissioner; and

(C) any notification of adverse financial conditions report filed with the other state, in accordance with the filing date prescribed by the Insurance Code §401.017.

(2) A foreign or alien insurer or HMO required to file management's report of internal control over financial reporting in another state is exempt from filing the report in this state under subsection (m)(1) of this section if the other state has substantially similar reporting requirements and the report is filed with the commissioner in that state in the time specified.

(f) Requirements for Financial Statements in Audited Financial Report. The financial statements included in the audited financial report must be prepared in a form and use language and groupings substantially the same as the relevant sections of the annual statement of the insurer or HMO filed with the commissioner. The financial statements must be comparative, including amounts on December 31 of the current year and amounts as of the immediately preceding December 31, except for the first year in which an insurer or HMO is required to file the report.

(g) Scope of Audit and Report of Accountant. An accountant must audit the financial reports provided by an insurer or HMO for purposes of an audit conducted under the Insurance Code Chapter 401, Subchapter A. In addition to complying with the requirements of the Insurance Code §401.010, the accountant shall obtain an understanding of internal control sufficient to plan the audit, in accordance with "Consideration of Internal Control in a Financial Statement Audit," AU Section 319, Professional Standards of the American Institute of Certified Public Accountants. To the extent required by AU Section 319, for those insurers or HMOs required to file a management's report of internal control over financial reporting under subsection (m) of this section, the accountant shall consider the most recently available report in planning and performing the audit of the statutory financial statements. In this subsection, "consider" has the meaning assigned by Statement on Auditing Standards No. 102, "Defining Professional Requirements in Statements on Auditing Standards," or a successor document.

(h) Qualifications and Independence of Accountant; Acceptance of Audited Financial Report. Except as provided by the Insurance Code §401.011(b) and (d), and paragraphs (1), (3), (4), (5), and (10) of this subsection, the commissioner shall accept an audited financial report from an independent certified public accountant or accounting firm that is a member in good standing of the American Institute of Certified Public Accountants; is in good standing with all states in which the accountant or firm is licensed to practice, as applicable; and conforms to the American Institute of Certified Public Accountants Code of Professional Conduct and to the rules of professional conduct and other rules of the Texas State Board of Public Accountancy or a similar code.

(1) A lead partner or other person responsible for rendering an audited financial report for an insurer or HMO may not act in that capacity for more than five consecutive years and may not, during the five-year period after that fifth year, render an audited financial report for the insurer or HMO or for a subsidiary or affiliate of the insurer or HMO that is engaged in the business of insurance. On application made at least 30 days before the end of the calendar year, the commissioner may determine that the limitation provided by this paragraph does not apply to an accountant for a particular insurer or HMO if the insurer or HMO demonstrates to the satisfaction of the commissioner that the limitation's application to the insurer or HMO would be unfair because of unusual circumstances. In making the determination, the commissioner may consider:

(A) the number of partners or individuals the accountant employs, the expertise of the partners or individuals the accountant employs, or the number of the accountant's insurance clients;

(B) the premium volume of the insurer or HMO; and

(C) the number of jurisdictions in which the insurer or HMO engages in business.

(2) On filing its annual statement, an insurer or HMO for which the commissioner has approved an exemption under paragraph (1) of this subsection shall file the approval with the states in which it is doing business or is authorized to do business and with the National Association of Insurance Commissioners. If a state other than this state accepts electronic filing with the National Association of Insurance Commissioners, the insurer or HMO shall file the approval in an electronic format acceptable to the National Association of Insurance Commissioners.

(3) In providing services, the accountant shall not:

(A) function in the role of management, audit the accountant's own work, or serve in an advocacy role for the insurer or HMO; or

(B) directly or indirectly enter into an agreement of indemnity or release from liability regarding the audit of the insurer or HMO.

(4) The commissioner may not recognize as qualified or independent an accountant, or accept an annual audited financial report that was prepared wholly or partly by an accountant, who provides an insurer or HMO at the time of the audit:

(A) bookkeeping or other services related to the accounting records or financial statements of the insurer or HMO;

(B) services related to financial information systems design and implementation;

(C) appraisal or valuation services, fairness opinions, or contribution-in-kind reports;

(D) actuarially oriented advisory services involving the determination of amounts recorded in the financial statements;

(E) internal audit outsourcing services;

(F) management or human resources services;

(G) broker or dealer, investment adviser, or investment banking services;

(H) legal services or other expert services unrelated to the audit; or

(I) any other service that the commissioner determines to be inappropriate.

(5) Notwithstanding paragraph (4)(D) of this subsection, an accountant may assist an insurer or HMO in understanding the methods, assumptions, and inputs used in the determination of amounts recorded in the financial statement if it is reasonable to believe that the advisory service will not be the subject of audit procedures during an audit of the insurer's or HMO's financial statements. An accountant's actuary may also issue an actuarial opinion or certification on an insurer's or HMO's reserves if:

(A) the accountant or the accountant's actuary has not performed management functions or made any management decisions;

(B) the insurer or HMO has competent personnel, or engages a third-party actuary, to estimate the reserves for which management takes responsibility; and

(C) the accountant's actuary tests the reasonableness of the reserves after the insurer's or HMO's management has determined the amount of the reserves.

(6) An insurer or HMO that has direct written and assumed premiums of less than $100 million in any calendar year may request an exemption from the requirements of paragraph (4) of this subsection by filing with the commissioner a written statement explaining why the insurer or HMO should be exempt. The commissioner may grant the exemption if the commissioner finds that compliance with paragraph (4) of this subsection would impose an undue financial or organizational hardship on the insurer or HMO.

(7) An accountant who performs an audit may perform non-audit services, including tax services, that are not described in paragraph (4) of this subsection or that do not conflict with paragraph (3) of this subsection, only if the activity is approved in advance by the audit committee in accordance with paragraph (8) of this subsection.

(8) The audit committee must approve in advance all auditing services and non-audit services that an accountant provides to the insurer or HMO. The prior approval requirement is waived with respect to non-audit services if the insurer or HMO is a SOX-compliant entity or a direct or indirect wholly owned subsidiary of a SOX-compliant entity or:

(A) the aggregate amount of all non-audit services provided to the insurer or HMO is not more than five percent of the total amount of fees paid by the insurer or HMO to its accountant during the fiscal year in which the non-audit services are provided;

(B) the services were not recognized by the insurer or HMO at the time of the engagement to be non-audit services; and

(C) the services are promptly brought to the attention of the audit committee and approved before the completion of the audit by the audit committee or by one or more members of the audit committee who are the members of the board of directors to whom the audit committee has delegated authority to grant approvals.

(9) The audit committee may delegate to one or more designated members of the audit committee the authority to grant the prior approval required by paragraph (7) of this subsection. The decisions of any member to whom this authority is delegated shall be presented to the full audit committee at each of its scheduled meetings.

(10) The commissioner may not recognize an accountant as qualified or independent for a particular insurer or HMO if a member of the board, the president, chief executive officer, controller, chief financial officer, chief accounting officer, or any individual serving in an equivalent position for the insurer or HMO, was employed by the accountant and participated in the audit of that insurer or HMO during the one-year period preceding the date on which the most current statutory opinion is due. This paragraph applies only to partners and senior managers involved in the audit. An insurer or HMO may apply to the commissioner for an exemption from the requirements of this paragraph on the basis of unusual circumstances.

(11) The commissioner shall not accept an audited financial report prepared wholly or partly by an individual or firm who the commissioner finds:

(A) has been convicted of fraud, bribery, a violation of the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. §1961 et seq.), or a state or federal criminal offense involving dishonest conduct;

(B) has violated the insurance laws of this state with respect to a report filed under the Insurance Code Chapter 401, Subchapter A, or this section;

(C) has demonstrated a pattern or practice of failing to detect or disclose material information in reports filed under the Insurance Code Chapter 401, Subchapter A, or this section; or

(D) has directly or indirectly entered into an agreement of indemnity or release of liability regarding an audit of an insurer.

(12) The insurer or HMO shall file, with its annual statement filing, the approval of an exemption granted under paragraph (6) or (10) of this subsection with the states in which it does business or is authorized to do business and with the National Association of Insurance Commissioners. If a state, other than this state, in which the insurer or HMO does business or is authorized to do business accepts electronic filing, the insurer or HMO shall file the approval in an electronic format acceptable to the National Association of Insurance Commissioners.

(i) Accountant's Letter of Qualifications. The audited financial report required under the Insurance Code §401.004 must be accompanied by a letter, provided by the accountant who performed the audit, that includes the representations and statements required under the Insurance Code §401.013, and a representation that the accountant is in compliance with the requirements specified in subsection (h) of this section.

(j) Communication of Internal Control Matters Noted in Audit.

(1) In addition to the audited financial report required by the Insurance Code Chapter 401, Subchapter A, and this section, each insurer or HMO shall provide to the commissioner a written communication prepared by an accountant in accordance with the Professional Standards of the American Institute of Certified Public Accountants that describes any unremediated material weaknesses in its internal

controls over financial reporting noted during the audit. The insurer or HMO shall annually file with the commissioner the communication required by this subsection not later than the 60th day after the date the audited financial report is filed. The communication must contain a description of any unremediated material weaknesses, as defined by Statement on Auditing Standards No. 112, "Communicating Internal Control Related Matters Identified in an Audit," or a successor document, as of the immediately preceding December 31, in the insurer's or HMO's internal control over financial reporting that was noted by the accountant during the course of the audit of the financial statements. The communication must affirmatively state if unremediated material weaknesses were not noted by the accountant.

(2) The insurer or HMO shall also provide a description of remedial actions taken or proposed to be taken to correct unremediated material weaknesses, if the actions are not described in the accountant's communication.

(k) Requirements for Audit Committees.

(1) This subsection does not apply to the following:

(A) a foreign or alien insurer or HMO;

(B) an insurer or HMO that is a SOX-compliant entity;

(C) an insurer or HMO that is a direct or indirect wholly owned subsidiary of a SOX-compliant entity; or

(D) a non-stock insurer that is under the direct or indirect control of a SOX-compliant entity, including pursuant to the terms of an exclusive management contract.

(2) Except as provided in paragraphs (1) and (3) of this subsection, an insurer or HMO to which the Insurance Code Chapter 401, Subchapter A, applies shall establish an audit committee conforming to the following criteria:

(A) an insurer or HMO with over $500 million in direct written and assumed premiums for the preceding calendar year shall establish an audit committee with an independent membership of at least 75 percent;

(B) an insurer or HMO with $300 million to $500 million in direct written and assumed premiums for the preceding calendar year shall establish an audit committee with an independent membership of at least 50 percent; and

(C) except as provided in paragraph (3) of this subsection, an insurer with less than $300 million in direct and assumed premiums for the preceding calendar year is not required to comply with the independence requirements in this subsection for its audit committee.

(3) Notwithstanding subsection (k)(1) and (9) of this section, the commissioner may require the insurer's or HMO's board to enact improvements to the independence of the audit committee membership if the insurer or HMO:

(A) is in a risk-based capital action level event, as described by or provided in the Insurance Code Chapters 822, 841, 843, or 884 or rules adopted thereunder, including §7.402 of this chapter (relating Risk-Based Capital and Surplus Requirements for Insurers and HMOs);

(B) meets one or more of the standards of an insurer or HMO considered to be in hazardous financial condition as described by or provided in the Insurance Code Chapter 404, 441, or 843 or rules adopted thereunder, including Chapter 8 of this title (relating to Early Warning System for Insurers in Hazardous Condition) and §11.810 of this title (relating to Harzardous Conditions for HMOs); or

(C) otherwise exhibits qualities of a troubled insurer or HMO.

(4) An insurer or HMO with direct written and assumed premiums, excluding premiums reinsured with the Federal Crop Insurance Corporation and the National Flood Insurance Program, of less than $500 million may apply to the commissioner for a waiver from the requirements of paragraphs (1), (2), and (5) - (12) of this subsection based on hardship. The insurer or HMO shall file, with its annual statement filing, the approval of a waiver under this paragraph with the states in which it does business or is authorized to do business and with the National Association of Insurance Commissioners. If a state other than this state accepts electronic filing, the insurer or HMO shall file the approval in an electronic format acceptable to the National Association of Insurance Commissioners.

(5) In this subsection, direct written and assumed premiums for the preceding calendar year shall be the combined total of direct premiums and assumed premiums from non-affiliates for the reporting entities.

(6) The audit committee is directly responsible for the appointment, compensation, and oversight of the work of any accountant, including the resolution of disagreements between the management of the insurer or HMO and the accountant regarding financial reporting, for the purpose of preparing or issuing the audited financial report or related work under the Insurance Code Chapter 401, Subchapter A, and this section. Each accountant shall report directly to the audit committee.

(7) Each member of the audit committee must be a member of the board of directors of the insurer or HMO or, at the election of the controlling person, a member of the board of directors of an entity that controls the group of insurers or HMOs as provided under paragraph (10) of this subsection and described under subsection (c)(3) of this section.

(8) To be independent for purposes of this subsection, a member of the audit committee may not, other than in his or her capacity as a member of the audit committee, the board of directors, or any other board committee, accept any consulting, advisory, or other compensatory fee from the entity or be an affiliate of the entity or an affiliate of any subsidiary of the entity. To the extent of any conflict with a statute requiring an otherwise non-independent board member to participate in the audit committee, the other statute prevails and controls, and the member may participate in the audit committee unless the member is an officer or employee of the insurer or HMO or an affiliate of the insurer or HMO.

(9) Except as provided in paragraph (3) of this subsection, if a member of the audit committee ceases to be independent for reasons outside the member's reasonable control, the member may remain an audit committee member of the responsible entity, if the responsible entity gives notice to the commissioner, until the earlier of:

(A) the next annual meeting of the responsible entity; or

(B) the first anniversary of the occurrence of the event that caused the member to be no longer independent.

(10) To exercise the election of the controlling person to designate the audit committee under this section, the ultimate controlling person must provide written notice of the affected insurers or HMOs to the commissioner. Notice must be made before the issuance of the statutory audit report and must include a description of the basis for the election. The election may be changed through a notice to the commissioner by the insurer or HMO, which must include a description

of the basis for the change. An election remains in effect until changed by later election.

(11) The audit committee shall require the accountant who performs an audit required by the Insurance Code Chapter 401, Subchapter A, and this section to report to the audit committee in accordance with the requirements of Statement on Auditing Standards No. 114, "The Auditor's Communication With Those Charged With Governance," or a successor document, including:

(A) all significant accounting policies and material permitted practices;

(B) all material alternative treatments of financial information in statutory accounting principles that have been discussed with the insurer's or HMO's management officials;

(C) ramifications of the use of the alternative disclosures and treatments, if applicable, and the treatment preferred by the accountant; and

(D) other material written communications between the accountant and the management of the insurer or HMO, such as any management letter or schedule of unadjusted differences.

(12) If an insurer or HMO is a member of an insurance holding company system, the report required by paragraph (11) of this subsection may be provided to the audit committee on an aggregate basis for insurers or HMOs in the holding company system if any substantial differences among insurers or HMOs in the system are identified to the audit committee.

(l) Prohibited Conduct in Connection with Preparation of Required Reports and Documents.

(1) A director or officer of an insurer or HMO may not, directly or indirectly:

(A) make or cause to be made a materially false or misleading statement to an accountant in connection with an audit, review, or communication required by the Insurance Code Chapter 401, Subchapter A, or this section; or

(B) omit to state, or cause another person to omit to state, any material fact necessary in order to make statements made, in light of the circumstances under which the statements were made, not misleading to an accountant in connection with any audit, review, or communication required under the Insurance Code Chapter 401, Subchapter A, or this section.

(2) An officer or director of an insurer or HMO, or another person acting under the direction of an officer or director of an insurer or HMO, may not directly or indirectly coerce, manipulate, mislead, or fraudulently influence an accountant performing an audit under the Insurance Code Chapter 401, Subchapter A, or this section if that person knew or should have known that the action, if successful, could result in rendering the insurer's or HMO's financial statements materially misleading. For purposes of this paragraph, actions that could result in rendering the insurer's or HMO's financial statements materially misleading include actions taken at any time with respect to the professional engagement period to coerce, manipulate, mislead, or fraudulently influence an accountant:

(A) to issue or reissue a report on an insurer's or HMO's financial statements that is not warranted and would result in material violations of statutory accounting principles prescribed by the commissioner, generally accepted auditing standards, or other professional or regulatory standards;

(B) not to perform an audit, review, or other procedure required by generally accepted auditing standards or other professional standards;

(C) not to withdraw an issued report; or

(D) not to communicate matters to an insurer's or HMO's audit committee.

(m) Report of Internal Control over Financial Reporting.

(1) Each insurer or HMO required to file an audited financial report under the Insurance Code Chapter 401, Subchapter A, and this section that has annual direct written and assumed premiums, excluding premiums reinsured with the Federal Crop Insurance Corporation and the National Flood Insurance Program, of $500 million or more shall prepare a report of the insurer's or HMO's or group of insurers' or HMOs' internal control over financial reporting. The report must be filed with the commissioner with the communication described by subsection (j) of this section. The report of internal control over financial reporting shall be filed with the commissioner as of the immediately preceding December 31.

(2) Notwithstanding the premium threshold under paragraph (1) of this subsection, the commissioner may require an insurer or HMO to file the management's report of internal control over financial reporting if the insurer or HMO is in any risk-based capital level event or meets one or more of the standards of an insurer or HMO considered to be in hazardous financial condition as described by or provided in the Insurance Code Chapter 404, 441, 822, 841, 843, or 884 or rules adopted thereunder, including §7.402 of this title, Chapter 8 of this title, and §11.810 of this title.

(3) An insurer or HMO or a group of insurers or HMOs may file the insurer's or HMO's or the insurer's or HMO's parent's Section 404 report and an addendum if the insurer or HMO or group of insurers or HMOs is:

(A) directly subject to Section 404;

(B) part of a holding company system whose parent is directly subject to Section 404;

(C) not directly subject to Section 404 but is a SOX-compliant entity; or

(D) a member of a holding company system whose parent is not directly subject to Section 404 but is a SOX-compliant entity.

(4) A Section 404 report described by paragraph (3) of this subsection must include those internal controls of the insurer or HMO or group of insurers or HMOs that have a material impact on the preparation of the insurer's or HMO's or group of insurers' or HMOs' audited statutory financial statements, including those items listed in the Insurance Code §401.009(a)(3)(B) - (H) and (b). The addendum must be a positive statement by management that there are no material processes excluded from the Section 404 report with respect to the preparation of the insurer's or HMO's or group of insurers' or HMOs' audited statutory financial statements, including those items specified in the Insurance Code §401.009(a)(3)(B) - (H) and (b). If there are internal controls of the insurer or HMO or group of insurers or HMOs that have a material impact on the preparation of the insurer's or HMO's or group of insurers' or HMOs' audited statutory financial statements and those internal controls are not included in the Section 404 report, the insurer or HMO or group of insurers or HMOs may either file:

(A) a report under this subsection; or

(B) the Section 404 report and a report under this subsection for those internal controls that have a material impact on the preparation of the insurer's or HMO's or group of insurers' or HMOs'

audited statutory financial statements not covered by the Section 404 report.

(5) The insurer's or HMO's management report of internal control over financial reporting must include:

(A) a statement that management is responsible for establishing and maintaining adequate internal control over financial reporting;

(B) a statement that management has established internal control over financial reporting and an opinion concerning whether, to the best of management's knowledge and belief, after diligent inquiry, its internal control over financial reporting is effective to provide reasonable assurance regarding the reliability of financial statements in accordance with statutory accounting principles;

(C) a statement that briefly describes the approach or processes by which management evaluates the effectiveness of its internal control over financial reporting;

(D) a statement that briefly describes the scope of work that is included and whether any internal controls were excluded;

(E) disclosure of any unremediated material weaknesses in the internal control over financial reporting identified by management as of the immediately preceding December 31;

(F) a statement regarding the inherent limitations of internal control systems; and

(G) signatures of the chief executive officer and the chief financial officer or an equivalent position or title.

(6) For purposes of paragraph (5)(E) of this subsection, an insurer's or HMO's management may not conclude that the internal control over financial reporting is effective to provide reasonable assurance regarding the reliability of financial statements in accordance with statutory accounting principles if there is one or more unremediated material weaknesses in its internal control over financial reporting.

(7) Management shall document, and make available upon financial condition examination, the basis of the opinions required by paragraph (5) of this subsection. Management may base opinions, in part, on its review, monitoring, and testing of internal controls undertaken in the normal course of its activities.

(8) Management has discretion about the nature of the internal control framework used, and the nature and extent of the documentation required by paragraph (7) of this subsection, in order to form its opinions in a cost-effective manner and may include an assembly of or reference to existing documentation.

(9) The management's report of internal control over financial reporting required by this subsection and any supporting documentation provided in the course of a financial condition examination are considered examination information pursuant to the Insurance Code §401.058 and information described by the Insurance Code §401.201.

(n) Transition Dates.

(1) An insurer or HMO or group of insurers or HMOs whose audit committee as of September 1, 2010, is not subject to the independence requirements of subsection (k) of this section because the total written and assumed premium is below the threshold specified in subsection (k)(2)(A) or (B) of this section and that later becomes subject to one of the independence requirements because of changes in the amount of written and assumed premium, has one year following the year in which the written and assumed premium exceeds the threshold amount to comply with the independence requirements. An insurer or HMO that becomes subject to one of the independence requirements as a result of a business combination must comply with the independence requirements not later than the first anniversary of the date of the acquisition or combination.

(2) An insurer or HMO required to file an audited financial report under the Insurance Code Chapter 401, Subchapter A, and this section that has annual direct written and assumed premiums, excluding premiums reinsured with the Federal Crop Insurance Corporation and the National Flood Insurance Program, of $500 million or more for the reporting period ending December 31, 2010, and that has not had total written premium at the $500 million or more premium threshold amount in any prior calendar year reporting period must comply with the reporting requirements in subsection (m) of this section no later than two years after the year in which the written premium exceeds the threshold amount required to file a report.

(3) An insurer or HMO or group of insurers or HMOs that is not required by subsection (m)(1) of this section to file a report beginning with the reporting period ending December 31, 2010, because the total written premium is below the threshold amount, and that later becomes subject to the reporting requirements, has two years after the year in which the written premium exceeds the threshold amount required to file a report. An insurer or HMO acquired in a business combination must comply with the reporting requirements not later than the second anniversary of the date of the acquisition or combination.

(o) Severability. If any subsection or portion of a subsection of this section is held to be invalid for any reason, all valid parts are severable from the invalid parts and remain in effect. If any subsection or portion of a subsection is held to be invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications. To this end, all provisions of this section are declared to be severable.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 11, 2010.

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Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
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Proposal publication date: May 28, 2010
For further information, please call: (512) 463-6327

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 291. UTILITY REGULATIONS
SUBCHAPTER B. RATES, RATE-MAKING, AND RATES/TARIFF CHANGES

30 TAC §291.31, §291.34

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendments to §291.31 and §291.34.

Section 291.31 is adopted *with changes* to the proposed text as published in the March 26, 2010, issue of the *Texas Register*

(35 TexReg 2507). Section 291.34 is adopted *without changes* to the proposed text and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The 81st Legislature, 2009, passed Senate Bill (SB) 2306. SB 2306 amended Texas Water Code (TWC), Chapter 13, Subchapter E, by amending §13.131, which requires the commission by rule to allow water and/or sewer utilities to claim the book cost less net salvage of depreciable utility plant retired to be charged in its entirety to the accumulated depreciation account, consistent with accounting treatment of regulated electric and gas utilities in this state.

SECTION BY SECTION DISCUSSION

§291.31, Cost of Service

The commission adopts the amendment to §291.31(b)(1)(B). This section was amended to include net salvage value in annual depreciation for determining allowable expenses in order to establish consistency of accounting. SB 2306 requires that rules adopted under the legislation be consistent with accounting treatment of regulated electric and gas utilities in this state. The regulatory practice for both industries includes determination of net salvage value in a depreciable utility plant when an asset is retired as well as in annual depreciation calculations relating to allowable expenses when an asset is placed into service. That is because the "methodologies used to compute depreciation expense and accumulated depreciation in rate base should be consistent. *City of Weslaco v. General Telephone Co. of S.W., 359 S.W.2d 260* (Tex. Civ. App.-San Antonio, 1962, writ ref'd n.r.e.)." *Natural Gas Rate Review Handbook*, Gas Services Division, Railroad Commission of Texas (June 2007, page 35). Additionally, the adopted amendment requires the utility to submit "reasonable" estimations of net salvage value. Reasonable is meant to include the submission of sufficient evidence to establish net salvage value, such as estimates of removal costs. This is consistent with the practice of electric and gas utility regulations in the state. "Determining a reasonably accurate estimate of the average or future net salvage value is not an easy task; estimates can be the subject of considerable discussion and controversy between regulators and utility personnel. When estimating future net salvage, every effort should be made to ensure that the estimate is as accurate as possible." {*Public Utilities Depreciation Manual*, NARUC, page 157 (1996)} (from the direct testimony of Nara V. Srinivasa, P.E., Infrastructure Reliability Division, Public Utility Commission of Texas, March 23, 2007, *Application of AEP Texas Central Company for Authority to Change Rates Before the State Office of Administrative Hearings,* SOAH Docket Number 473-07-0833, PUC Docket Number 33309). In response to comment and for further clarity the commission reworded §291.31(b)(1)(B).

The commission adopts the amendment to §291.31(c)(2)(A) to make a grammatical change.

The commission adopts §291.31(c)(2)(B). This change addresses the concern that a retired plant could no longer be included in the rate base under prior commission practices because it was not used and useful in providing utility service after retirement. Consistent with the practice in the regulated electric and gas utilities in this state, the new subparagraph clarifies that retired assets can be included in rate base through depreciation studies.

The commission reletters §291.31(c)(2)(A)(i) and (ii) to §291.31(c)(2)(B)(i) and (ii) for lettering consistency. The commission also adopts the amendment to §291.31(c)(2)(B)(i) and (ii) by adding language making it clear that the bookkeeping for accumulated depreciation, original cost, and salvage value apply to both §291.31(c)(2)(A) and (B). The commission further adopts the amendment to §291.31(c)(2)(B)(i) and (ii) to prescribe the methodology that will allow water and/or sewer utilities to include net salvage in depreciable utility plant retired to be charged in its entirety to the accumulated depreciation account, consistent with accounting treatment of regulated electric and gas utilities in this state. The adopted rule also includes language allowing group accounting of assets. SB 2306 requires that the rules adopted under it must be consistent with accounting treatment of regulated electric and gas utilities in this state. The electric and gas utility regulatory practice is to allow group accounting. The TCEQ has used itemized accounting because complete verification of whether or not an asset is used and useful is difficult to confirm for particular assets with group accounting. Group accounting involves the practice of averaging service lives and salvage values of all assets in a particular category. This methodology assumes the averaging of many assets in a category accurately reflects the real life depreciation of each utility asset. This methodology facilitates consistency with requirements of other governmental accounting regulations, both federal and state, applicable to utilities that operate in other states as well as this state. Also, this methodology may decrease a utility's expense in preparing an application and proving it in a contested case hearing. In order to create transparency of group accounting, the adopted rule requires accounting for all assets and their retirement to be supported by an approved accounting system. In the electric and gas utility industries such transparency is required. For instance, in the gas utility industry, "Historical Commission practice has been to disallow depreciation rate adjustments unless fully supported by a depreciation study. The study should include the average service lives of the property groups, salvage factors and adequacy of the present booked depreciation reserve." *Natural Gas Rate Review Handbook*, Gas Services Division, Railroad Commission of Texas (June 2007, page 35). The new methods of including net salvage in depreciable utility plant will apply to applications declared administratively complete after the date that this rulemaking becomes effective. Because SB 2306 was not retroactive, only assets removed from service after June 19, 2009, (the date the bill became effective), are affected. Additionally, because assets may be retired outside of a test year, the amendment allows inclusion of retired assets in the first full rate application filed by a utility after the date on which the asset was removed from service, excluding alternative rate method applications, such as single issue rate change applications. Furthermore, the amendment requires the utility to bear the burden of proof and provide credible evidence on the decision to retire assets early, consistent with the methods for electric and gas utility regulations in the state. The adopted amendment also requires the utility to provide information to show that it used due diligence in recovering maximum salvage value of a retired asset. Examples include any insurance recovery, scrap value, warranty claims, and competitive bids for tear down and removal of retired assets. Additionally, because of concerns that affiliated interests might benefit from business transactions involving the retirement of the utility's assets, the adopted rules make it clear that the requirements of TWC, §13.185(e) also apply. In response to comment, the commission added language to

§291.31(c)(2)(B)(i) to address the commenter's concern that the unrecovered portions of the investment in the prematurely retired asset may become an unrecoverable loss to the utility. The changes to this section allow losses from prematurely retired assets to be recovered by amortization. In response to comment, the commission also added language to §291.31(c)(2)(B)(i) to allow losses from prematurely retired assets to be recovered by amortization which will spread the cost over the remaining expected life of the asset. This change addresses the concern that customers may have been required to pay for the full unrecovered plant cost of a prematurely retired asset in the first rate case filed after retirement of the asset. Additionally, in response to comment, the commission expanded §291.31(c)(2)(B)(i) to require depreciation studies to achieve more transparency in ratemaking to the customers. Further, in response to comment, the commission also expanded §291.31(c)(2)(B)(i) by listing the minimum requirements to be included in depreciation studies. This change addresses the comment that explained the standard requirements of depreciation studies used in electric and gas utility regulation in Texas. In response to comment, the commission revised §291.31(c)(2)(B)(i) to prohibit accelerated depreciation (including the use of equal life group procedure). Additionally, the changes also addressed concerns regarding how cost of removal should be allocated, the booking of depreciation expense after plant retirement, and the truing-up of over or under accruals in an account or for an asset. Further, in response to comment, the commission added §291.31(c)(2)(B)(i) by providing what depreciation studies should provide at a minimum. This change addresses the comment that explained the standard requirements of depreciation studies used in electric and gas utility regulation in Texas. In response to comment, the commission also changed §291.31(c)(2)(B)(i)(II) to require depreciation studies for utilities using group accounting. This change addresses the concern that if the commission required group accounting, it also must require depreciation studies to properly recognize net salvage for retired assets. In response to comment, the commission also added language to §291.31(c)(2)(B)(ii) to clarify that evidence regarding the reasonableness of retirement decisions for individual assets only applies to utilities using itemized accounting and to make it clear that the accounting for specific items retired in the first application after that retirement only applies to utilities practicing itemized accounting. Additionally, the commission amended the language in §291.31(c)(2)(B) to add the word "of" to correct a typographical omission with the language as originally proposed. Due to the complex nature and cost of an engineering or economic based depreciation study associated with group accounting, the commission will continue to allow water and/or sewer utilities the option of itemized accounting.

The commission relettered §291.31(c)(2)(B) to §291.31(c)(2)(C) to account for these changes previously outlined.

§291.34, Alternative Rule Methods

The commission adopts the amendment to §291.34(d)(2)(B) to allow water and/or sewer utilities that use a cash basis rate methodology to follow the same method prescribed in §291.31(b)(1)(B). The commission adopts this amendment in order to implement SB 2306.

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 the Texas Administrative Procedure Act. A "major environmental rule" is a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The intent of the rulemaking is to incorporate changes made by SB 2306 to TWC, §13.131(c). TWC, §13.131(c) requires the commission to "fix proper and adequate rates and methods of depreciation, amortization, or depletion of several classes of property of each utility and shall require every utility to carry a proper and adequate depreciation account in accordance with those rates and methods with any other rules the commission requires." SB 2306 added the following language: "Rules adopted under this subsection must require the book cost less net salvage of depreciable utility plant retired to be charged in its entirety to the accumulated depreciation account in a manner consistent with accounting treatment of regulated electric and gas utilities in this state." The specific intent of the adopted rulemaking is to amend the commission's rules to incorporate recent legislative changes that account for net salvage value of utility property to be included in depreciation calculations. Therefore, the adopted rulemaking does not meet the definition of a "major environmental rule."

Even if the adopted rules were a major environmental rule, Texas Government Code, §2001.0225 still would not apply to this rulemaking because §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability criteria because it: 1) does not involve any standard set by federal law; 2) does not exceed the requirements of TWC, §13.131(c) or any other state law; 3) 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; and 4) is not adopted solely under the general powers of the agency, but rather specifically under TWC, §13.131(c), which requires the commission to adopt rules to implement the statute. Therefore, this adopted rulemaking does not fall under any of the applicability criteria in Texas Government Code, §2001.0225.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this adopted rulemaking and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this rulemaking is to incorporate changes to TWC, §13.131(c) made by SB 2306. The adopted rules will substantially advance this stated purpose by incorporating the additional requirements of this statute into the commission's rules.

The commission's analysis indicates that Texas Government Code, Chapter 2007 does not apply to the adopted rules

because this is an action that is reasonably taken to fulfill an obligation mandated by state law, which is exempt under Texas Government Code, §2007.003(b)(4). The commission is the regulatory agency for statutes found in TWC, Chapter 13, Subchapter E, which contains TWC, §13.131(c).

Nevertheless, the commission further evaluated the adopted rules and performed an assessment of whether it constitutes a taking under Texas Government Code, Chapter 2007. Promulgation and enforcement of the adopted rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject adopted regulation does 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 regulation. In other words, the adopted rules require compliance with a state statute to require the adoption of rules regarding how salvage value is to be included in depreciation calculations for utility rate applications and proceedings without burdening or restricting or limiting the owner's right to property and reducing its value by 25% or more. Therefore, the adopted rules do not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted rules are not subject to the Texas Coastal Management Program.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received regarding the consistency of this rulemaking with the coastal management program.

PUBLIC COMMENT

The commission held a public hearing for this rulemaking on April 19, 2010, in Austin, Texas. At the hearing, the commission received comments from SouthWest Water Company, Texas Utilities (SWWC). The comment period closed on April 26, 2010.

The commission received written comments from: SWWC; Independent Water and Sewer Companies of Texas (IWSCOT); Epstein, Becker, Green, Wickliff & Hall, P.C. on behalf of the City of Houston (Houston); and Ferguson Associates. SWWC and IWSCOT both generally disapproved of the proposed rules. Houston generally approved of the proposed rules. Ferguson Associates generally approved of the proposed rules, but suggested clarification of complex accounting concepts.

RESPONSE TO COMMENTS

SWWC commented that the rules implementing SB 2306 have been "way over extended" and should be limited to repeating the words of the statute.

The commission responds that the statute requires detailed rules that reflect the practice of electric and gas utility regulation in Texas. Restating the statute in the rules would abrogate the responsibility and the charge the legislature gave the commission in the statute and the policy intent revealed in the bill analysis. SB 2306 specifically states "rules adopted under this subsection *must require* the book cost less net salvage value of depreciable utility plant retired to be charged in its entirety to the accumulated depreciation account *in a manner consistent with accounting treatment of regulated electric and gas utilities in this state*" (Emphasis added.) The statute contemplated that rules will be written reflecting the "accounting treatment of electric and gas utilities in this state." Simply restating the statute would not execute the charge. The commission made no change in response to this comment.

SWWC commented that the commission rules already have adequate flexibility to implement SB 2306 without detailing procedures in the rules and that such details can be worked out in individual contested case hearings.

The commission responds that working out the details in each contested case would lead to reinvestigating the phrase "consistent with accounting treatment of electric and gas utilities in this state" multiple times with possibly inconsistent results. The accounting treatment of electric and gas utilities in Texas is not memorialized in any Texas Public Utility Commission (PUC) or Railroad Commission rule, and interpretations of their practice and orders would have to be litigated in each case, rather than determined by rule. The adopted rules have outlined the basic accounting treatment used in the regulation of electric and gas utilities in Texas. The executive director's staff has verified that this is the practice in electric and gas utility regulation through discussions with the PUC's depreciation expert, from review of PUC Proposals for Decisions and orders, from review of the Railroad Commission of Texas' Gas Services Division's *Natural Gas Rate Review Handbook* (June 2007), and other comments made regarding this adopted rulemaking. Further support for putting the details of implementing SB 2306 into the rules is found in the legislative history of the companion bill to SB 2306. The companion bill was House Bill (HB) 3610. The House Research Organization's Bill Analysis of HB 3610 revealed that opponents to the bill were concerned that "this bill would allow assets left in a depreciable account where a utility still could make a return." The HB 3610 bill analysis also showed that the supporters responded to this concern as follows: "Although this bill could allow assets to be left in a depreciable account where a utility still could make a return, the {Commission} could prevent this from happening through rulemaking." Therefore, the HB 3610 bill analysis reveals that the legislature contemplated the commission writing specific rules to address this concern. The commission made no changes in response to this comment.

SWWC further commented that "there is not a single word in the bill that says anything about salvage that should cause a complete set of rules to be written. Inclusion of the net salvage value - costs which can be either positive or negative values by the way - has always been an option available to utilities under the current rules. To my knowledge there have never been significant issues related to the improper treatment of salvage value in rate cases before the commission that would require such detailed rules."

The commission responds that the statute specifically requires the commission to adopt rules that require "book costs less net salvage of depreciable utility plant retired." Therefore, net salvage calculations must be an integral part of implementing the statute through rules. Contrary to SWWC's position that salvage value could be included in depreciable utility plant under current rules, the commission's current rules do not discuss net salvage value. Past commission practice has been to treat the cost of removal (part of net salvage value) as an expense. Consistent with this prior approach, revenues collected from the scrap sale

of retired assets would have been included as income in the category "other revenues." This treatment of net salvage value is changed by the statute because SB 2306 requires that the rules adopted under it be "consistent with accounting treatment of regulated electric and gas utilities in this state." The gas and electric industries in Texas do not treat salvage values as income and expense items, but instead address these items in the calculation of depreciation. Because including net salvage value in the depreciation calculations is new to the commission, rules are required to be adopted explaining how this will be implemented. The commission made no changes in response to this comment.

SWWC also noted that the detail in the rules was unnecessary because the law relating to reports and records "directs utilities to maintain a system of accounts approved by the executive director which will be adequately informative for all regulatory purposes, or uniform system of accounts as adopted and amended by the National Association of Regulatory Utility Commissioners."

The commission responds that the rules to which SWWC referred discuss accounting practices and do not address how those accounting processes relate to how rates are set. The history of SB 2306 shows that the primary concern of the legislature was how retired assets relate to rates. Specifically, supporters were concerned that utilities would not be allowed to get a return on early retired assets included in their rate calculations. While opponents to SB 2306 were concerned that they would pay rates reflecting a return on an asset that was no longer used and useful in providing customers utility service. Therefore, the rules have to explain how the accounting practices relate to how rates are set, because that was the concern SB 2306 addressed. The commission made no changes in response to this comment.

SWWC also noted that it disagreed with requiring all future applications to have "salvage incorporated in the value and if so depreciation must then be computed on a remaining life basis." SWWC expressed concern that most utility assets have zero salvage value and that it would over complicate the application process for utilities to include salvage value for assets that "might have a little salvage." SWWC stated that small utilities will be especially burdened.

The commission responds that accounting for net salvage value when salvage value is small may be cumbersome, but the statute requires such calculations. Specifically, SB 2306 provides "rules adopted under this subsection *must require* the book cost less net salvage value of depreciable utility plant retired to be charged in its entirety to the accumulated depreciation account *in a manner consistent with accounting treatment of regulated electric and gas utilities in this state*" (Emphasis added.) Therefore, because all assets will eventually become retired assets, the commission has no alternative but to write rules that require net salvage value calculations for all assets. Furthermore, the practice in both the electric and gas utility industry is to include net salvage in the depreciation schedules for assets. However, the commission recognizes that small utilities may find preparing salvage calculations to be burdensome. Therefore, as proposed in §291.31(c)(2)(B)(ii), adopted §291.31(c)(2)(B)(ii) allows for a utility that finds net salvage calculations to be *de minimus* to declare net salvage to be zero and avoid having to make such calculations. The commission made no changes in response to this comment.

SWWC expressed concern that "Utilities should not be potentially penalized many years in the future for not including a salvage component initially as future circumstances may change."

The commission responds that utilities that have assets in previous rate applications would not have included net salvage values in their depreciation calculations because past practice has been to treat net salvage components as other income or expense items. Therefore, the rates the utility has been charging included a depreciation expense and a net plant calculation that did not incorporate net salvage. If the utility then changes its depreciation expense and net plant calculations to include net salvage, it will be changing how the assets are accounted for in rates. Rates charged by a utility are derived from the cost of service. The cost of service includes both annual depreciation (an allowable expense under §291.31(b)(1)(B)) and return on invested capital, which requires consideration of accumulated depreciation (an adjustment to invested capital under §291.31(c)(2)(B)). Therefore, if the utility changes its annual depreciation and accumulated depreciation by adding net salvage value, the customers would pay rates on shifting cost information. Because the utility would be changing the way it accounted for net salvage the rate would be skewed and inequitable to customers for different time periods. For consistency purposes, once a utility changes how an asset will be accounted for in rate calculations, the calculations need to be restarted with the remaining life. Therefore, if future circumstances change and the impact of depreciation on rates changes, the penalty would be on the customers rather than the utility. If the utility were allowed to shift the way that customers are charged for the same asset over different time periods, it could create inequitable and confusing problems, such as including salvage value that had already been accounted for in another accounting category. The commission made no changes in response to this comment.

SWWC also commented that requiring group accounting to be supported by an approved accounting system could involve costly depreciation studies and added that would have a significant financial impact on small utilities.

The commission responds that depreciation studies will only be required for utilities using group accounting. Smaller utilities can use itemized accounting. As for the difficulties associated with depreciation studies that may be encountered by larger utilities that use group accounting, depreciation studies must be required, because SB 2306 requires the commission to adopt rules consistent with accounting treatment of regulated electric and gas utilities in this state. The requirement of depreciation studies is the practice in the electric and gas utility industries as illustrated in the Uniform System of Accounts (USOA). The executive director's staff has verified that this is the practice in electric and gas utility regulation through discussions with the PUC's depreciation expert, from review of PUC Proposals for Decisions and orders, from review of the Railroad Commission of Texas' Gas Services Division's *Natural Gas Rate Review Handbook* (June 2007), and other comments made on this rulemaking. The reason for requiring depreciation studies is that it is the only way to verify that average life computations and survival curves are accurate. As for utilities that claim salvage value but use itemized accounting, the adopted rules require procedures that allow for the estimates of net salvage values and service lives to be trued-up in the first application filed after the asset is retired. Therefore, any expenses associated with depreciation studies could be avoided by using itemized accounting. The commission made no changes in response to this comment.

SWWC stated that language detailing "guidelines for determining whether the decision on retirement of an asset was 'reasonable or not,'" and language relating to affiliated interests was unnecessary. The concern was that it would "blunt the clear lan-

guage of the law" and "the staff's discretion to review the early retirement transactions is already in the rules."

The commission responds that as explained previously, the clear language of SB 2306 is that the rules adopted by the commission must require that net salvage calculations be determined "in a manner consistent with accounting treatment of regulated electric and gas utilities in this state." Additionally, deciding details on a case by case basis would require reinvestigating the appropriate methodology multiple times with potentially inconsistent results. Furthermore, with group accounting the USOA creates the necessary transparency and verification of reasonableness with depreciation studies. In order the achieve clarity and completeness, details regarding reasonableness of decisions to retire assets and dealings with affiliated interests are necessary. The executive director's staff has verified that this is the practice in electric and gas utility regulation through discussions with the PUC's depreciation expert, from review of PUC Proposals for Decisions and orders, from review of the Railroad Commission of Texas' Gas Services Division's *Natural Gas Rate Review Handbook* (June 2007), and other comments made on this rulemaking. Only utilities claiming net salvage and using itemized accounting will need to provide information regarding the reasonableness of retirement decisions for individual assets and meet other transparency requirements listed in the rules. In order to clarify that accounting for specific assets only applies to utilities claiming net salvage value not equal to zero and using itemized accounting, the rules have been clarified. In response to this comment, the commission has changed §291.31(c)(2)(B)(ii) to clarify when specific assets need to be accounted for.

SWWC disagreed with the provision found in §291.31(c)(2)(B)(ii) by stating: "Retired assets will be included in a utility's application for a rate change if the application is the first application for a rate change filed by the utility after the date the asset was retired."

The commission responds that requiring the asset to be included in the first rate application after the asset is retired is necessary to fully implement the policy underlying SB 2306. The problem discussed when SB 2306 was before the Texas Legislature was the utility's under-recovery of the value of the investment in an asset that is retired early. Specifically, the situation sought to be resolved is one in which the utility invests in an asset and then includes the asset in rate calculations based on the expected useful life of the asset. The asset, however, may be retired early. Prior commission practice was to take the asset out of rate calculations because the asset was no longer used and useful and TWC, §13.185(j) only allows depreciation for "all currently used, depreciable utility property." The utility then finds itself still having to pay the cost of the asset that was retired early but unable to recover this cost in rate design. It is important to note that the opposite also could occur, to wit, the asset may be retired late rather than early. In that case, the utility will continue to collect annual depreciation in its rates for an asset that is still used and useful even after the entire original cost of the item has been recovered when the expected life of the asset is expired, but the asset continues to be used. In order to ensure that the above referenced over-collections and under-collections do not occur, a "truing-up" of the estimated service lives with the actual experienced service lives is necessary. In group accounting this "truing-up" occurs in depreciation studies that explain and show the average service life experienced. The requirements of the rules dealing with accounting for specific items relate only to itemized accounting because individual items are not separated out in group accounting. For itemized accounting the retired asset needs to be specifically accounted for in order to achieve this "truing-up." It must be included in the first application filed after the asset is retired to make sure the asset is trued-up while the evidence regarding the asset is still fresh. In response to this comment, §291.31(c)(2)(B)(ii) has been changed to make it clear that the accounting for specific items retired in the first application after that retirement only applies to utilities practicing itemized accounting.

SWWC noted that an asset may be retired after the date of filing an application and that the utility did "not want to be penalized for having to make hasty decisions simply to meet timing deadlines."

The commission responds that the timing deadline with applications is not unique to decisions to retire, but relates to the fact that applications are limited to information from the utility's test year. Therefore, the timing deadline observation relates to the requirement of a test year rather than rules implementing SB 2306. The rules actually make the test year limitation less problematic because the retirement is not required to occur within the test year in order to be included in the application under §291.31(c)(2)(B)(ii). Furthermore, changes in rate applications that are known and measurable and will occur in the 12 months following the test year are allowed in rate applications. Known and measurable adjustments are also allowed under §291.31(b), and the application for rate change form provides that the adjustments are based on the 12 months following the test year. The commission made no changes in response to this comment.

SWWC requested deletion of the last sentence in §291.31(c)(2)(B)(ii) that states "the utility cannot include the retired asset in its net plant calculations in any subsequent application," and noted that "it neuters the whole intent of the law which is to ensure that the unrecovered portions of prematurely retired asset costs remain in rate base and not result in an unrecoverable loss to the utility."

The commission responds that TWC, §13.183(a)(1), allows a utility to collect a return on assets only if they are currently used and useful. The practice in the electric and gas utility industry is that a retired asset is accounted for by crediting the book cost to the utility plant account in which it is included. At the same time, accumulated depreciation is debited with the original cost and the cost of removal and credited with the salvage value and any other amounts recovered, such as insurance. The executive director's staff has verified that this is the practice in electric and gas utility regulation through discussions with the PUC's depreciation expert, from review of PUC Proposals for Decisions and orders, from review of the Railroad Commission of Texas' Gas Services Division's *Natural Gas Rate Review Handbook* (June 2007), and other comments made to this rulemaking. Therefore, the adjustments to net plant are completed upon retirement. For utilities using group accounting, the depreciation studies required by the USOA and the *Natural Gas Rate Review Handbook* do not require specific assets to be taken out of depreciation calculations because the studies provide transparency necessary to reveal the true average life of the assets. In order to address SWWC's concern that the unrecovered portions of the investment in the prematurely retired asset may become an unrecoverable loss to the utility, the commission made changes to §291.31(c)(2)(B)(i) to allow losses from prematurely retired assets to be recovered by amortization.

SWWC commented that the rules should include the following provisions: retired plant can be included in rate base, the proper accounting treatment for retirement of assets is for book cost less net salvage of depreciable utility plant retired to be charged in

its entirety to the accumulated depreciation account, and group depreciation is allowed.

The commission responds that the rules already provide that retired plant can be included in rate base in the first application filed after the asset is retired (§291.31(c)(2)(B)(ii)), that the proper accounting treatment for retirement of assets is for book cost less net salvage of depreciable utility plant retired to be charged in its entirety to the accumulated depreciation account (§291.31(c)(2)(B)(ii)), and group depreciation is allowed (§291.31(c)(2)(B)(i)). The commission made no changes in response to this comment.

IWSCOT commented that the proposed rules do not make ratemaking more transparent for the benefit of customers.

The commission responds that SB 2306 requires the commission to write rules implementing the statute that reflect the practice in the electric and gas utility industry in Texas. That practice requires details of retirement decisions, calculations, and their effect on depreciation. The executive director's staff has verified that this is the practice in electric and gas utility regulation through discussions with the PUC's depreciation expert, from review of PUC Proposals for Decisions and orders, from review of the Railroad Commission of Texas' Gas Services Division's *Natural Gas Rate Review Handbook* (June 2007), and other comments made to this rulemaking. Giving the details of retirement decisions, calculations, and their effect on depreciation is what creates transparency when itemized accounting is used. For group accounting, the transparency is achieved in the gas and electric industry through depreciation studies which are required by USOA. In response to this comment and in order to achieve transparency to the customers, §291.31(b)(1)(B) has been changed to require depreciation studies.

IWSCOT also stated that there was no need to restrict the retirement rule to rate applications found to be administratively complete after these rules are adopted.

The commission responds that the rules do not become final and enforceable until the commission issues an order adopting the rules in compliance with Texas Government Code, §2001.033, and after the expiration of 20 days after the adopted rule is filed in the Office of the Secretary of State pursuant to Texas Government Code, §2001.036. Attempting to apply the rules to rate applications filed before the rules are adopted could create confusion if the rules are changed before they are adopted. Therefore, the rules should only apply to rate application found to be administratively complete after the final rule language is adopted. The commission made no changes in response to this comment.

IWSCOT commented on the portion of the rules providing that retired assets will be included in the first full rate case following their retirement. Specifically, IWSCOT stated "Presumably, the retired asset would be depreciated for ratemaking purposes for the remainder of its useful life. This would spread the rate impact over the same number of years customers would have experienced had the asset not been retired early. However, the next sentence of the rules says the assets can only be included in that first post-retirement rate case. There is no spreading of the cost of the retired asset over time. Therefore, to avoid confiscating capital, the {Commission} must allow the full unrecovered plant cost in that first rate case. This could mean a big financial hit to customers. It could mean over-recovery or further reconciliation if the utility does not have another rate case within one year."

The commission made several changes to the rules in response to this comment. Section 291.31(c)(2)(B)(ii) now requires specific assets to be accounted for in the first application after the asset is retired and prohibits future inclusion of the asset in rate base only for utilities using itemized accounting in order to reconcile estimations of retirement costs. The rule now provides that utilities using group accounting shall use depreciation studies to meet this goal (§291.31(c)(2)(B)(i)). For itemized accounting, TWC, 13.183(a)(1) only allows a utility to collect a return on assets that are currently used and useful. When an asset is retired, the practice in the electric and gas utility industry is to account for it by crediting the book cost to the utility plant account in which it is included. At the same time, accumulated depreciation is debited with the original cost and the cost of removal and credited with the salvage value and any other amounts recovered, such as insurance. The executive director's staff has verified that this is the practice in electric and gas utility regulation through discussions with the PUC's depreciation expert, from review of PUC Proposals for Decisions and orders, from review of the Railroad Commission of Texas' Gas Services Division's *Natural Gas Rate Review Handbook* (June 2007), and other comments made to this rulemaking. Therefore, the adjustments to net plant are completed upon retirement. In order to address IWSCOT's concern that the unrecovered portions of the investment in the prematurely retired asset may become an unrecoverable loss to the utility, changes have been made to §291.31(c)(2)(B)(i) to allow losses from prematurely retired assets to be recovered by amortization. Amortization will spread the cost over the remaining expected life of the asset.

Houston commented that the intent of SB 2306 was to bring the commission's treatment of depreciation relating to the net salvage component of depreciation and retirement amounts in compliance with the accounting treatment of regulated electric and gas utilities.

The commission agrees that the focus of SB 2306 was to treat calculation of water and sewer utility depreciation relating to net salvage in a manner consistent with the treatment used by regulated electric and gas utilities. The commission made no changes in response to this comment.

Houston also provided comments illustrating how net salvage and retiring of assets are treated in the electric and gas regulation in Texas. Specifically, Houston explained as follows: "The overview of how the depreciation process works is relatively simple. The following examples may be helpful. When $1,000 of plant is placed into service it is booked into Account 101. If the item has an average 10-year life and a 0% net salvage, then over the next ten years, $100 of depreciation expense would be taken per year for a total of $1,000 and booked into Account 108. When the plant retires after 10 years, assuming the 10-year life estimate was correct, the $1,000 of plant removed from Account 101 and the same $1,000 of retired plant is removed from Account 108. Thus, if everything worked as it was theoretically intended to, there would be $0.00 of gross plant and $0.00 of net plant. Net plant is the gross plant less the accumulated provision for depreciation. A second example assumes that the same $1,000 of plant had a 10%, or $100, assumed positive net salvage. This would imply that $900 ($1,000 original cost less $100 net salvage) must be recovered over the estimated 10-year life producing a $90 per year depreciation expense, with the assumption that $100 would be collected at the time of retirement associated with salvage. Thus, after ten years, if everything works as theoretically intended, the Reserve would be at $900 ($90 x $10) and when the plant retires $1,000 would be removed from both Account 101 and Account 108. At that point Account 108 would have a negative $100 balance ($900 - $1,000). The negative

$100 would then be offset by the $100 obtained from salvage, thus yielding a $0 level of both Account 101 and Account 108. While the two above examples reflect how plant accounting is intended to work when historical estimates are accurate, this level of accurate forecasting is not normally the case. For example, the plant assumed to last for ten years might actually retire in year one or in year 15. In the past, when an item of plant in water/sewer systems in Texas would retire after year one, the utility would not have the ability to recover the remaining 90% of investment since the plant was assumed to be no longer used or useful. However, the accounting treatment afforded gas and electric utilities would result in the following situation. After one year, $100 of accumulated depreciation would have been booked. When the $1,000 plant was retired and removed from Account 101, the $1,000 would also be removed from Account 108. This would leave a negative $900 balance in Account 108. Since Account 108 is a 'contra' account, which simply means that it is subtracted from gross plant to obtain net plant, the net effect of such retirement would be to leave $900 of rate base in place. The main component of rate base is net plant. Rate base is the investment level on which a utility is allowed to earn a return. Since the retired plant is no longer in service it would need to be amortized off the utility's books and records over some period of time. (footnote omitted) Thus, as directed by Senate Bill 2306, rather than the utility absorbing a $900 loss on its investment, customers would be responsible for the return of the Company's un-depreciated investment of $900 in this example. If a positive $100 of net salvage were reflected in the example, then the remaining net amount necessary to be recovered from customers, which would still be reflected on the Company's books through a negative reserve, would be $800 ($1,000 retired plant less $100 of accumulation depreciation expense less $100 of net salvage associated with the plant removed from service). A decision would then have to be made as to how best to amortize the remaining $800 of investment such that the retired asset would be fully recovered on the utility's books and the customers who received benefits, to the best extent possible, pay such amount taking into account various regulatory principles (e.g., the matching principle and rate shock)." Houston further commented that utilities expressed concern at the Legislature regarding the prior system's failure to allow them to recover their investment in items of plant retired early. However, the accounting treatment reflected in the USOA for gas and electric utilities also recognizes that plant can last longer than the initial estimate. The normal practice is for a regulator to establish a depreciation rate and that rate is applied to the original cost as long as the plant is in service. Continuing with the previous example of a $1,000 investment, if it were to last for 12 years (two years longer than the assumed ten-year average service life), the reserve would be $1,200 at the time of retirement. Therefore, when the plant retired, assuming 0% net salvage, there would be a positive $200 of reserve creating a negative $200 of rate base, since the reserve is a 'contra' account. Under the concept of individual item accounting, the Company would earn a negative return on the $200 of negative rate base, which would offset other revenue requirements. The negative rate base amount would normally be required to be paid back to customers over some period of time until the $200 of negative rate base was extinguished. The treatment of under-recovery and over-recovery can be handled either through the continuation of itemized depreciation practices or through group accounting depreciation as normally employed by electric and gas utilities. Houston commented that the TCEQ has operated under the itemized depreciation process while electric and gas utilities normally operate under group accounting practices. Group accounting practices apply an average service life and an average net salvage value to all items in an account. Thus, while some items may retire in year one, two, three or other years up to ten years, other items of the group may retire in years 11, 12, 13, or other number of years greater than ten years. However, if the average age of all retired plant was at ten years, all over and under-recoveries that transpired during the life of the group would hopefully net out to zero. If a utility were to continue to utilize an itemized depreciation approach under the new requirements of SB 2306, then a separate account would have to be established in order to capture both the over and under-recoveries of depreciation until the utility's next rate proceeding. At that time, the utility as well as the TCEQ staff and interveners could address the appropriate amortization period for any excess or deficiency in the separate account. This would add a limited level of increased accounting to the current process; however it would remain manageable for those utilities not prepared to undertake a full depreciation analysis associated with a group depreciation approach.

The commission agrees with Houston's analysis. This comment clearly explains the problem SB 2306 was meant to remedy. The executive director's staff has verified that this is the practice in electric and gas regulation through discussions with the PUC's depreciation expert, from review of PUC Proposals for Decisions and orders, from review of the Railroad Commission of Texas' Gas Services Division's *Natural Gas Rate Review Handbook* (June 2007), and other comments made on this rulemaking. Section 291.31(c)(2)(B)(i) has been changed in response to this comment by allowing amortization to recover losses and to remit over-recovery because of assets that either exceed or fall short of surviving for their expected lives.

Houston also commented that "For those utilities who are determined to migrate to a group accounting approach, compliance with the USOA's instructions regarding reliance on an engineering or economic based depreciation studies must be required. However, in either instance (itemization approach or group accounting approach) the recognition of net salvage must also become an integral part of the depreciation process."

The commission agrees with this comment. The executive director's staff has verified that this is the practice in electric and gas utility regulation through discussions with the PUC's depreciation expert, from review of PUC Proposals for Decisions and orders, from review of the Railroad Commission of Texas' Gas Services Division's *Natural Gas Rate Review Handbook* (June 2007), and other comments made on this rulemaking. Section 291.31(c)(2)(B)(i)(II) has been changed in response to this comment by requiring depreciation studies for utilities using group accounting.

Houston also commented that "The commission should require those utilities seeking to implement group accounting to maintain their investment in homogeneous account groupings. In other words, meters should be separated from mains, which are separated from pumps and motors, etc. The need to maintain investment by homogeneous categories is necessary given the need to perform actuarial or semi-actuarial analyses to determine average service lives and corresponding dispersion patterns. A dispersion pattern simply identifies the expected pattern of retirements over the estimated average service life. The TCEQ should require the use of 'Iowa Survivor Curves' as the standard dispersion pattern. Iowa Survivor Curves are utilized by almost all regulatory authorities. Depreciation studies should provide, at a minimum, the following: A. The investment by homogeneous

category; B. Expected level of gross salvage; C. Expected level of cost of removal; D. The accumulated provision for depreciation as appropriately reflected on the Company's books and records; E. The average service life; F. The remaining life; G. The Iowa Dispersion Pattern; H. All input on electronic medium; and I. A detailed narrative identifying the specific factors, data, criteria, assumptions, etc. that were employed to arrive at the specific mortality proposal for each homogenous group of property."

The commission agrees with this comment. The executive director's staff has verified that this is the practice in electric and gas utility regulation through discussions with the PUC's depreciation expert, from review of PUC Proposals for Decisions and orders, from review of the Railroad Commission of Texas' Gas Services Division's *Natural Gas Rate Review Handbook* (June 2007), and other comments made on this rulemaking. Section 291.31(c)(2)(B)(i)(II) has been changed in response to this comment by incorporating the suggestions made in this comment.

Houston also commented that "The commission should further clearly prohibit all forms of accelerated depreciation, including but not limited to, the declining balance method, the sum of years digits, and the equal life group procedure." The studies should further provide a detailed narrative identifying the specific and significant factors employed to arrive at the proposed mortality characteristics (i.e., average service life, cost of removal and gross salvage). The narrative should clearly identify to what extent the result of actuarial and semi-actuarial results were relied upon, as well as other pertinent factors such as input from management or industry comparative data. The narrative should clearly identify how each component was incorporated into the final decision for that particular account. The study should be based on the test-year for depreciation purposes which should be no more than five years old in comparison to the test year for ratemaking purposes. As it applies to gross salvage, the amounts recognized must include all forms of salvage, including insurance proceeds, reimbursed retirements associated with situations where a third party reimburses the utility (e.g., retirements due to dig-ins, requests for relocations, etc.) as well as sale proceeds, whether related to scrap value sales or for sales of usable equipment, facilities or systems. Cost of removal must reflect only those costs associated with cost of removal that can be justified. Costs that are normally anticipated to be incurred in instances where replacement activity transpires should be assigned and/or accounted for as cost of the new installation and added to gross plant in service. The costs assigned as cost of removal in a replacement project must be clearly substantiated and supported as being cost of removal, rather than costs associated with installing the replacement investment. In addition, the utility must demonstrate that it is in compliance with National Association of Regulatory Utility commissioners (NARUC) Interpretation No. 67. That interpretation specifically states the following: The reimbursement received shall be accounted for: a) by crediting operation and maintenance expenses to the extent of actual expenses occasioned by the plant changes; and b) crediting the remainder to the Reserve for depreciation, unless contractual terms definitively characterize residual or specific amounts applicable to the cost of replacement. In the latter event, appropriate credit should be entered into the plant accounts. Moreover, any amounts received as reimbursed retirements and assigned as contribution in aid of construction should not be included in gross plant where it would be depreciable. An example of potential interactions of the above concepts would be as follows. Assume a water line is to be retired and abandoned in place. A new replacement line is to be installed to provide service previously provided by the retired line. In this instance, no cost of removal or gross salvage would be anticipated. Alternatively, if the water service line is retired due to a contractor dig-in, the cost charged to the contractor is $500. If there are no specific contract terms identifying which portion of the $500, if any, is associated with the cost of the new investment; then, $500 would first offset any operating expenses, if any, and the balance would be assigned to the Reserve. Alternatively, if a contract is entered into between the utility and the party that damaged the line, and that contract definitively identifies $300 for the cost of the new installation as a contribution in aid of construction, and $50 for O&M expense incurred in the retirement process with the remaining $150 as reimbursement for cost of removal, then the Reserve would only increase $150, operating and maintenance expenses would be credited with $50, and gross plant would not change other than for the property unit retired.

The commission agrees with this comment. The executive director's staff has verified that this is the practice in electric and gas regulation through discussions with the PUC's depreciation expert, from review of PUC Proposals for Decisions and orders, from review of the Railroad Commission of Texas' Gas Services Division's *Natural Gas Rate Review Handbook* (June 2007), and other comments made on this rulemaking. Section 291.31(c)(2)(B)(i) has been changed in response to this comment by incorporating many of the suggestions made by this comment. While much of the comment describes how the process under the rules should be administered, the commission has not memorialized all of this discussion in the rules.

Houston also commented that "Once a depreciation rate is established and approved by the {commission}, it must remain in place and applied to gross plant in service until subsequently changed in a rate proceeding or other designated proceeding by the {commission}. In no event should a utility be permitted to unilaterally change the rate explicitly or implicitly (e.g., ceasing the booking of depreciation which implicitly changes the rate to zero). The booking of depreciation expense is initiated once an item of plant is placed into service and the process stops only when plant is actually retired. Unlike non-regulated entities, utilities must continue booking depreciation expense to the Reserve even when a utility believes it is fully accrued. The continuation of depreciation expense will be accumulated on the Company's books and records and appropriately treated at the time of the utility's next rate proceeding in which a depreciation study recognizes the under or over-accrual of plant investment through the depreciation process. This process of rectifying or truing-up the over or under accruals in an account, or for an item of plant, is specifically recognized as an appropriate regulatory process and is not and should not be considered a form of retroactive ratemaking."

The commission agrees with this comment. The executive director's staff has verified that this is the practice in electric and gas regulation through discussions with the PUC's depreciation expert, from review of PUC Proposals for Decisions and orders, from review of the Railroad Commission of Texas' Gas Services Division's *Natural Gas Rate Review Handbook* (June 2007), and other comments made on this rulemaking. Section 291.31(c)(2)(B)(i) has been changed in response to this comment by incorporating many of the suggestions made by this comment. While much of the comment describes how the process under the rules should be administered, the commission has not memorialized all of this discussion in the rules. By including the requirements of following several different

procedures used by the PUC and the Railroad Commission in regulating electric and gas utilities, many of these details will already be required by the rules without having to specifically list them.

Houston also commented that "Under Senate Bill 2306 utilities are entitled to recognize the full reduction of the level of retirement in its Reserve at the time of retirement. Utilities are also required to recognize appropriate levels of cost of removal and gross salvage on an estimated basis in determining depreciation rates while recognizing cost of removal and gross salvage on an actual basis at the time of retirement of the asset. The Reserve should be increased in recognition of monthly depreciation expense accruals and actual gross salvage associated with plant, while it should be decreased for actual retirements of property units and actual costs of removal incurred at the time of retirement. It is recognized that depreciation is a process of estimation and must be trued-up as time progresses. The utility must maintain appropriate and accurate records to permit the development and substantiation of depreciation studies as required by the USOA. The commission should require any utility to fully substantiate and support, both on a numerical and narrative basis, its request for depreciation based on homogeneous categories of investment. Such depreciation studies should not be more than five years old in comparison to the test year utilized for ratemaking purposes. The depreciation rates established in a rate case must remain in place until the commission adopts subsequent changes in a following rate proceeding."

The commission agrees with this comment. The executive director's staff has verified that this is the practice in electric and gas regulation through discussions with the PUC's depreciation expert, from review of PUC Proposals for Decisions and orders, from review of the Railroad Commission of Texas' Gas Services Division's *Natural Gas Rate Review Handbook* (June 2007), and other comments made on this rulemaking. Section 291.31(c)(2)(B)(i) has been changed in response to this comment by incorporating many of the suggestions made by this comment. While much of the comment describes how the process under the rules should be administered, the commission has not memorialized all of this discussion in the rules.

Ferguson Associates expressed surprise that the commission is just beginning to recognize that net salvage should be a component of depreciation based on his experience in "a career as a management consultant that included conducting depreciation studies for entities practicing the group concept of depreciation accounting" and noted that its depreciation practice was primarily for property of electric and gas utilities.

The commission agrees with this comment. Until recently, the commission and its predecessor agencies have exercised original jurisdiction primarily over small investor owned utilities that operate outside of city limits. Because the water and sewer utilities regulated by the commission have historically been small investor owned utilities, rate making procedures, including the treatment of depreciation in rate calculations, have developed with very simple models that less sophisticated utilities could understand. In recent years, larger entities have begun operating multiple systems in areas under the commission's original jurisdiction. These larger business entities have more assets to account for and have more financial sophistication. Therefore, the utilities regulated by the commission have become more analogous to electric and gas utilities. The commission's rules implementing SB 2306 will integrate the more sophisticated practices of the gas and electric utility industry into its ratemaking procedures including the inclusion of net salvage in depreciation, group accounting, and the depreciation studies that are part of group accounting. The commission made no changes in response to this comment.

Ferguson Associates noted that sometimes regulatory accounting has used cash treatment rather that depreciation treatment for net salvage and that approach usually results in increased costs borne by the ratepayers. Therefore, Ferguson Associates recommended against cash treatment for net salvage.

The commission responds that the rules include net salvage in depreciation calculations rather than with cash treatment. However, the commission anticipates that cases could arise in which the financial integrity of the utility and just and reasonable rates for the customer might require income or expense treatment for unusual net salvage situations. However, the rules do contemplate that the primary position of the agency will be to include net salvage in depreciation calculations rather than to give net salvage cash treatment. The commission made no change to the rules in response to this comment.

Ferguson Associates commented that the proposed modification to §291.31(b)(1)(B) requires use of the remaining life rate calculation technique when net salvage is estimated to be different than zero, and does not require this technique when net salvage is estimated to be zero. This distinction is not rational, because whether the remaining life or the whole life technique is appropriate depends on the adequacy of the book reserve position; not on the mortality characteristics utilized to calculate depreciation rates and test the reserve position. If the book reserve is determined through a theoretical reserve calculation to be too high or too low, a common reaction is to amortize the calculated difference over the remaining life of the property through the use of remaining life rates. A more rational requirement would be to either require remaining life rates, no matter what the net salvage factors are, or to allow either whole life or remaining life rates.

The commission responds that the reason why remaining life is required for applications including net salvage different than zero is to keep treatment of assets consistent over time. Utilities that have assets in previous rate applications would not have included salvage values in their depreciation calculations because past practice has been to treat net salvage components as other income or expense items. Therefore, the rates the utility had been charging include a depreciation expense and a net plant calculation that did not incorporate net salvage. If the utility were allowed to shift the way that customers are charged for the same asset over different time periods, it could create inequitable and confusing problems such as including salvage value that had already been accounted for in another accounting category. Rates charged by a utility are derived from the cost of service. The cost of service includes both annual depreciation (an allowable expense under §291.31(b)(1)(B)) and return on invested capital which involves accumulated depreciation (an adjustment to invested capital under §291.31(c)(2)(B)). Therefore, if the utility changes its annual depreciation and accumulated depreciation by adding net salvage value, the customers would pay rates on shifting cost information. Because the utility would be changing the way it accounted for net salvage the rate would be skewed and inequitable to customers for different time periods. For consistency purposes, once a utility changes how an asset will be accounted for in rate calculations, the depreciation calculations need to be restarted with the remaining life. Because many utilities that are subject to commission jurisdiction will still be small investor owned utilities and net salvage

calculations for these small utilities will be negligible, the rules allow for simpler rate calculations for utilities claiming zero net salvage. Therefore, whole life is still available for these small utilities. For utilities using group accounting or claiming net salvage and using itemized accounting, remaining life is required. Section 291.31(c)(2)(B)(i) has been changed in response to this comment to authorize amortization of any theoretical reserve calculation that may prove to have been too high or too low.

Ferguson Association further commented that the proposed modification to §291(b)(1)(B) also requires that applicants including net salvage in depreciation provide evidence establishing the validity of the net salvage estimates. The financial statements of entities practicing the item concept of depreciation accounting disclose whether the depreciable lives are appropriate for the property. However, a special study is required for this determination by entities practicing the group concept, which is why regulators require support for the validity of proposed changes to depreciation rates, because USOA's specify that jurisdictional entities practice the group concept. Therefore, basing the requirement for support solely on net salvage is not rational.

The commission agrees with the portion of the comment stating that group accounting requires depreciation studies. The executive director's staff has verified that this is the practice in electric and gas regulation through discussions with the PUC's depreciation expert, from review of PUC Proposals for Decisions and orders, from review of the Railroad Commission of Texas' Gas Services Division's *Natural Gas Rate Review Handbook* (June 2007), and other comments made to this rulemaking. Section 291.31(c)(2)(B)(i) has been changed in response to this comment by requiring depreciation studies for utilities using group accounting. Additionally, the commission has changed the rules to clarify that specific verification of salvage values for specific assets is limited to utilities practicing itemized accounting. Section 291.31(c)(2)(B)(ii) now requires evidence establishing the validity of net salvage estimates on individual items only for entities practicing itemized accounting. And §291.31(c)(2)(B)(i) now requires depreciation studies for entities using group accounting in order to validate net salvage estimates.

Ferguson Associates commented that among the proposed modifications to §291.31(c)(2)(A)(ii) is a requirement to provide evidence of the amount of accumulated depreciation up to the date each asset is taken out of service. Under the group concept of depreciation accounting that the {Commission} requires jurisdictional entities to practice, an average depreciation rate unique to each depreciable property group is applied to that group and each ordinary retirement from each such group is recorded as being fully depreciated upon retirement, regardless of the age at which the retirement occurs. Therefore, this requirement is meaningless and suggests that the {Commission} needs to improve its understanding of the depreciation accounting practices imposed by its USOA's. The requirement to practice the group concept is inherent in the plant and depreciation accounting specified by the {Commission} USOA's, and is not specifically stated.

The commission agrees with the portion of the comment regarding how the depreciation studies used in group accounting deals with accumulated depreciation regardless of the date of retirement. The executive director's staff has verified that this is the practice in electric and gas regulation through discussions with the PUC's depreciation expert, from review of PUC Proposals for Decisions and orders, from review of the Railroad Commission of Texas' Gas Services Division's *Natural Gas Rate Review Handbook* (June 2007), and other comments made to this rulemaking. However, the commission disagrees that its rules have been interpreted to require group accounting. The adopted rules represent the first time the commission will explicitly allow group accounting (the rules still allow itemized accounting). Section 291.31(c)(2)(B)(i) has been changed in response to this comment by requiring depreciation studies for utilities using group accounting. Additionally, the commission has changed §291.31(c)(2)(B)(ii) to clarify that only entities practicing itemized accounting are required to provide evidence of the amount of accumulated depreciation up to the date each asset is taken out of service. The commission has also changed §291.31(c)(2)(B)(i) in response to this comment to require depreciation studies for entities using group accounting in order to validate accumulated depreciation totals.

STATUTORY AUTHORITY

These amendments are adopted under Texas Water Code (TWC), §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; TWC, §5.103, which establishes the commission's general authority to adopt rules; TWC, §5.105, which establishes the commission's authority to set policy by rule; TWC, §13.041, which requires the commission to adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction; and TWC, §13.132 and §13.181, which empower and require the commission to enforce the requirements contained in TWC, Chapter 13, Subchapters E and F, respectively.

The adopted amendments implement TWC, §13.131(c).

§291.31. Cost of Service.

(a) Components of cost of service. Rates are based upon a utility's cost of rendering service. The two components of cost of service are allowable expenses and return on invested capital.

(b) Allowable expenses. Only those expenses that are reasonable and necessary to provide service to the ratepayers may be included in allowable expenses. In computing a utility's allowable expenses, only the utility's historical test year expenses as adjusted for known and measurable changes may be considered.

(1) Components of allowable expenses. Allowable expenses, to the extent they are reasonable and necessary, and subject to this section, may include, but are not limited to, the following general categories:

(A) operations and maintenance expense incurred in furnishing normal utility service and in maintaining utility plant used by and useful to the utility in providing such service (payments to affiliated interests for costs of service, or any property, right, or thing, or for interest expense are not allowed as an expense for cost of service except as provided in Texas Water Code (TWC), §13.185(e));

(B) depreciation expense based on original cost and computed on a straight line basis over the useful life of the asset as approved by the commission. Depreciation is allowed on all currently used depreciable utility property owned by the utility except for property provided by explicit customer agreements or funded by customer contributions in aid of construction. Depreciation on all currently used and useful developer or governmental entity contributed property is allowed in the cost of service. On all applications declared administratively complete after the effective date of these rules, the depreciation accrual for all assets must account for expected net salvage value in the calculation of the depreciation rate and actual net salvage value related to retired plant. The depreciation rate and expense must be

calculated on a straight line basis over the expected or remaining life of the asset. Utilities must calculate depreciation on a straight line basis, but are not required to use the remaining life method if salvage value is zero. When submitting an application that includes salvage value in depreciation calculations, the utility must submit sufficient evidence with the application establishing that the estimated salvage value, including removal costs, is reasonable. Such evidence will be included for the asset group in deprecation studies for those utilities practicing group accounting while such evidence will relate to specific assets for those utilities practicing itemized accounting;

(C) assessments and taxes other than income taxes;

(D) federal income taxes on a normalized basis (federal income taxes must be computed according to the provisions of TWC, §13.185(f), if applicable);

(E) reasonable expenditures for ordinary advertising, contributions, and donations; and

(F) funds expended in support of membership in professional or trade associations, provided such associations contribute toward the professionalism of their membership.

(2) Expenses not allowed. The following expenses are not allowed as a component of cost of service:

(A) legislative advocacy expenses, whether made directly or indirectly, including, but not limited to, legislative advocacy expenses included in professional or trade association dues;

(B) funds expended in support of political candidates;

(C) funds expended in support of any political movement;

(D) funds expended in promotion of political or religious causes;

(E) funds expended in support of or membership in social, recreational, fraternal, or religious clubs or organizations;

(F) funds promoting increased consumption of water;

(G) additional funds expended to mail any parcel or letter containing any of the items mentioned in subparagraphs (A) - (F) of this paragraph;

(H) costs, including, but not limited to, interest expense of processing a refund or credit of sums collected in excess of the rate finally ordered by the commission;

(I) any expenditure found by the commission to be unreasonable, unnecessary, or not in the public interest, including, but not limited to, executive salaries, advertising expenses, rate case expenses, legal expenses, penalties and interest on overdue taxes, criminal penalties or fines, and civil penalties or fines; and

(J) the costs of purchasing groundwater from any source if:

(i) the source of the groundwater is located in a priority groundwater management area; and

(ii) a wholesale supply of surface water is available.

(c) Return on invested capital. The return on invested capital is the rate of return times invested capital.

(1) Rate of return. The commission shall allow each utility a reasonable opportunity to earn a reasonable rate of return, which is expressed as a percentage of invested capital, and shall fix the rate of return in accordance with the following principles.

(A) The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties.

(B) The commission shall consider the efforts and achievements of the utility in the conservation of resources, the quality of the utility's services, the efficiency of the utility's operations, and the quality of the utility's management, along with other relevant conditions and practices.

(C) The commission may, in addition, consider inflation, deflation, the growth rate of the service area, and the need for the utility to attract new capital. In each case, the commission shall consider the utility's cost of capital, which is the composite of the cost of the various classes of capital used by the utility.

(i) Debt capital. The cost of debt capital is the actual cost of debt.

(ii) Equity capital. The cost of equity capital must be based upon a fair return on its value. For companies with ownership expressed in terms of shares of stock, equity capital commonly consists of the following classes of stock.

(I) Common stock capital. The cost of common stock capital must be based upon a fair return on its value.

(II) Preferred stock capital. The cost of preferred stock capital is its annual dividend requirement, if any, plus an adjustment for premiums, discounts, and cost of issuance.

(2) Invested capital, also referred to as rate base. The rate of return is applied to the rate base. Components to be included in determining the rate base are as follows:

(A) original cost, less accumulated depreciation, of utility plant, property, and equipment used by and useful to the utility in providing service;

(B) original cost, less net salvage and accumulated depreciation at the date of retirement, of depreciable utility plant, property and equipment retired by the utility; and

(i) original cost under subparagraph (A) of this paragraph or this subparagraph is the actual money cost, or the actual money value of any consideration paid other than money, of the property at the time it was dedicated to public use, whether by the utility that is the present owner or by a predecessor. Assets may be booked in itemized or group accounting, but all accounting for assets and their retirements must be supported by an approved accounting system. On all assets retired from service after June 19, 2009, the original cost of an asset must be the book cost less net salvage value. If a utility calculates annual depreciation expense for an asset with allowance for salvage value, then it must account for the actual salvage amounts when the asset is actually retired. The utility must include the actual salvage calculation(s) in its net plant calculation(s) in the first full rate change application (excluding alternative rate method applications as described in §291.34 of this title (relating to Alternative Rate Methods)) it files after the date on which the asset was removed from service, even if it was not retired during the test year. Recovery of investment on assets retired from service before the estimated useful life or remaining life of the asset shall be combined with over accrual of depreciation expense for those assets retired after the estimated useful life or remaining life, and the net amount shall be amortized over a reasonable period of time taking into account prudent regulatory principles. The following list shall govern the manner by which depreciation will be accounted for.

(I) Accelerated depreciation is not allowed.

(III) For those utilities that elect a group accounting approach, all mortality characteristics, both life and net salvage, must be supported by an engineering or economic based depreciation study for which the test year for the depreciation is no more than five years old in comparison to the rate case test year. The engineering or economic based depreciation study must include:

(-a-) investment by homogenous category;

(-b-) expected level of gross salvage by category;

(-c-) expected cost of removal by category;

(-d-) the accumulated provision for depreciation as appropriately reflected on the company's books by category;

(-e-) the average service life by category;

(-f-) the remaining life by category;

(-g-) the Iowa Dispersion Pattern by category; and

(-h-) a detailed narrative identifying the specific factors, data, criteria and assumptions that were employed to arrive at the specific mortality proposal for each homogenous group of property.

(ii) reserve for depreciation under subparagraph (A) of this paragraph or this subparagraph is the accumulation of recognized allocations of original cost, representing recovery of initial investment, over the estimated useful life or remaining life of the asset. If individual accounting is used, a utility must continue booking depreciation expense until the asset is actually retired, and the reserve for depreciation shall include any additional depreciation expense accrued past the estimated useful or remaining life of the asset. If salvage value is zero, depreciation must be computed on a straight line basis over the expected useful life or remaining life of the item or facility. If salvage value is not zero, depreciation must also be computed on a straight line basis over the expected useful life or the remaining life. For an asset removed from service after June 19, 2009, accumulated depreciation will be calculated on book cost less net salvage of the asset. The retirement of a plant asset from service is accounted for by crediting the book cost to the utility plant account in which it is included. Accumulated depreciation must also be debited with the original cost and the cost of removal and credited with the salvage value and any other amounts recovered. Return is allowed for assets removed from service after June 19, 2009, that result in an increased rate base through recognition in the reserve for depreciation if the utility proves that the decision to retire the asset was financially prudent, unavoidable, necessary because of technological obsolescence, or otherwise reasonable. The utility must also provide evidence establishing the original cost of the asset, the cost of removal, salvage value, any other amounts recovered, the useful life of the asset (or remaining life as may be appropriate), the date the asset was taken out of service, and the accumulated depreciation up to the date it was taken out of service. Additionally, the utility must show that it used due diligence in recovering maximum salvage value of a retired asset. The requirements relating to the accounting for the reasonableness of retirement decisions for individual assets and the net salvage value calculations for individual assets only apply to those utilities using itemized accounting. For those utilities practicing group accounting, the depreciation study will provide similar information by category. TWC, §13.185(e) relating to dealings with affiliated interests, will apply to business dealings with any entity involved in the retirement, removal, or recovery of assets. Assets retired subsequent to June 19, 2009, will be included in a utility's application for a rate change if the application is the first application for a rate change filed by the utility after the date the asset was retired and specifically identified if the utility uses itemized accounting. Retired assets will be reported for the asset group in depreciation studies for those utilities practicing group accounting, while retired assets will be specifically identified for those utilities practicing itemized accounting;

(iii) the original cost of plant, property, and equipment acquired from an affiliated interest may not be included in invested capital except as provided in TWC, §13.185(e);

(iv) utility property funded by explicit customer agreements or customer contributions in aid of construction such as surcharges may not be included in original cost or invested capital; and

(C) working capital allowance to be composed of, but not limited to, the following:

(i) reasonable inventories of materials and supplies, held specifically for purposes of permitting efficient operation of the utility in providing normal utility service;

(ii) reasonable prepayments for operating expenses (prepayments to affiliated interests) are subject to the standards set forth in TWC, §13.185(e); and

(iii) a reasonable allowance up to one-eighth of total annual operations and maintenance expense excluding amounts charged to operations and maintenance expense for materials, supplies, and prepayments (operations and maintenance expense does not include depreciation, other taxes, or federal income taxes).

(3) Terms not included in rate base. Unless otherwise determined by the commission, for good cause shown, the following items will not be included in determining the overall rate base.

(A) Miscellaneous items. Certain items that include, but are not limited to, the following:

(i) accumulated reserve for deferred federal income taxes;

(ii) unamortized investment tax credit to the extent allowed by the Internal Revenue Code;

(iii) contingency and/or property insurance reserves;

(iv) contributions in aid of construction; and

(v) other sources of cost-free capital, as determined by the commission.

(B) Construction work in progress. Under ordinary circumstances, the rate base consists only of those items that are used and useful in providing service to the public. Under exceptional circumstances, the commission may include construction work in progress in rate base to the extent that the utility has proven that:

(i) the inclusion is necessary to the financial integrity of the utility; and

(ii) major projects under construction have been efficiently and prudently planned and managed. However, construction work in progress may not be allowed for any portion of a major project that the utility has failed to prove was efficiently and prudently planned and managed.

(d) Recovery of positive acquisition adjustments.

(1) For utility plant, property, and equipment acquired by a utility from another retail public utility as a sale, merger, etc. of utility service area for which an application for approval of sale has been filed with the commission on or after September 1, 1997, and that sale application closed thereafter, a positive acquisition adjustment will be allowed to the extent that the acquiring utility proves that:

(A) the property is used and useful in providing water or sewer service at the time of the acquisition or as a result of the acquisition;

(B) reasonable, prudent, and timely investments will be made if required to bring the system into compliance with all applicable rules and regulations;

(C) as a result of the sale, merger, etc.:

(i) the customers of the system being acquired will receive higher quality or more reliable water or sewer service or that the acquisition was necessary so that customers of the acquiring utility's other systems could receive higher quality or more reliable water or sewer service;

(ii) regionalization of retail public utilities (meaning a pooling of financial, managerial, or technical resources that achieve economies of scale or efficiencies of service) was achieved; or

(iii) the acquiring system will become financially stable and technically sound as a result of the acquisition, or the system being acquired that is not financially stable and technically sound will become a part of a financially stable and technically sound utility;

(D) any and all transactions between the buyer and the seller entered into as a part or condition of the sale are fully disclosed to the executive director and were conducted at arm's length;

(E) the actual purchase price is reasonable in consideration of the condition of the plant, property, and equipment being acquired; the impact on customer rates if the acquisition adjustment is granted; the benefits to the customers; and the amount of contributions in aid of construction in the system being acquired;

(F) in a single or multi-stage sale, the owner of the acquired retail public utility and the final acquiring utility are not affiliated. A multi-stage sale is where a stock transaction is followed by a transfer of assets in what is essentially a single sales transaction. A positive acquisition adjustment is allowed only in those cases where the multi-stage transaction was fully disclosed to the executive director in the application for approval of the initial stock sale. Any multi-stage sale occurring between September 1, 1997 and February 4, 1999 is exempt from the requirement for executive director notification at the time of the approval of the initial sale, but must provide such notification by April 5, 1999; and

(G) the rates charged by the acquiring utility to its preacquisition customers will not increase unreasonably because of the acquisition.

(2) The amount of the acquisition adjustment approved by the regulatory authority must be amortized using a straight line method over a period equal to the weighted average remaining useful life of the acquired plant, property, and equipment, at an interest rate equal to the rate of return determined under subsection (c) of this section. The acquisition adjustment may be treated as a surcharge and may be recovered using non-system-wide rates.

(3) The authorization for and the amount of an acquisition adjustment can only be determined as a part of a rate change application.

(4) The acquisition adjustment can only be included in rates as a part of a rate change application.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 13, 2010.

TRD-201004708

Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: September 2, 2010
Proposal publication date: March 26, 2010
For further information, please call: (512) 239-6090

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 1. GENERAL LAND OFFICE

CHAPTER 15. COASTAL AREA PLANNING

The General Land Office (GLO) adopts new §15.17, concerning local government Erosion Response Plans, and amendments to §15.41, concerning the evaluation process for coastal erosion studies and projects, without changes to the proposed text as published in the June 18, 2010, issue of the *Texas Register* (35 TexReg 5175) and will not be republished.

The new section and amendments are adopted in order to provide guidelines for local governments to establish Erosion Response Plans (ERPs). The guidelines for ERPs include provisions for consideration of local erosion conditions, prohibition of building habitable structures seaward of a building set-back line, exemptions for certain construction seaward of the set-back line, stricter construction requirements for exempted construction, improvements to and protection of public beach access and dunes from storm damage, and procedures for adoption of plans. Adoption of ERPs by local governments is a required element in consideration for award of funds for Coastal Erosion Planning and Response Act (CEPRA) Projects by the Commissioner. The adopted amendment to §15.41 adds consideration of whether a local government has implemented an ERP to the factors considered by the Commissioner for a CEPRA award for a project within the local government's jurisdiction.

BACKGROUND AND SECTION-BY-SECTION ANALYSIS OF ADOPTED RULES

§15.17. Local Government Erosion Response Plans.

Texas Natural Resources Code §33.607(g) as amended by House Bill (HB) 2819, 80th Legislature and §33.607(e), (f), and (g) as amended by HB 2073, 81st Legislature authorize the Commissioner to adopt rules for the establishment and implementation of Erosion Response Plans. Section 33.607(e) requires a local government subject to Chapters 61 and 63 to use historical erosion data and the coastal erosion response plan published by the Commissioner under §33.602 to prepare a local plan for reducing public expenditures for erosion and storm damage losses to public and private properties. Plans developed under §33.607(e) may include a set-back line that will accommodate a shoreline retreat. The local government is required to hold public educational meetings before implementing the plan to establish an ERP through the plans, orders, or ordinances provided by Chapter 61 (Open Beaches Act) and Chapter 63 (Dune Protection Act). Texas Natural Resources Code §33.607(f) provides further guidance on plan contents by outlining provisions for preservation and enhancement of the public's right of access to and use of the public beach, the protection of critical dunes for natural storm protection and conservation purposes, the procedures for implementing an optional set-back line, the prohibition of construction seaward

of a set-back line, and the acquisition of fee title to or a lesser interest in property seaward of the building set-back line.

The GLO adopts new §15.17 which incorporates guidelines for local governments to address when implementing the provisions of Texas Natural Resources Code §33.607(e) and (f). The new rule includes certain benchmarks local governments may use when determining an initial reference point for a proposed set-back line, including the line of vegetation (LOV), Mean Low Tide, Mean High Tide, or the line depicted in a coastal boundary survey approved and filed as provided in Texas Natural Resources Code §33.136. The primary objective of a building set-back line is to prohibit construction of all structures seaward of the line except in cases where no practicable alternative exists. The new rule outlines matters the plan should address including a presumption that a permit applicant has met the dune mitigation sequence requirements for avoidance and minimization if it complies with a building set-back provision, exemptions from set-back provisions, stricter building standards for exempted property, use of a registered professional engineer licensed in the State of Texas for design and certification of structures, and minimization of impacts to natural dune hydrology. Local governments must address in the ERP relocation of habitable structures built seaward of a building set-back line as an exempt property to insure their removal in the event of damage, destruction, or placement on the public beach as a result of storm damage or erosion. Local governments are also required to address protection of the foredune ridge when siting new construction, enhanced measures to protect existing dunes, preparing goals and implementation schedules for protecting public access and the foredune ridge, and re-establishment of access areas and the foredune ridge when impacted by storms and erosion. Finally, the ERP outlines procedures for local governments to establish criteria for voluntary acquisition of properties seaward of the set-back line. The rules include guidelines for submitting ERPs to the GLO for approval before being certified as an amendment to the local government beach access and dune protection plan.

In order to be fully considered by the GLO for an expenditure from the coastal erosion response account (Account) pursuant to Texas Natural Resources Code, §33.605(b)(6)(B), a local government must adopt and submit the ERP or any amendments to the GLO for certification no later than December 31 immediately preceding the state fiscal biennium in which funding is sought. However, in order to allow local governments additional time after the effective date of this rule to draft and implement an ERP for consideration by the GLO for an expenditure from the Account in the next state fiscal biennium beginning September 1, 2011, a local government must submit a draft ERP to the GLO no later than July 1, 2011, rather than December 31, 2010.

§15.41. Evaluation Process for Coastal Erosion Studies and Projects.

Texas Natural Resources Code §33.605(b) as amended by HB 2073 requires the Commissioner to consider whether a local government is adequately administering a plan for reducing public expenditures for erosion and storm damage losses prepared by the local government under Texas Natural Resources Code §33.607 in determining whether to approve an expenditure from the Coastal Erosion Response Account for a coastal erosion study or project within a local government's jurisdiction. The GLO adopts an amendment to §15.41 to conform the GLO's rules for evaluation of CEPRA project goal summaries to the statute as amended by HB 2073.

FACTUAL BASIS AND REASONED JUSTIFICATION FOR ADOPTION OF NEW SECTION AND AMENDMENTS

The justification for the adopted new section and amendments is that the public will benefit from local government adoption of Erosion Response Plans because of reduced public expenditures associated with loss of structures and public infrastructure due to storm damage and erosion, disaster response costs, and loss of life. If local governments establish a building set-back line based on erosion rates, longer time periods will allow for depreciation of new buildings before being subjected to erosion, especially modern hotels and condominiums. Placing structures further landward is also important because natural dune processes are allowed to continue with minimal disturbance and the risk to life and property from storm damage and public expenses of disaster relief will be reduced. By placing structures (especially taller and larger structures) further landward, the additional hazards created by tall buildings when subjected to storm surge will be reduced. Further, the increased intensity of use associated with these large building complexes and the greater demand for public services, such as sewer and water, are minimized. Larger structures are more difficult to move, and create increased pressure on the state and local government for the construction of hard erosion control structures, further increasing public expenses.

Additional justification for the new adopted ERP regulations will be the anticipated reduced storm damage loss to properties exempted from constructing landward of the building set-back line. Exempted properties, including property which has an existing beachfront construction certificate or dune protection permit, and properties with no practicable alternative to building landward of the set-back line, will be subject to stricter building standards. Additionally, existing structures and properties constructed seaward of the building set-back line will be protected by local government implementation of plans to improve foredune ridges and beach access points to protect against storm surge. Scientific and engineering studies considered by the GLO noted that during Hurricane Alicia in 1983, vegetation line retreat and landward extent of storm wash-over deposits were greater for developed areas than for natural areas (Bureau of Economic Geology Circular 85-5). This difference is attributed in part to the fact that naturally occurring vegetated dunes are stronger than reconstructed dunes due to greater root depths of dune vegetation. (Circular 85-5).

Finally, the requirements that local governments adopt erosion response plans pursuant to these adopted regulations will encourage those entities to undertake planning efforts that integrate measures for reducing public expenditures for erosion and storm damage losses to public and private property, including public beaches, into local dune protection and beach access plans approved by the commissioner of the General Land Office. Local governments are encouraged, but not required, to include building set-back lines in their adopted ERP. The adopted rules are intended to provide flexibility to local governments to adapt the guidelines to local conditions. The adopted rules also provide flexibility to local governments to exempt properties from building set-back requirements where there is no practicable alternative to construction seaward of the set-back line to avoid an unconstitutional taking of private property without compensation. However, set-back regulations implemented pursuant to the adopted rules are exempt from a statutory taking claim under the Private Real Property Rights Preservation Act inasmuch as Texas Natural Resources Code §33.607(h) as added by HB 2819 provides that Chapter 2007, Government Code, does not

apply to a rule or local government order or ordinance authorized by §33.607.

CONSISTENCY WITH COASTAL MANAGEMENT PROGRAM

The new rule for local government Erosion Response Plans contained in §15.17 is subject to the Coastal Management Program (CMP), 31 TAC §505.11(c), relating to the Actions and Rules subject to the CMP. The GLO has reviewed these adopted actions for consistency with the CMP's goals and policies in accordance with regulations of the Coastal Coordination Council (Council). The applicable goals and policies are found at 31 TAC §501.12 (relating to Goals) and §501.26 (relating to Policies for Construction in the Beach/Dune System). Section 15.17 is consistent with the CMP goals outlined in 31 TAC §501.12(1), (2), (3), and (6). These goals seek protection of critical natural resource areas (CNRAs), compatible economic development and multiple uses of the coastal zone, minimization of the loss of human life and property due to the impairment and loss of CNRA functions, and coordination of GLO and local government decision-making through the establishment of clear, effective policies for the management of CNRAs. ERPs will allow the GLO and local governments to develop plans that are tailored to the unique natural features, degree of development, storm, and erosion exposure potential of each area. The new rule for ERPs in 31 TAC §15.17 is also consistent with the CMP policies outlined in 31 TAC §501.26(a)(1) and (2) that prohibit construction within a critical dune area that results in the material weakening of dunes and dune vegetation or adverse effects on the sediment budget. ERPs will provide reduced impacts to critical dunes and dune vegetation by placement of structures further landward, reduce dune area habitat and biodiversity loss, and reduce structure encroachment on the beach which leads to interruption of the natural sediment cycle.

The amendment adopted for §15.41 concerning consideration of whether a local government has implemented an ERP as a factor considered by the Commissioner for a CEPRA award conforms the rule to a legislative change and is not subject to the CMP, 31 TAC §505.11(c), relating to the Actions and Rules subject to the CMP. Individual erosion response projects undertaken in compliance with these rules may be subject to the CMP, and consistency with the CMP is determined at the appropriate stage of project planning.

Consequently, the GLO has determined that the adopted actions are consistent with the applicable CMP goals and policies. No public comments were received regarding the consistency of the adopted rulemaking with the CMP goals and policies.

ENVIRONMENTAL REGULATORY ANALYSIS

The GLO has evaluated the adopted rulemaking action in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and determined that the action is not subject to §2001.0225 because it does not exceed express requirements of state law and does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule of which the specific intent is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state. The adopted amendment and new rule are not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because the adopted rulemaking implements legislative requirements in Texas Natural Resources Code §33.605 and §33.607. These sections as amended by HB 2819 and HB 2073 provide the GLO with the authority to adopt rules for the establishment and implementation of an ERP by a local government.

RESPONSE TO PUBLIC COMMENT

No public comments were received regarding the adopted new section and amendments.

SUBCHAPTER A. MANAGEMENT OF THE BEACH/DUNE SYSTEM

31 TAC §15.17

STATUTORY AUTHORITY

The new §15.17 is adopted under Texas Natural Resources Code §§33.607, 61.011, 61.015, 63.054, 63.056, and 63.121. These sections as amended by HB 2819, 80th Legislature and HB 2073, 81st Legislature authorize the Commissioner to adopt rules for the establishment and implementation of Erosion Response Plans that may include a building set-back line, rules for the preservation and enhancement of the public's right to use and have access to and from the public beaches of Texas, rules to certify that local government plans to manage the beach/dune system are consistent with state law, and rules to insure that proposed construction meets the objectives of the Dune Protection Act.

Texas Natural Resources Code §§33.607, 61.011, 61.015, 63.054, 63.056, and 63.121 are affected and implemented by the adopted new rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 11, 2010.

TRD-201004654
Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
General Land Office
Effective date: August 31, 2010
Proposal publication date: June 18, 2010
For further information, please call: (512) 475-1859

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SUBCHAPTER B. COASTAL EROSION PLANNING AND RESPONSE

31 TAC §15.41

STATUTORY AUTHORITY

The amendments to §15.41 are adopted under Texas Natural Resources Code §33.602(c) which provides the Commissioner of the General Land Office with authority to adopt rules necessary to implement Texas Natural Resources Code, Chapter 33, Subchapter H (the Coastal Erosion Planning and Response Act) and Texas Natural Resources Code §33.605 which requires the Commissioner to consider whether a local government is adequately administering a building set-back line established under Texas Natural Resources Code §33.607 in determining whether to approve an expenditure from the Coastal Erosion Response

Account for a coastal erosion study or project within a local government's jurisdiction.

Texas Natural Resources Code §33.605 and §33.607 are affected and implemented by the adopted amendments.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
General Land Office
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For further information, please call: (512) 475-1859

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PART 17. TEXAS STATE SOIL AND WATER CONSERVATION BOARD

CHAPTER 523. AGRICULTURAL AND SILVICULTURAL WATER QUALITY MANAGEMENT

31 TAC §523.3

The Texas State Soil and Water Conservation Board (State Board or agency) adopts amendments to §523.3, Water Quality Management Plan (WQMP) Certification Program, without changes to the proposed text published in the April 23, 2010 issue of the *Texas Register* (35 TexReg 3219). The adopted text will allow for the "conditional" certification of a WQMP in certain situations for demonstrating experimental conservation technologies, and to modify the requirements associated with documenting neighbor consent relating to odor control plans for a proposed poultry facility.

Specifically, the adopted text changes 31 TAC §523.3(c), relating to the certification of a WQMP, by adding new §523.3(c)(2). New §523.3(c)(2) establishes the allowance for "conditional" certification of a WQMP in situations where the landowner, the local soil and water conservation district (SWCD), and State Board agree to demonstrate experimental conservation technologies and systems. The option of a conditional certification allows the State Board to work with landowners to find alternative solutions to problems that otherwise result in the landowner not participating in the program. One of the major components to this new text would be the requirement that the landowner allow the State Board to intensely monitor compliance with management measures within the WQMP, and to perform intensive soil and water quality monitoring to verify if the experimental technologies are being successful in protecting state water quality standards. Upon completion of the monitoring, the State Board will make a determination that the conditional certification be made permanent, or be removed resulting in the WQMP not being certified.

The change in 31 TAC §523.3(j)(3)(D) addresses the fact that after September 1, 2009 the State Board may not certify a water quality management plan for a proposed newly constructed poultry facility, or an existing poultry facility that proposes to expand by more than 50 percent the number of birds included in the existing certified water quality management plan as of September 1, 2009, that is located less than one half of one mile from a neighbor if the presence of the facility is likely to create a persistent nuisance odor for such neighbors, unless the facility provides an odor control plan the Texas Commission on Environmental Quality (TCEQ) determines is sufficient to control odors. New §523.3(j)(3)(D) provides that a proposed newly constructed poultry facility does not need to obtain an odor control plan if all neighbors within one half of one mile provide their consent for the facility to begin construction and operate. Existing §523.3(j)(3)(D) requires that a "notarized letter of consent" signed by the neighbor or authorized legal representative(s) of the neighbor must be submitted to the State Board in order to verify its authenticity. New §523.3(j)(3)(D) eliminates the need for the consent to be provided by a notarized written document, and proposes to refer to the written document as a "form" rather than a "letter."

The State Board has developed a standard form the poultry facility owner signs affirming that properly signed consent forms have been obtained from all neighbors and a separate standard form to use for obtaining consent so as to receive consistent consent from all neighbors rather than each neighbor having to write their own unique letter to grant consent. This new language removes the burden and cost of obtaining notarization from neighbors.

No comments were received regarding adoption of these amendments.

The amendment is adopted under the Agriculture Code of Texas, Title 7, Chapter 201, §201.020, which authorizes the State Board to adopt rules that are necessary for the performance of its functions under the Agriculture Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 12, 2010.

TRD-201004686
Mel Davis
Special Projects Coordinator
Texas State Soil and Water Conservation Board
Effective date: September 1, 2010
Proposal publication date: April 23, 2010
For further information, please call: (254) 773-2250 x252

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 3. TEXAS YOUTH COMMISSION

CHAPTER 85. ADMISSION, PLACEMENT, RELEASE, AND DISCHARGE

The Texas Youth Commission (TYC) adopts an amendment to §85.45, concerning movement prior to program completion, without changes to the proposed text as published in the June 25, 2010, issue of the *Texas Register* (35 TexReg 5485). TYC adopts amendments to §85.55 and §85.69, concerning program completion and release, without changes to the proposed text as published in the June 25, 2010, issue of the *Texas Register* (35 TexReg 5485). TYC also adopts amendments to §85.59 and §85.62, concerning program completion and release, with changes to the proposed text as published in the June 25, 2010,

issue of the *Texas Register* (35 TexReg 5485). The changes consist of minor technical corrections.

The justification for the amended rules is compliance with recently enacted legislation, enhanced communication with courts regarding youth progress and re-entry plans, improved youth participation in required rehabilitation and educational programming, and provision of an appropriate level of review and executive approval for release decisions.

Amended §§85.55, 85.59, and 85.69 include a new provision requiring youth to participate in certain statutorily required programs, such as the reading improvement program and positive behavioral supports and interventions system, in order to complete rehabilitation programming and earn release to parole. Youth will also be required to complete a gang intervention education program, if ordered by the committing court to do so.

Amended §§85.45, 85.55, 85.59, and 85.65 include new provisions relating to notices TYC is statutorily required to provide prior to releasing a youth on parole. TYC will provide a progress report and community re-entry plan to the youth's committing court. These documents will also be provided to the juvenile court having jurisdiction over the youth's parole placement, if different than the committing court.

Amended §§85.59, 85.65, and 85.69 include clarification that the notification sent to parents/guardians and victims of a pending exit review will include notice of the right to present information in person during the youth's exit review process.

Amended §85.59 and §85.65 require the Special Services Committee at each TYC high restriction facility to review a sentenced offender's case within 45 days after revocation of TYC parole to determine whether a transfer to the Texas Department of Criminal Justice-Institutions Division will be recommended.

In addition to the changes identified above, amended §85.45 establishes that the TYC director of youth services is the final decision authority for approving the transition to medium restriction facilities for youth with the most serious committing offenses. The amended rule also establishes that youth are not eligible for early release due to population control if they have not completed or participated in all statutorily required programming.

In addition to the changes identified above, amended §85.55 establishes that the TYC executive director, rather than the division director over programming and treatment services, is the final decision authority for approving the release to parole for youth with the most serious committing offenses. The amended rule also clarifies that for youth who have been assigned an extension to their length of stay by the Release Review Panel, completion of that extension is a requirement to be considered as having completed rehabilitation programming.

No comments were received regarding adoption of the rules.

SUBCHAPTER C. MOVEMENT PRIOR TO PROGRAM COMPLETION

37 TAC §85.45

The amended rule is adopted under: (1) Human Resources Code §61.034, which provides the commission with the authority to adopt rules appropriate to the proper accomplishment of its functions; (2) Human Resources Code §61.08141, which requires the commission, prior to releasing a child, to provide a progress report and a copy of the child's re-entry and reintegration plan to the court that committed the child to the commission, and if different, the juvenile court in the county where the child is placed after release; (3) Education Code §30.106, which prohibits a student in a commission education program from being released on parole unless the student participates, to the extent required under commission rule, in the positive behavior support system and reading instruction program; and (4) Family Code §54.0491, which prohibits a child from being discharged or released under supervision by the commission until the child completes a criminal street gang intervention program, if the youth is ordered by a juvenile court to attend such a program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 10, 2010.

TRD-201004633
Cheryln K. Townsend
Executive Director
Texas Youth Commission
Effective date: September 1, 2010
Proposal publication date: June 25, 2010
For further information, please call: (512) 424-6014

SUBCHAPTER D. PROGRAM COMPLETION AND RELEASE

37 TAC §§85.55, 85.59, 85.65, 85.69

The amended rules are adopted under: (1) Human Resources Code §61.034, which provides the commission with the authority to adopt rules appropriate to the proper accomplishment of its functions; (2) Human Resources Code §61.08141, which requires the commission, prior to releasing a child, to provide a progress report and a copy of the child's re-entry and reintegration plan to the court that committed the child to the commission, and if different, the juvenile court in the county where the child is placed after release; (3) Education Code §30.106, which prohibits a student in a commission education program from being released on parole unless the student participates, to the extent required under commission rule, in the positive behavior support system and reading instruction program; and (4) Family Code §54.0491, which prohibits a child from being discharged or released under supervision by the commission until the child completes a criminal street gang intervention program, if the youth is ordered by a juvenile court to attend such a program.

§85.59. Program Completion for Sentenced Offenders.

(a) Purpose. The purpose of this rule is to establish criteria and the approval process for sentenced offender youth to qualify for release or transfer to parole by completing required programming.

(b) Applicability.

(1) Definitions pertaining to this rule are under §85.1 of this title.

(2) This rule applies only to sentenced offenders.

(3) This rule does not apply to:

(A) sentenced offenders who are discharged due to expiration of the sentence or transferred to the Texas Department of Criminal Justice (TDCJ) by court order or by aging out of TYC; or

(B) sentenced offenders adjudicated for capital murder.

(c) General Requirements.

(1) A detainer or bench warrant is not an automatic bar to earned release. The agency shall release a youth to authorities pursuant to a warrant.

(2) In order to determine eligibility for release or transfer, the Special Services Committee (SSC) shall review the youth's progress:

(A) six months after admission to TYC;

(B) when the minimum period of confinement (MPC) is complete;

(C) to determine eligibility/recommendation for transfer to TDCJ-Institutional Division (ID) or TDCJ-Parole Division (PD), on or before:

(i) 18 years of age and 18 years and six months of age for youth committed on or after June 9, 2007; or

(ii) 20 years of age and 20 years and six months of age for youth committed before June 9, 2007;

(D) within 45 days after revocation of parole, if applicable; and

(E) at other times as requested by the committee.

(3) Staff shall notify the youth, parent/guardian, any designated advocate for the youth, and any identified victim(s) of a pending SSC exit review/interview at least 30 days prior to the date of the review. The notification shall inform the recipients that they have the opportunity to submit written comments to the SSC. The notification shall also inform the parent/guardian and any identified victim(s) that they may present information in person during the youth's exit review process. Any information received from a youth's family members, victims, local officials, staff, or the general public will be considered by the SSC or designee and included in the release/transfer packet.

(4) A plan to minimize risk factors for re-offending shall be developed for each youth prior to release or transfer to TDCJ-PD, unless the youth is to be discharged.

(5) TYC shall comply with Chapter 57, Family Code and Article 56.02, Code of Criminal Procedure, regarding victim notification. Refer to §81.35 of this title for victim notification procedures.

(6) Immigration and Customs Enforcement must be notified when releasing an undocumented foreign national youth. Refer to §85.79 of this title for notification procedures for youth who are undocumented foreign nationals.

(7) TYC shall comply with the Sex Offender Registration Program, pursuant to Chapter 62, Code of Criminal Procedure, regarding youth who are subject to sex offender registration. Refer to §87.85 of this title for sex offender registration procedures.

(8) Parents or guardians of youth under the age of 18 will be notified of all movements. Youth 18 or older must give consent to notify parents or guardians of any movement.

(9) Sentenced offenders shall serve the entire MPC applicable to the youth's committing offense in high restriction facilities unless:

(A) the youth is transferred to TDCJ-ID by the committing court. See §85.65 of this title; or

(B) the youth is approved by the committing court to attain parole status prior to completion of serving the MPC; or

(C) the youth's sentence expires before the MPC expires; or

(D) the executive director waives such placement.

(d) Program Completion Criteria.

(1) A sentenced offender youth whose committing offense occurred before September 1, 2005 will be eligible for release/transfer from a high restriction facility as described in paragraph (3) of this subsection when the following criteria have been met:

(A) no major rule violations confirmed through a Level I or II due process hearing within 90 days prior to the SSC exit interview or during the approval process; and

(B) participation in or completion of assigned specialized treatment programs or curriculum as required under §87.51 of this title; and

(C) assignment by the multi-disciplinary team to the highest stage in the assigned rehabilitation program as described in §87.3 of this title, which reflects that the youth:

(i) is consistently participating in academic and workforce development programs commensurate with abilities as reflected in the youth's educational plan; and

(ii) is consistently participating in skills development groups, as reflected in the youth's individual case plan; and

(iii) is consistently demonstrating learned skills, as reflected in the individual youth log and daily rating of performance expectations; and

(iv) has completed a community re-integration plan, approved by the multi-disciplinary team, that demonstrates the youth's:

(I) understanding of his/her risk and protective factors;

(II) development of skills, abilities, and knowledge to reduce risk factors and increase protective factors;

(III) identification of goals and a plan of action to achieve those goals; and

(IV) identification of obstacles that may hinder successful re-entry and plans to deal with those obstacles;

(D) participation in or completion of any statutorily required rehabilitation programming, including but not limited to:

(i) for youth eligible for release on or after September 1, 2010, participation in a reading improvement program for identified youth to the extent required under §91.55 of this title;

(ii) for youth eligible for release on or after September 1, 2010, participation in a positive behavioral interventions and supports system to the extent required under §91.55 of this title; and

(iii) for youth eligible for release on or after September 1, 2009, completion of at least 12 hours of a gang intervention education program, if required by court order; and

(E) completion of the MPC.

(2) A sentenced offender youth whose committing offense occurred on or after September 1, 2005, may be considered for release/transfer from a high restriction facility as described in paragraph (3) of this subsection when he/she:

(A) meets criteria listed in paragraph (1)(A) - (D) of this subsection; and

(B) meets the following:

(i) completes all but nine months of the sentence if the sentence expires before the MPC or simultaneously with the MPC; or

(ii) completion of the MPC if the sentence expires after the MPC.

(3) Release will be to TYC parole unless, at the time the youth meets program completion criteria, he/she is:

(A) within two months prior the 19th birthday if committed to TYC on or after June 9, 2007, in which case the youth will be transferred to TDCJ-PD; or

(B) at least 19 years of age if committed to TYC before June 9, 2007, in which case the youth will be transferred to TDCJ-PD.

(e) Release/Transfer Approval. The executive director or his/her designee shall approve the youth's release or transfer upon a determination that the youth meets program completion criteria as set forth in this rule.

(f) Loss of Release/Transfer Eligibility.

(1) Eligibility for release/transfer is lost when any of the following occurs after the exit interview:

(A) youth commits a major rule violation that is confirmed through a Level I or II due process hearing; or

(B) the youth's multi-disciplinary team determines that the youth no longer meets the required rehabilitation program criteria.

(2) Except as described in paragraph (3) of this subsection, a youth who loses release or transfer eligibility will not be eligible for release/transfer until such time as the youth meets program completion criteria and a subsequent SSC exit review/interview confirms release/transfer eligibility.

(3) If a youth whose committing offense occurred on or after September 1, 2005, is being considered for release/transfer nine months prior to his/her sentence completion loses eligibility for release/transfer, he/she will remain in high restriction until his/her sentence has expired.

(g) Release/Transfer Date.

(1) The SSC must hold an exit interview within 14 calendar days from the date a youth meets program completion criteria as set forth in subsection (d) of this section.

(2) If the SSC confirms the youth meets program completion criteria, the youth shall be:

(A) released to TYC parole within 120 calendar days after the date the youth met program completion criteria, unless the youth loses release eligibility as described in subsection (f) of this section in which case the release process is re-initiated when the youth meets program completion criteria; or

(B) transferred to TDCJ parole within 120 calendar days after the date the youth met program completion criteria, unless:

(i) the youth loses transfer eligibility as set forth in subsection (f) of this section in which case the transfer process is re-initiated when the youth meets program completion criteria; or

(ii) the Department of Sentenced Offender Disposition has not received notification of parole conditions from TDCJ to confirm the transfer date, in which case the 120-day deadline will be extended to determine the status of the transfer request. The Department of Sentenced Offender Disposition will determine the duration of the extension.

(h) Notification.

(1) TYC will provide the committing juvenile court a copy of the youth's re-entry/reintegration plan and a report concerning the youth's progress while committed to TYC no later than 30 days prior to the date of the youth's release or discharge. Additionally, if on release the youth is placed in another state or a county other than a county served by the committing juvenile court, TYC will provide the re-entry/reintegration plan and progress report to a juvenile court having jurisdiction over the county of the youth's residence.

(2) TYC will notify the committing juvenile court, the prosecuting attorney, the parole officer, and the chief juvenile probation officer in the county to which the youth is being moved no later than ten calendar days prior to the release.

§85.65. Discharge of Sentenced Offenders upon Transfer to TDCJ or Expiration of Sentence.

(a) Purpose. The purpose of this rule is to establish criteria and an approval process for requesting court approval to transfer sentenced offenders to adult prison, and for discharging sentenced offenders whose sentences have expired, or who have not qualified for release or transfer based on completing required programming.

(b) Applicability.

(1) Definitions pertaining to this rule are under §85.1 of this title.

(2) This rule only applies to the disposition of the original determinate sentence.

(3) This rule applies only to sentenced offenders. This rule does not apply to:

(A) sentenced offenders who qualify for release or transfer to parole due to completion of required programming; or

(B) sentenced offenders adjudicated for capital murder.

(c) General Requirements.

(1) Sentenced offenders shall by law, be transferred from TYC's custody no later than the youth's:

(A) 19th birthday for youth committed to TYC on or after June 9, 2007; or

(B) 21st birthday for youth committed to TYC prior to June 9, 2007.

(2) Sentenced offenders must serve the entire Minimum Period of Confinement (MPC) applicable to the youth's committing offense in high restriction facilities unless:

(A) the youth is transferred to Texas Department of Criminal Justice-Institutional Division (TDCJ-ID) in accordance with legal requirements or committing court approval; or

(B) the youth is approved by the committing court to attain parole status prior to completion of serving the MPC; or

(C) the youth's sentence expires before the MPC expires; or

(D) the executive director waives such placement.

(3) The Special Services Committee (SSC) or designee shall review the youth's progress:

(A) six months after admission to TYC;

(B) when the MPC is complete;

(C) to determine eligibility/recommendation for transfer to TDCJ-ID or TDCJ-PD, on or before:

(i) 18 years of age and 18 years and six months of age for youth committed on or after June 9, 2007; or

(ii) 20 years of age and 20 years and six months of age for youth committed before June 9, 2007;

(D) within 45 days after revocation of parole, if applicable; and

(E) at other times as requested by the committee.

(4) Staff shall notify the youth, parent/guardian, any designated advocate for the youth, and any identified victim(s) of a pending SSC exit review/interview at least 30 days prior to the date of the review. The notification shall inform the recipients that they have the opportunity to submit written comments to the SSC. The notification shall also inform the parent/guardian and any identified victim(s) that they may present information in person during the youth's exit review process. Any information received from a youth's family members, victims, local officials, staff, or the general public will be considered by the SSC or designee and included in the release/transfer packet.

(5) A plan to minimize risk factors for re-offending shall be developed for each youth prior to transfer to TDCJ-PD.

(6) TYC jurisdiction shall be terminated and a sentenced offender discharged when he/she is transferred to TDCJ or his/her sentence has expired, except when the youth is committed to TYC under concurrent determinate and indeterminate commitment orders as specified in §85.25 of this title.

(7) TYC shall comply with Chapter 57, Family Code, and Article 56.02, Code of Criminal Procedure, regarding victim notification. Refer to §81.35 of this title.

(8) All residential programs transferring an undocumented foreign national youth to TDCJ must notify Immigration and Customs Enforcement (ICE). Refer to §85.79 of this title for procedures.

(9) TYC shall comply with the Sex Offender Registration Program, pursuant to Chapter 62, Code of Criminal Procedure, regarding youth who are subject to sex offender registration. Refer to §87.85 of this title for sex offender registration procedures.

(10) Parents or guardians of youth under the age of 18 will be notified of all movements. Youth 18 or older must give consent to disclose any movement information to a parent.

(d) Transfer Criteria.

(1) Sentenced Offenders Whose Parole has been Revoked or Who have been Adjudicated or Convicted for a Felony Offense. TYC may request a juvenile court hearing for transfer to TDCJ-ID for a youth whose parole has been revoked or who has been adjudicated or convicted for a felony offense and the following criteria have been met:

(A) youth is at least age 16; and

(B) youth has not completed his/her sentence; and

(C) youth's conduct indicates that the welfare of the community requires the transfer; and

(D) youth's conduct occurred while on parole status.

(2) Sentenced Offenders in High Restriction Transferring to TDCJ-ID. TYC may request a juvenile court hearing to recommend transfer of a sentenced offender in a high restriction facility to TDCJ-ID if the following criteria have been met:

(A) youth is at least age 16; and

(B) youth has spent at least six months in a high restriction facility; and

(C) youth has not completed his/her sentence; and

(D) youth has met at least one of the following behavior criteria:

(i) youth has committed a felony or Class A misdemeanor while assigned to a residential placement; or

(ii) youth has committed major rule violations as confirmed though a Level I or II due process hearing on three or more occasions; or

(iii) youth has engaged in chronic disruption of program (five security admissions or extensions in one month or ten in three months); or

(iv) youth has demonstrated an inability to progress in his/her rehabilitation program due to persistent non-compliance with objectives; and

(E) alternative interventions have been tried without success; and

(F) youth's conduct indicates that the welfare of the community requires the transfer.

(3) Sentenced Offenders in High Restriction Transferring to TDCJ-PD. A youth in a high restriction facility who has not completed transfer criteria as outlined in §85.59 of this title and who has not received court approval for transfer to TDCJ-ID, shall be transferred to TDCJ-PD to complete the sentence:

(A) no later than the youth's 19th birthday, for youth committed on or after June 9, 2007; or

(B) no later than the youth's 21st birthday, for youth committed before June 9, 2007.

(4) Sentenced Offenders on TYC Parole Transferring to TDCJ-PD. A youth on TYC parole who has not completed his/her sentence shall be transferred to TDCJ-PD (court approval not required) no later than the youth's:

(A) 19th birthday, for youth committed on or after June 9, 2007; or

(B) 21st birthday, for youth committed before June 9, 2007.

(5) Sentenced Offenders Committed on or after June 9, 2007 Who Will Not Complete the Minimum Period of Confinement Prior to Age 19. For a youth sentenced on or after June 9, 2007 who will not have completed his/her MPC upon reaching his/her 19th birthday, TYC shall request a court hearing to determine whether he/she will be transferred to TDCJ-ID or TDCJ-PD. TYC will consider the following in forming a recommendation for the committing court:

(A) length of stay in TYC;

(B) youth's progress in the rehabilitation program;

(C) youth's behavior while in TYC;

(D) youth's offense/delinquent history; and

(E) any other relevant factors, such as:

(i) risk factors and protective factors the youth possesses as identified in his/her psychological evaluation; and

(ii) the welfare of the community.

(e) Discharge Criteria. A sentenced offender shall be discharged from TYC jurisdiction when one of the following occurs:

(1) expiration of the sentence imposed by the juvenile court, unless the youth is under concurrent commitment orders as described in §85.25 of this title; or

(2) the youth has been transferred to TDCJ-ID under court order or transferred to TDCJ-PD.

(f) Decision Authority for Approval to Transfer.

(1) A youth shall not be transferred from high restriction to TDCJ-PD until the executive director or his/her designee has determined that the youth's plan adequately addresses risk factors to minimize re-offending.

(2) When a determination has been made that the youth meets transfer criteria to TDCJ or cannot complete his/her MPC prior to the expiration of TYC's jurisdiction, the executive director or his/her designee approves the request for a hearing by the committing juvenile court.

(3) The final transfer approval authority for transfer to TDCJ-ID is the committing juvenile court.

(g) Notification.

(1) For youth who will not be returning to court for a transfer hearing, TYC will provide the committing juvenile court a copy of the youth's re-entry and reintegration plan and a report concerning the youth's progress while committed to TYC no later than 30 days prior to the date of the youth's release or discharge. Additionally, if on release the youth is placed in another state or a county other than a county served by the committing juvenile court, TYC will provide the re-entry/reintegration plan and progress report to a juvenile court having jurisdiction over the county of the youth's residence.

(2) TYC will notify the committing juvenile court, the prosecuting attorney, parole officer, and the county chief juvenile probation officer in the county to which the youth is being moved no later than ten calendar days prior to the discharge.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 10, 2010.

TRD-201004634
Cheryln K. Townsend
Executive Director
Texas Youth Commission
Effective date: September 1, 2010
Proposal publication date: June 25, 2010
For further information, please call: (512) 424-6014

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CHAPTER 91. PROGRAM SERVICES
SUBCHAPTER B. EDUCATION PROGRAMS

37 TAC §91.55

The Texas Youth Commission (TYC) adopts new §91.55, concerning participation and reporting requirements of the reading improvement program and Positive Behavioral Interventions and Supports (PBIS) system, without changes to the proposed text as published in the June 25, 2010, issue of the *Texas Register* (35 TexReg 5491).

The justification for the new rule is enhanced student safety as well as increased educational achievement and lower recidivism as a result of a more orderly and supportive climate where educational instruction and treatment can be delivered more effectively. Another justification for the new rule is improved reading gains as a result of more consistent, intensive remediation for students with a deficit in reading skills.

In accordance with HB 3689 (81st Texas Legislature), the new rule defines participation in the reading improvement program and the PBIS system for purposes of qualifying for parole. The rule also establishes criteria for evaluating the effectiveness of the reading improvement program and PBIS system as required under HB 3689.

No comments were received regarding adoption of the rule.

The new rule is adopted under: (1) Human Resources Code §61.034, which provides TYC with the authority to adopt rules appropriate to the proper accomplishment of its functions; and (2) Education Code §30.106, which requires TYC to adopt rules to define participation in the reading instruction program and the positive behavior support system, as well as to define the subgroups by which data will be disaggregated when evaluating the effectiveness of these programs.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 90. INTERMEDIATE CARE FACILITIES FOR PERSONS WITH MENTAL RETARDATION OR RELATED CONDITIONS

The Health and Human Services Commission (HHSC), on behalf of the Department of Aging and Disability Services (DADS), adopts amendments to §90.3, concerning definitions, §90.11, concerning criteria for licensing, and §90.17, concerning criteria for denying a license or renewal of a license, in Chapter 90, Intermediate Care Facilities for Persons with Mental Retardation or Related Conditions, without changes to the proposed text published in the May 28, 2010, issue of the *Texas Register* (35 TexReg 4350).

The amendments are adopted to implement Senate Bill 643, 81st Legislature, Regular Session, 2009, which amended Texas Health and Safety Code Chapter 252 to define "controlling person" as it relates to obtaining a license to operate a facility. The amendments replace the terms "affiliate," "person with a disclosable interest," and "manager" with the term "controlling person" and add a definition of "license holder." The amendments also extend the review period of a person applying for an initial or renewal license from two years to five years.

DADS received no comments regarding adoption of the amendments.

SUBCHAPTER A. INTRODUCTION

40 TAC §90.3

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 252, which authorizes DADS to license and regulate intermediate care facilities for persons with mental retardation or related conditions.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 11, 2010.

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Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
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For further information, please call: (512) 438-3734

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SUBCHAPTER B. APPLICATION PROCEDURES

40 TAC §90.11, §90.17

The amendments are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 252, which authorizes DADS to license and regulate intermediate care facilities for persons with mental retardation or related conditions.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Kenneth L. Owens
General Counsel
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CHAPTER 92. LICENSING STANDARDS FOR ASSISTED LIVING FACILITIES

The Health and Human Services Commission (HHSC), on behalf of the Department of Aging and Disability Services (DADS), adopts amendments to §92.2, concerning definitions; §92.3, concerning types of assisted living facilities; §92.11, concerning criteria for licensing; §92.41, concerning standards for type A, type B, and type E assisted living facilities; §92.53, concerning standards for certified Alzheimer's assisted living facilities; and the repeal of §92.71, concerning introduction and application: type E facilities; and §92.72, concerning general requirements: type E facilities, in Chapter 92, Licensing Standards for Assisted Living Facilities. The amendments and repeals are adopted without changes to the proposed text published in the May 28, 2010, issue of the *Texas Register* (35 TexReg 4354).

The amendments and repeals are adopted to implement portions of House Bill (HB) 216, 81st Legislature, Regular Session, 2009. HB 216 amended the definitions of "assisted living facility" and "personal care services" in Texas Health and Safety Code §247.002. In response, the agency adopts the amendment of the definition of "personal care services" in §92.2, which excludes the activities of medication administration and assistance with, or supervision of, medication from that definition. In addition, the agency adopts the amended description of an assisted living facility in §92.11(a)(1), which adds administration of medication as a service that requires a facility to be licensed as an assisted living facility and adds assistance with, or supervision of, the administration of medication as a service that may be provided by an assisted living facility.

HB 216 also repealed §247.030, regarding facilities that provide only medication supervision and general supervision of residents' welfare, known as Type E facilities. In response, the agency adopts amendments to §§92.2, 92.3, 92.41 and 92.53, which delete references to Type E facilities. The agency also adopts the repeal of §92.71 and §92.72, which contain requirements related to Type E facilities.

The agency adopts additional amendments to §92.41(e) that prohibit an assisted living facility from using its own employees to provide nursing services other than personal care services or the administration of medication. This amendment is in response to Texas Attorney General Opinion JC-0072. Other amendments update the agency name from the Department of Human Services to DADS and update section references.

DADS received one written comment from the Texas Assisted Living Association (TALA). A summary of the comment and the response follow.

Comment: The comment addressed the deletion of the phrase in §92.41(e) that states, "individuals with a terminal condition or who are experiencing a short-term, acute episode are excluded from this requirement." The commenter stated that, "this deletion could be construed as limiting the ability of individuals with terminal conditions or who are experiencing a short-term acute care episode to reside in assisted living." The commenter requested that the agency "provide assurances that the deletion from subpart (B) does not prohibit persons with terminal or short-term acute care needs from residing in assisted living facilities and from receiving the necessary nursing services."

Response: The deleted phrase allowed an individual with a terminal condition or who is experiencing a short-term, acute episode to receive daily or regular nursing services from a nurse employed by the assisted living facility. The phrase was deleted because a facility must not admit or retain a resident who cannot secure nursing services from an outside resource, if those services are needed. The amendment does not prohibit a person with terminal or short-term, acute care needs from residing in an assisted living facility or from receiving the necessary nursing services, but the services must be provided by an independent health care professional. Section 92.5 explicitly allows residents to contract with health care professionals for the provision of nursing services. The agency did not change the rule in response to this comment.

SUBCHAPTER A. INTRODUCTION

40 TAC §92.2, §92.3

The amendments are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 247, which authorizes DADS to license and regulate assisted living facilities.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Kenneth L. Owens
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SUBCHAPTER B. APPLICATION PROCEDURES

40 TAC §92.11

The amendments are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 247, which authorizes DADS to license and regulate assisted living facilities.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. STANDARDS FOR LICENSURE

40 TAC §92.41, §92.53

The amendments are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 247, which authorizes DADS to license and regulate assisted living facilities.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER D. FACILITY CONSTRUCTION

40 TAC §92.71, §92.72

The repeal is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive com-

missioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 247, which authorizes DADS to license and regulate assisted living facilities.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 97. LICENSING STANDARDS FOR HOME AND COMMUNITY SUPPORT SERVICES AGENCIES

The Health and Human Services Commission (HHSC), on behalf of the Department of Aging and Disability Services (DADS), adopts amendments to §§97.246, 97.289, and 97.602, concerning personnel records, independent contractors and arranged services, and administrative penalties; adopts new §97.247, concerning verification of employability and use of unlicensed volunteers; and adopts the repeal of §97.247, in Chapter 97, Licensing Standards for Home and Community Support Services Agencies. The amendments to §§97.246, 97.289, and 97.602; and new §97.247 are adopted with changes to the proposed text published in the February 26, 2010, issue of the *Texas Register* (35 TexReg 1722). The repeal of §97.247 is adopted without changes to the proposed text.

The amendments, new section, and repeal are adopted to implement portions of Senate Bill (SB) 806, 81st Legislature, Regular Session, 2009. SB 806, in part, amended the Texas Health and Safety Code (THSC), §250.003 and §253.008. The statutory amendments require a Home and Community Support Services Agency (HCSSA) to search the nurse aide registry (NAR) and employee misconduct registry (EMR) annually for each unlicensed person who has face-to-face client contact. The purpose of the search is to determine whether any HCSSA employee or applicant for employment is listed in either registry as unemployable. The statutory amendments also require a HCSSA to maintain a copy of the results of the annual searches in the personnel record of the employee. The repeal of §97.247 allows for new §97.247, which updates, reorganizes, and clarifies the requirements for a HCSSA to conduct and process criminal history checks and searches of the NAR and EMR for unlicensed applicants, employees, and volunteers whose duties would or do include face-to-face client contact.

In §97.246(a)(6)(B), a cross-reference to §97.247(a)(4), for an employee, and to §97.247(b)(4), for a volunteer, were added to provide a cross-reference to the requirements for a HCSSA to provide written information about the EMR to an unlicensed employee and volunteer whose duties would or do include face-to-face client contact.

In §97.247, "Volunteers" was changed to "Persons" in the title because the section applies to unlicensed employees, unlicensed volunteers, and cross-references rules in §97.289 that apply to an unlicensed person providing services under arrangement.

In §97.247(a)(1), the requirement that a HCSSA document its review of an unlicensed applicant's or employee's criminal history was moved to §97.247(a)(2) to clarify that a HCSSA is required to document its review of a conviction that is not listed in THSC §250.006 and its determination of whether the conviction is a contraindication to employment.

In §97.247(a)(5), the requirement that a HCSSA annually search the NAR and EMR during the month of an employee's anniversary date was deleted. Section 97.247(a)(5)(A) was added to require a HCSSA to search the registries by August 31, 2011, and at least once every 12 months thereafter, for an employee most recently hired before September 1, 2009. Section 97.247(a)(5)(B) was added to require a HCSSA to search the registries at least once every 12 months for an employee most recently hired on or after September 1, 2009.

In §97.247(b)(2), the requirement that a HCSSA document its review of an unlicensed volunteer's criminal history check was changed to clarify that a HCSSA is required to document its review of a conviction of an offense that is not listed in THSC, §250.006 and its determination that the conviction is not a contraindication to employment.

In §97.247(b)(5), the requirement that a HCSSA annually search the NAR and EMR during the month of the anniversary date of a volunteer's first face-to-face contact with a client was deleted. Section 97.247(b)(5)(A) was added to require a HCSSA to search the registries by August 31, 2011, and at least once every 12 months thereafter for a volunteer with face-to-face contact with a client for the first time before September 1, 2009. Section §97.247(b)(5)(B) was added to require a HCSSA to search the registries at least once every 12 months for a volunteer with face-to-face contact with a client for the first time on or after September 1, 2009.

In §97.247(c), the last sentence regarding the documentation requirements for a criminal history check for an employee and volunteer was deleted because it repeats information in subsections (a) and (b).

Section 97.247(d) was added to clarify that, with respect to checking the background of an unlicensed person who provides services under arrangement, a HCSSA must comply with §97.289(c) and (d).

In §97.289(a), the proposed amendment was deleted to avoid the implication that a HCSSA may independently contract with an unlicensed person to provide personal assistance services.

Section 97.289(a) was also revised to clarify that the contract must designate the responsibilities of the HCSSA and the independent contractor.

Section 97.289(c)(2) was revised to delete the requirement that an unlicensed person providing services for a HCSSA under a contract with another HCSSA or organization must receive information about the EMR within five working days of the date of the

person's first face-to-face contact with a HCSSA client. So that an unlicensed person working for another agency or organization receives information about the EMR only one time, the deleted language was replaced with the requirement for the HCSSA to ensure that either it, or the contracting HCSSA, or organization comply with the requirements of §93.3(c) of this title (relating to Employment and Registry Information).

Section 97.289(c)(3) was revised to delete the requirement that a HCSSA ensure that either it or the contracting HCSSA or organization searches the NAR and EMR annually during the month of the anniversary date of the unlicensed person's first face-to-face contact with a HCSSA client. As revised, a search is required "at least every 12 months" to allow a HCSSA or contracting HCSSA or organization to decide when to conduct the registry searches within the 12-month period.

In §97.289(d), the requirement that a HCSSA obtain and keep a written statement signed and dated by a person authorized to make decisions on personnel matters for the contracting HCSSA or organization regarding conducting a criminal history check on an unlicensed person was moved to §97.289(e)(3). Also, the requirement to review convictions not listed in THSC §250.006 has been deleted. Therefore, the revised subsection requires a HCSSA to ensure that the contracting HCSSA or organization: 1) conducts a criminal history check before the unlicensed person's first face-to-face contact with a client of the HCSSA; and 2) verifies that the unlicensed person's criminal history information does not include a conviction that bars employment under the THSC §250.006.

In §97.602(h)(3)(E), on the Severity Level B Violations table, the rule cite for §97.247(a)(5) was changed to §97.247(a)(5)(A) and (B) and the rule cite for §97.247(b)(5) was changed to §97.247(b)(5)(A) and (B) to correspond to the changes in §97.247(a)(5) and (b)(5) explained above. Also, in the subject matter description for §97.289(c)(3), "annually" was changed to "at least every 12 months" because of the changes made to §97.289(c)(3).

DADS received written comments from the Texas Association for Home Care and Hospice and from two HCSSAs. A summary of the comments and the responses follow.

Comment: A commenter suggested rewording §97.246(a)(1) so a volunteer can sign a primary job description rather than a description for every separate role the volunteer fulfills when the volunteer serves in a variety of roles.

Response: The staffing policies in §97.245 provide that a HCSSA must have a written job description that states the functions and responsibilities that constitute job requirements for each position or role within the HCSSA. An employee or a volunteer may be asked to fulfill the functions and responsibilities for more than one position or role. To ensure that a HCSSA maintains documentation that an employee or volunteer reads and understands each position or role accepted, the amendment in §97.246(a)(1) clarifies that the HCSSA must ensure that an employee or volunteer signs a job description for each position the employee or volunteer accepts, or signs a statement that the person read each job description. The HCSSA's personnel record for the employee or volunteer must include the signed job description or signed statement for each position the employee or volunteer accepts. DADS did not make the suggested change.

Comment: Two commenters stated that §§97.246(a)(6)(A), 97.247(a)(3), and 97.247(b)(3) require a HCSSA to conduct searches of the NAR and EMR using the DADS Internet website instead of using the DADS 1-800 number, as currently allowed. One commenter's concern is whether use of the website alone would cause an interruption in client services or upset a client because of a delay in hiring the client's attendant of choice due to malfunction of the website.

Response: A HCSSA must ensure that adequate staffing and backup services are available to meet the needs of the HCSSA's clients while the agency verifies the criminal history background or employability status of any employee. Furthermore, DADS has estimated that DADS' website is available over 99 percent of the time. Therefore, if the website is not available for a short period, it should not affect a HCSSA's ability to provide services by an unlicensed person. DADS did not make changes in response to this comment.

Comment: A commenter suggested it is inappropriate and administratively burdensome on HCSSAs for DADS to delete the option to use the 1-800 number now that HCSSAs must conduct annual searches. The commenter suggested that the rule in §97.246 remain silent on a method for conducting the searches and that DADS allow the use of the 1-800 number in §97.247(a)(3) and §97.247(b)(3).

Response: DADS has eliminated use of the 1-800 number in §97.247 as a method for conducting a search of both registries. Currently, requiring a HCSSA to search both registries by using the DADS' website is the only method that provides undisputable, documentary evidence that the HCSSA timely complied with THSC §250.003. Using the website to search both registries: 1) takes less time than using the 1-800 number; and 2) should prove to be less burdensome because use of the website allows the user to print the results of the search and store the results in the employee's file. DADS did not make changes in response to this comment.

Comment: Concerning §97.246(a)(6)(B), a commenter requested that written information about the EMR be provided to employees one time, at hire, without the need to provide the EMR information again with each annual check. The commenter also asked whether including a disclosure statement about the EMR check on the HCSSA's employment application is sufficient documentation that the HCSSA provided the information if the application is signed by the employee.

Response: Chapter 93 and 97 of Title 40 of the Texas Administrative Code do not require a HCSSA to provide written information about the EMR with each annual registry search. Section 93.3 has been amended and, effective September 1, 2010, requires a HCSSA to provide the written information to a new employee within five days of hire. Section §97.247(b)(4) requires a HCSSA to provide the written information to a volunteer within five working days from the date of the person's first face-to-face contact with a client. Regarding the question about sufficient documentation of compliance, a HCSSA must demonstrate that an employee and a volunteer received written information about the EMR.

Comment: A commenter requested that DADS add "in accordance with §93.3(c) of this title" at the end of §97.246(a)(6)(B) to clarify that the HCSSA must provide documentation to the employee or volunteer in compliance with Chapter 93, Employee Misconduct Registry.

Response: In §97.246(a)(6)(B), DADS added a cross-reference to §97.247(a)(4), and (b)(4), both of which reference §93.3(c).

Comment: A commenter asked what type of documentation would demonstrate a HCSSA's compliance with §97.247(a)(1) and (b)(2), which require a HCSSA to document its review of a criminal history report and determine the report does not include a conviction of an offense that prohibits employment or a conviction that the HCSSA has determined is a contraindication to employment. The commenter wrote that, at present: 1) a HCSSA can hire a person whose Department of Public Safety criminal history report shows no convictions without documenting it reviewed the report, and 2) if a criminal history report shows a conviction, then the HCSSA reviews the report to determine if there is a conviction that bars employment or a conviction the HCSSA determines is a contraindication to employment. The commenter asked if the intent of §97.247(a)(1) and (b)(2) is for a HCSSA to provide documentation that it reviewed a conviction or that it reviewed all criminal history reports regardless of whether there is a conviction listed.

Response: The intent of §97.247(a)(1) and (b)(2) is to require a HCSSA to document its review of a criminal history report that includes a conviction that is not listed in THSC §250.006 and its determination that the conviction is not a contraindication to employment. This requirement implements a provision in THSC §250.004(b). During a survey, if a HCSSA provides DADS with a criminal history report that includes a conviction that is not listed in THSC §250.006, the HCSSA must also provide documentation that it reviewed the conviction and determined the conviction is not a contraindication to employment. To clarify the intent of the rule, DADS revised §97.247(a)(1) and moved the requirements to §97.247(a)(2) for applicants and employees and revised §97.247(b)(2) for volunteers.

Comment: Two commenters were opposed to the proposed amendments in §97.247(a)(5) and (b)(5), which require a HCSSA to annually search the NAR and EMR during the month of an employee's or volunteer's anniversary date. One commenter suggested that DADS change the rule language to allow for a one-time annual search of all current employees to allow the HCSSA to conduct the searches once each year. The second commenter suggested using only "annually" in the rule and that DADS allow a HCSSA to determine, by policy, how it would conduct annual searches.

Response: In response to these comments, DADS deleted proposed amendments in §97.247(a)(5) and (b)(5) which require a HCSSA to annually search the NAR and EMR during the month of an employee's or volunteer's anniversary date. To implement Senate Bill 806, 81st Legislature, Regular Session, 2009, DADS added: 1) §97.247(a)(5)(A) to require a HCSSA to search the registries by August 31, 2011, and at least once every 12 months thereafter for an employee most recently hired before September 1, 2009; 2) §97.247(a)(5)(B) to require a HCSSA to search the registries at least once every 12 months for an employee most recently hired on or after September 1, 2009; 3) §97.247(b)(5)(A) to require a HCSSA to search the registries by August 31, 2011, and at least once every 12 months thereafter for a volunteer who had face-to-face contact with a client for the first time before September 1, 2009; and 4) §97.247(b)(5)(B) to require a HCSSA to search the registries at least once every 12 months for a volunteer who had face-to-face contact with a client for the first time on or after September 1, 2009.

Comment: A commenter suggested that DADS delete the last sentence in §97.247(c) regarding the documentation requirements for a criminal history check for an employee and volunteer. The commenter wrote that the last sentence is not necessary because documentation of the verification of criminal history checks is already required in §97.247(a) and (b).

Response: DADS agrees with the comment and changed §97.247(c) as suggested.

Comment: A commenter requested that DADS delete the proposed addition to §97.289(a) because: 1) a HCSSA cannot "independently contract" for personal assistance services, and 2) the individuals who provide those services require supervision and may never "independently" direct the services they provide. In addition, this section, if left as written, would allow a HCSSA to directly contract with an unlicensed individual to provide home health, hospice or personal assistance services and the HCSSA would not be required to check the person's criminal history or verify their status on the EMR or NAR.

Response: The intent of §97.289(a) is to clarify that the requirement for a HCSSA to have a written contract with an independent contractor applies when the contractor provides home health, hospice, or personal assistance services. A personal assistance services agency that provides health-related services using unlicensed personnel may contract with a registered nurse as an independent contractor to assess clients, set up the individualized service plan, and supervise the services. However, to avoid the implication in this rule that a HCSSA may independently contract with an unlicensed person to provide personal assistance services, DADS deleted the proposed addition to §97.289(a).

Comment: Regarding §97.289(a)(4), a commenter suggested that DADS use the original language in this rule because a HCSSA may not independently contract for personal assistance services.

Response: DADS does not agree with the suggestion to entirely delete the amended language in §97.289(a)(4) because: 1) §97.289(a) does not apply to an unlicensed person; 2) a HCSSA may contract with a registered nurse to provide personal assistance services; and 3) the intent of the amendment is to clarify the requirement in the current rule. However, in response to this comment, DADS revised §97.289(a)(4) to clarify that the contract must clearly indicate the level of the contractor's participation in developing a client's plan of care, care plan or individualized service plan.

Comment: A commenter does not agree with DADS' decision to move rules in §97.247, related to unlicensed contract staff, to §97.289. The commenter requested that DADS move the rule language in §97.289(c) and (d) to §97.247 and delete "Volunteers" in the title of new §97.247 and replace it with "Persons." The commenter stated that moving rules related to unlicensed contract staff to §97.289 is confusing when a HCSSA must also ensure that contract staff have the same employability checks as employees and volunteers. The commenter also stated that §97.289(c) creates a loophole for HCSSAs to independently contract with an unlicensed person to provide home health, hospice, or personal assistance services and allows the HCSSAs to avoid the requirement to ensure that criminal history and NAR and EMR searches are conducted for unlicensed contract staff.

Response: Section 97.247 for contract staff, as proposed, became increasingly inconsistent with the rules in §97.247 for applicants, employees, and volunteers. Therefore, DADS moved all the rules on the use of unlicensed contract staff to §97.289, the rule that specifically addresses services provided under a written contract. Moving the rules for contract staff from §97.247 to §97.289 also places all the rules on documentation for unlicensed contract staff in one section. Accordingly, DADS did

not make the requested change in §97.247. However, DADS changed "Volunteers" to "Persons" in the title of §97.247, as suggested, and added §97.247(d) to provide a cross-reference to §97.289(c) and (d) for a HCSSA that uses an unlicensed person to provide services under a contract with another HCSSA or organization.

Comment: The same commenter also suggested that DADS change §97.289(c) - (e) to make it easier for a HCSSA to comply. Specifically, the commenter requested that DADS change the language in §97.289(c)(3) to require annual searches of the NAR and EMR. This was requested because: 1) it would be impossible for a HCSSA to track exactly when a contracted entity is performing the annual registry searches based on the anniversary date of each unlicensed person's first face-to-face contact with a client; and 2) it could create multiple anniversary dates if the unlicensed person is the entity's employee.

Response: DADS made several changes in response to the request to revise §97.289(c) - (e) to promote HCSSA compliance. DADS deleted the rule language in §97.289(c)(2) that specifies a five working day time frame, from the first face-to-face contact with a HCSSA client, during which the contracted employee must receive information about the EMR. So that an unlicensed person working for another HCSSA or organization receives information about the EMR only one time, the deleted language was replaced with requirements for the HCSSA to ensure that either it, or the contracting HCSSA, or organization comply with the requirements of §93.3(c) of this title (relating to Employment and Registry Information). In §97.289(c)(3), DADS deleted the rule requiring a HCSSA to search the NAR and EMR annually during the month of the anniversary date of the unlicensed person's first face-to-face contact with a HCSSA client and replaced it with "at least every 12 months." In addition, the documentation requirement in §97.289(d)(2) was moved to §97.289(e)(3).

Comment: A commenter suggested that DADS delete the last part of §97.289(d)(2) regarding convictions the contracting HCSSA or organization determines are a contraindication to employment since a contracted entity cannot determine what convictions would be a contraindication to employment with the HCSSA's clients.

Response: DADS agreed with the comment and changed §97.289(d)(2) as suggested.

SUBCHAPTER C. MINIMUM STANDARDS FOR ALL HOME AND COMMUNITY SUPPORT SERVICES AGENCIES

DIVISION 3. AGENCY ADMINISTRATION

40 TAC §97.246

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; Texas Health and Safety Code, Chapter 142, which provides DADS with the authority to adopt rules for the licensing and regulation of home and community support services agencies; Texas Health and Safety Code, Chapter 250, which requires DADS to maintain the NAR; and Texas Health and Safety Code, Chapter 253, which requires DADS to maintain the EMR.

§97.246. Personnel Records.

(a) An agency must maintain a personnel record for an employee and volunteer. A personnel record may be maintained electronically if it meets the same requirements as a paper record. All information must be kept current. A personnel record must include the following:

(1) a signed job description and qualifications for each position accepted or a signed statement that the person read the job description and qualifications for each position accepted;

(2) an application for employment or volunteer agreement;

(3) verification of license, permits, references, job experience, and educational requirements as conducted by the agency to verify qualifications for each position accepted;

(4) performance evaluations and disciplinary actions;

(5) the signed statement about compliance with agency policies required by §97.245(b)(10) of this subchapter (relating to Staffing Policies), if applicable; and

(6) for an unlicensed employee and unlicensed volunteer whose duties would or do include face-to-face contact with a client:

(A) a printed copy of the results of the initial and annual searches of the nurse aide registry (NAR) and employee misconduct registry (EMR) obtained from the DADS Internet website; and

(B) documentation that the employee, in accordance with §97.247(a)(4) of this subchapter (relating to Verification of Employability and Use of Unlicensed Persons), or volunteer, in accordance with §97.247(b)(4) of this subchapter, received written information about the EMR.

(b) An agency may keep a complete and accurate personnel record for an employee and volunteer in any location as determined by the agency. An agency must provide personnel records not stored at the site of a survey upon request by a DADS surveyor as specified in §97.507(c) of this chapter (relating to Agency Cooperation with a Survey).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 11, 2010.

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Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
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Proposal publication date: February 26, 2010
For further information, please call: (512) 438-3734

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40 TAC §97.247

The repeal is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall

study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which provides DADS with the authority to adopt rules for the licensing and regulation of home and community support services agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
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For further information, please call: (512) 438-3734

♦ ♦ ♦

40 TAC §97.247

The new section is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; Texas Health and Safety Code, Chapter 142, which provides DADS with the authority to adopt rules for the licensing and regulation of home and community support services agencies; Texas Health and Safety Code, Chapter 250, which requires DADS to maintain the NAR; and Texas Health and Safety Code, Chapter 253, which requires DADS to maintain the EMR.

§97.247. Verification of Employability and Use of Unlicensed Persons.

(a) The provisions in this subsection apply to an unlicensed applicant for employment and an unlicensed employee, if the person's duties would or do include face-to-face contact with a client.

(1) An agency must conduct a criminal history check authorized by, and in compliance with, Texas Health and Safety Code (THSC), Chapter 250 (relating to Nurse Aide Registry and Criminal History Checks of Employees and Applicants for Employment in Certain Facilities Serving the Elderly or Persons with Disabilities) for an unlicensed applicant for employment and an unlicensed employee.

(2) The agency must not employ an unlicensed applicant whose criminal history check includes a conviction listed in THSC §250.006 that bars employment or a conviction the agency has determined is a contraindication to employment. If an applicant's or employee's criminal history check includes a conviction of an offense that is not listed in THSC §250.006, the agency must document its review of the conviction and its determination of whether the conviction is a contraindication to employment.

(3) Before the agency hires an unlicensed applicant, or before an unlicensed employee's first face-to-face contact with a client, the agency must search the nurse aide registry (NAR) and the employee misconduct registry (EMR) using the DADS Internet website to determine if the applicant or employee is listed in either registry as unemployable. The agency must not employ an unlicensed applicant who is listed as unemployable in either registry.

(4) The agency must provide written information about the EMR to an unlicensed employee in compliance with the requirements of §93.3(c) of this title (relating to Employment and Registry Information).

(5) In addition to the initial verification of employability, the agency must search the NAR and the EMR to determine if the employee is listed as unemployable in either registry as follows:

(A) for an employee most recently hired before September 1, 2009, by August 31, 2011, and at least every twelve months thereafter; and

(B) for an employee most recently hired on or after September 1, 2009, at least every 12 months.

(6) The agency must immediately discharge an unlicensed employee whose duties would or do include face-to-face contact with a client when the agency becomes aware:

(A) that the employee is designated in the NAR or the EMR as unemployable; or

(B) that the employee's criminal history check reveals conviction of a crime that bars employment or that the agency has determined is a contraindication to employment.

(b) The provisions in this subsection apply to an unlicensed volunteer if the person's duties would or do include face-to-face contact with a client.

(1) An agency must conduct a criminal history check before an unlicensed volunteer's first face-to-face contact with a client of the agency.

(2) The agency must not use the services of an unlicensed volunteer for duties that would or do include face-to-face contact with a client whose criminal history information includes a conviction that bars employment under THSC §250.006 or a conviction the agency has determined is a contraindication to employment. If an unlicensed volunteer's criminal history check includes a conviction of an offense that is not listed in THSC §250.006, the agency must document its review of the conviction and its determination of whether the conviction is a contraindication to employment.

(3) Before an unlicensed volunteer's first face-to-face contact with a client, the agency must conduct a search of the NAR and the EMR using the DADS Internet website to determine if an unlicensed volunteer is listed in either registry as unemployable. The agency must not use the services of an unlicensed volunteer who is listed as unemployable in either registry.

(4) The agency must provide written information about the EMR that complies with the requirements of §93.3(c) of this title to an unlicensed volunteer within five working days from the date of the person's first face-to-face contact with a client.

(5) In addition to the initial verification of employability, the agency must search the NAR and the EMR to determine if a volunteer is designated in either registry as unemployable, as follows:

(A) for a volunteer with face-to-face contact with a client for the first time before September 1, 2009, by August 31, 2011, and at least every twelve months thereafter; and

(B) for a volunteer with face-to-face contact with a client for the first time on or after September 1, 2009, at least every twelve months.

(6) The agency must immediately stop using the services of an unlicensed volunteer for duties that would or do include face-to-face contact with a client when the agency becomes aware:

(A) that the unlicensed volunteer is designated in the NAR or the EMR as unemployable; or

(B) that the unlicensed volunteer's criminal history check reveals conviction of a crime that bars employment or that the agency has determined is a contraindication to employment.

(c) Upon request by DADS, an agency must provide documentation to demonstrate compliance with subsections (a) and (b) of this section.

(d) An agency that contracts with another agency or organization for an unlicensed person to provide home health services, hospice services, or personal assistance services under arrangement must also comply with the requirements in §97.289(c) - (d) of this subchapter (relating to Independent Contractors and Arranged Services).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 4. PROVISION AND COORDINATION OF TREATMENT AND SERVICES

40 TAC §97.289

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; Texas Health and Safety Code, Chapter 142, which provides DADS with the authority to adopt rules for the licensing and regulation of home and community support services agencies; Texas Health and Safety Code, Chapter 250, which requires DADS to maintain the NAR; and Texas Health and Safety Code, Chapter 253, which requires DADS to maintain the EMR.

§97.289. Independent Contractors and Arranged Services.

(a) Independent contractors. If an agency uses independent contractors, there must be a contract between each independent contractor that performs services and the agency. The contract must be enforced by the agency and clearly designate:

(1) that clients are accepted for care only by the agency;

(2) the services to be provided by the contractor and how they will be provided (i.e. per visit, per hours, etc.);

(3) the necessity of the contractor to conform to all applicable agency policies, including personnel qualifications;

(4) the contractor's responsibility for participating in developing the plan of care, care plan or individualized service plan;

(5) the manner in which services will be coordinated and evaluated by the agency in accordance with §97.288 of this subchapter (relating to Coordination of Services);

(6) the procedures for:

(A) submitting information and documentation by the contractor in accordance with the agency's client record policies;

(B) scheduling of visits by the contractor or the agency;

(C) periodic client evaluation by the contractor; and

(D) determining charges and reimbursement payable by the agency for the contractor's services under the contract.

(b) Arranged services. Home health services, hospice services, or personal assistance services provided by an agency under arrangement with another agency or organization must be provided under a written contract conforming to the requirements specified in subsection (a) of this section.

(c) If an agency contracts with another agency or organization for an unlicensed person to provide home health services, hospice services, or personal assistance services under arrangement, the agency must ensure that either it or the contracting agency or organization:

(1) searches the nurse aide registry (NAR) and the employee misconduct registry (EMR) before the unlicensed person's first face-to-face contact with a client of the agency using the DADS Internet website to confirm that the unlicensed person is not listed in either registry as unemployable;

(2) provides written information to the unlicensed person about the EMR that complies with the requirements of §93.3(c) of this title (relating to Employment and Registry Information); and

(3) searches the NAR and the EMR at least every twelve months using the DADS Internet website to confirm that the person is not listed in either registry as unemployable.

(d) If an agency contracts with another agency or organization for an unlicensed person to provide home health services, hospice services, or personal assistance services under arrangement, the agency must ensure that the contracting agency or organization:

(1) conducts a criminal history check before the unlicensed person's first face-to-face contact with a client of the agency; and

(2) verifies that the unlicensed person's criminal history information does not include a conviction that bars employment under the Texas Health and Safety Code (THSC) §250.006.

(e) Documentation for contract staff. An agency is not required to maintain a personnel record for independent contractors or staff who provide services under arrangement with another agency or organization. Upon request by DADS, an agency must provide documentation at the site of a survey within eight working hours of the request to demonstrate:

(1) that independent contractors or staff under arrangement meet the agency's written job qualifications for the position and duties performed;

(2) the agency ensures compliance with subsection (c) of this section for unlicensed staff providing services to the agency's clients under arrangement; and

(3) the agency complies with subsection (d) of this section for unlicensed staff providing services to the agency's clients under arrangement by providing a written statement, signed by a person authorized to make decisions on personnel matters for the contracting agency or organization, attesting that a criminal history check was conducted before an unlicensed person's first face-to-face contact with a client and did not include a conviction barring employment under THSC §250.006.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 11, 2010.

TRD-201004660
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Effective date: September 1, 2010
Proposal publication date: February 26, 2010
For further information, please call: (512) 438-3734

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SUBCHAPTER F. ENFORCEMENT

40 TAC §97.602

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; Texas Health and Safety Code, Chapter 142, which provides DADS with the authority to adopt rules for the licensing and regulation of home and community support services agencies; Texas Health and Safety Code, Chapter 250, which requires DADS to maintain the NAR; and Texas Health and Safety Code, Chapter 253, which requires DADS to maintain the EMR.

§97.602. Administrative Penalties.

(a) Assessing penalties. DADS may assess an administrative penalty against a person who violates:

(1) the statute;

(2) a provision in this chapter for which a penalty may be assessed; or

(3) Occupations Code, §102.001, Soliciting Patients, if related to the provision of home health, hospice, or personal assistance services.

(b) Criteria for assessing penalties. DADS assesses administrative penalties in accordance with the schedule of appropriate and graduated penalties established in this section.

(1) The schedule of appropriate and graduated penalties for each violation is based on the following criteria:

(A) the seriousness of the violation, including the nature, circumstances, extent, and gravity of the violation and the hazard of the violation to the health or safety of clients;

(B) the history of previous violations by a person or a controlling person with respect to that person;

(C) whether the affected agency identified the violation as part of its internal quality assurance process and made a good faith, substantial effort to correct the violation in a timely manner;

(D) the amount necessary to deter future violations;

(E) efforts made to correct the violation; and

(F) any other matters that justice may require.

(2) In determining which violation warrants a penalty, DADS considers:

(A) the seriousness of the violation, including the nature, circumstances, extent, and gravity of the violation and the hazard of the violation to the health or safety of clients; and

(B) whether the affected agency identified the violation as part of its internal quality assurance program and made a good faith, substantial effort to correct the violation in a timely manner.

(c) Opportunity to correct. Except as provided in subsections (e) and (f) of this section, DADS provides an agency with an opportunity to correct a violation in accordance with the time frames established in §97.527(g)(2) of this chapter (relating to Post-Survey Procedures) before assessing an administrative penalty if a plan of correction has been implemented.

(d) Minor violations.

(1) DADS may not assess an administrative penalty for a minor violation unless the violation is of a continuing nature or is not corrected in accordance with an accepted plan of correction.

(2) DADS may assess an administrative penalty for a subsequent occurrence of a minor violation when cited within three years from the date the agency first received written notice of the violation.

(3) DADS does not assess an administrative penalty for a subsequent occurrence of a minor violation when cited more than three years from the date the agency first received written notice of the violation.

(e) No opportunity to correct. DADS may assess an administrative penalty without providing an agency with an opportunity to correct a violation if DADS determines that the violation:

(1) results in serious harm to or death of a client;

(2) constitutes a serious threat to the health or safety of a client;

(3) substantially limits the agency's capacity to provide care;

(4) involves the provisions of Texas Human Resources Code, Chapter 102, Rights of the Elderly;

(5) is a violation in which a person:

(A) makes a false statement, that the person knows or should know is false of a material fact:

(i) on an application for issuance or renewal of a license or in an attachment to the application; or

(ii) with respect to a matter under investigation by DADS;

(B) refuses to allow a representative of DADS to inspect a book, record, or file required to be maintained by an agency;

(C) willfully interferes with the work of a representative of DADS or the enforcement of this chapter;

(D) willfully interferes with a representative of DADS preserving evidence of a violation of this chapter or a rule, standard, or order adopted or license issued under this chapter;

(E) fails to pay a penalty assessed by DADS under this chapter not later than the 10th day after the date the assessment of the penalty becomes final; or

(F) fails to submit:

(i) a plan of correction not later than the 10th day after the date the person receives a statement of licensing violations; or

(ii) an acceptable plan of correction not later than the 30th day after the date the person receives notification from DADS that the previously submitted plan of correction is not acceptable.

(f) Violations relating to Advance Directives. As provided in Texas Health and Safety Code, §142.0145, DADS assesses an administrative penalty of $500 for a violation of §97.283 of this chapter (relating to Advance Directives) without providing an agency with an opportunity to correct the violation.

(g) Penalty calculation and assessment.

(1) Each day that a violation occurs before the date on which the person receives written notice of the violation is considered one violation.

(2) Each day that a violation occurs after the date on which an agency receives written notice of the violation constitutes a separate violation.

(h) Schedule of appropriate and graduated penalties.

(1) If two or more rules listed in paragraphs (2) and (3) of this subsection relate to the same or similar matter, one administrative penalty may be assessed at the higher severity level violation.

(2) Severity Level A violations.

(A) The penalty range for a Severity Level A violation is $100 - $250 per violation.

(B) A Severity Level A violation is a violation that has or has had minor or no client health or safety significance.

(C) DADS assesses a penalty for a Severity Level A violation only if the violation is of a continuing nature or was not corrected in accordance with an accepted plan of correction.

(D) DADS may assess a separate Severity Level A administrative penalty for each of the rules listed in the following table. Figure: 40 TAC §97.602(h)(2)(D)

(3) Severity Level B violations.

(A) The penalty range for a Severity Level B violation is $500 - $1,000 per violation.

(B) A Severity Level B violation is a violation that:

(i) results in serious harm to or death of a client;

(ii) constitutes an actual serious threat to the health or safety of a client; or

(iii) substantially limits the agency's capacity to provide care.

(C) The penalty for a Severity Level B violation that:

(i) results in serious harm to or death of a client is $1,000;

(ii) constitutes an actual serious threat to the health or safety of a client is $500 - $1,000; and

(iii) substantially limits the agency's capacity to provide care is $500 - $750.

(D) As provided in subsection (e) of this section, a Severity Level B violation is a violation for which DADS may assess an administrative penalty without providing an agency with an opportunity to correct the violation.

(E) DADS may assess a separate Severity Level B administrative penalty for each of the rules listed in the following table. Figure: 40 TAC §97.602(h)(3)(E)

(i) Violations for which DADS may assess an administrative penalty of $500.

(1) DADS may assess an administrative penalty of $500 for each of the violations listed in subsection (e)(4) and (5) of this section, without providing an agency with an opportunity to correct the violation.

(2) A separate penalty may be assessed for each of these violations.

(j) Proposal of administrative penalties.

(1) If DADS assesses an administrative penalty, DADS provides a written notice of violation letter to an agency. The notice includes:

(A) a brief summary of the violation;

(B) the amount of the proposed penalty; and

(C) a statement of the agency's right to a formal administrative hearing on the occurrence of the violation, the amount of the penalty, or both the occurrence of the violation and the amount of the penalty.

(2) An agency may accept DADS' determination not later than 20 days after the date on which the agency receives the notice of violation letter, including the proposed penalty, or may make a written request for a formal administrative hearing on the determination.

(A) If an agency notified of a violation accepts DADS' determination, the DADS commissioner or the DADS commissioner's designee issues an order approving the determination and ordering that the agency pay the proposed penalty.

(B) If an agency notified of a violation does not accept DADS' determination, the agency must submit to the Health and Human Services Commission a written request for a formal administrative hearing on the determination and must not pay the proposed penalty. Remittance of the penalty to DADS is deemed acceptance by the agency of DADS' determination, is final, and waives the agency's right to a formal administrative hearing.

(C) If an agency notified of a violation fails to respond to the notice of violation letter within the required time frame, the DADS commissioner or the DADS commissioner's designee issues an order approving the determination and ordering that the agency pay the proposed penalty.

(D) If an agency requests a formal administrative hearing, the hearing is held in accordance with the statute, §142.0172, §142.0173, and the formal hearing procedures in 1 TAC Chapter 357, Subchapter I (relating to Hearings Under the Administrative Procedure 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 August 11, 2010.

TRD-201004661
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Effective date: September 1, 2010
Proposal publication date: February 26, 2010
For further information, please call: (512) 438-3734

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REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Adopted Rule Reviews

Texas State Soil and Water Conservation Board

Title 31, Part 17

Pursuant to the notice of proposed rule review published in the May 28, 2010, issue of the *Texas Register* (35 TexReg 4479), the Texas State Soil and Water Conservation Board (State Board) has reviewed and considered for readoption, revision or repeal 31 TAC Part 17, Chapter 517, Subchapter A, §§517.1 - 517.12, Conservation Assistance, in accordance with Texas Government Code, §2001.039.

The State Board considered, among other things, whether the reasons for adoption of these rules continue to exist. As a result of the review, the State Board determined that the rules are still necessary and readopts the sections since they govern the State Board's program for financial assistance to soil and water conservation districts established by the Agriculture Code of Texas, Chapter 201. This completes the State Board's review of 31 TAC Chapter 517, Subchapter A, Conservation Assistance.

No comments were received on the proposed rule review.

TRD-201004687
Mel Davis
Special Projects Coordinator
Texas State Soil and Water Conservation Board
Filed: August 12, 2010

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Pursuant to the notice of proposed rule review published in the May 28, 2010, issue of the *Texas Register* (35 TexReg 4479), the Texas State Soil and Water Conservation Board (State Board) has reviewed and considered for readoption, revision or repeal 31 TAC Part 17, Chapter 519, Subchapter A, §§519.1 - 519.12, Technical Assistance Program, in accordance with Texas Government Code, §2001.039.

The State Board considered, among other things, whether the reasons for adoption of these rules continue to exist. As a result of the review, the State Board determined that the rules are still necessary and readopts the sections since they govern the State Board's program for technical assistance through soil and water conservation districts established by the Agriculture Code of Texas, Chapter 201. This completes the State Board's review of 31 TAC Chapter 519, Subchapter A, Technical Assistance Program.

No comments were received on the proposed rule review.

TRD-201004688
Mel Davis
Special Projects Coordinator
Texas State Soil and Water Conservation Board
Filed: August 12, 2010

♦ ♦ ♦

Pursuant to the notice of proposed rule review published in the May 28, 2010, issue of the *Texas Register* (35 TexReg 4479), the Texas State Soil and Water Conservation Board (State Board) has reviewed and considered for readoption, revision or repeal 31 TAC Part 17, Chapter 521, Subchapter A, §§521.1 - 521.13, Technical Assistance Program for Soil and Water Conservation Land Improvement Measures, in accordance with Texas Government Code, §2001.039.

The State Board considered, among other things, whether the reasons for adoption of these rules continue to exist. As a result of the review, the State Board determined that the rules are still necessary and readopts the sections since they govern the State Board's program for technical assistance for soil and water conservation land improvement measures established by the Agriculture Code of Texas, Chapter 201, Subchapter H, §§201.201 - 201.204. This completes the State Board's review of 31 TAC Chapter 521, Subchapter A, Technical Assistance Program for Soil and Water Conservation Land Improvement Measures.

No comments were received on the proposed rule review.

TRD-201004689
Mel Davis
Special Projects Coordinator
Texas State Soil and Water Conservation Board
Filed: August 12, 2010

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TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 1 TAC §55.120(b)

Request for Review of National Medical Support Notice (NMSN)

To:

Office of the Attorney General
Medical Support Unit
P O BOX 1328
AUSTIN, TX 78767-1328

Telephone
Number: (800) 522-2421
Fax Number: (512) 279-1723

From:

Name:

Address:

Telephone Number:

Cause #:

OAG #:

Custodial Parent:

Child(ren):

I, _____ (obligor / employee name),

contest the National Medical Support Notice (NMSN) sent to my employer,

_____ (name of employer),

on or about _____/_____/_____ (date), and request an administrative review based upon the following mistake(s) of fact:

_____

_____

_____.

It has been within 30 calendar days from the date of the Notice of Issuance of the NMSN.

I understand:

- I will receive notice of the date, time and place of the review within 10 days of the Office of the Attorney General (OAG) receiving this request;
- the review may be in person or over the telephone;
- my employer and I must comply with the terms of the NMSN during this review period;
- at the end of the review, which will be completed within 30 days of receipt of this request, the OAG may issue a revised NMSN, terminate the NMSN, or send me notice of a determination that the NMSN is proper and should remain in effect as previously issued; and
- if the OAG does not revise or terminate the NMSN, I may request a hearing with the court of continuing jurisdiction to resolve any issue in dispute.

_____ Obligor / Employee Signature

_____/_____/_____ Date

REQUEST FOR REVIEW OF NATIONAL MEDICAL SUPPORT NOTICE (NMSN) September 2010

Figure: 25 TAC §289.302(bb)(3)(C)

Percentage of Maximum Amount Based on Severity Level of Violation

Severity Level	Percent of Maximum Amount
I	100
II	80
III	50
IV	15
V	5

Figure: 25 TAC §289.302(hh)(3)

RC FORM 302-1

Department of State Health Services
1100 West 49th Street
P.O. Box 149347
Austin, Texas 78714-9347
Complaint Reports 1-888-899-6688

NOTICE TO EMPLOYEES

The Department of State Health Services has established standards for your protection against radiation hazards, in accordance with the Texas Radiation Control Act, Health and Safety Code, Chapter 401 and 25 Texas Administrative Code (TAC) §289.302.

YOUR EMPLOYER'S RESPONSIBILITY

Your employer is required to-
1. Apply these rules to work involving laser hair removal devices.
2. Post or otherwise make available to you a copy of the Department of State Health Services rules, certificate of laser registration, notices of violations, and protocols that apply to your work, and explain their provisions to you.

YOUR RESPONSIBILITY AS A WORKER

You should familiarize yourself with those provisions of the rules and the protocols that apply to your work. You should observe the rules for your own protection and protection of your co-workers.

WHAT IS COVERED BY THESE RULES

1. Operating requirements for use of laser hair removal devices;
2. Warning signs, client notifications;
3. Options for worker participation regarding agency inspections; and
4. Related matters.

INSPECTIONS

All registered activities are subject to inspection by representatives of the Department of State Health Services. In addition, any worker or representative of the workers who believe that there is or may be a violation of the Texas Radiation Control Act, the rules issued thereunder, or the terms of the employer's registration with regard to radiological working conditions in which the worker is engaged, may request an inspection by sending a notice of the alleged violation to the Department of State Health Services. The request must state the specific grounds for the notice, and must be signed by the worker or the representative of the workers. During inspections, agency inspectors may confer privately with workers, and any worker may bring to the attention of the inspectors any past or present condition that the individual believes contributed to or caused any violation as described above.

POSTING REQUIREMENT

Copies of this notice shall be posted in a sufficient number of places in every establishment where employees are employed in activities registered, in accordance with 25 TAC §289.302 (relating to Registration and Radiation Safety Requirements for Use of Laser Hair Removal Devices), to permit employees to observe a copy on the way to or from their place of employment.

25 TAC §289.302 may be reviewed online, at www.dshs.state.tx.us/radiation/rules.shtm. Our certificate of laser hair removal registration and any associated documents, our protocols, and any "Notice of Violation" or order issued by the agency may be reviewed at the following location:

_____

Figure: 25 TAC §289.302(nn)

Specific Subsection	Name of Record	Time Interval Required for Record Keeping
(m)(3)	Consulting Physician Audits	3 years
(p)(5)	Inventory	3 years
(p)(6)	Receipt, Transfer, and Disposal	Until termination or expiration of Certificate of LHR Registration
(q)(8)	Instruction to Individuals	3 years
(q)(11)	Protective Eyewear Examination	3 years
(q)(20)	Audits by LHR Professional	3 years
(q)(21)	LHR Procedures Performed	3 years
(hh)	Current Certificate of LHR Registration Current Individual LHR Certificate Current 25 TAC §289.302 Notice of Violation from Last Inspection, if applicable	Until termination or expiration of Certificate of LHR Registration or Individual LHR Certificate

Figure: 30 TAC §116.12(18)(A)

TABLE I
MAJOR SOURCE/MAJOR MODIFICATION EMISSION THRESHOLDS

POLLUTANT designation[1]	MAJOR SOURCE tons/year	SIGNIFICANT LEVEL[2] tons/year	OFFSET RATIO minimum
OZONE (VOC, NO_X)[3]			
I marginal	100	40	1.10 to 1
II moderate	100	40	1.15 to 1
III serious	50	25	1.20 to 1
IV severe	25	25	1.30 to 1
CO			
I moderate	100	100	1.00 to 1[4]
II serious	50	50	1.00 to 1[4]
SO_2	100	40	1.00 to 1[4]
PM_{10}			
I moderate	100	15	1.00 to 1[4]
II serious	70	15	1.00 to 1[4]
NO_x[5]	100	40	1.00 to 1[4]
Lead	100	0.6	1.00 to 1[4]

[1] Texas nonattainment area designations as defined in §101.1(70) of this title.

[2] The significant level is applicable only to existing major sources and shall be evaluated after netting, unless the applicant chooses to apply nonattainment new source review (NNSR) directly to the project. The appropriate netting triggers for existing major sources of NO_X and VOC are specified in §116.150 of this title (relating to New Major Source or Major Modification in Ozone Nonattainment Areas) and for other pollutants are equal to the significant level listed in this table.

[3] VOC and NO_X are precursors to ozone formation and should be quantified individually to determine whether a source is subject to NNSR under §116.150 of this title. As specified in §116.150 of this title, for El Paso County, the NNSR rules apply to sources of VOC, but not to sources of NO_X.

[4] The offset ratio is specified to be greater than 1.00 to 1.

VOC = volatile organic compounds
NO_X = oxides of nitrogen
NO_2 = nitrogen dioxide
CO = carbon monoxide
SO_2 = sulfur dioxide
PM_{10} = particulate matter with an aerodynamic diameter less than or equal to ten microns

[5] Applies to the NAAQS for nitrogen dioxide (NO_2).

Figure: 40 TAC §97.602(h)(2)(D)

SEVERITY LEVEL A VIOLATIONS $100 - $250 per violation	
Rule Cite	**Subject Matter**
§97.212	Prohibiting material alteration of a license.
§97.213(a)-(b) separate penalties	Agency relocation.
§97.214(a)-(b) separate penalties	Notification procedures for reporting a change in agency telephone number and agency operating hours.
§97.216(a)	Change in agency certification or accreditation status.
§97.217(b)(1)-(2) separate penalties	Procedures for notifying DADS of a voluntary suspension of operations.
§97.218(a)-(b) separate penalties	Notice of agency organizational changes and submitting criminal history check consent forms.
§97.219	Procedure for adding or deleting a category of service to the agency's license.
§97.220(a)(2)	Providing services only within an agency's licensed service area.
§97.220(c)	Providing a written notification of an expansion of an agency's licensed service area.
§97.220(d)	Providing written notification of a reduction of an agency's licensed service area.
§97.242(a)-(b) separate penalties	Preparing and maintaining a current written description of the agency's organizational structure.
§97.243(b)(1)(A)-(B) and (D)-(G) separate penalties	Responsibilities of the administrator.
§97.243(b)(3)	Requirement that the administrator designate in writing an agency employee who must provide DADS surveyors entry to the agency.
§97.243(d)	Adoption of a written policy for the supervision of branch offices or alternate delivery sites, if established.
§97.244(b)(1)-(5) separate penalties	Conditions of the agency administrator and alternate administrator.
§97.245(a)-(b)(1)-(10) separate penalties	Adoption and enforcement of written policies governing all personnel staffed by the agency.
§97.246(a)(1)-(6)(A)-(B) and (b) separate penalties	An agency's personnel records and content of such records.
§97.247(a)(4) and (b)(4) separate penalties	Providing unlicensed employees and volunteers with written information about the employee misconduct registry.
§97.247(c)	Documentation of compliance with verifying the employability and use of unlicensed applicants, employees, and volunteers.
§97.248(a)-(b)(1)-(4) separate penalties	The use of volunteers in an agency.
§97.249(b)	Adoption of a written policy for the reporting of alleged acts of abuse, neglect, and exploitation of clients.
§97.250(a)	Adoption of a written policy covering procedures for investigating known and alleged acts of abuse, neglect, and exploitation and other complaints.

SEVERITY LEVEL A VIOLATIONS $100 - $250 per violation	
Rule Cite	**Subject Matter**
§97.250(e)	Prohibiting an agency from retaliating against a person for filing a complaint, presenting a grievance, or providing, in good faith, information about the services provided by the agency.
§97.251	Adoption of a written policy for ensuring that all professional disciplines comply with their respective professional practice acts or title acts for reporting and peer review.
§97.253	Adoption of a written policy describing whether an agency will conduct drug testing of employees that describes the method and provides a copy of the policy.
§97.254	Adoption of a written policy for ensuring that the agency submits accurate billings and insurance claims.
§97.255	Adoption of a written policy for prohibition of illegal remuneration for securing or soliciting clients or patronage.
§97.256	Development and documentation of a written emergency preparedness and response plan.
§97.256(1)(A)-(M) separate penalties	Developing, maintaining and implementing a written emergency preparedness and response plan.
§97.259(g)	Prohibiting use of the presurvey conference to meet initial training requirements for a first-time administrator and alternate administrator.
§97.260(d)	Prohibiting use of the pre-survey conference to meeting continuing education requirements for an administrator and alternate administrator.
§97.281(1)-(16) separate penalties	Adoption of a written policy that specifies the agency's client care practices.
§97.282(a)-(b), (d)-(f)(1)-(8), and (g)-(h) separate penalties	Adoption of a written policy governing client conduct and responsibility and client rights.
§97.284	Adoption of a written policy for complying with the Clinical Laboratory Improvement Amendments of 1988, 42 USC, §263a, Certification of Laboratories (CLIA 1988).
§97.285	Adoption of written policies addressing infection control.
§97.285(1)(A)-(C) and (2) separate penalties	Adoption and compliance with a written policy that addresses infection control.
§97.286(a)	Adoption of a written policy for safe handling and disposal of biohazardous waste and materials, if applicable.
§97.288(a)	Adoption of a written policy that all service providers involved in the care of a client effectively coordinate the client's care.
§97.289(c)(2)	Providing written information about the employee misconduct registry to an unlicensed person providing services under arrangement.
§97.289(e)(1)-(3) separate penalties	Documentation of personnel qualifications and for unlicensed staff that provide services under arrangement.
§97.290(a)	Adoption of a written policy for ensuring that backup services are available when an agency employee or contractor is not available to deliver the services.
97.290(a)(1)-(2)	Documentation that a client's designee agreed to provide backup services.
97.290(a)(3)	Not coercing a client to accept backup services.

SEVERITY LEVEL A VIOLATIONS $100 - $250 per violation	
Rule Cite	**Subject Matter**
§97.290(b)	Adoption of a written policy for ensuring that clients are educated in how to access care from the agency or another health care provider after regular business hours.
§97.291	Adoption of a written policy for an agency's written contingency plan.
§97.292(a)	Providing a client or a client's family with a written agreement for services and ensuring appropriate content of the agreement.
97.292(b)	Obtaining acknowledgment that the client received an appropriate written agreement for services and ensuring that the acknowledgment is in the client's record.
§97.293	Maintaining a current list of clients for each category of service licensed.
§97.294	Adoption of a written policy for establishing a time frame for the initiation of care or services.
§97.295(c), (d), and (f) separate penalties	Delivery of written notice and documentation requirements pertaining to an agency's transfer or discharge of a client.
§97.296(a)	Adoption of a written policy that states whether physician delegation will be honored by the agency.
97.296(b)	Information the agency must receive to accept physician delegation.
§97.297	Adoption of a written policy describing protocols and procedures agency staff must follow when receiving physician orders, if applicable.
§97.297(2)	Physician orders received by facsimile.
§97.298	Adoption of a written policy for ensuring compliance with rules adopted by the Texas Board of Nursing in 22 TAC Chapter 224 (Delegation of Nursing Tasks by Registered Professional Nurses to Unlicensed Personnel for Clients with Acute Conditions or in Acute Care Environments) and 22 TAC Chapter 225 (RN Delegation to Unlicensed Personnel and Tasks Not Requiring Delegation in Independent Living Environments for Clients with Stable and Predictable Conditions).
§97.299	Adoption of a written policy for ensuring compliance with rules of the Texas Board of Nursing adopted at 22 TAC Chapters 211-226 (Nursing Continuing Education, Licensure, and Practice in the State of Texas).
§97.300(b)	Adoption of a written policy for maintaining a current medication list and a current medication administration record.
§97.300(b)(2)(A)-(B) separate penalties	The administration of medication.
§97.301(a)(1)-(9)(A)-(P) separate penalties	Requirements for maintaining an agency's client records.
§97.301(b)(1)-(3) separate penalties	Adoption and enforcement of a written policy for retention of records.
§97.302	Adoption of a written policy for pronouncement of death if that function is carried out by an agency registered nurse.
§97.321(a)	Branch office compliance with the regulations of its parent agency.
§97.321(c)(1)	Providing services only within a branch office licensed service area.
§97.321(c)(3)	Providing a written notification of an expansion of a branch office service area.

SEVERITY LEVEL A VIOLATIONS $100 - $250 per violation	
Rule Cite	**Subject Matter**
§97.321(c)(4)	Providing written notification of a reduction of a branch office licensed service area.
§97.321(d)(1)-(3) separate penalties	Requirements for branch offices.
§97.321(f)	Requirement prohibiting branch offices from providing services not offered by the parent agency.
§97.322(a)	Alternate delivery site compliance with hospice services standards.
§97.322(b)	An alternate delivery site's independent compliance with §97.403(c), (f)(1), (i), and §97.301.
§97.322(c)(1)	Providing services only within an alternate delivery site licensed service area.
§97.322(c)(3)	Providing a written notification of an expansion of an alternate delivery site service area.
§97.322(c)(4)	Providing written notification of a reduction of an alternate delivery site licensed service area.
§97.322(d)(1)-(3) separate penalties	Requirements for hospices and alternate delivery sites.
§97.401(f)	The use of home health aides.
§97.402(b)	Requirement for implementing a home health aide training and competency program.
§97.403(b)	Restriction on use of the word "hospice" in a title or description of a facility, organization, program, service provider, or services without a license.
§97.403(c)	Adoption of a written policy for the provision of hospice services.
§97.403(e)(3)	Designating which among multiple interdisciplinary teams is responsible for establishing the policies governing day-to-day hospice functions.
§97.403(f)(4)	Retaining responsibility for payment for services.
§97.403(j)	Requirement that reassessment of a client must not reduce core services.
§97.403(k)	Informing the client of the availability of short-term inpatient care.
§97.403(l)	Making and documenting efforts to arrange for visits of clergy and other members of spiritual and religious organizations.
§97.403(u)(4)	Specifying the persons authorized to administer medications in the client's plan of care.
§97.403(w)(2)(A)-(G) separate penalties	Development and documentation of a written emergency preparedness and response plan for a freestanding hospice in the event of a disaster.
§97.403(w)(5)-(6) and (8) separate penalties	Physical plant requirements in a freestanding hospice that provides inpatient care.
§97.403(w)(11)(A)-(D) separate penalties	Providing and supervising meal service in a freestanding hospice that provides inpatient care.
§97.404(e)	Requirement that an agency develops operational policies that are considerate of the principles of individual and family choice and control, functional need, and accessible and flexible services.
§97.404(f)(1)-(3) separate penalties	Additional requirements for maintaining client records in an agency that provides personal assistance services.

SEVERITY LEVEL A VIOLATIONS $100 - $250 per violation	
Rule Cite	**Subject Matter**
§97.404(g)	Adoption of a written policy that addresses the supervision of agency personnel with input from the client or family on the frequency of supervision.
§97.404(g)(1)-(2) separate penalties	Conditions and qualifications for supervision of agency personnel delivering personal assistance services.
§97.405(d)	Requirement for individual personnel files on all physicians.
§97.405(g)	A written transfer agreement with a local hospital for an agency that provides home dialysis services.
§97.405(h)	An agreement with a licensed end stage renal disease facility to provide backup outpatient dialysis services.
§97.405(j)	Ensuring that names of clients awaiting a donor transplant are entered in the recipient registry program.
§97.405(s)(1) and (4)-(7) separate penalties	Additional requirements for maintaining client records in an agency that provides home dialysis services.
§97.405(v)	Development of a written preventive maintenance program for home dialysis equipment.
§97.405(v)(1)(B)	Maintaining written evidence of preventive maintenance and equipment repairs.
§97.405(z)	Adoption of policies and procedures for medical emergencies and emergencies resulting from a disaster required of an agency that provides home dialysis services.
§97.406(1)	Adoption of a written policy for the provision of psychoactive treatments, if applicable.
§97.521(a)	Requirement for initiation of services for receiving an initial license.
§97.523(a)	Staff availability for the initial survey.
§97.523(b)	Staff availability for survey other than the initial survey.
§97.523(e)	Providing surveyor entry to the agency during regular business hours and within two hours of the surveyor's arrival at the agency.
97.525(c)	Having documentation of accreditation available at the time of a survey.
§97.527(b)	Providing surveyor with audio recording of the exit conference if made by the agency.
§97.527(c)	Providing surveyor with video recording of the exit conference if made by the agency.
§97.527(g)(1)-(2)(A)-(D)	Submitting an acceptable plan of correction and correcting a violation within the required time frame.

Figure: 40 TAC §97.602(h)(3)(E)

SEVERITY LEVEL B VIOLATIONS $500 - $1,000 per violation	
Rule Cite	**Subject Matter**
§97.11(d)	Requirement to have a separate license for each place of business.
§97.23	A license may not be sold or assigned to another person.
§97.220(b)	Maintaining adequate staff to provide services and supervise the provision of services within the service area.
§97.241(a), (c), and (d) separate penalties	Management responsibilities.
§97.243(a)(1)	Designating a qualified agency administrator.
§97.243(a)(2)	Designating a qualified agency alternate administrator.
§97.243(b)(1)(A)-(F) and (2)-(3) separate penalties	Responsibilities of an agency administrator.
§97.243(c)(1)	Requirement to directly employ or contract with a qualified individual to serve as the supervising nurse.
§97.243(c)(2)	Requirement to designate a qualified alternate supervising nurse.
§97.243(c)(2)(A)(i)-(iv) separate penalties	Supervisory responsibilities of the supervising nurse or alternate supervising nurse.
§97.243(c)(2)(B)	Allowing the supervising nurse to be the administrator if the supervising nurse meets the qualifications of the administrator.
§97.243(c)(3)	Requirements for the supervision of physical, occupational, speech, or respiratory therapy; medical social services; or nutritional counseling.
§97.243(d)	Enforcing a written policy for the supervision of branch offices or alternate delivery sites, if established.
§97.244(a)(1)	Qualifications of the agency administrator and alternate administrator for agencies licensed to provide licensed home health services, licensed and certified home health services or hospice services.
97.244(a)(2)	Qualifications of the agency administrator and alternate administrator for agencies licensed to provide only personal assistance services.
§97.244(b)(1)-(5) separate penalties	Conditions of the agency administrator and alternate administrator.
§97.244(c)(1)	Qualifications of the supervising nurse and alternate supervising nurse for agencies without the home dialysis designation.
§97.244(c)(2)	Qualifications of the supervising nurse and alternate supervising nurse for agencies with the home dialysis designation.
§97.245(a)-(b)(1)-(10) separate penalties	Enforcement of staffing policies that govern all personnel used by the agency.
§97.247(a)(1)-(3) and (5)(A)-(B)-(6)(A)-(B) and (b)(1)-(3) and (5)(A)-(B)-(6)(A)-(B) separate penalties	Verifying the employability and use of unlicensed applicants, employees and volunteers.
§97.249(c)	Reporting alleged acts of abuse, neglect, and exploitation of clients.
§97.250(b)(1)-(3), (c)(1)-(2), and (d)-(e) separate penalties	Enforcement of an agency's written policy for investigation of known and alleged acts of abuse, neglect, and exploitation and other complaints.

SEVERITY LEVEL B VIOLATIONS $500 - $1,000 per violation	
Rule Cite	**Subject Matter**
§97.251	Compliance with the agency's written policy to ensure that all professional disciplines comply with their respective professional practice acts or title acts for reporting and peer review.
§97.252(1)-(2)	An agency's financial ability to carry out its functions.
§97.256(1)(A)-(M) and (2) separate penalties	Developing, maintaining and implementing a written emergency preparedness and response plan.
§97.256(4) and (5)(A)-(B) separate penalties	Compliance with rules related to written records and notice of temporary changes due to an emergency or disaster.
§97.259(b)-(e) separate penalties	Initial educational training requirements for a first-time agency administrator and alternate administrator.
§97.259(f)	Documentation requirements for initial educational training of a first-time administrator and alternate administrator.
§97.260(a)	Annual continuing education requirements for an agency administrator and alternate administrator.
§97.260(b)	Continuing education requirements for an agency administrator and alternate administrator who has not served for 180 days or more immediately preceding the date of designation.
§97.260(c)	Documentation requirements for continuing education of an administrator and alternate administrator.
§97.281(1)-(16) separate penalties	Enforcement of a written policy for client care practices.
§97.282(a)-(f)(1)-(8) and (g)-(h) separate penalties	Compliance with an agency policy on client conduct and responsibility and client rights.
§97.284	Compliance with the Clinical Laboratory Improvement Amendments of 1988.
§97.285	Compliance with written policies addressing infection control.
§97.285(1)(A)-(C) and (2) separate penalties	Enforcement and compliance with written policies on infection control.
§97.286(b)	Compliance with 25 TAC §§1.131-1.137 concerning the Definition, Treatment, and Disposition of Special Waste from Health Care-Related Facilities.
§97.287(a)(1)-(3) and (b)-(c) separate penalties	An agency's Quality Assessment and Performance Improvement Program.
§97.288(a)-(b) separate penalties	Compliance with an agency's written policy for coordination of services and documentation requirements.
§97.289(a)-(b) separate penalties	An agency's use of and agreement with independent contractors and arranged services.
§97.289(c)(1) and (3) separate penalties	Initial searches and searches at least every 12 months of the nurse aide registry and employee misconduct registry for unlicensed staff providing services under arrangement.
§97.289(d)(1)-(2) separate penalties	Conducting and reviewing a criminal history check for an unlicensed person that provides services under arrangement.
§97.290(a)	Enforcing a written policy that backup services are available when needed.
§97.290(a)(1)-(2)	Documentation that a client's designee agreed to provide backup services.

SEVERITY LEVEL B VIOLATIONS $500 - $1,000 per violation	
Rule Cite	**Subject Matter**
§97.290(b)	Enforcing a written policy that clients are educated in how to access care after hours.
§97.291(1)-(2) separate penalties	Implementing a written policy for an agency's written contingency plan.
§97.292(a)	Complying with the terms of a written agreement for services that the agency provided to a client or a client's family.
§97.295(a)(1)-(2) separate penalties	Providing a client with written notification, and notifying a client's attending physician if applicable, of transfer or discharge.
§97.295(b)	An agency providing written notification of a client's transfer or discharge within the required time frame.
§97.296(a)	Enforcement of an agency's policy regarding acceptance of physician delegation orders.
97.296(b)	Information the agency must receive to accept physician delegation.
§97.297	Enforcement of a written policy describing protocols and procedures agency staff must follow when receiving physician orders, if applicable.
§97.297(1)	Countersignature of physician verbal orders.
§97.298	Enforcement of a written policy for ensuring compliance with the rules adopted by the Texas Board of Nursing in 22 TAC Chapter 224 (Delegation of Nursing Tasks by Registered Professional Nurses to Unlicensed Personnel for Clients with Acute Conditions or in Acute Care Environments) and 22 TAC Chapter 225 (RN Delegation to Unlicensed Personnel and Tasks Not Requiring Delegation in Independent Living Environments for Clients with Stable and Predictable Conditions).
§97.300(b)	Enforcement of a written policy for maintaining a current medication list and a current medication administration record.
§97.300(b)(1)-(2)(A)-(B) and (3) separate penalties	The administration of medication.
§97.303(1)-(3)(A)-(F) separate penalties	The possession and use of sterile water or saline, certain vaccines or tuberculin, and certain dangerous drugs.
§97.321(c)(2)	Maintaining adequate staff to provide and supervise services at a branch office.
§97.322(c)(2)	Maintaining adequate staff to provide and supervise services at an alternate delivery site.
§97.401(b)(1)-(2)(A)-B) separate penalties	Acceptance of a client for home health services and the initiation of services.
§97.401(d)	Requirement that qualified personnel provide and supervise all services.
§97.401(e)	Requirement that all staff providing services, delegation, and supervision be employed by or be under contract with the agency.
§97.401(g)	Age and competency of unlicensed persons providing licensed home health services.
§97.402(a)	Compliance with the Medicare Conditions of Participation (Social Security Act, Title 42, Code of Federal Regulations, Part 484.)

SEVERITY LEVEL B VIOLATIONS $500 - $1,000 per violation	
Rule Cite	**Subject Matter**
§97.402(c)-(e) separate penalties	Compliance with §97.701(f) of this chapter (relating to Home Health Aides) for an agency that implements a competency evaluation program.
§97.403(a)	Compliance with the Social Security Act and the regulations in Title 42, Code of Federal Regulations, Part 418.
§97.403(c)	Enforcement of a written policy for the provision of hospice services.
§97.403(d)(1)-(3) separate penalties	Requirement and conditions of the medical director for an agency that provides hospice services.
§97.403(e)(1)(A)-(D) separate penalties	Composition of an interdisciplinary team or teams.
§97.403(e)(2)(A)-(D) separate penalties	Responsibilities of the interdisciplinary team.
§97.403(e)(4)	Designating a registered nurse to coordinate implementation of the plan of care for each client.
§97.403(f)(1)	Ensuring continuity of client and family care in home and outpatient and inpatient settings.
§97.403(f)(2)	Contract requirements for providing arranged services.
§97.403(f)(3)	Professional management responsibility for arranged services.
§97.403(f)(5)	Ensuring that inpatient care is furnished only in a licensed facility and according to contract requirements.
§97.403(g)(1)-(3) separate penalties	Time requirements for contacting the client or client's representative, performing the initial health assessment visit, and initiation of services.
§97.403(h)	Performing and making available to each client a comprehensive health assessment that identifies the client's needs.
§97.403(h)(1)	Completing the comprehensive health assessment in a timely manner.
§97.403(h)(2)(A)-(C) separate penalties	Composition of the comprehensive health assessment.
§97.403(h)(3)(A)-(B) separate penalties	Requirement for updating and revising the comprehensive health assessment.
§97.403(i)(1)-(3) separate penalties	Requirements for a written plan of care.
§97.403(m)	Ensuring that all core services are provided, and requirements for using contracted staff, if necessary.
§97.403(n)(1)-(3) separate penalties	Requirements for providing nursing care and services.
§97.403(o)	Qualifications of the social worker performing hospice services.
§97.403(p)	Requirements for ensuring that general medical needs of clients are met.
§97.403(q)(1)-(4) separate penalties	Requirements for providing counseling services.
§97.403(r)	Requirements for providing services, maintaining a system for ensuring identification of client needs, communication across all disciplines, and integration of services.
§97.403(s)	Requirements for having therapy services available.

SEVERITY LEVEL B VIOLATIONS $500 - $1,000 per violation	
Rule Cite	**Subject Matter**
§97.403(t)	Requirements for having home health aide and homemaker services available.
§97.403(t)(1)-(2) separate penalties	Requirements for RN supervisory visits to assess aide services.
§97.403(u)(1)-(3) separate penalties	Requirements for providing medical supplies, appliances, and medications, as needed, for palliation and management of terminal illness and related conditions.
§97.403(v)	Requirements that inpatient care be available for pain control, symptom management, and respite.
§97.403(v)(1)	Requirements for providing inpatient care.
§97.403(v)(2)(A)-(B) separate penalties	Requirements for a quality assessment and performance improvement plan for hospice services.
§97.403(w)(1)(A)-(B) separate penalties	Requirements for having on-site 24-hour nursing services provided by RNs and LVNs.
§97.403(w)(2)(A)-(G) separate penalties	Implementation of a written disaster preparedness and response plan for a freestanding hospice in the event of a disaster.
§97.403(w)(3)	Meeting all federal, state, and local laws, regulations, and codes pertaining to health and safety.
§97.403(w)(4)	Meeting the National Fire Protection Association Life Safety Code for fire in buildings and structures.
§97.403(w)(9)	Having available at all times a quantity of linen essential for proper care of clients and requirements to prevent the spread of infection on linens.
§97.403(w)(10)	Making provisions for isolating clients with infectious diseases.
§97.403(w)(12)(A)-(I) separate penalties	Methods and procedures for dispensing and administering medications.
§97.404(c)	Qualifications of agency staff performing personal assistance services.
§97.404(d)	Tasks authorized under a personal assistance services license category.
§97.404(g)	Enforcement of a written policy that addresses the supervision of agency personnel with input from the client or family on the frequency of supervision.
§97.404(g)(1)-(2) separate penalties	Conditions and qualifications for supervising agency personnel delivering personal assistance services.
§97.404(h)(1)-(5) separate penalties	Performance of gastrostomy tube feedings and medication administration for an agency that provides personal assistance services.
§97.405(a)	Requirements for agencies that provide peritoneal dialysis or hemodialysis services.
§97.405(c)(1)-(2) separate penalties	Qualifications and responsibilities of the medical director for an agency that provides home dialysis services.
§97.405(e)(1)(A)-(C) separate penalties	Provision and supervision of nursing services for an agency that provides home dialysis services.
§97.405(e)(2)	Provision of nutritional counseling for an agency that provides home dialysis services.

SEVERITY LEVEL B VIOLATIONS $500 - $1,000 per violation	
Rule Cite	**Subject Matter**
§97.405(e)(3)	Provision of medical social services for an agency that provides home dialysis services.
§97.405(f)(1)	Requirements for orientation and training of personnel providing direct care to clients receiving home dialysis services.
§97.405(f)(2)(A)-(G) separate penalties	Requirement for an orientation and skills education period for licensed nurses.
§97.405(i)	Requirement that an agency coordinate the exchange of medical and other important information when transferring a home dialysis client to a health-care facility for treatment.
§97.405(k)	Requirement for routine hepatitis testing of home dialysis clients and agency employees providing dialysis care.
§97.405(k)(1)(A)-(C) separate penalties	Requirements for hepatitis B screening and vaccinations for staff.
§97.405(k)(2)(A)-(E) separate penalties	Requirements for hepatitis B screening and vaccinations for clients.
§97.405(l)	Requirements for employees providing direct care to clients to have a current CPR certification.
§97.405(m)	Requirement for initial admission assessment of a client for home dialysis services.
§97.405(n)	Requirement for development of a long-term program for a client receiving home dialysis services.
§97.405(o)	Requirement that the agency conducts a history and physical of a home dialysis client at admission and annually.
§97.405(p)(1)-(2) separate penalties	Requirement for physician orders for home self-assisted dialysis treatment.
§97.405(q)(1)-(7) separate penalties	Requirements for development and implementation of a care plan for a home dialysis client.
§97.405(r)	Requirement for medication administration by licensed personnel for an agency that provides home dialysis services.
§97.405(s)(2)-(3) separate penalties	Additional requirements for maintaining client records in an agency that provides home dialysis services.
§97.405(t)(1)-(4) separate penalties	Requirements for use of water in the home dialysis setting.
§97.405(u)	Adoption and enforcement of a policy to test dialysis equipment prior to each treatment.
§97.405(v)	Enforcing the agency's written preventive maintenance program for home dialysis equipment.
§97.405(v)(1), (1)(A), (1)(C)-(D), and (2) separate penalties	Implementing requirements for a written preventive maintenance program for home dialysis equipment.
§97.405(w)(1)-(6) separate penalties	Reuse of disposable medical devices in the home dialysis setting.
§97.405(x)(1)-(2)	Provision of laboratory services.
§97.405(x)(3)-(4) separate penalties	Provision of laboratory services.
§97.405(y)(1)-(2) separate penalties	Supplies for home dialysis services.

SEVERITY LEVEL B VIOLATIONS $500 - $1,000 per violation	
Rule Cite	**Subject Matter**
§97.405(z)(1)-(7) separate penalties	Compliance with policies and procedures for medical emergencies and emergencies resulting from a disaster required of an agency that provides home dialysis services.
§97.406(2)-(5) separate penalties	Provision of psychoactive services.
§97.407(1)-(11) separate penalties	Provision of intravenous therapy services.
§97.523(e)	Requirement to grant the surveyor entry to the agency if closed when the surveyor arrives during regular business hours.
§97.701(a)-(f)(1)-(7) separate penalties	Home health aides.

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Department of Aging and Disability Services

Notice - Procurement of Services by Area Agencies on Aging

The Department of Aging and Disability Services' Access and Intake Division - Area Agencies on Aging Section oversees the delivery of Older Americans Act services for individuals 60 years of age and older, their family members, and other caregivers through contracts with area agencies on aging located throughout the state. These 28 area agencies on aging are currently seeking qualified entities to provide services such as: Congregate Meals, Home Delivered Meals, Transportation, Personal Assistance, Homemaker, and Caregiver, as well as other related services. Parties interested in providing services must contact the area agency on aging operating within their service area to obtain information relating to vendor open enrollment, requests for proposals (RFP), the contracting process, the types of services being considered, and the actual funding available.

Identified in the comprehensive list are all area agencies on aging, contact information, addresses, telephone numbers, and service areas:

List of Area Agencies on Aging

Area Agencies on Aging
8/11/2010

Area Agency on Aging of the Alamo Area
8700 Tesoro, Suite 700
San Antonio, Texas 78217-6228
Ph: 210-362-5200 **1-866-231-4922**
Fax: 210-225-5937

Director:
Ms. Gloria Vasquez, Director
gvasquez@aacog.com

Executive Director:
Alamo Area Council of Governments
Ms. Gloria C. Arriaga, Executive Director
garriaga@aacog.com

Fiscal Director:	Contact:
Blanca Tapia	Andrew Perez
btapia@aacog.com	aperez@aacog.com

Counties Served: Atascoca, Bandera, Comal, Frio, Gillespie, Guadalupe; Karnes, Kendall, Kerr, Medina, Willson

Area Agency on Aging of Bexar County
8700 Tesoro, Suite 700
San Antonio, Texas 78217-6228
Ph: 210-362-5254 **1-800-960-5201**
Fax: 210-225-5937

Director:
Dr. Martha Spinks,Director
mspinks@aacog.com

Executive Director:
Alamo Area Council of Governments
Ms. Gloria C. Arriaga, Executive Director
garriaga@aacog.com

Fiscal Director:	Contact:
Blanca Tapia	Andrew Perez
btapia@aacog.com	aperez@aacog.com

Counties Served: Bexar

Area Agency on Aging of Ark-Tex
P. O. Box 5307
Texarkana, Texas 75505-5307
Ph: 903-832-8636 **1-800-372-4464**
Fax: 903-832-3441

Director:
Ms. Diane McKinnon, Manager
dmckinnon@atcog.org

Executive Director:
Ark-Tex Council of Governments
Mr. L.D. Williamson, Executive Director
ldwilliamson@atcog.org

Fiscal Director:	Contact:
Brenda Davis	Debra Newton
bdavis@atcog.org	dnewton@atcog.org

Counties Served: Bowie, Cass, Delta, Franklin, Hopkins, Lamar, Morris, Red River, Titus

Area Agency on Aging of Brazos Valley
P. O. Box 4128
Bryan, Texas 77805-4128
Ph: 979-595-2806 **1-800-994-4000**
Fax: 979-595-2810

Director:
Mr. Ronnie Gipson, Director
rgipson@bvcog.org

Executive Director:
Brazos Valley Council of Governments
Mr. Tom M. Wilkinson, Jr., Executive Director
twilkinson@bvcog.org

Fiscal Director:	Contact:
John Jackson	Kay Wilson
jjackton@bvcog.org	kwilson@bvcog.org

Counties Served: Brazos, Burleson, Grimes, Leon, Madison, Robertson, Washington

Area Agencies on Aging
8/11/2010

Area Agency on Aging of the Capital Area
6800 Burleson Rd. Bldg. 310, STE 165
Austin, Texas 78744-2306
Ph: 512-916-6062 **1-888-622-9111**
Fax: 512-916-6042

Director:
Ms. Glenda Rogers, Director
grogers@capcog.org

Executive Director:
Capital Area Council of Governments
Ms. Betty Voights, Executive Director
bvoights@capcog.org

Fiscal Director: James Mikolaichik
jmikolaichik@capcog.org

Contact: Michael Weddell
mjweddell@capcog.org

Counties Served: Bastrop, Blanco, Burnet, Caldwell, Fayette, Hays, Lee, Llano, Travis, Williamson

Area Agency on Aging of Central Texas
2180 North Main Street
Belton, Texas 76513-1919
Ph: 254-770-2330 **1-800-447-7169**
Fax: 254-939-0087

Director:
Mr. H. Richard McGhee, Director
richard.mcghee@ctcog.org

Executive Director:
Central Texas Council of Governments
Mr. Jim Reed, Executive Director
jreed@ctcog.org

Fiscal Director: Michael Irvine
mirvine@ctcog.org

Contact: Sharon Harrell

Counties Served: Bell, Coryell, Hamilton, Lampasas, Milam, Mills, San Saba

Area Agency on Aging of the Coastal Bend
P. O. Box 9909
Corpus Christi, Texas 78469
Ph: 361-883-3935 **1-800-817-5743**
Fax: 361-883-5749

Director:
Ms. Betty Lamb, Director
betty@cbcogaaa.org

Executive Director:
Coastal Bend Council of Governments
Mr. John P. Buckner, Executive Director
john@cbcog98.org

Fiscal Director: Veronica Toomey
veronica@cbcog98.org

Contact:

Counties Served: Aransas, Bee, Brooks, Duval, Jim Wells, Kenedy, Kleberg, Live Oak, McMullen, Nueces, Refugio, San Patricio

Area Agency on Aging of Concho Valley
2801 W. Loop 306, Suite A
San Angelo, Texas 76904-6502
Ph: 325-223-5704 **1-877-944-9666**
Fax: 325-223-8233

Director:
Rosie Quintela, Director
rosie@cvcog.org

Executive Director:
Concho Valley Council of Governments
Mr. Jeffrey K. Sutton, Executive Director
jsutton@cvcog.org

Fiscal Director: Nancy Pahira
Nancy@cvcog.org

Contact: Rosie Quintella
rosie@cvcog.org

Counties Served: Coke, Concho, Crockett, Irion, Kimble, Mason, Mculloch, Menard, Reagan, Schleicher, Sterling, Sutton, Tom Green

Area Agencies on Aging
8/11/2010

Area Agency on Aging of Dallas County
1349 Empire Central, Ste. 400
Dallas, Texas 75247-4033
Ph: 214-871-5065 **1-800-548-1873**
Fax: 214-871-7442

Director:
Ms. Monita McGhee, Director
mmcghee@ccgd.org

Executive Director:
Community Council of Greater Dallas
Ms. Martha Blaine, Executive Director
mblaine@ccgd.org

Fiscal Director:	Contact:
Vicki White	Dena Boyd
vwhite@ccgd.org	dboyd@ccgd.org

Counties Served: Dallas

Area Agency on Aging of Deep East Texas
210 Premier Drive
Jasper, Texas 75951-7495
Ph: 409-384-7614 **1-800-435-3377**
Fax: 409-384-5390

Director:
Ms. Holly Anderson, Director
handerson@detcog.org

Executive Director:
Deep East Texas Council of Governments
Mr. Walter Diggles, Executive Director
wdiggles@detcog.org

Fiscal Director:	Contact:
Patricia DuBose	Holly Anderson
pdubose@detcog.org	

Counties Served: Angelina, Houston, Jasper, Nacogdoches, Newton, Polk, Sabine, San Augustine, San Jacinto, Shelby, Trinity, Tyler

Area Agency on Aging of East Texas
3800 Stone Road
Kilgore, Texas 75662-6927
Ph: 903-984-8641 **1-800-442-8845**
Fax: 903-984-4482

Director:
Mr. Claude I. Andrews, Director
Candrews@etcog.org

Executive Director:
East Texas Council of Governments
Mr. David Cleveland, Executive Director
David.cleveland@etcog.org

Fiscal Director:	Contact:
Judy Durland	Beverly Brown
Judy.durland@twc.state.tx.us	

Counties Served: Anderson, Camp, Cherokee,Gregg, Harrision, Henderson, Marion, Panola, Rains, Rusk, Smith, Upshur, VanZandt, Wood

Area Agency on Aging of the Golden Crescent Region
568 Big Bend Dr.
Victoria, Texas 77904-3623
Ph: 361-578-1587 **1-800-574-9745**
Fax: 361-578-8865

Director:
Ms. Cindy Cornish, Director
cindyco@gcrpc.org

Executive Director:
Golden Crescent Regional Planning Commission
Mr. Joe E. Brannan, Executive Director
jbrannan@gcprc.org

Fiscal Director:	Contact:
Cynthia Skarpa	Cynthia Skarpa
cindys@gcrpc.org	

Counties Served: Calhoun, DeWitt, Goliad, Gonzales, Jackson, Lavaca, Victoria

Area Agencies on Aging
8/11/2010

Area Agency on Aging of Harris County
8000 North Stadium Drive, 3rd. Floor
Houston, Texas 77054-1823
Ph: 713-794-9001 **1-800-213-8471**
Fax: 713-794-9238

Director:
Ms. Deborah A. Moore, Director
deborahA.moore@houstontx.gov

Executive Director:
Houston Dept. of Health & Human Services
Stephen Williams, Director
stephen.williams@houstontx.gov

Fiscal Director: Contact
Monica Mitchell Celina Ridge
monica.mitchell@houstontx.gov

Counties Served: Harris

Area Agency on Aging of the Heart of Texas
1514 S. New Rd.
Waco, Texas 76711-1316
Ph: 254-292-1800 **1-866-772-9600**
Fax: 254-756-0102

Director:
Mr. Gary Luft, Director
Gary.Luft@hot.cog.tx.us

Executive Director:
Heart of Texas Council of Governments
Mr. Ken Simons, Executive Director
ken.simons@hot.cog.tx.us

Fiscal Director: Contact:
John Minnix Donnis Cowan
John.minnix@hot.cog.tx.us

Counties Served: Bosque, Falls, Freestone, Hill, Limestone, McLennan

Area Agency on Aging of Houston-Galveston
P. O. Box 22777
Houston, Texas 77227-2777
Ph: 713-627-3200 **1-800-437-7396**
Fax: 713-993-4578

Director:
Mr. Curtis M. Cooper, Manager
curtis.cooper@h-gac.com

Executive Director:
Houston-Galveston Area Council
Mr. Jack Steele, Executive Director
jack.steele@H-GAC.com

Fiscal Director: Contact:
Nancy Haussler David Waller
Nancy.haussler@h-gac.com

Counties Served: Austin, Brazoria, Chambers, Colorado, Fort Bend, Galveston, Liberty, Matagorda, Montgomery, Walker, Waller, Wharton

Area Agency on Aging of the Lower Rio Grande Valley
311 N. 15th Street
McAllen, Texas 78501-4705
Ph: 956-682-3481 **1-800-365-6131**
Fax: 956-682-8852

Director:
Mr. Jose L. Gonzalez, Director
jgonzalez@lrgvdc.org

Executive Director:
Lower Rio Grande Valley Development Council
Mr. Kenneth N. Jones, Executive Director
knjones@lrgvdc.org

Fiscal Director: Contact:
Ann Lyles Crystal Balboa
lyles@acnet.net cbalboa@lrgvdc.org

Counties Served: Cameron, Hidalgo, Willacy

Area Agencies on Aging
8/11/2010

Area Agency on Aging of the Middle Rio Grande Area
P. O. Box 1199
Carrizo Springs, Texas 78834-3211
Ph: 830-876-3533 **1-800-224-4262**
Fax: 830-876-9415

Director:
Mr. Conrado Longoria, Jr. Director
conrado.longoria@mrgdc.org

Executive Director:
Middle Rio Grande Development Council
Mr. Leodoro Martinez, Executive Director
leodoro.martinez@mrgdc.org

Fiscal Director: Contact:
Joe D. Cruz, Jr. Pete Perez
Joe.cruz@mrgdc.org

Counties Served: Dimmit, Edwards, Kinney, LaSalle, Maverick, Real, Uvalde,Val Verde, Zavala

Area Agency on Aging of North Central TX
P. O. Box 5888
Arlington, Texas 76005-5888
Ph: 817-695-9194 **1-800-272-3921**
Fax: 817-695-9274

Director:
Ms. Doni Van Ryswyk, Manager
dvanryswyk@nctcog.org

Executive Director:
North Central Texas Council of Governments
Mr. Mike Eastland, Executive Director
meastland@nctcog.org

Fiscal Director: Contact:
Shannan Ramirez Mona Barbee
lamardones@nctcog.org

Counties Served: Collin, Denton, Ellis, Erath, Hood, Hunt, Johnson, Kaufman, Navarro, Palo Pinto, Parker, Rockwall, Somervell, Wise

Area Agency on Aging of North Texas
P. O. Box 5144
Wichita Falls, Texas 76307-5144
Ph: 940-322-5281 **1-800-460-2226**
Fax: 940-322-6743

Director:
Ms. Rhonda K. Pogue, Director
rpogue@nortexrpc.org

Executive Director:
Nortex Regional Planning Commission
Mr. Dennis Wilde, Executive Director
dwilde@nortexrpc.org

Fiscal Director: Contact:
James Springer Rhonda Pogue
jspringer@nortexrpc.org

Counties Served: Archer, Baylor, Clay, Cottle, Foard, Hardeman, Jack, Montague, Wichta, Wilbarger, Young

Area Agency on Aging of the Panhandle Area
P. O. Box 9257
Amarillo, Texas 79105-9257
Ph: 806-331-2227 **1-800-642-6008**
Fax: 806-373-3268

Director:
Ms. Melissa Carter, Director
mcarter@prpc.cog.tx.us

Executive Director:
Panhandle Regional Planning Commission
Mr. Gary Pitner, Executive Director
Gpitner@theprpc.org

Fiscal Director: Contact:
Cindy Boone Christy Henderson
cboone@theprpc.org

Counties Served: Armstrong, Briscoe, Carson, Castro, Childress, Collingsworth, Dallam, Deaf Smith, Donley, Gray, Hall, Hansford, Hartley, Hemphill, Hutchinson, Lipscomb, Moore, Ochiltree, Oldham, Parmer, Potter, Randall, Roberts, Sherman, Swisher, Wheeler

Area Agencies on Aging
8/11/2010

Area Agency on Aging of the Permian Basin
P.O. Box 60660
Midland, Texas 79711-0660
Ph: 432-563-1061 **1-800-491-4636**
Fax: 432-567-1011

Director:
Ms. Jeannie Raglin, Director
jraglin@aaapbcom

Executive Director:
Permian Basin Regional Planning Commission
Ms. Terri Moore, Executive Director
tmoore@pbrpc.org

Fiscal Director:	Contact:
Helen Grady	Jeannie Raglin
heleng@pbrpc.org	

Counties Served: Andrews, Borden, Crane, Dawson, Ector, Gaines, Glasscock, Howard, Loving, Martin, Midland, Pecos, Reeves, Terrell, Upton, Ward, Winkler

Area Agency on Aging of the Rio Grande Area
1100 North Stanton, Suite 610
El Paso, Texas 79902-4155
Ph: 915-533-0998 **1-800-333-7082**
Fax: 915-544-5402

Director:
Ms. Yvette Lugo, Director
yvettel@riocog.org

Executive Director:
Rio Grande Council of Governments
Ms. Annette Gutierrez. Executive Director
anneteg@riocog.org

Fiscal Director:	Contact:
Hector F. Diaz	Lorena Estrada
hectord@riocog.org	lorenae@riocog.org

Counties Served: Brewster, Culberson, El Paso, Hudspeth, Jeff Davis, Presidio

Area Agency on Aging of Southeast TX
2210 Eastex Freeway
Beaumont, Texas 77703-4929
Ph: 409-924-3381 **1-800-395-5465**
Fax: 409-899-4829

Director:
Colleen Halliburton, Director
challiburton@setrpc.org

Executive Director:
South East Texas Regional Planning Commission
Mr. Shaun Davis, Executive Director
sdavis@setrpc.org

Fiscal Director:	Contact:
Jim Borel	Teri Barnes
jborel@setrpc.org	tbarnes@setrpc.org

Counties Served: Hardin, Jefferson, Orange

Area Agency on Aging of South Plains
P. O. Box 3730 / Freedom Station
Lubbock, Texas 79452
Ph: 806-687-0940 **1-888-418-6564**
Fax: 806-765-9544

Director:
Ms. Liz Castro, Director
lcastro@spag.org

Executive Director:
South Plains Association of Governments
Mr. Tim C. Pierce, Executive Director
tpierce@spag.org

Fiscal Director:	Contact:
Tim Schwartz	Al Garcia
tschwartz@spag.org	

Counties Served: Bailey, Cochran, Crosby, Dickens, Floyd, Garza, Hale, Hockley, King, Lamb, Lubbock, Lynn, Motley, Terry, Yoakum

Area Agencies on Aging
8/11/2010

Area Agency on Aging of South Texas
P.O. Box 2187
Laredo, Texas 78044-2187
Ph: 956-722-3995 **1-800-292-5426**
Fax: 956-722-2670

Director:
Mr. Alberto Rivera, Jr., Aging Services Director
arivera@stdc.cog.tx.us

Executive Director:
South Texas Development Council
Mr. Amando Garza, Jr., Executive Director
agarzajr@stdc.cog.tx.us

Fiscal Director: Contact:
Robert Mendiola Nancy Rodriquez
mendiola@stdc.cog.tx.us

Counties Served: Jim Hogg, Starr, Webb, Zapata

Area Agency on Aging of Tarrant County
1500 N. Main St. Suite 200
Fort Worth, Texas 76164-0448
Ph: 817-258-8081 **1-877-886-4833**
Fax: 817-258-8074

Director:
Mr. Don Smith, Director
Don.smith@unitedwaytarrant.org

Executive Director:
United Way Metropolitan Tarrant County
Ms. Ann Rice, Sr. Vice President
ann.rice@unitedwaytarrant.org

Fiscal Director: Contact:
Mitch Leach Sarah Hummer
mitch.leach@unitedwaytarrant.org

Counties Served: Tarrant

Area Agency on Aging of Texoma
1117 Gallagher, Suite 200
Sherman, Texas 75090-3107
Ph: 903-813-3580 **1-800-677-8264**
Fax: 903-813-3573

Director:
Mr. Ron Michael, Director
rmichael@texoma.cog.tx.us

Executive Director:
Texoma Council of Governments
Dr. Susan B. Thomas, Executive Director
sthomas@texoma.cog.tx.us

Fiscal Director: Contact:
Terrell Culbertson Rodrigo Moyshondt
tculbertson@texoma.cog.tx

Counties Served: Cooke, Fannin, Grayson

Area Agency on Aging of West Central TX
3702 Loop 322
Abilene, Texas 79602-7300
Ph: 325-672-8544 **1-800-928-2262**
Fax: 325-675-5214

Director:
Ms. Gail Kaiser, Director
gkaiser@wctcog.org

Executive Director:
West Central Texas Council of Governments
Mr. Tom K. Smith, Executive Director
tsmith@wctcog.org

Fiscal Director: Contact:
Christy Marlar Theresa Edwards
cmarlar@wctcog.org

Counties Served: Brown, Callahan, Coleman, Comanche, Eastland, Fisher, Haskell, Jones, Kent, Knox, Mitchell, Nolan, Runnels, Scurry, Shackelford, Stephens, Stonewall, Taylor, Throckmorton

Contact the Department of Aging and Disability Services, Access and Intake Division - Area Agencies on Aging Section at (512) 438-4290 for questions about this general notice.

TRD-201004767
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Filed: August 18, 2010

♦ ♦ ♦

Texas Department of Agriculture

Request for Applications: Young Farmer Grant Program

Statement of Purpose. Pursuant to the Texas Agriculture Code, §58.011, the Texas Department of Agriculture (TDA) is requesting applications for the Young Farmer Grant program (YFGP). The YFGP is administered by TDA under the direction of the Texas Agricultural Finance Authority (TAFA). The purpose of this program is to provide financial assistance in the form of dollar-for-dollar matching grant funds to those persons 18 years or older but younger than 46 years of age that are engaged or will be engaged in creating or expanding an agricultural business in Texas.

Submission Dates/Locations. Forms required for submitting an application are available by accessing TDA's website at: www.TexasAgriculture.gov or by e-mailing TAFA at finance@TexasAgriculture.gov. One hard copy of the application must arrive no later than 5:00 p.m. on **September 30, 2010** to one of the following:

Physical Address: Texas Department of Agriculture, Texas Agricultural Finance Authority, Attn: Allen Regehr, 1700 N. Congress Avenue, 11th Floor, Austin, Texas 78701, Phone Number: (512) 936-0273 or (512) 463-9932, Fax Number: (888) 216-9867.

Mailing Address: Texas Department of Agriculture, Texas Agricultural Finance Authority, Attn: Allen Regehr, P.O. Box 12847, Austin, Texas 78711.

Proposals must set forth accurate and complete information as required by this Request for Applications (RFA). Oral modifications will not be considered. Electronic applications will not be accepted or considered.

Eligibility. Grant applications will be accepted from any person 18 years or older but younger than 46 years of age that is engaged or will be engaged in creating or expanding agriculture in Texas. The applicant must be able to make dollar-for-dollar matching expenditures to sustain, create or expand the proposed project.

Application Requirements.

Funding Parameters:

The TAFA Board of Directors (board) anticipates funding in an amount of $150,000 for grants not less than $5,000 and not to exceed $10,000 per grant application. Recipients will have up to two years to expend grant funds.

The TAFA board reserves the right to fully or partially fund any particular grant application.

Form Requirements:

Applications must be submitted on form RED-300 for consideration. Required forms and instructions are available by accessing TDA's website at www.TexasAgriculture.gov or by e-mailing TAFA at: finance@TexasAgriculture.gov.

Budget Information:

YFGP projects are paid on a cost reimbursement basis.

1. **Eligible Expenses.** Generally, eligible expenses include those costs that are necessary and reasonable for proper and efficient performance and administration of a project. Expenses must be properly documented with sufficient detail, including copies of invoices. Examples of eligible expenditures are:

Personnel costs - both salary and benefits of those that perform work for the grant recipient;

Materials and direct operating expenses - equipment that costs less than $5,000 per unit, animals, seed, fertilizer, irrigation, etc.;

Equipment - nonexpendable, tangible personal property having a useful life of less than one year and an acquisition cost of less than $5,000; and

Other expenses - any expenses that do not fall into the above categories;

Indirect expenses - the YFGP limits reimbursable indirect expenses to 10% of the grant award.

2. **Ineligible Expenses.** Expenses that are prohibited by state or federal law are ineligible. Examples of these expenditures are:

Alcoholic beverages;

Entertainment;

Contributions for charitable, political, or lobbying purposes;

Expenses falling outside of the contract period;

Expenses for expenditures not listed in the project budget;

Expenses that are not adequately documented;

Value of applicant's own services;

Land; and

Personal property or other capital items with a useful life of more than one year and a cost of more than $5,000.

3. **Description of the Budget.** Applicant must present an overall project budget and include the following items in the budget description:

A. *Wages:* Grant funds may be used for directly supporting salaries and wages of employees, but not for the value of your own services.

B. *Materials and Direct Operating Expenses:* The grant may be used for expenses that are directly related to the day-to-day operation of the project, if those expenses are not included in any other budget category, and if those expenses have an acquisition cost of less than $5,000 per unit. An applicant must allocate costs on a prorated basis for shared usage.

C. *Equipment:* Eligible equipment is defined as tangible personal property having a useful life of less than one year and an acquisition cost of $5,000 or less per unit. Applicants must submit a list of all proposed equipment purchases for approval. Recipients are not authorized to purchase any equipment until they have received written approval to do so from the Commissioner or his designee through the original grant award or a subsequent grant adjustment notice. The YFGP may refuse any request for equipment. Decisions regarding equipment purchases are made based on whether or not the grant recipient has demonstrated that the requested equipment will be purchased at a reasonable cost and is essential to the successful operation of the project.

D. *Professional/Contractual:* Any contract or agreement between a grant recipient and a third party must be in writing and consistent with Texas law. Recipients must maintain adequate documentation supporting budget items for a contractor's time, services, and rates of compensation.

E. *Indirect Expenses:* Grant funds may be used for indirect costs up to 10% of the amount of the grant award.

F. *Additional Budget Information:* Applicant should provide additional information that will be helpful to the TAFA board in evaluating a grant application, including justification for equipment purchases, a list of subcontractors and amounts, a list of key personnel and salaries to be paid with the grant, and a description of other large expenditures.

G. *Documentation of Employment Status:* Applicant should be prepared to furnish documentation of lawful employment status for each employee included in personnel costs for the project.

Evaluation of Applications.

The TAFA board will review and evaluate all applications. Prior to consideration by the board, TDA staff will score and rank the applications based on the criteria identified by the TAFA board. The board is not required to make awards based solely on staff's scoring or ranking of the applications. The board may consider other factors in making grant awards under the program, including, without limitation, the quality of the application, applicant's need for financial assistance, the project's ability to create, enhance, or sustain applicant's agricultural operation, the project's ability to improve overall agricultural productivity in Texas, and the project's ability to increase the number of agricultural enterprises in Texas that are owned and operated by young farmers.

Award Information and Notification.

The TAFA board will approve projects for funding. The TAFA board reserves the right to accept or reject any or all applications. TDA and TAFA are under no legal or other obligation to award a grant on the basis of a submitted application. Neither TDA nor TAFA will pay for any cost or expense incurred by applicant or any other entity in responding to this RFA, including, without limitation, compensation for the value of applicant's time or services incurred in responding to this RFA.

Public announcements and written notifications of funding rounds will be made. Selected applicants will be notified of the amount of award, duration of the grant, and any special conditions associated with the project.

General Compliance Information.

1. Prior to accepting the Young Farmer grant and signing the grant agreement, the recipient will be provided a copy of TDA reporting requirements, for review and execution. The Grant Agreement outlines billing procedures, annual reporting requirements, procedures for requesting a change in the scope or budget for a project, and other miscellaneous items.

2. Late or incomplete applications will not be accepted.

3. Any delegation by a grant recipient to a subcontractor regarding any duties and responsibilities imposed by the grant award must be approved in advance by TDA but shall not relieve the recipient of responsibility for performance.

4. All grant awards are subject to the availability of appropriations and authorizations by the Texas Legislature, TDA and TAFA.

5. Any information or documentation submitted to TDA in connection with a grant application is subject to disclosure under the Texas Public Information Act.

6. While TDA and TAFA attempt to observe the strictest confidence in handling applications, they cannot guarantee complete confidentiality on any matter. The confidentiality of applicant's "proprietary data", if so designated, shall be strictly observed to the extent permitted by Texas law, including the Texas Public Information Act.

7. The ownership and disposition of all patentable products and intellectual property inventories shall be subject to the agreement of the grant recipient and TDA.

8. Funded projects must remain in full compliance with state and federal law and regulations. Noncompliance may result in termination.

9. Grant recipients must keep a separate bookkeeping account with a complete record of all expenditures relating to the project. Records shall be maintained for three years after the completion of the project or as otherwise agreed with TDA. TDA and the Texas State Auditor's Office reserve the right to examine all books, documents, records, and accounts relating to the project at any time throughout the duration of the grant agreement and for three years immediately following completion of the project. If there has been any litigation, claim, negotiation, audit or other action started prior to the expiration of the three-year period involving the project's records, then the records must be retained until the completion of the action and resolution of all issues which arise from it, or until the end of the regular three-year period, whichever is later. TDA and the Texas State Auditor's Office reserve the right to inspect project locations and to obtain full information regarding all project activities.

10. If a grant recipient has a financial audit performed in any year during which the recipient receives grant funds, the recipient shall, upon TDA's request, provide a complete copy of such audit and all information related thereto to TDA and/or TAFA, including the audit transmittal letter, management letter, and any schedules in which grant funds are analyzed, discussed, included, or reported.

11. Grant awards shall comply in all respects with the Uniform Grant Management Standards (UGMS). A copy may be downloaded from the following website: www.governor.state.tx.us/divisions/stategrants/guidelines/files/UGMS012001.doc. Grant management guidelines for YFGP grants will be provided to a grant recipient after an award has been made.

For Any Questions: Please contact Allen Regehr at (512) 463-9932 or by e-mail at finance@TexasAgriculture.gov.

TRD-201004779
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Filed: August 18, 2010

♦ ♦ ♦

Office of the Attorney General

Notice of Settlement of a Texas Water Code Enforcement Action

The State of Texas gives notice of the following proposed resolution of an environmental enforcement action under the Texas Water Code. Before the State may enter into a voluntary settlement agreement, pursuant to §7.110 of the Texas Water Code, the State shall permit the public to comment in writing. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed agreement if the comments disclose facts or considerations indicating that consent is inappropriate, improper, inadequate or inconsistent with the requirements of the law.

Case Title: *United States of America and State of Texas v. Air Products, LLC,* to be filed in the United States District Court for the Southern District of Texas.

Background: Air Products, LLC, owns and operates a facility on approximately 105 acres located on the north side of State Highway 225 in Pasadena, Harris County, Texas. Air Products produces chemical

intermediates used in the manufacturing of polyurethane and hydrogen gas: these intermediates include dinitrotoluene ("DNT"), toluenediamine ("TDA"), and nitric acid. From at least 1990 until September 2009, Air Products or its predecessors purchased sulphuric acid from Agrifos Fertilizer, Inc. ("Agrifos") and returned the spent acid by pipeline to the adjoining Agrifos facility. The United States and the State have alleged that the spent acid was a hazardous waste, and did not come under any exemption, due to contamination with DNT. Agrifos was not authorized to treat, store or dispose of hazardous waste.

The United States and the State of Texas allege that Air Products has thus committed violations of federal and state hazardous waste laws, including violations of the Texas Solid Waste Disposal Act, Texas Health and Safety Code §§361.001 et seq., and associated regulations.

Nature of the Settlement: The action by the United States and the State of Texas against Air Products, LLC, will be settled by a consent decree in the district court.

Proposed Settlement: The proposed judgment provides for injunctive relief and the recovery of civil penalties and attorneys' fees.

The Office of the Attorney General will accept written comments relating to the proposed judgment for thirty (30) days from the date of publication of this notice. Copies of the proposed judgment may be examined at the Office of the Attorney General, 300 W. 15th Street, 10th Floor, Austin, Texas. A copy of the proposed judgment may also be obtained in person or by mail at the above address for the cost of copying. Requests for copies of the judgment, and written comments on the same, should be directed to Thomas H. Edwards, Assistant Attorney General, Office of the Attorney General, P.O. Box 12548, Austin, Texas 78711-2548; telephone (512) 463-2012, fax (512) 320-0052.

For information regarding this publication, contact Zindia Thomas, Agency Liaison, at (512) 936-9901.

TRD-201004745
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: August 17, 2010

♦ ♦ ♦

Cancer Prevention and Research Institute of Texas

Request for Information - Cancer Risk Reduction and Obesity in Texas

Key Dates

RFI Release: August 19, 2010, published in the *Texas Register* on August 27, 2010

Submission Deadline: September 20, 2010

Purpose

The Cancer Prevention and Research Institute of Texas (CPRIT) is seeking input related to the current landscape of obesity research, policy and systems change, and prevention and control programs in Texas; and what unique role CPRIT could have in addressing the obesity burden in the state.

Background

Overweight and obesity can lead to serious health concerns such as type 2 diabetes, cardiovascular disease and stroke, osteoarthritis, respiratory issues and some cancers. Texas adults are the 15th most obese population in the nation and 40% of Texas children are overweight or obese. Associated annual costs are projected to reach $15.6 billion this year and $39 billion by the year 2040. Obese workers cost Texas employers an estimated $3.3 billion annually, including costs related to decreased productivity, disability and absenteeism.[1]

Studies have concluded that:

* Lack of physical activity is strongly associated with obesity

* Avoiding weight gain can lower the risk of cancers of the breast (postmenopausal), endometrium, colon, kidney, and esophagus

* Regular physical activity lowers the risk of cancers of the colon and breast.[2]

Obesity is a multi-faceted problem and will require a comprehensive, collaborative systems change approach involving families, workplaces, schools, communities, organizations, business and industry, academic institutions, and local and state governments. Listed below are some of the current initiatives in the state that are addressing the burden of obesity.

Texas state agencies with programs related to nutrition and obesity include:

* The Department of State Health Services (DSHS). The Nutrition, Physical Activity and Obesity Prevention Program (NPAOP) of DSHS, http://www.dshs.state.tx.us/obesity, works to reduce the burden of death and disease related to overweight and obesity in Texas, partnering with state and local organizations, groups and communities across the state to promote science-based nutrition and physical activity interventions, policies and environmental changes to prevent and control obesity and overweight.

* Programs include Growing Community, Farm to Work Initiative, Texas Active Living Network, Promotoras in Action and TexPlate.

* Recent awards of $2.6M for Community-Based Obesity Prevention projects based on implementing CDC's Community Evidence-Based Strategies for Obesity Prevention

* Regional nutritionists located throughout the state of Texas

* The Texas Education Agency (TEA). TEA has approved 4 coordinated school health programs for Texas schools. As one example, CATCH (Coordinated Approach to Child Health) is a program designed to promote physical activity and healthy food choices, and to prevent tobacco use in elementary school aged children.

* The Texas Department of Agriculture (TDA). TDA administers the National School Lunch and Breakfast program for Texas school children and fights obesity in Texas through a statewide campaign highlighting the 3E's of Healthy Living - Education, Exercise and Eating Right

Other organization involved in obesity and healthy lifestyle initiatives include but are not limited to:

* LiveSmart Texas, www.livesmarttexas.org, is a consortium of researchers, practitioners, advocates and government employees concerned with improving the lives of Texans of all ages, with a specific focus on children. The LiveSmart website includes a listing of current community obesity-prevention initiatives, funding opportunities and publications along with other resources.

* Partnership for a Healthy Texas, www.PartnershipforaHealthyTexas.org, develops and promotes policies and programs that prevent obesity in Texas

* Action for Healthy Kids, www.actionforhealthykids.org, partners with schools to improve nutrition and physical activity to help our kids learn to eat right, be active every day, and be ready to learn. Some

Texas initiatives include the 3-Point Play project in Houston and the ACTIVE Life Challenge Program.

* Texas Obesity Research Center, University of Houston, http://hhp.uh.edu/obesity, conducts and promotes basic and applied research in obesity prevention, treatment and control as well as enhances collaborations within and among the university community, health professionals and social agencies on projects related to obesity.

Request for Information

CPRIT invites comments on the following questions:

* Given current efforts in Texas that address obesity research, prevention, and control, where are the gaps? What other evidence, research, programs, or services are needed to fill these gaps?

* Given CPRIT's mission to fund innovation in cancer prevention and research, what unique niche, if any, should CPRIT attempt to fill?

Submission

Please respond to the above questions or provide additional thoughts on the needs and CPRIT's role in obesity research, prevention, and control.

Submit your RFI response, limit to one page, to RFI@cprit.state.tx.us.

Results

All ideas submitted will be reviewed by and distributed to CPRIT Program staff and advisory groups. CPRIT will use these ideas to consider its role in addressing the burden of obesity in Texas. This RFI should not be construed as a solicitation for applications or an obligation on the part of CPRIT to release a request for applications or fund applications on this topic.

1. Texas Health Institute. Obesity in Texas: Reaching Epidemic Proportions. Retrieved August 17, 2010, from: http://www.healthpolicyinstitute.org/files/obesity_brochure.pdf.

2. National Cancer Institute. Obesity and Cancer: Questions and Answers. Retrieved August 17, 2010, from: http://www.cancer.gov/cancertopics/factsheet/Risk/obesity.

TRD-201004772
William "Bill" Gimson
Executive Director
Cancer Prevention and Research Institute of Texas
Filed: August 18, 2010

♦ ♦ ♦

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. Requests for federal consistency review were deemed administratively complete for the following project(s) during the period of August 6, 2010, through August 12, 2010. 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 this activity extends 30 days from the date published on the Coastal Coordination Council's web site. The notice was published on the web site on August 18, 2010. The public comment period for this project will close at 5:00 p.m. on September 17, 2010.

FEDERAL AGENCY ACTIONS:

Applicant: David Ross Hinds, Jr.; Location: The project site is located in the Waterwood Estates Subdivision, in a canal confluent with Cow Bayou, on the left descending bank, northwest of the intersection of State Highway (SH) 87 and SH 62, north of Bridge City, in Orange County, Texas. The project can be located on the U.S.G.S. quadrangle map titled: Orangefield, Texas. Approximate UTM Coordinates in NAD 83 (meters): Zone 15; Easting: 420731.63; Northing: 3325101.57. Project Description: The applicant proposes to excavate and bulkhead a canal to the north of Greenhead Point within the existing Waterwood Estates Subdivision. The prior subdivision was constructed in the 1990's under different ownership. The proposed canal's dimensions are approximately 925 feet long by 30 feet wide and excavated to a depth of -4.5 feet (MLT). The excavated material will be placed in uplands and the canal will connect a previously excavated canal and Cow Bayou. The preliminary plat is provided to disclose the potential future scope of the project; however, the applicant's current plan includes only the additional lots abutting the proposed canal at this time. CMP Project No.: 10-0169-F1. Type of Application: U.S.A.C.E. permit application #SWG-2010-00256 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403).

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information on the applications listed above, including a copy of the consistency certifications for inspection, may be obtained from Tammy Brooks, Consistency Review Coordinator, Coastal Coordination Council, P.O. Box 12873, Austin, Texas 78711-2873, or tammy.brooks@glo.state.tx.us. Comments should be sent to Ms. Brooks at the above address or by fax at (512) 475-0680.

TRD-201004746
Larry L. Laine
Chief Clerk/Deputy Land Commissioner, General Land Office
Coastal Coordination Council
Filed: August 17, 2010

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Comptroller of Public Accounts

Certification of the Average Taxable Price of Gas and Oil

The Comptroller of Public Accounts, administering agency for the collection of the Crude Oil Production Tax, has determined that the average taxable price of crude oil for reporting period July 2010, as required by Tax Code, §202.058, is $62.90 per barrel for the three-month period beginning on April 1, 2010, and ending June 30, 2010. Therefore, pursuant to Tax Code, §202.058, crude oil produced during the month of July 2010, from a qualified Low-Producing Oil Lease, is not eligible for exemption from the crude oil production tax imposed by Tax Code, Chapter 202.

The Comptroller of Public Accounts, administering agency for the collection of the Natural Gas Production Tax, has determined that the average taxable price of gas for reporting period July 2010, as required by Tax Code, §201.059, is $3.42 per mcf for the three-month period beginning on April 1, 2010, and ending June 30, 2010. Therefore, pursuant to Tax Code, §201.059, gas produced during the month of July

2010, from a qualified Low-Producing Well, is eligible for 25% credit on the natural gas production tax imposed by Tax Code, Chapter 201.

Inquiries should be directed to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528.

TRD-201004747
Ashley Harden
General Counsel
Comptroller of Public Accounts
Filed: August 17, 2010

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Notice of Contract Award

The Comptroller of Public Accounts (Comptroller) State Energy Conservation Office (SECO) announces the award of a contract under Request for Proposals (RFP) #195d for Clean Energy Incubators, to the University of Texas at Austin, Office of Sponsored Projects, P.O. Box 8179, Austin, Texas 78713. The amount of the contract is not to exceed $250,000.00. The term of the contract is August 10, 2010 through August 31, 2011.

The notice of the RFP was published in the February 12, 2010, issue of the *Texas Register* (35 TexReg 1361).

The contractor will create a sustainable Clean Energy Incubation network for the Clean Energy Incubator Emerging Technology Program.

TRD-201004690
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: August 12, 2010

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Notice of Request for Applications

Pursuant to Chapters 403, 447 and 2305, Texas Government Code; and the American Recovery and Reinvestment Act of 2009, Public Law, PL-111-5 (ARRA or Act); and 10 Code of Federal Regulations (CFR) Parts 420 and 600; Executive Order (EO) RP-72 and related legal authority and regulations, the Comptroller of Public Accounts (Comptroller), State Energy Conservation Office (SECO), announces its Request for Applications (RFA #RE-AG2-2010) and invites applications from eligible interested governmental entities for grant assistance to assist them in initiatives to increase the amount of installed renewable energy in Texas, further develop Texas' renewable energy potential, assist in meeting the state's Renewable Portfolio Standard target of ten thousand megawatts (10,000 MW) by the year 2025, and advance the market for renewable technologies. The Comptroller reserves the right to award more than one grant under the terms of the RFA. If a grant award is made under the terms of the RFA, Grantee will be expected to begin performance of the grant agreement as soon as practical.

Contact: Parties interested in submitting an application should contact William Clay Harris, Assistant General Counsel, Contracts, Comptroller of Public Accounts, in the Issuing Office at: 111 E. 17th St., Room 201, Austin, Texas 78774, (512) 305-8673, to obtain a complete copy of the RFA. The Comptroller will mail copies of the RFA only to those parties specifically requesting a copy. The RFA will be available for pick-up at the above referenced address on Friday, August 27, 2010, after 10:00 a.m. Central Standard Time (CST) and during normal business hours thereafter. The Comptroller will also make the entire RFA available electronically on the Electronic State Business Daily (ESBD) at: http://esbd.cpa.state.tx.us after 10:00 a.m. CST on Friday, August 27, 2010.

Questions and Non-Mandatory Letters of Intent: All written inquiries, questions, and Non-mandatory Letters of Intent must be received at the above-referenced address not later than 2:00 p.m. (CST) on Friday, September 3, 2010. Prospective applicants are encouraged to fax non-mandatory Letters of Intent and Questions to (512) 463-3669 to ensure timely receipt. Non-mandatory Letters of Intent must be addressed to William Clay Harris, Assistant General Counsel, Contracts, and must contain the information as stated in the corresponding Section of the RFA and be signed by an official of the entity. On or about Friday, September 10, 2010, the Comptroller expects to post responses to questions on the ESBD. Late Non-mandatory Letters of Intent and Questions will not be considered under any circumstances. Applicants shall be solely responsible for verifying timely receipt of Non-Mandatory Letters of Intent and Questions in the Issuing Office.

Closing Date: Applications must be delivered in the Issuing Office to the attention of the Assistant General Counsel, Contracts, no later than 2:00 p.m. (CST), on Friday, September 24, 2010. Late Applications will not be considered under any circumstances; Applicants shall be solely responsible for verifying time receipt of applications in the Issuing Office.

Evaluation Criteria: Applications will be evaluated under the criteria outlined in the RFA. The Comptroller will make the final decision. The Comptroller reserves the right to accept or reject any or all applications submitted. The Comptroller is not obligated to execute a grant agreement on the basis of this notice or the distribution of any RFA. The Comptroller shall not pay for any costs incurred by any entity in responding to this Notice or to the RFA.

The anticipated schedule of events pertaining to this RFA is as follows: Issuance of RFA - August 27, 2010, after 10:00 a.m. CST; Non-Mandatory Letters of Intent and Questions Due - September 3, 2010, 2:00 p.m. CST; Official Responses to Questions posted - September 10, 2010; Applications Due - September 24, 2010, 2:00 p.m. CST; Grant Agreement Execution - as soon as practical; Commencement of Project - as soon as practical.

TRD-201004766
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: August 18, 2010

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.005, and 303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 08/23/10 - 08/29/10 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 08/23/10 - 08/29/10 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

TRD-201004735
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: August 16, 2010

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Credit Union Department

Application for a Merger or Consolidation

Notice is given that the following application has been filed with the Credit Union Department (Department) and is under consideration:

An application was received from Thermon Employees Credit Union (San Marcos) seeking approval to merge with St. John's Federal Credit Union (San Marcos), with the latter being the surviving credit union.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-201004765
Harold E. Feeney
Commissioner
Credit Union Department
Filed: August 18, 2010

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Application to Amend Articles of Incorporation

Notice is given that the following application has been filed with the Credit Union Department (Department) and is under consideration:

An application for a name change was received from Baylor Health Care Systems Credit Union, Dallas, Texas. The credit union is proposing to change its name to Baylor Health Care System Credit Union.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-201004763
Harold E. Feeney
Commissioner
Credit Union Department
Filed: August 18, 2010

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Applications to Expand Field of Membership

Notice is given that the following applications have been filed with the Credit Union Department (Department) and are under consideration:

An application was received from SPCO Credit Union, Waco, Texas (#1) to expand its field of membership. The proposal would permit persons who live, work, worship or attend school within a 10 mile radius of the credit union's office located at 12755 N. Houston-Rosslyn Road, Houston, Texas 77086, to be eligible for membership in the credit union.

An application was received from SPCO Credit Union, Waco, Texas (#2) to expand its field of membership. The proposal would permit persons who live, work, worship or attend school within a 10 mile radius of the credit union's office located at 9800 Northwest Freeway #100, Houston, Texas 77092, to be eligible for membership in the credit union.

An application was received from GECU, El Paso, Texas to expand its field of membership. The proposal would permit persons who work or reside in the County of Hudspeth, Texas, to be eligible for membership in the credit union.

An application was received from NCI Community Development Credit Union, Houston, Texas to expand its field of membership. The proposal would permit people who live, work, worship, or attend school within the following U.S. Postal Zip Codes: 77033, 77061, and 77087, to be eligible for membership in the credit union.

An application was received from Cabot & NOI Employees Credit Union, Pampa, Texas (#1) to expand its field of membership. The proposal would permit employees of JJ Curtis Company, LC, 1050 N. Price Road, Pampa, Texas 79065, to be eligible for membership in the credit union.

An application was received from Cabot & NOI Employees Credit Union, Pampa, Texas (#2) to expand its field of membership. The proposal would permit employees of Pampa Regional Medical Center, One Medical Plaza, Pampa, Texas 79065, to be eligible for membership in the credit union.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Credit unions that wish to comment on any application must also complete a Notice of Protest form. The form may be obtained by contacting the Department at (512) 837-9236 or downloading the form at http://www.tcud.state.tx.us/applications.html. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-201004762
Harold E. Feeney
Commissioner
Credit Union Department
Filed: August 18, 2010

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Notice of Final Action Taken

In accordance with the provisions of 7 TAC §91.103, the Credit Union Department provides notice of the final action taken on the following applications:

Application to Expand Field of Membership - Approved

The Education Credit Union, Amarillo, Texas (#1) - See *Texas Register* issue dated May 28, 2010.

Application for a Merger or Consolidation - Approved

Southeast Community Credit Union (San Antonio) and River City Federal Credit Union (San Antonio) - See *Texas Register* issue dated April 30, 2010.

Application to Amend Articles of Incorporation - Approved

Memorial Hermann Credit Union, Houston, Texas - See *Texas Register* issue dated June 25, 2010.

TRD-201004764

Harold E. Feeney
Commissioner
Credit Union Department
Filed: August 18, 2010

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Deep East Texas Council of Governments

Request for Proposals for Transportation Plan

The Deep East Texas Council of Governments is seeking consulting services to assist in completing an updated, comprehensive regional coordinated transportation plan and in participating in public involvement outreach. In addition, consultant services will involve performing transportation planning to develop implementation strategies for enhancing regional transportation services throughout the Deep East Texas region. It is anticipated that the requested services would be performed between October 1, 2010 and January 31, 2011. Proposals are being requested from qualified firms or individuals with specific experience to perform this project.

If your firm is interested and qualified to complete this Regionally Coordinated Transportation Planning project, please contact our office to express your interest:

Walter Diggles, Executive Director

Deep East Texas Council of Governments

210 Premier Drive

Jasper, Texas 75951

Fax: (409) 384-5390

E-mail: wdiggles@detcog.org

Proposals are due by 5:00 p.m. CST on September 7, 2010. A complete Request for Proposal package is available at www.detcog.org. No submissions will be accepted after September 7, 2010.

TRD-201004738
Walter G. Diggles, Sr.
Executive Director
Deep East Texas Council of Governments
Filed: August 16, 2010

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Texas Education Agency

Correction of Error

The Texas Education Agency (TEA) adopted new sections under 19 TAC Chapter 130 in the August 28, 2009, issue of the *Texas Register* (34 TexReg 5914) to take effect August 23, 2010. The text that TEA submitted for several rules had errors that were incorporated into the Texas Administrative Code.

The following corrections have been made to the Texas Administrative Code which is available on the Office of the Secretary of State's web site.

In 19 TAC §130.10(a), Mathematical Applications in Agriculture, Food, and Natural Resources (One Credit), the sentence, "This course is recommended for students in Grade 12," is changed to read, "This course is recommended for students in Grades 9-11."

In 19 TAC §130.49(c)(25)(E), Construction Management (One to Two Credits), a comma is added after the word "assemble" to read, "lay out, assemble, erect, and brace exterior walls for a frame building;".

In 19 TAC §130.169(c)(6)(E), Statistics and Risk Management (One Credit), the word "forgiveness" is changed to the word "ogives" to read, "analyze data presented in frequency distributions, histograms, and ogives;".

In 19 TAC §130.272(c)(1)(D), Principles of Information Technology (One-Half to One Credit), the word "skill" is changed to the word "skills" to read, "employ effective verbal and nonverbal communication skills;".

In 19 TAC §130.342(c)(1)(A), Advertising and Sales Promotion (One-Half to One Credit), the word "such" is added after the word "activities" to read, "categorize business activities such as production, marketing, management, or finance;".

In 19 TAC §130.370(a), Robotics and Automation (One to Two Credits), the term "Prerequisites" is changed to the term "Recommended prerequisites" to read, "Recommended prerequisites: Concepts of Engineering and Technology and Electronics."

In 19 TAC §130.374(c)(6)(A)(viii), Practicum in Science, Technology, Engineering, and Mathematics (Two to Three Credits), the word "valuation" should be changed to the word "evaluation" to read, "evaluation from the practicum supervisor; and".

In 19 TAC §130.401(c)(5)(F), Advanced Small Engine Technology (Two to Three Credits), the word "safety" is changed to the word "safely" to read, "develop and manage preventative maintenance plans and systems to keep facility, tools, and equipment operating safely and properly;".

In 19 TAC §130.403(c)(5)(E), Logistics, Planning, and Management Systems (One to Two Credits), the word "trough" is changed to the word "through" to read, "describe the development of organizational vision, mission, and goals through the strategic planning process."

In 19 TAC §130.403(c)(11)(A), the phrase "identify, assess, implement, and control" is changed to "identify, assess, and control" to read, "identify, assess, and control hazards to maintain safe and healthful working conditions;".

TRD-201004748

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State Board for Educator Certification

Correction of Error

The State Board for Educator Certification adopted an amendment to 19 TAC §231.1, Criteria for Assignment of Public School Personnel, to be effective August 19, 2010. The rule adoption was published in the August 13, 2010, issue of the *Texas Register* (35 TexReg 7061). Due to its length, Figure: 19 TAC §231.1(e) was not published in the print version of the *Texas Register* but was made available in the on-line editions.

On page 75 of Figure: 19 TAC §231.1(e), the assignments "Engine Technology" and "Advanced Engine Technology" should be changed to read "Small Engine Technology" and "Advanced Small Engine Technology" to accurately reflect the correct names of the high school courses. The corrected table is now available on-line as part of the Texas Administrative Code.

TRD-201004749

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Employees Retirement System of Texas

Contract Award Announcement

This contract award notice is being filed by the Employees Retirement System of Texas ("ERS") in relation to a contract award for the employee discount products and services program ("Discount Program") that would offer discounted benefits and/or services to state and certain higher education employees, retirees, and their qualified dependents ("Participants"). The selected contractor is Beneplace, Inc. ("Beneplace"), 11940 Jollyville Road, Austin, Texas 78759. Beneplace will make available discount products and services to Participants for Fiscal Years 2011-2014. No fees shall be charged to ERS for administration of the Discount Program. The contract was executed on August 16, 2010, and is for a term of September 1, 2010 through August 31, 2013.

TRD-201004778
Paula A. Jones
General Counsel and Chief Compliance Officer
Employees Retirement System of Texas
Filed: August 18, 2010

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Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **September 27, 2010.** 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 indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512)239-2545 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on September 27, 2010.** Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing.**

(1) COMPANY: ANUM TEXAS CORPORATION dba Big Country Mart; DOCKET NUMBER: 2010-0281-PST-E; IDENTIFIER: RN103044400; LOCATION: Burleson, Tarrant County TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 Texas Administrative Code (TAC) §115.246(5) and (6) and Texas Health and Safety Code (THSC), §382.085(b), by failing to maintain Stage II records at the station; 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; 30 TAC §115.242(4) and THSC, §382.085(b), by failing to prevent avoidable gasoline leaks, as detected by smell, anywhere in the liquid transfer or vapor balance system; and 30 TAC §115.242(3)(D) and THSC, §382.085(b), by failing to maintain the Stage II vapor recovery system in proper operating condition and free of defects; PENALTY: $6,171; ENFORCEMENT COORDINATOR: Philip Aldridge, (512) 239-0855; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: Aqua Development, Inc.; DOCKET NUMBER: 2010-0528-MWD-E; IDENTIFIER: RN102342227; LOCATION: Montgomery County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §305.125(1), Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0014007001, Interim Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with permitted effluent limitations for ammonia nitrogen (NH_3N); PENALTY: $26,260; ENFORCEMENT COORDINATOR: Carlie Konkol, (512) 239-0735; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-0335.

(3) COMPANY: City of Atlanta; DOCKET NUMBER: 2010-0764-MWD-E; IDENTIFIER: RN102883212; LOCATION: Atlanta, Cass County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(17) and §319.7(d) and TPDES Permit Number WQ0010338001, Monitoring and Reporting Requirements Number 1, by failing to timely submit the discharge monitoring reports (DMRs); 30 TAC §305.125(17) and §319.7(d) and TPDES Permit Number WQ0010338001, Biomonitoring Requirements Numbers 3.b(2) and (3), by failing to timely submit the DMRs for toxicity; 30 TAC §305.125(17) and §319.1 and TPDES Permit Number WQ0010338001, Monitoring and Reporting Requirements Number 1, by failing to timely submit monitoring results at the interval specified in the permit; and 30 TAC §305.125(17) and TPDES Permit Number WQ0010338001, Sludge Provisions, by failing to timely submit the annual sludge report; PENALTY: $2,134; ENFORCEMENT COORDINATOR: J.R. Cao, (512) 239-2543; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(4) COMPANY: Yunbae Choe; DOCKET NUMBER: 2010-0720-PST-E; IDENTIFIER: RN101378164; LOCATION: Corpus Christi, Nueces County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor the underground storage tanks (USTs) for releases; 30 TAC §334.50(b)(2) and the Code, §26.3475(a), by failing to provide proper release detection for the piping associated with the USTs; 30 TAC §334.50(b)(2)(A)(i)(III) and the Code, §26.3475(c), by failing to test the line leak detectors at least once per year for performance and operational reliability; 30 TAC §334.50(d)(1)(B)(ii) and the Code, §26.3475(c)(1), by failing to conduct reconciliation of detailed inventory control records; 30 TAC §334.50(d)(1)(B)(iii)(I) and the Code, §26.3475(c)(1), by failing to conduct inventory volume measurement for the regulated substance inputs, withdrawals, and the amount still remaining in the tank each operating day; 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for all USTs involved in the retail sale of petroleum substances; and 30 TAC §334.51(a)(6) and the Code, §26.3475(c)(2), by failing to ensure that all spill and overfill prevention devices are maintained in good operating condition, inspected, and serviced; PENALTY: $6,602; ENFORCEMENT COORDINATOR: Elvia Maske, (512) 239-0789; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(5) COMPANY: ConocoPhillips Company; DOCKET NUMBER: 2010-0675-AIR-E; IDENTIFIER: RN102495884; LOCATION: Borger, Hutchinson County; TYPE OF FACILITY: petroleum refining and natural gas processing plant; RULE VIOLATED: 30 TAC

§101.20(3) and §116.715(a), Flexible Permit Number 9868A and PSD-TX-102M7, Special Condition (SC) Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $70,000; Supplement Environmental Project (SEP) offset amount of $35,000 applied to Texas Association of Resource Conservation and Development Areas, Inc. (RC&D) - Clean School Buses; ENFORCEMENT COORDINATOR: Trina Grieco, (210) 490-3096; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(6) COMPANY: D.B. Western, Inc. - Texas; DOCKET NUMBER: 2010-0713-IWD-E; IDENTIFIER: RN100897362; LOCATION: La Porte, Harris County; TYPE OF FACILITY: chemical production plant; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0004201000, Effluent Limitations and Monitoring Requirements Numbers 1 and 2 and Other Requirements Number 10, and the Code, §26.121(a), by failing to comply with the permitted effluent limitations and excursion criteria; 30 TAC §§305.125(1), 319.1, and 319.7(a)(5) and TPDES Permit Number WQ0004201000, Monitoring and Reporting Requirements Number 2, by failing to accurately complete monthly effluent reports; 30 TAC §305.125(1) and TPDES Permit Number WQ0004201000, Monitoring and Reporting Requirements Number 7, by failing to timely submit noncompliance notification; 30 TAC §319.11(b) and TPDES Permit Number WQ0004201000, Monitoring and Reporting Requirements Number 2.a., by failing to utilize a National Institute of Standards and Technology traceable thermometer in the sample storage refrigerator; 30 TAC §305.125(1) and TPDES Permit Number WQ0004201000, Other Requirements Number 5, by failing to sample and submit analytical results for parameters in the permit; 30 TAC §305.125(1) and TPDES Permit Number WQ0004201000, Other Requirements Number 12, by failing to develop and implement a new treatment option to reduce pH levels; 30 TAC §§305.125(1), 319.1, and 319.7(d) and TPDES Permit Number WQ0004201000, Monitoring and Reporting Requirements Number 1, by failing to timely submit monthly effluent reports by the 20th day of the following month; and 30 TAC §§305.125(1), 319.1, and 319.7(d) and TPDES Permit Number WQ0004201000, Monitoring ad Reporting Requirements Number 1, by failing to timely submit monthly effluent reports by the 20th day of the following month whether or not a discharge is made that month; PENALTY: $91,135; ENFORCEMENT COORDINATOR: Tom Jecha, (512) 239-2576; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(7) COMPANY: DCP Midstream, L.P.; DOCKET NUMBER: 2010-0830-AIR-E; IDENTIFIER: RN100210278; LOCATION: near Iraan, Crockett County; TYPE OF FACILITY: gas processing plant; RULE VIOLATED: 30 TAC §116.115(b)(2)(F) and (c), New Source Review (NSR) Permit Number 18370, SC Numbers 7 and 8, and THSC, §382.085(b), by failing to comply with the emissions limitation for the acid gas flare; PENALTY: $3,075; ENFORCEMENT COORDINATOR: Kirk Schoppe, (512) 239-0489; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7035, (325) 658-5431.

(8) COMPANY: DELUXE AUTO PARTS, L.L.C.; DOCKET NUMBER: 2009-1797-MLM-E; IDENTIFIER: RN103218780; LOCATION: Corpus Christi, Nueces County; TYPE OF FACILITY: automobile salvage yard; RULE VIOLATED: 30 TAC §281.25(a)(4) and TPDES General Permit Number TXR05M499, Part III Section C.1(c), by failing to maintain a rain gauge on-site or use a rain gauge located in the immediate vicinity of the site and monitor the rain gauge a minimum of once per week and once per day during storm events; 30 TAC §328.56(d)(2), by failing to obtain a scrap tire storage site registration; and 30 TAC §305.125(1) and TPDES General Permit Number TXR05M499, Part III Section E. 2(b) and Part V. Section M.3., by failing to take all reasonable steps to minimize or prevent any discharge or other permit violation that has a reasonable likelihood of adversely affecting human health or the environment; PENALTY: $7,350; ENFORCEMENT COORDINATOR: Clinton Sims, (512) 239-6933; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (316) 825-3100.

(9) COMPANY: East Montgomery County Municipal Utility District Number 3; DOCKET NUMBER: 2010-0814-MWD-E; IDENTIFIER: RN102671427; LOCATION: Montgomery County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0014379001, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with permitted effluent limits for total suspended solids (TSS) and NH_3N; PENALTY: $1,370; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5800; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(10) COMPANY: Equistar Chemicals, LP; DOCKET NUMBER: 2010-0328-AIR-E; IDENTIFIER: RN100210319; LOCATION: La Porte, Harris County; TYPE OF FACILITY: polymer manufacturing plant; RULE VIOLATED: 30 TAC §101.20(3) and §116.115(c), NSR Air Permit Number 18978/PSD-TX-752M3, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $10,000; ENFORCEMENT COORDINATOR: Kirk Schoppe, (512) 239-0489; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(11) COMPANY: Good Time Stores, Inc. dba Good Times Store 70; DOCKET NUMBER: 2010-1201-PST-E; IDENTIFIER: RN105683486; LOCATION: El Paso County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.8(c)(5)(A)(i), by failing to possess a valid TCEQ delivery certificate prior to receiving fuel; and 30 TAC §334.8(c), by failing to submit initial/renewal UST registration and self-certification form; PENALTY: $1,750; ENFORCEMENT COORDINATOR: Keith Frank, (512) 239-1203; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1212, (915) 834-4949.

(12) COMPANY: City of Gustine; DOCKET NUMBER: 2008-1819-MWD-E; IDENTIFIER: RN102178654; LOCATION: Comanche County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1) and §317.4(a)(5) and TPDES Permit Number WQ0010441001, Operational Requirements Number 4, by failing to provide auxiliary power at the facility during electrical power failures; 30 TAC §305.125(17) and TPDES Permit Number WQ0010841001, Sludge Provisions, by failing to timely submit the annual sludge report; 30 TAC §305.125(1), (11)(B) and (C), and §319.7(a) and (c), and TPDES Permit Number WQ0010841001, Monitoring and Reporting Requirements Numbers 3.b and 3.c, and Other Requirements Number 4, by failing to maintain complete records of monitoring activities and operations and maintenance records; 30 TAC §30.350(d) and §305.125(1) and TPDES Permit Number WQ0010841001, Other Requirements Number 1, by failing to employ an operator with adequate wastewater certification; and 30 TAC §305.125(1), TPDES Permit Number WQ0010841001, Effluent Limitations and Monitoring Requirements Numbers 1 and 2, and the Code, §26.121(a)(1), by failing to comply with its permitted effluent limits for dissolved oxygen (DO), TSS, NH_3N, and five-day carbonaceous biochemical oxygen demand ($CBOD_5$); PENALTY: $65,133; ENFORCEMENT COORDINATOR: Heather Brister, (254) 751-0335; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(13) COMPANY: William Emmett Hartzog, Jr.; DOCKET NUMBER: 2010-0776-MWD-E; IDENTIFIER: RN102517372; LOCA-

TION: Harris County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0012917001, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a)(1), by failing to comply with permitted effluent limits for NH_3N; PENALTY: $1,150; ENFORCEMENT COORDINATOR: Lanae Foard, (512) 239-2554; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(14) COMPANY: Himalayan Star, Inc. dba Junction Shell; DOCKET NUMBER: 2010-0780-PST-E; IDENTIFIER: RN101569051; LOCATION: Stephenville, Erath County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.7(e)(2), by failing to completely and accurately fill out the UST registration form; 30 TAC §334.49(a)(4) and the Code, §26.3475(d), by failing to ensure that corrosion protection is provided to all underground metal components of an UST system; 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor the UST system for releases; 30 TAC §334.50(b)(2) and the Code, §26.3475(a), by failing to provide proper release detection for the pressurized piping associated with the USTs; 30 TAC §334.50(b)(2)(A)(i)(III) and the Code, §26.3475(a), by failing to test the line leak detectors at least once per year for performance and operational reliability; 30 TAC §334.8(c)(5)(C), by failing to ensure that a legible tag, label, or marking with the UST identification number is permanently applied upon or affixed to either the top of the fill tube or to a nonremovable point in the immediate area of the fill tube; and 30 TAC §334.42(i), by failing to conduct the required inspections on the UST system's overfill containers to assure that they were liquid-tight and free from liquids or debris; PENALTY: $6,684; ENFORCEMENT COORDINATOR: Philip Aldridge, (512) 239-0855; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 761189-6951, (817) 588-5800.

(15) COMPANY: Kendall Speight dba Hook-N-Bull Oilfield Service; DOCKET NUMBER: 2010-0851-SLG-E; IDENTIFIER: RN105480404; LOCATION: Robstown, Nueces County; TYPE OF FACILITY: sludge transporting operation; RULE VIOLATED: 30 TAC §312.142(a), by failing to operate with a valid sludge transporter registration; and 30 TAC §312.145(b)(4), by failing to timely submit an annual summary report of sludge transportation activities; PENALTY: $2,560; ENFORCEMENT COORDINATOR: Tom Jecha, (512) 239-2576; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(16) COMPANY: Houston Refining, LP; DOCKET NUMBER: 2010-0641-AIR-E; IDENTIFIER: RN100218130; LOCATION: Houston, Harris County; TYPE OF FACILITY: petroleum refinery; RULE VIOLATED: 30 TAC §116.715(a), Flexible Permit Number 2167, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; and 30 TAC §101.201(b)(1)(G) and THSC, §382.085(b), by failing to identify the compound descriptive type of all compounds or mixtures of air contaminants released; PENALTY: $20,499; ENFORCEMENT COORDINATOR: Kimberly Morales, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(17) COMPANY: Key Building Systems Incorporated; DOCKET NUMBER: 2010-1163-WQ-E; IDENTIFIER: RN105938997; LOCATION: White Oak, Gregg County; TYPE OF FACILITY: general contractor; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a construction general permit; PENALTY: $700; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(18) COMPANY: City of Lampasas; DOCKET NUMBER: 2010-0717-PWS-E; IDENTIFIER: RN101409100; LOCATION: Lampasas County; TYPE OF FACILITY: public water supply (PWS); RULE VIOLATED: 30 TAC §290.42(d)(2)(F) and §290.44(d)(1), by failing to properly screen the air release device as to preclude the possible entrance of contaminants; 30 TAC §290.43(e), by failing to provide an intruder-resistant fence to protect the ground storage tanks; 30 TAC §290.47(e), by failing to issue a boil water notification; 30 TAC §290.47(i), by failing to install backflow prevention assemblies or an air gap at all residences or establishments where an actual or potential contamination hazard exists; 30 TAC §290.44(h)(4), by failing to ensure backflow prevention assemblies which are installed to provide protection against health hazards are tested and certified to be operating within specifications; 30 TAC §290.42(l), by failing to compile and maintain a complete and up-to-date plant operations manual for operator review and reference; 30 TAC §290.46(l), by failing to flush dead-end mains at regular monthly intervals; and 30 TAC §290.42(e)(3)(G), by failing to obtain approval from the executive director prior to using any primary disinfectant other than chlorine; PENALTY: $2,136; ENFORCEMENT COORDINATOR: Andrea Linson-Mgbeoduru, (512) 239-1482; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(19) COMPANY: LUCKY ASSOCIATES, INC. dba 7 Days Food Stores; DOCKET NUMBER: 2010-0657-PST-E; IDENTIFIER: RN103052023; LOCATION: Austin, Travis County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.49(a) and the Code, §26.3475(d), by failing to provide corrosion protection to all metal components of a UST system; 30 TAC §334.49(c)(2)(C) and the Code, §26.3475(d), by failing to inspect the impressed current cathodic protection system; 30 TAC §334.49(d)(1)(D) and the Code, §26.3475(d), by failing to make appropriate repairs or modifications; 30 TAC §334.8(c)(5)(C), by failing to ensure that a legible tag, label, or marking with the tank number is permanently applied upon or affixed to either the top of the fill tube or to a nonremovable point in the immediate area of the fill tube; 30 TAC §334.51(b)(2)(C) and the Code, §26.3475(c)(2), by failing to equip each tank with a valve or other appropriate device designed to automatically shut off the flow of regulated substances into the tank when the liquid level in the tank reaches a preset level no higher than the 95% capacity level for the tank; and 30 TAC §334.10(b) and §334.48(g), by failing to maintain the required UST records and make them immediately available for inspection; PENALTY: $4,856; ENFORCEMENT COORDINATOR: Theresa Hagood, (512) 239-2540; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5700, (512) 339-2929.

(20) COMPANY: MeadWestvaco Texas, L.P.; DOCKET NUMBER: 2010-0617-IWD-E; IDENTIFIER: RN102157609; LOCATION: Evadale, Jasper County; TYPE OF FACILITY: paper mill with wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1) and (5), TPDES Permit Number WQ0000493000, Operational Requirements Number 1, and the Code, §26.121(a), by failing to ensure that all systems of collection, treatment, and disposal are properly operated and maintained; 30 TAC §305.125(1) and §319.11(d) and TPDES Permit Number WQ0000493000, Monitoring and Reporting Requirements Number 2, by failing to conform to the installation and flow measurement procedures prescribed in the Water Measurement Manual, United States Department of the Interior Bureau of Reclamation, Washington, D.C., or by methods that are equivalent as approved by the executive director; 30 TAC §305.125(1), TPDES Permit Number WQ0000493000, Permit Conditions Number 2.d., and the Code, §26.121(a), by failing to prevent the unauthorized discharge of wastewater; 30 TAC §305.125(1) and TPDES Permit Number

WQ0000493000, Monitoring and Reporting Requirements Number 7, by failing to timely submit noncompliance notification for any effluent violation which deviates from the permitted effluent limitation by greater than 40%; and 30 TAC §305.125(1), TPDES Permit Number WQ0000493000, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to prevent the unauthorized discharge of wastewater; PENALTY: $28,361; SEP offset amount of $11,345 applied to RC&D - Water or Wastewater Treatment Assistance; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 588-5800; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(21) COMPANY: City of New Waverly; DOCKET NUMBER: 2010-0763-MWD-E; IDENTIFIER: RN101608099; LOCATION: Walker County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0011020001, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a)(1), by failing to comply with the permitted effluent limitations for flow and NH_3N; PENALTY: $2,040; SEP offset amount of $1,632 applied to RC&D - Unauthorized Trash Dump Clean-Up; ENFORCEMENT COORDINATOR: Jennifer Graves, (956) 425-6010; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(22) COMPANY: RACETRAC PETROLEUM, INC. dba Racetrac 6761; DOCKET NUMBER: 2010-1000-PST-E; IDENTIFIER: RN102272895; LOCATION: Fort Worth, Tarrant County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; PENALTY: $4,786; ENFORCEMENT COORDINATOR: Mike Pace, (817) 588-5800; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(23) COMPANY: S. I. Enterprises, LLC; DOCKET NUMBER: 2010-0850-MWD-E; IDENTIFIER: RN102178845; LOCATION: Houston, Harris County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0013316001, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a)(1), by failing to comply with permit effluent limits for flow and $CBOD_5$; PENALTY: $2,040; ENFORCEMENT COORDINATOR: Merrilee Hupp, (512) 239-4490; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(24) COMPANY: Sonic Automotive of Texas, L.P.; DOCKET NUMBER: 2010-0904-PWS-E; IDENTIFIER: RN100675479; LOCATION: Houston, Harris County; TYPE OF FACILITY: PWS; RULE VIOLATED: 30 TAC §290.109(c)(2)(A)(i) and §290.122(c)(2)(B) and THSC, §341.033(d), by failing to collect routine distribution water samples for coliform analysis and by failing to provide public notification of the failure to collect routine samples; PENALTY: $2,293; ENFORCEMENT COORDINATOR: Amanda Henry, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(25) COMPANY: David Schuler dba Spirit Custom Homes; DOCKET NUMBER: 2010-0804-WQ-E; IDENTIFIER: RN105910418; LOCATION: College Station, Brazos County; TYPE OF FACILITY: single-family, residential construction site; RULE VIOLATED: 30 TAC §281.25(a)(4) and 40 Code of Federal Regulations §122.26(c), by failing to obtain authorization to discharge storm water associated with construction activities; and the Code, §26.121(a), by failing to prevent the unauthorized discharge of sediment; PENALTY: $4,000; SEP offset amount of $1,600 applied to Keep Texas Beautiful - Stop Trashing Texas Program; ENFORCEMENT COORDINATOR: Carlie Konkol, (512) 239-0735; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(26) COMPANY: Tarkington Independent School District; DOCKET NUMBER: 2010-0848-MWD-E; IDENTIFIER: RN101702868; LOCATION: Cleveland, Liberty County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0011377001, Interim Effluent Limitation and Monitoring Requirements Number 1, and the Code, §26.121(a)(1), by failing to comply with permit effluent limits for TSS and five-day biochemical oxygen demand; PENALTY: $5,680; ENFORCEMENT COORDINATOR: Merrilee Hupp, (512) 239-4490; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(27) COMPANY: City of Tenaha; DOCKET NUMBER: 2010-0778-MWD-E; IDENTIFIER: RN102844560; LOCATION: Shelby County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0010818001, Effluent Limitations and Monitoring Requirements Numbers 1 and 6, and the Code, §26.121(a)(1), by failing to comply with permitted effluent limitations for NH_3N, TSS and DO; 30 TAC §305.125(1) and (17) and §319.7(d) and TPDES Permit Number WQ0010818001, Monitoring and Reporting Requirements Number 1, by failing to timely submit monitoring results at the intervals specified in the permit; and 30 TAC §305.125(1) and (17) and TPDES Permit Number WQ0010818001, Sludge Provisions, by failing to timely submit the annual sludge report; PENALTY: $6,000; ENFORCEMENT COORDINATOR: Evette Alvarado, (512) 239-2573; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(28) COMPANY: Turlington Water Supply Corporation; DOCKET NUMBER: 2010-0893-PWS-E; IDENTIFIER: RN101241446; LOCATION: Freestone County; TYPE OF FACILITY: PWS; RULE VIOLATED: 30 TAC §290.271(b) and §290.274(a) and (c), by failing to mail or directly deliver one copy of the consumer confidence report to each bill paying customer by July 1 of each year and by failing to submit to the TCEQ by July 1 of each year a copy of the annual CCR and certification that the CCR has been distributed to the customers of the facility and that the information in the CCR is correct and consistent with compliance monitoring data; PENALTY: $224; ENFORCEMENT COORDINATOR: Rebecca Clausewitz, (210) 490-3096; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(29) COMPANY: Walnut Cove Water Supply Corporation; DOCKET NUMBER: 2010-0618-MWD-E; IDENTIFIER: RN103123279; LOCATION: Montgomery County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0012416001, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with the permitted effluent limitations for NH_3N and TSS; and 30 TAC §305.125(17) and §319.1 and TPDES Permit Number WQ0012416001, Monitoring and Reporting Requirements Number 1, by failing to timely submit monitoring results at the intervals specified in the permit; PENALTY: $7,339; ENFORCEMENT COORDINATOR: J.R. Cao, (512) 239-2543; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(30) COMPANY: WTG Gas Processing, L.P.; DOCKET NUMBER: 2010-0668-AIR-E; IDENTIFIER: RN100212653; LOCATION: Martin County; TYPE OF FACILITY: gas processing plant; RULE VIOLATED: 30 TAC §122.145(2)(A) and §122.146(1) and THSC, §382.085(b), by failing to certify the entire 12-month permit compliance certification reporting period and by failing to submit a complete deviation report; and 30 TAC §116.110(a) and THSC, §382.0518(a) and §382.085(b), by failing to obtain authorization to install an additional compressor engine; PENALTY: $6,240; ENFORCEMENT

COORDINATOR: Kirk Schoppe, (512) 239-0489; REGIONAL OFFICE: 3300 North A Street, Building 4-107, Midland, Texas 79705-5406, (432) 570-1359.

TRD-201004742
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: August 17, 2010

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Notice of a Public Hearing on Proposed Revisions to 30 TAC Chapter 116 and to the State Implementation Plan

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed revisions to 30 TAC Chapter 116, Control of Air Pollution by Permits for New Construction or Modification; and corresponding revisions to the state implementation plan (SIP), under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Chapter 2001, Subchapter B; and 40 Code of Federal Regulations §51.102 of the United States Environmental Protection Agency (EPA) regulations concerning SIPs.

The revisions to the SIP would also include the withdrawal from United States Environmental Protection Agency (EPA) consideration as revisions to the SIP of §§116.121, 116.400, 116.402, 116.404 and 116.406 as adopted by the commission on January 11, 2006, effective on February 1, 2006.

The proposed amended, repealed, and new rules address issues identified by the EPA in its September 23, 2009, proposed disapproval notice. Specifically, those concern definitions related to and other changes to the Plant-Wide Applicability Limit (PAL) rules to meet federal requirements, including the conditions for reopening PAL permits. The rulemaking would also amend the standard permit rule for Pollution Control Projects. The rulemaking would also include removing obsolete references and making non-substantive administrative changes.

The commission will hold a public hearing on this proposal in Austin on September 20, 2010, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

Written comments may be submitted to Natalia Henricksen, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/.* File size restrictions may apply to comments being submitted via the *eComments* system. All comments should reference Rule Project Number 2010-008-116-PR. The comment period closes September 27, 2010. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html.* For further information, please contact Blake Stewart, Air Permits Division, (512) 239-6931.

TRD-201004713
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: August 13, 2010

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Notice of Comment Period and Announcement of Public Meeting on Proposed Air Quality Standard Permit for Pollution Control Projects

The Texas Commission on Environmental Quality (TCEQ) is providing an opportunity for public comment and will conduct a public meeting to receive testimony concerning the pollution control projects air quality standard permit proposed for issuance under the Texas Clean Air Act, Texas Health and Safety Code, §382.05195, Standard Permit, and 30 Texas Administrative Code (TAC) Chapter 116, Subchapter F, Standard Permits.

PROPOSED STANDARD PERMIT

The proposed new air quality standard permit for pollution control projects would replace the current standard permit (SP) for pollution control projects available under 30 TAC §116.617, State Pollution Control Project Standard Permit. Owners or operators currently authorized under the SP can continue to do so until the facilities are modified, administratively incorporated, or renewed. The proposed standard permit would authorize projects undertaken voluntarily or as required by any federal or state air statute or rule, which reduce or maintain currently authorized emission rates for facilities authorized by a permit, SP, or permit by rule. In a separate commission action, §116.617 will be amended and will be unavailable for new or modified pollution control projects upon issuance of this standard permit.

The New Source Review Program under 30 TAC Chapter 116, Control of Air Pollution by Permits for New Construction or Modification, requires any person who plans to construct any new facility or to engage in the modification of any existing facility which may emit air contaminants into the air of the state to obtain a permit in accordance with §116.111, General Application, satisfy the *de minimis* criteria of §116.119, De Minimis Facilities or Sources, or satisfy the conditions of a standard permit, a flexible permit, or a permit by rule before any actual work is begun on the facility.

A standard permit is subject to the procedural requirements of §116.603, Public Participation in Issuance of Standard Permits, which includes a 30-day public comment period and a public meeting to provide an additional opportunity for public comment. Any person is entitled to submit written or verbal comments regarding the proposed standard permit.

PUBLIC MEETING

A public meeting on the proposed standard permit for pollution control projects will be held in Austin, Texas. The meeting will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion with the audience will not occur during the meeting; however, TCEQ staff will be available to discuss the standard permit for pollution control projects 30 minutes prior to the meeting and staff will also answer questions after the meeting. The public meeting will be held on September 20, 2010 at 10:00 a.m., at the Texas Commission on Environmental Quality, Building E, Room 201S, 12100 Park 35 Circle, Austin.

PUBLIC COMMENT AND INFORMATION

Copies of the proposed standard permit for pollution control projects may be obtained from the TCEQ Web site at

http://www.tceq.state.tx.us/permitting/air/nav/nsr_news.html or by contacting the Texas Commission on Environmental Quality, Office of Permitting and Registration, Air Permits Division, at (512) 239-1250. Comments may be mailed to Mandolin Shannon, Texas Commission on Environmental Quality, Office of Permitting and Registration, Air Permits Division, MC 163, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-5698. **All comments should reference the Standard Permit for Pollution Control Projects. Comments must be received by 5:00 p.m. on September 27, 2010.** To inquire about the submittal of comments or for further information, contact Ms. Shannon at (512) 239-6541. Si desea información en Español, puede llamar al (800) 687-4040.

Persons who have special communication or other accommodation needs who are planning to attend the public meeting should contact the TCEQ at (512) 239-1250. Requests should be made as far in advance as possible.

TRD-201004723
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: August 16, 2010

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Notice of Groundwater Conservation District Creation Report Completion and Availability

The executive director of the Texas Commission on Environmental Quality (commission) gives notice of the completion, recommended action, and availability of the Groundwater Conservation District (GCD) creation report titled *Groundwater Conservation District Recommendation for Hill Country Priority Groundwater Management Area, Western Comal County and Southwestern Travis County.* This notice is to announce the completion and availability of the final report. In the report, the executive director concludes and recommends that the most feasible and practicable solution would be for the commission to issue an order to create a GCD in the Hill Country Priority Groundwater Management Area (PGMA) with boundaries that include the western Comal County territory, the southwestern Travis County territory, and the portion of the Hill Country PGMA in Hays County that is presently the Hays Trinity GCD. The report was filed with the commission's Office of the Chief Clerk on July 30, 2010 (Docket Number 2010-1940-MIS). The matter will be referred to the State Office of Administrative Hearings (SOAH) for a public hearing to be scheduled at a later date. Notice of the SOAH hearing will be published in at least one newspaper with general circulation in the area and mailed to stakeholders at least 30 days before the date chosen for the hearing.

EXECUTIVE SUMMARY OF REPORT

Recognizing the groundwater supply limitations of the Trinity aquifer, the Texas Water Commission designated the Hill Country Priority Groundwater Management Area in June 1990 to include Bandera, Blanco, Gillespie, Kendall, and Kerr Counties; and parts of Comal, Hays, and Travis Counties. In 2001, the commission added the Trinity aquifer outcrop portion of northern Bexar County to the Hill Country PGMA. To date, groundwater conservation districts are established in all of the Hill Country PGMA counties except for the western Comal and southwestern Travis territories. Local efforts to establish a GCD for the western Comal territory were defeated by the voters in 1995 and 2001, and no formal efforts to establish a GCD for the southwestern Travis territory have succeeded.

In accordance with Texas Water Code, Chapters 35 and 36, and 30 Texas Administrative Code §293.19(b) and §294.44, the executive director respectfully petitions the Texas Commission on Environmental Quality for actions to establish groundwater management in the Hill Country PGMA territories that have not created a GCD or joined an existing GCD. The purpose of this report is to identify and evaluate the areas in the Hill Country PGMA not included in a GCD and evaluate and recommend whether one or more GCDs be created, whether the identified areas be added to an existing GCD, or whether a combination of these actions be taken.

There are several GCD creation options for the Hill Country PGMA. The executive director concludes that creating a new western Comal territory GCD and new southwestern Travis territory GCD, or creating a noncontiguous Comal and Travis territories GCD would not establish district boundaries that provide effective management of the Trinity aquifer. These options would require voter-approved tax revenue to finance GCD operations and maintenance, a proposition that has been twice defeated in the Comal territory. The Hays Trinity GCD is the most logical option for adding both of the non-GCD territories to an existing district. However, under the Hays Trinity GCD's present authority, the executive director concludes that adding the two territories neither provides for effective management of the groundwater resources, nor adequate funding to manage the groundwater resources. The executive director concludes that adding the western Comal County territory to the Trinity Glen Rose GCD and the southwestern Travis County territory to the Barton Springs/Edwards Aquifer Conservation District (BS/EACD) would provide for effective boundaries for the management of the groundwater resources and adequate funding to finance required or authorized groundwater management planning, regulatory, and district operation functions under the authorities of the existing GCDs. However, the Trinity Glen Rose GCD does not support adding the western Comal territory at this time and the BS/EACD does not support adding all of the southwestern Travis territory.

The executive director concludes and recommends that the most feasible and practicable solution would be for the commission to issue an order to create a groundwater conservation district in the Hill Country PGMA with boundaries that include the western Comal County territory, the southwestern Travis County territory, and the portion of the Hill Country PGMA in Hays County that is presently the Hays Trinity GCD. This recommended action provides for the most effective boundaries for the management of the groundwater resources under the authorities provided in Texas Water Code, Chapter 36, and adequate funding to finance required or authorized groundwater management planning, regulatory, and district operation functions under Texas Water Code, Chapter 36. The commissioners courts of Bexar, Comal, Hays, and Travis Counties have filed resolutions supporting the creation of a new multi-county GCD for the Trinity aquifer in the Hill Country PGMA.

REPORT AVAILABILITY

The executive director's report was filed with the commission's Office of the Chief Clerk, located at 12100 Park 35 Circle, Building F, Room 1104, Austin, Texas. The report is available for public inspection at the following county clerk office locations: 100 Dolorosa, Number 104, San Antonio; 5501 Airport Boulevard, Austin; 150 North Seguin, Suite 101, New Braunfels; and 137 North Guadalupe Street, San Marcos. The report is available for inspection at the following public libraries: New Braunfels Public Library, 700 Common Street, New Braunfels; San Marcos Public Library, 625 East Hopkins Street, San Marcos; Will Hampton Branch Library at Oak Hill, 5125 Convict Hill Road, Austin; and Twin Oaks Branch Library, 2301 South Congress Avenue, Number 7, Austin. The report is also available for inspection at the following Groundwater Conservation Districts: Barton Springs/Edwards Aquifer Conservation District, 1124-A Regal Row, Austin; Blanco-Pedernales GCD, 601 West Main, Johnson City; Cow Creek GCD, 216 Market

Avenue, Suite 105, Boerne; Central Texas GCD, 225 South Pierce, Burnet; Edwards Aquifer Authority, 1615 North Saint Mary's Street, San Antonio; Hays Trinity GCD, Center Lake Business Park, 14101 Highway 290 West, Building 100, Suite 212, Austin; and Trinity Glen Rose GCD, 7550 West Interstate Highway 10, Suite 800, San Antonio.

The final version of the report is also available for review on the commission's Web site at *http://www.tceq.state.tx.us/permitting/water_supply/groundwater/pgma.html.* Copies of the report may be obtained by contacting Mr. Leon Byrd at (512) 239-0540, by email at *cbyrd@tceq.state.tx.us,* or in writing to Mr. Leon Byrd, P.G., Texas Commission on Environmental Quality, Groundwater Planning and Assessment, MC 147, P.O. Box 13087, Austin, Texas 78711-3087.

Any questions or comments may be addressed to Ross Henderson, Staff Attorney, Environmental Law Division, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, (512) 239-6257.

TRD-201004743
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: August 17, 2010

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Notice of Opportunity to Comment on Agreed Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **September 27, 2010.** 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 indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on September 27, 2010.** Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorney is available to discuss the AO and/or the comment procedure at the listed phone number; however, §7.075 provides that comments on an AO shall be submitted to the commission in **writing.**

(1) COMPANY: Belvan Corporation; DOCKET NUMBER: 2009-1490-AIR-E; TCEQ ID NUMBER: RN100214022; LOCATION: approximately 20 miles northwest of Ozona, on United States (US) Highway 190, six miles east of the intersection of US Highway 190 and State Highway 137, Crockett County; TYPE OF FACILITY: natural gas processing plant; RULES VIOLATED: Texas Health and Safety Code (THSC), §382.085(b), 30 TAC §116.115(b)(2)(F), and Air Permit Number 9824A, General Condition Number 8, by failing to prevent unauthorized emissions of 15,419 pounds (lbs) of sulfur dioxide, 164 lbs of hydrogen sulfide, 16 lbs of nitrogen oxide, and 135 lbs of carbon monoxide for 72 hours; and THSC, §382.085(b) and 30 TAC §101.201(a), by failing to properly report an emissions event within 24 hours of discovery; PENALTY: $7,650; STAFF ATTORNEY: Anna Treadwell, Litigation Division, MC 175, (512) 239-0974; REGIONAL OFFICE: San Angelo Regional Office, 622 South Oakes, Suite K, San Angelo, Texas 76903-7013, (325) 655-9479.

(2) COMPANY: G. L. Properties, Inc.; DOCKET NUMBER: 2009-1733-PST-E; TCEQ ID NUMBER: RN101743987; LOCATION: 1001 Bristol Road, Laredo, Webb County; TYPE OF FACILITY: three underground storage tanks (USTs) and former convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.7(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, a UST system for which any applicable component of the system is not brought into timely compliance with the upgrade requirements; 30 TAC §334.54(b)(2), by failing to maintain all piping, pump, manways, tank access points, and ancillary equipment in a capped, plugged, locked, and/or otherwise secured manner to prevent access, tampering, or vandalism by unauthorized persons; and 30 TAC §334.54(d)(2), by failing to ensure that any residue from stored regulated substances which remained in the temporarily out-of-service UST system did not exceed a depth of 2.5 centimeters at the deepest point and did not exceed 0.3% by weight of the system at full capacity; PENALTY: $2,750; STAFF ATTORNEY: Marshall Coover, Litigation Division, MC 175, (512) 239-0620; REGIONAL OFFICE: Laredo Regional Office, 707 East Calton Road, Suite 304, Laredo, Texas 78041-3887, (956) 791-6611.

(3) COMPANY: Equistar Chemicals, LP; DOCKET NUMBER: 2007-1469-IHW-E; TCEQ ID NUMBER: RN100221662; LOCATION: 1501 McKinzie Road, Corpus Christi, Nueces County; TYPE OF FACILITY: chemical manufacturing plant; RULES VIOLATED: 30 TAC §335.69(a)(1)(B) and 40 Code of Federal Regulations (CFR) §265.192(a), by failing to provide a written tank assessment to fulfill the requirements for the design and installation of a new tank and components; 30 TAC §335.69(a)(1)(B) and 40 CFR §265.195(f)(1) and (2), by failing to confirm the proper operation of the cathodic protection system within six months after the initial installation, and annually thereafter, and by failing to ensure that the impressed current system is being tested bimonthly; and 30 TAC §335.69(a)(1)(B) and 40 CFR §265.193(a)(1), by failing to provide secondary containment for a hazardous waste tank; PENALTY: $58,100; STAFF ATTORNEY: Tracy Chandler, Litigation Division, MC 175, (512) 239-0629; REGIONAL OFFICE: Corpus Christi Regional Office, NRC Building, Suite 1200, 6300 Ocean Drive, Unit 5839, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(4) COMPANY: Exxon Mobil Corporation; DOCKET NUMBER: 2010-0134-AIR-E; TCEQ ID NUMBER: RN102212925; LOCATION: 3525 Decker Drive, Baytown, Harris County; TYPE OF FACILITY: petrochemical plant; RULES VIOLATED: THSC, §382.085(b), 30 TAC §116.715(a) and §101.20(3), and New Source Review Flexible Air Permit Number 3452 and PSD-TX-302M2, Special Condition 1, by failing to comply with permitted emissions limits; PENALTY: $40,000; Supplemental Environmental Projects offset amount of $20,000 applied to Houston Regional Monitoring Corporation (HRMC) - HRMC Houston Area Air Monitoring; STAFF ATTORNEY: Anna Treadwell, Litigation Division, MC 175, (512) 239-0974; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(5) COMPANY: Magic First, Inc. dba Magic Food Mart; DOCKET NUMBER: 2009-1340-PST-E; TCEQ ID NUMBER: RN102362241; LOCATION: 16141 Market Street, Channelview, Harris County; TYPE OF FACILITY: two USTs and a convenience store; RULES VIOLATED: 30 TAC §334.10(b), by failing to maintain the required UST records and make them immediately available for inspection upon request by agency personnel; and 30 TAC §334.50(d)(9)(A)(iii)(V)(iv) and §334.72(3)(B), by failing to report to the TCEQ a suspected release within 24 hours of discovery; and 30 TAC §334.74, by failing to investigate a suspected release within 30 days of discovery; PENALTY: $20,340; STAFF ATTORNEY: Peipey Tang, Litigation Division, MC 175, (512) 239-0654; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(6) COMPANY: Valero Refining-Texas, L.P.; DOCKET NUMBER: 2008-1520-IHW-E; TCEQ ID NUMBER: RN100214386; LOCATION: 5900 Up River Road, Corpus Christi, Nueces County; TYPE OF FACILITY: refinery; RULES VIOLATED: 30 TAC §335.69(a)(1)(A) and §335.112(a)(8) and 40 CFR, §§262.34(a)(1)(i), 265.171 and 265.176(a), by failing to maintain containers managing hazardous waste in good condition; 30 TAC §335.69(a)(1)(A) and (d)(1) and §335.112(a)(8) and 40 CFR §§262.34(a)(1)(i) and (c)(1)(i), 265.171, 265.173(a), by failing to keep containers managing hazardous waste in good condition and by failing to maintain hazardous waste containers closed except when adding or removing waste; 30 TAC §335.6, by failing to provide written notification for all waste management units; 30 TAC §335.62 and 40 CFR §262.11, by failing to conduct a hazardous waste determination for each solid waste generated; 30 TAC §335.4, by failing to prevent the unauthorized discharge of industrial solid waste; 30 TAC §335.10(c) and 40 CFR §262.23, by failing to properly prepare and complete waste manifests as required; PENALTY: $19,344; STAFF ATTORNEY: Jim Sallans, Litigation Division, MC 175, (512) 239-2053; REGIONAL OFFICE: Corpus Christi Regional Office, NRC Building, Suite 1200, 6300 Ocean Drive, Unit 5839, Corpus Christi, Texas 78412-5839, (361) 825-3100.

TRD-201004751
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: August 17, 2010

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Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Default Orders (DOs). The commission staff proposes a DO when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the commission, in accordance with Texas Water Code (TWC), §7.075 this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **September 27, 2010.** The commission will consider any written comments received and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate that consent to the proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on September 27, 2010.** Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission's attorneys are available to discuss the DOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the DOs shall be submitted to the commission in **writing.**

(1) COMPANY: Artie Longron d/b/a Texas Hogwallow; DOCKET NUMBER: 2009-1383-MLM-E; TCEQ ID NUMBER: RN105450621; LOCATION: 2084 Private Road 7073, Deweyville, Newton County; TYPE OF FACILITY: real property; RULES VIOLATED: 30 TAC §111.201 and Texas Health and Safety Code (THSC), §382.085(b), by failing to prohibit the unauthorized burning of municipal solid waste (MSW) for the purpose of disposal; and 30 TAC §330.15(c) and TWC, §26.121, by failing to prevent the unauthorized disposal of MSW; PENALTY: $8,027; STAFF ATTORNEY: Peipey Tang, Litigation Division, MC 175, (512) 239-0654; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(2) COMPANY: David Trevino; DOCKET NUMBER: 2010-0583-MSW-E; TCEQ ID NUMBER: RN105808174; LOCATION: 9514 County Road 2500, Lubbock, Lubbock County; TYPE OF FACILITY: unauthorized MSW disposal site; RULES VIOLATED: 30 TAC §330.15(c), by failing to prevent the unauthorized disposal of MSW at the site; PENALTY: $10,500; STAFF ATTORNEY: Gary Shiu, Litigation Division, MC R-12, (713) 422-8916; REGIONAL OFFICE: Lubbock Regional Office, 5012 50th Street, Suite 100, Lubbock, Texas 79414-3421, (806) 796-7092.

(3) COMPANY: Mardoche Abdelhak d/b/a Big Trees Trailer City; DOCKET NUMBER: 2010-0602-PWS-E; TCEQ ID NUMBER: RN101652048; LOCATION: 103 Plumnear Road, San Antonio, Bexar County; TYPE OF FACILITY: mobile home park with a public water system; RULES VIOLATED: 30 TAC §290.109(c)(3)(A)(ii) and §290.122(c)(2)(A), by failing to collect a set of repeat distribution coliform samples within 24 hours of being notified of a total coliform-positive result for a routine distribution coliform sample collected during the month of February 2008, and failing to provide public notice of the failure to collect repeat distribution samples within 24 hours of being notified of a total coliform positive sample for February 2008; 30 TAC §290.109(f)(3) and §290.122(b)(2)(A) and THSC, §341.031(a), by failing to comply with the Maximum Contaminant Level for total coliform during the month of May 2008 and by failing to provide public notice of the exceedence for May 2008; 30 TAC §290.109(c)(2)(A)(ii) and §290.122(c)(2)(A) and THSC, §341.033(d), by failing to collect routine distribution water samples for coliform analysis for the months of July 2008 and September - December 2008 and by failing to provide public notice of the failure to sample for the months of July 2008 and September - December 2008; and 30 TAC §290.271(b) and §290.274(a) and (c), by failing to mail or directly deliver one copy of the Consumer Confidence Report

(CCR) to each bill paying customer by July 1 of each year and by failing to submit to the TCEQ by July 1 of each year a copy of the annual CCR and certification that the CCR has been distributed to the customers of the facility and that the information in the CCR is correct and consistent with compliance monitoring data; PENALTY: $5,659; STAFF ATTORNEY: Phillip Goodwin, Litigation Division, MC 175, (512) 239-0675; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

TRD-201004752
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: August 17, 2010

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Notice of Opportunity to Comment on Shutdown/Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (commission) staff is providing an opportunity for written public comment on the listed Shutdown/Default Orders (S/DOs). Texas Water Code (TWC), §26.3475 authorizes the commission to order the shutdown of any underground storage tank (UST) system found to be noncompliant with release detection, spill and overfill prevention, and/or, after December 22, 1998, cathodic protection regulations of the commission, until such time as the owner/operator brings the UST system into compliance with those regulations. The commission proposes a Shutdown Order after the owner or operator of a UST facility fails to perform required corrective actions within 30 days after receiving notice of the release detection, spill and overfill prevention, and/or, after December 22, 1998, cathodic protection violations documented at the facility. The commission proposes a Default Order when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. In accordance with TWC, §7.075, this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **September 27, 2010.** The commission will consider any written comments received and the commission may withdraw or withhold approval of a S/DO if a comment discloses facts or considerations that indicate that consent to the proposed S/DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed S/DO is not required to be published if those changes are made in response to written comments.

Copies of each of the proposed S/DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the S/DO shall be sent to the attorney designated for the S/DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on September 27, 2010.** Written comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission attorneys are available to discuss the S/DOs and/or the comment procedure at the listed phone numbers; however, comments on the S/DOs shall be submitted to the commission in **writing.**

(1) COMPANY: Shamsuddin Lassi d/b/a AJ's 3, Suleman Shamsuddin d/b/a AJ's3, and Wazir A. Dhanini d/b/a AJ's 3; DOCKET NUMBER: 2009-1715-PST-E; TCEQ ID NUMBER: RN101906279; LOCATION: 701 East Waco Drive, Waco, McLennan County; TYPE OF FACILITY: three underground storage tanks (USTs) and a convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.8(c)(5)(C), by failing to ensure that a legible tag, label, or marking with the tank number is permanently applied upon or affixed to either the top of the fill tube or to a nonremovable point in the immediate area of the fill tube for each regulated UST according to the UST registration and self-certification form; 30 TAC §334.10(b), by failing to maintain the required UST records and make them immediately available for the inspection upon request by agency personnel; 30 TAC §334.7(d)(3), by failing to provide an amended UST registration to the agency for any change or additional information regarding USTs within 30 days from the date of the occurrence of the change or addition; 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to timely renew a previously issued UST delivery certificate by submitting a properly completed UST registration and self-certification form at least 30 days before the expiration date; 30 TAC §334.8(c)(5)(A)(i) and TWC, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the USTs; 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs; 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to ensure that all USTs are monitored in a manner which will detect a release at a frequency of at least once every month (not to exceed 35 days between each monitoring); 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for all USTs involved in the retail sale of petroleum substances used as motor fuel; and 30 TAC §334.42(i), by failing to inspect all sumps including the dispenser sumps, manways, overspill containers, or catchment basins associated with the UST system at least once every 60 days to assure that the sides, bottoms, and any penetration points are maintained liquid-tight; PENALTY: $18,021; STAFF ATTORNEY: Rudy Calderon, Litigation Division, MC 175, (512) 239-0205; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(2) COMPANY: Tiki Food Mart, L.L.C.; DOCKET NUMBER: 2009-2052-PST-E; TCEQ ID NUMBER: RN102232055; LOCATION: 200 Tiki Drive, Galveston, Galveston County; TYPE OF FACILITY: four USTs and a convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.10(b), by failing to maintain UST records and make them immediately available for inspection upon request by agency personnel; 30 TAC §334.50(d)(4)(A)(ii)(II) and TWC, §26.3475(c)(1), by failing to perform an automatic test for substance loss that can detect a release which equals or exceeds a rate of 0.2 gallon per hour from any portion of the tank which contains regulated substances; 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for the UST system at the facility; 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs; 30 TAC §334.8(c)(4)(C), by failing to submit a properly completed UST registration and self-certification form to the agency within 30 days of ownership change; and 30 TAC §334.8(c)(5)(A)(i) and TWC, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the UST; PENALTY: $15,035; STAFF ATTORNEY: Stephanie J. Frazee, Litigation Division, MC 175, (512)

239-3693; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

TRD-201004750
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: August 17, 2010

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Notice of Receipt of Application and Intent to Obtain a Municipal Solid Waste Limited Scope Major Amendment Application

APPLICATION. Maverick County, 500 Quarry Street, Suite 3, Eagle Pass, Maverick County, Texas 78852-4528, has applied to the Texas Commission on Environmental Quality (TCEQ) for a limited scope major amendment to their current permit for the Maverick County El Indio MSWF, a Type I municipal solid waste landfill. The applicant is requesting a limited scope major amendment to the permit to obtain authorization for an alternate liner system. The facility is located at 16179 FM 1021, El Indio, Maverick County, Texas 78860. The TCEQ received the application on July 29, 2010. The permit amendment application is available for viewing and copying at the Maverick County Court House, 500 Quarry Street, Suite 3, Eagle Pass, Maverick County, Texas 78852.

ADDITIONAL NOTICE. TCEQ'S Executive Director has determined the application is administratively complete and will conduct a technical review of the application. After technical review of the application is complete, the Executive Director may prepare a draft permit and will issue a preliminary decision on the application. Notice of the Application and Preliminary Decision will be published and mailed to those who are on the county-wide mailing list and to those who are on the mailing list for this application. That notice will contain the deadline for submitting public comments.

PUBLIC COMMENT/PUBLIC MEETING. You may submit public comments or request a public meeting on this application. The purpose of a public meeting is to provide the opportunity to submit comments or to ask questions about the application. TCEQ will hold a public meeting if the Executive Director determines that there is a significant degree of public interest in the application or if requested by a local legislator. A public meeting is not a contested case hearing.

OPPORTUNITY FOR A CONTESTED CASE HEARING. After the deadline for submitting public comments, the Executive Director will consider all timely comments and prepare a response to all relevant and material or significant public comments. Unless the application is directly referred for a contested case hearing, the response to comments, and the Executive Director's decision on the application, will be mailed to everyone who submitted public comments and to those persons who are on the mailing list for this application. If comments are received, the mailing will also provide instructions for requesting reconsideration of the Executive Director's decision and for requesting a contested case hearing. A person who may be affected by the facility is entitled to request a contested case hearing from the commission. A contested case hearing is a legal proceeding similar to a civil trial in state district court.

TO REQUEST A CONTESTED CASE HEARING, YOU MUST INCLUDE THE FOLLOWING ITEMS IN YOUR REQUEST: your name, address, phone number; applicant's name and permit number; the location and distance of your property/activities relative to the facility; a specific description of how you would be adversely affected by the facility in a way not common to the general public; and, the statement "[I/we] request a contested case hearing." If the request for contested case hearing is filed on behalf of a group or association, the request must designate the group's representative for receiving future correspondence; identify an individual member of the group who would be adversely affected by the facility or activity; provide the information discussed above regarding the affected member's location and distance from the facility or activity; explain how and why the member would be affected; and explain how the interests the group seeks to protect are relevant to the groups purpose. Following the close of all applicable comment and request periods, the Executive Director will forward the application and any requests for reconsideration or for a contested case hearing to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. The Commission will only grant a contested case hearing on disputed issues of fact that are relevant and material to the Commission's decision on the application. Further, the Commission will only grant a hearing on issues that were raised in timely filed comments that were not subsequently withdrawn.

MAILING LIST. If you submit public comments, a request for a contested case hearing or a reconsideration of the Executive Director's decision, you will be added to the mailing list for this specific application to receive future public notices mailed by the Office of the Chief Clerk. In addition, you may request to be placed on: (1) the permanent mailing list for a specific applicant name and permit number; and/or (2) the mailing list for a specific county. If you wish to be placed on the permanent and/or the county mailing list, clearly specify which list(s) and send your request to TCEQ Office of the Chief Clerk at the address below.

AGENCY CONTACTS AND INFORMATION. All written public comments and requests must be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087 or electronically at www.tceq.state.tx.us/about/comments.html. If you need more information about this permit application or the permitting process, please call TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. Si desea información en Español, puede llamar al 1-800-687-4040. General information about TCEQ can be found at our web site at www.tceq.state.tx.us. Further information may also be obtained from Maverick County at the address stated above or by calling Mr. Ryan Kuntz, P.E., Consultant, SCS Engineers at (817) 571-2288. Issued: August 6, 2010

If you need more information about these permit applications or the permitting process, please call the TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.TCEQ.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-201004769
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: August 18, 2010

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Notice of Request for Public Comment and Notice of a Public Meeting for an Implementation Plan to Address Bacteria in Gilleland Creek in the Lower Colorado River Basin

The Texas Commission on Environmental Quality (TCEQ or commission) has made available for public comment a draft Implementation Plan concerning one total maximum daily load (TMDL) for bacteria in Gilleland Creek, located in Travis County. The TCEQ will conduct a public meeting to receive comments on the draft Implementation Plan.

Gilleland Creek (Segment 1428C) is included in the State of Texas Clean Water Act, §303(d) list of impaired water bodies. As required by the federal Clean Water Act, §303(d) one TMDL was developed for bacteria. The TMDL was adopted by the commission on August 8, 2007, as an update to the State Water Quality Management Plan. Upon adoption by the commission, the TMDL was submitted to the United States Environmental Protection Agency (EPA) who approved the TMDL on April 21, 2009. The implementation plan is a flexible tool that the governmental and non-governmental agencies involved in TMDL implementation will use to guide their program management.

The TCEQ will conduct a public meeting on the draft Implementation Plan for bacteria in Gilleland Creek (Segment 1428C). The purpose of the public meeting is to provide the public an opportunity to comment on the draft Implementation Plan. The commission requests comment on each of the major components of the Implementation Plan: description of control actions and management measures, implementation strategy and tracking, review strategy, and communication strategy. After the public comment period, TCEQ staff may revise the Implementation Plan, if appropriate. The final Implementation Plan will then be considered for approval by the commission. Upon approval of the Implementation Plan by the commission, the final Implementation Plan and a response to public comments will be made available on the TCEQ Web site.

The public comment meeting will be held on **September 8, 2010, 7:00 p.m., at the Pflugerville City Council Chambers, 100 East Main Street, Suite 500, Pflugerville, Texas 78660.** At this meeting individuals have the opportunity to present oral statements when called upon in order of registration. An agency staff member will give a brief presentation at the start of the meeting and will be available to answer questions before and after all public comments have been received.

Written comments should be submitted to Amanda Ross, TCEQ Water Quality Planning Division, Texas Commission on Environmental Quality, MC 203, P.O. Box 13087, Austin, Texas, 78711-3087 or faxed to (512) 239-1414. All comments must be received by **5:00 p.m., September 27, 2010,** and should reference, *Implementation Plan for One Total Maximum Daily Load for Bacteria in Gilleland Creek for Segment Number 1428C.* For further information regarding this proposed TMDL Implementation Plan, please contact Amanda Ross, Water Quality Planning Division, (512) 239-6646 or *aross@tceq.state.tx.us.* Copies of the draft Implementation Plan will be available and can be obtained via the commission's Web site at: *http://www.tceq.state.tx.us/implementation/water/tmdl/tmdlcalendar.html* or by calling (512) 239-6682.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the meeting should contact the commission at (512) 239-6682. Requests should be made as far in advance as possible.

TRD-201004744
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: August 17, 2010

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Notice of Water Quality Applications

The following notice was issued on August 6, 2010 through August 13, 2010.

The following require the applicants to publish notice in a newspaper. Public comments, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

INFORMATION SECTION

EQUISTAR CHEMICALS LP which operates the Corpus Christi Complex which manufactures, stores, and ships ethylene, propylene, benzene, butadiene, and fuel products, has applied for a renewal of TPDES Permit No. WQ0002075000, which authorizes treated process wastewater, treated utility wastewater, treated domestic sewage, treated landfill return water, and treated storm water at a daily average flow not to exceed 2,000,000 gallons per day via Outfall 001; and storm water runoff on an intermittent and flow variable basis via Outfalls 002 and 003. The facility is located at 1501 McKinzie Road, approximately two (2) miles south of the intersection of McKinzie Road and State Highway 407 (Leopard Street) in the City of Corpus Christi, Nueces County, Texas 78410.

RIVIERA WATER CONTROL AND IMPROVEMENT DISTRICT has applied for a renewal of TPDES Permit No. WQ0013374002, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 60,000 gallons per day. The facility is located at 400 West Live Oak in the southwest corner of the City of Riviera, approximately 0.35 mile west of U.S. Highway 77 and approximately 0.4 mile south of State Highway 285 in Kleberg County, Texas 78379.

FRITO LAY INC which operates the Frito-Lay Rosenberg Facility, a snack food production facility, including potato chips, corn chips, and tortilla chips, has applied for a renewal of TPDES Permit No. WQ0002443000, which authorizes the discharge of process wastewater, truck wash water, storm water runoff and utility wastewater on an intermittent and flow variable basis via Outfall 001; domestic wastewater at a daily average dry weather flow not to exceed 14,000 gallons per day via Outfall 002; and process wastewater, truck wash water, storm water runoff and utility wastewater at a daily average dry weather flow not to exceed 1,100,000 gallons per day via Outfall 003. The facility is located on the north side of State Highway 36 and approximately three miles west of the intersection of State Highway 36 and U.S. Alternate Highway 90 near the City of Rosenberg, Fort Bend County, Texas 77471.

THE PICTSWEET COMPANY which operates the Pictsweet Facility, a frozen vegetable processing plant, has applied for a renewal of TCEQ Permit No. WQ0002803000, which authorizes discharge of vegetable wash water, vegetable cooling water, equipment cleaning wastewater, cooling tower blowdown, and boiler blowdown at an annual average flow not to exceed 537,000 gallons per day via irrigation/evaporation. This permit will not authorize a discharge of pollutants into water in the State. The facility and land application site are located approximately one-fourth mile west of Farm-to-Market Road 88, adjacent to the abandoned Missouri Pacific Railroad Track in the Community of Monte Alto, Hidalgo County, Texas 78538.

GALVESTON COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NO. 1 has applied for a renewal of TPDES Permit No. WQ0010173001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 4,800,000 gallons per day. The facility is located at 4,900 Nebraska Street, on the north side of Dickinson Bayou between the Galveston, Houston and Henderson Railroad and Nebraska Street in the City of Dickinson in Galveston County, Texas 77539.

CITY OF ODEM has applied for a renewal of TPDES Permit No. WQ0010237002, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 475,000 gallons per day. The facility is located at the City of Odem Closed Municipal Solid

Waste Landfill on the southeast side of Odem; approximately 200 feet from the end of County Road 49 and approximately 1.8 miles southeast of the intersection of U.S. Highway 77 and Farm-to-Market Road 631 in San Patricio County, Texas 78370.

CITY OF HOUSTON has applied for a renewal of TPDES Permit No. WQ0010495150 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 700,000 gallons per day. The facility is located approximately 600 feet east of U.S. Highway 59 at Greens Bayou Bridge on the south bank of Greens Bayou in Harris County, Texas 77050.

CITY OF WESLACO has applied for a renewal of TPDES Permit No. WQ0010619005, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 2,500,000 gallons per day. The facility is located at 5210 South Midway Road, approximately 0.2 mile west and 0.6 mile north of the confluence of the South Donna Drain and Llano Grande Lake and approximately 3.2 miles south of the Missouri-Pacific Railroad southwest of the City of Weslaco in Hidalgo County, Texas 78596.

CITY OF BEASLEY has applied for a renewal of TPDES Permit No. WQ0011450001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 125,000 gallons per day. The facility is located approximately 3,000 feet east of the intersection of U.S. Highway 59 (Southwest Freeway) and Farm-to-Market Road 1875, approximately 3,000 feet west-southwest of the intersection of U.S. Highway 59 and Eslieb Road, on the frontage of Emerson Road south of the City of Beasley in Fort Bend County, Texas 77417.

GALVESTON COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NO. 12 has applied for a renewal of TPDES Permit No. WQ0012039001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,000,000 gallons per day. The facility is located approximately 500 feet east of State Highway 146 and approximately 2,500 feet southeast of the intersection of Farm-to-Market Road 518 and State Highway 146 (adjacent to 524 Cien) in Galveston County, Texas 77565.

SKYMARK DEVELOPMENT COMPANY INC has applied for a major amendment to TPDES Permit No. WQ0014793001 to authorize the relocation of the facility and the point of discharge. The application also, is a request to continue authorization for the discharge of treated domestic wastewater at a daily average flow not to exceed 800,000 gallons per day. The facility will be located on the north side of the 18,200 block of Raven Rock Lane in Fort Bend County, Texas 77469.

HAPPY HILL FARM CHILDREN'S HOME INC has applied for a new permit, Proposed TCEQ Permit No. WQ0014976001, to authorize the disposal of treated domestic wastewater at a daily average flow not to exceed 20,000 gallons per day via surface irrigation of 38 acres of non-public access agricultural land. The facility was previously permitted under Permit No. WQ0011638001 which expired May 1, 2009. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site are located approximately 2.0 miles northeast of the intersection of U.S. Highway 67 and State Highway 144 in Somervell County, Texas 76048.

If you need more information about these permit applications or the permitting process, please call the TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.TCEQ.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-201004768

LaDonna Castañuela

Chief Clerk

Texas Commission on Environmental Quality

Filed: August 18, 2010

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Proposal for Decision

The State Office of Administrative Hearings issued a Proposal for Decision and Order to the Texas Commission on Environmental Quality on August 11, 2010, in the matter of the Executive Director of the Texas Commission on Environmental Quality, Petitioner v. Jason Rustman; SOAH Docket No. 582-10-2134; TCEQ Docket No. 2008-1514-WQ-E. The commission will consider the Administrative Law Judge's Proposal for Decision and Order regarding the enforcement action against Jason Rustman on a date and time to be determined by the Office of the Chief Clerk in Room 201S of Building E, 12100 N. Interstate 35, Austin, Texas. This posting is Notice of Opportunity to Comment on the Proposal for Decision and Order. The comment period will end 30 days from date of this publication. Written public comments should be submitted to the Office of the Chief Clerk, MC-105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. If you have any questions or need assistance, please contact Melissa Chao, Office of the Chief Clerk, (512) 239-3300.

TRD-201004770

LaDonna Castañuela

Chief Clerk

Texas Commission on Environmental Quality

Filed: August 18, 2010

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Public Hearing on Proposed Revisions to 30 TAC Chapters 101 and 116 and to the State Implementation Plan

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed revisions to 30 Texas Administrative Code (TAC) Chapter 101, General Air Quality Rules, §101.1, and Chapter 116, Control of Air Pollution by Permits for New Construction or Modification, §116.12 and §116.150; and corresponding revisions to the state implementation plan (SIP), under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Chapter 2001, Subchapter B; and 40 Code of Federal Regulations §51.102 of the United States Environmental Protection Agency (EPA) regulations concerning SIPs.

The proposed rulemaking would amend definitions in Chapter 101 to remove language regarding specific maintenance and nonattainment areas. Additionally, the proposed rulemaking would amend Chapter 116 to remove language indicating that the one-hour thresholds and offsets are not effective unless the EPA promulgates rules. The proposed rulemaking would also amend Chapter 116 to add a requirement for continued applicability of nonattainment New Source Review until the EPA approves its removal for areas attaining the ozone national ambient air quality standard. In addition, the proposed rules address issues identified by the EPA in its September 23, 2009, disapproval notice.

The commission will hold a public hearing on this proposal in Austin on September 20, 2010, at 2:00 p.m. in Building E Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

Written comments may be submitted to Devon Ryan, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/.* File size restrictions may apply to comments being submitted via the *eComments* system. All comments should reference Rule Project Number 2008-030-116-PR. The comment period closes September 27, 2010. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html.* For further information, please contact Blake Stewart, Air Permits Division, (512) 239-6931.

TRD-201004712
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: August 13, 2010

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Texas Health and Human Services Commission

Notice of Correction

The Texas Health and Human Services Commission (HHSC) withdraws its intent to submit Amendment 944, Transmittal Number TX 10-051, to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act, which would have proposed to cover certain pharmacy supplies as part of the home health benefit that may be provided by a licensed pharmacy provider. HHSC intends to submit the amendment with updated language at a later date. HHSC will notify the public when the amendment is finalized and will accept public comment at that time.

Please direct questions regarding the amendment to Barbara Dean, Policy Analyst, by mail at the Texas Health and Human Services Commission, P.O. Box 13257, H-600, Austin, Texas 78711; by telephone at (512) 491-1101; by facsimile at (512) 491-1953; or by e-mail at Barbara.Dean@hhsc.state.tx.us.

TRD-201004656
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: August 11, 2010

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Public Notice

The Texas Health and Human Services Commission (HHSC) announces its intent to submit amendments to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. The proposed amendments are effective September 1, 2010.

The first adjustment to the proposed rates related to the no-cost inpatient hospital rebasing initiative complies with the 2010-2011 General Appropriations Act (Article II, HHSC, Rider 68, Senate Bill 1, 81st Legislature, Regular Session, 2009). This rider requires HHSC to rebase acute care hospital rates within available funds (at no additional cost). Specifically, the legislation requires HHSC to update the payment division standard dollar amounts (PDSDAs) and diagnosis related group (DRG) factors with more recent cost data and to proportionately reduce the PDSDAs within available funds.

In addition, the Legislative Budget Board (LBB) and the Governor's Office informed HHSC in a letter dated May 17, 2010, of their revision to the Spending Reduction Plan for the 2010-2011 Biennium submitted by HHSC in response to the January 15, 2010, letter from the Governor, Lieutenant Governor, and Speaker requesting a spending reduction proposal. In response to this direction, HHSC proposes to adjust payments for inpatient hospital services. The result of this revision is that the payment rates for inpatient hospital services reimbursed under (DRG) prospective payment system (with the adjustments for the no-cost rebasing) will be reduced by one percent effective September 1, 2010, consistent with the May 17, 2010, direction from the LBB and the Governor's Office. The rates are proposed to be effective September 1, 2010.

The proposed amendments are estimated to result in an additional annual aggregate expenditure reduction of $2,597,824 for the remainder of federal fiscal year (FFY) 2010, with approximately $1,842,897 in federal funds and $754,927 in State General Revenue (GR). For FFY 2011, the estimated additional aggregate expenditure reduction is $31,173,892, with approximately $19,687,871 in federal funds and $11,486,021 in GR.

Interested parties may obtain copies of the proposed amendment by contacting Kevin Nolting, Director of Rate Analysis for Hospital Services, by mail at the Rate Analysis Department, Texas Health and Human Services Commission, P.O. Box 85200, H-400, Austin, Texas 78708-5200; by telephone at (512) 491-1348; by facsimile at (512) 491-1998; or by e-mail at Kevin.Nolting@hhsc.state.tx.us. Copies of the proposals will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-201004756
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: August 17, 2010

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Texas Boarding House Model Standards

Introduction: The Legislature through House Bill 216, 81st Legislature, Regular Session, 2009, created Health and Safety Code Chapter 254, Boarding Home Facilities. Section 254.003 directs the Health and Human Services Commission (HHSC) to develop and publish model standards for the operation of boarding home facilities relating to: construction and remodeling of boarding homes; sanitary and related conditions; the reporting and investigation of injuries, incidents, and unusual accidents and the establishment of policies and procedures to ensure resident health and safety; assistance with self-administering medication; requirements for in-service education of the facility's staff; criminal history record checks; assessment and periodic monitoring to ensure that a resident does not require personal care, nursing or other services and is capable of self-administering medication. The legislation further directed HHSC to make the model standards available to local counties or municipalities that choose to require boarding homes to obtain a permit to operate the boarding home.

Definitions:

A. Boarding home facility means an establishment that:

1. furnishes, in one or more buildings, lodging to three or more persons with disabilities or elderly persons who are unrelated to the owner of the establishment by blood or marriage; and

2. provides community meals, light housework, meal preparation, transportation, grocery shopping, money management, laundry services, or assistance with self-administration of medication but does not provide personal care services to those persons.

B. Personal care services means

1. assistance with meals, dressing, movement, bathing, or other personal needs or maintenance;

2. the administration of medication by a person licensed to administer medication or the assistance with or supervision of medication; or

3. general supervision or oversight of the physical and mental well-being of a person who needs assistance to maintain a private and independent residence in an assisted living facility or who needs assistance to manage the person's personal life, regardless of whether a guardian has been appointed for the person.

C. Assistance with self-administration of medication means assisting a resident by reminding the resident to take medication, opening and removing medications from a container, placing medication in a resident's hand or in/on a clean surface such as a pill cup or a medication reminder box and reminding the resident when a prescription medication needs to be refilled.

D. Resident means a person who is residing in a boarding home facility.

E. Elderly person means a person who is 65 years of age or older.

F. Person with a disability means a person with a mental, physical, or developmental disability that substantially impairs the person's ability to provide adequately for the person's care or protection and

1. who is 18 years of age or older or

2. under 18 years of age and who has had the disabilities of minority removed.

G. An injury, incident or unusual accident is an event that resulted in a change in the resident's physical or mental status that occurred in the boarding home facility or on the grounds of the boarding home facility that requires intervention by a private or public entity responsible for physical or mental health services, or an event that requires the facility taking resident safety and protection measures including:

1. an allegation of abuse, neglect, or exploitation;

2. death;

3. a resident's absence from the facility when circumstances place the resident's health, safety or welfare at risk;

4. fire;

5. criminal acts; and

6. altercations between residents.

H. Abuse, neglect and exploitation is defined in the Texas Human Resource Code and48.002 as the following:

1. "Abuse" means:

a. the negligent or willful infliction of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical or emotional harm or pain to an elderly or disabled person by the person's caretaker, family member, or other individual who has an ongoing relationship with the person; or

b. sexual abuse of an elderly or disabled person, including any involuntary or nonconsensual sexual conduct that would constitute an offense under §21.08, Penal Code (indecent exposure) or Chapter 22, Penal Code (assaultive offenses), committed by the person's caretaker, family member, or other individual who has an ongoing relationship with the person.

2. "Exploitation" means the illegal or improper act or process of a caretaker, family member, or other individual who has an ongoing relationship with the elderly or disabled person using the resources of an elderly or disabled person for monetary or personal benefit, profit, or gain without the informed consent of the elderly or disabled person.

3. "Neglect" means the failure to provide for one's self the goods or services, including medical services, which are necessary to avoid physical or emotional harm or pain or the failure of a caretaker to provide such goods or services.

Standard 1. Construction/Remodeling

A. Each owner/operator of a boarding home facility must ensure the resident's health, safety, comfort and protection through the following standards that address the construction or remodeling of a boarding home facility, including plumbing, heating, lighting, ventilation and other housing conditions.

B. Each facility must meet the following applicable codes and regulations:

1. local zoning and building codes;

2. federal, state and local fire codes;

3. federal, state and local health & safety codes; and

4. federal and state accessibility regulations.

C. Mobile homes shall not be permitted for use as boarding homes or additions to existing boarding homes.

D. Interior doors to living spaces, bedrooms, bathrooms and toilet rooms must fit the openings in which they are hung, be properly equipped with hardware and be maintained in good working condition. Doors with locking devices must be provided where necessary to provide privacy and protection of the resident.

1. Every closet door latch will be such that it can be readily opened from the inside in case of an emergency.

2. Every bathroom door or door lock must permit the opening of the locked door in case of an emergency.

E. Public pathways and stairways in buildings must maintain a minimum unobstructed width concurrent with federal fire codes and must be provided with convenient light switches controlling an adequate lighting system.

F. Boarding home facilities must be supplied with electric service and fixtures that are properly installed and maintained in safe working condition and connected to a source of electrical power.

G. Every boarding home facility must have heating and cooling equipment that are properly installed, vented, and maintained in a safe good working condition. The temperature of rooms intended for human occupancy will remain at a temperature between sixty-eight (68) and eighty-two (82) degrees Fahrenheit.

H. Every boarding home facility must have water heating facilities that are properly installed, vented, in good working condition, and are properly connected with hot and cold water lines. The temperature of water drawn at every required sink, lavatory basin, bathtub or shower will remain at a temperature between one hundred and ten (110) and one hundred and twenty (120) degrees Fahrenheit.

I. Every habitable room must have at least one window that can be easily opened, or such other device as will ventilate the room. Locks that can be easily opened manually from the inside must be provided on

all exterior doors. All windows must be openable without tools. The window opening must meet local codes for emergency egress. The bottom of the window opening must not be more than 44 inches above the floor.

J. Sleeping rooms must have:

1. at least 70 square feet of floor space in single-occupancy rooms;

2. at least 60 square feet of floor space for each occupant in multi-occupancy rooms

3. beds spaced at least three feet apart when placed side by side or end-to-end;

4. at least a seven feet, six inches (7'6") ceiling height;

5. required accessibility for non-ambulatory residents and residents with conditions that substantially limit ambulation and/or mobility;

6. beds at least six feet (6') long and three feet (3') wide equipped with supportive springs in good condition and a clean supportive mattress in good condition, and a mattress cover that prevents bodily fluids from soiling the mattress;

7. at least one pillow with a clean pillowcase, two (2) clean sheets, and a cover such as a blanket or quilt, in good condition, per bed, cleaned weekly or more often if soiled;

8. extra bed linens, including sheets, pillowcase and blankets must be available to each resident;

9. at least one chest of drawers or equivalent, in good condition having a sufficient number of drawers or other areas to contain all necessary items of clothing and personal belongings of each resident that can be locked/secured;

10. at least one chair in good condition in each sleeping room;

11. at least one end table in good condition located adjacent to each bed in each sleeping room;

12. sufficient hanging space to allow clothes not stored in drawers to be hung. Clothing must not be stored on the floor;

13. bath towels, washcloths, soap, individual comb and toothbrush must be available at all times and in quantity sufficient to meet the needs of the residents; and

14. access to emergency exit without passing through another sleeping room.

K. All equipment, fixtures, furniture, and furnishings, including windows, draperies, curtains, and carpets, must be kept clean and free of dust, dirt, vermin, and other contaminants, and must be maintained in good order and repair.

L. Water closets, lavatories, and bathtubs or showers must be:

1. available on each floor when not provided in each individual room;

2. provided in the ratio of one toilet and one lavatory, and one bathtub or shower for every six residents, or fraction thereof; and

3. accessible to the residents without going outside of the building or without going through a sleeping room of another resident.

M. A telephone must be available, 24 hours per day, must be easily accessible, and must afford privacy for use by residents.

1. A listing of emergency telephone numbers, including the numbers of the local police, fire department, ambulance, the office of the local governmental entity that issued the boarding house permit, the Texas Department of Family and Protective Services (DFPS), the Local Mental Health Authority, and the Texas Information and Referral Network must be placed in plain view on or next to the telephone and accessible to persons who are visually or hearing impaired, as needed.

N. Each boarding home facility must provide:

1. A washer and dryer for every 10 residents, or fraction thereof that is properly vented to the outside. Washer or dryer must be in a utility room/ area that is not in kitchen area.

2. A sitting/communal/recreational room for the common use of all residents. Furniture must include comfortable chairs and tables, and lamps in good repair and appearance.

3. A dining room located on the same floor as the communal kitchen and must:

a. be as nearly adjacent to the communal kitchen as practicable;

b. be accessible to the residents, without going through a sleeping room or sleeping dormitory of another resident;

c. contain not less than 70 square feet of floor area; and

d. be supplied with one dining chair and 2 linear feet of dining table space for each resident of a boarding home facility.

4. A kitchen that:

a. is accessible to the residents sharing the use without going through a sleeping room of another resident;

b. has a food preparation area with a total of not less than 6 square feet;

c. contains a minimum floor space of 60 square feet for dining area or, each kitchen with dining attached must be at least 100 square feet;

d. has a minimum two compartment sink for manual dishwashing;

e. has a cooking stove fueled by gas or electricity;

f. contains at least one cabinet of adequate size, suitable for storage of food and utensils; and

g. is properly equipped to allow for the preparation of meals.

O. Fire precautions must include:

1. providing suitable fire escapes/exits that must be kept in good repair and accessible at all times;

2. having a written fire and evacuation plan that sets forth responsibilities and steps to be taken by staff and residents in the event of fire or other emergency;

3. posting an emergency evacuation plan throughout the facility; and

4. not storing gasoline operated maintenance equipment, lawn care equipment, and flammable supplies inside the boarding home facility.

P. Alarm precautions must include the following:

1. Extinguishers must be sufficiently provided, accessible, checked monthly and recharged annually by a certified person.

2. All fire protection measures must be in accordance with requirements of the local fire authority.

3. Smoke detectors must be hard-wired, working and equipped in each bedroom, in corridors or hallways on each floor, and in laundry and basement areas.

4. If a facility has a resident who is hearing impaired, a boarding house owner/operator must install a visual smoke detector that is capable of alerting a person with a hearing impairment of the presence of fire or smoke.

5. Carbon monoxide detectors must be working and equipped close to sleeping areas.

Q. All residents must be shown how to use all emergency exits from the facility within 24 hours of arrival to the facility.

R. The boarding home site must pass all required inspections and the owner/operator must keep a current file of reports and other documentation on-site needed to demonstrate compliance with applicable laws and regulations. The inspections must be signed, dated, and free of any outstanding corrective actions. The following inspections are required:

1. annual inspection by the local fire authority or the State fire marshal;

2. annual inspection of the alarm system by the local fire authority or an inspector authorized to install and inspect such systems;

3. annual kitchen inspection by the local health authority;

4. gas pipe pressure test once every three years by the local gas company or a licensed plumber;

5. annual inspection and maintenance of fire extinguishers by personnel licensed or certified to perform these duties; and

6. annual inspection of liquefied petroleum gas systems by an inspector certified by the Texas Railroad Commission.

Standard 2. Sanitary and Related Conditions

A. Each owner/operator of a boarding home facility must be responsible for maintaining the dwelling and premises in a clean and sanitary condition.

B. Every boarding home facility must be kept in good repair, and so maintained as to promote the health, comfort, safety and well-being of residents.

C. Interior walls, ceilings and floors must be capable of affording privacy and must be maintained free of holes, cracks, loose or deteriorated material, or any other condition that constitutes a hazard to the residents or is a harborage for insects, pests or vermin.

D. Every window, exterior door and basement hatchway must be weather tight, watertight, insect and rodent-proof and must be kept in good working condition.

E. The water supply must be of safe, sanitary quality, suitable for use, and adequate in quantity and pressure. The water must be obtained from a water supply system approved by the Texas Commission on Environmental Quality (TCEQ).

F. Every plumbing fixture, water pipe and waste pipe must be properly installed and maintained in good sanitary working condition, free from defects, leaks and obstructions and properly connected to an approved sewage disposal system.

G. Every boarding home facility utilizing well water must provide water samples at least annually to the permit issuing entity. If the sample results show coliform present, a resample must be taken within seven (7) days of receipt of the results.

H. All garbage and refuse must be kept in watertight, covered containers. The garbage and refuse area must be kept in a clean and sanitary condition. A sufficient number of garbage receptacles must be provided by the boarding home. All garbage, trash and refuse must be removed from the premises frequently to prevent nuisance and unsightly conditions.

I. Each owner/operator must be responsible for the extermination of any insects, rodents or other pests in the rooms occupied by residents, storage areas, attics or on the premises and yard.

J. Water closets, lavatories, and bathtubs or showers must be:

1. kept clean and in good repair and must be well-lighted and ventilated;

2. adequately supplied with toilet paper, soap, and hand towels for each bathroom; and

3. supplied with non-slip surfaces in bathtub or shower, and curtains or other safe enclosures for privacy.

K. Each kitchen in a boarding home must:

1. be kept in a clean and sanitary condition;

2. have a food preparation area with a surface area that is smooth, impermeable, free of cracks and easily cleanable, that shall not be used for eating; and

3. have a refrigerator that is equipped with a thermometer and is maintained in an operational, clean and sanitary condition that is adequate to maintain foods at the required temperature.

L. Each facility shall meet all applicable state and local sanitary codes.

M. All linens and laundry shall be

1. bagged or placed in a hamper before being transported to the laundry area;

2. properly identified to prevent loss; and

3. not be transported through, sorted, processed, or stored in kitchens, food preparation areas, or food storage areas, if soiled.

N. Poisonous, toxic, and flammable materials shall

1. be stored and maintained away from bed linens, towels, or kitchen equipment;

2. be prominently and distinctly labeled for easy identification of contents; and

3. not be used in a way that contaminates food equipment or utensils, or in a way that constitutes a hazard to employees or residents.

O. After each usage, all eating and drinking utensils shall be thoroughly washed and sanitized in hot water containing a suitable soap or synthetic detergent and rinsed in clean hot water. In the event a mechanical dishwasher is used, dish detergent is required.

P. All food and drink shall be:

1. clean, free from spoilage, pathogenic organisms, toxic chemicals, and other harmful substances;

2. prepared, stored, handled, and served so as to be safe for human consumption;

3. maintained at a temperature of 41 degrees Fahrenheit or below for foods subject to spoilage;

4. maintained at 140 degrees Fahrenheit or above at all times for hot foods ready to serve;

5. maintained in the freezer at a temperature of 0 degrees Fahrenheit or below for foods stored as frozen; and

6. stored in food containers that are appropriately labeled, dated, and protected from flies, insects, rodents, dust, and moisture.

Q. Meals provided by the facility shall be nutritionally balanced and shall provide the USDA recommended daily allowances of vitamins, minerals and calories.

R. With the exception of service animals for persons with disabilities, birds, cats, dogs or other animals are not permitted in areas in which food is prepared, stored or where utensils are washed or stored.

S. Meals shall be served:

1. at least three (3) times per day;

2. in sufficient quantity and quality to meet the nutritional needs of the residents;

3. daily at regular hours, with at least one hot meal per day;

4. with no more than 14 hours between the beginning of the evening meal and the beginning of the morning meal; and

5. with alternative selections for residents on medically prescribed diets.

T. A time schedule of meals shall be posted daily.

U. Employees or residents engaged in food handling shall

1. observe sanitary methods, including hand washing as appropriate; and

2. not be assigned to preparing foods for others at the facility if carrying a disease that can be transmitted to others.

V. Regardless of the number of residents, each boarding home facility shall hold a valid food handling permit issued by the applicable local or state regulatory authority in the name of the owner/operator and for the specific boarding home facility.

W. If preparing meals for residents, staff must have a food-handler's permit.

X. Each boarding home facility shall maintain a minimum food and water supply sufficient for all residents as recommended by the American Red Cross.

Y. Each boarding home facility shall be equipped with a first aid kit as recommended by the American Red Cross.

Standard 3. Reporting and Investigation of Injuries, Incidents and Unusual Accidents and the Establishment of Other Policies and Procedures to Ensure Resident Health and Safety

A. Each owner/operator of a boarding home facility must develop and implement policies and procedures for investigating and documenting injuries, incidents and unusual accidents that involve residents. Owners/operators must also establish policies and procedures necessary to ensure resident health and safety.

1. Minimum requirements for the documentation of injuries, incidents or unusual accidents should include, but are not limited to:

a. Date and time of the injury, incident or unusual accident occurred;

b. Description of the injury, incident or unusual accident;

c. Description of any medical or mental health treatment the resident received;

d. Steps taken by the owner/operator to prevent future injuries, incidents or unusual accidents if a problem at the boarding home facility resulted in the injury, incident or unusual accident.

e. When the resident's legal guardian or legally authorized representative was notified about the injury, incident or unusual accident.

2. Residents, the resident's guardian, or legally authorized representatives should be given access to the inspection records as described in A (1) within 48 hours of requesting the records from the owner/operator.

B. In addition to investigating and documenting injuries, incidents or unusual accidents, an owner/operator must report any allegations of abuse, neglect or exploitation of an adult age 65 or older or an adult with a disability to the Texas Department of Family and Protective Services. Failure to report suspected abuse, neglect or exploitation of an elderly adult or adult with a disability is a Class A misdemeanor.

1. Each owner/operator should ensure that each resident has access to a telephone 24 hours per day that is easily accessible and affords privacy for use by residents.

2. The owner/operator shall ensure that no resident is harassed, retaliated against, threatened or intimidated at anytime for making a report of abuse, neglect or exploitation.

3. Owner/operators will provide each resident with a copy of the definitions of abuse, neglect or exploitation as outlined in Chapter 48 of the Human Resources Code.

4. Owner/operators will allow law enforcement personnel, emergency medical and fire personnel access to the boarding home facility when these professionals are responding to a call at the owner/operator's room and board facility.

C. No operator or other employee of a boarding home facility shall provide services or engage in behavior that constitutes a financial conflict of interest including:

1. borrowing from or loaning money to residents;

2. witnessing wills in which the operator or employee is a beneficiary;

3. commingling the resident's funds with the operator's or other residents' funds; or

4. becoming the guardian, conservator or power of attorney for a resident.

D. If an owner/operator becomes the representative payee for a resident or assists a resident with general money management, the owner/operator shall:

1. maintain separate financial records for each resident for which the owner/operator is the representative payee for the entire period of time the owner/operator is the resident's representative payee and continue to maintain the resident's records for one year past the last calendar day the owner/operator is the resident's representative payee;

2. include in the records an itemized list of expenditures that the owner/operator has made on behalf of the resident, including the charges that are assessed by the owner/operator;

3. maintain receipts for all expenditures in addition to the itemized documentation;

4. develop a budget with the resident outlining routine expenditures and ensure that expenditures that are not routine are discussed with the resident before the resident's funds are expended; and

5. the owner/operator will allow the resident, the resident's guardian, or legally authorized representative access to the resident's financial records that are maintained by the owner/operator within 48 hours of receiving a request.

E. An owner/operator of a boarding home facility shall develop a service agreement with each resident and maintain a copy of the agreement signed by the resident.

Standard 4. Assistance with Self-Administration of Medication

A. Assistance with self-administration of medication may be provided to adult residents who can identify their medication and know when their medication should be taken but require assistance with self-administration. Assistance with self-administration of medication may not be provided to minors.

B. Assistance with self-administration of medication is limited to:

1. reminding the resident to take medication;

2. opening a container, removing medication from a container, and placing medication in a resident's hand or in/on a clean surface, such as a pill cup or medication reminder box, for the resident's self-administration; and

3. reminding the resident when a prescription needs to be refilled.

C. All residents' medication must be stored in a locked area. The boarding home facility must provide a central locked storage or individual locked storage areas for each resident's medication.

1. If the boarding home facility uses a central medication storage area, a boarding home employee must be available to provide access at all times and each resident's medication must be stored separately from other residents' medications within the storage area.

2. If a residents medication requires refrigeration, the boarding home facility must provide a refrigerator with a designated and locked storage area or a refrigerator inside a locked medication room.

3. Medications labeled for "external use only" must be stored separately within the locked area.

4. Poisonous substances must be labeled, stored safely, and stored separately from medications within a locked area.

5. If a boarding home facility stores controlled drugs, the facility must adopt and enforce a written policy for preventing the diversion of the controlled drugs.

D. Medication that remains in the boarding home facility after a resident is no longer lodging in the facility must be properly disposed of by the owner or operator in accordance with applicable county or municipality requirements.

Standard 5. Requirements for in-service education of facility's staff

A. Each owner/operator and employee is subject to the following initial training requirements prior to contact with residents:

1. employer rules and policies;

2. recognizing and reporting abuse, neglect and exploitation;

3. Resident's rights, including all applicable rights from the following:

a. Texas Human Resource Code, Chapter 102, Rights of the Elderly;

b. Texas Human Resource Code, Chapter 112, Developmental Disabilities;

c. Texas Property Code, Chapter 301, Fair Housing Practices; and

d. Texas Property Code, Chapter 92, Residential Tenancies.

4. policies and procedures for contacting emergency personnel when a resident's health or safety is at risk;

5. complaint process specific to the city and boarding home;

6. assistance with self-administration of medication;

7. prevention of injuries, incidents and unusual accidents;

8. emergency, evacuation and disaster plan; and

9. service specific orientation that includes, but is not limited to:

a. nutrition, including meal preparation and dietary needs;

b. sanitation;

c. laundry; and

d. housework.

B. Each owner/operator and employee is subject to the following ongoing training requirements:

1. Updates and changes in any policies and procedures within 10 days of the owner, operator or employee becoming aware of the change.

2. Orientation specific to the needs of each new resident within one day of the resident moving into the home.

3. Orientation specific to the needs of a resident whose needs have changed due to injury, illness, hospitalization or other circumstances which affect the resident's needs within one day of the owner, operator, or employee becoming aware of the change.

Standard 6. Criminal Background History Checks

A. A boarding home facility owner/operator's permit to operate a boarding home may be denied, revoked, suspended, or denied for renewal if the owner/operator has been convicted of a criminal offense listed in subsection C or D of this section, or if the owner/operator has in its employ any person convicted of a criminal offense listed in subsection C or D.

B. The owner/operator must complete any state or federal request and release forms that are required to obtain a criminal history report for the owner/operator. In addition to the permit fee, the owner/operator will provide funding to the county/municipality in a manner specified by the county/municipality to cover any fees imposed by state or federal agencies for the report.

C. The following histories will disqualify an owner/operator from obtaining a permit to operate a boarding home or will serve as a bar to being employed by a boarding home facility:

1. an offense under Chapter 19, Penal Code (criminal homicide);

2. an offense under Chapter 20, Penal Code (kidnapping and unlawful restraint);

3. an offense under §21.02, Penal Code (continuous sexual abuse of young child or children), or §21.11, Penal Code (indecency with a child);

4. an offense under §22.011, Penal Code (sexual assault);

5. an offense under §22.02, Penal Code (aggravated assault);

6. an offense under §22.04, Penal Code (injury to a child, elderly individual, or disabled individual);

7. an offense under §22.041, Penal Code (abandoning or endangering child);

8. an offense under §22.08, Penal Code (aiding suicide);

9. an offense under §25.031, Penal Code (agreement to abduct from custody);

10. an offense under §25.08, Penal Code (sale or purchase of a child);

11. an offense under §28.02, Penal Code (arson);

12. an offense under §29.02, Penal Code (robbery);

13. an offense under §29.03, Penal Code (aggravated robbery);

14. an offense under §21.08, Penal Code (indecent exposure);

15. an offense under §21.12, Penal Code (improper relationship between educator and student);

16. an offense under §21.15, Penal Code (improper photography or visual recording);

17. an offense under §22.05, Penal Code (deadly conduct);

18. an offense under §22.021, Penal Code (aggravated sexual assault);

19. an offense under §22.07, Penal Code (terroristic threat);

20. an offense under §33.021, Penal Code (online solicitation of a minor);

21. an offense under §34.02, Penal Code (money laundering);

22. an offense under §35A.02, Penal Code (Medicaid fraud);

23. an offense under §42.09, Penal Code (cruelty to animals);

24. an offense under §30.02, Penal Code (burglary);

25. an offense under §31, Penal Code (theft), that is punishable as a felony; or

26. a conviction under the laws of another state, federal law, or the Uniform Code of Military Justice for an offense containing elements that are substantially similar to the elements of an offense listed in this subsection.

D. A person may not own a boarding home or be employed in a position the duties of which involve direct contact with a resident in a boarding home before the fifth anniversary of the date the person is convicted of any felony offense not listed in subsection C or any of the following non-felony offenses:

1. an offense under §22.01, Penal Code (assault), that is punishable as a Class A misdemeanor;

2. an offense under §32.45, Penal Code (misapplication of fiduciary property or property of a financial institution), that is punishable as a Class A misdemeanor;

3. an offense under §32.46, Penal Code (securing execution of a document by deception), that is punishable as a Class A misdemeanor;

4. an offense under §37.12, Penal Code (false identification as peace officer);

5. an offense under §42.01(a)(7), (8), or (9), Penal Code (disorderly conduct); or

6. a conviction under the laws of another state, federal law, or the Uniform Code of Military Justice for an offense containing elements that are substantially similar to the elements of an offense listed in this subsection.

E. The owner/operator must ensure that all employees, including volunteers who are not residents, have had a background check of conviction records, pending charges and disciplinary board decisions completed within the past two years, and is repeated every year thereafter, and that the individual is not disqualified under the provisions of Subsections C and D of this section. The owner/operator will immediately discharge any employee or volunteer whose criminal history check reveals conviction of a crime that bars employment or volunteer service.

Standard 7. Assessment and periodic monitoring of residents

A. Owners/operators of a boarding home facility or their designee will complete and document an annual assessment and conduct periodic monitoring to ensure that a resident is capable of self-administering medication and completing basic elements of personal care as listed in Subsection B & C. The assessment will be used as a tool to determine if the needs of the resident can be addressed in a boarding home facility or if the resident needs personal care services and/or medication administration that cannot be provided by the boarding home facility.

B. Elements of the self-administration of medication to be assessed by the boarding home facility owner/operator or designee include the ability to perform each of the following tasks with little assistance:

1. identifying the name of the medication;

2. providing a reason for the medication (the owner/operator cannot force the resident to disclose a health condition that is the basis for the medication if the resident refuses);

3. distinguishing color or shape;

4. preparing correct number of pills (dosage);

5. confirming the time to take medication(s); and

6. reading labels.

C. Elements of personal care to be assessed by the boarding home facility owner/operator include the resident's ability to:

1. eat independently;

2. bathe without assistance;

3. dress without assistance; and

4. move and transfer independently.

D. As a result of an assessment, if an owner/operator finds that a resident is in a state of possible self-neglect due to no longer being able to perform basic elements of personal care as listed in Subsection C and believes that a higher level of care is needed, the owner/operator is responsible for the following:

1. Contacting DFPS by phoning the Statewide Intake division at 1-800-252-5400;

2. Notifying the resident's guardian or legally authorized representative; and

3. Contacting the appropriate health or human services authority to advise that the resident requires services beyond what can be provided by the boarding home facility.

E. A state of self-neglect does not exist if the resident receives outside professional services that meet the resident's need for personal care or self-administration of medication. In these cases, the resident can remain in the boarding home facility provided that all needs for personal care and self-administration of medication are met.

TRD-201004668
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: August 12, 2010

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Department of State Health Services

Correction of Error

The Department of State Health Services adopted new rules under 25 TAC §§140.575 - 140.595, concerning the licensing and regulation of dyslexia therapists and dyslexia practitioners. The rules were published in the August 13, 2010, issue of the *Texas Register* (35 TexReg 7072).

The deadline was incorrect in new §140.577(b), page 7073, column 1. Instead of September 1, 2010, as published, the correct deadline is January 1, 2011. The subsection as corrected should read as follows.

"(b) For applications and renewal applications postmarked on and after January 1, 2011, the licensing fees are as follows: ..."

TRD-201004737

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Licensing Actions for Radioactive Materials

The Department of State Health Services has taken actions regarding Licenses for the possession and use of radioactive materials as listed in the tables. The subheading "Location" indicates the city in which the radioactive material may be possessed and/or used. The location listing "Throughout TX" indicates that the radioactive material may be used on a temporary basis at job sites throughout the state.

NEW LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Austin	Cardiotexas P.L.L.C.	L06330	Austin	00	08/04/10
Houston	Oncology Consultants P.A.	L06339	Houston	00	08/11/10
Plano	Physicians Medical Center L.L.C. dba Texas Health Center for Diagnostics and Surgery - Plano	L06328	Plano	00	08/09/10
Round Rock	Cardiovascular Specialists of Texas P.A.	L06320	Round Rock	00	08/13/10
Throughout TX	TRI Environmental Inc.	L06345	Austin	00	08/09/10
Throughout TX	IESCO L.L.C.	L06351	Corpus Christi	00	08/16/10
Throughout TX	Enviroklean Product Development Inc.	L06350	Houston	00	08/02/10

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Amarillo	Baptist St. Anthony's Health System	L01259	Amarillo	90	08/02/10
Amarillo	The Don and Sybil Harrington Cancer Center	L03053	Amarillo	46	07/30/10
Angleton	Isotherapeutics Group L.L.C.	L05969	Angleton	15	08/04/10
Arlington	Diagnostic Health Centers of Texas L.P. dba Diagnostic Health - Arlington	L05033	Arlington	24	08/10/10
Austin	The University of Texas at Austin	L00485	Austin	83	08/09/10
Austin	Austin Radiological Association	L00545	Austin	163	08/02/10
Austin	Austin Radiological Association	L00545	Austin	164	08/12/10
Austin	Austin Texas Radiation Oncology Group P.A. dba Austin Cancer Centers	L01761	Austin	62	08/13/10
Austin	St. David's Healthcare Partnership L.P., L.L.P. dba North Austin Medical Center	L04910	Austin	88	08/03/10
Austin	St. David's Healthcare Partnership L.P., L.L.P. dba North Austin Medical Center	L04910	Austin	89	08/16/10
Austin	Texas Cardiovascular Consultants P.A.	L05246	Austin	37	08/04/10
Austin	ARA Imaging	L05862	Austin	50	08/02/10
Baytown	Fayez Hadidi, M.D. dba Fayez Hadidi, M.D., P.A.	L05772	Baytown	06	08/06/10
Brownsville	Columbia Valley Healthcare System L.P. dba Valley Regional Medical Center	L02274	Brownsville	43	07/30/10
Bryan	St. Joseph Regional Health Center	L00573	Bryan	74	07/30/10
Cleburne	Numed Imaging Centers Inc.	L05762	Cleburne	10	08/16/10
College Station	Texas A&M University	L00448	College Station	131	08/05/10
Conroe	Adnan Afzal, M.D., F.A.C.C. dba Healing Hearts	L06071	Conroe	02	08/10/10
Dallas	The University of Texas Southwestern Medical Center at Dallas	L00384	Dallas	103	08/09/10
Denton	University of North Texas	L00101	Denton	87	08/09/10
Edinburg	Doctors Hospital at Renaissance Ltd. dba Doctors Hospital at Renaissance	L05761	Edinburg	25	08/06/10
El Paso	The University of Texas at El Paso	L00159	El Paso	63	08/04/10
El Paso	Cardiology Care Consultants	L05045	El Paso	11	08/09/10
El Paso	East El Paso Physicians Medical Center L.L.C.	L05676	El Paso	24	08/02/10
El Paso	East El Paso Physicians Medical Center L.L.C.	L05676	El Paso	25	08/16/10
Fort Worth	Baylor All Saints Medical Center dba Baylor Medical Center at Southwest Ft. Worth	L04105	Fort Worth	31	08/02/10

AMENDMENTS TO EXISTING LICENSES ISSUED (CONTINUED):

Location	Name	License #	City	Amend-ment #	Date of Action
Fort Worth	Fort Worth Heart P.A.	L05480	Fort Worth	32	08/10/10
Fort Worth	Physician Reliance L.P. dba Texas Oncology at Klabzuba	L05545	Fort Worth	37	08/10/10
Fort Worth	TSIT	L05697	Fort Worth	06	08/04/10
Friendswood	ISO Tex Diagnostics Inc.	L02999	Friendswood	48	08/10/10
Gatesville	Coryell County Memorial Hospital Authority dba Coryell Memorial Hospital	L02391	Gatesville	32	08/06/10
Harlingen	Valley Eye Center P.A.	L02639	Harlingen	12	08/04/10
Harlingen	Cardiac Imaging Associates L.L.P.	L05845	Harlingen	06	08/03/10
Houston	Memorial Hermann Hospital System dba Memorial Hospital Memorial City	L01168	Houston	120	08/12/10
Houston	Texas Childrens Hospital	L04612	Houston	48	08/05/10
Houston	UT Physicians	L05465	Houston	09	08/06/10
Houston	Medi Physics Inc. dba G.E. Healthcare	L05517	Houston	21	08/10/10
Houston	Mohammed Attar, M.D./Nadim Zacca, M.D. dba Nuclear Lab	L05615	Houston	05	08/11/10
Houston	Northwest Diagnostic Clinic P.A.	L05814	Houston	07	08/16/10
Humble	Memorial Hermann Hospital Systems dba Memorial Hermann Northeast	L02412	Humble	82	08/06/10
Humble	Memorial Hermann Hospital Systems dba Memorial Hermann Northeast	L02412	Humble	83	08/11/10
Kingsville	Texas A&M University - Kingsville	L01821	Kingsville	42	07/28/10
Longview	Eastman Chemicals Company	L00301	Longview	113	08/05/10
Longview	Westlake Longview Corporation	L06294	Longview	03	08/05/10
Lubbock	Texas Tech University	L01536	Lubbock	91	08/09/10
Lubbock	Texas Tech University	L01536	Lubbock	92	08/12/10
Lufkin	Memorial Medical Center of East Texas	L01346	Lufkin	81	08/09/10
Lufkin	Temple Imaging Center	L05839	Lufkin	06	08/05/10
McAllen	McAllen Hospitals L.P. dba McAllen Medical Center	L01713	McAllen	92	08/04/10
McAllen	McAllen Hospitals L.P. dba McAllen Medical Heart Hospital	L04902	McAllen	21	08/04/10
Nacogdoches	Stephen F. Austin State University	L05191	Nacogdoches	07	08/03/10
North Richland Hills	Columbia North Hills Hospital Subsidiary L.P. dba North Hills Hospital	L02271	North Richland Hills	67	08/04/10
Paris	Radiology Center of Paris Ltd.	L05445	Paris	17	08/06/10
Plano	Clements Clinic P.L.L.C.	L06194	Plano	02	08/02/10
Port Arthur	Gulf Coast Cardiology Group P.A.	L05393	Port Arthur	15	08/03/10
Port Arthur	S. K. Rao, M.D., P.A.	L05415	Port Arthur	16	08/06/10
Richardson	Medical Edge Healthcare Group P.A. dba PET/CT Center of Richardson	L05688	Richardson	16	08/10/10
San Antonio	Methodist Healthcare System of San Antonio Ltd. L.L.P.	L00594	San Antonio	275	08/03/10
San Antonio	South Texas Cardiovascular Consultants P.L.L.C.	L03833	San Antonio	30	08/06/10
San Antonio	Hector R. Villasenor, M.D., P.A. dba Heart Institute of South Texas	L04377	San Antonio	27	08/09/10
San Antonio	Alamo Heart Associates P.A.	L04909	San Antonio	13	08/10/10
San Antonio	Metro North Cardiovascular Associates P.A. dba Metro North Clinic	L05235	San Antonio	19	08/04/10
San Antonio	M. M. Ontiveros, M.D., P.A.	L05675	San Antonio	08	08/10/10
San Antonio	Schnitzler Cardiovascular Consultants	L05792	San Antonio	09	08/09/10
San Antonio	Jeremy Nyle Wiersig, M.D., P.A. dba Concord Imaging	L05915	San Antonio	06	08/04/10

AMENDMENTS TO EXISTING LICENSES ISSUED (continued):

Location	Name	License #	City	Amend-ment #	Date of Action
Sugar Land	Schlumberger Technology Corporation	L05677	Sugar Land	07	08/09/10
Sugar Land	Sugar Land Veterinary Specialists P.C.	L05903	Sugar Land	08	08/10/10
The Woodlands	Memorial Hermann Hospital System dba Memorial Hermann Hospital The Woodlands	L03772	The Woodlands	78	08/06/10
Throughout TX	Desert Industrial X-Ray L.P.	L04590	Abilene	111	08/05/10
Throughout TX	J-W Wireline Company	L06132	Addison	13	08/11/10
Throughout TX	Fesco Ltd. Inc.	L06343	Alice	01	07/30/10
Throughout TX	Team Industrial Services Inc.	L00087	Alvin	218	08/02/10
Throughout TX	Ramming Paving Company Ltd.	L04666	Austin	09	08/02/10
Throughout TX	Construction Services	L05625	Christoval	11	08/03/10
Throughout TX	OSCS Inc.	L05813	Haltom City	09	08/09/10
Throughout TX	Baker Hughes Oilfield Operations Inc. dba Baker Atlas	L00446	Houston	162	08/04/10
Throughout TX	HVJ Associates Inc.	L03813	Houston	44	08/10/10
Throughout TX	Q.C. Laboratories Inc.	L04750	Houston	25	08/04/10
Throughout TX	Wood Group Logging Services Inc.	L05262	Houston	37	08/10/10
Throughout TX	Alpha-Neutronics Inc.	L05784	Houston	07	08/12/10
Throughout TX	Marco Inspection Services L.L.C.	L06072	Kilgore	32	07/29/10
Throughout TX	Southern Services Inc. dba Southern Technical Services dba Bix Testing Laboratories	L05270	Lake Jackson	56	08/10/10
Throughout TX	Hi-Tech Testing Service Inc.	L05021	Longview	87	08/12/10
Throughout TX	Techcorr USA L.L.C. dba Aut Specialists L.L.C.	L05972	Palestine	79	07/29/10
Throughout TX	Texas Gamma Ray L.L.C.	L05561	Pasadena	95	08/03/10
Throughout TX	Duininck Brothers Inc.	L03957	Roanoke	16	08/10/10
Throughout TX	Duininck Brothers Inc.	L03957	Roanoke	17	08/12/10
Throughout TX	US Ecology Texas Inc.	L05518	Robstown	09	08/16/10
Throughout TX	US Ecology Texas Inc.	L06150	Robstown	03	08/04/10
Throughout TX	NRG Texas Power L.L.C.	L02063	Thompsons	71	07/29/10
Tyler	Mother Frances Hospital	L01670	Tyler	156	08/13/10
Victoria	Texas Internal Medicine & Diagnostic Center P.A.	L06304	Victoria	03	08/16/10
Weatherford	Weatherford Texas Hospital Company L.L.C. dba Weatherford Regional Medical Center	L02973	Weatherford	25	08/04/10
Weslaco	Knapp Medical Center	L03290	Weslaco	48	07/30/10
Winnsboro	Mother Frances Hospital - Winnsboro	L03336	Winnsboro	27	08/10/10

RENEWAL OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Amarillo	Southwestern Public Service Company dba Xcel Energy	L05238	Amarillo	12	08/05/10
Mont Belvieu	Exxonmobil Chemical	L03119	Mont Belvieu	29	07/30/10
Throughout TX	Fugro Consultants Inc.	L03875	Austin	23	08/12/10
Throughout TX	Hirschfeld Steel Company	L04361	San Angelo	18	08/12/10

TERMINATIONS OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Austin	Howerton Eye Center dba Eye Center	L03318	Austin	10	08/04/10
Duncanville	Duncanville Medical Center Inc.	L05471	Duncanville	08	08/09/10
Gainesville	Khawaja N. Anwar, M.D., P.A.	L05607	Gainesville	03	08/09/10
Georgetown	Austin Positron Emission Tomography LP dba Austin PET & Imaging Center	L05861	Georgetown	06	08/04/10
La Porte	Dow Chemical Company USA	L00510	La Porte	70	08/13/10
Throughout TX	American Surveys Inc.	L02086	Manvel	17	07/28/10

In issuing new licenses, amending and renewing existing licenses, or approving license exemptions, the Department of State Health Services (department), Radiation Safety Licensing Branch, has determined that the applicant has complied with the applicable provisions of Title 25 Texas Administrative Code (TAC) Chapter 289, regarding radiation control. In granting termination of licenses, the department has determined that the licensee has complied with the applicable decommissioning requirements of 25 TAC Chapter 289. In denying the application for a license, license renewal or license amendment, the department has determined that the applicant has not met the applicable requirements of 25 TAC Chapter 289.

This notice affords the opportunity for a hearing on written request of a person affected within 30 days of the date of publication of this notice. A person affected is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to the county, in which radioactive material is or will be located, or (b) doing business or has a legal interest in land in the county or adjacent county. A person affected may request a hearing by writing Richard A. Ratliff, Radiation Program Officer, Department of State Health Services, Radiation Material Licensing - Mail Code 2835, P.O. Box 149347, Austin, TX 78714-9347. For information call (512) 834-6688.

TRD-201004777
Linda Wiegman
Acting General Counsel
Department of State Health Services
Filed: August 18, 2010

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Texas Department of Insurance

Third Party Administrator Applications

The following third party administrator applications have been filed with the Texas Department of Insurance and are under consideration.

Application of MATRIX HEALTHCARE SERVICES, INC. (DOING BUSINESS AS MYMATRIXX), a foreign third party administrator. The home office is TAMPA, FLORIDA.

Application of EBS-RMSCO, INC. a foreign third party administrator. The home office is LIVERPOOL, NEW YORK.

Application of CLAIM INDEMNITY SERVICES, LLC, a foreign third party administrator. The home office is OKLAHOMA CITY, OKLAHOMA.

Any objections must be filed within 20 days after this notice is published in the *Texas Register,* addressed to the attention of David Moskowitz, MC 305-2E, 333 Guadalupe, Austin, Texas 78701.

TRD-201004771
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: August 18, 2010

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Texas Lottery Commission

Instant Game Number 1235 "Veterans Cash"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1235 is "VETERANS CASH." The play style is "key number match with doubler."

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1235 shall be $2.00 per ticket.

1.2 Definitions in Instant Game No. 1235.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, EAGLE SYMBOL, $2.00, $4.00, $5.00, $10.00, $20.00, $50.00, $100, $1,000 and $20,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1235 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
EAGLE SYMBOL	EAGLE
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$100	ONE HUND
$1,000	ONE THOU
$20,000	20 THOU

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $2.00, $4.00, $5.00, $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $50.00 or $100.

H. High-Tier Prize - A prize of $1,000 or $20,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1235), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 125 within each pack. The format will be: 1235-0000001-001.

K. Pack - A pack of "VETERANS CASH" Instant Game tickets contains 125 tickets, packed in plastic shrink-wrapping and fanfolded in pages of two (2). One ticket will be folded over to expose a front and back of one ticket on each pack. Please note the books will be in an A, B, C and D configuration.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "VETERANS CASH" Instant Game No. 1235 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule §401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "VETERANS CASH" Instant Game is determined once the latex on the ticket is scratched off to expose 22 (twenty-two) Play Symbols. If a player matches any of YOUR NUMBERS play symbols to either of the WINNING NUMBERS play symbols, the player wins the PRIZE shown for that number. If a player reveals an "eagle" play symbol, the player wins DOUBLE the PRIZE shown for that symbol. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 22 (twenty-two) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 22 (twenty-two) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 22 (twenty-two) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 22 (twenty-two) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets in a pack will not have identical play data, spot for spot.

B. The "EAGLE" (doubler) play symbol will only appear on intended winning tickets and only as dictated by the prize structure.

C. No more than two (2) matching non-winning prize symbols will appear on a ticket.

D. No duplicate WINNING NUMBERS play symbols on a ticket.

E. No duplicate non-winning YOUR NUMBERS play symbols on a ticket.

F. Non-winning prize symbols will never be the same as the winning prize symbol(s).

G. No prize amount in a non-winning spot will correspond with the YOUR NUMBERS play symbol (i.e. 5 and $5).

H. The top prize symbol will appear on every ticket unless otherwise restricted.

2.3 Procedure for Claiming Prizes.

A. To claim a "VETERANS CASH" Instant Game prize of $2.00, $4.00, $5.00, $10.00, $20.00, $50.00 or $100, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $50.00 or $100 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "VETERANS CASH" Instant Game prize of $1,000 or $20,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "VETERANS CASH" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "VETERANS CASH" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "VETERANS CASH" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 8,040,000 tickets in the Instant Game No. 1235. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1235 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$2	964,800	8.33
$4	578,880	13.89
$5	96,480	83.33
$10	112,560	71.43
$20	48,240	166.67
$50	59,831	134.38
$100	4,154	1,935.48
$1,000	47	171,063.83
$20,000	9	893,333.33

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.31. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1235 without advance notice, at which point no further tickets in that game may be sold. The determination of the closing date and reasons for closing the game will be made in accordance with the instant game closing procedures and the Instant Game Rules, 16 TAC §401.302(j).

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1235, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-201004733
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: August 16, 2010

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Instant Game Number 1344 "Find the 9's"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1344 is "FIND THE 9'S." The play style is "match 3 of 6 with auto win."

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1344 shall be $1.00 per ticket.

1.2 Definitions in Instant Game No. 1344.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: $1.00, $2.00, $3.00, $5.00, $30.00, $50.00, $300 and 9.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1344 - 1.2D

PLAY SYMBOL	CAPTION
$1.00	ONE$
$2.00	TWO$
$3.00	THREE$
$5.00	FIVE$
$30.00	THIRTY
$50.00	FIFTY
$300	THR HUND
9	NINE

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $1.00, $2.00, $3.00, $5.00, $9.00 or $19.00.

G. Mid-Tier Prize - A prize of $30.00, $50.00, $90.00 or $300.

H. High-Tier Prize - A prize of $999.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1344), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 150 within each pack. The format will be: 1344-0000001-001.

K. Pack - A pack of "FIND THE 9'S" Instant Game tickets contains 150 tickets, packed in plastic shrink-wrapping and fanfolded in pages of five (5). Tickets 001 to 005 will be on the top page; tickets 146 to 150 will be on the last page with backs exposed. Tickets 001 will be folded over so the front of ticket 001 and 010 will be exposed.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "FIND THE 9'S" Instant Game No. 1344 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule §401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "FIND THE 9'S" Instant Game is determined once the latex on the ticket is scratched off to expose 6 (six) Play Symbols. If a player reveals 3 matching amounts in the play area, the player wins that amount. If a player reveals any "9" play symbols in the play area, the player wins the corresponding prize in the prize legend. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 6 (six) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 6 (six) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 6 (six) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 6 (six) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. No ticket will contain two sets of three matching prize amounts.

C. No ticket will contain 4 or more matching prize amounts.

D. No ticket will contain more than four "9" play symbols.

E. No ticket will contain one or more "9" symbols and three matching prize symbols.

F. The "9" play symbol will only appear on intended winning tickets as dictated by the prize structure.

G. Tickets can only win once (and will win only the highest amount shown).

2.3 Procedure for Claiming Prizes.

A. To claim a "FIND THE 9'S" Instant Game prize of $1.00, $2.00, $3.00, $5.00, $9.00, $19.00, $30.00, $50.00, $90.00 or $300, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $30.00, $50.00, $90.00 or $300 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "FIND THE 9'S" Instant Game prize of $999, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "FIND THE 9'S" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "FIND THE 9'S" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "FIND THE 9'S" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 20,160,000 tickets in the Instant Game No. 1344. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1344 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$1	2,520,000	8.00
$2	940,800	21.43
$3	403,200	50.00
$5	235,200	85.71
$9	168,000	120.00
$19	67,200	300.00
$30	21,000	960.00
$50	12,600	1,600.00
$90	10,668	1,889.76
$300	420	48,000.00
$999	168	120,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.60. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1344 without advance notice, at which point no further tickets in that game may be sold. The determination of the closing date and reasons for closing the game will be made in accordance with the instant game closing procedures and the Instant Game Rules, 16 TAC §401.302(j).

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1344, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-201004734
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: August 16, 2010

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State Preservation Board

Consulting Services Contract Notification

In compliance with the provisions of Chapter 2254, Subchapter B, Texas Government Code, the State Preservation Board is giving notice that it intends to award a consulting agreement for a museum exhibit front end evaluation to Institute for Learning Innovation, unless a better offer is received. The Agency is engaging in audience research in

preparation for a grant from the National Endowment for the Humanities (NEH) and other underwriting entities to support the implementation of a major upcoming exhibit. The Consultant will work with agency staff to provide research strategy, develop test methods, review visitor testing results, analyze data and create a summary report in order to understand the effectiveness of specific components of the exhibition design. The Agency intends to award the contract to the consultant listed above who had been identified in a previous NEH grant. The consultant brings to the project valuable and necessary depth of knowledge of exhibition content and design objectives.

Please call David Denney, Director of Public Programs, The Bob Bullock Texas State History Museum, (512) 936-2311 if you have questions or need further information. The deadline for inquires is September 27, 2010.

TRD-201004736
Linda Gaby, CTPM
Director of Administration
State Preservation Board
Filed: August 16, 2010

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Public Utility Commission of Texas

Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on August 10, 2010, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Time Warner Cable San Antonio, L.P. d/b/a Time Warner Cable for an Amendment to its State-Issued Certificate of Franchise Authority, Project Number 38543 before the Public Utility Commission of Texas.

The requested amendment is to expand the service area footprint to include China Grove, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll free) 1-800-735-2989. All inquiries should reference Project Number 38543.

TRD-201004731
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 16, 2010

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Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on August 11, 2010, for an amendment to a state-issued certificate of franchise authority, pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act.

Project Title and Number: Application of Northland Cable Television, Inc. for an Amendment to its State-Issued Certificate of Franchise Authority, Project Number 38549 before the Public Utility Commission of Texas.

The requested amendment is to remove the area within the municipal boundaries of Hico, Texas, from the authorized service area footprint.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll free) 1-800-735-2989. All inquiries should reference Project Number 38549.

TRD-201004755
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 17, 2010

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Announcement of Application for State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on August 16, 2010, for a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of CoBridge Telecom, LLC for a State-Issued Certificate of Franchise Authority, Project Number 38558 before the Public Utility Commission of Texas.

The requested CFA service area is within the following areas: portions of the City of Fulton; City of Port Aransas; City of Portland; City of Rockport; portions of the City of Sinton as described on the map attached to the application; the unincorporated areas of San Patricio County as described on the map attached to the application; portions of the City of Hallsville as described on the attached service area map; portions of the City of Jefferson as described on the map attached to the application; and the unincorporated areas of Aransas County, Harrison County, Nueces County, and Marion County, Texas, excluding federal properties.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll free) (800) 735-2989. All inquiries should reference Project Number 38558.

TRD-201004774
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 18, 2010

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Announcement of Application for State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on August 16, 2010, for a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of CoBridge Telecom, LLC for a State-Issued Certificate of Franchise Authority, Project Number 38559 before the Public Utility Commission of Texas.

The requested CFA service area is within the following areas: portions of the City of Atlanta as described on the map attached to the application, the City of Carthage; City of Colorado; portions of the City of Levelland as described on the map attached to the application; portions of the City of Slaton as described on the map attached to the application; and the unincorporated areas of Cass County, Mitchell County, Cochran County, Hockley County, Lamb County, and Lubbock County, Texas, excluding federal properties.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll free) (800) 735-2989. All inquiries should reference Project Number 38559.

TRD-201004775
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 18, 2010

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Notice of Application for Amendment to Certificate of Convenience and Necessity for Name Change

Notice is given to the public of an application filed on August 16, 2010 with the Public Utility Commission of Texas for an amendment to a certificate of convenience and necessity for a name change.

Docket Style and Number: Application of Windstream Communications Kerrville, LP for an Amendment to its Certificate of Convenience and Necessity for a Name Change. Docket Number 38563.

The Application: Windstream Communications Kerrville, LP filed an application for an amendment to its Certificate of Convenience and Necessity (CCN) Number 40045 for name change only to Windstream Communications Kerrville, LLC.

Persons wishing to comment on the action sought or intervene should contact the Public Utility Commission of Texas by September 14, 2010, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 38563.

TRD-201004776
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 18, 2010

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Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On August 16, 2010, Covad Communications Company filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60192. Applicant seeks approval to reflect a change in ownership/control.

The Application: Application of Covad Communications Company for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 38566.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than September 3, 2010. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 38566.

TRD-201004753
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 17, 2010

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Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On August 16, 2010, DSLnet Communications, LLC filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60253. Applicant seeks approval to reflect a change in ownership/control.

The Application: Application of DSLnet Communications, LLC for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 38567.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than September 3, 2010. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 38567.

TRD-201004754
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 17, 2010

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Notice of Application for Designation as an Eligible Telecommunications Carrier and Eligible Telecommunications Provider

Notice is given to the public of an application filed with the Public Utility Commission of Texas on August 10, 2010, for designation as an eligible telecommunications provider (ETP) and eligible telecommunications carrier (ETC) pursuant to P.U.C. Substantive Rules §26.417 and §26.418, respectively.

Docket Title and Number: Application of Texas Hearing Services Corporation d/b/a Texas Hearing and Telephone for Designation as an Eligible Telecommunications Carrier Pursuant to P.U.C. Substantive Rule §26.418 and Eligible Telecommunications Provider Pursuant to P.U.C. Substantive Rule §26.417. Docket Number 38544.

The Application: Texas Hearing and Telephone (Texas Hearing) requests ETC/ETP designation to be eligible for federal and state universal service funds to assist it in providing universal service in Texas. Pursuant to P.U.C. Substantive Rule §26.418 and P.U.C. Substantive Rule §26.417, the commission, designates qualifying common carriers as ETCs and ETPs for service areas designated by the commission. Texas Hearing seeks ETC/ETP designation in the entire service areas

of AT&T Texas and Verizon Southwest. The company holds Service Provider Certificate of Operating Authority Number 60858.

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. The deadline for intervention in this proceeding is September 16, 2010. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 38544.

TRD-201004728
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 16, 2010

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Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on August 13, 2010, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of XYN Communications of Texas, LLC for a Service Provider Certificate of Operating Authority, Docket Number 38555.

Applicant intends to provide data, facilities-based, and resale telecommunications services.

Applicant's requested SPCOA will comprise the geographic areas of the major incumbent local exchange carriers in Texas exchanges, including AT&T Texas, Verizon Southwest, and CenturyLink.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than September 3, 2010. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 38555.

TRD-201004732
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 16, 2010

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Notice of Application for Waiver of Denial of Numbering Resources

Notice is given to the public of the filing with the Public Utility Commission of Texas an application on August 10, 2010, for waiver of denial by the Pooling Administrator (PA) of Southwestern Bell Telephone Company d/b/a AT&T Texas' (AT&T Texas) request for assignment of five (5) thousand-blocks of numbers in the Houston rate center.

Docket Title and Number: Petition of AT&T Texas for Waiver of Denial of Numbering Resources for Houston Rate Center, Docket Number 38546.

The Application: AT&T Texas submitted an application to the PA for the requested blocks in accordance with the current guidelines. The PA denied the request because AT&T Texas did not meet the months-to-exhaust and utilization criteria established by the Federal Communications Commission.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than September 8, 2010. Hearing and speech impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 38546.

TRD-201004729
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 16, 2010

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Notice of Application to Amend a Certificate of Convenience and Necessity for a Proposed Transmission Line

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on August 11, 2010, to amend a certificate of convenience and necessity for a proposed transmission line in El Paso County, Texas.

Docket Style and Number: Application of El Paso Electric Company to Amend a Certificate of Convenience and Necessity for a Proposed 115 kV Transmission Line within El Paso County. Docket Number 38513.

The Application: The application of El Paso Electric Company (EPEC) for a proposed transmission line is designated the Wrangler to Sparks 115-kV Relocation and Rebuild Transmission Line Project. The proposed project will be constructed on steel monopole structures and will be approximately five miles in length. The total estimated cost for the project is $3,525,149.

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. The deadline for intervention in this proceeding is September 27, 2010. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 38513.

TRD-201004730
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 16, 2010

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Notice of Application to Amend a Certificate of Convenience and Necessity for a Proposed Transmission Line

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on August 17, 2010, to amend a certificate of convenience and necessity for a proposed transmission line in Hansford and Ochiltree Counties, Texas.

Docket Style and Number: Application of Southwestern Public Service Company to Amend a Certificate of Convenience and Necessity for a Proposed 230-kV Transmission Line within Hansford and Ochiltree Counties. Docket Number 38524.

The Application: The application of Southwestern Public Service Company for a proposed 230-kV transmission line is designated as the Hitchland Substation to Ochiltree County Substation Transmission Line Project. The proposed project is presented with a preferred route and four alternate routes. Any route presented in the application could, however, be approved by the commission. The proposed project will be constructed on single-pole steel structures and, depending on the route chosen, will be between 38 and 50 miles in length. The total estimated cost for the project is approximately $26,572,869.

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. The deadline for intervention in this proceeding is October 1, 2010. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 38524.

TRD-201004773
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 18, 2010

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Request for Proposals for Reliability Monitor for the ERCOT Region

The Public Utility Commission of Texas (commission or PUCT) is issuing a Request for Proposals (RFP) for major consulting services to serve as the Reliability Monitor for the Electric Reliability Council of Texas, Inc. (ERCOT) region. The purpose of this RFP is to invite proposals from firms and electric industry subject matter experts for services necessary to meet the responsibilities for monitoring, investigating, auditing, and reporting to the PUCT regarding compliance by ERCOT and ERCOT Market Participants with the reliability-related ERCOT Protocols (Protocols) and Operating Guides (Operating Guides), the reliability-related provisions of the PUCT Substantive Rules, and the reliability-related provisions of the Public Utility Regulatory Act (PURA). Proposers must be independent third parties that are neutral and impartial, must not advocate specific positions to the PUCT, and must not have a direct financial interest in the provision of electric or telephone service in the state of Texas. To be considered independent third parties, proposers must, at a minimum, not be an independent system operator (ISO) operating an electric grid in the state of Texas, not be a market participant in the electric market in the state of Texas, not provision electric service in the state of Texas, not have any direct or indirect financial interest in any entity involved in the electric market, or the provisioning of electric service in the state of Texas, and not have any direct or indirect control over any entity involved in the electric market or the provisioning of electric service in the state of Texas.

This RFP is being undertaken pursuant to the commission's statutory responsibility provided for in PURA §39.151(d). To be considered for the RFP, deadline for submission of proposals is Tuesday, September 28, 2010, before 2:00 p.m. This deadline is available on the PUCT website (www.puc.state.tx.us).

Project Description. The Reliability Monitor for the ERCOT Region will be responsible for monitoring, investigating, auditing, and reporting to the PUCT regarding compliance with the reliability-related ERCOT Protocols and Operating Guides, and the reliability-related provisions of the PUCT Substantive Rules and the reliability-related provisions of PURA (collectively, the Legal Requirements) by ERCOT and ERCOT Market Participants (collectively, Market Entities). The Reliability Monitor will also provide other reliability-related subject matter advice, expertise, and assistance to the PUCT in the conduct of the PUCT's oversight and enforcement activities. The tasks, duties, and responsibilities (Services) of the Reliability Monitor will include, but are not limited to, the following:

- Maintain a working knowledge and understanding of the current and future Legal Requirements and understanding of the enforcement authority, policies, and procedures of the PUCT.

- Monitor, oversee, and report to the PUCT regarding ERCOT and Market Participant compliance and non-compliance with the Legal Requirements.

- Assist and support the PUCT in its enforcement and prosecution obligations by promptly developing reports, providing technical expertise, and otherwise supporting PUCT enforcement activities as needed.

- Develop procedures to gather and analyze information and data as needed for its monitoring compliance activities and actively monitor reliability in the ERCOT power region, pursuant to the direction of the PUCT.

- Evaluate proposed changes to Legal Requirements.

The PUCT shall make the selection and award on the basis of the proposer's demonstrated knowledge, competence, and qualifications to provide the services as outlined in Attachment A of the RFP.

All other factors being equal, preference will be given to a proposer who is incorporated in Texas, whose principal place of business is in the state, or who has an established physical presence in the state.

If the winning proposer is the incumbent, the start date will be January 1, 2011. If the winning proposer is not the incumbent, the parties will negotiate a start date that takes into account any necessary transition time but no later than January 1, 2011.

Entities that meet the definition of a Historically Underutilized Business (HUB), as defined in Chapter 2161, §2161.001, Texas Government Code are encouraged to submit a proposal or to submit a proposal jointly with a non-HUB entity.

You may download a copy of the RFP from the PUCT website at the following address: http://www.puc.state.tx.us/about/procurement/currentrfps.cfm. You may also download the RFP from the Electronic State Business Daily website at http://esbd.tbpc.state.tx.us or request a copy from Michael Schurwon at (512) 936-7069.

Proposals must be received on or before the deadline, as stated above and in the RFP, in the Public Utility Commission of Texas Central Records Division. Proposals received after the deadline will not be considered. Proposals may be received in Central Records between 9:00 a.m. and 5:00 p.m., Monday through Friday, except on holidays.

TRD-201004761
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 17, 2010

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Supreme Court of Texas

Order Adopting Texas Rule of Civil Procedure 78a

Misc. Docket No. 10-9133

ORDERED that:

1. Pursuant to Section 22.004 of the Texas Government Code, the Supreme Court of Texas promulgates Rule 78a of the Texas Rules of Civil Procedure as follows.

2. By Order dated May 3, 2010, in Misc. Docket No. 10-9062, the Court proposed Rule 78a and invited public comment, and promulgated the civil case information sheet to be used under Rule 78a. This Order contains the final version of Rule 78a and the civil case information sheet.

3. The Clerk is directed to:

a. file a copy of this Order with the Secretary of State;

b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal;*

c. send a copy of this Order to each elected member of the Legislature; and

d. submit a copy of the Order for publication in the *Texas Register.*

SIGNED this 16th day of August, 2010.

_____

Wallace B. Jefferson, Chief Justice

_____

Nathan L. Hecht, Justice

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Dale Wainwright, Justice

_____

David M. Medina, Justice

_____

Paul W. Green, Justice

_____

Phil Johnson, Justice

_____

Don R. Willett, Justice

_____

Eva M. Guzman, Justice

_____

Debra H. Lehrmann, Justice

Rule 78a. Case Information Sheet

(a) *Requirement.* A civil case information sheet, in the form promulgated by the Supreme Court of Texas, must accompany the filing of:

(1) an original petition or application; and

(2) a post-judgment motion for modification or enforcement in a case arising under the Family Code.

(b)*Signature.* The civil case information sheet must be signed by the attorney for the party filing the pleading or by the party.

(c) *Enforcement.* The court and clerk must take appropriate measures to enforce this rule. But the clerk may not reject a pleading because the pleading is not accompanied by a civil case information sheet.

(d) *Limitation on Use.* The civil case information sheet is for data collection for statistical and administrative purposes and does not affect any substantive right.

(e) *Applicability.* The civil case information sheet is not required in cases filed in justice courts or small-claims courts, or in cases arising under Title 3 of the Family Code.

Comment: Rule 78a is added to require the submission of a civil case information sheet to collect data for statistical and administrative purposes, *see, e.g.,* Tex. Gov't Code §71.035. A civil case information sheet is not a pleading. Rule 78a is placed with other rules regarding pleadings because civil case information sheets must accompany pleadings.

CIVIL CASE INFORMATION SHEET

CAUSE NUMBER *(FOR CLERK USE ONLY)*: _____ **COURT** *(FOR CLERK USE ONLY)*: _____

STYLED _____
(e.g., John Smith v. All American Insurance Co; In re Mary Ann Jones; In the Matter of the Estate of George Jackson)

A civil case information sheet must be completed and submitted when an original petition or application is filed to initiate a new civil, family law, probate, or mental health case or when a post-judgment petition for modification or motion for enforcement is filed in a family law case. The information should be the best available at the time of filing. This sheet, approved by the Texas Judicial Council, is intended to collect information that will be used for statistical purposes only. It neither replaces nor supplements the filings or service of pleading or other documents as required by law or rule. The sheet does not constitute a discovery request, response, or supplementation, and it is not admissible at trial.

1. Contact information for person completing case information sheet:		**Names of parties in case:**	**Person or entity completing sheet is:**
Name:	Email:	Plaintiff(s)/Petitioner(s):	☐ Attorney for Plaintiff/Petitioner ☐ *Pro Se* Plaintiff/Petitioner ☐ Title IV-D Agency ☐ Other: _____
Address:	Telephone:		
City/State/Zip:	Fax:	Defendant(s)/Respondent(s):	Additional Parties in Child Support Case: Custodial Parent: Non-Custodial Parent: Presumed Father:
Signature:	State Bar No:	[Attach additional page as necessary to list all parties]	

2. Indicate case type, or identify the most important issue in the case ***(select only 1)***:

Civil

Contract

Debt/Contract
- ☐ Consumer/DTPA
- ☐ Debt/Contract
- ☐ Fraud/Misrepresentation
- ☐ Other Debt/Contract: _____

Foreclosure
- ☐ Home Equity—Expedited
- ☐ Other Foreclosure

- ☐ Franchise
- ☐ Insurance
- ☐ Landlord/Tenant
- ☐ Non-Competition
- ☐ Partnership
- ☐ Other Contract: _____

Injury or Damage
- ☐ Assault/Battery
- ☐ Construction
- ☐ Defamation

Malpractice
- ☐ Accounting
- ☐ Legal
- ☐ Medical
- ☐ Other Professional Liability: _____

- ☐ Motor Vehicle Accident
- ☐ Premises

Product Liability
- ☐ Asbestos/Silica
- ☐ Other Product Liability List Product: _____

- ☐ Other Injury or Damage: _____

Real Property
- ☐ Eminent Domain/ Condemnation
- ☐ Partition
- ☐ Quiet Title
- ☐ Trespass to Try Title
- ☐ Other Property: _____

Related to Criminal Matters
- ☐ Expunction
- ☐ Judgment Nisi
- ☐ Non-Disclosure
- ☐ Seizure/Forfeiture
- ☐ Writ of Habeas Corpus—Pre-indictment
- ☐ Other: _____

Employment
- ☐ Discrimination
- ☐ Retaliation
- ☐ Termination
- ☐ Workers' Compensation
- ☐ Other Employment: _____

Other Civil
- ☐ Administrative Appeal
- ☐ Antitrust/Unfair Competition
- ☐ Code Violations
- ☐ Foreign Judgment
- ☐ Intellectual Property
- ☐ Lawyer Discipline
- ☐ Perpetuate Testimony
- ☐ Securities/Stock
- ☐ Tortious Interference
- ☐ Other: _____

Family Law

Marriage Relationship
- ☐ Annulment
- ☐ Declare Marriage Void

Divorce
- ☐ With Children
- ☐ No Children

Post-judgment Actions (non-Title IV-D)
- ☐ Enforcement
- ☐ Modification—Custody
- ☐ Modification—Other

Title IV-D
- ☐ Enforcement/Modification
- ☐ Paternity
- ☐ Reciprocals (UIFSA)
- ☐ Support Order

Other Family Law
- ☐ Enforce Foreign Judgment
- ☐ Habeas Corpus
- ☐ Name Change
- ☐ Protective Order
- ☐ Removal of Disabilities of Minority
- ☐ Other: _____

Parent-Child Relationship
- ☐ Adoption/Adoption with Termination
- ☐ Child Protection
- ☐ Child Support
- ☐ Custody or Visitation
- ☐ Gestational Parenting
- ☐ Grandparent Access
- ☐ Paternity/Parentage
- ☐ Termination of Parental Rights
- ☐ Other Parent-Child: _____

Tax
- ☐ Tax Appraisal
- ☐ Tax Delinquency
- ☐ Other Tax

Probate & Mental Health

Probate/Wills/Intestate Administration
- ☐ Dependent Administration
- ☐ Independent Administration
- ☐ Other Estate Proceedings

- ☐ Guardianship—Adult
- ☐ Guardianship—Minor
- ☐ Mental Health
- ☐ Other: _____

3. Indicate procedure or remedy, if applicable ***(may select more than 1)***:

- ☐ Appeal from Municipal or Justice Court
- ☐ Arbitration-related
- ☐ Attachment
- ☐ Bill of Review
- ☐ Certiorari
- ☐ Class Action
- ☐ Declaratory Judgment
- ☐ Garnishment
- ☐ Interpleader
- ☐ License
- ☐ Mandamus
- ☐ Post-judgment
- ☐ Prejudgment Remedy
- ☐ Protective Order
- ☐ Receiver
- ☐ Sequestration
- ☐ Temporary Restraining Order/Injunction
- ☐ Turnover

TRD-201004741

Kennon Peterson
Rules Attorney
Supreme Court of Texas
Filed: August 16, 2010

♦ ♦ ♦

Open Meetings

Statewide agencies and regional agencies that extend into four or more counties post meeting notices with the Secretary of State.

Meeting agendas are available on the *Texas Register*'s Internet site:
http://www.sos.state.tx.us/open/index.shtml

Members of the public also may view these notices during regular office hours from a computer terminal in the lobby of the James Earl Rudder Building, 1019 Brazos (corner of 11th Street and Brazos) Austin, Texas. To request a copy by telephone, please call 512-463-5561. Or request a copy by email: register@sos.state.tx.us

For items ***not*** available here, contact the agency directly. Items not found here:

- minutes of meetings
- agendas for local government bodies and regional agencies that extend into fewer than four counties
- legislative meetings not subject to the open meetings law

The Office of the Attorney General offers information about the open meetings law, including Frequently Asked Questions, the *Open Meetings Act Handbook*, and Open Meetings Opinions.
http://www.oag.state.tx.us/open/index.shtml

The Attorney General's Open Government Hotline is 512-478-OPEN (478-6736) or toll-free at (877) OPEN TEX (673-6839).

Additional information about state government may be found here:
http://www.texas.gov

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

How to Use the Texas Register

Information Available: The 14 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 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.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

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 35 (2010) is cited as follows: 35 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 "35 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 35 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 at: 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 website information, call the Texas Register at (512) 463-5561.

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 and Parts (using Arabic 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 (800-356-6548), and West Publishing Company (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 ***Index of Rules***. The *Index of Rules* is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register***. If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with the ***Texas Register*** page number and a notation indicating the type of filing (emergency, proposed, withdrawn, or adopted) as shown in the following example.

TITLE 1. ADMINISTRATION
Part 4. Office of the Secretary of State
Chapter 91. Texas Register
40 TAC §3.704.....950 *(P)*