TEXAS REGISTER

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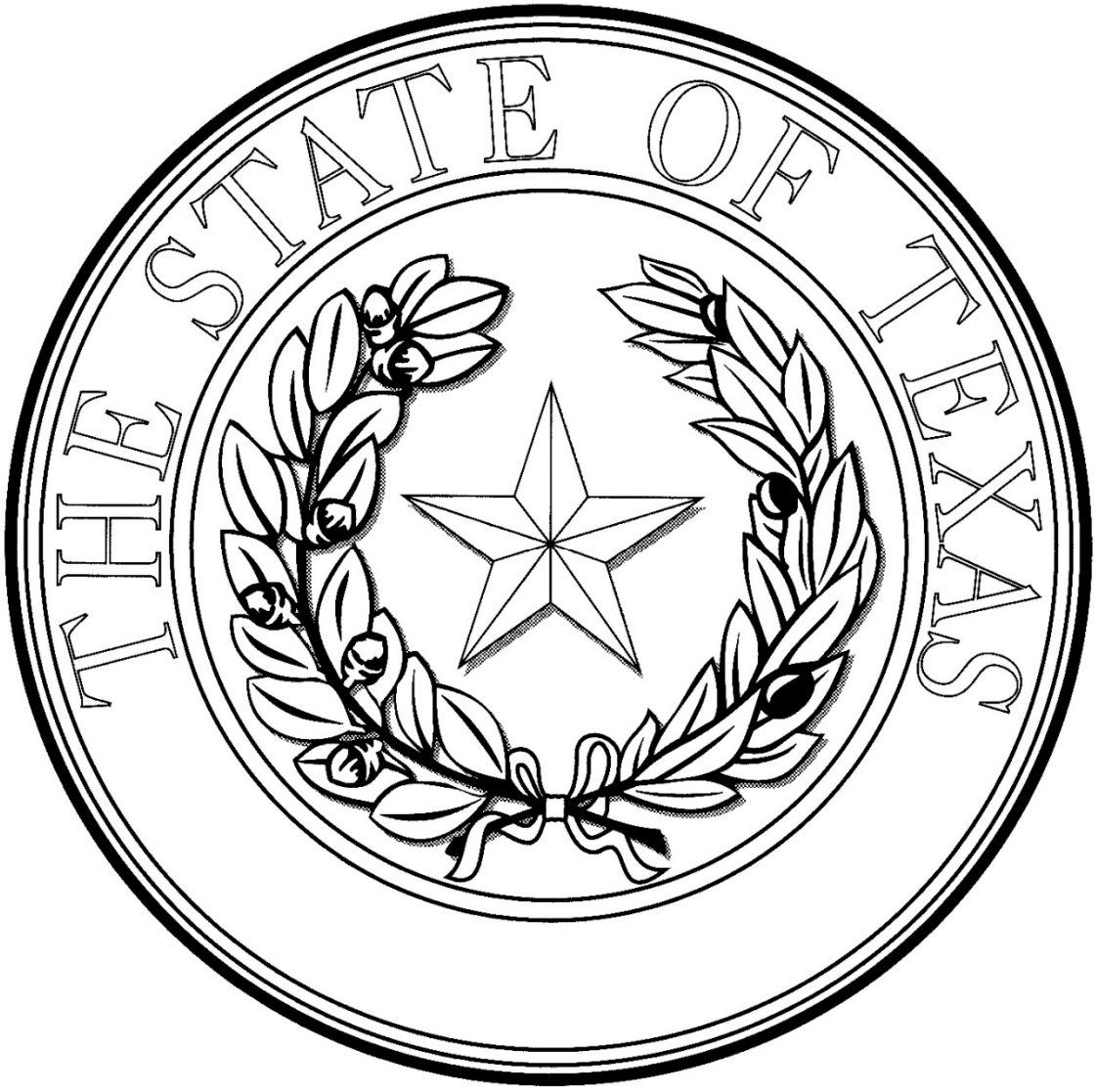

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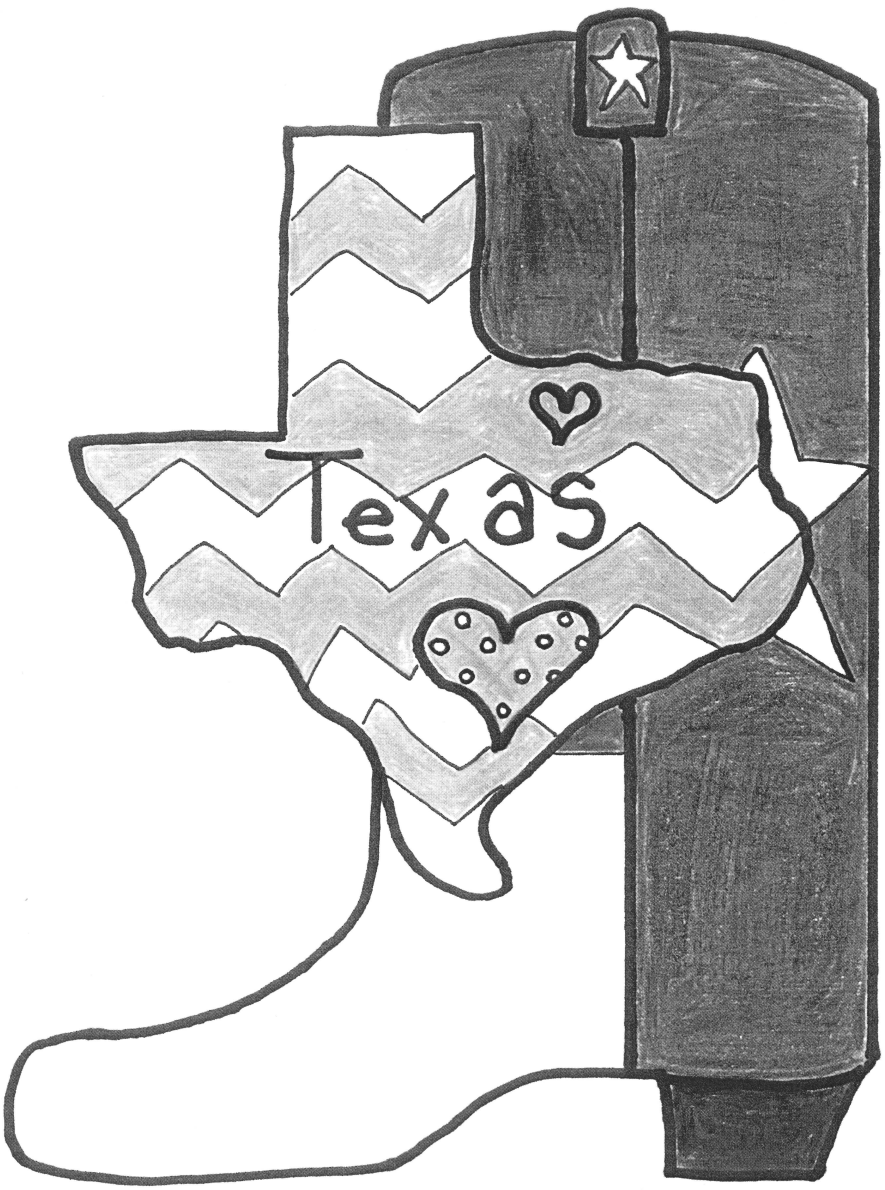
In This Issue

TABLES AND GRAPHICS

IN ADDITION


Texas

THE GOVERNOR

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

Appointments

Appointments for June 9, 2021

Appointed as the Independent Ombudsman for State Supported Living Centers, for a term to expire February 1, 2023, Candace M. Jennings of Austin, Texas (replacing George P. Bithos, D.D.S., Ph.D. of Austin, whose term expired).

Appointments for June 16, 2021

Designated as presiding officer of the Texas Racing Commission, for a term to expire at the pleasure of the Governor, Robert C. Pate of Corpus Christi (Judge Pate is replacing John T. Steen, III of Houston).

Greg Abbott, Governor

TRD-202102360

♦ ♦ ♦

Proclamation 41-3824

TO ALL TO WHOM THESE PRESENTS SHALL COME:

WHEREAS, I, GREG ABBOTT, Governor of the State of Texas, issued a disaster proclamation on February 12, 2021, certifying under Section 418.014 of the Texas Government Code that the severe winter weather poses an imminent threat of widespread and severe property damage, injury, and loss of life due to prolonged freezing temperatures, heavy snow, and freezing rain statewide; and

WHEREAS, in each subsequent month effective through today, I have issued a proclamation renewing the disaster declaration for all Texas counties; and

WHEREAS, a state of disaster continues to exist in all counties due to the widespread and severe damage caused by the severe winter weather;

NOW, THEREFORE, in accordance with the authority vested in me by Section 418.014 of the Texas Government Code, I do hereby renew the disaster proclamation for all 254 counties in Texas.

Pursuant to Section 418.017 of the code, I authorize the use of all available resources of state government and of political subdivisions that are reasonably necessary to cope with this disaster.

Pursuant to Section 418.016 of the code, any regulatory statute prescribing the procedures for conduct of state business or any order or rule of a state agency that would in any way prevent, hinder, or delay necessary action in coping with this disaster shall be suspended upon written approval of the Office of the Governor. However, to the extent that the enforcement of any state statute or administrative rule regarding contracting or procurement would impede any state agency's emergency response that is necessary to protect life or property threatened by this declared disaster, I hereby authorize the suspension of such statutes and rules for the duration of this declared disaster.

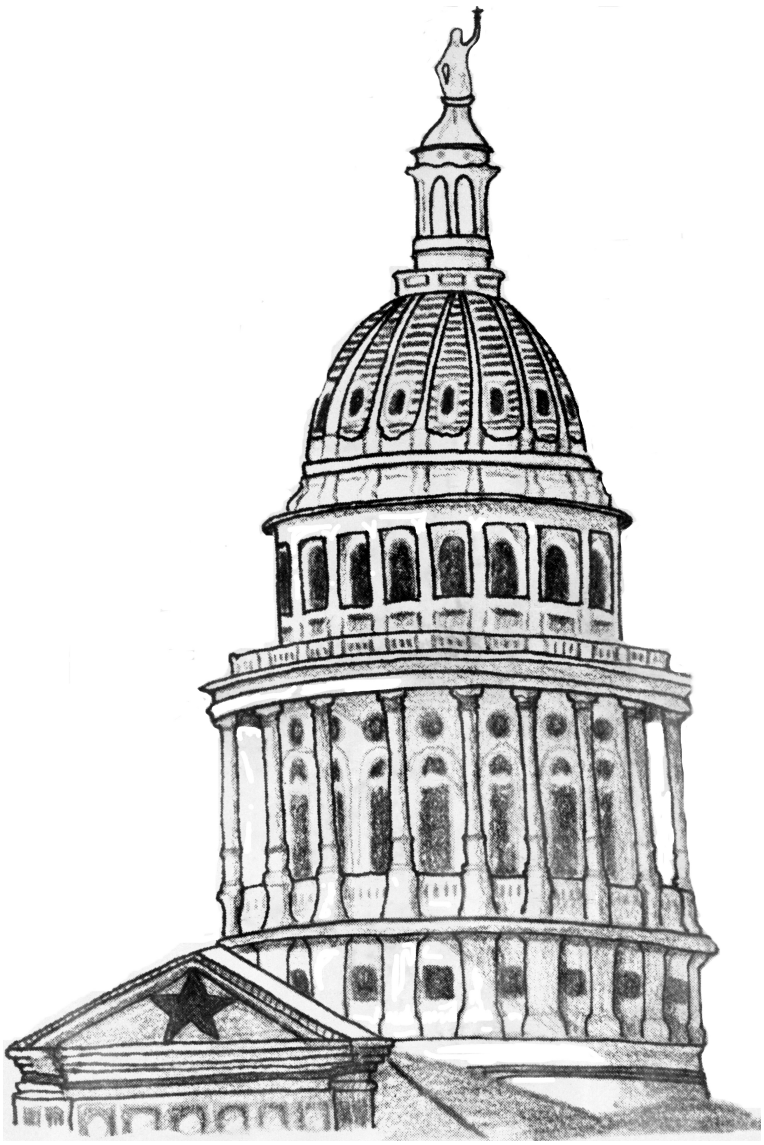
In accordance with the statutory requirements, copies of this proclamation shall be filed with the applicable authorities.

IN TESTIMONY WHEREOF, l have hereunto signed my name and have officially caused the Seal of State to be affixed at my office in the City of Austin, Texas, this the 12th day of June, 2021.

Greg Abbott, Governor

TRD-202102349

♦ ♦ ♦



THE ATTORNEY GENERAL

The *Texas Register* publishes summaries of the following: Requests for Opinions, Opinions, and Open Records Decisions.

An index to the full text of these documents is available on the Attorney General's website at https://www.texas.attorneygeneral.gov/attorney-general-opinions. For information about pending requests for opinions, telephone (512) 463-2110.

An Attorney General Opinion is a written interpretation of existing law. The Attorney General writes opinions as part of his responsibility to act as legal counsel for the State of Texas. Opinions are written only at the request of certain state officials. The Texas Government Code indicates to whom the Attorney General may provide a legal opinion. He may not write legal opinions for private individuals or for any officials other than those specified by statute. (Listing of authorized requestors: https://www.texasattorneygeneral.gov/attorney-general-opinions.)

Requests for Opinions

RQ-0410-KP

Requestor:

The Honorable Chris Taylor

Tom Green County Attorney

122 West Harris

San Angelo, Texas 76903

Re: Whether a court has discretion to accept an affidavit of surety to surrender a principal and to require a bondsman to show cause for the surrender (RQ-0410-KP)

Briefs requested by July 12, 2021

RQ-0411-KP

Requestor:

The Honorable Larry Taylor

Chair, Senate Committee on Education

Texas State Senate

Post Office Box 12068

Austin, Texas 78711-2068

Re: Whether HB 1525 requires school districts to accept PTA donations designated to fund supplemental educational staff positions and use funds donated for that purpose for the 2021-2022 school year (RQ-0411-KP)

For further information, please access the website at www.texasattorneygeneral.gov or call the Opinion Committee at (512) 463-2110.

TRD-202102325
Austin Kinghorn
General Counsel
Office of the Attorney General
Filed: June 15, 2021

♦ ♦ ♦

Opinions

Opinion No. KP-0372

Mr. Darrel D. Spinks

Executive Director

Texas Behavioral Health Executive Council

333 Guadalupe, Suite 3-900

Austin, Texas 78701

Re: Authority of the Behavioral Health Executive Council to adopt a rule prohibiting certain discriminatory conduct by licensed social workers (RQ-0391-KP)

S U M M A R Y

The Legislature authorized the Behavioral Health Executive Council to take disciplinary action against social workers who refuse to perform an act or service within the scope of their licenses solely because of the recipient's age, sex, race, religion, national origin, color, or political affiliation. The Council adopted a rule changing the word "sex" to "gender" and authorizing disciplinary action for refusal of service based on disability, sexual orientation, and gender identity and expression. In doing so, the Council exceeded the authority granted to it by the Legislature by rewriting the language chosen by the Legislature and imposing additional restrictions in excess of the relevant statutory provisions. A court would likely conclude that the rule is invalid to the extent that it is inconsistent with and exceeds the Council's statutory authority.

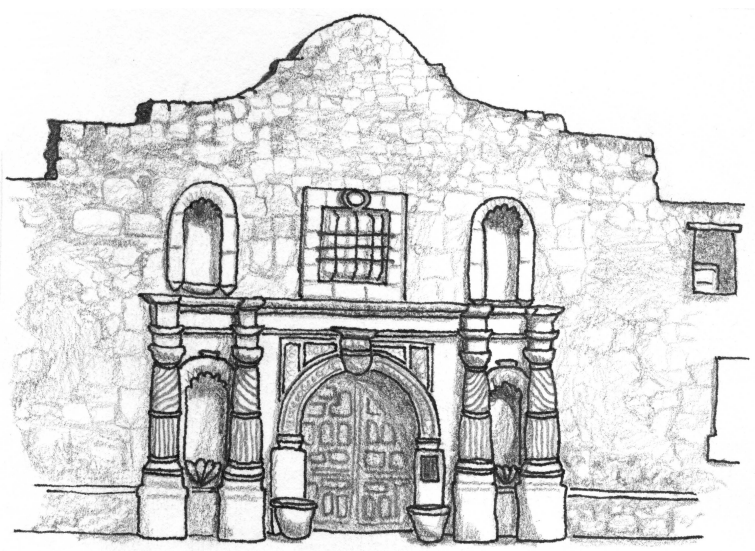
No Texas statute prohibits discrimination based on sexual orientation or gender identity or expression, and the U.S. Supreme Court has emphasized that religious and philosophical objections to categories of sexual orientation are protected views and in some instances protected forms of expression under the First Amendment. If the Legislature intends otherwise, it may expressly amend the statute to so provide. A Council rule prohibiting that expression conflicts with the longstanding constitutional protection for an individual's free exercise of religion.

While a social worker may not discriminate based on disability in contravention of state and federal law, the Council lacks statutory authority to discipline a licensee for discrimination based on disability.

For further information, please access the website at www.texasattorneygeneral.gov or call the Opinion Committee at (512) 463-2110.

TRD-202102326
Austin Kinghorn
General Counsel
Office of the Attorney General
Filed: June 15, 2021

♦ ♦ ♦



EMERGENCY RULES

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

TITLE 22. EXAMINING BOARDS

PART 36. COUNCIL ON SEX OFFENDER TREATMENT

CHAPTER 810. COUNCIL ON SEX OFFENDER TREATMENT

SUBCHAPTER A. LICENSED SEX OFFENDER TREATMENT PROVIDERS

22 TAC §810.4

The Council on Sex Offender Treatment is renewing the effectiveness of emergency amended §810.4 for a 60-day period. The text of the emergency rule was originally published in the March 12, 2021, issue of the *Texas Register* (46 TexReg 1573).

Filed with the Office of the Secretary of State on June 14, 2021.

TRD-202102318
Aaron Pierce, PhD, LPC, LSOTP-S
Chairman
Council on Sex Offender Treatment
Original effective date: February 23, 2021
Expiration date: August 21, 2021
For further information, please call: (512) 834-6605

♦ ♦ ♦

TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 417. AGENCY AND FACILITY RESPONSIBILITIES

SUBCHAPTER A. STANDARD OPERATING PROCEDURES

25 TAC §417.47

The Department of State Health Services is renewing the effectiveness of emergency amended §417.47 for a 60-day period. The text of the emergency rule was originally published in the February 26, 2021, issue of the *Texas Register* (46 TexReg 1311).

Filed with the Office of the Secretary of State on June 14, 2021.

TRD-202102319
Nycia Deal
Attorney
Department of State Health Services
Original effective date: February 15, 2021
Expiration date: August 13, 2021
For further information, please call: (512) 438-3049

♦ ♦ ♦

TITLE 26. HEALTH AND HUMAN SERVICES

PART 1. HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 551. INTERMEDIATE CARE FACILITIES FOR INDIVIDUALS WITH AN INTELLECTUAL DISABILITY OR RELATED CONDITIONS

SUBCHAPTER C. STANDARDS FOR LICENSURE

26 TAC §551.46

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) adopts on an emergency basis in Title 26, Part 1, Texas Administrative Code, Chapter 551, Subchapter C, new §551.46, concerning an emergency rule to mitigate and contain COVID-19 in an intermediate care facility for individuals with an intellectual disability (ICF/IID) or related condition. As authorized by Texas Government Code §2001.034, the Commission may adopt an emergency rule without prior notice or hearing upon finding that an imminent peril to the public health, safety, or welfare requires adoption on fewer than 30 days' notice. Emergency rules adopted under Texas Government Code §2001.034 may be effective for not longer than 120 days and may be renewed for not longer than 60 days.

BACKGROUND AND PURPOSE

The purpose of this emergency rulemaking is to support the Governor's March 13, 2020 proclamation certifying that the COVID-19 virus poses an imminent threat of disaster in the state and declaring a state of disaster for all counties in Texas. In this proclamation, the Governor authorized the use of all available resources of state government and of political subdivisions that are reasonably necessary to cope with this disaster and directed that government entities and businesses would continue providing essential services. HHSC accordingly finds that an imminent peril to the public health, safety, and welfare of the state requires immediate adoption of this emergency rule for ICF/IID Provider Response to COVID-19 - Mitigation.

To protect individuals receiving ICF/IID services and the public health, safety, and welfare of the state during the COVID-19 pandemic, HHSC is adopting an emergency rule to mitigate and contain COVID-19. The purpose of the new rule is to describe requirements for ICF/IID Provider Response to COVID-19.

STATUTORY AUTHORITY

The emergency rulemaking is adopted under Texas Government Code §2001.034 and §531.0055 and Texas Health and Safety Code §§252.031 - 252.033 and §242.043. Texas Government Code §2001.034 authorizes the adoption of emergency rules without prior notice and hearing, if an agency finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule on fewer than 30 days' notice. Texas Government Code §531.0055 authorizes the Executive Commissioner of HHSC to adopt rules and policies necessary for the operation and provision of health and human services by the health and human services system. Texas Health and Safety Code §§252.031 - 252.033 require the Executive Commissioner of HHSC to establish rules prescribing the minimum standards and process for licensure as an intermediate care facility. Texas Health and Safety Code §252.043 establishes HHSC's authority to conduct an inspection, survey, or investigation at an intermediate care facility to determine if the intermediate care facility is in compliance with the minimum acceptable levels of care for individuals who are living in an intermediate care facility, and the minimum acceptable life safety code and physical environment requirements.

The new rule implements Texas Government Code §531.0055 and §531.021 and Texas Human Resources Code §32.021.

§551.46. ICF/IID Provider Response to COVID-19 - Mitigation.

(a) The following words and terms, when used in this section, have the following meanings.

(1) Cohort--A group of individuals placed in rooms, halls, or sections of an intermediate care facility with others who have the same COVID-19 status or the act of grouping individuals with other individuals who have the same COVID-19 status.

(2) COVID-19 negative--A person who has tested negative for COVID-19, is not exhibiting symptoms of COVID-19, and has had no known exposure to the virus since the negative test.

(3) COVID-19 positive--A person who has tested positive for COVID-19 and does not yet meet Centers for Disease Control and Prevention (CDC) guidance for the discontinuation of transmission-based precautions.

(4) COVID-19 status--The status of a person based on COVID-19 test results, symptoms, or other factors that consider the person's potential for having the virus.

(5) Fully vaccinated person--A person who received the second dose in a two-dose series or a single dose of a one dose COVID-19 vaccine and 14 days have passed since this dose was received.

(6) Individual--A person enrolled in the ICF/IID Program.

(7) Isolation--The separation of people who have a COVID-19 positive status from those who have a COVID-19 negative status and those whose COVID-19 status is unknown.

(8) PPE--Personal protective equipment means specialized clothing or equipment worn by intermediate care facility staff for protection against transmission of infectious diseases such as COVID-19, including masks, goggles, face shields, gloves, and disposable gowns.

(9) Quarantine--The practice of keeping someone who might have been exposed to COVID-19 away from others. Quarantine helps prevent spread of disease that can occur before a person knows they are sick or if they are infected with the virus without experiencing symptoms.

(10) Unknown COVID-19 status--A person who is a new admission, except as provided by the CDC for an individual who is fully vaccinated for COVID-19 or recovered from COVID-19, who:

(A) is a new admission or readmission;

(B) has spent one or more nights away from the facility;

(C) has had known exposure or close contact with a person who is COVID-19 positive; or

(D) is exhibiting symptoms of COVID-19 while awaiting test results.

(b) An intermediate care facility must have a protocol in place, included in its COVID-19 response plan, that describes how, if the facility cannot successfully isolate the individual, the facility will transfer a COVID-19 positive individual to a facility capable of isolating and caring for the COVID-19 positive individual.

(1) An intermediate care facility must have contracts or agreements with alternative appropriate facilities to ensure care for COVID-19 positive individuals.

(2) An intermediate care facility must assist the individual and family members as needed to transfer the individual to the alternate facility.

(c) An intermediate care facility must have a COVID-19 response plan that includes:

(1) designated space for:

(A) COVID-19 negative individuals;

(B) individuals with unknown COVID-19 status; and

(C) COVID-19 positive individuals, when the facility is able to care for an individual at this level or until arrangements can be made to transfer the individual to a higher level of care;

(2) spaces for staff to don and doff PPE that minimize the movement of staff through other areas of the facility;

(3) individual transport protocols;

(4) plans for obtaining and maintaining a two-week supply of PPE, including surgical facemasks, gowns, gloves, and goggles or face shields; and

(5) if the facility houses COVID-19 positive individuals, an individual recovery plan for continuing care after an individual is recovering from COVID-19 as per CDC guidelines on recovery.

(d) An intermediate care facility must screen all individuals, staff, and people who come to the facility in accordance with the following criteria:

(1) fever, defined as a temperature of 100.4 Fahrenheit and above, or signs or symptoms of a respiratory infection, such as cough, shortness of breath, or sore throat;

(2) other signs or symptoms of COVID-19, including chills, new or worsening cough, shortness of breath or difficulty breathing, fatigue, muscle or body aches, headache, new loss of taste or smell, sore throat, congestion or runny nose, nausea or vomiting, or diarrhea;

(3) any other signs and symptoms as outlined by the CDC in Symptoms or Coronavirus at cdc.gov;

(4) contact in the last 14 days with someone who has a confirmed diagnosis of COVID-19, is under investigation for COVID-19, or is ill with a respiratory illness, regardless of whether the person is fully vaccinated, unless the person is entering the facility to provide critical assistance; or

(5) testing positive for COVID-19 in the last 10 days.

(e) An intermediate care facility must screen individuals according to the following timeframes:

(1) for the criteria in subsection (d) of this section, upon admission or readmission to the facility; and

(2) for the criteria in subsection (d)(1) - (4) of this section at least once a day in accordance with CDC guidance.

(f) An intermediate care facility must screen each employee or contractor for the criteria in subsection (d) of this section before entering the facility at the start of their shift. Staff screenings must be documented in a log kept at the facility entrance, and must include the name of each person screened, the date and time of the evaluation, and the results of the evaluation. Staff who meet any of the criteria must not be permitted to enter the facility.

(g) An intermediate care facility must assign each individual to the appropriate cohort based on the individual's COVID-19 status.

(h) An individual with unknown COVID-19 status must be quarantined and monitored for fever and other symptoms of COVID-19 in accordance with CDC guidance.

(i) An individual with COVID-19 positive status must be isolated until the individual meets CDC guidelines for the discontinuation of transmission-based precautions, if cared for in the facility.

(j) If an individual with COVID-19 positive status must be transferred for a higher level of care, the facility must isolate the individual until the individual can be transferred.

(k) An intermediate care facility must implement a staffing policy requiring the following:

(1) staff must wear appropriate PPE based on the cohort with which they work;

(2) staff must inform the facility per facility policy prior to reporting for work if they have known exposure or symptoms;

(3) staff must perform self-monitoring on days they do not work; and

(4) the facility must develop and implement a policy regarding staff working with other long-term care (LTC) providers that limits the sharing of staff with other LTC providers and facilities, unless required in order to maintain adequate staffing at a facility.

(l) The facility must develop and enforce policies and procedures for infection control. The written standards, policies, and procedures for the facility's infection prevention and control program must include standard and transmission-based precautions to prevent the spread of COVID-19, including the appropriate use of PPE. All facemasks and N95 masks must be in good functional condition as described in COVID-19 Response Plan for Intermediate Care Facilities.

(1) A facility must comply with CDC guidance on the optimization of PPE when supply limitations require PPE to be reused.

(2) A facility must document all efforts made to obtain PPE, including each organization contacted and the date of each attempt.

(m) COVID-19 activity must be reported to the Texas Health and Human Services Commission (HHSC) Complaint and Incident Intake as described below.

(1) A facility must report the first confirmed case of COVID-19 in staff or individuals, and the first confirmed case of COVID-19 after a facility has been without cases for 14 days or more, to HHSC Complaint and Incident Intake (CII) through TULIP, or by calling 1-800-458-9858, within 24 hours of the positive confirmation.

(2) A facility must submit a Form 3613-A Provider Investigation Report to HHSC Complaint and Incident Intake, through TULIP or by calling 1-800-458-9858, within five working days from the day a confirmed case is reported to CII.

(n) If an executive order or other direction is issued by the Governor of Texas, the President of the United States, or another applicable authority that is more restrictive than this rule or any minimum standard relating to an intermediate care facility, the intermediate care facility must comply with the executive order or other direction.

The agency certifies that legal counsel has reviewed the emergency adoption and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 9, 2021.

TRD-202102250
Karen Ray
Chief Counsel
Health and Human Services Commission
Effective date: June 10, 2021
Expiration date: October 7, 2021
For further information, please call: (512) 438-3161

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26 TAC §551.48

The Health and Human Services Commission is renewing the effectiveness of emergency new §551.48 for a 60-day period. The text of the emergency rule was originally published in the February 26, 2021, issue of the *Texas Register* (46 TexReg 1315).

Filed with the Office of the Secretary of State on June 11, 2021.

TRD-202102294
Nycia Deal
Attorney
Health and Human Services Commission
Original effective date: February 12, 2021
Expiration date: August 10, 2021
For further information, please call: (512) 438-3161

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 3. RESPONSIBILITIES OF STATE FACILITIES

SUBCHAPTER D. TRAINING

40 TAC §§3.401 - 3.403

The Department of Aging and Disability Services is renewing the effectiveness of emergency amended §§3.401 - 3.403 for a 60-day period. The text of the emergency rule was originally published in the February 26, 2021, issue of the *Texas Register* (46 TexReg 1316).

Filed with the Office of the Secretary of State on June 14, 2021.

TRD-202102320
Nycia Deal
Attorney
Department of Aging and Disability Services
Original effective date: February 15, 2021
Expiration date: August 13, 2021
For further information, please call: (512) 438-3049

♦ ♦ ♦

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 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. REIMBURSEMENT RATES

SUBCHAPTER J. PURCHASED HEALTH SERVICES

DIVISION 4. MEDICAID HOSPITAL SERVICES

1 TAC §355.8052

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes an amendment to §355.8052, concerning Inpatient Hospital Reimbursement.

BACKGROUND AND PURPOSE

The purpose of the proposed amendment to §355.8052 is to comply with Senate Bill 170 (S.B. 170), 86th Legislature, Regular Session 2019 and Senate Bill 1621 (S.B. 1621), 86th Legislature, Regular Session, 2019, and to make other amendments to enhance clarity, consistency, and specificity. HHSC is required by S.B. 170, to the extent allowed by law, to calculate Medicaid rural hospital inpatient rates using a cost-based prospective reimbursement methodology. Additionally, HHSC must calculate rates for rural hospitals once every two years, using the most recent cost information available. The current rule does not require a biennial review of the rural hospital rates. Rates have not been realigned or rebased since state fiscal year 2014. Previously, HHSC converted the rural hospital reimbursement from the methodology described in the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) to the prospective payment All Patient Refined Diagnosis Related Group (APR-DRG) methodology.

Pursuant to S.B. 1621 and S.B. 170, HHSC's managed care contracts require managed care organizations to reimburse rural hospitals using a minimum fee schedule for services delivered through the Medicaid managed care program. The proposed amendment adds subsection (e)(4), requiring a Medicaid minimum fee schedule for all rural hospitals, to conform the rule to the current law as well.

Presently, §355.8052 explains the standard dollar amount (SDA) rate setting process by addressing the multiple hospital types (rural, urban, and children's), concurrently. The proposed amendment arranges the rule by hospital type to enhance clarity, consistency, and specificity. The amendment adds and modifies definitions, including "rebasing" and "realignment." The proposed amendment also specifies a policy for updating DRG statistical calculations to align with 3M™ Grouper changes.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §355.8052(b) clarifies and updates definitions for "Add-on," "Base year claims," "Children's hospital," "Diagnosis Related Group," "Final settlement," "Impact file," "Interim rate," "Mean length of stay," "Rebasing," "State-owned teaching hospital," "Texas provider identifier," and "Trauma add-on." Definitions for "Inpatient ratio of cost-to-charge," "Managed care organization adjustment factor," "Realignment," "Rural base year stays," and "Standard dollar amount (SDA)" are added. The definition for "Base year cost per claim" is deleted. To account for the addition and deletion of definitions, the subsection is renumbered. The definition for "Adjudicated" is moved below "Add-on" to follow alphabetical order.

The proposed amendment to §355.8052 deletes subsections (c) - (f) and adds new subsections (c) - (f) to separately describe children's, urban, and rural hospital types and their SDA calculations as follows.

(1) The subject covered in subsection (c) was "Base urban and children's hospital standard dollar amount (SDA) calculations." The proposed amendment changes it to "Base children's hospitals SDA calculations."

(2) The subject covered in subsection (d) was "Add-ons" for both children's and urban hospitals. The proposed amendment changes it only to "Base urban hospital SDA calculations."

(3) The subject covered in subsection (e) was "Final urban and children's hospital SDA calculations." The proposed amendment changes it to "Rural hospital SDA calculations."

(4) The subject covered in subsection (f) was "Final rural hospital SDA calculation." The proposed amendment changes it to "Final SDA for military and out-of-state."

The proposed amendment to §355.8052(g)(4) splits the paragraph (g)(4) into paragraphs (g)(4) and (g)(5). Section 355.8052(g)(5) was added for clarification and readability. Other edits are made in this subsection for clarity and consistency.

The proposed amendment to §355.8052 creates new subsection (h) covering DRG grouper logic changes and renumbers the remaining subsections.

The proposed amendment to relabeled §355.8052(i) changes and adds language for clarification, consistency and accuracy of internal references.

The proposed amendment to relabeled §355.8052(j) adds clarifying language to paragraph (2).

The proposed amendment to relabeled §355.8052(l) and (n) makes edits for consistency.

The proposed amendment to relabeled §355.8052(m) adds clarifying language to paragraph (2) and adds new paragraph (4) to explain how HHSC assigns rates when Medicare assigns two different provider numbers to a merged facility.

FISCAL NOTE

Trey Wood, Chief Financial Officer, has determined that for each year of the first five years that the rule will be in effect, enforcing or administering the rule does not have foreseeable implications relating to costs or revenues of state government.

For each year of the first five years that the rule will be in effect, enforcing or administering the rule has implications relating to revenues of local governments. The effect is projected to be a net increase to revenues of local governments of approximately $53,472 General Revenue (GR) ($136,688 All Funds (AF)) for State Fiscal Year (SFY) 2022 and $54,868 GR ($139,969 AF) for SFY 2023. HHSC lacks information to provide an estimate of the impact during SFYs 2024 - 2026 because rates will be realigned for SFY 2024.

GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the rule will be in effect:

(1) the proposed rule will not create or eliminate a government program;

(2) implementation of the proposed rule will not affect the number of HHSC employee positions;

(3) implementation of the proposed rule will not require an increase in future legislative appropriations;

(4) the proposed rule will not affect fees paid to HHSC;

(5) the proposed rule will not create a new rule;

(6) the proposed rule will expand an existing rule;

(7) the proposed rule will not change the number of individuals subject to the rule; and

(8) the proposed rule will not affect the state's economy.

SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Trey Wood has also determined that there will be no adverse economic effect on small businesses or micro-businesses.

There will be an adverse effect on a rural community due to adoption and implementation of the rule.

The realignment is structured to benefit most rural hospitals; however, in one case a rural municipally-owned hospital will see rates decrease.

There are two rural hospitals in Texas owned by municipalities with fewer than 25,000 persons.

There is one rural hospital owned by a municipality with fewer than 25,000 persons that will have its rates decrease with adoption of this rule. The adverse economic impact in the first two state fiscal years the rule is in effect is projected to be $2,930 in SFY 2023 and $3001 in SFY 2023.

This rule is legislatively mandated, so HHSC has no regulatory flexibility on whether to adopt.

LOCAL EMPLOYMENT IMPACT

The proposed rule will not affect a local economy.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to this rule because the rule does not impose a cost on regulated persons, and it is necessary to implement legislation to which §2001.0045 does not specifically apply.

PUBLIC BENEFIT AND COSTS

Victoria Grady, Director of Provider Finance, has determined that for each year of the first five years the rule is in effect, the public benefit will be realignment of rural hospital rates on a regular basis using the most recent cost information. Additional benefits include clarification of language, readability, and clarity for hospital types, including children's, urban, and rural.

Trey Wood, Chief Financial Officer, has also determined that for the first five years the rule is in effect, there are no anticipated economic costs to persons who are required to comply with the proposed rule. There is no requirement to alter current business practices and no new fees or costs imposed on those required to comply.

TAKINGS IMPACT ASSESSMENT

HHSC has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code §2007.043.

PUBLIC HEARING

A public hearing to receive comments on the proposal will be held by HHSC through a webinar.

The meeting date and time will be posted on the HHSC Communications and Events Website at https://hhs.texas.gov/about-hhs/communications-events and the HHSC Provider Finance Hospitals website at https://rad.hhs.texas.gov/hospitals-clinic-services.

Please contact Cristina Melendez at PFD_Hospitals@hhsc.state.tx.us if you have questions.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Cristina Melendez in the HHSC Provider Finance for Hospitals department at PFD_Hospitals@hhsc.state.tx.us.

Written comments on the proposal may be submitted to the HHSC Provider Finance Department, 4900 North Lamar Blvd., Austin, TX 78751 (Mail Code H-400); P.O. Box 149030, Austin, TX 78714-9030 (Mail Code H-400); by fax to (512)-730-7475; or by email to PFD_Hospitals@hhsc.state.tx.us.

To be considered, comments must be submitted no later than 31 days after the date of this issue of the *Texas Register.* Comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) faxed or emailed before midnight on the last day of the comment period. If the last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted. When faxing or emailing comments, please indicate "Comments on Proposed Rule 21R075" in the subject line.

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code §531.033, which authorizes the Executive Commissioner of

HHSC to adopt rules necessary to carry out HHSC's duties; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; Texas Government Code §531.021(b), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Texas Human Resources Code, Chapter 32; and Texas Government Code §531.02194, which requires adoption of a prospective reimbursement methodology for the payment of rural hospitals.

The amendment affects Texas Government Code, §531.0055, Chapter 531 and Texas Human Resources Code Chapter 32.

§355.8052. Inpatient Hospital Reimbursement.

(a) Introduction. The Texas Health and Human Services Commission (HHSC) uses the methodology described in this section to calculate reimbursement for a covered inpatient hospital service.

(b) Definitions.

~~[(1) Adjudicated--The approval or denial of an inpatient hospital claim by HHSC.]~~

(1) [~~(2)~~] Add-on--An amount that is added to the base Standard Dollar Amount (SDA) [~~SDA~~] to reflect high-cost functions and services or regional cost differences.

(2) Adjudicated--The approval or denial of an inpatient hospital claim by HHSC.

(3) Base standard dollar amount (base SDA)--A standardized payment amount calculated by HHSC, as described in subsection (d) of this section, for the costs incurred by prospectively-paid hospitals in Texas for furnishing covered inpatient hospital services.

(4) Base year--For the purpose of this section, the base year is a state fiscal year (September through August) to be determined by HHSC.

(5) Base year claims--Individual sets of base year claims are compiled for children's hospitals and urban hospitals for the purposes of rate setting and realignment. All Medicaid inpatient [~~traditional~~] fee-for-service (FFS) and Primary Care Case Management (PCCM) inpatient hospital claims for reimbursement filed by an urban or children's [~~a~~] hospital that:

(A) had a date of admission occurring within the base year;

(B) were adjudicated and approved for payment during the base year and the six-month grace period that immediately followed the base year, except for such claims that had zero inpatient days;

(C) were not claims for patients who are covered by Medicare;

(D) were not Medicaid spend-down claims;

(E) were not claims associated with military hospitals, out-of-state hospitals, state-owned teaching hospitals, and freestanding psychiatric hospitals; and

(F) individual[~~Individual~~] sets of base year claims are compiled for children's hospitals, rural hospitals, and urban hospitals for the purposes of rate setting and rebasing.

~~[(6) Base year cost-per-claim--The cost for a base year claim that would have been paid to a hospital if HHSC reimbursed the hospital under methods and procedures used in the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), without the application of the TEFRA target cap for all hospitals except children's and state-owned teaching hospitals.]~~

(6) [~~(7)~~] Children's hospital--A Medicaid hospital designated by Medicare as a children's hospital and exempted by Centers for Medicare and Medicaid Services (CMS) [~~CMS~~] from the Medicare prospective payment system.

(7) [~~(8)~~] Cost outlier payment adjustment--A payment adjustment for a claim with extraordinarily high costs.

(8) [~~(9)~~] Cost outlier threshold--One factor used in determining the cost outlier payment adjustment.

(9) [~~(10)~~] Day outlier payment adjustment--A payment adjustment for a claim with an extended length of stay.

(10) [~~(11)~~] Day outlier threshold--One factor used in determining the day outlier payment adjustment.

(11) [~~(12)~~] Diagnosis-related group (DRG)--The classification of medical diagnoses as defined in the 3M™ All Patient Refined Diagnosis Related Group (APR-DRG) system or as otherwise specified by HHSC. Each DRG has four digits. The last digit of the Diagnosis-Related Group is the Severity of Illness (SOI). SOI indicates the seriousness of the condition on a scale of one to four: minor, moderate, major, or extreme. SOI may increase if secondary diagnoses are present, in addition to the primary diagnosis.

(12) [~~(13)~~] Final settlement--Reconciliation of Medicaid cost in the CMS form 2552-10 [~~Medicare/Medicaid~~] hospital fiscal year end cost report performed by HHSC within six months after HHSC receives the cost report audited by a Medicare intermediary, or HHSC.

(13) [~~(14)~~] Final standard dollar amount (final SDA)--The rate assigned to a hospital after HHSC applies the add-ons and other adjustments described in this section.

(14) [~~(15)~~] Geographic wage add-on--An adjustment to a hospital's base SDA to reflect geographical differences in hospital wage levels. Hospital geographical areas correspond to the Core-Based Statistical Areas (CBSAs) established by the federal Office of Management and Budget in 2003.

(15) [~~(16)~~] HHSC--The Texas Health and Human Services Commission, or its designee.

(16) [~~(17)~~] Impact file--The Inpatient Prospective Payment System (IPPS) Final Rule Impact File that contains data elements by provider used by the CMS [~~Centers for Medicare and Medicaid Services (CMS)~~] in calculating Medicare rates and impacts. The impact file is publicly available on the CMS website.

(17) [~~(18)~~] Inflation update factor--Cost of living index based on the annual CMS Prospective Payment System Hospital Market Basket Index.

(18) Inpatient Ratio of cost-to-charge (RCC)--A ratio that covers all applicable Medicaid hospital costs and charges relating to inpatient care.

(19) In-state children's hospital--A hospital located within Texas that is recognized by Medicare as a children's hospital and is exempted by Medicare from the Medicare prospective payment system.

(20) Interim payment--An initial payment made to a hospital that is later settled to Medicaid-allowable costs, for hospitals reimbursed under methods and procedures in the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA).

(21) Interim rate--The ratio of Medicaid allowed inpatient costs to Medicaid allowed inpatient charges filed on a hospital's [~~Medicare/Medicaid~~] cost report, expressed as a percentage. The interim rate established during a cost report settlement for an urban hospital or a rural hospital reimbursed under this section excludes the application of TEFRA target caps and the resulting incentive and penalty payments.

(22) Managed Care Organization (MCO) Adjustment Factor--Factor used to estimate managed care premium tax, risk margin, and administrative costs related to contracting with HHSC. The estimated amounts are subtracted from appropriations.

(23) [~~(22)~~] Mean length of stay (MLOS)--One factor used in determining the payment amount calculated for each DRG; [~~for each DRG,~~] the average number of inpatient days [~~that a patient stays in the hospital~~] per DRG.

(24) [~~(23)~~] Medical education add-on--An adjustment to the base SDA for an urban teaching hospital to reflect higher patient care costs relative to non-teaching urban hospitals.

(25) [~~(24)~~] Military hospital--A hospital operated by the armed forces of the United States.

(26) [~~(25)~~] New Hospital--A hospital that was enrolled as a Medicaid provider after the end of the base year and has no base year claims data.

(27) [~~(26)~~] Out-of-state children's hospital--A hospital located outside of Texas that is recognized by Medicare as a children's hospital and is exempted by Medicare from the Medicare prospective payment system.

(28) [~~(27)~~] Realignment--Recalculation of the base SDA and add-ons using current RCCs, inflation factors, and base year claims as specified by HHSC, or its designee, for one or more hospital types.

(29) [~~(27)~~] Rebasing--Calculation of [~~the base year cost per claim for each Medicaid inpatient hospital~~] the DRG relative weights, MLOS, and day outlier thresholds in addition to a realignment using a base period as specified by HHSC, or its designee.

(30) [~~(28)~~] Relative weight--The weighting factor HHSC assigns to a DRG representing the time and resources associated with providing services for that DRG.

(31) Rural base year stays--An individual set of base year stays is compiled for rural hospitals for the purposes of rate setting and realignment. All inpatient FFS claims and inpatient managed care encounters for reimbursement filed by a rural hospital that:

(A) had a date of admission occurring within the base year;

(B) were adjudicated and approved for payment during the base year or the six-month period that immediately followed the base year, except for such stays that had zero inpatient days;

(C) were not stays for patients who are covered by Medicare; and

(D) were not Medicaid spend-down stays; and were not stays associated with military hospitals, out-of-state hospitals, state-owned teaching hospitals, and freestanding psychiatric hospitals.

(32) [~~(29)~~] Rural hospital--A hospital enrolled as a Medicaid provider that:

(A) is located in a county with 60,000 or fewer persons according to the 2010 U.S. Census;

(B) is designated by Medicare as a Critical Access Hospital (CAH), a Sole Community Hospital (SCH), or a Rural Referral Center (RRC) that is not located in a Metropolitan Statistical Area (MSA), as defined by the U.S. Office of Management and Budget; or

(C) meets all of the following:

(i) has 100 or fewer beds;

(ii) is designated by Medicare as a CAH, a SCH, or a RRC; and

(iii) is located in an MSA.

(33) [~~(30)~~] Safety-Net add-on--An adjustment to the base SDA for a safety-net hospital to reflect the higher costs of providing Medicaid inpatient services in a hospital that provides a significant percentage of its services to Medicaid and/or uninsured patients.

(34) [~~(31)~~] Safety-Net hospital--An urban or children's hospital that meets the eligibility and qualification requirements described in §355.8065 of this division (relating to Disproportionate Share Hospital Reimbursement Methodology) for the most recent federal fiscal year for which such eligibility and qualification determinations have been made.

(35) Standard Dollar Amount (SDA)--A standardized payment amount calculated by HHSC for the costs incurred by prospectively-paid hospitals in Texas for furnishing covered inpatient hospital services.

(36) [~~(32)~~] State-owned teaching hospital--Acute care hospitals owned and operated by the state of Texas. [~~The following hospitals: University of Texas Medical Branch (UTMB); University of Texas Health Center Tyler; and M.D. Anderson Hospital.~~]

(37) [~~(33)~~] Teaching hospital--A hospital for which CMS has calculated and assigned a percentage Medicare education adjustment factor under 42 CFR §412.105.

(38) [~~(34)~~] Teaching medical education add-on--An adjustment to the base SDA for a children's teaching hospital with a program approved by the Accreditation Council for Graduate Medical Education (ACGME) to reflect higher patient care costs relative to non-teaching children's hospitals.

(39) [~~(35)~~] TEFRA target cap--A limit set under the Social Security Act §1886(b) (42 U.S.C. §1395ww(b)) and applied to a hospital's cost settlement under methods and procedures in the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA). TEFRA target cap is not applied to services provided to patients under age 21, and incentive and penalty payments associated with this limit are not applicable to those services.

(40) [~~(36)~~] Tentative settlement--Reconciliation of cost in the Medicare/Medicaid hospital fiscal year-end cost report performed by HHSC within six months after HHSC receives an acceptable cost report filed by a hospital.

(41) [~~(37)~~] Texas provider identifier (TPI)--A unique number assigned to a provider of Medicaid services in Texas.

(42) [~~(38)~~] Trauma add-on--An adjustment to the base SDA for a trauma hospital to reflect the higher costs of obtaining and maintaining a trauma facility designation, as well as the direct costs of providing trauma services, relative to non-trauma hospitals or to hospitals with lower trauma facility designations. To be eligible for the trauma add-on, a hospital must be eligible to receive an allocation from the trauma facilities and emergency medical services account under Texas Health and Safety Code Chapter 780.

(43) [~~(39)~~] Trauma hospital--An inpatient hospital that meets the Texas Department of State Health Services criteria for a Level I, II, III, or IV trauma facility designation under 25 Texas Administrative Code §157.125 (relating to Requirements for Trauma Facility Designation).

(44) [~~(40)~~] Universal mean--Average base year cost per claim for all urban hospitals.

(45) [~~(41)~~] Urban hospital--Hospital located in a metropolitan statistical area and not fitting the definition of rural hospitals, children's hospitals, state-owned teaching hospitals, or freestanding psychiatric hospitals.

(c) Base children's hospitals SDA calculations. HHSC will use the methodologies described in this subsection to determine average statewide base SDA and a final SDA for each children's hospital.

(1) HHSC calculates the average base year cost per claim as follows.

(A) To calculate the total inpatient base year cost per children's hospital:

(i) sum the allowable inpatient charges by hospital for the base year claims; and

(ii) multiply clause (i) of this subparagraph by the hospital's inpatient RCC and the inflation update factors to inflate the base year cost to the current year.

(B) Sum the amount of all hospitals' base year costs from subparagraph (A) of this paragraph.

(C) Subtract an amount equal to the estimated outlier payment amount for the base year claims for all children's hospitals from subparagraph (B) of this paragraph.

(D) To derive the average base year cost per claim, divide the result from subparagraph (C) of this paragraph by the total number of base year claims.

(2) HHSC calculates the base children's SDA as follows.

(A) From the amount determined in paragraph (1)(A)(ii) of this subsection, HHSC sets aside an amount for add-ons as described in paragraph (3) of this subsection. In determining the amount to set aside, HHSC considers factors including other funding available to reimburse high-cost hospital functions and services, available data sources, historical costs, Medicare practices, and feedback from hospital industry experts.

(B) The amount remaining from paragraph (1)(C) of this subsection after HHSC sets aside the amount for add-ons in subparagraph (A) of this paragraph is then divided by the sum of the relative weights for all children's base year claims to derive the base SDA.

(3) A children's hospital may receive increases to the base SDA for any of the following.

(A) Add-on amounts, which will be determined or adjusted based on the following.

(i) Impact files.

(I) HHSC will use the most recent finalized impact file available at the time of realignment to calculate add-ons; and

(II) HHSC will use the impact file in effect at the last realignment to calculate add-ons for new hospitals, except as otherwise specified in this section.

(ii) Geographic wage reclassification. If a hospital becomes eligible for the geographic wage reclassification under Medicare, the hospital will become eligible for the adjustment upon the next realignment.

(iii) Teaching medical education add-on during the fiscal year. If a hospital becomes eligible for the teaching medical education add-on, the hospital will receive an increased final SDA to include these newly eligible add-ons, effective for claims that have a date of discharge occurring on or after the first day of the next state fiscal year.

(iv) Safety-net add-on during the fiscal year. The hospital will receive an increased final SDA to include these newly eligible add-ons, effective for claims that have a date of discharge occurring on or after the first day of the next state fiscal year.

(v) New children's hospital teaching medical education add-on. If an eligible children's hospital is new to the Medicaid program and a cost report is not available, the teaching medical education add-on will be calculated at the beginning of the state fiscal year after a cost report is received.

(B) Geographic wage add-on.

(i) CBSA assignment. For claims with dates of admission beginning September 1, 2013, and continuing until the next realignment, the geographic wage add-on for children's hospitals will be calculated based on the corresponding CBSA in the impact file in effect on September 1, 2011.

(ii) Designated impact file. Subsequent add-ons will be based on the impact file available at the time of realignment.

(iii) Wage index. To determine a children's hospital geographic wage add-on, HHSC first calculates a wage index for Texas as follows.

(I) HHSC identifies the Medicare wage index factor for each CBSA in Texas.

(II) HHSC identifies the lowest Medicare wage index factor in Texas.

(III) HHSC divides the Medicare wage index factor in subclause (I) of this clause for each CBSA by the lowest Medicare wage index factor identified in subclause (II) of this clause and subtracts one from each resulting quotient.

(iv) County assignment. HHSC will initially assign a hospital to a CBSA based on the county in which the hospital is located. A hospital that has been approved for geographic reclassification under Medicare may request that HHSC recognize its Medicare CBSA reclassification under the process described in subparagraph (E) of this paragraph.

(v) Medicare labor-related percentage. HHSC uses the Medicare labor-related percentage available at the time of realignment.

(vi) Geographic wage add-on calculation. The final geographic wage add-on is equal to the product of the base SDA calculated in subsection (c)(2)(B) of this section, the wage index calculated in clause (iii)(III) of this subparagraph, and the Medicare labor-related percentage in clause (v) of this subparagraph.

(C) Teaching medical education add-on.

(i) Eligibility. A teaching hospital that is a children's hospital is eligible for the teaching medical education add-on. Each children's hospital is required to confirm, under the process described in subparagraph (E) of this paragraph, that HHSC's determination of the hospital's eligibility for the add-on is correct.

(ii) Teaching medical education add-on calculation.

(I) For each children's hospital, identify the total hospital medical education cost from each hospital cost report or reports that cross over the base year.

(II) For each children's hospital, sum the amounts identified in subclause (I) of this clause to calculate the total medical education cost.

(III) For each children's hospital, calculate the average medical education cost by dividing the amount from subclause (II) of this clause by the number of cost reports that cross over the base year.

(IV) Sum the average medical education cost per hospital to determine a total average medical education cost for all hospitals.

(V) For each children's hospital, divide the average medical education cost for the hospital from subclause (III) of this clause by the total average medical education cost for all hospitals from subclause (IV) of this clause to calculate a percentage for the hospital.

(VI) Divide the total average medical education cost for all hospitals from subclause (IV) of this clause by the total base year cost for all children's hospitals from subsection (c)(1)(B) of this section to determine the overall teaching percentage of Medicaid cost.

(VII) For each children's hospital, multiply the percentage from subclause (V) of this clause by the percentage from subclause (VI) of this clause to determine the teaching percentage for the hospital.

(VIII) For each children's hospital, multiply the hospital's teaching percentage by the base SDA amount to determine the teaching medical education add-on amount.

(D) Safety-Net add-on.

(i) Eligibility. If a children's hospital meets the definition of a "safety-net hospital" as defined in subsection (b) of this section, it is eligible for a safety-net add-on.

(ii) Add-on amount. HHSC calculates the safety-net add-on amounts annually or at the time of realignment as follows.

(I) For each eligible hospital, determine the following amounts for a period of 12 contiguous months specified by HHSC:

(-a-) total allowable Medicaid inpatient days for fee-for-service claims;

(-b-) total allowable Medicaid inpatient days for managed care encounters;

(-c-) total relative weights for fee-for-service claims; and

(-d-) total relative weights for managed care encounters.

(II) Determine the total allowable days for eligible safety-net hospitals by summing the amounts in items (-a-) and (-b-) of this subclause.

(III) Determine the hospital's percentage of total allowable days to the total in subclause (II) of this clause.

(IV) Determine the hospital's portion of appropriated safety-net funds before the MCO adjustment factor is applied by multiplying the amount in subclause (III) of this clause for each hospital by the total safety-net funds deflated to the data year.

(V) For each hospital, multiply item (-d-) of this subclause by the relevant MCO adjustment factor.

(VI) Sum the amounts in item (-c-) of this subclause and subclause (V) of this clause for each hospital.

(VII) To calculate the safety-net add-on, divide the amount in subclause (IV) of this clause by the amount in subclause (VI) of this clause for each hospital. The result is the safety-net add-on.

(iii) Reconciliation. Effective for costs and revenues accrued on or after September 1, 2015, HHSC may perform a reconciliation for each hospital that received the safety-net add-on to identify any such hospitals with total Medicaid reimbursements for inpatient and outpatient services in excess of their total Medicaid and uncompensated care inpatient and outpatient costs. For hospitals with total Medicaid reimbursements in excess of total Medicaid and uncompensated care costs, HHSC may recoup the difference.

(E) Add-on status verification.

(i) Notification. HHSC will determine a hospital's initial add-on status by reference to the impact file at the time of realignment, Medicaid days, and relative weight information from HHSC's fiscal intermediary. HHSC will notify the hospital of the CBSA to which the hospital is assigned, the Medicare teaching hospital designation for children's hospitals as applicable, and any other related information determined relevant by HHSC. For state fiscal years 2017 and after, HHSC will also notify eligible hospitals of the data used to calculate the safety-net add-on. HHSC may post the information on its website, send the information through the established Medicaid notification procedures used by HHSC's fiscal intermediary, send through other direct mailing, or provide the information to hospital associations to disseminate to their member hospitals.

(ii) Rate realignment. HHSC will calculate a hospital's final SDA using the add-on status initially determined by HHSC unless, within 14 calendar days after the date of the notification, HHSC receives notification in writing from the hospital, in a format determined by HHSC, that any add-on status determined by HHSC is incorrect and:

(I) the hospital provides documentation of its eligibility for a different teaching medical education add-on or teaching hospital designation;

(II) the hospital provides documentation that it is approved by Medicare for reclassification to a different CBSA; or

(III) for state fiscal years 2017 and after, the hospital provides documentation of different data and demonstrates to HHSC's satisfaction that the different data should be used to calculate the safety-net add-on.

(iii) Annual SDA calculation. HHSC will calculate a hospital's final SDA annually using the add-on status initially determined during realignment by HHSC unless, within 14 calendar days after the date of the notification, HHSC receives notification in writing from the hospital, in a format determined by HHSC, that any add-on status determined by HHSC is incorrect and:

(I) the hospital provides documentation of a new teaching program or new teaching hospital designation; or

(II) for state fiscal years 2017 and after, the hospital provides documentation of different data and demonstrates to HHSC's satisfaction that the different data should be used to calculate the safety-net add-on.

(iv) Failure to notify. If a hospital fails to notify HHSC within 14 calendar days after the date of the notification that the

add-on status as initially determined by HHSC includes one or more add-ons for which the hospital is not eligible, resulting in an overpayment, HHSC will recoup such overpayment and will prospectively reduce the SDA accordingly.

(4) Final children's hospital SDA calculations. HHSC calculates a children's hospital's final SDA as follows.

(A) Add all add-on amounts for which the hospital is eligible to the base SDA.

(B) For labor and delivery services provided to adults age 18 or older in a children's hospital, the final SDA is equal to the base SDA for urban hospitals without add-ons, calculated as described in subsection (d)(4)(E)(i) of this section plus the urban hospital geographic wage add-on for an urban hospital located in the same CBSA as the children's hospital providing the service.

(C) For new children's hospitals that are not teaching hospitals, for which HHSC has no base year claim data, the final SDA is the base SDA plus the hospital's geographic wage add-on. The SDA will be inflated from the base year to the current period at the time of enrollment or to state fiscal year 2015, whichever is earlier.

(D) For new children's hospitals that qualify for the teaching medical education add-on, as defined in subsection (b) of this section, for which HHSC has no base year claim data, the final SDA is calculated based on one of the following options until realignment is performed with base year claim data for the hospital. A new children's hospital must notify the HHSC Provider Finance Department of its selected option within 60 days from the date the hospital is notified of its provider activation by HHSC's fiscal intermediary. If the HHSC Provider Finance Department does not receive timely notice of the option, HHSC will assign the hospital the SDA calculated as described in clause (i) of this subparagraph. The SDA calculated based on the selected option will be effective retroactive to the first day of the provider's enrollment.

(i) Children's hospital base SDA plus the applicable geographic wage add-on and the minimum teaching add-on for existing children's hospitals. No settlement of costs is required for services reimbursed under this option. The SDA will be in effect until the next realignment when a new SDA will be determined. The SDA will be inflated from the base year to the current period at the time of enrollment or to state fiscal year 2015, whichever is earlier.

(ii) Children's base SDA plus the applicable geographic wage add-on and the maximum teaching add-on for existing children's hospitals. A cost settlement is required for services reimbursed under this option. The SDA will be in effect for the hospital until the next realignment when a new SDA will be determined. The SDA will be inflated from the base year to the current period at the time of enrollment or to state fiscal year 2015, whichever is earlier.

~~[(c) Base urban and children's hospital standard dollar amount (SDA) calculations. HHSC will use the methodologies described in this subsection to determine two separate average statewide base SDAs: one for children's hospitals and one for urban hospitals. For each category of hospital:]~~

~~[(1) HHSC calculates the average base year cost per claim as follows:]~~

~~[(A) Use the sum of the base year costs per claim for each hospital.]~~

~~[(B) Sum the amount for all hospitals' base year costs from subparagraph (A) of this paragraph.]~~

~~[(C) For children's hospitals subtract an amount equal to the estimated outlier payment amount for the base year claims for all children's hospitals from subparagraph (B) of this paragraph.]~~

~~[(D) To derive the average base year cost per claim:]~~

~~*[(i)* for urban hospitals, divide the result from subparagraph (B) of this paragraph by the total number of base year claims; and]~~

~~*[(ii)* for children's hospitals, divide the result from subparagraph (C) of this paragraph by the total number of base year claims.]~~

~~[(E) The result from subparagraph (D)(i) of this paragraph is the universal mean that is used in calculations described in subsections (g) and (h) of this section.]~~

~~[(2) From the amount determined in paragraph (1)(B) of this subsection for urban hospitals and paragraph (1)(C) of this subsection for children's hospitals, HHSC sets aside an amount to recognize high-cost hospital functions, services and regional wage differences. In determining the amount to set aside, HHSC considers factors including other funding available to reimburse high-cost hospital functions and services, available data sources, historical costs, Medicare practices, and feedback from hospital industry experts.]~~

~~[(A) The costs remaining after HHSC sets aside the amount for high-cost hospital functions and services will be used to determine the base SDA.]~~

~~[(B) The costs HHSC sets aside will determine the funds available for distribution to hospitals that are eligible for one or more add-ons as described in subsection (d) of this section.]~~

~~[(3) HHSC divides the amount in paragraph (2)(A) of this subsection by the total number of base year claims to derive the base SDA.]~~

(d) Base urban hospital SDA calculations. HHSC will use the methodologies described in this subsection to determine the average statewide base SDA and the final SDA for each urban hospital.

(1) HHSC calculates the average base year cost per claim (the universal mean) as follows.

(A) To calculate the total inpatient base year cost per urban hospital:

(i) sum the allowable inpatient charges by hospital for the base year claims; and

(ii) multiply clause (i) of this subparagraph by the hospital's inpatient RCC and the inflation update factors to inflate the base year cost to the current year.

(B) Sum the amount for all hospitals' base year costs from subparagraph (A) of this paragraph.

(C) To derive the average base year cost per claim, divide the result from subparagraph (B) of this paragraph by the total number of base year claims.

(2) HHSC calculates the base urban SDA as follows.

(A) From the amount determined in paragraph (1)(A)(ii) of this subsection for urban hospitals, HHSC sets aside an amount for add-ons as described in paragraph (3) of this subsection. In determining the amount to set aside, HHSC considers factors including other funding available to reimburse high-cost hospital functions and services, available data sources, historical costs, Medicare practices, and feedback from hospital industry experts.

(B) The amount remaining from paragraph (1)(A)(ii) of this subsection after HHSC sets aside the amount for add-ons in subparagraph (A) of this paragraph is then divided by the total number of base year claims to derive the base SDA.

(3) An urban hospital may receive increases to the base SDA for any of the following.

(A) Add-on amounts, which will be determined or adjusted based on the following.

(i) Impact files.

(I) HHSC will use the most recent finalized impact file available at the time of realignment to calculate add-ons; and

(II) HHSC will use the impact file in effect at the last realignment to calculate add-ons for new hospitals, except as otherwise specified in this section.

(ii) Geographic wage reclassification. If a hospital becomes eligible for the geographic wage reclassification under Medicare, the hospital will become eligible for the adjustment upon the next realignment.

(iii) Medical education add-on during fiscal year. If an existing hospital has a change in its medical education operating adjustment factor under Medicare, the hospital will become eligible for the adjustment to its medical education add-on upon the next realignment.

(iv) New medical education add-on. If a hospital becomes eligible for the medical education add-on after the most recent realignment:

(I) the hospital will receive a medical education add-on, effective for claims that have a date of discharge occurring on or after the first day of the next state fiscal year; and

(II) HHSC will calculate the add-on using the impact file in effect at the time the hospital initially claims eligibility for the medical education add-on; and

(III) this amount will remain fixed until the next realignment.

(B) Geographic wage add-on.

(i) Designated impact file. Subsequent add-ons will be based on the impact file available at the time of realignment.

(ii) Wage index. To determine an urban geographic wage add-on, HHSC first calculates a wage index for Texas as follows.

(I) HHSC identifies the Medicare wage index factor for each CBSA in Texas;

(II) HHSC identifies the lowest Medicare wage index factor in Texas;

(III) HHSC divides the Medicare wage index factor identified in subclause (I) of this clause for each CBSA by the lowest Medicare wage index factor identified in subclause (II) of this clause and subtracts one from each resulting quotient.

(iii) County assignment. HHSC will initially assign a hospital to a CBSA based on the county in which the hospital is located. A hospital that has been approved for geographic reclassification under Medicare may request that HHSC recognize its Medicare CBSA reclassification under the process described in subparagraph (F) of this paragraph.

(iv) Medicare labor-related percentage. HHSC uses the Medicare labor-related percentage available at the time of realignment.

(v) Geographic wage add-on calculation. The final geographic wage add-on is equal to the product of the base SDA calculated in subsection (d)(2)(B) of this section, the wage index calculated in clause (ii)(III) of this subparagraph, and the Medicare labor-related percentage in clause (iv) of this subparagraph.

(C) Medical education add-on.

(i) Eligibility. If an urban hospital meets the definition of a teaching hospital, as defined in subsection (b) of this section, it is eligible for the medical education add-on. Each hospital is required to confirm, under the process described in subparagraph (F) of this paragraph, that HHSC's determination of the hospital's eligibility and medical education operating adjustment factor under Medicare for the add-on is correct.

(ii) Add-on amount. HHSC multiplies the base SDA calculated in subsection (d)(2)(B) of this section by the hospital's Medicare education adjustment factor to determine the hospital's medical education add-on amount.

(D) Trauma add-on.

(i) Eligibility.

(I) If an urban hospital meets the definition of a trauma hospital, as defined in subsection (b) of this section, it is eligible for a trauma add-on.

(II) HHSC initially uses the trauma level designation associated with the physical address of a hospital's TPI. A hospital may request that HHSC, under the process described in subparagraph (F) of this paragraph use a higher trauma level designation associated with a physical address other than the hospital's TPI address.

(ii) Add-on amount. To determine the trauma add-on amount, HHSC multiplies the base SDA:

(I) by 28.3 percent for hospitals with Level 1 trauma designation;

(II) by 18.1 percent for hospitals with Level 2 trauma designation;

(III) by 3.1 percent for hospitals with Level 3 trauma designation; or

(IV) by 2.0 percent for hospitals with Level 4 trauma designation.

(iii) Reconciliation with other reimbursement for uncompensated trauma care. Subject to General Appropriations Act and other applicable law:

(I) if a hospital's allocation from the trauma facilities and emergency medical services account administered under Texas Health and Safety Code Chapter 780, is greater than the total trauma add-on amount estimated to be paid to the hospital under this section during the state fiscal year, the Department of State Health Services will pay the hospital the difference between the two amounts at the time funds are disbursed from that account to eligible trauma hospitals; and

(II) if a hospital's allocation from the trauma facilities and emergency medical services account is less than the total trauma add-on amount estimated to be paid to the hospital under this section during the state fiscal year, the hospital will not receive a pay-

ment from the trauma facilities and emergency medical services account.

(E) Safety-Net add-on.

(i) Eligibility. If an urban hospital meets the definition of a safety-net hospital as defined in subsection (b) of this section, it is eligible for a safety-net add-on.

(ii) Add-on amount. HHSC calculates the safety-net add-on amounts annually or at the time of realignment as follows.

(I) For each eligible hospital, determine the following amounts for a period of 12 contiguous months specified by HHSC:

(-a-) total allowable Medicaid inpatient days for fee-for-service claims;

(-b-) total allowable Medicaid inpatient days for managed care encounters;

(-c-) total relative weights for fee-for-service claims; and

(-d-) total relative weights for managed care encounters.

(II) Determine the total allowable days for eligible safety-net hospitals by summing the amounts in items (-a-) and (-b-) of this subclause.

(III) Determine the hospital's percentage of total allowable days to the total in subclause (II) of this clause.

(IV) Determine the hospital's portion of appropriated safety-net funds before the MCO adjustment factor is applied by multiplying the amount in subclause (III) of this clause for each hospital by the total safety-net funds deflated to the data year.

(V) For each hospital, multiply item (-d-) of this subclause by the relevant MCO adjustment factor.

(VI) Sum the amounts in item (-c-) of this subclause and subclause (V) of this clause for each hospital.

(VII) To calculate the safety-net add-on, divide the amount in subclause (IV) of this clause by the amount in subclause (VI) of this clause for each hospital. The result is the safety-net add-on.

(iii) Reconciliation. Effective for costs and revenues accrued on or after September 1, 2015, HHSC may perform a reconciliation for each hospital that received the safety-net add-on to identify any such hospitals with total Medicaid reimbursements for inpatient and outpatient services in excess of their total Medicaid and uncompensated care inpatient and outpatient costs. For hospitals with total Medicaid reimbursements in excess of total Medicaid and uncompensated care costs, HHSC may recoup the difference.

(F) Add-on status verification.

(i) Notification. HHSC will determine a hospital's initial add-on status by reference to the impact file available at the time of realignment or at the time of eligibility for a new medical education add-on as described in subparagraph (A)(iv) of this paragraph; the Texas Department of State Health Services' list of trauma-designated hospitals; and Medicaid days and relative weight information from HHSC's fiscal intermediary. HHSC will notify the hospital of the CBSA to which the hospital is assigned, the Medicare education adjustment factor assigned to the hospital for urban hospitals, the trauma level designation assigned to the hospital, and any other related information determined relevant by HHSC. For state fiscal years 2017 and after, HHSC will also notify eligible hospitals of the data used to calculate the safety-net add-on. HHSC may post the information on its website, send the information through the established Medicaid notification procedures used by HHSC's fiscal intermediary, send through other direct mailing, or provide the information to the hospital associations to disseminate to their member hospitals.

(ii) During realignment, HHSC will calculate a hospital's final SDA using the add-on status initially determined by HHSC unless, within 14 calendar days after the date of the notification, the HHSC Provider Finance Department receives notification in writing from the hospital, in a format determined by HHSC, that any add-on status determined by HHSC is incorrect and:

(I) the hospital provides documentation of its eligibility for a different medical education add-on or teaching hospital designation;

(II) the hospital provides documentation that it is approved by Medicare for reclassification to a different CBSA;

(III) the hospital provides documentation of its eligibility for a different trauma designation; or

(IV) for state fiscal years 2017 and after, the hospital provides documentation of different data and demonstrates to HHSC's satisfaction that the different data should be used to calculate the safety-net add-on.

(iii) Annually, HHSC will calculate a hospital's final SDA using the add-on status initially determined during realignment by HHSC unless, within 14 calendar days after the date of the notification, HHSC receives notification in writing from the hospital (in a format determined by HHSC) that any add-on status determined by HHSC is incorrect and:

(I) the hospital provides documentation of a new teaching program or new teaching hospital designation; or

(II) the hospital provides documentation of its eligibility for a different trauma designation; or

(III) for state fiscal years 2017 and after, the hospital provides documentation of different data and demonstrates to HHSC's satisfaction that the diifferent data should be used to calculate the safety-net add-on.

(iv) If a hospital fails to notify HHSC within 14 calendar days after the date of the notification that the add-on status as initially determined by HHSC includes one or more add-ons for which the hospital is not eligible, resulting in an overpayment, HHSC will recoup such overpayment and will prospectively reduce the SDA accordingly.

(4) Urban hospital final SDA calculations. HHSC calculates an urban hospital's final SDA as follows.

(A) Add all add-on amounts for which the hospital is eligible to the base SDA. These are the fully-funded final SDAs.

(B) Multiply the final SDA determined in subparagraph (A) of this paragraph by each urban hospital's total relative weight of the base year claims.

(C) Sum the amount calculated in subparagraph (B) of this paragraph for all urban hospitals.

(D) Divide the total funds appropriated for reimbursing inpatient urban hospital services under this section by the amount determined in subparagraph (C) of this paragraph.

(E) To determine the budget-neutral final SDA:

(i) multiply the base SDA in paragraph (2) of this subsection by the percentage determined in subparagraph (D) of this paragraph;

(ii) multiply each of the add-ons described in paragraph (3)(B) - (E) by the percentage determined in subparagraph (D) of this paragraph; and

(iii) sum the results of clauses (i) and (ii) of this subparagraph.

(F) For new urban hospitals for which HHSC has no base year claim data, the final SDA is a base SDA plus any add-ons for which the hospital is eligible, multiplied by the percentage determined in subparagraph (D) of this paragraph.

~~[(d) Add-ons.]~~

~~[(1) A children's hospital may receive increases to the base SDA for any of the following:]~~

~~[(A) Geographic wage add-on, as described in paragraph (4) of this] subsection.]~~

~~*[(i)* For claims with dates of admission beginning September 1, 2013, and continuing until the next rebasing, the geographic wage add-on for children's hospitals will be calculated based on the impact file in effect on September 1, 2011.]~~

~~*[(ii)* Subsequent add-ons will be based on the impact file available at the time of rebasing.]~~

~~[(B) Teaching medical education add-on, as described in paragraph (5) of this subsection.]~~

~~[(C) Safety-Net add-on, as described in paragraph (8) of this subsection.]~~

~~[(D) Children's Hospital Supplemental add-on, as described in paragraph (9) of this subsection.]~~

~~[(2) An urban hospital may receive increases to the base SDA for any of the following:]~~

~~[(A) Geographic wage add-on, as described in paragraph (4) of this subsection.]~~

~~[(B) Medical education add-on, as described in paragraph (6) of this subsection.]~~

~~[(C) Trauma add-on, as described in paragraph (7) of this subsection.]~~

~~[(D) Safety-Net add-on, as described in paragraph (8) of this subsection.]~~

~~[(3) Add-on amounts will be determined or adjusted based on the following:]~~

~~[(A) Impact files.]~~

~~*[(i)* HHSC will use the impact file in effect at the last rebasing to calculate add-ons for new hospitals, except as otherwise specified in this section; and]~~

~~*[(ii)* HHSC will use the most recent finalized impact file from the current Hospital Inpatient Prospective Payment System (PPS) final rule available at the time of rebasing to calculate add-ons.]~~

~~[(B) If a hospital becomes eligible for the geographic wage reclassification under Medicare during the fiscal year, the hospital will become eligible for the adjustment upon the next rebasing.]~~

~~[(C) If a hospital becomes eligible for the teaching medical education add-on, medical education add-on, trauma add-on, or safety-net add-on during the fiscal year, the hospital will receive an increased final SDA to include these newly eligible add-ons, effective for claims that have a date of discharge occurring on or after the first day of the next state fiscal year.]~~

~~[(D) If an eligible children's hospital is new to the Medicaid program and a cost report is not available, the teaching medical education add-on will be calculated at the beginning of the state fiscal year after a cost report is received.]~~

~~[(4) Geographic wage add-on.]~~

~~[(A) Wage index. To determine a children's or urban hospital's geographic wage add-on, HHSC first calculates a wage index for Texas as follows:]~~

~~*[(i)* HHSC identifies the Medicare wage index factor for each Core Based Statistical Area (CBSA) in Texas.]~~

~~*[(ii)* HHSC identifies the lowest Medicare wage index factor in Texas.]~~

~~*[(iii)* HHSC divides the Medicare wage index factor for each CBSA by] the lowest Medicare wage index factor identified in clause (ii) of this subparagraph and subtracts one from each resulting quotient to arrive at a percentage.]~~

~~*[(iv)* HHSC uses the result of the calculations in clause (iii) of this subparagraph to calculate each CBSA's add-on amount described in subparagraph (C) of this paragraph.]~~

~~[(B) County assignment. HHSC will initially assign a hospital to a CBSA based on the county in which the hospital is located. A hospital that has been approved for geographic reclassification under Medicare may request that HHSC recognize its Medicare CBSA reclassification, under the process described in paragraph (10) of this subsection.]~~

~~[(C) Add-on amount.]~~

~~*[(i)* HHSC calculates 62 percent of the base SDA to derive the labor-related portion of that rate, consistent with the Medicare labor-related percentage.]~~

~~*[(ii)* To determine the geographic wage add-on amount for each CBSA, HHSC multiplies the wage index factor determined in subparagraph (A)(iv) of this paragraph for that CBSA by the percentage labor share of the base SDA calculated in clause (i) of this subparagraph.]~~

~~[(5) Teaching medical education add-on.]~~

~~[(A) Eligibility. A teaching hospital that is a children's hospital is eligible for the teaching medical education add-on. Each children's hospital is required to confirm, under the process described in paragraph (9) of this subsection, that HHSC's determination of the hospital's eligibility for the add-on is correct.]~~

~~[(B) Add-on amount. HHSC calculates the teaching medical education add-on amounts as follows:]~~

~~*[(i)* For each children's hospital, identify the total hospital medical education cost from each hospital cost report or reports that cross over the base year.]~~

~~*[(ii)* For each children's hospital, sum the amounts identified in clause (i) of this subparagraph to calculate the total medical education cost.]~~

~~*[(iii)* For each children's hospital, calculate the average medical education cost by dividing the amount from clause (ii) of this subparagraph by the number of cost reports that cross over the base year.]~~

~~*[(iv)* Sum the average medical education cost per hospital to determine a total average medical education cost for all hospitals.]~~

[(v) For each children's hospital, divide the average medical education cost for the hospital from clause (iii) of this subparagraph by the total average medical education cost for all hospitals from clause (iv) of this subparagraph to calculate a percentage for the hospital.]

[(vi) Divide the total average medical education cost for all hospitals from clause (iv) of this subparagraph by the total base year cost for all children's hospitals from subsection (e)(1)(B) of this section to determine the overall teaching percentage of Medicaid cost.]

[(vii) For each children's hospital, multiply the percentage from clause (v) of this subparagraph by the percentage from clause (vi) of this subparagraph to determine the teaching percentage for the hospital.]

[(viii) For each children's hospital, multiply the hospital's teaching percentage by the base SDA amount to determine the teaching medical education add on amount.]

[(6) Medical education add-on.]

[(A) Eligibility. A teaching hospital that is an urban hospital is eligible for the medical education add-on. Each hospital is required to confirm, under the process described in paragraph (10) of this subsection, that HHSC's determination of the hospital's eligibility and Medicare education adjustment factor for the add-on is correct.]

[(B) Add-on amount. HHSC multiplies the base SDA by the hospital's Medicare education adjustment factor to determine the hospital's medical education add-on amount.]

[(7) Trauma add-on.]

[(A) Eligibility.]

[(i) To be eligible for the trauma add-on, a hospital must be designated as a trauma hospital by the Texas Department of State Health Services and be eligible to receive an allocation from the trauma facilities and emergency medical services account under Chapter 780, Health and Safety Code.]

[(ii) HHSC initially uses the trauma level designation associated with the physical address of a hospital's TPI. A hospital may request that HHSC, under the process described in paragraph (9) of this subsection, use a higher trauma level designation associated with a physical address other than the hospital's TPI address.]

[(B) Add-on amount. To determine the trauma add-on amount, HHSC multiplies the base SDA:]

[(i) by 28.3 percent for hospitals with Level 1 trauma designation;]

[(ii) by 18.1 percent for hospitals with Level 2 trauma designation;]

[(iii) by 3.1 percent for hospitals with Level 3 trauma designation; or]

[(iv) by 2.0 percent for hospitals with Level 4 trauma designation.]

[(C) Reconciliation with other reimbursement for uncompensated trauma care. Subject to the General Appropriations Act and other applicable law:]

[(i) If a hospital's allocation from the trauma facilities and emergency medical services account administered under Chapter 780, Health and Safety Code, is greater than the total trauma add-on amount estimated to be paid to the hospital under this section during the state fiscal year, the Department of State Health Services will pay the hospital the difference between the two amounts at the time funds are disbursed from that account to eligible trauma hospitals.]

[(ii) If a hospital's allocation from the trauma facilities and emergency medical services account is less than the total trauma add-on amount estimated to be paid to the hospital under this section during the state fiscal year, the hospital will not receive a payment from the trauma facilities and emergency medical services account.]

[(8) Safety-Net add-on.]

[(A) Eligibility. To be eligible for the safety-net add-on, a hospital must meet the definition of a safety-net hospital in subsection (b) of this section.]

[(B) Add-on amount. HHSC calculates the safety-net add-on amounts as follows:]

[(i) for each eligible hospital, determine the total allowable Medicaid inpatient days for a period of 12 contiguous months specified by HHSC;]

[(ii) sum the amounts identified in clause (i) of this subparagraph to calculate the total allowable Medicaid inpatient days for all eligible hospitals;]

[(iii) for each eligible hospital, divide the amount determined in clause (i) of this subparagraph by the amount determined in clause (ii) of this subparagraph to calculate the hospital's percentage of total allowable Medicaid inpatient days for all eligible hospitals;]

[(iv) for each eligible hospital, multiply the amount determined in clause (iii) of this subparagraph by the amount of available funds;]

[(v) for each eligible hospital, sum the relative weights of all inpatient claims for the period of 12 contiguous months indicated in clause (i) of this subparagraph; and]

[(vi) for each eligible hospital, divide the amount determined in clause (iv) of this subparagraph by the amount determined in clause (v) of this subparagraph to calculate the safety-net add-on amount.]

[(C) Reconciliation. Effective for costs and revenues accrued on or after September 1, 2015, HHSC may perform a reconciliation for each hospital that received the safety-net add-on to identify any such hospitals with total Medicaid reimbursements for inpatient and outpatient services in excess of their total Medicaid and uncompensated care inpatient and outpatient costs. For hospitals with total Medicaid reimbursements in excess of total Medicaid and uncompensated care costs, HHSC may recoup the difference.]

[(9) Children's Hospital Supplemental add-on.]

[(A) Eligibility.]

[(i) To be eligible for the Children's Hospital Supplemental add-on, a hospital must meet the definition of a children's hospital in subsection (b) of this section on September 1, 2019.]

[(ii) This add-on will be effective for inpatient hospital discharges occurring after August 31, 2019 and before September 1, 2020.]

[(B) Add-on amount. Each eligible hospital will receive an SDA add-on equal to $1122.18.]

[(10) Add-on status verification.]

[(A) Notification. HHSC will determine a hospital's initial add-on status by reference to the impact file; the Texas Department

of State Health Services' list of trauma-designated hospitals; and Medicaid days and relative weight information from HHSC's fiscal intermediary. HHSC will notify the hospital of the CBSA to which the hospital is assigned, the Medicare education adjustment factor assigned to the hospital for urban hospitals, the trauma level designation assigned to the hospital, the Medicare teaching hospital designation for children's hospitals as applicable, and any other related information determined relevant by HHSC. For state fiscal years 2017 and after, HHSC will also notify eligible hospitals of the data used to calculate the safety-net add-on. HHSC may post the information on HHSC's website, send the information through the established Medicaid notification procedures used by HHSC's fiscal intermediary, send through other direct mailing, or provide the information to the hospital associations to disseminate to their member hospitals.]

[(B) HHSC will calculate a hospital's final SDA using the add-on status initially determined by HHSC unless, within 14 calendar days after the date of the notification, HHSC receives notification, in writing by regular mail, hand delivery or special mail delivery, from the hospital (in a format determined by HHSC) that any add-on status determined by HHSC is incorrect and:]

[(i) the hospital provides documentation of its eligibility for a different trauma designation, medical education percentage, or teaching hospital designation;]

[(ii) the hospital provides documentation that it is approved by Medicare for reclassification to a different CBSA; or]

[(iii) for state fiscal years 2017 and after, the hospital provides documentation of different data the hospital contends should be used to calculate the safety-net add-on.]

[(C) If a hospital fails to notify HHSC within 14 calendar days after the date of the notification that the add-on status as initially determined by HHSC includes one or more add-ons for which the hospital is not eligible, resulting in an overpayment, HHSC will recoup such overpayment and will prospectively reduce the SDA accordingly.]

(e) Rural hospital SDA calculations. HHSC will use the methodologies described in this subsection to determine the final SDA for each rural hospital.

(1) HHSC calculates the rural final SDA as follows.

(A) Base year cost. Calculate the total inpatient base year cost per rural hospital.

(i) Total the inpatient charges by hospital for the rural base year stays.

(ii) Multiply clause (i) by the hospital's inpatient RCC and the inflation update factors to inflate the base year claims to the current year of the realignment.

(B) Full-cost SDA. Calculate a hospital-specific full-cost SDA by dividing each hospital's base year cost, calculated as described in subparagraph (A) of this paragraph, by the sum of the relative weights for the rural base year stays.

(C) Calculating the SDA floor and ceiling.

(i) Calculate the average adjusted hospital-specific SDA from subparagraph (B) of this paragraph for all rural hospitals with more than 50 claims.

(ii) Calculate the standard deviation of the hospital-specific SDAs identified in subparagraph (B) of this paragraph for all rural hospitals with more than 50 claims.

(iii) Calculate an SDA floor as clause (i) minus clause (ii) multiplied by a factor, determined by HHSC to maintain budget neutrality.

(iv) Calculate an SDA ceiling as clause (i) plus clause (ii) multiplied by a factor, determined by HHSC to maintain budget neutrality.

(D) Assigning a final hospital-specific SDA.

(i) If the adjusted hospital-specific SDA from subparagraph (B) is less than the SDA floor in subparagraph (C)(iii) of this paragraph, the hospital is assigned the SDA floor amount as the final SDA.

(ii) If the adjusted hospital-specific SDA from subparagraph (B) is more than the SDA ceiling in subparagraph (C)(iv), the hospital is assigned the SDA ceiling amount as the final SDA.

(iii) Assign the adjusted hospital-specific SDA as the final SDA to each hospital not described in clauses (i) and (ii) of this subparagraph.

(2) Alternate SDA for labor and delivery. For labor and delivery services provided by rural hospitals on or after September 1, 2019, the final SDA is the alternate SDA for labor and delivery stays, which is equal to the final SDA determined in paragraph (1)(D) of this subsection plus an SDA add-on sufficient to increase paid claims by no less than $500.

(3) HHSC calculates a new rural hospital's final SDA as follows.

(A) For new rural hospitals for which HHSC has no base year claim data, the final SDA is the mean rural SDA in paragraph (1)(C)(i) of this subsection.

(B) The mean rural SDA assigned in subparagraph (A) of this paragraph remains in effect until the next realignment.

(4) Minimum Fee Schedule. Effective March 1, 2021, MCOs are required to reimburse rural hospitals based on a minimum fee schedule. The minimum fee schedule is the rate schedule as described above.

(5) Biennial review of rural rates. Every two years, HHSC will calculate new rural SDAs using the methodology in this subsection to the extent allowed by federal law and subject to limitations on appropriations.

[(e) Final urban and children's hospital SDA calculations.]

[(1) HHSC calculates an urban hospital's final SDA as follows:]

[(A) Add all add-on amounts for which the hospital is eligible to the base SDA.]

[(B) Multiply the SDA determined in subparagraph (A) of this paragraph by the hospital's total relative weight of base year claims as calculated in subsection (g)(1) of this section.]

[(C) Sum the amount calculated in subparagraph (B) of this paragraph for all urban hospitals.

[(D) Divide the total funds appropriated for reimbursing inpatient urban hospital services under this section by the amount determined in subparagraph (C) of this paragraph.]

[(E) Multiply the SDA determined for each hospital in subparagraph (A) of this paragraph by the percentage determined in subparagraph (D) of this paragraph.]

[(F) For new urban hospitals for which HHSC has no base year claim data, the final SDA is the base SDA plus any add-ons for which the hospital is eligible, multiplied by the percentage determined in subparagraph (D) of this paragraph.]

[(2) HHSC calculates a children's hospital's final SDA as follows:]

[(A) Add all add-on amounts for which the hospital is eligible to the base SDA.]

[(B) For labor and delivery services provided to adults age eighteen or greater in a children's hospital, the final SDA is equal to the base SDA for urban hospitals without add-ons, calculated as described in subsection (c)(3) of this section plus the urban hospital wage add-on for an urban hospital located in the same CBSA as the children's hospital providing the service.]

[(C) For new children's hospitals that are not teaching hospitals for which HHSC has no base year claim data, the final SDA is the base SDA plus the hospital's geographic wage add-on. The SDA will be inflated from the base year to the current period at the time of enrollment or to state fiscal year 2015, whichever is earlier.]

[(D) For new children's hospitals that qualify for the teaching medical education add-on described in subsection (b)(33) of this section for which HHSC has no base year claim data, the final SDA is calculated based on one of the following options until rebasing is performed with base year claim data for the hospital. A new children's hospital must notify the HHSC Rate Analysis Department of its selected option within 60 days from the date the hospital is notified of its provider activation by HHSC's fiscal intermediary. If notice of the option is not received, HHSC will assign the hospital the SDA calculated as described in clause (i) of this subparagraph. The SDA calculated based on the selected option will be effective retroactive to the first day of the provider's enrollment.]

[(i) Children's hospital base SDA plus the applicable geographic wage add-on and the minimum teaching add-on for existing children's hospitals. No settlement of costs is required for services reimbursed under this option. The SDA will be in effect for the hospital for three years or until the next rebasing when a new SDA will be determined. The SDA will be inflated from the base year to the current period at the time of enrollment or to state fiscal year 2015, whichever is earlier.]

[(ii) Children's base SDA plus the applicable geographic wage add-on and the maximum teaching add-on for existing children's hospitals. A cost settlement is required for services reimbursed under this option. The SDA will be in effect for the hospital for three years or until the next rebasing when a new SDA will be determined. The SDA will be inflated from the base year to the current period at] the time of enrollment or to state fiscal year 2015, whichever is earlier.]

[(3) For military and out-of-state hospitals, the final SDA is the urban hospital base SDA multiplied by the percentage determined in paragraph (1)(D) of this subsection.]

(f) Final SDA for military and out-of-state. The final SDA for military and out-of-state hospitals is the urban hospital base SDA multiplied by the percentage determined in subsection (d)(4)(D) of this section.

[(f) Final rural hospital SDA calculation.]

[(1) HHSC calculates a rural hospital's final SDA as follows:]

[(A) Calculate a hospital-specific full-cost SDA by dividing each hospital's base year cost, calculated as described in subsection (c)(1)(A) of this section, by the sum of the relative weights of the claims in the base year;]

[(B) Adjust the result from subparagraph (A) of this paragraph by multiplying the hospital- specific full-cost SDA by the inflation update factor to obtain an adjusted hospital-specific SDA;]

[(C) Calculate an SDA floor based on 1.5 standard deviations below the average adjusted hospital-specific SDA from subparagraph (B) of this paragraph for all rural hospitals with more than 50 claims as calculated in subparagraph (B) of this paragraph;]

[(D) Calculate an SDA ceiling based on 2.0 standard deviations above the average adjusted hospital-specific SDA from subparagraph (B) of this paragraph for all rural hospitals with more than 50 claims as calculated in subparagraph (B) of this paragraph;]

[(E) Compare the adjusted hospital-specific SDA for each hospital from subparagraph (B) of this paragraph to the SDA floor from subparagraph (C) of this paragraph. If the adjusted hospital-specific SDA is less than the SDA floor, the hospital is assigned the SDA floor amount as the final SDA;]

[(F) Compare the adjusted hospital-specific SDA for each hospital from subparagraph (B) of this paragraph to the SDA ceiling from subparagraph (D) of this paragraph. If the adjusted hospital-specific SDA is more than the SDA ceiling, the hospital is assigned the SDA ceiling amount as the final SDA;]

[(G) Assign the adjusted hospital-specific SDA as the final SDA to each hospital not described in subparagraphs (E) and (F) of this paragraph.]

[(H) Effective September 1, 2019, the final SDA for each rural hospital will be the final SDA determined in subparagraph (G) of this paragraph, with the following adjustments:]

[(i) apply CMS Prospective Payment System Hospital Market Basket inflation factors through SFY 2020 and SFY 2021, for each respective year; and]

[(ii) increase the amount in clause (i) of this subparagraph by 6.25%.]

[(2) For labor and delivery services provided by rural hospitals on or after September 1, 2019, an alternate SDA is effective, which is equal to the final SDA determined in paragraph (1)(H) of this subsection plus an SDA add-on sufficient to increase paid claims by no less than $500.]

[(3) HHSC calculates a new rural hospital's final SDA as follows:]

[(A) For new rural hospitals for which HHSC has no base year claim data, the final SDA is the mean rural SDA, calculated by dividing the sum of the base year costs per claim for the rural hospital group by the sum of the relative weights for the rural hospital group of claims.]

[(B) The mean rural SDA remains in effect until the next rebasing using the steps outlined in paragraph (1)(A) - (G) of this subsection, using the SDA floor and SDA ceiling in effect for the fiscal year.]

(g) DRG statistical calculations. HHSC rebases [recalibrates] the relative weights, MLOS, and day outlier threshold whenever the base SDAs for urban hospitals are recalculated. The relative weights, MLOS, and day outlier thresholds are calculated using data from urban hospitals and apply to all hospitals. The relative weights that were

implemented for urban hospitals on September 1, 2012, apply to all hospitals until the next realignment [~~rebasing~~].

(1) Recalibration of relative weights. HHSC calculates a relative weight for each DRG as follows.[:]

(A) Base year claims are grouped by DRG.

(B) For each DRG, HHSC:

(i) sums the base year costs per DRG [~~claim~~] as determined in subsection (c) of this section;

(ii) divides the result in clause (i) of this subparagraph by the number of claims in the DRG; and

(iii) divides the result in clause (ii) of this subparagraph by the universal mean, resulting in the relative weight for the DRG.

(2) Recalibration of the MLOS. HHSC calculates the MLOS for each DRG as follows.[:]

(A) Base year claims are grouped by DRG.

(B) For each DRG, HHSC:

(i) sums the number of days billed for all base year claims; and

(ii) divides the result in clause (i) of this subparagraph by the number of claims in the DRG, resulting in the MLOS for the DRG.

(3) Recalibration of day outlier thresholds. HHSC calculates a day outlier threshold for each DRG as follows.[:]

(A) Calculate for all claims the standard deviations from the MLOS in paragraph (2) of this subsection.

(B) Remove each claim with a length of stay (number of days billed by a hospital) greater than or equal to three standard deviations above or below the MLOS. The remaining claims are those with a length of stay less than three standard deviations above or below the MLOS.

(C) Sum the number of days billed by all hospitals for a DRG for the remaining claims in subparagraph (B) of this paragraph.

(D) Divide the result in subparagraph (C) of this paragraph by the number of remaining claims in subparagraph (B) of this paragraph.

(E) Calculate one standard deviation for the result in subparagraph (D) of this paragraph.

(F) Multiply the result in subparagraph (E) of this paragraph by two and add that to the result in subparagraph (D) of this paragraph, resulting in the day outlier threshold for the DRG.

(4) If a DRG has fewer than five base year claims, HHSC will use National Claim Statistics and a scaling factor to assign a relative weight, MLOS, and day outlier threshold. [~~to assign:~~]

[~~(A) a national relative weight recalibrated to a relative weight calculated in~~] [~~paragraph (1) of this subsection; and~~]

[~~(B) an MLOS and a day outlier as described in paragraphs (2) and (3) of~~] ~~this subsection.~~]

(5) Adjust the MLOS, day outlier, and relative weights to increase or decrease with SOI to coincide with the National Claim Statistics.

(h) DRG grouper logic changes. Beginning September 1, 2021, HHSC may adjust DRG statistical calculations to align with annual grouper logic changes while maintaining budget neutrality. The adjusted relative weights, MLOS, and day outlier threshold apply to all hospitals until the next adjustment or rebasing described in subsection (g) of this section.

(1) Base year claim data is regrouped, using the latest grouping software version to determine DRG assignment changes by comparing the newly assigned DRG to the DRG assignment from the previous grouper version.

(2) For DRGs impacted by the grouping logic changes, relative weights must be adjusted. HHSC adjusts a relative weight for each impacted DRG as follows.

(A) Divide the total cost for all claims in the base year by the number of claims in the base year.

(B) Base year claims are grouped by DRG, and for each DRG, HHSC:

(i) sums the base year costs for all claims in each DRG;

(ii) divides the result in clause (i) of this subparagraph by the number of claims in each DRG; and

(iii) divides the result in clause (ii) of this subparagraph by the amount determined in subparagraph (A) of this paragraph, resulting in the relative weight for the DRG.

(3) Recalibration of the MLOS. HHSC calculates the MLOS for each DRG as follows.

(A) Base year claims are grouped by DRG.

(B) For each DRG, HHSC:

(i) sums the number of days billed for all base year claims; and

(ii) divides the result in clause (i) of this subparagraph by the number of claims in the DRG, resulting in the MLOS for the DRG.

(4) Recalibration of day outlier thresholds. HHSC calculates a day outlier threshold for each DRG as follows.

(A) Calculate for all claims the standard deviations from the MLOS in paragraph (2) of this subsection.

(B) Remove each claim with a length of stay (number of days billed by a hospital) greater than or equal to three standard deviations above or below the MLOS. The remaining claims are those with a length of stay less than three standard deviations above or below the MLOS.

(C) Sum the number of days billed by all hospitals for a DRG for the remaining claims in subparagraph (B) of this paragraph.

(D) Divide the result in subparagraph (C) of this paragraph by the number of remaining claims in subparagraph (B) of this paragraph.

(E) Calculate one standard deviation for the result in subparagraph (D) of this paragraph and multiply by two.

(F) Add the result of subparagraph (E) of this paragraph to the result in subparagraph (D) of this paragraph, resulting in the day outlier threshold for the DRG.

(5) If a DRG has fewer than five base year claims, HHSC will use National Claim Statistics and a scaling factor to assign a relative weight, MLOS, and day outlier threshold.

(6) Adjust the MLOS, day outliers, and relative weights to increase or decrease with SOI to coincide with the National Claim Statistics.

(i) [~~(h)~~] Reimbursements.

(1) Calculating the payment amount. HHSC reimburses a hospital a prospective payment for covered inpatient hospital services by multiplying the hospital's final SDA as calculated in subsections (c) - (f) [~~subsection (c) or (f)~~] of this section as applicable, [~~appropriate~~] by the relative weight for the DRG assigned to the adjudicated claim. The resulting amount is the payment amount to the hospital.

(2) Full payment. The prospective payment as described in paragraph (1) of this subsection is considered full payment for covered inpatient hospital services. A hospital's request for payment in an amount higher than the prospective payment will be denied.

(3) Day and cost outlier adjustments. HHSC pays a day outlier or a cost outlier for medically necessary inpatient services provided to clients under age 21 in all Medicaid participating hospitals that are reimbursed under the prospective payment system. If a patient age 20 is admitted to and remains in a hospital past his or her 21st birthday, inpatient days and hospital charges after the patient reaches age 21 are included in calculating the amount of any day outlier or cost outlier payment adjustment.

(A) Day outlier payment adjustment. HHSC calculates a day outlier payment adjustment for each claim as follows.[:]

(i) Determine whether the number of medically necessary days allowed for a claim exceeds:

(I) the MLOS by more than two days; and

(II) the DRG day outlier threshold as calculated in subsection (g)(3) of this section.

(ii) If clause (i) of this subparagraph is true, subtract the DRG day outlier threshold from the number of medically necessary days allowed for the claim.

(iii) Multiply the DRG relative weight by the final SDA.

(iv) Divide the result in clause (iii) of this subparagraph by the DRG MLOS described in subsection (g)(2) of this section to arrive at the DRG per diem amount.

(v) Multiply the number of days in clause (ii) of this subparagraph by the result in clause (iv) of this subparagraph.

(vi) Multiply the result in clause (v) of this subparagraph by 60 percent.

(vii) Multiply the allowed charges by the current interim rate to determine the cost.

(viii) Subtract the DRG payment amount calculated in clause (iii) of this subparagraph from the cost calculated in clause (vii) of this subparagraph.

(ix) The day outlier amount is the lesser of the amount in clause (vi) of this subparagraph or the amount in clause (viii) of this subparagraph.

(x) For urban and rural hospitals, multiply the amount in clause (ix) of this subparagraph by 90 percent to determine the final day outlier amount. For children's hospitals the amount in clause (ix) of this subparagraph is the final day outlier amount.

(B) Cost outlier payment adjustment. HHSC makes a cost outlier payment adjustment for an extraordinarily high-cost claim as follows.[:]

(i) To establish a cost outlier, the cost outlier threshold must be determined by first selecting the lesser of the universal mean of base year claims multiplied by 11.14 or the hospital's final SDA multiplied by 11.14.

(ii) Multiply the full DRG prospective payment by 1.5.

(iii) The cost outlier threshold is the greater of clause (i) or (ii) of this subparagraph.

(iv) Subtract the cost outlier threshold from the amount of reimbursement for the claim established under cost reimbursement principles described in the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA).

(v) Multiply the result in clause (iv) of this subparagraph by 60 percent to determine the amount of the cost outlier payment.

(vi) For urban and rural hospitals, multiply the amount in clause (v) of this subparagraph by 90 percent to determine the final cost outlier amount. For children's hospitals the amount in clause (v) of this subparagraph is the final cost outlier amount.

(C) Final outlier determination.[:]

(i) If the amount calculated in subparagraph (A)(ix) of this paragraph is greater than zero and the amount calculated in subparagraph (B)(vi) of this paragraph is greater than zero, HHSC pays the higher of the two amounts.

(ii) If the amount calculated in subparagraph (A)(ix) of this paragraph is greater than zero and the amount calculated in subparagraph (B)(vi) of this paragraph is less than or equal to zero, HHSC pays the day outlier amount.

(iii) If the amount calculated in subparagraph (B)(vi) of this paragraph is greater than zero and the amount calculated in subparagraph (A)(ix) of this paragraph is less than or equal to zero, HHSC pays the cost outlier amount.

(iv) If the amount calculated in subparagraph (A)(ix) of this paragraph and the amount calculated in subparagraph (B)(vi) of this paragraph are both less than or equal to zero HHSC will not pay an outlier for the admission.

(D) If the hospital claim resulted in a downgrade of the DRG related to reimbursement denials or reductions for preventable adverse events, the outlier payment will be determined by the lesser of the calculated outlier payment for the non-downgraded DRG or the downgraded DRG.

(4) Interim bill. A hospital may submit a claim to HHSC before a patient is discharged, but only the first claim for that patient will be reimbursed the prospective payment described in paragraph (1) of this subsection. Subsequent claims for that stay are paid zero dollars. When the patient is discharged, and the hospital submits a final claim to ensure accurate calculation for potential outlier payments for clients younger than age 21, HHSC recoups the first prospective payment and issues a final payment in accordance with paragraphs (1) and (3) of this subsection.

(5) Patient transfers and split billing. If a patient is transferred, HHSC establishes payment amounts as specified in subparagraphs (A) - (D) of this paragraph. HHSC manually reviews transfers for medical necessity and payment.

(A) If the patient is transferred from a hospital to a nursing facility, HHSC pays the transferring hospital the total payment amount of the patient's DRG.

(B) If the patient is transferred from one hospital (transferring hospital) to another hospital (discharging hospital), HHSC pays the discharging hospital the total payment amount of the patient's DRG. HHSC calculates a DRG per diem and a payment amount for the transferring hospital as follows.[:]

(i) Multiply the DRG relative weight by the final SDA.

(ii) Divide the result in clause (i) of this subparagraph by the DRG MLOS described in subsection (g)(2) of this section, to arrive at the DRG per diem amount.

(iii) To arrive at the transferring hospital's payment amount:

(I) for a patient age 21 or older, multiply the result in clause (ii) of this subparagraph by the lesser of the DRG MLOS, the transferring hospital's number of medically necessary days allowed for the claim, or 30 days; or

(II) for a patient under age 21, multiply the result in clause (ii) of this subparagraph by the lesser of the DRG MLOS or the transferring hospital's number of medically necessary days allowed for the claim.

(C) HHSC makes payments to multiple hospitals transferring the same patient by applying the per diem formula in subparagraph (B) of this paragraph to all the transferring hospitals and the total DRG payment amount to the discharging hospital.

(D) HHSC performs a post-payment review to determine if the hospital that provided the most significant amount of care received the total DRG payment. If the review reveals that the hospital that provided the most significant amount of care did not receive the total DRG payment, an adjustment is initiated to reverse the payment amounts. The transferring hospital is paid the total DRG payment amount and the discharging hospital is paid the DRG per diem.

(j) [~~(i)~~] Cost reports. Each hospital must submit an initial cost report at periodic intervals as prescribed by Medicare or as otherwise prescribed by HHSC.

(1) Each hospital must send a copy of all cost reports audited and amended by a Medicare intermediary to HHSC within 30 days after the hospital's receipt of the cost report. Failure to submit copies or respond to inquiries on the status of the Medicare cost report will result in provider vendor hold.

(2) HHSC uses data from these reports when realigning or [~~in~~] rebasing to calculate base SDAs, DRG statistics, and interim rates [~~rate years to recalculate base SDAs, to calculate interim rates~~] and to complete cost settlements.

(k) [~~(j)~~] Cost Settlement.

(1) The cost settlement process is limited by the TEFRA target cap set pursuant to the Social Security Act §1886(b) (42 U.S.C. §1395ww(b)) for children's and state-owned teaching hospitals.

(2) Notwithstanding the process described in paragraph (1) of this subsection, HHSC uses each hospital's final audited cost report, which covers a fiscal year ending during a base year period, for calculating the TEFRA target cap for a hospital.

(3) HHSC may select a new base year period for calculating the TEFRA target cap at least every three years.

(4) HHSC increases a hospital's TEFRA target cap in years in which the target cap is not reset under this paragraph, by multiplying the hospital's target cap by the CMS Prospective Payment System Hospital Market Basket Index adjusted to the hospital's fiscal year.

(5) For a new children's hospital, the base year for calculating the TEFRA target cap is the hospital's first full 12-month cost reporting period occurring after the date the hospital is designated by Medicare as a children's hospital. For each cost reporting period after the hospital's base year, an increase in the TEFRA target cap will be applied as described in paragraph (4) of this subsection, until the TEFRA target cap is recalculated as described in paragraph (3) of this subsection.

(6) After a Medicaid participating hospital is designated by Medicare as a children's hospital, the hospital must submit written notification to HHSC's provider enrollment contact, including documents verifying its status as a Medicare children's hospital. Upon receipt of the written notification from the hospital, HHSC will convert the hospital to the reimbursement methodology described in this subsection retroactive to the effective date of designation by Medicare.

(l) [~~(k)~~] Out-of-state children's hospitals. HHSC calculates the prospective payment rate for an out-of-state children's hospital as follows:

(1) HHSC determines the overall average cost per discharge for all in-state children's hospitals by:

(A) summing [~~Summing~~] the Medicaid allowed cost from tentative or final cost report settlements for the base year; and

(B) dividing [~~Dividing~~] the result in subparagraph (A) of this paragraph by the number of in-state children's hospitals' base year claims [~~described in subsection (c)(1)(D)(ii) of this section~~].

(2) HHSC determines the average relative weight for all in-state children's hospitals' base year claims [~~described in subsection (c)(1)(D)(ii) of this section~~] by:

(A) assigning [~~Assigning~~] a relative weight to each claim pursuant to subsection (g)(1)(B)(iii) of this section;

(B) summing [~~Summing~~] the relative weights for all claims; and

(C) dividing [~~Dividing~~] by the number of claims.

(3) The result in paragraph (1) of this subsection is divided by the result in paragraph (2) of this subsection to arrive at the adjusted cost per discharge.

(4) The adjusted cost per discharge in paragraph (3) of this subsection is the payment rate used for payment of claims.

(5) HHSC reimburses each out-of-state children's hospital a prospective payment for covered inpatient hospital services. The payment amount is determined by multiplying the result in paragraph (4) of this subsection by the relative weight for the DRG assigned to the adjudicated claim.

(m) [~~(l)~~] Merged hospitals.

(1) When two or more Medicaid participating hospitals merge to become one participating provider and the participating provider is recognized by Medicare, the participating provider must submit written notification to HHSC's provider enrollment contact, including documents verifying the merger status with Medicare.

(2) The [~~HHSC will assign to the~~] merged entity receives the final SDA of [~~assigned to~~] the hospital associated with the surviving TPI. [~~and~~] HHSC will reprocess all claims for the merged entity back

to the effective date of the merger or the first day of the fiscal year, whichever is later.

(3) HHSC will not recalculate the final SDA of a hospital acquired in an acquisition or buyout unless the acquisition or buyout resulted in the purchased or acquired hospital becoming part of another Medicaid participating provider. HHSC will continue to reimburse the acquired hospital based on the final SDA assigned before the acquisition or buyout.

(4) When Medicare requires a merged hospital to maintain two Medicare provider numbers because they are in different CBSAs, HHSC assigns one base TPI with a separate suffix for each facility. Both suffixes receive the SDA of the primary hospital TPI which remains active.

(n) [~~(m)~~] Adjustments. HHSC may adjust a hospital's final SDA in accordance with §355.201 of this chapter [~~title~~] (relating to Establishment and Adjustment of Reimbursement Rates for Medicaid [~~by the Health and Human Services Commission~~]).

(o) [~~(n)~~] Additional data. HHSC may require a hospital to provide additional data in a format and at a time specified by HHSC. Failure to submit additional data as specified by HHSC may result in a provider vendor hold until the requested information is provided.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: July 25, 2021
For further information, please call: (512) 839-9493

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TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 8. PIPELINE SAFETY REGULATIONS

SUBCHAPTER A. GENERAL REQUIREMENTS AND DEFINITIONS

16 TAC §8.1

The Railroad Commission of Texas (Commission) proposes an amendment to §8.1, relating to General Applicability and Standards. The Commission proposes the amendment in §8.1(b) to update the minimum safety standards and to adopt by reference the Department of Transportation (DOT) pipeline safety standards found in 49 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 195, Transportation of Hazardous Liquids by Pipeline; 49 CFR Part 199, Drug and Alcohol Testing; and 49 CFR Part 40, Procedures for Transportation Workplace Drug and Alcohol Testing Programs. Current subsection (b) adopted the federal pipeline safety standards as of January 22, 2019. The amendment changes the date to September 6, 2021 to capture the federal Pipeline and Hazardous Materials Safety Administration (PHMSA) pipeline safety rule amendments summarized in the following paragraphs.

Docket No. PHMSA-2011-0023: Amdt. Nos. 191-26; 192-125, amended the federal pipeline safety regulations in 49 CFR Parts 191 and 192 to improve the safety of onshore gas transmission pipelines, effective July 1, 2020. The final rule addresses congressional mandates, National Transportation Safety Board (NTSB) recommendations, and responds to public input. The amendments address integrity management requirements and other requirements, and they focus on: (1) the actions an operator must take to reconfirm the maximum allowable operating pressure of previously untested natural gas transmission pipelines and pipelines lacking certain material or operational records; (2) the periodic assessment of pipelines in populated areas not designated as "high consequence areas;" (3) the reporting of exceedances of maximum allowable operating pressure; (4) the consideration of seismicity as a risk factor in integrity management; (5) safety features on in-line inspection launchers and receivers; (6) a 6-month grace period for 7-calendar-year integrity management reassessment intervals; and (7) related recordkeeping provisions.

Docket No. PHMSA-2010-0229: Amdt. No. 195-102, amended the federal pipeline safety regulations in 49 CFR Part 195 in response to congressional mandates, NTSB and Government Accountability Office recommendations, lessons learned, and public input, effective July 1, 2020. PHMSA amended the Pipeline Safety Regulations to improve the safety of pipelines transporting hazardous liquids. Specifically, the PHMSA amendments extended reporting requirements to certain hazardous liquid gravity and rural gathering lines; required the inspection of pipelines in areas affected by extreme weather and natural disasters; required integrity assessments at least once every 10 years of onshore hazardous liquid pipeline segments located outside of high consequence areas and that are "piggable" (i.e., can accommodate in-line inspection devices); extended the required use of leak detection systems beyond high consequence areas to all regulated, non-gathering hazardous liquid pipelines; and required that all pipelines in or affecting high consequence areas be capable of accommodating in-line inspection tools within 20 years, unless the basic construction of a pipeline cannot be modified to permit that accommodation. Additionally, PHMSA clarified other regulations and incorporated Sections 14 and 25 of the PIPES Act of 2016 to improve regulatory certainty and compliance.

PHMSA Rulemaking RIN 2105-AE78 amended PHMSA regulations in 49 CFR Part 199 and federal regulations in 49 CFR Part 40 governing drug testing for safety-sensitive employees to ensure consistency with the recent amendments made to the DOT's regulation, "Procedures for Transportation Workplace Drug and Alcohol Testing Programs," which added requirements to test for oxycodone, oxymorphone, hydrocodone, and hydromorphone to DOT-regulated drug testing programs, effective July 1, 2020. The changes to the DOT's regulation make it necessary to refer to these substances, as well as the previously covered drugs morphine, 6-acetylmorphine, and codeine, by the more inclusive term "opioids," rather than "opiates." Rulemaking RIN 21095-AE78 amended the term in the PHMSA regulations to ensure that all DOT drug testing rules are consistent with one another and with the Mandatory Guidelines for Federal Workplace Drug Testing Programs. In addition, the amendments

included the term "opioids" in the wording of the DOT's annual information collection requirement and clarify section 40.26 and Appendix H regarding the requirement for employers to follow the DOT's instructions for the annual information collection.

Finally, Docket No. PHMSA-2016-0016: Amdt. Nos. 191-27; 192-126; 195-103, published PHMSA's final rule to amend its minimum safety standards for underground natural gas storage facilities (UNGSFs). On December 19, 2016, PHMSA issued an interim final rule (IFR) establishing regulations in response to the 2015 Aliso Canyon incident and the subsequent mandate in section 12 of the Protecting our Infrastructure of Pipelines and Enhancing Safety Act of 2016. The IFR incorporated by reference two American Petroleum Institute (API) Recommended Practices (RPs): API RP 1170, "Design and Operation of Solution-mined Salt Caverns Used for Natural Gas Storage" (First Edition, July 2015); and API RP 1171, "Functional Integrity of Natural Gas Storage in Depleted Hydrocarbon Reservoirs and Aquifer Reservoirs" (First Edition, September 2015). The IFR required each provision in the API RPs to apply as mandatory (i.e., each "should" statement would apply as a "shall") unless an operator provides written justification for not implementing the practice, including an explanation for why it is impracticable and not necessary for safety. Based on the comments received to the IFR and a petition for reconsideration, PHMSA determined that the RPs, as originally published, provided PHMSA with a stronger basis upon which to base enforcement than the IFR. The final rule also addressed recommendations from commenters and a petition for reconsideration of the IFR by modifying compliance timelines, revising the definition of a UNGSF, clarifying the states' regulatory role, reducing recordkeeping and reporting requirements, formalizing integrity management practices, and adding risk management requirements for solution-mined salt caverns. Further, in Amdt. No. 191-28, PHMSA corrected portions of the UNGSF final rule that inadvertently removed certain reporting requirements for natural gas pipeline operators. Pursuant to PHMSA's final UNGSF rule, the Commission intends to submit a Certification under 49 U.S.C. §60105 and agree to adopt and enforce federal UNGSF regulations for intrastate facilities.

Stephanie Weidman, Pipeline Safety Director, Oversight and Safety Division, has determined there will be a one-time cost to the Commission of approximately $35,000 in programming costs based on 380 hours of programming to implement changes required to enforce federal UNGSF regulations. This cost will be covered using the Commission's existing budget. Ms. Weidman has determined that for the first five years the amendments will be in effect, there will be minimal fiscal implications, if any, for local governments as a result of enforcing the amendments.

Ms. Weidman has also determined that the public benefit anticipated as a result of enforcing or administering the amendments will be consistency with federal requirements.

Ms. Weidman has determined that for each year of the first five years that the amendments will be in effect, there will be no additional economic costs for persons required to comply as a result of Commission adoption of the proposed amendments. The PHMSA amendments discussed above, which are proposed for adoption by reference in Commission rules, create costs for persons required to comply. However, persons required to comply with the PHMSA requirements must do so regardless of whether the requirements are adopted in Commission rules. Therefore, the proposed amendments to Commission rules do not create economic costs for persons required to comply.

In accordance with Texas Government Code, §2006.002, the Commission has determined there will be no adverse economic effect on rural communities, small businesses or micro-businesses resulting from the proposed amendments. As discussed above, there will be no additional economic costs for persons required to comply as a result of adoption of the proposed amendments; therefore, the Commission has not prepared the economic impact statement or the regulatory flexibility analysis required under §2006.002.

The Commission has determined that the proposed rulemaking will not affect a local economy; therefore, pursuant to Texas Government Code, §2001.022, the Commission is not required to prepare a local employment impact statement for the proposed rules.

The Commission has determined that the proposed amendments do not meet the statutory definition of a major environmental rule as set forth in Texas Government Code, §2001.0225; therefore, a regulatory analysis conducted pursuant to that section is not required.

During the first five years that the rule would be in effect, the proposed amendments would not: create or eliminate a government program; create or eliminate any employee positions; require an increase or decrease in future legislative appropriations; increase fees paid to the agency; create a new regulation; increase or decrease the number of individuals subject to the rule's applicability; expand, limit, or repeal an existing regulation; or affect the state's economy. The PHMSA amendments discussed above increased the number of individuals subject to the PHMSA rules; however, these individuals are subject to PHMSA requirements even if those requirements are not adopted in Commission rules. The amendments are proposed to adopt by reference DOT pipeline safety standards, including PHMSA's minimum safety standards for UNGSFs. Pursuant to PHMSA's final UNGSF rule, the Commission intends to submit a Certification under 49 U.S.C. §60105 and agree to adopt and enforce federal UNGSF regulations for intrastate facilities.

Comments on the proposal may be submitted to Rules Coordinator, Office of General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967; online at www.rrc.texas.gov/general-counsel/rules/comment-form-for-proposed-rulemakings; or by electronic mail to rulescoordinator@rrc.texas.gov. The Commission will accept comments until noon (12 p.m.), on Monday, July 26, 2021. The Commission finds that this comment period is reasonable because the proposal and an online comment form will be available on the Commission's web site more than two weeks prior to Texas Register publication of the proposal, giving interested persons additional time to review, analyze, draft, and submit comments. The Commission encourages all interested persons to submit comments no later than the deadline. The Commission cannot guarantee that comments submitted after the deadline will be considered. For further information, call Ms. Weidman at (512) 463-2519. The status of Commission rulemakings in progress is available at www.rrc.texas.gov/general-counsel/rules/proposed-rules.

The Commission proposes 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, 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, 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, 121.213-121.214, 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.

Statutory authority: Texas Natural Resources Code, §81.051, §81.052, and §§117.001-117.101; Texas Utilities Code, §§121.201-121.211; §§121.213-121.214; §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.

§8.1. General Applicability and Standards.

(a) Applicability.

(1) The rules in this chapter establish minimum standards of accepted good practice and apply to:

(A) all gas pipeline facilities and facilities used in the intrastate transportation of gas, including LPG distribution systems and master metered systems, as provided in 49 United States Code (U.S.C.) §§60101, et seq.; and Texas Utilities Code, §§121.001 - 121.507;

(B) onshore pipeline and gathering and production facilities, beginning after the first point of measurement and ending as defined by 49 CFR Part 192 as the beginning of an onshore gathering line. The gathering and production beyond this first point of measurement shall be subject to 49 CFR §192.8 and shall be subject to the rules as defined as Type A or Type B gathering lines as those Class 2, 3, or 4 areas as defined by 49 CFR §192.5;

(C) the intrastate pipeline transportation of hazardous liquids or carbon dioxide and all intrastate pipeline facilities as provided in 49 U.S.C. §§60101, et seq.; and Texas Natural Resources Code, §117.011 and §117.012; and

(D) all pipeline facilities originating in Texas waters (three marine leagues and all bay areas). These pipeline facilities include those production and flow lines originating at the well.

(2) The regulations do not apply to those facilities and transportation services subject to federal jurisdiction under: 15 U.S.C. §§717, et seq.; or 49 U.S.C. §§60101, et seq.[;]

(b) Minimum safety standards. The Commission adopts by reference the following provisions, as modified in this chapter, effective September 6, 2021 [~~January 22, 2019~~].

(1) Natural gas pipelines, including LPG distribution systems and master metered systems, shall be designed, constructed, maintained, and operated in accordance with 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; and 49 CFR Part 193, Liquefied Natural Gas Facilities: Federal Safety Standards.

(2) Hazardous liquids or carbon dioxide pipelines shall comply with 49 U.S.C. §§60101, et seq.; and 49 CFR Part 195, Transportation of Hazardous Liquids by Pipeline.

(3) All operators of pipelines and/or pipeline facilities shall comply with 49 CFR Part 199, Drug and Alcohol Testing, and 49 CFR Part 40, Procedures for Transportation Workplace Drug and Alcohol Testing Programs.

(4) All operators of pipelines and/or pipeline facilities regulated by this chapter, other than master metered systems and distribution systems, shall comply with §3.70 of this title (relating to Pipeline Permits Required).

(c) Special situations. Nothing in this chapter shall prevent the Commission, after notice and hearing, from prescribing more stringent standards in particular situations. In special circumstances, the Commission may require the following:

(1) Any operator which cannot determine to its satisfaction the standards applicable to special circumstances may request in writing the Commission's advice and recommendations. In a special case, and for good cause shown, the Commission may authorize exemption, modification, or temporary suspension of any of the provisions of this chapter, pursuant to the provisions of §8.125 of this title (relating to Waiver Procedure).

(2) If an operator transports gas and/or operates pipeline facilities which are in part subject to the jurisdiction of the Commission and in part subject to the Department of Transportation pursuant to 49 U.S.C. §§60101, et seq.; the operator may request in writing to the Commission that all of its pipeline facilities and transportation be subject to the exclusive jurisdiction of the Department of Transportation. If the operator files a written statement under oath that it will fully comply with the federal safety rules and regulations, the Commission may grant an exemption from compliance with this chapter.

(d) Retention of DOT filings. A person filing any document or information with the Department of Transportation pursuant to the requirements of 49 CFR Parts 190, 191, 192, 193, 195, or 199 shall retain a copy of that document or information. Such person is not required to concurrently file that document or information with the Division unless another rule in this chapter requires the document or information to be filed with the Division or unless the Division requests a copy.

(e) Penalties. A person who submits incorrect or false information with the intent of misleading the Commission regarding any material aspect of an application or other information required to be filed at the Commission may be penalized as set out in Texas Natural Resources Code, §§117.051 - 117.054, and/or Texas Utilities Code, §§121.206 - 121.210, and the Commission may dismiss with prejudice to refiling an application containing incorrect or false information or reject any other filing containing incorrect or false information.

(f) Retroactivity. Nothing in this chapter shall be applied retroactively to any existing intrastate pipeline facilities concerning design, fabrication, installation, or established operating pressure, except as required by the Office of Pipeline Safety, Department of Transportation. All intrastate pipeline facilities shall be subject to the other safety requirements of this chapter.

(g) Compliance deadlines. Operators shall comply with the applicable requirements of this section according to the following guidelines.

(1) Each operator of a pipeline and/or pipeline facility that is new, replaced, relocated, or otherwise changed shall comply with the

applicable requirements of this section at the time the pipeline and/or pipeline facility goes into service.

(2) An operator whose pipeline and/or pipeline facility was not previously regulated but has become subject to regulation pursuant to the changed definition in 49 CFR Part 192 and subsection (a)(1)(B) of this section shall comply with the applicable requirements of this section no later than the stated date:

(A) for cathodic protection (49 CFR Part 192), March 1, 2012;

(B) for damage prevention (49 CFR 192.614), September 1, 2010;

(C) to establish an MAOP (49 CFR 192.619), March 1, 2010;

(D) for line markers (49 CFR 192.707), March 1, 2011;

(E) for public education and liaison (49 CFR 192.616), March 1, 2011; and

(F) for other provisions applicable to Type A gathering lines (49 CFR 192.8(c)), March 1, 2011.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 8, 2021.

TRD-202102230
Haley Cochran
Rules Attorney, Office of General Counsel
Railroad Commission of Texas
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For further information, please call: (512) 475-1295

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TITLE 19. EDUCATION

PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

CHAPTER 1. AGENCY ADMINISTRATION
SUBCHAPTER I. FAMILY PRACTICE RESIDENCY ADVISORY COMMITTEE

19 TAC §1.145

The Texas Higher Education Coordinating Board (Coordinating Board) proposes amendments to Texas Administrative Code, Title 19, Part 1, Chapter 1, Subchapter I, §1.145, concerning Family Practice Residency Advisory Committee. Specifically, this amendment will continue the advisory committee four more years.

The Family Practice Residency Advisory Committee provides the Board with advice and recommendation(s) regarding Family Practice Residency programs. Texas Education Code §61.026 authorizes the Coordinating Board to appoint an advisory committee as considered necessary and §61.505 establishes the Family Practice Residency Advisory Committee. The amendment is also proposed under the Texas Government Code, Chapter 2110, §2110.008 which requires the Coordinating Board by rule to provide for a different abolishment date for advisory committees to continue in existence.

Dr. Stacey Silverman, Assistant Commissioner for Academic and Health Affairs, has determined that for each of the first five years the sections are in effect there would be no fiscal implications for state or local governments as a result of enforcing or administering the rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule. There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rule.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Dr. Silverman, Assistant Commissioner for Academic and Health Affairs, 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 continued operation and function of the Family Practice Residency Advisory Committee to advise the Coordinating Board regarding Family Practice Residency programs. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Government Growth Impact Statement

(1) the rules will not create or eliminate a government program;

(2) implementation of the rules will not require the creation or elimination of employee positions;

(3) implementation of the rules will not require an increase or decrease in future legislative appropriations to the agency;

(4) the rules will not require an increase or decrease in fees paid to the agency;

(5) the rules will not create a new rule;

(6) the rules will not limit an existing rule;

(7) the rules will not change the number of individuals subject to the rule; and

(8) the rules will not affect this state's economy.

Comments on the proposal may be submitted to Stacey Silverman, Ph.D., Assistant Commissioner for Academic and Health Affairs, P.O. Box 12788, Austin, Texas 78711-2788 or via email at RuleComments@highered.texas.gov. Comments will be accepted until 5:00 p.m. on July 16, 2021.

The amendment is proposed under Texas Education Code, Sections 61.505, which mandates the establishment of the Family Practice Advisory Committee and 61.026, which provides the Coordinating Board with authority to appoint an advisory committee as necessary, and Texas Government Code, Section 2110.008, which requires the Coordinating Board by rule to provide for a different abolishment date for advisory committees to continue in existence.

The proposed amendment affects Texas Education Code Chapter 61, Subchapter I, which sets out the statutory authority for the implementation of the Family Practice Residency Advisory Committee.

§1.145. Duration.

The committee shall be abolished no later than October 31, 2025 [~~2021~~], in accordance with Texas Government Code, Chapter 2110. It may be reestablished by the Board.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 14, 2021.

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Nichole Bunker-Henderson
General Counsel
Texas Higher Education Coordinating Board
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For further information, please call: (512) 427-6206

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SUBCHAPTER P. LOWER-DIVISION ACADEMIC COURSE GUIDE MANUAL ADVISORY COMMITTEE

19 TAC §1.195

The Texas Higher Education Coordinating Board (Coordinating Board) proposes amendments to Texas Administrative Code, Title 19, Part 1, Chapter 1, Subchapter P, §1.195, concerning Lower-Division Academic Course Guide Manual Advisory Committee. Specifically, this amendment will continue the advisory committee four more years.

The Lower-Division Academic Course Guide Manual Advisory Committee provides the Board with advice and recommendations regarding new disciplines of study, developments within existing disciplines represented by courses in the manual, vertical alignment of courses within disciplines, and obsolesce of disciplines of study and courses. Texas Education Code §61.026 authorizes the Coordinating Board to appoint an advisory committee as considered necessary. The amendment is proposed under the Texas Government Code, Chapter 2110, §2110.008 which requires the Coordinating Board by rule to provide for a different abolishment for advisory committees to continue in existence.

Dr. Stacey Silverman, Assistant Commissioner for Academic and Health Affairs, has determined that for each of the first five years the sections are in effect there would be no fiscal implications for state or local governments as a result of enforcing or administering the rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule. There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rule.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Dr. Silverman, Assistant Commissioner for Academic and Health Affairs, 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 continued operation and function of the Lower-Division Academic Course Guide Manual Advisory Committee to advise the Coordinating Board about the deletion, addition and revision of lower-division academic courses intended for efficient and timely transfer of credit. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Government Growth Impact Statement

(1) the rules will not create or eliminate a government program;

(2) implementation of the rules will not require the creation or elimination of employee positions;

(3) implementation of the rules will not require an increase or decrease in future legislative appropriations to the agency;

(4) the rules will not require an increase or decrease in fees paid to the agency;

(5) the rules will not create a new rule;

(6) the rules will not limit an existing rule;

(7) the rules will not change the number of individuals subject to the rule; and

(8) the rules will not affect this state's economy.

Comments on the proposal may be submitted to Stacey Silverman, Ph.D., Assistant Commissioner for Academic and Health Affairs, P.O. Box 12788, Austin, Texas 78711-2788 or via email at RuleComments@highered.texas.gov. Comments will be accepted until 5:00 p.m. on July 16, 2021.

The amendment is proposed under Texas Education Code, Section 61.026, which provides the Coordinating Board with authority to appoint an advisory committee as considered necessary and Texas Government Code, Section 2110.008, which requires the Coordinating Board by rule to provide for a different abolishment date for advisory committees to continue in existence.

The proposed amendment affects institutions of higher education as defined in Texas Education Code, Section 61.003, in regard to requirements of Texas Education Code, Sections 51.4033-51.4034, 51.96852 and Chapter 61, Subchapter S, Transfer of Credit.

§1.195. Duration.

The committee shall be abolished no later than October 31, 2025 [~~2021~~], in accordance with Texas Government Code, Chapter 2110. It may be reestablished by the Board.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Nichole Bunker-Henderson
General Counsel
Texas Higher Education Coordinating Board
Earliest possible date of adoption: July 25, 2021
For further information, please call: (512) 427-6206

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CHAPTER 4. RULES APPLYING TO ALL PUBLIC INSTITUTIONS OF HIGHER EDUCATION IN TEXAS

SUBCHAPTER U. RECOMMENDED COURSE SEQUENCING; DEVELOPMENT AND INSTITUTIONAL REPORTING

19 TAC §§4.360 - 4.364

The Texas Higher Education Coordinating Board (Coordinating Board) proposes new rules in Texas Administrative Code, Title 19, Part 1, Chapter 4, Subchapter U, §§4.360-4.364, concerning Recommended Course Sequencing; Development and Institutional Reporting. Specifically, this new section will provide Texas public institutions of higher education with clarity on the development and reporting of recommended course sequencing for undergraduate certificate and degree programs.

The Coordinating Board convened a negotiated rulemaking committee, comprised of higher education institutional representatives with expertise in curriculum development, course sequencing, and institutional reporting. The negotiated rulemaking committee met once on March 9, 2021, to develop the proposed rules. The negotiated rulemaking committee developed the proposed rules in alignment with Texas Education Code (TEC) §51.96852, which authorizes the board to adopt rules relating to the development, reporting, and publication of recommended course sequences.

Rule 4.360 provides the purpose of the subchapter is to implement rules in accordance with statute.

Rule 4.361 provides the statutory authority, specifically TEC §51.96852, which authorizes the Coordinating Board to adopt rules relating to the development, reporting, and publication of recommended course sequences.

Rule 4.362 provides definitions related to course sequencing, which allow institutional reporting officials with clear guidance related to the following terms: certificate, Coordinating Board, Core Curriculum, Course Sequence, Degree Program, Institution of Higher Education, Lower-Division Academic Course Guide Manual, and Texas Common Course Numbering System. These definitions align the terms used in this subchapter with the definitions in other rules and the TEC. Alignment of the definitions across the chapters provides greater clarity about the requirements of the rules.

Rule 4.363 sets forth the expectations and requirements for Texas public institutions of higher education to develop at least one recommended course sequence for each undergraduate or degree program offered by the institution. The proposed rules specify that the recommended course sequences must identify all required lower-division courses for each certificate or degree program and include the Texas Common Course Numbering System course number and the course equivalent in the Lower-Division Academic Course Guide Manual. The recommended course sequences must also allow a full-time student to obtain a certificate or degree within a specified timeframe, which is two years for a 60-hour degree or certificate program, four years for a 120-hour degree program, or a comparable time frame of an approved certificate or degree program that requires a different time frame. This rule implements the requirement of TEC §51.96852. The rule further provides that each institution must publish the course sequence on its website not later than August 1 of each year. The requirement to publish this information in advance of the beginning of the fall semester will inform students about which courses best advance their progress toward a degree.

Rule 4.364 provides institutions of higher education reporting requirements related to recommended course sequencing. This includes a requirement for the Coordinating Board to publish instructions on its website to provide institutions clear guidance for reporting the required recommended course sequences. The Coordinating Board will publish instructions not later than September 1, 2021. Additionally, the Coordinating Board will provide institutions of higher education the template to use to submit the recommended course sequences to the agency. On an annual basis, institutions will review their recommended course sequences and provide updates to the Coordinating Board during a designated time period. These provisions implement the reporting requirements set out in TEC §51.96852(c), to ensure that institutions are timely and transparent in their reporting to the Board and to students.

Dr. Stacey Silverman, Assistant Commissioner for Academic and Health Affairs, has determined that for each of the first five years the rules are in effect there would be no fiscal implications for state or local governments as a result of enforcing or administering these rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule. There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rule.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Dr. Stacey Silverman 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 greater efficiency of Texas students in progressing through undergraduate certificate or degree programs. Students will be able to better understand the courses and the order in which they complete the recommended courses, which will allow them to efficiently progress through the recommended course sequence. Additionally, institutions, and specifically institutional advisors will be able to better help students navigate the course sequences they will need to complete an undergraduate certificate or degree. The proposed rules have long-term impact of reducing the cost of education for students. There are no anticipated economic costs to persons who are required to comply with the rules as proposed.

Government Growth Impact Statement

(1) the rules will not create or eliminate a government program;

(2) implementation of the rules will not require the creation or elimination of employee positions;

(3) implementation of the rules will not require an increase or decrease in future legislative appropriations to the agency;

(4) the rules will not require an increase or decrease in fees paid to the agency;

(5) the rules will create a new rule;

(6) the rules will not limit an existing rule;

(7) the rules will not change the number of individuals subject to the rule; and

(8) the rules will not affect this state's economy.

Comments on the proposal may be submitted to Stacey Silverman, Ph.D., Assistant Commissioner for Academic and Health Affairs, P.O. Box 12788, Austin, Texas 78711 or via email at RuleComments@highered.texas.gov. Comments will be accepted until 5:00 p.m. on July 16, 2021.

The new sections are proposed under Texas Education Code, Section 51.96852, which provides the Coordinating Board with the authority to adopt rules relating to the development, reporting, and publication of recommended course sequences.

The proposed new sections affect Texas public institutions of higher education as defined in Texas Education Code Section 61.003 and the Coordinating Board.

§4.360. Purpose.

The purpose of this subchapter is to implement rules requiring institutions of higher education to develop and report recommended course sequences for undergraduate certificate and degree programs in accordance with statute.

§4.361. Authority.

Texas Education Code §51.96852 authorizes the board to adopt rules relating to the development, reporting, and publication of recommended course sequences.

§4.362. Definitions.

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

(1) Certificate--a grouping of subject-matter courses which, when satisfactorily completed by a student, will lead to an undergraduate certificate from an institution of higher education.

(2) Coordinating Board or Board--the Texas Higher Education Coordinating Board.

(3) Core Curriculum or Texas Core Curriculum (TCC)--a required curriculum for an undergraduate degree, as defined in §4.23(3) of this title (relating to Definitions) and authorized by Texas Education Code §61.822.

(4) Course Sequence--a recommended list of courses by semester, term, or enrollment period that will satisfy the requirement for a student to complete an undergraduate certificate or degree program.

(5) Degree program--any grouping of subject-matter courses which, when satisfactorily completed by a student, will lead to an undergraduate degree from an institution of higher education.

(6) Institution of Higher Education--any public institution of higher education as defined by Texas Education Code, Section 61.003(8).

(7) Lower-Division Academic Course Guide Manual (ACGM)--a publication listing academic courses, as defined in §4.23(13) of this title.

(8) Texas Common Course Numbering System (TCCNS)--a common course numbering system, as defined in §4.23(10) of this title and authorized by Texas Education Code §61.832.

§4.363. Recommended Course Sequence Development.

(a) Each institution of higher education must develop at least one recommended course sequence for each undergraduate certificate or degree program offered by the institution.

(b) Each course sequence developed by the institution of higher education must:

(1) Identify all required lower-division courses for each certificate or degree program, if applicable;

(2) Include for each course, if applicable:

(A) The TCCNS course number; and

(B) The course equivalent in the ACGM; and

(3) Be designed to enable a full-time student to obtain a certificate or degree, as applicable, within:

(A) two years, for a 60-hour degree or certificate program;

(B) four years, for a 120-hour degree program; or

(C) a comparable time frame, for an approved certificate or degree program that requires credit hours other than those specified in subparagraph (A) or (B) of this paragraph.

(4) include at least one specific sequence in which courses should be taken to ensure completion of the applicable program within the time frame described in Section (b), subsection (3).

(c) Each institution shall publish the recommended course sequences developed under this rule in the institution's course catalog beginning with the 2021-2022 academic year course catalog cycle. Each institution shall publish recommended course sequences on the institution's website not later than August 1 of each year.

§4.364. Recommended Course Sequence: Institutional Reporting.

(a) In accordance with Texas Education Code §51.96852(b) and (c), each institution of higher education shall provide to the Coordinating Board a recommended course sequence for each undergraduate certificate and degree program offered by the institution. Not later than September 1, 2021, the Coordinating Board shall publish on its website instructions for institutions to submit course sequencing reporting.

(b) The Coordinating Board will provide institutions of higher education a template and instructions for submitting the recommended course sequences of undergraduate certificate and degree programs. Institutions must submit the recommended course sequences of undergraduate certificate and degree programs annually in accordance with the instructions and template and must include the following information, if applicable:

(1) Recommended course sequences must identify all courses required for completion by a student to attain each undergraduate certificate or degree; and

(2) For all courses that an institution includes in a recommended course sequence, the institution must identify the ACGM courses, as appropriate, using the TCCNS course numbers and rubrics.

(c) On an annual basis, institutions shall review course sequences for accuracy and submit any revisions or changes to the Coordinating Board during the designated time period.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 14, 2021.

TRD-202102310
Nichole Bunker-Henderson
General Counsel
Texas Higher Education Coordinating Board
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For further information, please call: (512) 427-6206

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PART 2. TEXAS EDUCATION AGENCY

CHAPTER 97. PLANNING AND ACCOUNTABILITY

SUBCHAPTER AA. ACCOUNTABILITY AND PERFORMANCE MONITORING

19 TAC §97.1005

(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 §97.1005 is not included in the print version of the Texas Register. The figure is available in the on-line version of the June 25, 2021, issue of the Texas Register.)

The Texas Education Agency (TEA) proposes an amendment to §97.1005, concerning results driven accountability (RDA). The proposed amendment would adopt in rule the 2021 RDA Manual.

BACKGROUND INFORMATION AND JUSTIFICATION: House Bill 3459, 78th Texas Legislature, 2003, added Texas Education Code (TEC), §7.027, limiting and redirecting monitoring done by TEA to that required to ensure school district and charter school compliance with federal law and regulations; financial accountability, including compliance with grant requirements; and data integrity for purposes of the Texas Student Data System (TSDS) PEIMS and accountability under TEC, Chapter 39. Legislation passed in 2005 renumbered TEC, §7.027, to TEC, §7.028. To meet this monitoring requirement, TEA developed the Performance Based Monitoring Analysis System (PBMAS), later renamed as RDA in 2019, which is used in conjunction with other evaluation systems to monitor performance of certain populations of students and the program effectiveness of special programs in school districts and charter schools.

TEA adopted its PBMAS Manual in rule from 2005 through 2018 and the RDA Manual in rule since 2019. The RDA Manual outlines a dynamic system that evolves over time, so the specific criteria and calculations for monitoring student performance and program effectiveness may differ from year to year. The intent is to update §97.1005 annually to refer to the most recently published RDA Manual.

The proposed amendment to §97.1005 would update the current rule by adopting the 2021 RDA Manual, which describes the specific criteria and calculations that will be used to assign 2021 RDA performance levels, as Figure: 19 TAC §97.1005(b).

The 2021 RDA Manual would include the following key changes from the 2020 system.

Referenced dates relevant to the 2021 RDA indicator data and calculations would be updated throughout. Additional explanatory text would be added to the RDA Manual overview as well as exemplar data for calculation methodologies demonstration.

Bilingual Education, English as a Second Language, and English Learner (BE/ESL/EL)

New report only indicators would be included for BE/ESL/EL Indicator #1(i-v): BE STAAR2 3-8 Passing Rate; and BE/ESL/EL Indicator #2(i-v): ESL STAAR 3-8 Passing Rate due to lack of comparable year data with included data sets for setting cut-point parameters. A new indicator named BE/ESL/EL Indicator #5(i-v): EL Years-After-Reclassification (YsAR) STAAR 3-8 Passing Rate would be included to parallel with programmatic terminology usage only with no impacts to data inclusion or exclusion. Duplicative information and renumeration of data notes would be eliminated.

Other Special Populations (OSP)

Changes to this section would include only minor language clean-up with no changes to reporting.

Special Education (SPED)

Indicator analysis and reporting would be expanded for SPED Indicator #5: SPED STAAR Alternate 2 Participation Rate (by race/ethnicity, data source).

Of Note for all RDA Program Areas

On March 16, 2020, Governor Greg Abbott waived the State of Texas Assessment of Academic Readiness (STAAR®) testing requirements for the 2019-2020 school year due to extensive school closures relating to the COVID-19 nationwide pandemic event. As a result, indicators specific to STAAR® testing proficiency, participation, or other reliance on non-existing 2019-2020 STAAR® data were assigned an "ND" for no data availability for RDA in 2020. Because application of the Special Analysis (SA) process uses data over the prior two years, impacted STAAR® assessment indicators will not include SA processing for RDA in 2021.

FISCAL IMPACT: Matthew Montaño, deputy commissioner for special populations, has determined that for the first five-year period the proposal is in effect there are no additional costs to state or local government, including school districts and open-enrollment charter schools, required to comply with the proposal.

LOCAL EMPLOYMENT IMPACT: The proposal has no effect on local economy; therefore, no local employment impact statement is required under Texas Government Code, §2001.022.

SMALL BUSINESS, MICROBUSINESS, AND RURAL COMMUNITY IMPACT: The proposal has no direct adverse economic impact for small businesses, microbusinesses, or rural communities; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

COST INCREASE TO REGULATED PERSONS: The proposal does not impose a cost on regulated persons, another state agency, a special district, or a local government and, therefore, is not subject to Texas Government Code, §2001.0045.

TAKINGS IMPACT ASSESSMENT: The proposal does not impose a burden on private real property and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

GOVERNMENT GROWTH IMPACT: TEA staff prepared a Government Growth Impact Statement assessment for this proposed rulemaking. During the first five years the proposed rulemaking would be in effect, it would create new regulations as required by federal law, limit some regulations by making some indicators be report-only, and repeal some regulations.

The proposed rulemaking would not create or eliminate a government program; would not require the creation of new employee positions or elimination of existing employee positions; would not require an increase or decrease in future legislative appropriations to the agency; would not require an increase or decrease in fees paid to the agency; would not expand an existing regulation; would not increase or decrease the number of individuals subject to its applicability; and would not positively or adversely affect the state's economy.

PUBLIC BENEFIT AND COST TO PERSONS: Mr. MontaÃ±o has determined that for each year of the first five years the proposal is in effect, the public benefit anticipated as a result of enforcing the proposal would be ensuring that rule language is based on current law and providing school districts with clarifications on the assignment of performance levels utilized in future district determination and status for monitoring and support assignments. There is no anticipated economic cost to persons who are required to comply with the proposal.

DATA AND REPORTING IMPACT: The proposal would have no data and reporting impact.

PRINCIPAL AND CLASSROOM TEACHER PAPERWORK REQUIREMENTS: TEA has determined that the proposal would not require a written report or other paperwork to be completed by a principal or classroom teacher.

PUBLIC COMMENTS: The public comment period on the proposal begins June 25, 2021, and ends July 26, 2021. A form for submitting public comments is available on the TEA website at https://tea.texas.gov/About_TEA/Laws_and_Rules/Commissioner_Rules_(TAC)/Proposed_Commissioner_of_Education_Rules/. Two virtual public hearings to solicit testimony and input on the proposed amendment will be held at 1:00 p.m. on July 7, 2021, and at 1:00 p.m. on July 8, 2021, via the link published on the TEA RDA and PBMAS Manuals website at https://tea.texas.gov/student-assessment/monitoring-and-interventions/rda/rda-and-pbmas-manuals. Anyone wishing to testify at one of the hearings must register between 12:45 p.m. and 1:30 p.m. on the day of the hearing. Each hearing will conclude once all who have signed in have been given the opportunity to comment. Due to potential limitations for some stakeholders to participate in the virtual environment, interested stakeholders who may be limited in access to the virtual platform are encouraged to submit written comments. For questions about the public hearing, please contact the TEA Department of Review and Support at (512) 463-9414.

STATUTORY AUTHORITY. The amendment is proposed under Texas Education Code (TEC), §7.021(b)(1), which authorizes the Texas Education Agency (TEA) to administer and monitor compliance with education programs required by federal or state law, including federal funding and state funding for those programs; TEC, §7.028, which authorizes TEA to monitor as necessary to ensure school district and charter school compliance with federal law and regulations, financial integrity and data integrity. Section 7.028(a) also authorizes TEA to monitor special education programs for compliance with state and federal laws. Section 7.028 also authorizes the agency to monitor school district and charter schools through its investigative process; TEC, §12.056, which requires that a campus or program for which a charter is granted under TEC, Chapter 12, Subchapter C, is subject to any prohibition relating to the Public Education Information Management System (PEIMS) to the extent necessary to monitor compliance with TEC, Chapter 12, Subchapter C, as determined by the commissioner; high school graduation under TEC, §28.025; special education programs under TEC, Chapter 29, Subchapter A; bilingual education under TEC, Chapter 29, Subchapter B; and public school accountability under TEC, Chapter 39, Subchapters B, C, D, F, and J, and Chapter 39A; TEC, §12.104, which states that a charter granted under TEC, Chapter 12, Subchapter D, is subject to a prohibition, restriction, or requirement, as applicable, imposed by TEC, Title 2, or a rule adopted under TEC, Title 2, relating to PEIMS to the extent necessary to monitor compliance with TEC, Chapter 12, Subchapter D, as determined by the commissioner; high school graduation requirements under TEC, §28.025; special education programs under TEC, Chapter 29, Subchapter A; bilingual education under TEC, Chapter 29, Subchapter B; discipline management practices or behavior management techniques under TEC, §37.0021; public school accountability under TEC, Chapter 39, Subchapters B, C, D, F, G, and J, and Chapter 39A; and intensive programs of instruction under TEC, §28.0213; TEC, §29.001, which authorizes TEA to effectively monitor all local educational agencies (LEAs) to ensure that rules relating to the delivery of services to children with disabilities are applied in a consistent and uniform manner, to ensure that LEAs are complying with those rules, and to ensure that specific reports filed by LEAs are accurate and complete; TEC, §29.0011(b), which authorizes TEA to meet the requirements under (1) 20 United States Code, §1418(d), and its implementing regulations to collect and examine data to determine whether significant disproportionality based on race or ethnicity is occurring in the state and in the school districts and open-enrollment charter schools in the state with respect to the: (A) Identification of children as children with disabilities, including the identification of children as children with particular impairments; (B) Placement of children with disabilities in particular educational settings; and (C) Incidence, duration, and type of disciplinary actions taken against children with disabilities including suspensions or expulsions; or (2) 20 United States Code, §1416(a)(3)(C), and its implementing regulations to address in the statewide plan the percentage of schools with disproportionate representation of racial and ethnic groups in special education and related services and in specific disability categories that results from inappropriate identification; TEC, §29.010(a), which authorizes TEA to adopt and implement a comprehensive system for monitoring LEA compliance with federal and state laws relating to special education, including ongoing analysis of LEA special education data; TEC, §29.062, which authorizes TEA to evaluate and monitor the effectiveness of LEA programs and apply sanctions concerning students with limited English proficiency; TEC, §29.066, which authorizes PEIMS reporting requirements for school districts that are required to offer bilingual education or special language programs to include the following information in the district's PEIMS report: (1) demographic information, as determined by the commissioner, on students enrolled in district bilingual education or special language programs; (2) the number and percentage of students enrolled in each instructional model of a bilingual education or special language program offered by the district; and (3) the number and percentage of students identified as students of limited English proficiency who do not receive specialized instruction; TEC, §29.182, which authorizes the State Plan for Career and Technology Education to ensure the state complies with requirements for supplemental federal career and technology funding; TEC, §39.051 and §39.052, which authorize the commissioner to determine criteria for accreditation statuses and to determine the accreditation status of each school district and open-enrollment charter school; TEC, §39.053, which authorizes the commissioner to adopt a set of indicators of the quality of learning and achievement and requires the commissioner to periodically review the indicators for consideration of appropriate revisions; TEC, §39.054(b-1), which authorizes TEA to consider the effectiveness of district programs for special populations when determining accreditation statuses; TEC, §39.0541, which authorizes the commissioner to adopt indicators and standards under TEC, Chapter 39, Subchapter C, at any time during a school year before the evaluation of a school district or campus; TEC, §§39.056, 39.057, and 39.058, which authorize the commissioner to adopt procedures relating to monitoring reviews and special accreditation investigations; TEC, §39A.001, which authorizes the commissioner to take any of the actions authorized by TEC, Chapter 39, Subchapter A, to the extent the commissioner determines necessary if a school does not satisfy the academic performance standards under TEC, §39.053 or §39.054, or based upon a special accreditation investigation; TEC, §39A.002, which authorizes the commissioner to take certain actions if a school district becomes subject to commissioner action under TEC, §39A.001;

TEC, §39A.004, which authorizes the commissioner to appoint a board of managers to exercise the powers and duties of a school district's board of trustees if the district is subject to commissioner action under TEC, §39A.001, and has a current accreditation status of accredited-warned or accredited-probation; or fails to satisfy any standard under TEC, §39.054(e); or fails to satisfy any financial accountability standard; TEC, §39A.005, which authorizes the commissioner to revoke school accreditation if the district is subject to TEC, §39A.001, and for two consecutive school years has received an accreditation status of accredited-warned or accredited-probation, failed to satisfy any standard under TEC, §39.054(e), or has failed to satisfy a financial performance standard; TEC, §39A.007, which authorizes the commissioner to impose a sanction designed to improve high school completion rates if the district has failed to satisfy any standard under TEC, §39.054(e), due to high school completion rates; TEC, §39A.051, which authorizes the commissioner to take action based on campus performance that is below any standard under TEC, §39.054(e); and TEC, §39A.063, which authorizes the commissioner to accept substantially similar intervention measures as required by federal accountability measures in compliance with TEC, Chapter 39A.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code, §§7.021(b)(1), 7.028, 12.056, 12.104, 29.001, 29.0011(b), 29.010(a), 29.062, 29.066, 29.182, 39.051, 39.052, 39.053, 39.054(b-1), 39.0541, 39.056, 39.057, 39.058, 39A.001, 39A.002, 39A.004, 39A.005, 39A.007, 39A.051, and 39A.063.

§97.1005. Results Driven Accountability.

(a) In accordance with Texas Education Code, §7.028(a), the purpose of the Results Driven Accountability (RDA) framework is to evaluate and report annually on the performance of school districts and charter schools for certain populations of students included in selected program areas. The performance of a school district or charter school is included on the RDA report through indicators of student performance and program effectiveness and corresponding performance levels established by the commissioner of education.

(b) The assignment of performance levels for school districts and charter schools in the 2021 [~~2020~~] RDA report is based on specific criteria and calculations, which are described in the 2021 [~~2020~~] RDA Manual provided in this subsection.
Figure: 19 TAC §97.1005(b)
[~~Figure: 19 TAC §97.1005(b)~~]

(c) The specific criteria and calculations used in the RDA framework will be 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 annual RDA manual adopted for prior school years will remain in effect for all purposes, including accountability and performance monitoring, data standards, and audits, with respect to those school years.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 14, 2021.

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Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Earliest possible date of adoption: July 25, 2021
For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 15. TEXAS STATE BOARD OF PHARMACY

CHAPTER 283. LICENSING REQUIREMENTS FOR PHARMACISTS

22 TAC §283.4

The Texas State Board of Pharmacy proposes amendments to §283.4, concerning Internship Requirements. The amendments, if adopted, update the internship hours requirement to reflect that the board requires the number of intern hours required by the Accreditation Council for Pharmacy Education (ACPE).

Allison Vordenbaumen Benz, R.Ph., M.S., Executive Director/Secretary, 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 rule. Ms. Benz has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the amendments will be to provide clear and concise regulations. There is no anticipated adverse economic impact on large, small or micro-businesses (pharmacies), rural communities, or local or state employment. Therefore, an economic impact statement and regulatory flexibility analysis are not required.

For each year of the first five years the proposed amendments will be in effect, Ms. Benz has determined the following:

(1) The proposed amendments do not create or eliminate a government program;

(2) Implementation of the proposed amendments does not require the creation of new employee positions or the elimination of existing employee positions;

(3) Implementation of the proposed amendments does not require an increase or decrease in the future legislative appropriations to the agency;

(4) The proposed amendments do not require an increase or decrease in fees paid to the agency;

(5) The proposed amendments do not create a new regulation;

(6) The proposed amendments do not limit or expand an existing regulation;

(7) The proposed amendments do not increase or decrease the number of individuals subject to the rule's applicability; and

(8) The proposed amendments do not positively or adversely affect this state's economy.

Written comments on the amendments may be submitted to Megan G. Holloway, Deputy General Counsel, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-500, Austin, Texas 78701, FAX (512) 305-8061. Comments must be received by 5:00 p.m., July 27, 2021.

The amendments are proposed under §§551.002 and 554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

§283.4. Internship Requirements.

(a) Goals and competency objectives of internship.

(1) The goal of internship is for the pharmacist-intern to attain the knowledge, skills, and abilities to safely, efficiently, and effectively provide pharmacist-delivered patient care to a diverse patient population and practice pharmacy under the laws and regulations of the State of Texas.

(2) The following competency objectives are necessary to accomplish the goal of internship in paragraph (1) of this subsection:

(A) Provides drug products. The pharmacist-intern shall demonstrate competence in determining the appropriateness of prescription drug orders and medication orders; evaluating and selecting products; and assuring the accuracy of the product/prescription dispensing process.

(B) Communicates with patients and/or patients' agents about prescription drugs. The pharmacist-intern shall demonstrate competence in interviewing and counseling patients, and/or the patients' agents, on drug usage, dosage, packaging, routes of administration, intended drug use, and storage; discussing drug cautions, adverse effects, and patient conditions; explaining policies on fees and services; relating to patients in a professional manner; and interacting to confirm patient understanding.

(C) Communicates with patients and/or patients' agents about nonprescription products, devices, dietary supplements, diet, nutrition, traditional nondrug therapies, complementary and alternative therapies, and diagnostic aids. The pharmacist-intern shall demonstrate competence in interviewing and counseling patients and/or patients' agents on conditions, intended drug use, and adverse effects; assisting in and recommending drug selection; triaging and assessing the need for treatment or referral, including referral for a patient seeking pharmacist-guided self-care; providing information on medical/surgical devices and home diagnostic products; and providing poison control treatment information and referral.

(D) Communicates with healthcare professionals and patients and/or patients' agents. The pharmacist-intern shall demonstrate competence in obtaining and providing accurate and concise information in a professional manner and using appropriate oral, written, and nonverbal language.

(E) Practices as a member of the patient's interdisciplinary healthcare team. The pharmacist-intern shall demonstrate competence in collaborating with physicians, other healthcare professionals, patients, and/or patients' agents to formulate a therapeutic plan. The pharmacist-intern shall demonstrate competence in establishing and interpreting databases, identifying drug-related problems and recommending appropriate pharmacotherapy specific to patient needs, monitoring and evaluating patient outcomes, and devising follow-up plans.

(F) Maintains professional-ethical standards. The pharmacist-intern is required to comply with laws and regulations pertaining to pharmacy practice; to apply professional judgment; to exhibit reliability and credibility in dealing with others; to deal professionally and ethically with colleagues and patients; to demonstrate sensitivity and empathy for patients/care givers; and to maintain confidentiality.

(G) Compounds. The pharmacist-intern shall demonstrate competence in using acceptable professional procedures; selecting appropriate equipment and containers; appropriately preparing compounded non-sterile and sterile preparations; and documenting calculations and procedures. Pharmacist-interns engaged in compounding non-sterile preparations shall meet the training requirements for pharmacists specified in §291.131 of this title (relating to Pharmacies Compounding Non-Sterile Preparations). Pharmacist-interns engaged in compounding sterile preparations shall meet the training requirements for pharmacists specified in §291.133 of this title (relating to Pharmacies Compounding Sterile Preparations).

(H) Retrieves and evaluates drug information. The pharmacist-intern shall demonstrate competence in retrieving, evaluating, managing, and using the best available clinical and scientific publications for answering a drug-related request in a timely fashion and assessing, evaluating, and applying evidence based information to promote optimal health care. The pharmacist-intern shall perform investigations on relevant topics in order to promote inquiry and problem-solving with dissemination of findings to the healthcare community and/or the public.

(I) Manages general pharmacy operations. The pharmacist-intern shall develop a general understanding of planning, personnel and fiscal management, leadership skills, and policy development. The pharmacist-intern shall have an understanding of drug security, storage and control procedures and the regulatory requirements associated with these procedures, and maintaining quality assurance and performance improvement. The pharmacist-intern shall observe and document discrepancies and irregularities, keep accurate records, and document actions. The pharmacist-intern shall attend meetings requiring pharmacy representation.

(J) Participates in public health, community service or professional activities. The pharmacist-intern shall develop basic knowledge and skills needed to become an effective healthcare educator and a responsible participant in civic and professional organizations.

(K) Demonstrates scientific inquiry. The pharmacist-intern shall develop skills to expand and/or refine knowledge in the areas of pharmaceutical and medical sciences or pharmaceutical services. This may include data analysis of scientific, clinical, sociological, and/or economic impacts of pharmaceuticals (including investigational drugs), pharmaceutical care, and patient behaviors, with dissemination of findings to the scientific community and/or the public.

(b) Hours requirement.

(1) The board requires the number of [~~1,500~~] hours of internship required by ACPE for licensure. These hours may be obtained through one or more of the following methods:

(A) in a board approved student internship program, as specified in subsection (c) of this section;

(B) in a board-approved extended-internship program, as specified in subsection (d) of this section; and/or

(C) graduation from a college/school of pharmacy after July 1, 2007. Persons graduating from such programs shall be credited the required number of [~~1,500~~] hours or the number of hours actually obtained and reported by the college; and/or

(D) internship hours approved and certified to the board by another state board of pharmacy.

(2) Pharmacist-interns participating in an internship may be credited no more than 50 hours per week of internship experience.

(3) Internship hours may be used for the purpose of licensure for no longer than two years from the date the internship is completed.

(c) College-/School-Based Internship Programs.

(1) Internship experience acquired by student-interns.

(A) An individual may be designated a student-intern provided he/she:

(i) submits an application to the board that includes the following information:

(I) name;

(II) addresses, phone numbers, date of birth, and social security number;

(III) college of pharmacy and expected graduation date; and

(IV) any other information requested on the application;

(ii) is enrolled in the professional sequence of a college/school of pharmacy; and

(iii) has met all requirements necessary for the board to access the criminal history records information, including submitting fingerprint information and being responsible for all associated costs.

(B) The terms of the student internship shall be as follows.

(i) The student internship shall be gained concurrent with college attendance, which may include:

(I) partial semester breaks such as spring breaks;

(II) between semester breaks; and

(III) whole semester breaks provided the student-intern attended the college/school in the immediate preceding semester and is scheduled with the college/school to attend in the immediate subsequent semester.

(ii) The student internship shall be obtained in pharmacies licensed by the board, federal government pharmacies, or in a board-approved program.

(iii) The student internship shall be in the presence of and under the supervision of a healthcare professional preceptor or a pharmacist preceptor.

(C) None of the internship hours acquired outside of a school-based program may be substituted for any of the hours required in a college/school of pharmacy internship program.

(2) Expiration date for student-intern designation.

(A) The student-internship expires if:

(i) [~~if~~] the student-intern voluntarily or involuntarily ceases enrollment, including suspension, in a college/school of pharmacy;

(ii) the student-intern fails either the NAPLEX or Texas Pharmacy Jurisprudence Examinations specified in this section; or

(iii) the student-intern fails to take either the NAPLEX or Texas Pharmacy Jurisprudence Examinations or both within six calendar months after graduation.

(B) The executive director of the board, in his/her discretion, may extend the term of the student internship if administration of the NAPLEX or Texas Pharmacy Jurisprudence Examinations is suspended or delayed.

(3) Texas colleges/schools of pharmacy internship programs.

(A) Student-interns completing a board-approved Texas college/school-based structured internship shall be credited the number of hours actually obtained and reported by the college. No credit shall be awarded for didactic experience.

(B) No more than 600 hours of the required number of [~~1,500~~] hours may be obtained under a healthcare professional preceptor except when a pharmacist-intern is working in a federal government pharmacy.

(d) Extended-internship program.

(1) A person may be designated an extended-intern provided he/she has met one of the following requirements:

(A) passed NAPLEX and the Texas Pharmacy Jurisprudence Examinations but lacks the required number of internship hours for licensure;

(B) applied to the board to take the NAPLEX and Texas Jurisprudence Examinations within six calendar months after graduation and has:

(i) graduated and received a professional degree from a college/school of pharmacy; or

(ii) completed all of the requirements for graduation and receipt of a professional degree from a college/school of pharmacy. [~~;~~]

(C) applied to the board to take the NAPLEX and Texas Jurisprudence Examinations within six calendar months after obtaining full certification from the Foreign Pharmacy Graduate Equivalency Commission;

(D) applied to the board for re-issuance of a pharmacist license which has expired for more than two years but less than ten years and has successfully passed the Texas Pharmacy Jurisprudence Examination, but lacks the required number of hours of internship or continuing education required for licensure;

(E) is a resident in a residency program accredited by the American Society of Health-System Pharmacists in the state of Texas; or

(F) been ordered by the Board to complete an internship.

(2) In addition to meeting one of the requirements in paragraph (1) of this subsection, an applicant for an extended-internship must:

(A) submit an application to the board that includes the following information:

(i) name;

(ii) addresses, phone numbers, date of birth, and social security number; and

(iii) any other information requested on the application; and

(B) meet all requirements necessary for the board to access the criminal history records information, including submitting fingerprint information and being responsible for all associated costs.

(3) The terms of the extended-internship shall be as follows.

(A) The extended-internship shall be board-approved and gained in a pharmacy licensed by the board, or a federal government pharmacy participating in a board-approved internship program.

(B) The extended-internship shall be in the presence of and under the direct supervision of a pharmacist preceptor.

(4) The extended internship remains in effect for two years. However, the internship expires immediately upon:

(A) the failure of the extended-intern to take the NAPLEX and Texas Pharmacy Jurisprudence Examinations within six calendar months after graduation or FPGEC certification;

(B) the failure of the extended-intern to pass the NAPLEX and Texas Pharmacy Jurisprudence Examinations specified in this section;

(C) [~~upon~~] termination of the residency program; or

(D) obtaining a Texas pharmacist license.

(5) The executive director of the board, in his/her discretion, may extend the term of the extended internship if administration of the NAPLEX and/or Texas Pharmacy Jurisprudence Examinations is suspended or delayed.

(6) An applicant for licensure who has completed less than 500 hours of internship at the time of application shall complete the remainder of the required number of [~~1,500~~] hours of internship and have the preceptor certify that the applicant has met the objectives listed in subsection (a) of this section.

(e) Pharmacist-intern identification.

(1) Pharmacist-interns shall keep documentation of designation as a pharmacist-intern with them at all times they are serving as a pharmacist-intern and make it available for inspection by board agents.

(2) All pharmacist-interns shall wear an identification tag or badge which bears the person's name and identifies him or her as a pharmacist-intern.

(f) Change of address and/or name.

(1) Change of address. A pharmacist-intern shall notify the board electronically or in writing within 10 days of a change of address, giving the old and new address.

(2) Change of name. A pharmacist-intern shall notify the board in writing within 10 days of a change of name by sending a copy of the official document reflecting the name change (e.g., marriage certificate, divorce decree, etc.).

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 14, 2021.

TRD-202102309

Allison Vordenbaumen Benz, R.Ph., M.S.
Executive Director
Texas State Board of Pharmacy
Earliest possible date of adoption: July 25, 2021
For further information, please call: (512) 305-8010

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CHAPTER 291. PHARMACIES
SUBCHAPTER A. ALL CLASSES OF PHARMACIES

22 TAC §291.6

The Texas State Board of Pharmacy proposes amendments to §291.6, concerning Pharmacy License Fees. The amendments, if adopted, will increase pharmacy license fees based on expected expenses.

Allison Vordenbaumen Benz, R.Ph., M.S., Executive Director/Secretary, has determined that, for the first five-year period the rules are in effect, there will be fiscal implications for state government as a result of enforcing or administering the amended rule as follows:

Revenue Increase

FY2022 = $125,736

FY2023 = $126,511

FY2024 = $127,286

FY2025 = $128,061

FY2026 = $128,836

There are no anticipated fiscal implications for local government.

Ms. Benz has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the amendments will be to assure that the Texas State Board of Pharmacy is adequately funded to carry out its mission. The economic cost to large, small or micro-businesses (pharmacies) required to comply with the amended rule will be an increase of $31 for an initial license and an increase of $31 for the renewal of a license. The economic cost to an individual will be the same as the economic cost to a business, if the individual chooses to pay the license fee for the business. An economic impact statement and regulatory flexibility analysis is not required because the proposed amendments will have a de minimis economic effect on Texas small businesses or rural communities.

For each year of the first five years the proposed amendments will be in effect, Ms. Benz has determined the following:

(1) The proposed amendments do not create or eliminate a government program;

(2) Implementation of the proposed amendments does not require the creation of new employee positions or the elimination of existing employee positions;

(3) Implementation of the proposed amendments does not require an increase or decrease in the future legislative appropriations to the agency;

(4) The proposed amendments do require an increase in fees paid to the agency;

(5) The proposed amendments do not create a new regulation;

(6) The proposed amendments do not limit or expand an existing regulation;

(7) The proposed amendments do not increase or decrease the number of individuals subject to the rule's applicability; and

(8) The proposed amendments do not positively or adversely affect this state's economy.

Written comments on the amendments may be submitted to Megan G. Holloway, Deputy General Counsel, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-500, Austin, Texas 78701, FAX (512) 305-8061. Comments must be received by 5:00 p.m., July 27, 2021.

The amendments are proposed under §§551.002 and 554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

§291.6. Pharmacy License Fees.

(a) Initial License Fee. The fee for an initial license shall be $538 [~~$507~~] for the initial registration period.

(b) Biennial License Renewal. The Texas State Board of Pharmacy shall require biennial renewal of all pharmacy licenses provided under the Act §561.002.

(c) Renewal Fee. The fee for biennial renewal of a pharmacy license shall be $535 [~~$504~~] for the renewal period.

(d) Duplicate or Amended Certificates. The fee for issuance of a duplicate pharmacy license renewal certificate shall be $20. The fee for issuance of an amended pharmacy license renewal certificate shall be $100.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 14, 2021.

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Allison Vordenbaumen Benz, R.Ph., M.S.
Executive Director
Texas State Board of Pharmacy
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For further information, please call: (512) 305-8010

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SUBCHAPTER D. INSTITUTIONAL PHARMACY (CLASS C)

22 TAC §291.76

The Texas State Board of Pharmacy proposes amendments to §291.76 concerning Class C Pharmacies Located in a Freestanding Ambulatory Surgical Center. The amendments, if adopted, allow a licensed nurse who is authorized by the pharmacist to perform the loading of an automated medication supply system; update the time interval in which a pharmacist must verify a drug withdrawal; update the requirements for using a floor stock method of drug distribution; update records requirements; and correct grammatical errors.

Allison Vordenbaumen Benz, R.Ph., M.S., Executive Director/Secretary, 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 rule. Ms. Benz has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the amendments will be to improve operational efficiency of pharmacies located in freestanding ambulatory surgical centers and provide clear and grammatically correct regulations. There is no anticipated adverse economic impact on large, small or micro-businesses (pharmacies), rural communities, or local or state employment. Therefore, an economic impact statement and regulatory flexibility analysis are not required.

For each year of the first five years the proposed amendments will be in effect, Ms. Benz has determined the following:

(1) The proposed amendments do not create or eliminate a government program;

(2) Implementation of the proposed amendments does not require the creation of new employee positions or the elimination of existing employee positions;

(3) Implementation of the proposed amendments does not require an increase or decrease in the future legislative appropriations to the agency;

(4) The proposed amendments do not require an increase or decrease in fees paid to the agency;

(5) The proposed amendments do not create a new regulation;

(6) The proposed amendments do limit an existing regulation;

(7) The proposed amendments do not increase or decrease the number of individuals subject to the rule's applicability; and

(8) The proposed amendments do not positively or adversely affect this state's economy.

Written comments on the amendments may be submitted to Megan G. Holloway, Deputy General Counsel, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-500, Austin, Texas 78701, FAX (512) 305-8061. Comments must be received by 5:00 p.m., July 27, 2021.

The amendments are proposed under §§551.002 and 554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

§291.76. Class C Pharmacies Located in a Freestanding Ambulatory Surgical Center.

(a) Purpose. The purpose of this section is to provide standards in the conduct, practice activities, and operation of a pharmacy located in a freestanding ambulatory surgical center that is licensed by the Texas Department of State Health Services. Class C pharmacies located in a freestanding ambulatory surgical center shall comply with this section, in lieu of §§291.71 - 291.75 of this title (relating to Purpose; Definitions; Personnel; Operational Standards; and Records).

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

(1) Act--The Texas Pharmacy Act, Occupations Code, Subtitle J, as amended.

(2) Administer--The direct application of a prescription drug by injection, inhalation, ingestion, or any other means to the body of a patient by:

(A) a practitioner, an authorized agent under his supervision, or other person authorized by law; or

(B) the patient at the direction of a practitioner.

(3) Ambulatory surgical center (ASC)--A freestanding facility that is licensed by the Texas Department of State Health Services that primarily provides surgical services to patients who do not require overnight hospitalization or extensive recovery, convalescent time or observation. The planned total length of stay for an ASC patient shall not exceed 23 hours. Patient stays of greater than 23 hours shall be the result of an unanticipated medical condition and shall occur infrequently. The 23-hour period begins with the induction of anesthesia.

(4) Automated medication supply system--A mechanical system that performs operations or activities relative to the storage and distribution of medications for administration and which collects, controls, and maintains all transaction information.

(5) Board--The Texas State Board of Pharmacy.

(6) Consultant pharmacist--A pharmacist retained by a facility on a routine basis to consult with the ASC in areas that pertain to the practice of pharmacy.

(7) Controlled substance--A drug, immediate precursor, or other substance listed in Schedules I - V or Penalty Groups 1 - 4 of the Texas Controlled Substances Act, as amended, or a drug immediate precursor, or other substance included in Schedules I - V of the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970, as amended (Public Law 91-513).

(8) Dispense--Preparing, packaging, compounding, or labeling for delivery a prescription drug or device in the course of professional practice to an ultimate user or his agent by or pursuant to the lawful order of a practitioner.

(9) Distribute--The delivery of a prescription drug or device other than by administering or dispensing.

(10) Downtime--Period of time during which a data processing system is not operable.

(11) Electronic signature--A unique security code or other identifier which specifically identifies the person entering information into a data processing system. A facility which utilizes electronic signatures must:

(A) maintain a permanent list of the unique security codes assigned to persons authorized to use the data processing system; and

(B) have an ongoing security program which is capable of identifying misuse and/or unauthorized use of electronic signatures.

(12) Floor stock--Prescription drugs or devices not labeled for a specific patient and maintained at a nursing station or other ASC department (excluding the pharmacy) for the purpose of administration to a patient of the ASC.

(13) Formulary--List of drugs approved for use in the ASC by an appropriate committee of the ambulatory surgical center.

(14) Hard copy--A physical document that is readable without the use of a special device (i.e., data processing system, computer, etc.).

(15) Investigational new drug--New drug intended for investigational use by experts qualified to evaluate the safety and effectiveness of the drug as authorized by the federal Food and Drug Administration.

(16) Medication order--An order from a practitioner or his authorized agent for administration of a drug or device.

(17) Pharmacist-in-charge--Pharmacist designated on a pharmacy license as the pharmacist who has the authority or responsibility for a pharmacy's compliance with laws and rules pertaining to the practice of pharmacy.

(18) Pharmacy--Area or areas in a facility, separate from patient care areas, where drugs are stored, bulk compounded, delivered, compounded, dispensed, and/or distributed to other areas or departments of the ASC, or dispensed to an ultimate user or his or her agent.

(19) Prescription drug--

(A) A substance for which federal or state law requires a prescription before it may be legally dispensed to the public;

(B) A drug or device that under federal law is required, prior to being dispensed or delivered, to be labeled with either of the following statements:

(i) Caution: federal law prohibits dispensing without prescription or "Rx only" or another legend that complies with federal law; or

(ii) Caution: federal law restricts this drug to use by or on order of a licensed veterinarian; or

(C) A drug or device that is required by any applicable federal or state law or regulation to be dispensed on prescription only or is restricted to use by a practitioner only.

(20) Prescription drug order--

(A) An order from a practitioner or his authorized agent to a pharmacist for a drug or device to be dispensed; or

(B) An order pursuant to Subtitle B, Chapter 157, Occupations Code.

(21) Full-time pharmacist--A pharmacist who works in a pharmacy from 30 to 40 hours per week or if the pharmacy is open less than 60 hours per week, one-half of the time the pharmacy is open.

(22) Part-time pharmacist--A pharmacist who works less than full-time.

(23) Pharmacy technician--An individual who is registered with the board as a pharmacy technician and whose responsibility in a pharmacy is to provide technical services that do not require professional judgment regarding preparing and distributing drugs and who works under the direct supervision of and is responsible to a pharmacist.

(24) Pharmacy technician trainee--An individual who is registered with the board as a pharmacy technician trainee and is authorized to participate in a pharmacy's technician training program.

(25) Texas Controlled Substances Act--The Texas Controlled Substances Act, Health and Safety Code, Chapter 481, as amended.

(c) Personnel.

(1) Pharmacist-in-charge.

(A) General. Each ambulatory surgical center shall have one pharmacist-in-charge who is employed or under contract, at least on a consulting or part-time basis, but may be employed on a full-time basis.

(B) Responsibilities. The pharmacist-in-charge shall have the responsibility for, at a minimum, the following:

(i) establishing specifications for procurement and storage of all materials, including drugs, chemicals, and biologicals;

(ii) participating in the development of a formulary for the ASC, subject to approval of the appropriate committee of the ASC;

(iii) distributing drugs to be administered to patients pursuant to the practitioner's medication order;

(iv) filling and labeling all containers from which drugs are to be distributed or dispensed;

(v) maintaining and making available a sufficient inventory of antidotes and other emergency drugs, both in the pharmacy and patient care areas, as well as current antidote information, telephone numbers of regional poison control center and other emergency assistance organizations, and such other materials and information as may be deemed necessary by the appropriate committee of the ASC;

(vi) maintaining records of all transactions of the ASC pharmacy as may be required by applicable state and federal law, and as may be necessary to maintain accurate control over and accountability for all pharmaceutical materials;

(vii) participating in those aspects of the ASC's patient care evaluation program which relate to pharmaceutical material utilization and effectiveness;

(viii) participating in teaching and/or research programs in the ASC;

(ix) implementing the policies and decisions of the appropriate committee(s) relating to pharmaceutical services of the ASC;

(x) providing effective and efficient messenger and delivery service to connect the ASC pharmacy with appropriate areas of the ASC on a regular basis throughout the normal workday of the ASC;

(xi) labeling, storing, and distributing investigational new drugs, including maintaining information in the pharmacy and nursing station where such drugs are being administered, concerning the dosage form, route of administration, strength, actions, uses, side effects, adverse effects, interactions, and symptoms of toxicity of investigational new drugs;

(xii) meeting all inspection and other requirements of the Texas Pharmacy Act and this subsection;

(xiii) maintaining records in a data processing system such that the data processing system is in compliance with the requirements for a Class C (institutional) pharmacy located in a free-standing ASC; and

(xiv) ensuring that a pharmacist visits the ASC at least once each calendar week that the facility is open.

(2) Consultant pharmacist.

(A) The consultant pharmacist may be the pharmacist-in-charge.

(B) A written contract shall exist between the ASC and any consultant pharmacist, and a copy of the written contract shall be made available to the board upon request.

(3) Pharmacists.

(A) General.

(i) The pharmacist-in-charge shall be assisted by a sufficient number of additional licensed pharmacists as may be required to operate the ASC pharmacy competently, safely, and adequately to meet the needs of the patients of the facility.

(ii) All pharmacists shall assist the pharmacist-in-charge in meeting the responsibilities as outlined in paragraph (1)(B) of this subsection and in ordering, administering, and accounting for pharmaceutical materials.

(iii) All pharmacists shall be responsible for any delegated act performed by pharmacy technicians or pharmacy technician trainees under his or her supervision.

(iv) All pharmacists while on duty shall be responsible for complying with all state and federal laws or rules governing the practice of pharmacy.

(B) Duties. Duties of the pharmacist-in-charge and all other pharmacists shall include, but need not be limited to, the following:

(i) receiving and interpreting prescription drug orders and oral medication orders and reducing these orders to writing either manually or electronically;

(ii) selecting prescription drugs and/or devices and/or suppliers; and

(iii) interpreting patient profiles.

(C) Special requirements for compounding non-sterile preparations. All pharmacists engaged in compounding non-sterile preparations shall meet the training requirements specified in §291.131 of this title (relating to Pharmacies Compounding Non-Sterile Preparations).

(4) Pharmacy technicians and pharmacy technician trainees.

(A) General. All pharmacy technicians and pharmacy technician trainees shall meet the training requirements specified in §297.6 of this title (relating to Pharmacy Technician and Pharmacy Technician Trainee Training).

(B) Duties. Pharmacy technicians and pharmacy technician trainees may not perform any of the duties listed in paragraph (3)(B) of this subsection. Duties may include, but need not be limited to, the following functions, under the direct supervision of a pharmacist:

(i) prepacking and labeling unit and multiple dose packages, provided a pharmacist supervises and conducts a final check and affixes his or her name, initials, or electronic signature to the appropriate quality control records prior to distribution;

(ii) preparing, packaging, compounding, or labeling prescription drugs pursuant to medication orders, provided a pharmacist supervises and checks the preparation;

(iii) compounding non-sterile preparations pursuant to medication orders provided the pharmacy technicians or pharmacy technician trainees have completed the training specified in §291.131 of this title;

(iv) bulk compounding, provided a pharmacist supervises and conducts in-process and final checks and affixes his or her name, initials, or electronic signature to the appropriate quality control records prior to distribution;

(v) distributing routine orders for stock supplies to patient care areas;

(vi) entering medication order and drug distribution information into a data processing system, provided judgmental decisions are not required and a pharmacist checks the accuracy of the information entered into the system prior to releasing the order or in compliance with the absence of pharmacist requirements contained in subsection (d)(6)(D) and (E) of this section;

(vii) maintaining inventories of drug supplies;

(viii) maintaining pharmacy records; and

(ix) loading drugs into an automated medication supply system. For the purpose of this clause, direct supervision may be accomplished by physically present supervision or electronic monitoring by a pharmacist.

(C) Procedures.

(i) Pharmacy technicians and pharmacy technician trainees shall handle medication orders in accordance with standard written procedures and guidelines.

(ii) Pharmacy technicians and pharmacy technician trainees shall handle prescription drug orders in the same manner as pharmacy technicians or pharmacy technician trainees working in a Class A pharmacy.

(D) Special requirements for compounding non-sterile preparations. All pharmacy technicians and pharmacy technician trainees engaged in compounding non-sterile preparations shall meet the training requirements specified in §291.131 of this title.

(5) Owner. The owner of an ASC pharmacy shall have responsibility for all administrative and operational functions of the pharmacy. The pharmacist-in-charge may advise the owner on administrative and operational concerns. The owner shall have responsibility for, at a minimum, the following, and if the owner is not a Texas licensed pharmacist, the owner shall consult with the pharmacist-in-charge or another Texas licensed pharmacist:

(A) establishing policies for procurement of prescription drugs and devices and other products dispensed from the ASC pharmacy;

(B) establishing and maintaining effective controls against the theft or diversion of prescription drugs;

(C) if the pharmacy uses an automated medication supply system, reviewing and approving all policies and procedures for system operation, safety, security, accuracy and access, patient confidentiality, prevention of unauthorized access, and malfunction;

(D) providing the pharmacy with the necessary equipment and resources commensurate with its level and type of practice; and

(E) establishing policies and procedures regarding maintenance, storage, and retrieval of records in a data processing system such that the system is in compliance with state and federal requirements.

(6) Identification of pharmacy personnel. All pharmacy personnel shall be identified as follows:

(A) Pharmacy technicians. All pharmacy technicians shall wear an identification tag or badge that bears the person's name and identifies him or her as a pharmacy technician.

(B) Pharmacy technician trainees. All pharmacy technician trainees shall wear an identification tag or badge that bears the person's name and identifies him or her as a pharmacy technician trainee.

(C) Pharmacist interns. All pharmacist interns shall wear an identification tag or badge that bears the person's name and identifies him or her as a pharmacist intern.

(D) Pharmacists. All pharmacists shall wear an identification tag or badge that bears the person's name and identifies him or her as a pharmacist.

(d) Operational standards.

(1) Licensing requirements.

(A) An ASC pharmacy shall register annually or biennially with the board on a pharmacy license application provided by the board, following the procedures specified in §291.1 of this title (relating to Pharmacy License Application).

(B) An ASC pharmacy which changes ownership shall notify the board within 10 days of the change of ownership and apply for a new and separate license as specified in §291.3 of this title (relating to Required Notifications).

(C) An ASC pharmacy which changes location and/or name shall notify the board of the change within 10 days and file for an amended license as specified in §291.3 of this title.

(D) An ASC pharmacy owned by a partnership or corporation which changes managing officers shall notify the board in writing of the names of the new managing officers within 10 days of the change, following the procedures in §291.3 of this title.

(E) An ASC pharmacy shall notify the board in writing within 10 days of closing, following the procedures in §291.5 of this title (relating to Closing a Pharmacy).

(F) A fee as specified in §291.6 of this title (relating to Pharmacy License Fees) will be charged for issuance and renewal of a license and the issuance of an amended license.

(G) A separate license is required for each principal place of business and only one pharmacy license may be issued to a specific location.

(H) An ASC pharmacy, licensed under the Act, §560.051(a)(3), concerning institutional pharmacy (Class C), which also operates another type of pharmacy which would otherwise be required to be licensed under the Act, §560.051(a)(1), concerning community pharmacy (Class A), or the Act, §560.051(a)(2), concerning nuclear pharmacy (Class B), is not required to secure a license for the other type of pharmacy; provided, however, such license is required to comply with the provisions of §291.31 of this title (relating to Definitions), §291.32 of this title (relating to Personnel), §291.33 of this title (relating to Operational Standards), §291.34 of this title (relating to Records), and §291.35 of this title (relating to Official Prescription Requirements), or §291.51 of this title (relating to Purpose), §291.52 of this title (relating to Definitions), §291.53 of this title (relating to Personnel), §291.54 of this title (relating to Operational Standards), and §291.55 of this title (relating to Records), contained in Nuclear Pharmacy (Class B), to the extent such sections are applicable to the operation of the pharmacy.

(I) An ASC pharmacy engaged in the compounding of non-sterile preparations shall comply with the provisions of §291.131 of this title.

(J) ASC pharmacy personnel shall not compound sterile preparations unless the pharmacy has applied for and obtained a Class C-S pharmacy license.

(K) An ASC pharmacy engaged in the provision of remote pharmacy services, including storage and dispensing of prescription drugs, shall comply with the provisions of §291.121 of this title (relating to Remote Pharmacy Services).

(L) An ASC pharmacy engaged in centralized prescription dispensing and/or prescription drug or medication order processing shall comply with the provisions of §291.123 of this title (relating to Central Prescription Drug or Medication Order Processing) and/or §291.125 of this title (relating to Centralized Prescription Dispensing).

(2) Environment.

(A) General requirements.

(i) Each ambulatory surgical center shall have a designated work area separate from patient areas, and which shall have space adequate for the size and scope of pharmaceutical services and shall have adequate space and security for the storage of drugs.

(ii) The ASC pharmacy shall be arranged in an orderly fashion and shall be kept clean. All required equipment shall be clean and in good operating condition.

(B) Special requirements.

(i) The ASC pharmacy shall have locked storage for Schedule II controlled substances and other controlled drugs requiring additional security.

(ii) The ASC pharmacy shall have a designated area for the storage of poisons and externals separate from drug storage areas.

(C) Security.

(i) The pharmacy and storage areas for prescription drugs and/or devices shall be enclosed and capable of being locked by key, combination, or other mechanical or electronic means, so as to prohibit access by unauthorized individuals. Only individuals authorized by the pharmacist-in-charge may enter the pharmacy or have access to storage areas for prescription drugs and/or devices.

(ii) The pharmacist-in-charge shall consult with ASC personnel with respect to security of the drug storage areas, including provisions for adequate safeguards against theft or diversion of dangerous drugs and controlled substances, and to security of records for such drugs.

(iii) The pharmacy shall have locked storage for Schedule II controlled substances and other drugs requiring additional security.

(3) Equipment and supplies. Ambulatory surgical centers supplying drugs for postoperative use shall have the following equipment and supplies:

(A) data processing system including a printer or comparable equipment;

(B) adequate supply of child-resistant, moisture-proof, and light-proof containers; and

(C) adequate supply of prescription labels and other applicable identification labels.

(4) Library. A reference library shall be maintained that includes the following in hard copy or electronic format and that pharmacy personnel shall be capable of accessing at all times:

(A) current copies of the following:

(i) Texas Pharmacy Act and rules;

(ii) Texas Dangerous Drug Act and rules;

(iii) Texas Controlled Substances Act and rules;

(iv) Federal Controlled Substances Act and rules or official publication describing the requirements of the Federal Controlled Substances Act and rules;

(B) at least one current or updated general drug information reference which is required to contain drug interaction information including information needed to determine severity or significance of the interaction and appropriate recommendations or actions to be taken; and

(C) basic antidote information and the telephone number of the nearest regional poison control center.

(5) Drugs.

(A) Procurement, preparation, and storage.

(i) The pharmacist-in-charge shall have the responsibility for the procurement and storage of drugs, but may receive input from other appropriate staff of the facility, relative to such responsibility.

(ii) The pharmacist-in-charge shall have the responsibility for determining specifications of all drugs procured by the facility.

(iii) ASC pharmacies may not sell, purchase, trade, or possess prescription drug samples, unless the pharmacy meets the requirements as specified in §291.16 of this title (relating to Samples).

(iv) All drugs shall be stored at the proper temperatures, as defined in the USP/NF and in §291.15 of this title (relating to Storage of Drugs).

(v) Any drug bearing an expiration date may not be dispensed or distributed beyond the expiration date of the drug.

(vi) Outdated drugs shall be removed from dispensing stock and shall be quarantined together until such drugs are disposed of.

(B) Formulary.

(i) A formulary may be developed by an appropriate committee of the ASC.

(ii) The pharmacist-in-charge or consultant pharmacist shall be a full voting member of any committee which involves pharmaceutical services.

(iii) A practitioner may grant approval for pharmacists at the ASC to interchange, in accordance with the facility's formulary, for the drugs on the practitioner's medication orders provided:

(I) a formulary has been developed;

(II) the formulary has been approved by the medical staff of the ASC;

(III) there is a reasonable method for the practitioner to override any interchange; and

(IV) the practitioner authorizes a pharmacist in the ASC to interchange on his/her medication orders in accordance with

the facility's formulary through his/her written agreement to abide by the policies and procedures of the medical staff and facility.

(C) Prepackaging and loading drugs into automated medication supply system.

(i) Prepackaging of drugs.

(I) Drugs may be prepackaged in quantities suitable for distribution to other Class C pharmacies under common ownership or for internal distribution only by a pharmacist or by pharmacy technicians or pharmacy technician trainees under the direction and direct supervision of a pharmacist.

(II) The label of a prepackaged unit shall indicate:

(-a-) brand name and strength of the drug; or if no brand name, then the generic name, strength, and name of the manufacturer or distributor;

(-b-) facility's lot number;

(-c-) expiration date;

(-d-) quantity of the drug, if quantity is greater than one; and

(-e-) if the drug is distributed to another Class C pharmacy, name of the facility responsible for prepackaging the drug.

(III) Records of prepackaging shall be maintained to show:

(-a-) the name of the drug, strength, and dosage form;

(-b-) facility's lot number;

(-c-) manufacturer or distributor;

(-d-) manufacturer's lot number;

(-e-) expiration date;

(-f-) quantity per prepackaged unit;

(-g-) number of prepackaged units;

(-h-) date packaged;

(-i-) name, initials, or electronic signature of the prepacker;

(-j-) signature or electronic signature of the responsible pharmacist; and

(-k-) if the drug is distributed to another Class C pharmacy, name of the facility receiving the prepackaged drug.

(IV) Stock packages, repackaged units, and control records shall be quarantined together until checked/released by the pharmacist.

(ii) Loading bulk unit of use drugs into automated medication supply systems. Automated medication supply systems may be loaded with bulk unit of use drugs only by a pharmacist, [~~or~~] by pharmacy technicians or pharmacy technician trainees under the direction and direct supervision of a pharmacist, or by a licensed nurse who is authorized by the pharmacist to perform the loading of the automated medication supply system. For the purpose of this clause, direct supervision may be accomplished by physically present supervision or electronic monitoring by a pharmacist. In order for the pharmacist to electronically monitor, the medication supply system must allow for bar code scanning to verify the loading of drugs, and a record of the loading must be maintained by the system and accessible for electronic review by the pharmacist.

(6) Medication orders.

(A) Drugs may be administered to patients in ASCs only on the order of a practitioner. No change in the order for drugs may be made without the approval of a practitioner except as authorized by the practitioner in compliance with paragraph (5)(B) of this subsection.

(B) Drugs may be distributed only pursuant to the practitioner's medication order.

(C) ASC pharmacies shall be exempt from the labeling provisions and patient notification requirements of §562.006 and §562.009 of the Act, as respects drugs distributed pursuant to medication orders.

(D) In ASCs with a full-time pharmacist, if a practitioner orders a drug for administration to a bona fide patient of the facility when the pharmacy is closed, the following is applicable:[.]

(i) prescription [~~Prescription~~] drugs and devices only in sufficient quantities for immediate therapeutic needs of a patient may be removed from the ASC pharmacy;[.]

(ii) only [~~Only~~] a designated licensed nurse or practitioner may remove such drugs and devices;[.]

(iii) a [~~A~~] record shall be made at the time of withdrawal by the authorized person removing the drugs and devices. The record shall contain the following information:

(I) name of the patient;

(II) name of device or drug, strength, and dosage form;

(III) dose prescribed;

(IV) quantity withdrawn [~~taken~~];

(V) time and date; and

(VI) signature or electronic signature of the person making the withdrawal; [.]

(iv) the [~~The~~] medication order in the patient's chart may substitute for such record, provided the medication order meets all the requirements of clause (iii) of this subparagraph;[.]

(v) the [~~The~~] pharmacist shall verify the withdrawal of a controlled substance as soon as practical, but in no event more than 72 hours from the time of such withdrawal; and [.]

(vi) the pharmacist shall verify the withdrawal of a dangerous drug at a reasonable interval, but such verification must occur at least once in every calendar week.

(E) In ASCs with a part-time or consultant pharmacist, if a practitioner orders a drug for administration to a bona fide patient of the ASC when the pharmacist is not on duty, or when the pharmacy is closed, the following is applicable:

(i) prescription [~~Prescription~~] drugs and devices only in sufficient quantities for therapeutic needs may be removed from the ASC pharmacy;

(ii) only [~~Only~~] a designated licensed nurse or practitioner may remove such drugs and devices; [~~and~~]

(iii) a record shall be made at the time of withdrawal by the authorized person removing the drug or device as described in subparagraph (D)(iii) and (iv) of this subsection; and

(iv) [~~(iii)~~] the [~~The~~] pharmacist shall verify withdrawals [~~conduct an audit of the patient's medical record according to the schedule set out in the policy and procedures~~] at a reasonable interval, but such verification [~~interval~~] must occur at least once in every calendar week that the pharmacy is open.

(7) Floor stock. In facilities using a floor stock method of drug distribution, the pharmacy shall establish designated floor stock areas outside of the central pharmacy where drugs may be stored, in

accordance with the pharmacy's policies and procedures. The [~~the~~] following is applicable for removing drugs or devices in the absence of a pharmacist:[.]

(A) prescription [~~Prescription~~] drugs and devices may be removed from the pharmacy only in the original manufacturer's container or prepackaged container; [.]

(B) only [~~Only~~] a designated licensed nurse or practitioner may remove such drugs and devices; [.]

(C) a [~~A~~] record shall be made at the time of withdrawal by the authorized person removing the drug or device and [;] the record shall contain the following information:

(i) name of the drug, strength, and dosage form;

(ii) quantity removed;

(iii) location of floor stock;

(iv) date and time; and

(v) signature or electronic signature of person making the withdrawal; and [.]

~~[(D) A pharmacist shall verify the withdrawal according to the following schedule.]~~

~~*[(i)* In facilities with a full-time pharmacist, the withdrawal shall be verified as soon as practical, but in no event more than 72 hours from the time of such withdrawal.]~~

~~*[(ii)* In facilities with a part-time or consultant pharmacist, the withdrawal shall be verified after a reasonable interval, but such interval must occur at least once in every calendar week that the pharmacy is open.]~~

~~*[(iii)* The medication order in the patient's chart may substitute for the record required in subparagraph (C) of this paragraph, provided the medication order meets all the requirements of subparagraph (C) of this paragraph.]~~

(D) if a stored drug or device is returned to the pharmacy from floor stock areas, a record shall be made by the authorized person returning the drug or device. The record shall contain the following information:

(i) drug name, strength, and dosage form, or device name;

(ii) quantity returned;

(iii) previous floor stock location for the drug or device;

(iv) date and time; and

(v) signature or electronic signature of person returning the drug or device.

(8) Policies and procedures. Written policies and procedures for a drug distribution system, appropriate for the ambulatory surgical center, shall be developed and implemented by the pharmacist-in-charge with the advice of the appropriate committee. The written policies and procedures for the drug distribution system shall include, but not be limited to, procedures regarding the following:

(A) controlled substances;

(B) investigational drugs;

(C) prepackaging and manufacturing;

(D) medication errors;

(E) orders of physician or other practitioner;

(F) floor stocks;

(G) adverse drug reactions;

(H) drugs brought into the facility by the patient;

(I) self-administration;

(J) emergency drug tray;

(K) formulary, if applicable;

(L) drug storage areas;

(M) drug samples;

(N) drug product defect reports;

(O) drug recalls;

(P) outdated drugs;

(Q) preparation and distribution of IV admixtures;

(R) procedures for supplying drugs for postoperative use, if applicable;

(S) use of automated medication supply systems;

(T) use of data processing systems; and

(U) drug regimen review.

(9) Drugs supplied for postoperative use. Drugs supplied to patients for postoperative use shall be supplied according to the following procedures.

(A) Drugs may only be supplied to patients who have been admitted to the ASC.

(B) Drugs may only be supplied in accordance with the system of control and accountability established for drugs supplied from the ambulatory surgical center; such system shall be developed and supervised by the pharmacist-in-charge or staff pharmacist designated by the pharmacist-in-charge.

(C) Only drugs listed on the approved postoperative drug list may be supplied; such list shall be developed by the pharmacist-in-charge and the medical staff and shall consist of drugs of the nature and type to meet the immediate postoperative needs of the ambulatory surgical center patient.

(D) Drugs may only be supplied in prepackaged quantities not to exceed a 72-hour supply in suitable containers and appropriately prelabeled (including name, address, and phone number of the facility, and necessary auxiliary labels) by the pharmacy provided, however, that topicals and ophthalmics in original manufacturer's containers may be supplied in a quantity exceeding a 72-hour supply.

(E) At the time of delivery of the drug, the practitioner shall complete the label, such that the prescription container bears a label with at least the following information:

(i) date supplied;

(ii) name of practitioner;

(iii) name of patient;

(iv) directions for use;

(v) brand name and strength of the drug; or if no brand name, then the generic name of the drug dispensed, strength, and the name of the manufacturer or distributor of the drug; and

(vi) unique identification number.

(F) After the drug has been labeled, the practitioner or a licensed nurse under the supervision of the practitioner shall give the appropriately labeled, prepackaged medication to the patient.

(G) A perpetual record of drugs which are supplied from the ASC shall be maintained which includes:

(i) name, address, and phone number of the facility;

(ii) date supplied;

(iii) name of practitioner;

(iv) name of patient;

(v) directions for use;

(vi) brand name and strength of the drug; or if no brand name, then the generic name of the drug dispensed, strength, and the name of the manufacturer or distributor of the drug; and

(vii) unique identification number.

(H) The pharmacist-in-charge, or a pharmacist designated by the pharmacist-in-charge, shall review the records at least once in every calendar week that the pharmacy is open.

(10) Drug regimen review.

(A) A pharmacist shall evaluate medication orders and patient medication records for:

(i) known allergies;

(ii) rational therapy--contraindications;

(iii) reasonable dose and route of administration;

(iv) reasonable directions for use;

(v) duplication of therapy;

(vi) drug-drug interactions;

(vii) drug-food interactions;

(viii) drug-disease interactions;

(ix) adverse drug reactions;

(x) proper utilization, including overutilization or underutilization; and

(xi) clinical laboratory or clinical monitoring methods to monitor and evaluate drug effectiveness, side effects, toxicity, or adverse effects, and appropriateness to continued use of the drug in its current regimen.

(B) A retrospective, random drug regimen review as specified in the pharmacy's policies and procedures shall be conducted on a periodic basis to verify proper usage of drugs not to exceed 31 days between such reviews.

(C) Any questions regarding the order must be resolved with the prescriber and a written notation of these discussions made and maintained.

(e) Records.

(1) Maintenance of records.

(A) Every inventory or other record required to be kept under the provisions of this section (relating to Class C Pharmacies Located in a Freestanding Ambulatory Surgical Center) shall be:

(i) kept by the pharmacy and be available, for at least two years from the date of such inventory or record, for inspecting and copying by the board or its representative, and other authorized local, state, or federal law enforcement agencies; and

(ii) supplied by the pharmacy within 72 hours, if requested by an authorized agent of the board. If the pharmacy maintains the records in an electronic format, the requested records must be provided in a mutually agreeable electronic format if specifically requested by the board or its representative. Failure to provide the records set out in this subsection, either on site or within 72 hours, constitutes prima facie evidence of failure to keep and maintain records in violation of the Act.

(B) Records of controlled substances listed in Schedule II shall be maintained separately and readily retrievable from all other records of the pharmacy.

(C) Records of controlled substances listed in Schedules III - V shall be maintained separately or readily retrievable from all other records of the pharmacy. For purposes of this subparagraph, "readily retrievable" means that the controlled substances shall be asterisked, redlined, or in some other manner readily identifiable apart from all other items appearing on the record.

(D) Records, except when specifically required to be maintained in original or hard copy form, may be maintained in an alternative data retention system, such as a data processing or direct imaging system provided:

(i) the records in the alternative data retention system contain all of the information required on the manual record; and

(ii) the alternative data retention system is capable of producing a hard copy of the record upon the request of the board, its representative, or other authorized local, state, or federal law enforcement or regulatory agencies.

(E) Controlled substance records shall be maintained in a manner to establish receipt and distribution of all controlled substances.

(F) An ASC pharmacy shall maintain a perpetual inventory of controlled substances listed in Schedules II - V which shall be verified for completeness and reconciled at least once in every calendar week that the pharmacy is open.

(G) Distribution records for controlled substances, listed in Schedules II - V, shall include the following information:

(i) patient's name;

(ii) practitioner's name who ordered the drug;

(iii) name of drug, dosage form, and strength;

(iv) time and date of administration to patient and quantity administered;

(v) signature or electronic signature of individual administering the controlled substance;

(vi) returns to the pharmacy; and

(vii) waste (waste is required to be witnessed and cosigned, manually or electronically, by another individual).

(H) The record required by subparagraph (G) of this paragraph shall be maintained separately from patient records.

(I) A pharmacist shall conduct an audit by randomly comparing the distribution records required by subparagraph (G) with the medication orders in the patient record on a periodic basis to verify proper administration of drugs not to exceed 30 days between such reviews.

(2) Patient records.

(A) Each medication order or set of orders issued together shall bear the following information:

(i) patient name;

(ii) drug name, strength, and dosage form;

(iii) directions for use;

(iv) date; and

(v) signature or electronic signature of the practitioner or that of his or her authorized agent, defined as an employee or consultant/full or part-time pharmacist of the ASC.

(B) Medication orders shall be maintained with the medication administration record in the medical records of the patient.

(3) General requirements for records maintained in a data processing system.

(A) If an ASC pharmacy's data processing system is not in compliance with the board's requirements, the pharmacy must maintain a manual recordkeeping system.

(B) The facility shall maintain a backup copy of information stored in the data processing system using disk, tape, or other electronic backup system and update this backup copy on a regular basis to assure that data is not lost due to system failure.

(C) A pharmacy that changes or discontinues use of a data processing system must:

(i) transfer the records to the new data processing system; or

(ii) purge the records to a printout which contains:

(I) all of the information required on the original document; or

(II) for records of distribution and return for all controlled substances, the same information as required on the audit trail printout as specified in subparagraph (F) of this paragraph. The information on the printout shall be sorted and printed by drug name and list all distributions and returns chronologically.

(D) Information purged from a data processing system must be maintained by the pharmacy for two years from the date of initial entry into the data processing system.

(E) The pharmacist-in-charge shall report to the board in writing any significant loss of information from the data processing system within 10 days of discovery of the loss.

(F) The data processing system shall have the capacity to produce a hard copy printout of an audit trail of drug distribution and return for any strength and dosage form of a drug (by either brand or generic name or both) during a specified time period. This printout shall contain the following information:

(i) patient's name and room number or patient's facility identification number;

(ii) prescribing or attending practitioner's name;

(iii) name, strength, and dosage form of the drug product actually distributed;

(iv) total quantity distributed from and returned to the pharmacy;

(v) if not immediately retrievable via electronic image, the following shall also be included on the printout:

(I) prescribing or attending practitioner's address; and

(II) practitioner's DEA registration number, if the medication order is for a controlled substance.

(G) An audit trail printout for each strength and dosage form of the drugs distributed during the preceding month shall be produced at least monthly and shall be maintained in a separate file at the facility. The information on this printout shall be sorted by drug name and list all distributions/returns for that drug chronologically.

(H) The pharmacy may elect not to produce the monthly audit trail printout if the data processing system has a workable (electronic) data retention system which can produce an audit trail of drug distribution and returns for the preceding two years. The audit trail required in this clause shall be supplied by the pharmacy within 72 hours, if requested by an authorized agent of the Texas State Board of Pharmacy, or other authorized local, state, or federal law enforcement or regulatory agencies.

(I) In the event that an ASC pharmacy which uses a data processing system experiences system downtime, the pharmacy must have an auxiliary procedure which will ensure that all data is retained for online data entry as soon as the system is available for use again.

(4) Distribution of controlled substances to another registrant. A pharmacy may distribute controlled substances to a practitioner, another pharmacy, or other registrant, without being registered to distribute, under the following conditions.

(A) The registrant to whom the controlled substance is to be distributed is registered under the Controlled Substances Act to possess that controlled substance.

(B) The total number of dosage units of controlled substances distributed by a pharmacy may not exceed 5.0% of all controlled substances dispensed by the pharmacy during the 12-month period in which the pharmacy is registered; if at any time it does exceed 5.0%, the pharmacy is required to obtain an additional registration to distribute controlled substances.

(C) If the distribution is for a Schedule III, IV, or V controlled substance, a record shall be maintained which indicates:

(i) the actual date of distribution;

(ii) the name, strength, and quantity of controlled substances distributed;

(iii) the name, address, and DEA registration number of the distributing pharmacy; and

(iv) the name, address, and DEA registration number of the pharmacy, practitioner, or other registrant to whom the controlled substances are distributed.

(D) A pharmacy shall comply with 21 CFR 1305 regarding the DEA order form (DEA 222) requirements when distributing a Schedule II controlled substance.

(5) Other records. Other records to be maintained by the pharmacy include:

(A) a log of the initials or identification codes which identifies each pharmacist by name. The initials or identification code shall be unique to ensure that each pharmacist can be identified, i.e., identical initials or identification codes cannot be used. Such log shall be maintained at the pharmacy for at least seven years from the date of the transaction;

(B) suppliers' invoices of dangerous drugs and controlled substances dated and initialed or signed by the person receiving the drugs;

(i) a pharmacist shall verify that the controlled substances [~~drugs~~] listed on the invoices were added to the pharmacy's perpetual inventory by clearly recording his/her initials and the date of review of the perpetual inventory; and

(ii) for controlled substances, the documents retained must contain the name, strength, and quantity of controlled substances distributed, and the name, address, and DEA number of both the supplier and the receiving pharmacy;

(C) supplier's credit memos for controlled substances and dangerous drugs;

(D) a copy of inventories required by §291.17 of this title (relating to Inventory Requirements) except that a perpetual inventory of controlled substances listed in Schedule II may be kept in a data processing system if the data processing system is capable of producing a copy of the perpetual inventory on-site;

(E) reports of surrender or destruction of controlled substances and/or dangerous drugs to an appropriate state or federal agency or reverse distributor;

(F) records of distribution of controlled substances and/or dangerous drugs to other pharmacies, practitioners, or registrants; and

(G) a copy of any notification required by the Texas Pharmacy Act or these rules, including, but not limited to, the following:

(i) reports of theft or significant loss of controlled substances to DEA and the board;

(ii) notification of a change in pharmacist-in-charge of a pharmacy; and

(iii) reports of a fire or other disaster which may affect the strength, purity, or labeling of drugs, medications, devices, or other materials used in the diagnosis or treatment of injury, illness, and disease.

(6) Permission to maintain central records. Any pharmacy that uses a centralized recordkeeping system for invoices and financial data shall comply with the following procedures.

(A) Controlled substance records. Invoices and financial data for controlled substances may be maintained at a central location provided the following conditions are met:

(i) Prior to the initiation of central recordkeeping, the pharmacy submits written notification by registered or certified mail to the divisional director of DEA as required by the Code of Federal Regulations, Title 21, §1304(a), and submits a copy of this written notification to the board. Unless the registrant is informed by the divisional director of DEA that permission to keep central records is denied, the pharmacy may maintain central records commencing 14 days after receipt of notification by the divisional director;

(ii) The pharmacy maintains a copy of the notification required in this subparagraph; and

(iii) The records to be maintained at the central record location shall not include executed DEA order forms, prescription drug orders, or controlled substance inventories, which shall be maintained at the pharmacy.

(B) Dangerous drug records. Invoices and financial data for dangerous drugs may be maintained at a central location.

(C) Access to records. If the records are kept in any form requiring special equipment to render the records easily readable, the pharmacy shall provide access to such equipment with the records.

(D) Delivery of records. The pharmacy agrees to deliver all or any part of such records to the pharmacy location within two business days of written request of a board agent or any other authorized official.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 14, 2021.

TRD-202102314
Allison Vordenbaumen Benz, R.Ph., M.S.
Executive Director
Texas State Board of Pharmacy
Earliest possible date of adoption: July 25, 2021
For further information, please call: (512) 305-8010

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SUBCHAPTER G. SERVICES PROVIDED BY PHARMACIES

22 TAC §291.121

The Texas State Board of Pharmacy proposes amendments to §291.121 concerning Remote Pharmacy Services. The amendments, if adopted, authorize a Class A or Class C pharmacy to provide remote pharmacy services using an automated dispensing and delivery system and correct grammatical errors.

Allison Vordenbaumen Benz, R.Ph., M.S., Executive Director/Secretary, 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 rule. Ms. Benz has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the amendments will be to improve patient care and operational efficiency of pharmacies by allowing additional services to be provided using an automated system in a facility that is not at the same location as the pharmacy and provide grammatically correct regulations. There is no anticipated adverse economic impact on large, small or micro-businesses (pharmacies), rural communities, or local or state employment. Therefore, an economic impact statement and regulatory flexibility analysis are not required.

For each year of the first five years the proposed amendments will be in effect, Ms. Benz has determined the following:

(1) The proposed amendments do not create or eliminate a government program;

(2) Implementation of the proposed amendments does not require the creation of new employee positions or the elimination of existing employee positions;

(3) Implementation of the proposed amendments does not require an increase or decrease in the future legislative appropriations to the agency;

(4) The proposed amendments do not require an increase or decrease in fees paid to the agency;

(5) The proposed amendments do not create a new regulation;

(6) The proposed amendments do limit an existing regulation;

(7) The proposed amendments do not increase or decrease the number of individuals subject to the rule's applicability; and

(8) The proposed amendments do not positively or adversely affect this state's economy.

Written comments on the amendments may be submitted to Megan G. Holloway, Deputy General Counsel, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-500, Austin, Texas 78701, FAX (512) 305-8061. Comments must be received by 5:00 p.m., July 27, 2021.

The amendments are proposed under §§551.002 and 554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

§291.121. Remote Pharmacy Services.

(a) Remote pharmacy services using automated pharmacy systems.

(1) Purpose. The purpose of this section is to provide standards for the provision of pharmacy services by a Class A or Class C pharmacy in a facility that is not at the same location as the Class A or Class C pharmacy through an automated pharmacy system as outlined in §562.109 of the Texas Pharmacy Act.

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

(A) Automated pharmacy system--A mechanical system that dispenses prescription drugs and maintains related transaction information.

(B) Prepackaging--The act of repackaging and relabeling quantities of drug products from a manufacturer's original commercial container, or quantities of unit dosed drugs, into another cartridge or container for dispensing by a pharmacist using an automated pharmacy system.

(C) Provider pharmacy--The community pharmacy (Class A) or the institutional pharmacy (Class C) providing remote pharmacy services.

(D) Remote pharmacy service--The provision of pharmacy services, including the storage and dispensing of prescription drugs, in remote sites.

(E) Remote site--A facility not located at the same location as a Class A or Class C pharmacy, at which remote pharmacy services are provided using an automated pharmacy dispensing system.

(F) Unit dose--An amount of a drug packaged in a dosage form ready for administration to a particular patient, by the prescribed route at the prescribed time, and properly labeled with name, strength, and expiration date of the drug.

(3) General requirements.

(A) A provider pharmacy may provide remote pharmacy services using an automated pharmacy system to a jail or prison operated by or for the State of Texas, a jail or prison operated by local government or a healthcare facility regulated under Chapter 142, 241, 242, 247, or 252, Health and Safety Code, provided drugs are administered by a licensed healthcare professional working in the jail, prison, or healthcare facility.

(B) A provider pharmacy may provide remote pharmacy services at more than one remote site.

(C) Before providing remote pharmacy services, the automated pharmacy system at the remote site must be tested by the provider pharmacy and found to dispense accurately. The provider pharmacy shall make the results of such testing available to the board upon request.

(D) A provider pharmacy which is licensed as an institutional (Class C) pharmacy is required to comply with the provisions of §§291.31 - 291.34 of this title (relating to Definitions, Personnel, Operational Standards, and Records, respectively [~~for Class A (Community) Pharmacies~~]) and this section.

(E) The pharmacist-in-charge of the provider pharmacy is responsible for all pharmacy operations involving the automated pharmacy system located at the remote site including supervision of the automated pharmacy system and compliance with this section.

(F) A pharmacist from the provider pharmacy shall be accessible at all times to respond to patients' [~~patient's~~] or other health professionals' questions and needs pertaining to drugs dispensed through the use of the automated pharmacy system. Such access may be through a 24 hour pager service or telephone which is answered 24 hours a day.

(4) Operational standards.

(A) Application for permission to provide pharmacy services using an automated pharmacy system.

(i) A Class A or Class C Pharmacy shall file a completed application containing all information required by the board to provide remote pharmacy services using an automated pharmacy system.

(ii) Such application shall be resubmitted every two years in conjunction with the application for renewal of the provider pharmacy's license.

(iii) Upon approval of the application, the provider pharmacy will be sent a certificate which must be displayed at the remote site.

(B) Notification requirements.

(i) A provider pharmacy shall notify the board in writing within ten days of a discontinuance of service, or closure of:

(I) a remote site where an automated pharmacy system is operated by the pharmacy; or

(II) a remote pharmacy service at a remote site.

(ii) A provider pharmacy shall comply with appropriate federal and state controlled substance registrations for each remote site if controlled substances are maintained within an automated pharmacy system at the facility.

(iii) A provider pharmacy shall file a change of location and/or name of a remote site as specified in §291.3 of this title (relating to Notifications) [~~of this title~~].

(C) Environment/Security.

(i) A provider pharmacy shall only store drugs at a remote site within an automated pharmacy system which is locked by key, combination or other mechanical or electronic means so as to prohibit access by unauthorized personnel.

(ii) An automated pharmacy system shall be under the continuous supervision of a provider pharmacy pharmacist. To qualify as continuous supervision, the pharmacist is not required to be physically present at the site of the automated pharmacy system if the system is supervised electronically by a pharmacist.

(iii) Automated pharmacy systems shall have adequate security and procedures to:

(I) comply with federal and state laws and regulations; and

(II) maintain patient confidentiality.

(iv) Access to the automated pharmacy system shall be limited to pharmacists or personnel who:

(I) are designated in writing by the pharmacist-in-charge; and

(II) have completed documented training concerning their duties associated with the automated pharmacy system.

(v) Drugs shall be stored in compliance with the provisions of §291.15 of this title (relating to Storage of Drugs) and §291.33(f)(2) of this title including the requirements for temperature and handling of outdated drugs.

(D) Prescription dispensing and delivery.

(i) Drugs shall only be dispensed at a remote site through an automated pharmacy system after receipt of an original prescription drug order by a pharmacist at the provider pharmacy in a manner authorized by §291.34(b) of this title.

(ii) A pharmacist at the provider pharmacy shall control all operations of the automated pharmacy system and approve the release of the initial dose of a prescription drug order. Subsequent doses from an approved prescription drug order may be removed from the automated medication system after this initial approval. Any change made in the prescription drug order shall require a new approval by a pharmacist to release the drug.

(iii) A pharmacist at the provider pharmacy shall conduct a drug regimen review as specified in §291.33(c) of this title prior to releasing a prescription drug order to the automated pharmacy system.

(iv) Drugs dispensed by the provider pharmacy through an automated pharmacy system shall comply with the labeling or labeling alternatives specified in §291.33(c) of this title.

(v) An automated pharmacy system used to meet the emergency medication needs for residents of a remote site must comply with the requirements for emergency medication kits in subsection (b) of this section.

(E) Drugs.

(i) Drugs for use in an automated pharmacy system shall be packaged in the original manufacturer's container or be prepackaged in the provider pharmacy and labeled in compliance with the board's prepackaging requirements for the class of pharmacy.

(ii) Drugs dispensed from the automated pharmacy system may be returned to the pharmacy for reuse provided the drugs are in sealed, tamper evident packaging which has not been opened.

(F) Stocking an automated pharmacy system.

(i) Stocking of drugs in an automated pharmacy system shall be completed by a pharmacist, pharmacy technician, or pharmacy technician trainee under the direct supervision of a pharmacist, except as provided in clause (ii) of this subparagraph.

(ii) If the automated pharmacy system uses removable cartridges or containers to hold drugs, the prepackaging of the cartridges or containers shall occur at the provider pharmacy unless provided by an FDA approved repackager. The prepackaged cartridges or containers may be sent to the remote site to be loaded into the machine by personnel designated by the pharmacist-in-charge provided:

(I) a pharmacist verifies the cartridge or container has been properly filled and labeled;

(II) the individual cartridges or containers are transported to the remote site in a secure, tamper-evident container; and

(III) the automated pharmacy system uses barcoding, microchip, or other technologies to ensure that the containers are accurately loaded in the automated pharmacy system.

(iii) All drugs to be stocked in the automated pharmacy system shall be delivered to the remote site by the provider pharmacy.

(G) Quality assurance program. A pharmacy that provides pharmacy services through an automated pharmacy system at a remote site shall operate according to a written program for quality assurance of the automated pharmacy system which:

(i) requires continuous supervision of the automated pharmacy system; and

(ii) establishes mechanisms and procedures to routinely test the accuracy of the automated pharmacy system at a minimum of every six months and whenever any upgrade or change is made to the system and documents each such activity.

(H) Policies and procedures of operation.

(i) A pharmacy that provides pharmacy services through an automated pharmacy system at a remote site shall operate according to written policies and procedures. The policy and procedure manual shall include, but not be limited to, the following:

(I) a current list of the name and address of the pharmacist-in-charge and personnel designated by the pharmacist-in-charge to have access to the drugs stored in the automated pharmacy system;

(II) duties which may only be performed by a pharmacist;

(III) a copy of the portion of the written contract or agreement between the pharmacy and the facility which outlines the services to be provided and the responsibilities and accountabilities of each party relating to the operation of the automated pharmacy system in fulfilling the terms of the contract in compliance with federal and state laws and regulations;

(IV) date of last review/revision of the policy and procedure manual; and

(V) policies and procedures for:

(-a-) security;

(-b-) operation of the automated pharmacy system;

(-c-) preventative maintenance of the automated pharmacy system;

(-d-) sanitation;

(-e-) storage of drugs;

(-f-) dispensing;

(-g-) supervision;

(-h-) drug procurement;

(-i-) receiving of drugs;

(-j-) delivery of drugs; and

(-k-) recordkeeping [~~record keeping~~].

(ii) A pharmacy that provides pharmacy services through an automated pharmacy system at a remote site shall, at least annually, review its written policies and procedures, revise them if necessary, and document the review.

(iii) A pharmacy providing remote pharmacy services using an automated pharmacy system shall maintain a written plan for recovery from an event which interrupts the ability of the automated pharmacy system to dispense prescription drugs. The written plan for recovery shall include:

(I) planning and preparation for maintaining pharmacy services when an automated pharmacy system is experiencing downtime;

(II) procedures for response when an automated pharmacy system is experiencing downtime; and

(III) procedures for the maintenance and testing of the written plan for recovery.

(5) Records.

(A) Maintenance of records.

(i) Every record required under this section must be:

(I) kept by the provider pharmacy and be available, for at least two years for inspecting and copying by the board or its representative and to other authorized local, state, or federal law enforcement agencies; and

(II) supplied by the provider pharmacy within 72 hours, if requested by an authorized agent of the Texas State Board of Pharmacy. If the pharmacy maintains the records in an electronic format, the requested records must be provided in an electronic format if specifically requested by the board or its representative. Failure to provide the records set out in this section, either on site or within 72 hours, constitutes prima facie evidence of failure to keep and maintain records in violation of the Act.

(ii) The provider pharmacy shall maintain original prescription drug orders for drugs dispensed from an automated pharmacy system in compliance with §291.34(b) of this title.

(iii) if prescription drug records are maintained in a data processing system, the system shall have a workable (electronic) data retention system which can produce a separate audit trail of drug usage by the provider pharmacy and each remote site for the preceding two years as specified in §291.34(e) of this title.

(B) Prescriptions. Prescription drug orders shall meet the requirements of §291.34(b) of this title.

(C) Records of dispensing. Dispensing records for a prescription drug order shall be maintained by the provider pharmacy in the manner required by §291.34(d) or (e) of this title.

(D) Transaction information.

(i) The automated pharmacy system shall electronically record all transactions involving drugs stored in, removed, or dispensed from the system.

(ii) Records of dispensing from an automated pharmacy system for a patient shall be maintained by the providing pharmacy and include the:

(I) identity of the system accessed;

(II) identification of the individual accessing the system;

(III) date of transaction;

(IV) name, strength, dosage form, and quantity of drug accessed; and

(V) name of the patient for whom the drug was accessed.

(iii) Records of stocking or removal from an automated pharmacy system shall be maintained by the pharmacy and include the:

(I) date;

(II) name, strength, dosage form, and quantity of drug stocked or removed;

(III) name, initials, or identification code of the person stocking or removing drugs from the system; and

(IV) name, initials, or identification code of the pharmacist who checks and verifies that the system has been accurately filled. [;]

(E) Patient medication records. Patient medication records shall be created and maintained by the provider pharmacy in the manner required by §291.34(c) of this title.

(F) Inventory.

(i) A provider pharmacy shall:

(I) keep a record of all drugs sent to and returned from a remote site separate from the records of the provider pharmacy and from any other remote site's records; and

(II) keep a perpetual inventory of controlled substances and other drugs required to be inventoried under §291.17 of this title (relating to Inventory Requirements [~~for All Classes of Pharmacies~~]) that are received and dispensed or distributed from each remote site.

(ii) As specified in §291.17 of this title, a provider pharmacy shall conduct an inventory at each remote site. The following is applicable to this inventory.

(I) The inventory of each remote site and the provider pharmacy shall be taken on the same day.

(II) The inventory of each remote site shall be included with, but listed separately from, the drugs of other remote sites and separately from the drugs of the provider pharmacy.

(b) Remote pharmacy services using emergency medication kits.

(1) Purpose. The purpose of this section is to provide standards for the provision of pharmacy services by a Class A or Class C pharmacy in a facility that is not at the same location as the Class A or Class C pharmacy through an emergency medication kit as outlined in §562.108 of the Texas Pharmacy Act.

(2) Definitions. The following words and terms, when used in this subsection, shall have the following meanings, unless the context clearly indicates otherwise. All other words and terms shall have the meanings defined in the Act or §291.31 of this title.

(A) Automated pharmacy system--A mechanical system that dispenses prescription drugs and maintains related transaction information.

(B) Emergency medication kits--Controlled substances and dangerous drugs maintained by a provider pharmacy to meet the emergency medication needs of a resident:

(i) at an institution licensed under Chapter 242 or 252, Health and Safety Code; or

(ii) at an institution licensed under Chapter 242, Health and Safety Code and that is a veterans home as defined by the §164.002, Natural Resources Code, if the provider pharmacy is a United States Department of Veterans Affairs pharmacy or another federally operated pharmacy.

(C) Prepackaging--The act of repackaging and relabeling quantities of drug products from a manufacturer's original commercial container, or quantities of unit dosed drugs, into another cartridge or container for dispensing by a pharmacist using an emergency medication kit.

(D) Provider pharmacy--The community pharmacy (Class A), the institutional pharmacy (Class C), the non-resident pharmacy (Class E) [~~pharmacy~~] located not more than 20 miles from an institution licensed under Chapter 242 or 252, Health and Safety Code, or the United States Department of Veterans Affairs pharmacy or another federally operated pharmacy providing remote pharmacy services.

(E) Remote pharmacy service--The provision of pharmacy services, including the storage and dispensing of prescription drugs, in remote sites.

(F) Remote site--A facility not located at the same location as a Class A, Class C, Class E pharmacy or a United States Department of Veterans Affairs pharmacy or another federally operated pharmacy, at which remote pharmacy services are provided using an emergency medication kit.

(3) General requirements.

(A) A provider pharmacy may provide remote pharmacy services using an emergency medication kit to an institution regulated under Chapter 242, or 252, Health and Safety Code.

(B) A provider pharmacy may provide remote pharmacy services at more than one remote site.

(C) A provider pharmacy shall not place an emergency medication kit in a remote site which already has a kit from another provider pharmacy except as provided by paragraph (4)(B)(iii) of this subsection.

(D) A provider pharmacy which is licensed as an institutional (Class C) or a non-resident (Class E) pharmacy is required to comply with the provisions of §§291.31 - 291.34 of this title and this section.

(E) The pharmacist-in-charge of the provider pharmacy is responsible for all pharmacy operations involving the emergency medication kit located at the remote site including supervision of the emergency medication kit and compliance with this section.

(4) Operational standards.

(A) Application for permission to provide pharmacy services using an emergency medication kit.

(i) A Class A, Class C, or Class E pharmacy [~~Pharmacy~~] shall file a completed application containing all information required by the board to provide remote pharmacy services using an emergency medication kit.

(ii) Such application shall be resubmitted every two years in conjunction with the application for renewal of the provider pharmacy's license.

(iii) Upon approval of the application, the provider pharmacy will be sent a certificate which must be displayed at the remote site.

(B) Notification requirements.

(i) A provider pharmacy shall notify the board in writing within ten days of a discontinuance of service, or closure of:

(I) a remote site where an emergency medication kit is operated by the pharmacy; or

(II) a remote pharmacy service at a remote site.

(ii) A provider pharmacy shall comply with appropriate federal and state controlled substance registrations for each remote site if controlled substances are maintained within an emergency medication kit at the facility.

(iii) If more than one provider pharmacy provides an emergency kit to a remote site, the provider pharmacies must enter into a written agreement as to the emergency medications supplied by each pharmacy. The provider pharmacies shall not duplicate drugs stored in the emergency medication kits. The written agreement shall include reasons why an additional pharmacy is required to meet the emergency medication needs of the residents of the institution.

(iv) A provider pharmacy shall file a change of location and/or name of a remote site as specified in §291.3 of this title.

(C) Environment/Security.

(i) Emergency medication kits shall have adequate security and procedures to:

(I) prohibit unauthorized access;

(II) comply with federal and state laws and regulations; and

(III) maintain patient confidentiality.

(ii) Access to the emergency medication kit shall be limited to pharmacists and licensed healthcare personnel employed by the facility.

(iii) Drugs shall be stored in compliance with the provisions of §291.15 and §291.33(f)(2) of this title including the requirements for temperature and handling outdated drugs.

(D) Prescription dispensing and delivery.

(i) Drugs in the emergency medication kit shall be accessed for administration to meet the emergency medication needs of a resident of the remote site pursuant to an order from a practitioner. The prescription drug order for the drugs used from the emergency medication kit shall be forwarded to the provider pharmacy in a manner authorized by §291.34(b) of this title.

(ii) The remote site shall notify the provider pharmacy of each entry into an emergency medication kit. Such notification shall meet the requirements of paragraph (5)(D)(ii) of this subsection.

(E) Drugs.

(i) The contents of an emergency medication kit:

(I) may consist of dangerous drugs and controlled substances; and

(II) shall be determined by the consultant pharmacist, pharmacist-in-charge of the provider pharmacy, medical director, and the director of nurses and limited to those drugs necessary to meet the resident's emergency medication needs. For the purpose of this subsection, this shall mean a situation in which a drug cannot be supplied by a pharmacy within a reasonable time period.

(ii) When deciding on the drugs to be placed in the emergency medication kit, the consultant pharmacist, pharmacist-in-charge of the provider pharmacy, medical director, and the director of nurses must determine, select, and record a prudent number of drugs for potential emergency incidents based on:

(I) clinical criteria applicable to each facility's demographics;

(II) the facility's census; and

(III) the facility's healthcare environment.

(iii) A current list of the drugs stored in each remote site's emergency medication kit shall be maintained by the provider pharmacy and a copy kept with the emergency medication kit.

(iv) An automated pharmacy system may be used as an emergency medication kit provided the system limits emergency access to only those drugs approved for the emergency medication kit.

(v) Drugs for use in an emergency medication kit shall be packaged in the original manufacturer's container or prepackaged in the provider pharmacy and labeled in compliance with the board's prepackaging requirements for the class of pharmacy.

(F) Stocking emergency medication kits.

(i) Stocking of drugs in an emergency medication kit shall be completed at the provider pharmacy or remote site by a pharmacist, pharmacy technician, or pharmacy technician trainee under the direct supervision of a pharmacist, except as provided in clause (ii) of this subparagraph.

(ii) If the emergency medication kit is an automated pharmacy system which uses bar-coding, microchip, or other technologies to ensure that the containers or unit dose drugs are accurately loaded, the prepackaging of the containers or unit dose drugs shall occur at the provider pharmacy unless provided by an [~~a~~] FDA approved repackager. The prepackaged containers or unit dose drugs may be sent to the remote site to be loaded into the machine by personnel designated by the pharmacist-in-charge provided:

(I) a pharmacist verifies the container or unit dose drug has been properly filled and labeled;

(II) the individual containers or unit dose drugs are transported to the remote site in a secure, tamper-evident container; and

(III) the automated pharmacy system uses bar-coding, microchip, or other technologies to ensure that the containers or unit dose drugs are accurately loaded in the automated pharmacy system.

(iii) All drugs to be stocked in the emergency medication kit shall be delivered to the remote site by the provider pharmacy.

(G) Policies and procedures of operation.

(i) A provider pharmacy that provides pharmacy services through an emergency medication kit at a remote site shall operate according to written policies and procedures. The policy and procedure manual shall include, but not be limited to, the following:

(I) duties which may only be performed by a pharmacist;

(II) a copy of the written contract or agreement between the pharmacy and the facility which outlines the services to be provided and the responsibilities and accountabilities of each party in fulfilling the terms of the contract in compliance with federal and state laws and regulations;

(III) date of last review/revision of the policy and procedure manual; and

(IV) policies and procedures for:

(-a-) security;

(-b-) operation of the emergency medication kit;

(-c-) preventative maintenance of the automated pharmacy system if the emergency medication kit is an automated pharmacy system;

(-d-) sanitation;

(-e-) storage of drugs;

(-f-) dispensing;

(-g-) supervision;

(-h-) drug procurement;

(-i-) receiving of drugs;

(-j-) delivery of drugs; and

(-k-) recordkeeping [~~record keeping~~].

(ii) A pharmacy that provides pharmacy services through an emergency medication kit at a remote site shall, at least annually, review its written policies and procedures, revise them if necessary, and document the review.

(iii) A pharmacy providing remote pharmacy services using an emergency medication kit which is an automated pharmacy system shall maintain a written plan for recovery from an event which interrupts the ability of the automated pharmacy system to provide emergency medications. The written plan for recovery shall include:

(I) planning and preparation for maintaining pharmacy services when an automated pharmacy system is experiencing downtime;

(II) procedures for response when an automated pharmacy system is experiencing downtime; and

(III) procedures for the maintenance and testing of the written plan for recovery.

(5) Records.

(A) Maintenance of records.

(i) Every record required under this section must be:

(I) kept by the provider pharmacy and be available, for at least two years, for inspecting and copying by the board or its representative and to other authorized local, state, or federal law enforcement agencies; and

(II) supplied by the provider pharmacy within 72 hours, if requested by an authorized agent of the Texas State Board of Pharmacy. If the pharmacy maintains the records in an electronic format, the requested records must be provided in an electronic format if specifically requested by the board or its representative. Failure to

provide the records set out in this section, either on site or within 72 hours, constitutes prima facie evidence of failure to keep and maintain records in violation of the Act.

(ii) The provider pharmacy shall maintain original prescription drug orders for drugs dispensed from an emergency medication kit in compliance with §291.34(b) of this title.

(B) Prescriptions. Prescription drug orders shall meet the requirements of §291.34(b) of this title.

(C) Records of dispensing. Dispensing records for a prescription drug order shall be maintained by the provider pharmacy in the manner required by §291.34(d) or (e) of this title.

(D) Transaction information.

(i) A prescription drug order shall be maintained by the provider pharmacy as the record of removal of a drug from an emergency medication kit for administration to a patient.

(ii) The remote site shall notify the provider pharmacy electronically or in writing of each entry into an emergency medication kit. Such notification may be included on the prescription drug order or a separate document and shall include the name, strength, and quantity of the drug removed, the time of removal, and the name of the person removing the drug.

(iii) A separate record of stocking, removal, or dispensing for administration from an emergency medication kit shall be maintained by the pharmacy and include the:

(I) date;

(II) name, strength, dosage form, and quantity of drug stocked, removed, or dispensed for administration;

(III) name, initials, or identification code of the person stocking, removing, or dispensing for administration, drugs from the system;

(IV) name, initials, or identification code of the pharmacist who checks and verifies that the system has been accurately filled; and

(V) unique prescription number assigned to the prescription drug order when the drug is administered to the patient.

(E) Inventory.

(i) A provider pharmacy shall:

(I) keep a record of all drugs sent to and returned from a remote site separate from the records of the provider pharmacy and from any other remote site's records; and

(II) keep a perpetual inventory of controlled substances and other drugs required to be inventoried under §291.17 of this title, that are received and dispensed or distributed from each remote site.

(ii) As specified in §291.17 of this title, a provider pharmacy shall conduct an inventory at each remote site. The following is applicable to this inventory.

(I) The inventory of each remote site and the provider pharmacy shall be taken on the same day.

(II) The inventory of each remote site shall be included with, but listed separately from, the drugs of other remote sites and separately from the drugs of the provider pharmacy.

(c) Remote pharmacy services using telepharmacy systems.

(1) Purpose. The purpose of this section is to provide standards for the provision of pharmacy services by a Class A or Class C pharmacy in a healthcare facility that is not at the same location as a Class A or Class C pharmacy through a telepharmacy system as outlined in §562.110 of the Texas Pharmacy Act.

(2) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise. All other words and terms shall have the meanings defined in the Act or §291.31 of this title.

(A) Provider pharmacy--

(i) a Class A pharmacy that provides pharmacy services through a telepharmacy system at a remote dispensing site or at a healthcare facility that is regulated by this state or the United States; or

(ii) a Class C pharmacy that provides pharmacy services though a telepharmacy system at a healthcare facility that is regulated by this state or the United States.

(B) Remote dispensing site--a location licensed as a telepharmacy that is authorized by a provider pharmacy through a telepharmacy system to store and dispense prescription drugs and devices, including dangerous drugs and controlled substances.

(C) Remote healthcare site--a healthcare facility regulated by this state or the United States that is a:

(i) rural health clinic regulated under 42 U.S.C. Section 1395x(aa);

(ii) health center as defined by 42 U.S.C. Section 254b;

(iii) healthcare facility located in a medically underserved area as determined by the United States Department of Health and Human Services;

(iv) healthcare facility located in a health professional shortage area as determined by the United States Department of Health and Human Services; or

(v) a federally qualified health center as defined by 42 U.S.C. Section 1396d(I)(2)(B).

(D) Remote pharmacy service--The provision of pharmacy services, including the storage and dispensing of prescription drugs, drug regimen review, and patient counseling, at a remote site.

(E) Remote site--a remote healthcare site or a remote dispensing site.

(F) Still image capture--A specific image captured electronically from a video or other image capture device.

(G) Store and forward--A video or still image record which is saved electronically for future review.

(H) Telepharmacy system--A system that monitors the dispensing of prescription drugs and provides for related drug use review and patient counseling services by an electronic method which shall include the use of the following types of technology:

(i) audio and video;

(ii) still image capture; and

(iii) store and forward.

(3) General requirements.

(A) A provider pharmacy may provide remote pharmacy services using a telepharmacy system at a:

(i) remote healthcare site; or

(ii) remote dispensing site.

(B) A provider pharmacy may not provide remote pharmacy services at a remote healthcare site if a Class A or Class C pharmacy that dispenses prescription drug orders to out-patients is located in the same community, unless the remote healthcare site is a federally qualified health center as defined by 42 U.S.C. Section 1396d(I)(2)(B). For the purposes of this subsection a community is defined as:

(i) the census tract in which the remote site is located, if the remote site is located in a Metropolitan Statistical Area (MSA) as defined by the United States Census Bureau in the most recent U.S. Census; or

(ii) within 10 miles of the remote site, if the remote site is not located in an [a] MSA.

(C) A provider pharmacy may not provide remote pharmacy services at a remote dispensing site if a Class A pharmacy is located within 22 miles by road of the remote dispensing site.

(D) If a Class A or Class C pharmacy is established in a community in which a remote healthcare site has been located, the remote healthcare site may continue to operate.

(E) If a Class A pharmacy is established within 22 miles by road of a remote dispensing site that is currently operating, the remote dispensing site may continue to operate at that location.

(F) Before providing remote pharmacy services, the telepharmacy system at the remote site must be tested by the provider pharmacy and found to operate properly. The provider pharmacy shall make the results of such testing available to the board upon request.

(G) A provider pharmacy which is licensed as a Class C pharmacy is required to comply with the provisions of §§291.31 - 291.34 of this title and this section.

(H) A provider pharmacy can only provide pharmacy services at no more than two remote dispensing sites.

(4) Personnel.

(A) The pharmacist-in-charge of the provider pharmacy is responsible for all operations at the remote site including supervision of the telepharmacy system and compliance with this section.

(B) The provider pharmacy shall have sufficient pharmacists on duty such that each pharmacist may supervise no more than two remote sites that are simultaneously open to provide services.

(C) The following duties shall be performed only by a pharmacist at the provider pharmacy:

(i) receiving an oral prescription drug order for a controlled substance;

(ii) interpreting the prescription drug order;

(iii) verifying the accuracy of prescription data entry;

(iv) selecting the drug product to be stored and dispensed at the remote site;

(v) interpreting the patient's medication record and conducting a drug regimen review;

(vi) authorizing the telepharmacy system to print a prescription label at the remote site;

(vii) performing the final check of the dispensed prescription to ensure that the prescription drug order has been dispensed accurately as prescribed; and

(viii) counseling the patient.

(D) A pharmacy technician at the remote site may receive an oral prescription drug order for a dangerous drug.

(5) Operational standards.

(A) Application to provide remote pharmacy services using a telepharmacy system.

(i) A Class A or Class [class] C pharmacy [Pharmacy] shall file a completed application containing all information required by the board to provide remote pharmacy services using a telepharmacy system.

(ii) Such application shall be resubmitted every two years in conjunction with the renewal of the provider pharmacy's license.

(iii) On approval of the application, the provider pharmacy will be sent a license for the remote site, which must be displayed at the remote site.

(iv) If the average number of prescriptions dispensed each day at a remote dispensing site is open for business is more than 125 prescriptions, as calculated each calendar year, the remote dispensing site shall apply for a Class A pharmacy license as specified in §291.1 of this title (relating to Pharmacy License Application).

(B) Notification requirements.

(i) A provider pharmacy shall notify the board in writing within ten days of a discontinuance of service, or closure of a remote site where a telepharmacy system is operated by the pharmacy.

(ii) A provider pharmacy shall comply with appropriate federal and state controlled substance registrations for each remote site, if controlled substances are maintained.

(iii) A provider pharmacy shall file a change of location and/or name of a remote site as specified in §291.3 of this title.

(C) Environment/Security.

(i) A remote site shall be under the continuous supervision of a provider pharmacy pharmacist at all times the site is open to provide pharmacy services. To qualify as continuous supervision, the pharmacist is not required to be physically present at the remote site and shall supervise electronically through the use of the following types of technology:

(I) audio and video;

(II) still image capture; and

(III) store and forward.

(ii) Drugs shall be stored in compliance with the provisions of §291.15 and §291.33(f)(2) of this title including the requirements for temperature and handling of outdated drugs.

(iii) Drugs for use in the telepharmacy system at a remote healthcare site shall be stored in an area that is:

(I) separate from any other drugs used by the healthcare facility; and

(II) locked by key, combination or other mechanical or electronic means, so as to prohibit access by unauthorized personnel.

(iv) Drugs for use in the telepharmacy system at a remote dispensing site shall be stored in an area that is locked by key, combination, or other mechanical or electronic means, so as to prohibit access by unauthorized personnel.

(v) Access to the area where drugs are stored at the remote site and operation of the telepharmacy system shall be limited to:

(I) pharmacists employed by the provider pharmacy;

(II) licensed healthcare providers, if the remote site is a remote healthcare site; and

(III) pharmacy technicians;

(vi) Individuals authorized to access the remote site and operate the telepharmacy system shall:

(I) be designated in writing by the pharmacist-in-charge; and

(II) have completed documented training concerning their duties associated with the telepharmacy pharmacy system.

(vii) Remote sites shall have adequate security and procedures to:

(I) comply with federal and state laws and regulations; and

(II) maintain patient confidentiality.

(D) Prescription dispensing and delivery.

(i) A pharmacist at the provider pharmacy shall conduct a drug regimen review as specified in §291.33(c) of this title prior to delivery of the dispensed prescription to the patient or patient's agent.

(ii) The dispensed prescription shall be labeled at the remote site with the information specified in §291.33(c) of this title.

(iii) A pharmacist at the provider pharmacy shall perform the final check of the dispensed prescription before delivery to the patient to ensure that the prescription has been dispensed accurately as prescribed. This final check shall be accomplished through a visual check using electronic methods.

(iv) A pharmacist at the provider pharmacy shall counsel the patient or patient's agent as specified in §291.33(c) of this title. This counseling may be performed using electronic methods. Non-pharmacist personnel may not ask questions of a patient or patient's agent which are intended to screen and/or limit interaction with the pharmacist.

(v) If the remote site has direct access to the provider pharmacy's data processing system, only a pharmacist or pharmacy technician may enter prescription information into the data processing system.

(vi) Drugs which require reconstitution through the addition of a specified amount of water may be dispensed by the remote site only if a pharmacy technician, pharmacy technician trainee, or licensed healthcare provider reconstitutes the product.

(vii) A telepharmacy system located at a remote dispensing site may not dispense a schedule II controlled substance.

(viii) Drugs dispensed at the remote site through a telepharmacy system shall only be delivered to the patient or patient's agent at the remote site.

(E) Quality assurance program. A pharmacy that provides remote pharmacy services through a telepharmacy system at a remote site shall operate according to a written program for quality assurance of the telepharmacy system which:

(i) requires continuous supervision of the telepharmacy system at all times the site is open to provide remote pharmacy services; and

(ii) establishes mechanisms and procedures to routinely test the operation of the telepharmacy system at a minimum of every six months and whenever any upgrade or change is made to the system and documents each such activity.

(F) Policies and procedures.

(i) A pharmacy that provides pharmacy services through a telepharmacy system at a remote site shall operate according to written policies and procedures. The policy and procedure manual shall include, but not be limited to, the following:

(I) a current list of the name and address of the pharmacist-in-charge and personnel designated by the pharmacist-in-charge to have:

(-a-) [~~have~~] access to the area where drugs are stored at the remote site; and

(-b-) operate the telepharmacy system;

(II) duties which may only be performed by a pharmacist;

(III) if the remote site is located at a remote healthcare site, a copy of the written contact or agreement between the provider pharmacy and the healthcare facility which outlines the services to be provided and the responsibilities and accountabilities of each party in fulfilling the terms of the contract or agreement in compliance with federal and state laws and regulations;

(IV) date of last review/revision of policy and procedure manual; and

(V) policies and procedures for:

(-a-) security;
(-b-) operation of the telepharmacy system;
(-c-) sanitation;
(-d-) storage of drugs;
(-e-) dispensing;
(-f-) supervision;
(-g-) drug and/or device procurement;
(-h-) receiving of drugs and/or devices;
(-i-) delivery of drugs and/or devices; and
(-j-) recordkeeping.

(ii) A pharmacy that provides remote pharmacy services through a telepharmacy system at a remote site shall, at least annually, review its written policies and procedures, revise them if necessary, and document the review.

(iii) A pharmacy providing remote pharmacy services through a telepharmacy system shall maintain a written plan for recovery from an event which interrupts the ability of a pharmacist to electronically supervise the telepharmacy system and the dispensing of prescription drugs at the remote site. The written plan for recovery shall include:

(I) a statement that prescription drugs shall not be dispensed at the remote site, if a pharmacist is not able to electronically supervise the telepharmacy system and the dispensing of prescription drugs;

(II) procedures for response when a telepharmacy system is experiencing downtime; and

(III) procedures for the maintenance and testing of the written plan for recovery.

(6) Additional operational standards for remote dispensing sites.

(A) A pharmacist employed by a provider pharmacy shall make at least monthly on-site visits to a remote site. The remote site shall maintain documentation of the visit.

(B) A pharmacist employed by a provider pharmacy shall be physically present at a remote dispensing site when the pharmacist is providing services requiring the physical presence of the pharmacist, including immunizations.

(C) A remote dispensing site shall be staffed by an on-site pharmacy technician who is under the continuous supervision of a pharmacist employed by the provider pharmacy.

(D) All pharmacy technicians at a remote dispensing site shall be counted for the purpose of establishing the pharmacist-pharmacy technician ratio of the provider pharmacy which, notwithstanding Section 568.006 of the Act, may not exceed three pharmacy technicians for each pharmacist providing supervision.

(E) A pharmacy technician working at a remote dispensing site must:

(i) have worked at least one year at a retail pharmacy during the three years preceding the date the pharmacy technician begins working at the remote dispensing site; and

(ii) have completed a training program on the proper use of a telepharmacy system.

(F) A pharmacy technician at a remote dispensing site may not perform sterile or nonsterile compounding. However, a pharmacy technician may prepare commercially available medications for dispensing, including the reconstitution of orally administered powder antibiotics.

(7) Records.

(A) Maintenance of records.

(i) Every record required under this section must be:

(I) accessible by the provider pharmacy and be available, for at least two years for inspecting and copying by the board or its representative and to other authorized local, state, or federal law enforcement agencies; and

(II) supplied by the provider pharmacy within 72 hours, if requested by an authorized agent of the Texas State Board of Pharmacy. If the pharmacy maintains the records in an electronic format, the requested records must be provided in an electronic format if specifically requested by the board or its representative. Failure to provide the records set out in this section, either on site or within 72 hours, constitutes prima facie evidence of failure to keep and maintain records in violation of the Act.

(ii) The remote site shall maintain original prescription drug orders for medications dispensed from a remote site using a telepharmacy system in the manner required by §291.34(b) of this title and the provider pharmacy shall have electronic access to all prescription records.

(iii) If prescription drug records are maintained in a data processing system, the system shall have a workable (electronic) data retention system which can produce a separate audit trail of drug usage by the provider pharmacy and by each remote site for the preceding two years as specified in §291.34(e) of this title.

(B) Prescriptions. Prescription drug orders shall meet the requirements of §291.34(b) of this title.

(C) Patient medication records. Patient medication records shall be created and maintained at the remote site or provider pharmacy in the manner required by §291.34(c) of this title. If such records are maintained at the remote site, the provider pharmacy shall have electronic access to those records.

(D) Inventory.

(i) A provider pharmacy shall:

(I) keep a record of all drugs ordered and dispensed by a remote site separate from the records of the provider pharmacy and from any other remote site's records;

(II) keep a perpetual inventory of all controlled substances that are received and dispensed or distributed from each remote site. The perpetual inventory shall be reconciled, by a pharmacist employed by the provider pharmacy, at least monthly.

(ii) As specified in §291.17 of this title, a [~~, A~~] provider pharmacy shall conduct an inventory at each remote site. The following is applicable to this inventory.

(I) The inventory of each remote site and the provider pharmacy shall be taken on the same day.

(II) The inventory of each remote site shall be included with, but listed separately from, the drugs of other remote sites and separately from the drugs at the provider pharmacy.

(III) A copy of the inventory of the remote site shall be maintained at the remote site.

(d) Remote pharmacy services using automated dispensing [~~storage~~] and delivery systems.

(1) Purpose. The purpose of this section is to provide standards for the provision of pharmacy services by a Class A or Class C pharmacy in a facility that is not at the same location as the Class A or Class C pharmacy through an automated dispensing [~~storage~~] and delivery system.

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

(A) Automated dispensing [~~storage~~] and delivery system--A mechanical system that dispenses and delivers [~~dispensed~~] prescription drugs to patients at a remote delivery site and maintains related transaction information.

(B) Deliver or delivery--The actual, constructive, or attempted transfer of a prescription drug or device or controlled substance from one person to another, whether or not for a consideration.

(C) Dispense--Preparing, packaging, compounding, or labeling for delivery a prescription drug or device in the course of professional practice to an ultimate user or his agent by or pursuant to the lawful order of a practitioner.

(D) Provider pharmacy--The community pharmacy (Class A) or the institutional pharmacy (Class C) providing remote pharmacy services.

(E) Remote delivery site--A location at which remote pharmacy services are provided using an automated dispensing [~~storage~~] and delivery system.

(F) Remote pharmacy service--The provision of pharmacy services, including the dispensing [~~storage~~] and delivery of prescription drugs, in remote delivery sites.

(3) General requirements for a provider pharmacy to provide remote pharmacy services using an automated dispensing [~~storage~~] and delivery system to dispense and deliver a [~~previously verified~~] prescription that is verified [~~dispensed~~] by the provider pharmacy to a patient or patient's agent.

(A) The pharmacist-in-charge of the provider pharmacy is responsible for all pharmacy operations involving the automated dispensing [~~storage~~] and delivery system located at the remote delivery site including supervision of the automated dispensing [~~storage~~] and delivery system and compliance with this section.

(B) The patient or patient's agent shall receive counseling via a direct link to audio or video communication by a Texas licensed pharmacist who has access to the complete patient medication record (patient profile) maintained by the provider pharmacy prior to the release of any new prescription released from the system.

(C) A pharmacist shall be accessible at all times to respond to patients' or other health professionals' questions and needs pertaining to drugs delivered through the use of the automated dispensing [~~storage~~] and delivery system. Such access may be through a 24 hour pager service or telephone which is answered 24 hours a day.

(D) The patient or patient's agent shall be given the option whether to use the system.

(E) An electronic notice shall be provided to the patient or patient's agent at the remote delivery site with the following information:

(i) the name and address of the pharmacy that verified the [~~previously dispensed~~] prescription; and

(ii) a statement that a pharmacist is available 24 hours a day, 7 days a week through the use of telephonic communication.

(F) Drugs stored in the automated dispensing [~~storage~~] and distribution system shall be stored at proper temperatures, as defined in the USP/NF and §291.15 of this title [~~(relating to Storage of Drugs)~~].

(G) A provider pharmacy may only provide remote pharmacy services using an automated dispensing [~~storage~~] and delivery system to patients at a board-approved remote delivery site.

(H) A provider pharmacy may provide remote pharmacy services at more than one remote delivery site.

(I) Before providing remote pharmacy services, the automated dispensing [~~storage~~] and delivery system at the remote delivery site must be tested by the provider pharmacy and found to dispense and deliver accurately. The provider pharmacy shall make the results of such testing available to the board upon request.

(J) A provider pharmacy which is licensed as an institutional (Class C) pharmacy is required to comply with the provisions of §§291.31 - 291.34 of this title [~~(relating to Definitions, Personnel, Operational Standards, and Records for Class A (Community) Pharmacies)~~] and this section.

(4) Operational standards.

(A) Application to provide remote pharmacy services using an automated dispensing [~~storage~~] and delivery system.

(i) A community (Class A) or institutional (Class C) pharmacy shall file a completed application containing all information required by the board to provide remote pharmacy services using an automated dispensing [~~storage~~] and delivery system.

(ii) Such application shall be resubmitted every two years in conjunction with the application for renewal of the provider pharmacy's license.

(iii) Upon approval of the application, the provider pharmacy will be sent a certificate which must be displayed at the provider pharmacy.

(B) Notification requirements.

(i) A provider pharmacy shall notify the board in writing within ten days of a discontinuance of service.

(ii) A provider pharmacy shall comply with appropriate controlled substance registrations for each remote delivery site if dispensed controlled substances are maintained within an automated dispensing [~~storage~~] and delivery system at the facility.

(iii) A provider pharmacy shall file an application for change of location and/or name of a remote delivery site as specified in §291.3 of this title [~~(relating to Notifications)~~].

(C) Environment/Security.

(i) A provider pharmacy shall only store prescription [~~dispensed~~] drugs at a remote delivery site within an automated dispensing [~~storage~~] and delivery system which is locked by key, combination or other mechanical or electronic means so as to prohibit access by unauthorized personnel.

(ii) Access to the automated dispensing [~~storage~~] and delivery system shall be limited to pharmacists[~~,~~] and pharmacy technicians or pharmacy technician trainees under the direct supervision of a pharmacist who:

(I) are designated in writing by the pharmacist-in-charge; and

(II) have completed documented training concerning their duties associated with the automated dispensing [~~storage~~] and delivery system.

(iii) Drugs shall be stored in compliance with the provisions of §291.15 of this title [~~(relating to Storage of Drugs)~~] and §291.33(c)(8) [~~(relating to Returning Undelivered Medication to Stock)~~] of this title, including the requirements for temperature and the return of undelivered medication to stock.

(iv) the automated dispensing [~~storage~~] and delivery system must have an adequate security system, including security camera(s), to prevent unauthorized access and to maintain patient confidentiality.

(D) Stocking an automated dispensing [~~storage~~] and delivery system. Stocking of prescription drugs [~~dispensed prescriptions~~] in an automated dispensing [~~storage~~] and delivery system shall be completed under the supervision of a pharmacist.

(E) Quality assurance program. A pharmacy that provides pharmacy services through an automated dispensing [~~storage~~] and delivery system at a remote delivery site shall operate according to a written program for quality assurance of the automated dispensing [~~storage~~] and delivery system which:

(i) requires continuous supervision of the automated dispensing [~~storage~~] and delivery system; and

(ii) establishes mechanisms and procedures to routinely test the accuracy of the automated dispensing [~~storage~~] and delivery system at a minimum of every six months and whenever any upgrade or change is made to the system and documents each such activity.

(F) Policies and procedures of operation.

(i) A pharmacy that provides pharmacy services through an automated dispensing [~~storage~~] and delivery system at a remote delivery site shall operate according to written policies and procedures. The policy and procedure manual shall include, but not be limited to, the following:

(I) a current list of the names and addresses of the pharmacist-in-charge and all personnel designated by the pharmacist-in-charge to have access to the prescription [~~dispensed~~] drugs stored in the automated dispensing [~~storage~~] and delivery system;

(II) duties which may only be performed by a pharmacist;

(III) a copy of the portion of the written contract or lease agreement between the pharmacy and the remote delivery site location which outlines the services to be provided and the responsibilities and accountabilities of each party relating to the operation of the automated dispensing [~~storage~~] and delivery system in fulfilling the terms of the contract in compliance with federal and state laws and regulations;

(IV) date of last review/revision of the policy and procedure manual; and

(V) policies and procedures for:

(-a-) security;

(-b-) operation of the automated dispensing [~~storage~~] and delivery system;

(-c-) preventative maintenance of the automated dispensing [~~storage~~] and delivery system;

(-d-) sanitation;

(-e-) storage of prescription [~~dispensed~~] drugs;

(-f-) supervision;

(-g-) delivery of prescription [~~dispensed~~] drugs; and

(-h-) recordkeeping [~~record keeping~~].

(ii) A pharmacy that provides pharmacy services through an automated dispensing [~~storage~~] and delivery system at a remote delivery site shall, at least annually, review its written policies and procedures, revise them if necessary, and document the review.

(iii) A pharmacy providing remote pharmacy services using an automated dispensing [~~storage~~] and delivery system shall maintain a written plan for recovery from an event which interrupts the ability of the automated dispensing [~~storage~~] and delivery system to dispense and deliver [~~dispensed~~] prescription drugs. The written plan for recovery shall include:

(I) planning and preparation for maintaining pharmacy services when an automated dispensing [~~storage~~] and delivery system is experiencing downtime;

(II) procedures for response when an automated dispensing [~~storage~~] and delivery system is experiencing downtime; and

(III) procedures for the maintenance and testing of the written plan for recovery.

(5) Records.

(A) Maintenance of records.

(i) Every record required under this section must be:

(I) kept by the provider pharmacy and be available, for at least two years for inspecting and copying by the board or its representative and to other authorized local, state, or federal law enforcement agencies; and

(II) supplied by the provider pharmacy within 72 hours, if requested by an authorized agent of the Texas State Board of Pharmacy. If the pharmacy maintains the records in an electronic format, the requested records must be provided in an electronic format if specifically requested by the board or its representative. Failure to provide the records set out in this section, either on site or within 72 hours, constitutes prima facie evidence of failure to keep and maintain records in violation of the Act.

(ii) The provider pharmacy shall have a workable (electronic) data retention system which can produce a separate audit trail of drug delivery and retrieval transactions at each remote delivery site for the preceding two years.

(B) Transaction information.

(i) The automated dispensing [~~storage~~] and delivery system shall electronically record all transactions involving drugs stored in, removed, or delivered from the system.

(ii) Records of delivery from an automated dispensing [~~storage~~] and delivery system for a patient shall be maintained by the provider pharmacy and include the:

(I) identity of the system accessed;

(II) identification of the individual accessing the system;

(III) date of transaction;

(IV) prescription number, drug name, strength, dosage form;

(V) number of prescriptions retrieved;

(VI) name of the patient for whom the prescription was retrieved;

(VII) name of prescribing practitioner; and

(VIII) name of pharmacist responsible for consultation with the patient, if required, and documentation that the consultation was performed.

(iii) Records of stocking or removal from an automated dispensing [~~storage~~] and delivery system shall be maintained by the pharmacy and include the:

(I) count of bulk prescription drugs stored or removed;

[(I) ~~date;~~*]*

[(II) ~~prescription number;~~*]*

[(III) ~~name of the patient;~~*]*

[(IV) ~~drug name;~~*]*

(II) [(~~V~~)] number of dispensed prescription packages [~~stocked or~~] removed;

(III) [~~(VI)~~] name, initials, or identification code of the person stocking or removing [~~dispensed~~] prescription drugs [~~packages~~] from the system; and

IV [~~(VII)~~] name, initials, or identification code of the pharmacist who checks and verifies that the system has been accurately filled. [~~;~~]

(C) The [~~the~~] pharmacy shall make the automated dispensing [~~storage~~] and delivery system and any records of the system, including testing records, available for inspection by the board.[~~; and~~]

(D) The [~~the~~] automated dispensing [~~storage~~] and delivery system records a digital image of the individual accessing the system to pick-up a prescription and such record is maintained by the pharmacy for two years.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Texas State Board of Pharmacy
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For further information, please call: (512) 305-8010

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SUBCHAPTER H. OTHER CLASSES OF PHARMACY

22 TAC §291.151

The Texas State Board of Pharmacy proposes amendments to §291.151, concerning Pharmacies Located in a Freestanding Emergency Medical Care Facility (Class F). The amendments, if adopted, allow a licensed nurse who is authorized by the pharmacist to perform the loading of an automated medication supply system; update the time interval in which a pharmacist must verify a drug withdrawal; update the requirements for using a floor stock method of drug distribution; update records requirements; update references to DEA 222 form requirements to be consistent with federal regulations; and correct grammatical errors.

Allison Vordenbaumen Benz, R.Ph., M.S., Executive Director/Secretary, 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 rule. Ms. Benz has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the amendments will be to improve operational efficiency of pharmacies located in freestanding emergency medical care facilities and provide clear and grammatically correct regulations. There is no anticipated adverse economic impact on large, small or micro-businesses (pharmacies), rural communities, or local or state employment. Therefore, an economic impact statement and regulatory flexibility analysis are not required.

For each year of the first five years the proposed amendments will be in effect, Ms. Benz has determined the following:

(1) The proposed amendments do not create or eliminate a government program;

(2) Implementation of the proposed amendments does not require the creation of new employee positions or the elimination of existing employee positions;

(3) Implementation of the proposed amendments does not require an increase or decrease in the future legislative appropriations to the agency;

(4) The proposed amendments do not require an increase or decrease in fees paid to the agency;

(5) The proposed amendments do not create a new regulation;

(6) The proposed amendments do limit an existing regulation;

(7) The proposed amendments do not increase or decrease the number of individuals subject to the rule's applicability; and

(8) The proposed amendments do not positively or adversely affect this state's economy.

Written comments on the amendments may be submitted to Megan G. Holloway, Deputy General Counsel, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-500, Austin, Texas 78701, FAX (512) 305-8061. Comments must be received by 5:00 p.m., July 27, 2021.

The amendments are proposed under §§551.002 and 554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

§291.151. Pharmacies Located in a Freestanding Emergency Medical Care Facility (Class F).

(a) Purpose. The purpose of this section is to provide standards in the conduct, practice activities, and operation of a pharmacy located in a freestanding emergency medical care facility that is licensed by the Texas Department of State Health Services or in a freestanding emergency medical care facility operated by a hospital that is exempt from registration as provided by §254.052, Health and Safety Code. Class F pharmacies located in a freestanding emergency medical care facility shall comply with this section.

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

(1) Act--The Texas Pharmacy Act, Occupations Code, Subtitle J, as amended.

(2) Administer--The direct application of a prescription drug by injection, inhalation, ingestion, or any other means to the body of a patient by:

(A) a practitioner, an authorized agent under his supervision, or other person authorized by law; or

(B) the patient at the direction of a practitioner.

(3) Automated medication supply system--A mechanical system that performs operations or activities relative to the storage and distribution of medications for administration and which collects, controls, and maintains all transaction information.

(4) Board--The Texas State Board of Pharmacy.

(5) Consultant pharmacist--A pharmacist retained by a facility on a routine basis to consult with the FEMCF in areas that pertain to the practice of pharmacy.

(6) Controlled substance--A drug, immediate precursor, or other substance listed in Schedules I - V or Penalty Groups 1 - 4 of the Texas Controlled Substances Act, as amended, or a drug immediate precursor, or other substance included in Schedules I - V of the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970, as amended (Public Law 91-513).

(7) Dispense--Preparing, packaging, compounding, or labeling for delivery a prescription drug or device in the course of professional practice to an ultimate user or his agent by or pursuant to the lawful order of a practitioner.

(8) Distribute--The delivery of a prescription drug or device other than by administering or dispensing.

(9) Downtime--Period of time during which a data processing system is not operable.

(10) Electronic signature--A unique security code or other identifier which specifically identifies the person entering information into a data processing system. A facility which utilizes electronic signatures must:

(A) maintain a permanent list of the unique security codes assigned to persons authorized to use the data processing system; and

(B) have an ongoing security program which is capable of identifying misuse and/or unauthorized use of electronic signatures.

(11) Floor stock--Prescription drugs or devices not labeled for a specific patient and maintained at a nursing station or other FEMCF department (excluding the pharmacy) for the purpose of administration to a patient of the FEMCF.

(12) Formulary--List of drugs approved for use in the FEMCF by an appropriate committee of the FEMCF.

(13) Freestanding emergency medical care facility (FEMCF)--A freestanding facility that is licensed by the Texas Department of State Health Services pursuant to Chapter 254, Health and Safety Code, to provide emergency care to patients.

(14) Hard copy--A physical document that is readable without the use of a special device (i.e., data processing system, computer, etc.).

(15) Investigational new drug--New drug intended for investigational use by experts qualified to evaluate the safety and effectiveness of the drug as authorized by the federal Food and Drug Administration.

(16) Medication order--An order from a practitioner or his authorized agent for administration of a drug or device.

(17) Pharmacist-in-charge--Pharmacist designated on a pharmacy license as the pharmacist who has the authority or responsibility for a pharmacy's compliance with laws and rules pertaining to the practice of pharmacy.

(18) Pharmacy--Area or areas in a facility, separate from patient care areas, where drugs are stored, bulk compounded, delivered, compounded, dispensed, and/or distributed to other areas or departments of the FEMCF, or dispensed to an ultimate user or his or her agent.

(19) Prescription drug--

(A) A substance for which federal or state law requires a prescription before it may be legally dispensed to the public;

(B) A drug or device that under federal law is required, prior to being dispensed or delivered, to be labeled with either of the following statements:

(i) Caution: federal law prohibits dispensing without prescription or "Rx only" or another legend that complies with federal law; or

(ii) Caution: federal law restricts this drug to use by or on order of a licensed veterinarian; or

(C) A drug or device that is required by any applicable federal or state law or regulation to be dispensed on prescription only or is restricted to use by a practitioner only.

(20) Prescription drug order--

(A) An order from a practitioner or his authorized agent to a pharmacist for a drug or device to be dispensed; or

(B) An order pursuant to Subtitle B, Chapter 157, Occupations Code.

(21) Full-time pharmacist--A pharmacist who works in a pharmacy from 30 to 40 hours per week or if the pharmacy is open less than 60 hours per week, one-half of the time the pharmacy is open.

(22) Part-time pharmacist--A pharmacist who works less than full-time.

(23) Pharmacy technician--An individual who is registered with the board as a pharmacy technician and whose responsibility in a pharmacy is to provide technical services that do not require professional judgment regarding preparing and distributing drugs and who works under the direct supervision of and is responsible to a pharmacist.

(24) Pharmacy technician trainee--An individual who is registered with the board as a pharmacy technician trainee and is authorized to participate in a pharmacy's technician training program.

(25) Texas Controlled Substances Act--The Texas Controlled Substances Act, Health and Safety Code, Chapter 481, as amended.

(c) Personnel.

(1) Pharmacist-in-charge.

(A) General. Each FEMCF shall have one pharmacist-in-charge who is employed or under contract, at least on a consulting or part-time basis, but may be employed on a full-time basis.

(B) Responsibilities. The pharmacist-in-charge shall have the responsibility for, at a minimum, the following:

(i) establishing specifications for procurement and storage of all materials, including drugs, chemicals, and biologicals;

(ii) participating in the development of a formulary for the FEMCF, subject to approval of the appropriate committee of the FEMCF;

(iii) distributing drugs to be administered to patients pursuant to the practitioner's medication order;

(iv) filling and labeling all containers from which drugs are to be distributed or dispensed;

(v) maintaining and making available a sufficient inventory of antidotes and other emergency drugs, both in the pharmacy and patient care areas, as well as current antidote information, tele-

phone numbers of regional poison control center and other emergency assistance organizations, and such other materials and information as may be deemed necessary by the appropriate committee of the FEMCF;

(vi) maintaining records of all transactions of the FEMCF pharmacy as may be required by applicable state and federal law, and as may be necessary to maintain accurate control over and accountability for all pharmaceutical materials;

(vii) participating in those aspects of the FEMCF's patient care evaluation program which relate to pharmaceutical material utilization and effectiveness;

(viii) participating in teaching and/or research programs in the FEMCF;

(ix) implementing the policies and decisions of the appropriate committee(s) relating to pharmaceutical services of the FEMCF;

(x) providing effective and efficient messenger and delivery service to connect the FEMCF pharmacy with appropriate areas of the FEMCF on a regular basis throughout the normal workday of the FEMCF;

(xi) labeling, storing, and distributing investigational new drugs, including maintaining information in the pharmacy and nursing station where such drugs are being administered, concerning the dosage form, route of administration, strength, actions, uses, side effects, adverse effects, interactions, and symptoms of toxicity of investigational new drugs;

(xii) meeting all inspection and other requirements of the Texas Pharmacy Act and this section; and

(xiii) maintaining records in a data processing system such that the data processing system is in compliance with the requirements for an FEMCF; and

(xiv) ensuring that a pharmacist visits the FEMCF at least once each calendar week that the facility is open.

(2) Consultant pharmacist.

(A) The consultant pharmacist may be the pharmacist-in-charge.

(B) A written contract shall exist between the FEMCF and any consultant pharmacist, and a copy of the written contract shall be made available to the board upon request.

(3) Pharmacists.

(A) General.

(i) The pharmacist-in-charge shall be assisted by a sufficient number of additional licensed pharmacists as may be required to operate the FEMCF pharmacy competently, safely, and adequately to meet the needs of the patients of the facility.

(ii) All pharmacists shall assist the pharmacist-in-charge in meeting the responsibilities as outlined in paragraph (1)(B) of this subsection and in ordering, administering, and accounting for pharmaceutical materials.

(iii) All pharmacists shall be responsible for any delegated act performed by pharmacy technicians or pharmacy technician trainees under his or her supervision.

(iv) All pharmacists while on duty shall be responsible for complying with all state and federal laws or rules governing the practice of pharmacy.

(B) Duties. Duties of the pharmacist-in-charge and all other pharmacists shall include, but need not be limited to, the following:

(i) receiving and interpreting prescription drug orders and oral medication orders and reducing these orders to writing either manually or electronically;

(ii) selecting prescription drugs and/or devices and/or suppliers; and

(iii) interpreting patient profiles.

(C) Special requirements for compounding non-sterile preparations. All pharmacists engaged in compounding non-sterile preparations shall meet the training requirements specified in §291.131 of this title (relating to Pharmacies Compounding Non-Sterile Preparations).

(4) Pharmacy technicians and pharmacy technician trainees.

(A) General. All pharmacy technicians and pharmacy technician trainees shall meet the training requirements specified in §297.6 of this title (relating to Pharmacy Technician and Pharmacy Technician Trainee Training).

(B) Duties. Pharmacy technicians and pharmacy technician trainees may not perform any of the duties listed in paragraph (3)(B) of this subsection. Duties may include, but need not be limited to, the following functions, under the direct supervision of a pharmacist:

(i) prepacking and labeling unit and multiple dose packages, provided a pharmacist supervises and conducts a final check and affixes his or her name, initials, or electronic signature to the appropriate quality control records prior to distribution;

(ii) preparing, packaging, compounding, or labeling prescription drugs pursuant to medication orders, provided a pharmacist supervises and checks the preparation;

(iii) compounding non-sterile preparations pursuant to medication orders provided the pharmacy technicians or pharmacy technician trainees have completed the training specified in §291.131 of this title;

(iv) bulk compounding, provided a pharmacist supervises and conducts in-process and final checks and affixes his or her name, initials, or electronic signature to the appropriate quality control records prior to distribution;

(v) distributing routine orders for stock supplies to patient care areas;

(vi) entering medication order and drug distribution information into a data processing system, provided judgmental decisions are not required and a pharmacist checks the accuracy of the information entered into the system prior to releasing the order or in compliance with the absence of pharmacist requirements contained in subsection (d)(6)(D) and (E) of this section;

(vii) maintaining inventories of drug supplies;

(viii) maintaining pharmacy records; and

(ix) loading drugs into an automated medication supply system. For the purpose of this clause, direct supervision may be accomplished by physically present supervision or electronic monitoring by a pharmacist.

(C) Procedures.

(i) Pharmacy technicians and pharmacy technician trainees shall handle medication orders in accordance with standard written procedures and guidelines.

(ii) Pharmacy technicians and pharmacy technician trainees shall handle prescription drug orders in the same manner as pharmacy technicians or pharmacy technician trainees working in a Class A pharmacy.

(D) Special requirements for compounding non-sterile preparations. All pharmacy technicians and pharmacy technician trainees engaged in compounding non-sterile preparations shall meet the training requirements specified in §291.131 of this title.

(5) Owner. The owner of an FEMCF pharmacy shall have responsibility for all administrative and operational functions of the pharmacy. The pharmacist-in-charge may advise the owner on administrative and operational concerns. The owner shall have responsibility for, at a minimum, the following, and if the owner is not a Texas licensed pharmacist, the owner shall consult with the pharmacist-in-charge or another Texas licensed pharmacist:

(A) establishing policies for procurement of prescription drugs and devices and other products dispensed from the FEMCF pharmacy;

(B) establishing and maintaining effective controls against the theft or diversion of prescription drugs;

(C) if the pharmacy uses an automated medication supply system, reviewing and approving all policies and procedures for system operation, safety, security, accuracy and access, patient confidentiality, prevention of unauthorized access, and malfunction;

(D) providing the pharmacy with the necessary equipment and resources commensurate with its level and type of practice; and

(E) establishing policies and procedures regarding maintenance, storage, and retrieval of records in a data processing system such that the system is in compliance with state and federal requirements.

(6) Identification of pharmacy personnel. All pharmacy personnel shall be identified as follows:

(A) Pharmacy technicians. All pharmacy technicians shall wear an identification tag or badge that bears the person's name and identifies him or her as a pharmacy technician.

(B) Pharmacy technician trainees. All pharmacy technician trainees shall wear an identification tag or badge that bears the person's name and identifies him or her as a pharmacy technician trainee.

(C) Pharmacist interns. All pharmacist interns shall wear an identification tag or badge that bears the person's name and identifies him or her as a pharmacist intern.

(D) Pharmacists. All pharmacists shall wear an identification tag or badge that bears the person's name and identifies him or her as a pharmacist.

(d) Operational standards.

(1) Licensing requirements.

(A) An FEMCF pharmacy shall register annually or biennially with the board on a pharmacy license application provided by the board, following the procedures specified in §291.1 of this title (relating to Pharmacy License Application).

(B) An FEMCF pharmacy which changes ownership shall notify the board within 10 days of the change of ownership and apply for a new and separate license as specified in §291.3 of this title (relating to Required Notifications).

(C) An FEMCF pharmacy which changes location and/or name shall notify the board of the change within 10 days and file for an amended license as specified in §291.3 of this title.

(D) A pharmacy owned by a partnership or corporation which changes managing officers shall notify the board in writing of the names of the new managing officers within 10 days of the change, following the procedures in §291.3 of this title.

(E) An FEMCF pharmacy shall notify the board in writing within 10 days of closing, following the procedures in §291.5 of this title (relating to Closing a Pharmacy).

(F) A fee as specified in §291.6 of this title (relating to Pharmacy License Fees) will be charged for issuance and renewal of a license and the issuance of an amended license.

(G) A separate license is required for each principal place of business and only one pharmacy license may be issued to a specific location.

(H) An FEMCF pharmacy, which also operates another type of pharmacy which would otherwise be required to be licensed under the Act, §560.051(a)(1), concerning community pharmacy (Class A), is not required to secure a license for the other type of pharmacy; provided, however, such license is required to comply with the provisions of §291.31 of this title (relating to Definitions), §291.32 of this title (relating to Personnel), §291.33 of this title (relating to Operational Standards), §291.34 of this title (relating to Records), and §291.35 of this title (relating to Official Prescription Requirements), to the extent such sections are applicable to the operation of the pharmacy.

(I) An FEMCF pharmacy engaged in the compounding of non-sterile preparations shall comply with the provisions of §291.131 of this title.

(2) Environment.

(A) General requirements.

(i) Each FEMCF shall have a designated work area separate from patient areas, and which shall have space adequate for the size and scope of pharmaceutical services and shall have adequate space and security for the storage of drugs.

(ii) The FEMCF pharmacy shall be arranged in an orderly fashion and shall be kept clean. All required equipment shall be clean and in good operating condition.

(B) Special requirements.

(i) The FEMCF pharmacy shall have locked storage for Schedule II controlled substances and other controlled drugs requiring additional security.

(ii) The FEMCF pharmacy shall have a designated area for the storage of poisons and externals separate from drug storage areas.

(C) Security.

(i) The pharmacy and storage areas for prescription drugs and/or devices shall be enclosed and capable of being locked by key, combination, or other mechanical or electronic means, so as to prohibit access by unauthorized individuals. Only individuals authorized by the pharmacist-in-charge may enter the pharmacy or have access to storage areas for prescription drugs and/or devices.

(ii) The pharmacist-in-charge shall consult with FEMCF personnel with respect to security of the drug storage areas, including provisions for adequate safeguards against theft or diversion of dangerous drugs, controlled substances, and records for such drugs.

(iii) The pharmacy shall have locked storage for Schedule II controlled substances and other drugs requiring additional security.

(3) Equipment and supplies. FEMCFs supplying drugs for outpatient use shall have the following equipment and supplies:

(A) data processing system including a printer or comparable equipment;

(B) adequate supply of child-resistant, moisture-proof, and light-proof containers; and

(C) adequate supply of prescription labels and other applicable identification labels.

(4) Library. A reference library shall be maintained that includes the following in hard copy or electronic format and that pharmacy personnel shall be capable of accessing at all times:

(A) current copies of the following:

(i) Texas Pharmacy Act and rules;

(ii) Texas Dangerous Drug Act and rules;

(iii) Texas Controlled Substances Act and rules; and

(iv) Federal Controlled Substances Act and rules or official publication describing the requirements of the Federal Controlled Substances Act and rules;

(B) at least one current or updated general drug information reference which is required to contain drug interaction information including information needed to determine severity or significance of the interaction and appropriate recommendations or actions to be taken; and

(C) basic antidote information and the telephone number of the nearest regional poison control center.

(5) Drugs.

(A) Procurement, preparation, and storage.

(i) The pharmacist-in-charge shall have the responsibility for the procurement and storage of drugs, but may receive input from other appropriate staff of the facility, relative to such responsibility.

(ii) The pharmacist-in-charge shall have the responsibility for determining specifications of all drugs procured by the facility.

(iii) FEMCF pharmacies may not sell, purchase, trade, or possess prescription drug samples, unless the pharmacy meets the requirements as specified in §291.16 of this title (relating to Samples).

(iv) All drugs shall be stored at the proper temperatures, as defined in the USP/NF and in §291.15 of this title (relating to Storage of Drugs).

(v) Any drug bearing an expiration date may not be dispensed or distributed beyond the expiration date of the drug.

(vi) Outdated drugs shall be removed from dispensing stock and shall be quarantined together until such drugs are disposed of.

(B) Formulary.

(i) A formulary may be developed by an appropriate committee of the FEMCF.

(ii) The pharmacist-in-charge, consultant pharmacist, or designee shall be a full voting member of any committee which involves pharmaceutical services.

(iii) A practitioner may grant approval for pharmacists at the FEMCF to interchange, in accordance with the facility's formulary, for the drugs on the practitioner's medication orders provided:

(I) a formulary has been developed;

(II) the formulary has been approved by the medical staff of the FEMCF;

(III) there is a reasonable method for the practitioner to override any interchange; and

(IV) the practitioner authorizes a pharmacist in the FEMCF to interchange on his/her medication orders in accordance with the facility's formulary through his/her written agreement to abide by the policies and procedures of the medical staff and facility.

(C) Prepackaging and loading drugs into automated medication supply system.

(i) Prepackaging of drugs.

(I) Drugs may be prepackaged in quantities suitable for internal distribution only by a pharmacist or by pharmacy technicians or pharmacy technician trainees under the direction and direct supervision of a pharmacist.

(II) The label of a prepackaged unit shall indicate:

(-a-) brand name and strength of the drug; or if no brand name, then the generic name, strength, and name of the manufacturer or distributor;

(-b-) facility's lot number;

(-c-) expiration date; and

(-d-) quantity of the drug, if quantity is greater than one.

(III) Records of prepackaging shall be maintained to show:

(-a-) the name of the drug, strength, and dosage form;

(-b-) facility's lot number;

(-c-) manufacturer or distributor;

(-d-) manufacturer's lot number;

(-e-) expiration date;

(-f-) quantity per prepackaged unit;

(-g-) number of prepackaged units;

(-h-) date packaged;

(-i-) name, initials, or electronic signature of the prepacker; and

(-j-) signature or electronic signature of the responsible pharmacist.

(IV) Stock packages, repackaged units, and control records shall be quarantined together until checked/released by the pharmacist.

(ii) Loading bulk unit of use drugs into automated medication supply systems. Automated medication supply systems may be loaded with bulk unit of use drugs only by a pharmacist, [~~or~~] by pharmacy technicians or pharmacy technician trainees under the direction and direct supervision of a pharmacist, or by a licensed nurse

who is authorized by the pharmacist to perform the loading of the automated medication supply system. For the purpose of this clause, direct supervision may be accomplished by physically present supervision or electronic monitoring by a pharmacist. In order for the pharmacist to electronically monitor, the medication supply system must allow for bar code scanning to verify the loading of drugs, and a record of the loading must be maintained by the system and accessible for electronic review by the pharmacist.

(6) Medication orders.

(A) Drugs may be administered to patients in FEMCFs only on the order of a practitioner. No change in the order for drugs may be made without the approval of a practitioner except as authorized by the practitioner in compliance with paragraph (5)(B) of this subsection.

(B) Drugs may be distributed only pursuant to the copy of the practitioner's medication order.

(C) FEMCF pharmacies shall be exempt from the labeling provisions and patient notification requirements of §562.006 and §562.009 of the Act, as respects drugs distributed pursuant to medication orders.

(D) In FEMCFs with a full-time pharmacist, if a practitioner orders a drug for administration to a bona fide patient of the facility when the pharmacy is closed, the following is applicable:[.]

(i) prescription [~~Prescription~~] drugs and devices only in sufficient quantities for immediate therapeutic needs of a patient may be removed from the FEMCF pharmacy;[.]

(ii) only [~~Only~~] a designated licensed nurse or practitioner may remove such drugs and devices;[.]

(iii) a [~~A~~] record shall be made at the time of withdrawal by the authorized person removing the drugs and devices. The record shall contain the following information:

(I) name of the patient;

(II) name of device or drug, strength, and dosage form;

(III) dose prescribed;

(IV) quantity withdrawn [~~taken~~];

(V) time and date; and

(VI) signature or electronic signature of the person making the withdrawal;[.]

(iv) the [~~The~~] medication order in the patient's chart may substitute for such record, provided the medication order meets all the requirements of clause (iii) of this subparagraph;[.]

(v) the [~~The~~] pharmacist shall verify the withdrawal of a controlled substance as soon as practical, but in no event more than 72 hours from the time of such withdrawal; and[.]

(vi) the pharmacist shall verify the withdrawal of a dangerous drug at a reasonable interval, but such verification must occur at least once in every calendar week.

(E) In FEMCFs with a part-time or consultant pharmacist, if a practitioner orders a drug for administration to a bona fide patient of the FEMCF when the pharmacist is not on duty, or when the pharmacy is closed, the following is applicable:[.]

(i) prescription [~~Prescription~~] drugs and devices only in sufficient quantities for therapeutic needs may be removed from the FEMCF pharmacy;[.]

(ii) only [~~Only~~] a designated licensed nurse or practitioner may remove such drugs and devices;[.]

(iii) a record shall be made at the time of withdrawal by the authorized person removing the drug or device as described in clauses (6)(D)(iii) and (iv) of this subsection; and

(iv) [~~(iii)~~] the [~~The~~] pharmacist shall verify withdrawals [~~conduct an audit of the patient's medical record according to the schedule set out in the policy and procedures~~] at a reasonable interval, but such verification [~~interval~~] must occur at least once in every calendar week that the pharmacy is open.

(7) Floor stock. In facilities using a floor stock method of drug distribution, the pharmacy shall establish designated floor stock areas outside of the central pharmacy where drugs may be stored, in accordance with the pharmacy's policies and procedures. The [~~the~~] following is applicable for removing drugs or devices in the absence of a pharmacist:[.]

(A) prescription [~~Prescription~~] drugs and devices may be removed from the pharmacy only in the original manufacturer's container or prepackaged container;[.]

(B) only [~~Only~~] a designated licensed nurse or practitioner may remove such drugs and devices;[.]

(C) a [~~A~~] record shall be made at the time of withdrawal by the authorized person removing the drug or device and[:] the record shall contain the following information:

(i) name of the drug, strength, and dosage form;

(ii) quantity removed;

(iii) location of floor stock;

(iv) date and time; and

(v) signature or electronic signature of person making the withdrawal; and[.]

(D) if a stored drug or device is returned to the pharmacy from floor stock areas, a record shall be made by the authorized person returning the drug or device. The record shall contain the following information:

(i) drug name, strength, and dosage form, or device name;

(ii) quantity returned;

(iii) previous floor stock location for the drug or device;

(iv) date and time; and

(v) signature or electronic signature of person returning the drug or device.

~~[(D) A pharmacist shall verify the withdrawal according to the following schedule.]~~

~~*[(i)* In facilities with a full-time pharmacist, the withdrawal shall be verified as soon as practical, but in no event more than 72 hours from the time of such withdrawal.]~~

~~*[(ii)* In facilities with a part-time or consultant pharmacist, the withdrawal shall be verified after a reasonable interval, but such interval must occur at least once in every calendar week that the pharmacy is open.]~~

~~*[(iii)* The medication order in the patient's chart may substitute for the record required in subparagraph (C) of this paragraph,~~

~~provided the medication order meets all the requirements of subparagraph (C) of this paragraph.]~~

(8) Policies and procedures. Written policies and procedures for a drug distribution system, appropriate for the freestanding emergency medical facility, shall be developed and implemented by the pharmacist-in-charge with the advice of the appropriate committee. The written policies and procedures for the drug distribution system shall include, but not be limited to, procedures regarding the following:

(A) controlled substances;

(B) investigational drugs;

(C) prepackaging and manufacturing;

(D) medication errors;

(E) orders of physician or other practitioner;

(F) floor stocks;

(G) adverse drug reactions;

(H) drugs brought into the facility by the patient;

(I) self-administration;

(J) emergency drug tray;

(K) formulary, if applicable;

(L) drug storage areas;

(M) drug samples;

(N) drug product defect reports;

(O) drug recalls;

(P) outdated drugs;

(Q) preparation and distribution of IV admixtures;

(R) procedures for supplying drugs for postoperative use, if applicable;

(S) use of automated medication supply systems;

(T) use of data processing systems; and

(U) drug regimen review.

(9) Drugs supplied for outpatient use. Drugs provided to patients for take home use shall be supplied according to the following procedures.

(A) Drugs may only be supplied to patients who have been admitted to the FEMCF.

(B) Drugs may only be supplied in accordance with the system of control and accountability established for drugs supplied from the FEMCF; such system shall be developed and supervised by the pharmacist-in-charge or staff pharmacist designated by the pharmacist-in-charge.

(C) Only drugs listed on the approved outpatient drug list may be supplied; such list shall be developed by the pharmacist-in-charge and the medical staff and shall consist of drugs of the nature and type to meet the immediate postoperative needs of the FEMCF patient.

(D) Drugs may only be supplied in prepackaged quantities not to exceed a 72-hour supply in suitable containers and appropriately prelabeled (including name, address, and phone number of the facility and necessary auxiliary labels) by the pharmacy, provided, however that topicals and ophthalmics in original manufacturer's containers may be supplied in a quantity exceeding a 72-hour supply.

(E) At the time of delivery of the drug, the practitioner shall complete the label, such that the prescription container bears a label with at least the following information:

(i) date supplied;

(ii) name of practitioner;

(iii) name of patient;

(iv) directions for use;

(v) brand name and strength of the drug; or if no brand name, then the generic name of the drug dispensed, strength, and the name of the manufacturer or distributor of the drug; and

(vi) unique identification number.

(F) After the drug has been labeled, the practitioner or a licensed nurse under the supervision of the practitioner shall give the appropriately labeled, prepackaged medication to the patient.

(G) A perpetual record of drugs which are supplied from the FEMCF shall be maintained which includes:

(i) name, address, and phone number of the facility;

(ii) date supplied;

(iii) name of practitioner;

(iv) name of patient;

(v) directions for use;

(vi) brand name and strength of the drug; or if no brand name, then the generic name of the drug dispensed, strength, and the name of the manufacturer or distributor of the drug; and

(vii) unique identification number.

(H) The pharmacist-in-charge, or a pharmacist designated by the pharmacist-in-charge, shall review the records at least once in every calendar week that the pharmacy is open.

(10) Drug regimen review.

(A) A pharmacist shall evaluate medication orders and patient medication records for:

(i) known allergies;

(ii) rational therapy--contraindications;

(iii) reasonable dose and route of administration;

(iv) reasonable directions for use;

(v) duplication of therapy;

(vi) drug-drug interactions;

(vii) drug-food interactions;

(viii) drug-disease interactions;

(ix) adverse drug reactions;

(x) proper utilization, including overutilization or underutilization; and

(xi) clinical laboratory or clinical monitoring methods to monitor and evaluate drug effectiveness, side effects, toxicity, or adverse effects, and appropriateness to continued use of the drug in its current regimen.

(B) A retrospective, random drug regimen review as specified in the pharmacy's policies and procedures shall be conducted

on a periodic basis to verify proper usage of drugs not to exceed 31 days between such reviews.

(C) Any questions regarding the order must be resolved with the prescriber and a written notation of these discussions made and maintained.

(e) Records.

(1) Maintenance of records.

(A) Every inventory or other record required to be kept under the provisions of this section (relating to Pharmacies Located in a Freestanding Emergency Medical Care Facility (Class F) shall be:

(i) kept by the pharmacy and be available, for at least two years from the date of such inventory or record, for inspecting and copying by the board or its representative, and other authorized local, state, or federal law enforcement agencies; and

(ii) supplied by the pharmacy within 72 hours, if requested by an authorized agent of the board. If the pharmacy maintains the records in an electronic format, the requested records must be provided in a mutually agreeable electronic format if specifically requested by the board or its representative. Failure to provide the records set out in this subsection, either on site or within 72 hours, constitutes prima facie evidence of failure to keep and maintain records in violation of the Act.

(B) Records of controlled substances listed in Schedule II shall be maintained separately and readily retrievable from all other records of the pharmacy.

(C) Records of controlled substances listed in Schedules III - V shall be maintained separately or readily retrievable from all other records of the pharmacy. For purposes of this subparagraph, "readily retrievable" means that the controlled substances shall be asterisked, redlined, or in some other manner readily identifiable apart from all other items appearing on the record.

(D) Records, except when specifically required to be maintained in original or hard copy form, may be maintained in an alternative data retention system, such as a data processing or direct imaging system, provided:

(i) the records in the alternative data retention system contain all of the information required on the manual record; and

(ii) the alternative data retention system is capable of producing a hard copy of the record upon the request of the board, its representative, or other authorized local, state, or federal law enforcement or regulatory agencies.

(E) Controlled substance records shall be maintained in a manner to establish receipt and distribution of all controlled substances.

(F) An FEMCF pharmacy shall maintain a perpetual inventory of controlled substances listed in Schedules II - V which shall be verified for completeness and reconciled at least once in every calendar week that the pharmacy is open.

(G) Distribution records for controlled substances, listed in Schedules II - V, shall include the following information:

(i) patient's name;

(ii) practitioner's name who ordered the drug;

(iii) name of drug, dosage form, and strength;

(iv) time and date of administration to patient and quantity administered;

(v) signature or electronic signature of individual administering the controlled substance;

(vi) returns to the pharmacy; and

(vii) waste (waste is required to be witnessed and cosigned, manually or electronically, by another individual).

(H) The record required by subparagraph (G) of this paragraph shall be maintained separately from patient records.

(I) A pharmacist shall conduct an audit by randomly comparing the distribution records required by subparagraph (G) of this paragraph with the medication orders in the patient record on a periodic basis to verify proper administration of drugs not to exceed 30 days between such reviews.

(2) Patient records.

(A) Each medication order or set of orders issued together shall bear the following information:

(i) patient name;

(ii) drug name, strength, and dosage form;

(iii) directions for use;

(iv) date; and

(v) signature or electronic signature of the practitioner or that of his or her authorized agent, defined as a licensed nurse employee or consultant/full or part-time pharmacist of the FEMCF.

(B) Medication orders shall be maintained with the medication administration record in the medical records of the patient.

(3) General requirements for records maintained in a data processing system.

(A) If an FEMCF pharmacy's data processing system is not in compliance with the board's requirements, the pharmacy must maintain a manual recordkeeping system.

(B) The facility shall maintain a backup copy of information stored in the data processing system using disk, tape, or other electronic backup system and update this backup copy on a regular basis to assure that data is not lost due to system failure.

(C) A pharmacy that changes or discontinues use of a data processing system must:

(i) transfer the records to the new data processing system; or

(ii) purge the records to a printout which contains:

(I) all of the information required on the original document; or

(II) for records of distribution and return for all controlled substances, the same information as required on the audit trail printout as specified in subparagraph (F) of this paragraph. The information on the printout shall be sorted and printed by drug name and list all distributions and returns chronologically.

(D) Information purged from a data processing system must be maintained by the pharmacy for two years from the date of initial entry into the data processing system.

(E) The pharmacist-in-charge shall report to the board in writing any significant loss of information from the data processing system within 10 days of discovery of the loss.

(F) The data processing system shall have the capacity to produce a hard copy printout of an audit trail of drug distribution

and return for any strength and dosage form of a drug (by either brand or generic name or both) during a specified time period. This printout shall contain the following information:

(i) patient's name or patient's facility identification number;

(ii) prescribing or attending practitioner's name;

(iii) name, strength, and dosage form of the drug product actually distributed;

(iv) total quantity distributed from and returned to the pharmacy;

(v) if not immediately retrievable via electronic image, the following shall also be included on the printout:

(I) prescribing or attending practitioner's address; and

(II) practitioner's DEA registration number, if the medication order is for a controlled substance.

(G) An audit trail printout for each strength and dosage form of the drugs distributed during the preceding month shall be produced at least monthly and shall be maintained in a separate file at the facility. The information on this printout shall be sorted by drug name and list all distributions/returns for that drug chronologically.

(H) The pharmacy may elect not to produce the monthly audit trail printout if the data processing system has a workable (electronic) data retention system which can produce an audit trail of drug distribution and returns for the preceding two years. The audit trail required in this clause shall be supplied by the pharmacy within 72 hours, if requested by an authorized agent of the board, or other authorized local, state, or federal law enforcement or regulatory agencies.

(I) In the event that an FEMCF pharmacy which uses a data processing system experiences system downtime, the pharmacy must have an auxiliary procedure which will ensure that all data is retained for online data entry as soon as the system is available for use again.

(4) Distribution of controlled substances to another registrant. A pharmacy may distribute controlled substances to a practitioner, another pharmacy, or other registrant, without being registered to distribute, under the following conditions.

(A) The registrant to whom the controlled substance is to be distributed is registered under the Controlled Substances Act to possess that controlled substance.

(B) The total number of dosage units of controlled substances distributed by a pharmacy may not exceed 5.0% of all controlled substances dispensed by the pharmacy during the 12-month period in which the pharmacy is registered; if at any time it does exceed 5.0%, the pharmacy is required to obtain an additional registration to distribute controlled substances.

(C) If the distribution is for a Schedule III, IV, or V controlled substance, a record shall be maintained which indicates:

(i) the actual date of distribution;

(ii) the name, strength, and quantity of controlled substances distributed;

(iii) the name, address, and DEA registration number of the distributing pharmacy; and

(iv) the name, address, and DEA registration number of the pharmacy, practitioner, or other registrant to whom the controlled substances are distributed.

(D) A pharmacy shall comply with 21 CFR 1305 regarding the DEA order form (DEA 222) requirements when distributing a Schedule II controlled substance. [~~If the distribution is for a Schedule II controlled substance, the following is applicable.~~

~~*[(i)*~~ ~~The pharmacy, practitioner, or other registrant who is receiving the controlled substances shall issue Copy 1 and Copy 2 of a DEA order form (DEA 222) to the distributing pharmacy.]~~

~~*[(ii)*~~ ~~The distributing pharmacy shall:]~~

~~*[(I)*~~ ~~complete the area on the DEA order form (DEA 222) titled "To Be Filled in by Supplier";]~~

~~*[(II)*~~ ~~maintain Copy 1 of the DEA order form (DEA 222) at the pharmacy for two years; and]~~

~~*[(III)*~~ ~~forward Copy 2 of the DEA order form (DEA 222) to the divisional office of DEA.]~~

(5) Other records. Other records to be maintained by the pharmacy include:

(A) a permanent log of the initials or identification codes which identifies each pharmacist by name. The initials or identification code shall be unique to ensure that each pharmacist can be identified, i.e., identical initials or identification codes cannot be used;

[~~(B) Copy 3 of DEA order form (DEA 222), which has been properly dated, initialed, and filed, and all copies of each unaccepted or defective order form and any attached statements or other documents and/or for each order filled using the DEA Controlled Substance Ordering System (CSOS), the original signed order and all linked records for that order;~~]

[~~(C) a copy of the power of attorney to sign DEA 222 order forms (if applicable);~~]

(B) [~~(D)~~] suppliers' invoices of dangerous drugs and controlled substances dated and initialed or signed by the person receiving the drugs;

(i) a pharmacist shall verify that the controlled substances [~~drugs~~] listed on the invoices were added to the pharmacy's perpetual inventory by clearly recording his/her initials and the date of review of the perpetual inventory; and

(ii) for controlled substances, the documents retained must contain the name, strength and quantity of controlled substances distributed, and the name, address and DEA number of both registrants; the supplier and the receiving pharmacy;

(C) [~~(E)~~] supplier's credit memos for controlled substances and dangerous drugs;

(D) [~~(F)~~] a copy of inventories required by §291.17 of this title (relating to Inventory Requirements) except that a perpetual inventory of controlled substances listed in Schedule II may be kept in a data processing system if the data processing system is capable of producing a hard copy of the perpetual inventory on site;

(E) [~~(G)~~] reports of surrender or destruction of controlled substances and/or dangerous drugs to an appropriate state or federal agency or reverse distributor;

(F) [~~(H)~~] records of distribution of controlled substances and/or dangerous drugs to other pharmacies, practitioners, or registrants; and

(G) [~~(I)~~] a copy of any notification required by the Texas Pharmacy Act or these rules, including, but not limited to, the following:

(i) reports of theft or significant loss of controlled substances to DEA and the board;

(ii) notification of a change in pharmacist-in-charge of a pharmacy; and

(iii) reports of a fire or other disaster which may affect the strength, purity, or labeling of drugs, medications, devices, or other materials used in the diagnosis or treatment of injury, illness, and disease.

(6) Permission to maintain central records. Any pharmacy that uses a centralized recordkeeping system for invoices and financial data shall comply with the following procedures.

(A) Controlled substance records. Invoices and financial data for controlled substances may be maintained at a central location provided the following conditions are met:

(i) Prior to the initiation of central recordkeeping, the pharmacy submits written notification by registered or certified mail to the divisional director of DEA as required by the Code of Federal Regulations, Title 21, §1304(a), and submits a copy of this written notification to the board. Unless the registrant is informed by the divisional director of DEA that permission to keep central records is denied, the pharmacy may maintain central records commencing 14 days after receipt of notification by the divisional director;

(ii) The pharmacy maintains a copy of the notification required in this subparagraph; and

(iii) The records to be maintained at the central record location shall not include executed DEA order forms, prescription drug orders, or controlled substance inventories, which shall be maintained at the pharmacy.

(B) Dangerous drug records. Invoices and financial data for dangerous drugs may be maintained at a central location.

(C) Access to records. If the records are kept on microfilm, computer media, or in any form requiring special equipment to render the records easily readable, the pharmacy shall provide access to such equipment with the records.

(D) Delivery of records. The pharmacy agrees to deliver all or any part of such records to the pharmacy location within two business days of written request of a board agent or any other authorized official.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Allison Vordenbaumen Benz, R.Ph., M.S.
Executive Director
Texas State Board of Pharmacy
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For further information, please call: (512) 305-8010

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CHAPTER 295. PHARMACISTS

22 TAC §295.5

The Texas State Board of Pharmacy proposes amendments to §295.5, concerning Pharmacist License or Renewal Fees. The amendments, if adopted, will increase pharmacist license fees based on expected expenses.

Allison Vordenbaumen Benz, R.Ph., M.S., Executive Director/Secretary, has determined that, for the first five-year period the rules are in effect, there will be fiscal implications for state government as a result of enforcing or administering the amended rule as follows:

Revenue Increase

FY2022 = $560,000

FY2023 = $574,000

FY2024 = $587,776

FY2025 = $601,295

FY2026 = $614,523

There are no anticipated fiscal implications for local government.

Ms. Benz has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the amendments will be to assure that the Texas State Board of Pharmacy is adequately funded to carry out its mission. The economic cost to large, small or micro-businesses (pharmacies) will be the same as the economic cost to an individual, if the pharmacy chooses to pay the fee for the individual. The economic cost to individuals who are required to comply with the amended rule will be an increase of $28 for an initial license and an increase of $28 for the renewal of a license. An economic impact statement and regulatory flexibility analysis is not required because the proposed amendments will have a de minimis economic effect on Texas small businesses or rural communities.

For each year of the first five years the proposed amendments will be in effect, Ms. Benz has determined the following:

(1) The proposed amendments do not create or eliminate a government program;

(2) Implementation of the proposed amendments does not require the creation of new employee positions or the elimination of existing employee positions;

(3) Implementation of the proposed amendments does not require an increase or decrease in the future legislative appropriations to the agency;

(4) The proposed amendments do require an increase in fees paid to the agency;

(5) The proposed amendments do not create a new regulation;

(6) The proposed amendments do not limit or expand an existing regulation;

(7) The proposed amendments do not increase or decrease the number of individuals subject to the rule's applicability; and

(8) The proposed amendments do not positively or adversely affect this state's economy.

Written comments on the amendments may be submitted to Megan G. Holloway, Deputy General Counsel, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-500, Austin, Texas 78701, FAX (512) 305-8061. Comments must be received by 5:00 p.m., July 27, 2021.

The amendments are proposed under §§551.002 and 554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

§295.5. Pharmacist License or Renewal Fees.

(a) Biennial Registration. The Texas State Board of Pharmacy shall require biennial renewal of all pharmacist licenses provided under the Pharmacy Act, §559.002.

(b) Initial License Fee.

(1) The fee for the initial license shall be $360 [~~$332~~] for a two-year registration.

(2) New pharmacist licenses shall be assigned an expiration date and initial fee shall be prorated based on the assigned expiration date.

(c) Renewal Fee. The fee for biennial renewal of a pharmacist license shall be $357 [~~$329~~] for a two-year registration.

(d) Exemption from fee. The license of a pharmacist who has been licensed by the Texas State Board of Pharmacy for at least 50 years or who is at least 72 years old shall be renewed without payment of a fee provided such pharmacist is not actively practicing pharmacy. The renewal certificate of such pharmacist issued by the board shall reflect an inactive status. A person whose license is renewed pursuant to this subsection may not engage in the active practice of pharmacy without first paying the renewal fee as set out in subsection (c) of this section.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Allison Vordenbaumen Benz, R.Ph., M.S.
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CHAPTER 297. PHARMACY TECHNICIANS AND PHARMACY TECHNICIAN TRAINEES

22 TAC §297.4

The Texas State Board of Pharmacy proposes amendments to §297.4, concerning Fees. The amendments, if adopted, will increase pharmacy technician registration fees based on expected expenses.

Allison Vordenbaumen Benz, R.Ph., M.S., Executive Director/Secretary, has determined that, for the first five-year period the rules are in effect, there will be fiscal implications for state government as a result of enforcing or administering the amended rule as follows:

Revenue Increase

FY2022 = $17,500

FY2023 = $17,938

FY2024 = $18,368

FY2025 = $18,790

FY2026 = $19,204

There are no anticipated fiscal implications for local government.

Ms. Benz has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the amendments will be to assure that the Texas State Board of Pharmacy is adequately funded to carry out its mission. The economic cost to large, small or micro-businesses (pharmacies) will be the same as the economic cost to an individual, if the pharmacy chooses to pay the fee for the individual. The economic cost to individuals who are required to comply with the amended rule will be an increase of $1 for an initial registration as a pharmacy technician, and an increase of $1 for the renewal of a registration as a pharmacy technician. An economic impact statement and regulatory flexibility analysis is not required because the proposed amendments will have a de minimis economic effect on Texas small businesses or rural communities.

For each year of the first five years the proposed amendments will be in effect, Ms. Benz has determined the following:

(1) The proposed amendments do not create or eliminate a government program;

(2) Implementation of the proposed amendments does not require the creation of new employee positions or the elimination of existing employee positions;

(3) Implementation of the proposed amendments does not require an increase or decrease in the future legislative appropriations to the agency;

(4) The proposed amendments do require an increase in fees paid to the agency;

(5) The proposed amendments do not create a new regulation;

(6) The proposed amendments do not limit or expand an existing regulation;

(7) The proposed amendments do not increase or decrease the number of individuals subject to the rule's applicability; and

(8) The proposed amendments do not positively or adversely affect this state's economy.

Written comments on the amendments may be submitted to Megan G. Holloway, Deputy General Counsel, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-500, Austin, Texas 78701, FAX (512) 305-8061. Comments must be received by 5:00 p.m., July 27, 2021.

The amendments are proposed under §§551.002 and 554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

§297.4. Fees.

(a) Pharmacy technician trainee. The fee for registration shall be $55 for a two-year registration.

(b) Pharmacy technician.

(1) Biennial Registration. The board shall require biennial renewal of all pharmacy technician registrations provided under Chapter 568 of the Act.

(2) Initial Registration Fee. The fee for initial registration shall be $84 [$83] for a two-year registration.

(3) Renewal Fee. The fee for biennial renewal shall be $81 [$80] for a two-year registration.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 311. WATERSHED PROTECTION RULES

SUBCHAPTER J. BEST MANAGEMENT PRACTICES FOR SAND MINING FACILITY OPERATIONS WITHIN THE SAN JACINTO RIVER BASIN

30 TAC §§311.101 - 311.103

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes new §§311.101 - 311.103.

Background and Summary of the Factual Basis for the Proposed Rules

The Texas Aggregates and Concrete Association (TACA) and the Lake Houston Area Grassroots Flood Prevention Initiative (FPI) filed separate petitions for rulemaking with TCEQ on June 15, 2020, and June 23, 2020, respectively (Non-Rule Project Numbers 2020-042-PET-NR and 2020-044-PET-NR). Both organizations proposed the TCEQ revise Chapter 311 rules to include a new subchapter that would require the executive director (ED) to establish a guidance document of best management practices (BMPs) for commercial sand mining and other lawful purposes within the San Jacinto River Watershed. The proposed rulemaking applies to sand mining facilities within the San Jacinto River Watershed. On August 12, 2020, the commissioners instructed the ED to initiate rulemaking with stakeholder involvement to amend Chapter 311.

A virtual stakeholder meeting was held on November 10, 2020. Stakeholders were offered the opportunity to provide comments on the draft rule, including the San Jacinto River watershed definition, and sand mining BMPs. Comments were received from 17 stakeholders, including the rule petitioners, United States Fish and Wildlife Service, Texas Parks and Wildlife Department, San Jacinto River Authority, Texans for Responsible Aggregate Mining, Bayou Land Conservancy, and ten individual citizens.

The proposed rulemaking establishes a new subchapter to include: a definition of the San Jacinto River watershed, based on the petitions; requirements for the ED to develop a guidance document of BMPs for sand mining facilities; requirements for sand mining facility operators in the watershed to utilize the guidance document of BMPs at their site; requirements for sand mining facility operators to prepare and submit a final stabilization report to the TCEQ for review prior to operations terminating at the site or portion(s) of the site; and requirements for sand mining facility operators to implement the approved final stabilization report prior to operations terminating at the site or portion(s) of the site.

Stakeholders generally agreed that requirements for sand mining facilities to submit reclamation and restoration plans with financial assurance bonds should be included as part of this rulemaking. The proposed rulemaking seeks to address the concerns raised in the requests, while working within the scope of the ED's rulemaking authority. The ED cannot impose requirements for sand mining facilities to submit reclamation and restoration plans along with financial assurance bonds without a mandate from the legislature. In response to stakeholders' concern that sand mining facility operators might terminate operations without properly stabilizing the site, proposed new §311.103 establishes requirements for sand mining facilities within the defined watershed to submit a final stabilization report to the ED for review and approval and to implement the approved final stabilization report prior to operations terminating at the site or portion(s) of the site and allows for additional investigation by ED staff prior to approval.

Section by Section Discussion

Subchapter J: Best Management Practices for Sand Mining Facilities Within the San Jacinto River Basin

§311.101, Definitions

Proposed new §311.101 would define the terms used within the subchapter. Definitions for the following terms are consistent with definitions found in Texas Pollutant Discharge Elimination System (TPDES) stormwater general permits: BMPs, infeasible, and minimize. The definition for Aggregate Production Operation (APO) is consistent with other state rules found in 30 TAC Chapter 342. The definitions for sand mining facilities, operator, and San Jacinto River Watershed were developed specifically to reference APOs within distinct portions of Harris, Montgomery, Walker, Grimes, Waller, and Liberty Counties where impacts from sand mining are of concern. The definition for operator was modified from the definition in the TPDES Multi-Sector General Permit (TXR050000) for stormwater to address APOs. To further clarify the definition for San Jacinto River Watershed, a map of the watershed area is indicated as a figure located in §311.101(a)(7). The map was developed using United States Geological Survey information to delineate the appropriate watershed according to the proposed definition. The definition for storm event is consistent with the United States Environmental Protection Agency 2021 Multi-Sector General Permit for stormwater.

§311.102, Scope and Applicability

Proposed new §311.102(a) and (b) identify activities regulated by this subchapter. Activities regulated by this subchapter include sand mining facility operations within the San Jacinto River Watershed.

Proposed new §311.102(c) specifically requires the ED to develop and maintain a guidance document of BMPs for use by regulated sand mining facilities.

§311.103, General Requirements

Proposed new §311.103 outlines requirements specific to sand mining facilities in the San Jacinto River Watershed. Subsection (a) requires operators to develop and implement all vegetative BMPs from the guidance document of BMPs.

Subsection (b) requires operators to develop and implement all structural BMPs from the guidance document of BMPs.

Subsection (c) requires operators to identify, develop, and implement all other BMPs from the guidance document of BMPs for pre-mining, mining, and post-mining unless they are documented as infeasible. A BMP may be determined to be infeasible considering certain financial and site conditions included in paragraphs (1) - (13). If a BMP is infeasible, the operator must use an alternative BMP and keep documentation of the reason on site.

Subsection (d) specifies that the operator's BMPs must be properly installed.

Subsection (e) indicates that the operator must modify or replace controls in a timely manner, but no later than the next anticipated storm event, when an inspection by the operator or the ED reveals the controls are not installed correctly or are not adequate.

Subsection (f) requires the operator to obtain certification of BMPs by a licensed Texas professional engineer or a licensed Texas professional geoscientist.

Subsection (g)(1) requires that operators submit to the ED for review, prior to operations terminating at the site or portion(s) of the site, a final stabilization report. Subparagraphs (A) - (C) outline the requirements for the final stabilization report, including: development as outlined in the guidance document of BMPs, certification by a licensed Texas professional engineer or a licensed Texas professional geoscientist, and ED approval prior to implementation. Subsection (g)(2) requires operators to implement and complete the approved final stabilization report prior to operations terminating at the site or portion(s) of the site.

Subsection (h) allows for the ED to conduct an investigation of a sand mining facility prior to approval of the final stabilization report.

Subsection (i) requires operators to maintain documentation related to compliance with the proposed subchapter onsite and make the documentation available upon request to ED staff and local pollution control entities. In addition, the ED may require additional information necessary to demonstrate compliance with the provisions of Texas Water Code, Chapter 26 or the proposed subchapter.

Fiscal Note: Costs to State and Local Government

Jené Bearse, Analyst in the Budget and Planning Division, has determined that for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed rulemaking.

This rulemaking addresses necessary changes which would require the ED to develop and maintain a guidance document with requirements for BMPs for sand mining facility operations located in the San Jacinto River Watershed.

Public Benefits and Costs

Ms. Bearse determined that for each year of the first five years the proposed rules are in effect, the anticipated public benefit would be a reduced environmental impact during heavy rains, better-equipped facilities for large rain events, and more aesthetically pleasing bodies of water in the San Jacinto River Watershed. The public also may experience an increase in water quality in the creeks in the region.

The proposed rulemaking is anticipated to result in fiscal implications for businesses or individuals who are owners or operators of sand mining facilities in the San Jacinto River Watershed. The agency estimates that 114 APO facilities regulated under the Multi-Sector General Permit for stormwater discharges through Section J, for Mineral Mining and Processing facilities or registered APOs may be affected by the rule.

The proposed rulemaking would direct the ED to issue guidance to sand mining facility operations in the San Jacinto River Watershed which would require them to implement best practices for vegetative and structural controls, pre-mining, mining, post-mining, as well as control measures. The proposed rulemaking allows the owner to use an alternative best practice if the requirements under §311.103(c) are infeasible due to a variety of factors, including financial considerations.

The proposed rulemaking would require that the operator obtain a certificate of the design and installation of all new and existing BMPs by a licensed Texas professional engineer or a licensed Texas professional geoscientist prior to commencing or continuing regulated activities. Prior to operations terminating at all or part of the site, the proposed rulemaking requires the operator to submit for approval a Final Stabilization Report that is signed and certified by a Texas licensed professional engineer or a Texas licensed professional geoscientist. The agency estimates the cost for contracting for these services is $150 per hour with some firms requiring a four-hour minimum. The estimated cost per owner or operator cannot be determined because of the different variables within each facility. The estimated costs in the proposed rulemaking will likely be a one-time cost for the owner or operator of a sand mining facility.

Local Employment Impact Statement

The commission reviewed this proposed rulemaking and determined that a Local Employment Impact Statement is not required because the proposed rulemaking would not adversely affect a local economy in a material way for the first five years that the proposed rules would be in effect.

Rural Communities Impact Assessment

The commission reviewed this proposed rulemaking and determined that the proposed rulemaking would not adversely affect rural communities in a material way for the first five years that the proposed rules would be in effect. The rules would apply to Grimes, Harris, Liberty, Montgomery, San Jacinto, Walker, and Waller Counties and have the same effect in rural communities as in urban communities.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the

proposed rulemaking for the first five-year period the proposed rules would be in effect.

Small Business Regulatory Flexibility Analysis

The commission reviewed this proposed rulemaking and determined that a Small Business Regulatory Flexibility Analysis is not required because the proposed rules would not adversely affect a small or micro-business in a material way for the first five years the proposed rules would be in effect.

Government Growth Impact Statement

The commission prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking would not create or eliminate a government program and would not require an increase or decrease in future legislative appropriations to the agency. The proposed rulemaking would not require the creation of new employee positions, eliminate current employee positions, nor require an increase or decrease in fees paid to the agency. The proposed rulemaking would expand an existing regulation for certain regulated facilities in the San Jacinto River Watershed region; however, the number of regulated individuals is expected to remain constant. During the first five years, the proposed rules should not impact positively or negatively the state's economy.

Draft Regulatory Impact Analysis Determination

The TCEQ reviewed the proposed rulemaking in consideration of the regulatory analysis of major environmental rules required by Texas Government Code. §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225(a) because it does not meet the definition of a "Major environmental rule" as defined in Texas Government Code, §2001.0225(g)(3). The following is a summary of that review.

Texas Government Code, §2001.0225 applies to a "Major environmental rule" adopted by a state agency, the result of which is to exceed standards set by federal law, exceed express requirements of state law, exceed requirements of delegation agreements between the state and the federal government to implement a state and federal program, or adopt a rule solely under the general powers of the agency instead of under a specific state law. 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 or the state.

On June 15, 2020, and June 23, 2020, the TACA and the FPI respectively filed separate petitions for rulemaking with TCEQ. Both organizations proposed to revise Chapter 311 to include a new subchapter that would require the ED to establish a guidance document of BMPs for commercial sand mining and other lawful purposes within the San Jacinto River Watershed. The proposed rulemaking would apply to sand mining facilities within the San Jacinto River Watershed. On August 12, 2020, the commission instructed the ED to initiate rulemaking with stakeholder involvement to amend Chapter 311.

Therefore, the specific intent of the proposed rulemaking is to add a new Subchapter J for the San Jacinto Watershed within the TCEQ's existing rules. The proposed rulemaking amends 30 TAC to add the new subchapter establishing a guidance document of BMPs and requirements for sand mining facilities to implement BMPs and prepare and implement a final stabilization report to apply in the San Jacinto Watershed.

Certain aspects of the TCEQ's Watershed Protection Rules are intended to protect the environment or reduce risks to human health from environmental exposure. However, the proposed rulemaking would not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs; nor would the proposed rulemaking adversely affect in a material way the environment, or the public health and safety of the state or a sector of the state. Therefore, the proposed rulemaking does not fit the Texas Government Code, §2001.0225 definition of major environmental rule.

Even if this rulemaking was a major environmental rule, this rulemaking meets none of the criteria in Texas Government Code, §2001.0225 for the requirement to prepare a full Regulatory Impact Analysis. First, this rulemaking is not governed by federal law. Second, it does not exceed state law but rather applies state law to a specified environmental need within the San Jacinto Watershed. Third, it does not come under a delegation agreement or contract with a federal program, and finally, it is not being proposed under the TCEQ's general rulemaking authority. This rulemaking is being proposed under existing state law found at Texas Water Code, §26.0135 that states that the commission must establish strategic and comprehensive monitoring of water quality and the periodic assessment of water quality in each watershed and river basin of the state. Because this proposal does not constitute a major environmental rule, a regulatory impact analysis is not required.

Therefore, the commission does not adopt the rule solely under the commission's general powers. The commission invites public comment on the Draft Regulatory Impact Analysis Determination.

Written comments on the Draft Regulatory Impact Analysis may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The TCEQ evaluated the proposed rulemaking and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The following is a summary of that analysis.

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 Section 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 governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The specific purpose of the proposed rulemaking is to amend Chapter 311 to add a new subchapter for the San Jacinto Watershed related to BMPs required for sandmining in the watershed. Promulgation and enforcement of the proposed rules would not

be a statutory or constitutional taking of private real property because, as the commission's analysis indicates, Texas Government Code, Chapter 2007 does not apply to these proposed rules because these rules would not impact private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. Specifically, the proposed rulemaking does not apply to or affect any landowner's rights in any private real property because it does not burden (constitutionally), restrict, or limit any landowner's right to real property and reduce any property's value by 25% or more beyond that which would otherwise exist in the absence of the regulations. The Chapter 311 rules do not regulate property but instead regulate water quality in the specific watersheds. The proposed rulemaking is reasonably taken to fulfill requirements of state law. Therefore, the proposed rulemaking would not cause a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rules and found that they are neither identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(b)(2) or (4), nor would they affect any action/authorization identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(a)(6). Therefore, the proposed rules are not subject to the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Virtual Hearing

The commission will hold a *virtual* public hearing on this proposal on July 22, 2021, at 2:00 p.m. The virtual 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, staff will be available to discuss the proposal 30 minutes prior to the hearing and after the virtual hearing via the Teams Live Event Q&A chat function.

Registration

The hearing will be conducted remotely using an internet meeting service. Individuals who plan to attend the hearing and want to provide oral comments and/or want their attendance on record must **register by Friday, July 16, 2021.** To register for the hearing, please email Rules@tceq.texas.gov and provide the following information: your name, your affiliation, your email address, your phone number, and whether or not you plan to provide oral comments during the hearing. Instructions for participating in the hearing will be sent on **July 19, 2021,** to those who register for the hearing.

For the public who do not wish to provide oral comments but would like to view the hearing may do so at no cost at:

https://teams.microsoft.com/l/meetup-join/19%3ameeting_YWQ1MGNjOTQtYTNjNi00OGQ3LTg1MDktZGQ0NTk0OTgwNjY3%40thread.v2/0?context=%7b%22Tid%22%3a%22871a83a4-a1ce-4b7a-8156-3bcd93a08fba%22%2c%22Oid%22%3a%22bf237360-1655-4724-96f6-ba9493e841ba%22%2c%22IsBroadcastMeeting%22%3atrue%7d&btype=a&role=a

Persons who have special communication or other accommodation needs who are planning to register to provide formal oral comments and/or attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or (800) RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Ms. Lee Bellware, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to *fax4808@tceq.texas.gov.*Electronic comments may be submitted at: *https://www6.tceq.texas.gov/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2020-048-311-OW. Please choose one form of submittal when submitting *written* comments.

The comment period closes on July 27, 2021. Copies of the proposed rulemaking can be obtained from the commission's website at *https://www.tceq.texas.gov/rules/propose_adopt.html.*

For further information, please contact Ms. Macayla Coleman, Wastewater Permitting, (512) 239-3925.

Statutory Authority

The new rules are proposed under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by TWC, §5.103; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §5.120, which requires the commission to administer the law so as to promote judicious use and maximum conservation and protection of the environment and the natural resources of the state; and TWC, §26.0135, which requires the commission to establish the strategic and comprehensive monitoring of water quality and the periodic assessment of water quality in each watershed and river basin of the state.

The proposed new rules implement, TWC, §§5.013, 5.102, 5.103, 5.120. and 26.0135.

§311.101. Definitions.

The following words and terms, when used in this subchapter, have the following meanings.

(1) Aggregate Production Operation (APO)--as defined in Chapter 342 of this title (relating to Regulation of Certain Aggregate Production Operations).

(2) Best management practices (BMPs)--Schedules of activities, prohibitions of practices, maintenance procedures, and other techniques to control, prevent or reduce the discharge of pollutants into surface water in the state. The BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spills or leaks, sludge or waste disposal, or drainage from raw material storage areas.

(3) Infeasible--Not technologically possible or not economically practicable and achievable in light of best industry practices.

(4) Minimize--To reduce or eliminate to the extent achievable using control measures that are technologically available and economically practicable and achievable in light of best industry practices.

(5) Operator--A person responsible for the management of an aggregate production operation (APO) facility subject to the provisions of this subchapter. The APO facility operators include entities with operational control over APO regulated activities, including the ability to modify those activities; or entities with day-to-day opera-

tional control of activities at a facility necessary to ensure compliance with this subchapter (e.g., the entity is authorized to direct workers at a facility to carry out activities required by this subchapter).

(6) Sand Mining Facilities--The aggregate production operations (APOs) engaged in activities described by Standard Industrial Classification codes 1442 and 1446, concerning industrial and construction sand. Additionally, this applies to any other APO that the executive director has determined to be a sand mining facility by sending written notice to the APO operator.

(7) San Jacinto River Watershed--Those portions of the San Jacinto River Watershed that includes the watersheds of the following and its tributaries:
Figure: 30 TAC §311.101(a)(7)

(A) the East Fork of the San Jacinto River in Montgomery, Harris and Liberty Counties;

(B) Peach Creek in Montgomery County;

(C) Caney Creek in Montgomery and Harris Counties;

(D) the West Fork of the San Jacinto River from the Lake Conroe Dam in Montgomery and Harris Counties to the Lake Houston Dam in Harris County;

(E) Lake Creek in Montgomery and Grimes Counties;

(F) Spring Creek in Montgomery and Harris Counties; and

(G) Cypress Creek in Harris and Waller Counties.

(8) Storm Event--A precipitation event that results in a measurable amount of precipitation.

§311.102. Scope and Applicability.

(a) The purpose of this chapter is to regulate, through Best Management Practices (BMPs), sand mining facilities, which have the potential to adversely impact water quality within the San Jacinto River Watershed as defined in this subchapter.

(b) This subchapter applies to sand mining facilities located in the San Jacinto River Watershed.

(c) The executive director shall develop and maintain a guidance document of BMPs to minimize water pollution from sand mining facilities regulated by this subchapter. The BMPs shall be based on technically supported information that is generally relied upon by professionals within the appropriate environmental area or discipline. The BMPs guidance document shall be updated on a frequency determined by the executive director to allow for technological advancements and improved practices.

§311.103. General Requirements.

(a) Vegetative Controls. The operators shall develop and implement all vegetative Best Management Practices (BMPs) identified in the guidance document developed by the executive director for the appropriate phases of the sand mining facility's operation.

(b) Structural Controls. The operator shall develop and implement all structural BMPs identified in the guidance document developed by the executive director for the appropriate phases of the sand mining facility's operation.

(c) Pre-mining, Mining, and Post-mining. The operator shall identify, develop and implement all other BMPs identified in the guidance document developed by the executive director for pre-mining, mining, and post-mining phases of the sand mining facility's operation, unless they are infeasible. If a BMP is infeasible, the operator shall use an alternative equivalent BMP and maintain documentation of the reason onsite. The following considerations may be used to determine if a BMP is infeasible:

(1) financial considerations;

(2) health and safety concerns;

(3) local restrictions or codes;

(4) site soils;

(5) slope;

(6) available area;

(7) precipitation pattern;

(8) site geometry;

(9) site vegetation;

(10) infiltration capacity;

(11) geotechnical factors;

(12) depth to groundwater; and

(13) other similar considerations.

(d) Installation and Maintenance. The operator shall install and maintain all control measures in accordance with the manufacturer's specifications and good engineering practices.

(e) Replacement or Modification of Controls. Following periodic inspections, the operator shall replace or modify controls in a timely manner, but no later than the next anticipated storm event. Periodic inspections include those performed by the operator in compliance with the guidance document of BMPs or permits required by Chapters 205 or 305 of this title (relating to General Permits for Waste Discharges and Consolidated Permits, respectively) or inspections performed by the executive director determine that such measures have been used inappropriately, or incorrectly, or are not adequate.

(f) Certification of BMPs. The operator shall obtain certification of the design and installation of all new and existing BMPs, within the appropriate area or discipline, by a licensed Texas professional engineer or a licensed Texas professional geoscientist prior to commencing or continuing regulated activities. The selected BMPs may be independently certified, as appropriate.

(g) Final Stabilization Report.

(1) The operator shall submit to the executive director a Final Stabilization Report for review and approval prior to operations terminating at the site or portion(s) of the site. This report shall:

(A) be developed in accordance with the guidance document of BMPs developed by the executive director;

(B) be signed and certified by a Texas licensed professional engineer or a Texas licensed professional geoscientist; and

(C) receive executive director approval prior to implementation.

(2) All required elements of the approved Final Stabilization Report shall be implemented and completed prior to operations terminating at portion(s) of the site or cancelling any permit or authorization required by Chapter 205 or 305 of this title as a result of operations terminating at the site.

(h) Investigation. The executive director may conduct an investigation in addition to the review of the Final Stabilization Report, prior to the termination of sand mining facility operations at the site or portion(s) of the site.

(i) Documentation. All documentation related to compliance with this subchapter shall be maintained onsite and made readily available for inspection and review upon request by authorized executive director staff as well as local pollution control entities with jurisdiction. The executive director may require any additional information deemed appropriate and necessary to demonstrate compliance with the provisions of Texas Water Code, Chapter 26 or this subchapter.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 11, 2021.

TRD-202102292
Robert Martinez
Deputy Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: July 25, 2021
For further information, please call: (512) 239-6095

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 58. OYSTERS, SHRIMP, AND FINFISH

SUBCHAPTER A. STATEWIDE OYSTER FISHERY PROCLAMATION

31 TAC §58.21

The Texas Parks and Wildlife Department proposes an amendment to 31 TAC §58.21, concerning Taking or Attempting to Take Oysters from Public Oyster Beds: General Rules.

The proposed amendment would prohibit the harvest of oysters for two years within the boundary of the restoration area on four reefs: two sites in Conditionally Approved Area TX-6 in Galveston Bay (Dollar Reef and North Todd's Dump, approximately 50 and 65 acres, respectively), one site in Conditionally Approved Area TX-1 in Galveston Bay (Pepper Grove Reef - Middle Site, 2 acres), and one site in Approved Area TX-18 at the mouth of Keller Bay in the Matagorda Bay system (Keller Bay Reefs, 82 acres). The proposed amendment would temporarily close a total of 199 acres of oyster reef for two years. The Texas Department of State Health Services (DSHS) regulates shellfish sanitation and designates specific areas where oysters may be harvested for human consumption. The designation of "Conditionally Approved" or "Approved" is determined by DSHS.

The temporary closures will allow for the planting of oyster cultch to repopulate in those areas and enough time for those oysters to reach legal size for harvest. Oyster cultch is the material to which oyster spat (juvenile oysters) attach in order to create an oyster bed.

Under Parks and Wildlife Code, §76.115, the department may close an area to the taking of oysters when the commission finds that the area is being overworked or damaged or the area is to be reseeded or restocked. Oyster reefs in Texas have been impacted due to drought, flooding, and hurricanes (Hurricane Ike, September 2008 and Hurricane Harvey, August 2017), as well as high harvest pressure. The department's oyster habitat restoration efforts to date have resulted in a total of approximately 1,640 acres of oyster habitat returned to productive habitat within these bays.

House Bill 51 (85th Legislature, 2017) included a requirement that certified oyster dealers re-deposit department-approved cultch materials in an amount equal to thirty percent of the total volume of oysters purchased in the previous license year. For the 2021 - 2022 fiscal years, the department anticipates this requirement will result in the restoration of approximately 47 acres. Funds and materials generated from House Bill 51 are expected to be used to restore up to 35.6 acres on Todd's Dump Reef and up to 20 acres on Keller Bay Reefs in 2021-2022.

Following Hurricane Harvey in 2017, the National Marine Fisheries Service (NMFS) awarded the Texas Parks and Wildlife Department over $13 million of fisheries disaster relief funding that was appropriated by Congress under the Bipartisan Budget Act of 2018 (P.L. 115-123). The notification to the governor of Texas from National Marine Fisheries Service (NMFS) stated that funds should be spent to "strengthen the long-term economic and environmental sustainability of the fishery" and over $4 million was dedicated specifically to oyster restoration activities. A portion of these funds, combined with funding generated by House Bill 51 (85th Texas Legislature, 2017) and the Shell Recovery Program (82nd Texas Legislature, 2011), will be used to restore up to 120 acres of oyster habitat in Galveston and Matagorda bay systems in 2021-2022. Within Matagorda Bay system, oyster habitats will be restored within an 82-acre area on Keller Bay reefs. Within the Galveston Bay system, oyster habitats will be restored in a 50-acre area on Dollar Reef and a 65-acre area on North Todd's Dump reef. In addition, the Coastal Conservation Association has donated funding to restore a 2-acre area on Pepper Grove reef (Pepper Grove Reef - Middle Site) during this large restoration event. Oyster abundance on these reefs has severely declined over time; average oyster abundance on these reefs is 50-75% less than the average oyster abundance on other reefs in the Matagorda Bay and Galveston Bay systems. The portion of the reefs selected for restoration is characterized by degraded substrates. The restoration activities will focus on establishing stable substrate and providing suitable conditions for spat settlement and oyster bed development.

Dakus Geeslin, Science and Policy Branch Chief, Coastal Fisheries Division, has determined that for each of the first five years that the rule as proposed is in effect, there will be no fiscal implications to state or local governments as a result of administering or enforcing the rule.

Mr. Geeslin also has determined that for each of the first five years that the rule as proposed is in effect, the public benefit anticipated as a result of enforcing or administering the proposed rule will be the dispensation of the agency's statutory duty to protect and conserve the fisheries resources of this state; the duty to equitably distribute opportunity for the enjoyment of those resources among the citizens; the execution of the commission's policy to maximize recreational opportunity within the precepts of sound biological management practices; the potential for increased oyster production by repopulating damaged public oyster reefs and allowing these oysters to reach legal size and subsequent recreational and commercial harvest; and providing protection from harvest to a reef complex thus establishing a continual supply of oyster larvae to colonize oyster habitat within the bay system.

Under provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses and micro-businesses. Those guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and micro-businesses to determine if any further analysis is required. For that purpose, the department considers "direct economic impact" to mean a requirement that would directly impose recordkeeping or reporting requirements; impose taxes or fees; result in lost sales or profits; adversely affect market competition; or require the purchase or modification of equipment or services. The department has determined that because the areas designated for closure have been degraded to the extent that they no longer support any commercial exploitation, the closures effected by the proposed rule will not result in direct adverse economic impacts to any small business, micro-business, or rural community. The department does note, however, that numerous areas previously closed (South Redfish Reef, Texas City 1, Texas City 2, Hanna's Reef, and Middle Reef), are now home to healthy populations of oysters that have reached legal size and may be harvested by both recreational and commercial users.

There will be no adverse economic effect on persons required to comply with the rule as proposed.

The department has not drafted a local employment impact statement under the Administrative Procedures Act, §2001.022, as the agency has determined that the rule as proposed will not impact local economies.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rule.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rule.

The department has determined that because the rule as proposed does not impose a cost on regulated persons, it is not necessary to repeal or amend any existing rule.

The department has determined that the proposed rule is in compliance with Government Code §505.11 (Actions and Rule Amendments Subject to the Coastal Management Program).

In compliance with the requirements of Government Code, §2001.0221, the department has prepared the following Government Growth Impact Statement (GGIS). The rule as proposed, if adopted, will neither create nor eliminate a government program; not result in an increase or decrease in the number of full-time equivalent employee needs; not result in a need for additional General Revenue funding; not affect the amount of any fee; not create a new regulation; will expand an existing regulation (by creating new area closures); neither increase nor decrease the number of individuals subject to regulation; and not positively or adversely affect the state's economy.

Comments on the proposed rule may be submitted to Dr. Tiffany Hopper, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4650; email: tiffany.hopper@tpwd.texas.gov, or via the department website at https://tpwd.texas.gov/business/feedback/public_comment/.

The amendment is proposed under Parks and Wildlife Code, §76.301, which authorizes the commission to regulate the taking, possession, purchase and sale of oysters, including prescribing the times, places, conditions, and means and manner of taking oysters, and §76.115, which authorizes the commission to close an area to the taking of oysters when the area is to be reseeded or restocked.

The proposed amendment affects Parks and Wildlife Code, Chapter 76.

§58.21. Taking or Attempting to Take Oysters from Public Oyster Beds: General Rules.

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

(c) Area Closures.

(1) (No change.)

(2) No person may take or attempt to take oysters within an area described in this paragraph. [~~The provisions of subparagraphs (A)(i) -(ii), (B), and (C) of this paragraph cease effect on November 1, 2021.~~] The provisions of subparagraphs (A)(i) - (v) and (C) [~~(A)(iii) - (vii), (D) and (E)~~] of this paragraph cease effect on November 1, 2022. The provisions of subparagraphs (A)(vi) - (viii) and (B) cease effect on November 1, 2023.

(A) Galveston Bay.

~~(i)~~ ~~Todd's Dump Reef. The area within the boundaries of a line beginning at 29° 29' 55.4"N, 94° 53' 40.1"W (29.498733°N, -94.894467°W; corner marker buoy A); to 29° 29' 55.4"N, 94° 53' 30.6"W (29.498724°N, -94.891834°W; corner marker buoy B); thence to 29° 29' 46.6"N, 94° 53- 30.4"W (29.496273°N, -94.891768°W; corner marker buoy C); thence to 29° 29' 46.6"N, 94° 53' 40.2"W (29.496273°N, -94.894495°W; corner marker buoy D); and thence back to corner marker buoy A.~~]

~~(ii)~~ ~~Pasadena Reef. The area within the boundaries of a line beginning at 29° 28' 21.1"N, 94° 49' 17.3"W (29.472517°N, -94.821472°W; corner marker buoy A); thence, to 29° 28' 08.3"N, 94° 49' 00.3"W (29.468971°N, -94.816744°W; corner marker buoy B); thence to 29° 27' 58.9"N, 94° 49' 09.7"W (29.466359°N, -94.81935°W; corner marker buoy C); thence to 29° 28' 12.0"N, 94° 49' 26.5"W (29.469989N, -94.824025°W; corner marker buoy D); and thence and back to corner marker buoy A.~~]

(i) [~~(iii)~~] Pepper Grove Reef. The area within the boundaries of a line beginning at 29° 29' 14.7"N, 94° 40' 01.0"W (29.487421°N, -94.666944°W; corner marker buoy A); thence, to 29° 29' 14.8"N, 94° 39' 52.3"W (29.48745°N, -94.664525°W; corner marker buoy B); thence to 29° 29' 08.1"N, 94° 39' 52.2"W (29.485596°N, -94.664497°W; corner marker buoy C); thence to 29° 29' 08.0"N, 94° 40' 00.9"W (29.485567°N, -94.666915°W; corner marker buoy D); and thence back to corner marker buoy A.

(ii) [~~(iv)~~] Resignation Reef. The area within the boundaries of a line beginning at 29° 28' 54.3"N, 94° 52' 23.6"W (29.481741°N, -94.873234°W; corner marker buoy A); thence, to 29° 28' 49.3"N, 94° 52' 35.4"W (29.480370°N, -94.876513°W; corner marker buoy B); thence to 29° 28' 39.5"N, 94° 52' 27.5"W (29.477627°N, -94.874316°W; corner marker buoy C); thence to 29° 28' 47.7"N, 94° 52' 18.1"W (29.479921°N, -94.871687°W; corner marker buoy D); and thence back to corner marker buoy A.

(iii) [~~(v)~~] Trinity Sanctuary Reef. The area within the boundaries of a line beginning at 29° 38' 26.2"N, 94° 51' 53.1"W (29.640616°N, -94.864753°W; corner marker buoy A); thence, to 29° 38' 22.9"N, 94° 51' 48.7"W (29.639701°N, -94.863539°W; corner marker buoy B); thence to 29° 38' 17.9"N, 94° 51' 49.8"W (29.638304°N, -94.863857°W; corner marker buoy C); thence to 29° 38' 13.2"N, 94° 51' 50.1"W (29.636994°N, -94.863926°W; corner marker buoy D); thence to 29° 38' 10.1"N, 94° 51' 53.2"W (29.636131°N, -94.864777°W; corner marker buoy E); thence to 29°

38' 17.1"N, 94° 52' 01.3"W (29.638092°N, -94.867041°W; corner marker buoy F); and thence back to corner marker buoy A.

(iv) [~~(vi)~~] Trinity Harvestable Reef 1. The area within the boundaries of a line beginning at 29° 38' 56.2"N, 94° 51' 34.4"W (29.648936°N, -94.859552°W; corner marker buoy A); thence, to 29° 38' 58.8"N, 94° 51' 29.5"W (29.649673°N, -94.858202°W; corner marker buoy B); thence to 29° 38' 55.4"N, 94° 51' 27.1"W (29.648733°N, -94.857531°W; corner marker buoy C); thence to 29° 38' 56.7"N, 94° 51' 24.8"W (29.649075°N, -94.856906°W; corner marker buoy D); thence to 29° 38' 50.5"N, 94° 51' 20.5"W (29.647369°N, -94.855690°W; corner marker buoy E); thence to 29° 38' 46.8"N, 94° 51' 27.7"W (29.646345°N, -94.857704°W; corner marker buoy F); and thence back to corner marker buoy A.

(v) [~~(vii)~~] Trinity Harvestable Reef 2. The area within the boundaries of a line beginning at 29° 36' 47.0"N, 94° 52' 23.7"W (29.613063°N, -94.873269°W; corner marker buoy A); thence, to 29° 36' 37.2"N, 94° 52' 22.9"W (29.610327°N, -94.873046°W; corner marker buoy B); thence to 29° 36' 36.7"N, 94° 52' 31.1"W (29.610187°N, -94.875306°W; corner marker buoy C); thence to 29° 36' 46.5"N, 94° 52' 31.9"W (29.612924°N, -94.875529°W; corner marker buoy D); and thence back to corner marker buoy A.

(vi) Dollar Reef. The area within the boundaries of a line beginning at 29° 27' 30.44" N, 94° 52' 03.23" W (29.458456°N, -94.867565°W, corner marker buoy A); thence, to 29° 27' 32.83" N , 94° 51' 59.91" W (29.459121°N, -94.866643°W, corner marker buoy B); thence, to 29° 27' 29.13" N, 94° 51' 52.67" W (29.458094°N, -94.864632°W, corner marker buoy C); thence, to 29° 27' 15.67" N, 94° 51' 53.44" W (29.454535°N, -94.864846°W, corner marker buoy D); thence, to 29° 27' 04.04" N , 94° 52' 08.47" W (29.451124°N, -94.869021°W, corner marker buoy E) ; and thence back to corner marker buoy A.

(vii) North Todd's Dump Reef. The area within the boundaries of a line beginning at 29° 30' 33.76" N , 94° 53' 17.07" W (29.509379°N, -94.888077°W, corner marker buoy A); thence, to 29° 30' 27.89" N , 94° 53' 44.39" W (29.507749°N, -94.895666°W, corner marker buoy B); thence, to 29° 30' 17.10" N, 94° 53' 41.73" W (29.504752°N, -94.894926°W, corner marker buoy C); thence, to 29° 30' 23.60" N, 94° 53' 12.46" W (29.506556°N, -94.886797°W, corner marker buoy D); and thence back to corner marker buoy A.

(viii) Pepper Grove Reef - Middle Site. The area within the boundaries of a line beginning at 29° 29' 15.83" N , 94° 40' 01.01" W (29.487733°N, -94.666948°W, corner marker buoy A); thence, to 29° 29' 15.93" N , 94° 39' 52.30" W (29.487760°N, -94.66453°W, corner marker buoy B); thence, to 29° 29' 14.81" N , 94° 39' 52.28" W (29.487450°N, -94.664525°W, corner marker buoy C); thence, to 29° 29' 14.71" N , 94° 40' 00.99" W (29.487422°N, -94.666944°W, corner marker buoy D) ; and thence back to corner marker buoy A.

(B) Matagorda Bay System - Keller Bay Reefs. The area within the boundaries of a line beginning at 28° 36' 16.7" N, 96° 28' 29.042" W (28.604656°N, -96.474734°W, corner marker buoy A); thence, from 28° 26' 16.7" N, 96° 28' 40.933" W (28.604659°N, -96.478037°W, corner marker buoy B); thence, from 28° 36' 5.31", 96° 28' 48.95" W (28.601476°N, -96.480265°W, corner marker buoy C); thence, from 28° 35' 56.2" N, 96° 28', 39.94" W (28.598953°N, -96.477761°W, corner marker buoy D); thence, from 28° 35' 55.9" N, 96° 28' 21.9" W (28.598886°N , -96.47275°W, corner marker buoy E); and thence back to corner marker buoy A. [~~Noble Point Reef. The area within the boundaries of a line beginning at 28° 39' 38.79"N, -96° 36' 33.68"W (28.660774°N, -96.609355°W); thence to 28° 39' 38.79"N, -96° 36' 29.15"W (28.660774°N, -96.608098°W); thence to 28° 39' 33.38"N, -96° 36' 33.68"W (28.659270°N, -96.609355°W); thence to 28° 39' 33.38"N, -96° 36' 29.15"W (28.659270°N, -96.608098°W).~~]

[~~(C) Copano Bay.~~]

~~f(i)~~ ~~Sanctuary Reef. The area within the boundaries of a line beginning at 28° 8' 33.82"N, -97° 3' 6.47"W (28.142728°N, -97.051796°W; corner marker buoy A); thence to 28° 8' 34.5"N, -97° 3' 24.18"W (28.142917°N, -97.056718W; corner marker buoy B); thence to 28° 8' 31.39"N, -97° 3' 29.1"W (28.142052°N, -97.058085°W; corner marker buoy C); thence to 28° 8' 23.32"N, -97° 3' 29.09"W (28.139812°N, -97.058081°W; corner marker buoy D); thence to 28° 8' 20.78"N, -97° 3' 26.77"W (28.139106°N, -97.057435°W; corner marker buoy E); and thence back to corner marker A.~~]

~~f(ii)~~ ~~Non-Sanctuary Reef. The area within the boundaries of a line beginning at 28° 8' 23.23"N, -97° 2' 53.02"W (28.139785°N, -97.048062°W; corner marker buoy A); thence to 28° 8' 24.76"N, -97° 3' 4.99"W (28.14021°N, -97.051387°W; corner marker buoy B); thence to 28° 8' 12.98"N, -97° 3' 6.69"W (28.136938°N, -97.051859°W; corner buoy C); thence to 28° 8' 8.61"N, -97° 2' 52.48"W (28.135726°N, -97.047912°W; corner buoy D); and thence back to corner marker A.~~]

(C) [~~(D)~~] Aransas Bay- Grass Island Reef. The area within the boundaries of a line beginning at 28° 06' 17.9"N, 97° 00' 25.6"W (28.104990°N, -97.007128°W; corner marker buoy A); thence, to 28° 06' 06.1"N, 97° 00' 12.7"W (28.101691°N, -97.003527°W; corner marker buoy B); thence to 28° 06' 20.45"N, 96° 59' 55.9"W (28.105682°N, -96.998876°W; corner marker buoy C); thence to 28° 06' 32.3"N, 97° 00' 08.9"W (28.108981°N, -97.002476°W; corner marker buoy D); and thence back to corner marker buoy A.

(D) [~~(E)~~] Christmas Bay, Brazoria County.

(E) [~~(F)~~] Carancahua Bay, Calhoun and Matagorda County.

(F) [~~(G)~~] Powderhorn Lake, Calhoun County.

(G) [~~(H)~~] Hynes Bay, Refugio County.

(H) [~~(I)~~] St. Charles Bay, Aransas County.

(I) [~~(J)~~] South Bay, Cameron County.

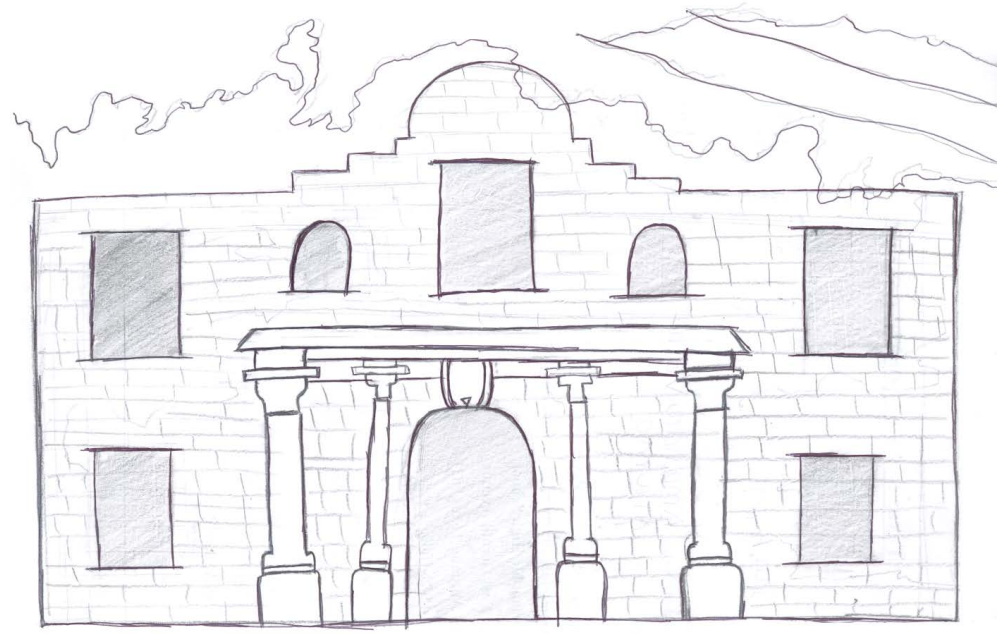
(J) [~~(K)~~] Areas along all shorelines extending 300 feet from the water's edge, including all oysters (whether submerged or not) landward of this 300-foot line.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 14, 2021.

TRD-202102306
James Murphy
General Counsel
Texas Parks and Wildlife Department
Earliest possible date of adoption: July 25, 2021
For further information, please call: (512) 389-4775

♦ ♦ ♦



WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 19. EDUCATION

PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

CHAPTER 1. AGENCY ADMINISTRATION

SUBCHAPTER I. FAMILY PRACTICE RESIDENCY ADVISORY COMMITTEE

19 TAC §1.145

The Texas Higher Education Coordinating Board withdraws the proposed amended §1.145 which appeared in the May 14, 2021, issue of the *Texas Register* (46 TexReg 3094).

Filed with the Office of the Secretary of State on June 11, 2021.

TRD-202102295
Nichole Bunker-Henderson
General Counsel
Texas Higher Education Coordinating Board
Effective date: June 11, 2021
For further information, please call: (512) 427-6206

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SUBCHAPTER P. LOWER-DIVISION ACADEMIC COURSE GUIDE MANUAL ADVISORY COMMITTEE

19 TAC §1.195

The Texas Higher Education Coordinating Board withdraws the proposed amended §1.195 which appeared in the May 14, 2021, issue of the *Texas Register* (46 TexReg 3097).

Filed with the Office of the Secretary of State on June 11, 2021.

TRD-202102296
Nichole Bunker-Henderson
General Counsel
Texas Higher Education Coordinating Board
Effective date: June 11, 2021
For further information, please call: (512) 427-6206

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CHAPTER 4. RULES APPLYING TO ALL PUBLIC INSTITUTIONS OF HIGHER EDUCATION IN TEXAS

SUBCHAPTER U. RECOMMENDED COURSE SEQUENCE; DEVELOPMENT AND INSTITUTIONAL REPORTING

19 TAC §§4.360 - 4.364

The Texas Higher Education Coordinating Board withdraws the proposed new §§4.360 - 4.364 which appeared in the May 7, 2021, issue of the *Texas Register* (46 TexReg 2981).

Filed with the Office of the Secretary of State on June 11, 2021.

TRD-202102297
Nichole Bunker-Henderson
General Counsel
Texas Higher Education Coordinating Board
Effective date: June 11, 2021
For further information, please call: (512) 427-6206

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TITLE 26. HEALTH AND HUMAN SERVICES

PART 1. HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 745. LICENSING

SUBCHAPTER X. EMERGENCY RULES

DIVISION 3. PREVIOUS COMPLIANCE HISTORY, HEIGHTENED MONITORING, AND THE DECISION TO ISSUE OR DENY A RESIDENTIAL CHILD-CARE OPERATION LICENSE

26 TAC §§745.10201, 745.10203, 745.10205, 745.10207

The Health and Human Services Commission withdraws the emergency adoption of new §§745.10201, 745.10203, 745.10205, and 745.10207, which appeared in the January 15, 2021, issue of the *Texas Register* (46 TexReg 417).

Filed with the Office of the Secretary of State on June 14, 2021.

TRD-202102301
Karen Ray
Chief Counsel
Health and Human Services Commission
Effective date: June 14, 2021
For further information, please call: (512) 438-3269

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the 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 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. REIMBURSEMENT RATES

SUBCHAPTER J. PURCHASED HEALTH SERVICES

DIVISION 4. MEDICAID HOSPITAL SERVICES

1 TAC §355.8065

The Texas Health and Human Services Commission (HHSC) adopts an amendment to §355.8065, concerning Disproportionate Share Hospital Reimbursement Methodology. Section 355.8065 is adopted with changes to the proposed text as published in the April 16, 2021, issue of the *Texas Register* (46 TexReg 2533). The rule will be republished.

BACKGROUND AND JUSTIFICATION

The Disproportionate Share Hospital (DSH) program payments are made by HHSC to qualifying hospitals that serve a large number of Medicaid and uninsured individuals. Federal law establishes an annual DSH allotment for each state that limits Federal Financial Participation (FFP) for total statewide DSH payments made to hospitals. Federal law also limits FFP for DSH payments through the hospital-specific DSH limit. In Texas, the state has established a State Payment Cap that limits the amount of payments that a provider receives through the interim payment process. This adoption amends the definitions of certain provider classes and makes other clarifying amendments.

Historically, HHSC has allowed state institutions of mental disease (IMDs) to participate in the DSH program. However, the current rule makes no mention of State IMDs nor the fact that IMDs have been recognized as state-owned providers for many years. The adoption amends the definition of state-owned hospitals to be broader and include these hospitals.

The definition of "Urban public hospitals - Class one" is amended to clarify that the providers in this class must be owned-and-operated by the hospital districts included in the provider class.

The DSH rule requires providers to maintain a Trauma system designation or actively pursue one. Yet several providers do not have them because the designation does not fit the hospital's function. Children's hospitals, IMDs, and State IMDs generally fall into this misalignment category. However, the rule makes no mention of an exemption for these providers though it has been established practice to exempt them from this requirement. HHSC adopts this amendment to explicitly exempt these providers.

The DSH rule currently has no provision for the DSH advanced payment methodology and leaves it up to HHSC's discretion. The Provider Finance Department has been using a methodology for several years to accomplish this payment and the rule amendment incorporates the established methodology into the rule.

COMMENTS

The 31-day comment period ended May 17, 2021.

During this period, HHSC received comments from 10 commenters, including Ascension Texas, Texas Children's Hospital (TCH), Texas Hospital Association (THA), Texas Department of State Health Services' (DSHS) - Texas Center for Infectious Disease (TCID), Teaching Hospitals of Texas (THOT), CHRISTUS Health, Oceans Healthcare, Texas Organization of Rural and Community Hospitals (TORCH), DHR Health, Children's Hospital Association of Texas (CHAT), and Community Health Systems (CHS).

Comment: Three commenters support the removal of Travis County Healthcare District dba Central Health/Dell Seton Medical Center at the University of Texas from the Urban Public Hospital - Class One definition.

Response: HHSC appreciates the support for the proposed amendment. No revision to the rule text was made in response to this comment.

Comment: One commenter supports the updated definition of "Urban Public Hospital - Class One" but would like to replace "owned and operated by" with the original terminology "operated by or under a lease contract with."

Response: HHSC appreciates the support for the proposed amendment but declines to make the additional change suggested by the commenter. All Urban Public Hospital - Class One facilities are both owned-and-operated by the public entity. No revision to the rule text was made in response to this comment.

Comment: One commenter would like to remove and update the definition of "State Chest Hospital" to "Public Health Hospital (PHH)" throughout the rule. PHH means a hospital operated by the department to provide services under this subchapter, including the Texas Center for Infectious Disease.

Response: HHSC does not intend to implement any proposed changes to the terminology "State Chest Hospital" at this time but will consider the comment in future rule amendments. No revision to the rule text was made in response to this comment.

Comment: One commenter asked if Charity Care and a Charity Care Policy are a requirement for DSH.

Response: A Charity Care Policy is not a requirement for DSH. No revision to the rule text is necessary.

Comment: One commenter mentions concerns related to CMS's withdrawal of approval of the 1115 waiver extension. The commenter explains that various state programs are at risk because of the withdrawal and the one stable program is Medicaid DSH."

Response: The comment is outside of the scope of the rule project. No revision to the rule text was made in response to this comment.

Comment: One commenter supports the addition of subsection(s) describing Advanced payments.

Response: HHSC appreciates the support for the proposed amendment. No revision to the rule text was made in response to this comment.

Comment: One commenter supports the addition of (e)(3)(c), which exempts certain hospital classes from the condition of participation related to a trauma designation, to the rule.

Response: HHSC appreciates the support for the proposed amendment. No revision to the rule text was made in response to this comment.

Comment: One commenter asked HHSC how they define the conditions of participation.

Response: HHSC appreciates the comment. The conditions of participation are listed in subsection (e) of the rule. No revision to the rule text is necessary.

Comment: One commenter requested that DSHS - TCID be included in (e)(3)(C). Similarly, another commenter mentioned that TCID may meet eligibility depending on the patients they take that year, some years they are eligible and others they are not.

Response: HHSC will consider the comment for future rule projects, but declines to make a change at this time. No revision to the rule text was made in response to this comment.

Comment: Multiple commenters are requesting that HHSC withdraw the change to the low income utilization rate (LIUR) calculation and keep the current LIUR calculation. Multiple commenters mentioned that the new LIUR will affect many providers in a negative way and that they may lose participation and payment in DSH.

Response: HHSC agrees that the proposed changes to the LIUR calculation should be withdrawn so the impact to providers can be further studied. HHSC will seek to align the definition of the LIUR calculation with the federal definition in a future rule amendment but agrees that other changes related to how the LIUR is used in the DSH calculation or eligibility determination should be considered contemporaneously with the change. The rule text is being amended upon adoption to withdraw the proposed change.

Comment: Multiple commenters would like to discuss changing the LIUR calculation in a stakeholder workgroup as well as modeling potential calculations to get a better idea of how they will be impacted.

Response: HHSC agrees that the proposed changes to the LIUR calculation should be withdrawn so the impact to providers can be further studied. HHSC will seek to align the definition of the LIUR calculation with the federal definition in a future rule amendment but agrees that other changes related to how the LIUR is used in the DSH calculation or eligibility determination should be considered contemporaneously with the change. The rule text is being amended upon adoption to withdraw the proposed change.

Comment: One commenter requests that HHSC postpone the adoption of the proposed rule and instead incorporate HHSC's intentions and policy concerns into the upcoming Medicaid DSH technical workgroups that HHSC previously announced for deliberation on substantive changes to the Medicaid DSH methodology for the 2022 program year.

Response: HHSC declines to postpone the adoption of the proposed rule as the proposed changes may impact the payments providers receive in DSH 2021. No changes to the rule text were made in response to this comment.

Comment: One commenter mentions every April providers are sent the qualification workbook with known and proven methodologies. Hospitals use the qualification workbook to project changes in their Medicaid DSH payment participation and budget based on those projections. The commenter states that the proposed rule precludes reasonable reliance on its budgeting and historical experience with the otherwise stable Medicaid DSH program during a period in which the level of uncertainty is unprecedented. The commenter also mentions that HHSC has yet to release the 2021 Medicaid DSH qualification workbook -- with the final Medicaid DSH payment around the corner - which only compounds the problem.

Response: The comment is outside of the scope of the rule project. No revision to the rule text was made in response to this comment.

Comment: Multiple commenters are requesting that HHSC not adopt the addition of subsection (q). Commenters mention that the proposed rule text in subsection (q) borrows language from the uncompensated care payment methodology. Commenters are curious whether it is the agency's intent to create a separate reconciliation process that serves the same purpose as the DSH audit, and to use the demonstration years instead of the DSH program years. Commenters are concerned these processes maybe duplicative or not applicable to DSH and would value the opportunity to discuss the commission's intent to add section. One commenter mentions that it is unclear how the proposed reconciliation process differs from the audit process described in §355.8065(o), Audit, and recommends removing this subsection.

Response: HHSC agrees with the commenters that this warrants further review and has removed subsections (p), (q), and (r) from the rule text.

Comment: Multiple commenters oppose or prefer that HHSC withdraw the additions of subsection (p), (q), and (r). Commenters mention that these additions/changes should be discussed in a stakeholder meeting. One commenter mentions that (p), Recoupment, is currently mentioned in subsections (l), Recovery, and (o), Audit. One commenter mentions that it is both unnecessary and confusing to have three separate sections addressing recoupment. One commenter states that subsection (q) is taken directly from the Uncompensated Care (UC) Program and that HHSC should update the term demonstration year with program year to reflect the DSH Program. One commenter mentions that subsection (r) is flawed and favors certain provider types over others. One commenter supports adding language to reflect HHSC's current practices in DSH. However, as proposed, there appear to be changes in the proposed rules that do not reflect what the commenter understands to be the current practice.

Response: HHSC agrees with the commenters that this warrants further review and has removed subsections (p), (q), and (r) from the rule text.

Comment: Multiple commenters request that HHSC withdraw the addition of subsection (r) to the rule. Multiple commenters would like to have these changes discussed in a stakeholder workgroup. One commenter mentions that it appears this methodology would exclude non-governmental hospitals located in areas with class one public hospitals from redistribution since their local provider fund statutes prevent use of those funds for DSH, and thereby they lack a pathway to receive redistributed funds via a governmental entity. One commenter mentions that for DSH years 2011-2017 and 2020 and after, recouped funds would be redistributed to the governmental entity that provided the nonfederal share. The same commenter states that it appears this methodology would exclude non-governmental hospitals located in areas with class one public hospitals from redistribution since their local provider fund statutes prevent use of those funds for DSH, and thereby they lack a pathway to receive redistributed funds via a governmental entity.

Response: HHSC agrees with the commenters that this warrants further review and have removed subsections (p), (q), and (r) from the rule text.

Comment: One commenter supports the addition of subsection (r) to the rule.

Response: HHSC appreciates the support for the proposed amendment. As noted above, HHSC has removed subsection (r) from the rule text.

Comment: One commenter suggests updating §355.8065(r)(1)(B) so that the federal share will be distributed proportionately among all providers eligible for additional payments that have the same source of the non-federal share of the payments. One commenter would like more clarity on §355.8065(r)(1) and §355.8065(r)(2).

Response: HHSC appreciates the comments. As noted above, HHSC has removed subsection (r) from the rule text.

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out HHSC's duties; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b-1), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Texas Human Resources Code Chapter 32.

§355.8065. Disproportionate Share Hospital Reimbursement Methodology.

(a) Introduction. Hospitals participating in the Texas Medicaid program that meet the conditions of participation and that serve a disproportionate share of low-income patients are eligible for reimbursement from the disproportionate share hospital (DSH) fund. The Texas Health and Human Services Commission (HHSC) will establish each hospital's eligibility for and amount of reimbursement using the methodology described in this section.

(b) Definitions.

(1) Adjudicated claim--A hospital claim for payment for a covered Medicaid service that is paid or adjusted by HHSC or another payer.

(2) Available DSH funds--The total amount of funds that may be distributed to eligible qualifying DSH hospitals for the DSH program year, based on the federal DSH allotment for Texas (as determined by the Centers for Medicare & Medicaid Services) and available non-federal funds. HHSC may divide available DSH funds for a program year into one or more portions of funds to allow for partial payment(s) of total available DSH funds at any one time with remaining funds to be distributed at a later date(s). If HHSC chooses to make a partial payment, the available DSH funds for that partial payment are limited to the portion of funds identified by HHSC for that partial payment.

(3) Available general revenue funds--The total amount of state general revenue funds appropriated to provide a portion of the non-federal share of DSH payments for the DSH program year for non-state-owned hospitals. If HHSC divides available DSH funds for a program year into one or more portions of funds to allow for partial payment(s) of total available DSH funds as described in paragraph (2) of this subsection, the available general revenue funds for that partial payment are limited to the portion of general revenue funds identified by HHSC for that partial payment.

(4) Bad debt--A debt arising when there is nonpayment on behalf of an individual who has third-party coverage.

(5) Centers for Medicare & Medicaid Services (CMS)--The federal agency within the United States Department of Health and Human Services responsible for overseeing and directing Medicare and Medicaid, or its successor.

(6) Charity care--The unreimbursed cost to a hospital of providing, funding, or otherwise financially supporting health care services on an inpatient or outpatient basis to indigent individuals, either directly or through other nonprofit or public outpatient clinics, hospitals, or health care organizations. A hospital must set the income level for eligibility for charity care consistent with the criteria established in §311.031, Texas Health and Safety Code.

(7) Charity charges--Total amount of hospital charges for inpatient and outpatient services attributed to charity care in a DSH data year. These charges do not include bad debt charges, contractual allowances, or discounts given to other legally liable third-party payers.

(8) Children's hospital--A hospital within Texas that is recognized by Medicare as a children's hospital and is exempted by Medicare from the Medicare prospective payment system.

(9) Disproportionate share hospital (DSH)--A hospital identified by HHSC that meets the DSH program conditions of participation and that serves a disproportionate share of Medicaid or indigent patients.

(10) DSH data year--A twelve-month period, two years before the DSH program year, from which HHSC will compile data to determine DSH program qualification and payment.

(11) DSH program year--The twelve-month period beginning October 1 and ending September 30.

(12) Dually eligible patient--A patient who is simultaneously eligible for Medicare and Medicaid.

(13) Governmental entity--A state agency or a political subdivision of the state. A governmental entity includes a hospital authority, hospital district, city, county, or state entity.

(14) HHSC--The Texas Health and Human Services Commission or its designee.

(15) Hospital-specific limit (HSL) --The maximum payment amount, as applied to payments made during a prior DSH program year, that a hospital may receive in reimbursement for the cost of providing Medicaid-allowable services to individuals who are Medicaid-eligible or uninsured. The hospital-specific limit is calculated using the methodology described in §355.8066 of this title (relating to Hospital-Specific Limit Methodology) using actual cost and payment data from the DSH program year.

(16) Independent certified audit--An audit that is conducted by an auditor that operates independently from the Medicaid agency and the audited hospitals and that is eligible to perform the DSH audit required by CMS.

(17) Indigent individual--An individual classified by a hospital as eligible for charity care.

(18) Inpatient day--Each day that an individual is an inpatient in the hospital, whether or not the individual is in a specialized ward and whether or not the individual remains in the hospital for lack of suitable placement elsewhere. The term includes observation days, rehabilitation days, psychiatric days, and newborn days. The term does not include swing bed days or skilled nursing facility days.

(19) Inpatient revenue--Amount of gross inpatient revenue derived from the most recent completed Medicaid cost report or reports related to the applicable DSH data year. Gross inpatient revenue excludes revenue related to the professional services of hospital-based physicians, swing bed facilities, skilled nursing facilities, intermediate care facilities, other nonhospital revenue, and revenue not identified by the hospital.

(20) Institution for mental diseases (IMD)--A hospital that is primarily engaged in providing psychiatric diagnosis, treatment, or care of individuals with mental illness.

(21) Intergovernmental transfer (IGT)--A transfer of public funds from a governmental entity to HHSC.

(22) Low-income days--Number of inpatient days attributed to indigent patients, calculated as described in subsection (h)(4)(A)(ii) of this section.

(23) Low-income utilization rate--A ratio, calculated as described in subsection (d)(2) of this section, that represents the hospital's volume of inpatient charity care relative to total inpatient services.

(24) Mean Medicaid inpatient utilization rate--The average of Medicaid inpatient utilization rates for all hospitals that have received a Medicaid payment for an inpatient claim, other than a claim for a dually eligible patient, that was adjudicated during the relevant DSH data year.

(25) Medicaid contractor--Fiscal agents and managed care organizations with which HHSC contracts to process data related to the Medicaid program.

(26) Medicaid cost report--Hospital and Hospital Health Care Complex Cost Report (Form CMS 2552), also known as the Medicare cost report.

(27) Medicaid hospital--A hospital meeting the qualifications set forth in §354.1077 of this title (relating to Provider Participation Requirements) to participate in the Texas Medicaid program.

(28) Medicaid inpatient utilization rate (MIUR)--A ratio, calculated as described in subsection (d)(1) of this section, that represents a hospital's volume of Medicaid inpatient services relative to total inpatient services.

(29) MSA--Metropolitan Statistical Area as defined by the United States Office of Management and Budget. MSAs with populations greater than or equal to 137,000, according to the most recent decennial census, are considered "the largest MSAs."

(30) Non-federal percentage--The non-federal percentage equals one minus the federal medical assistance percentage (FMAP) for the program year.

(31) Non-urban public hospital--A rural public-financed hospital, as defined in paragraph (37) of this subsection, or a hospital owned and operated by a governmental entity other than hospitals in Urban public hospital - Class one or Urban public hospital - Class two.

(32) Obstetrical services--The medical care of a woman during pregnancy, delivery, and the post-partum period provided at the hospital listed on the DSH application.

(33) PMSA--Primary Metropolitan Statistical Area as defined by the United States Office of Management and Budget.

(34) Public funds--Funds derived from taxes, assessments, levies, investments, and other public revenues within the sole and unrestricted control of a governmental entity. Public funds do not include gifts, grants, trusts, or donations, the use of which is conditioned on supplying a benefit solely to the donor or grantor of the funds.

(35) Ratio of cost-to-charges (inpatient only)--A ratio that covers all applicable hospital costs and charges relating to inpatient care. This ratio does not distinguish between payer types such as Medicare, Medicaid, or private pay.

(36) Rural public hospital--A hospital owned and operated by a governmental entity that is located in a county with 500,000 or fewer persons, based on the most recent decennial census.

(37) Rural public-financed hospital--A hospital operating under a lease from a governmental entity in which the hospital and governmental entity are both located in the same county with 500,000 or fewer persons, based on the most recent decennial census, where the hospital and governmental entity have both signed an attestation that they wish the hospital to be treated as a public hospital for all purposes under both this section and §355.8201 of this title (relating to Waiver Payments to Hospitals for Uncompensated Care).

(38) State chest hospital--A public health facility operated by the Department of State Health Services designated for the care and treatment of patients with tuberculosis.

(39) State institution for mental diseases (State IMD)--A hospital that is primarily engaged in providing psychiatric diagnosis, treatment, or care of individuals with mental illness and that is owned and operated by a state university or other state agency.

(40) State-owned hospital--A hospital owned and operated by a state university or other state agency.

(41) State payment cap--The maximum payment amount, as applied to payments that will be made for the DSH program year, that a hospital may receive in reimbursement for the cost of providing Medicaid-allowable services to individuals who are Medicaid-eligible or uninsured. The state payment cap is calculated using the methodology described in §355.8066 of this title (relating to Hospital-Specific Limit Methodology) using interim cost and payment data from the DSH data year.

(42) Third-party coverage--Creditable insurance coverage consistent with the definitions in 45 Code of Federal Regulations (CFR)

Parts 144 and 146, or coverage based on a legally liable third-party payer.

(43) Total Medicaid inpatient days--Total number of inpatient days based on adjudicated claims data for covered services for the relevant DSH data year.

(A) The term includes:

(i) Medicaid-eligible days of care adjudicated by managed care organizations or HHSC;

(ii) days that were denied payment for spell-of-illness limitations;

(iii) days attributable to individuals eligible for Medicaid in other states, including dually eligible patients;

(iv) days with adjudicated dates during the period; and

(v) days for dually eligible patients for purposes of the MIUR calculation described in subsection (d)(1) of this section.

(B) The term excludes:

(i) days attributable to Medicaid-eligible patients ages 21 through 64 in an IMD;

(ii) days denied for late filing and other reasons; and

(iii) days for dually eligible patients for purposes of the following calculations:

(I) Total Medicaid inpatient days, as described in subsection (d)(3) of this section; and

(II) Pass one distribution, as described in subsection (h)(4) of this section.

(44) Total Medicaid inpatient hospital payments--Total amount of Medicaid funds that a hospital received for adjudicated claims for covered inpatient services during the DSH data year. The term includes payments that the hospital received:

(A) for covered inpatient services from managed care organizations and HHSC; and

(B) for patients eligible for Medicaid in other states.

(45) Total state and local payments--Total amount of state and local payments that a hospital received for inpatient care during the DSH data year. The term includes payments under state and local programs that are funded entirely with state general revenue funds and state or local tax funds, such as County Indigent Health Care, Children with Special Health Care Needs, and Kidney Health Care. The term excludes payment sources that contain federal dollars such as Medicaid payments, Children's Health Insurance Program (CHIP) payments funded under Title XXI of the Social Security Act, Substance Abuse and Mental Health Services Administration, Ryan White Title I, Ryan White Title II, Ryan White Title III, and contractual discounts and allowances related to TRICARE, Medicare, and Medicaid.

(46) Urban public hospital--Any of the urban hospitals listed in paragraph (47) or (48) of this subsection.

(47) Urban public hospital - Class one--A hospital that is owned and operated by one of the following entities: the Dallas County Hospital District, the El Paso County Hospital District, the Harris County Hospital District, the Tarrant County Hospital District, or the University Health System of Bexar County.

(48) Urban public hospital - Class two--A hospital operated by or under a lease contract with one of the following entities: the Ector County Hospital District, the Lubbock County Hospital District, or the Nueces County Hospital District.

(c) Eligibility. To be eligible to participate in the DSH program, a hospital must:

(1) be enrolled as a Medicaid hospital in the State of Texas;

(2) have received a Medicaid payment for an inpatient claim, other than a claim for a dually eligible patient, that was adjudicated during the relevant DSH data year; and

(3) apply annually by completing the application packet received from HHSC by the deadline specified in the packet.

(A) Only a hospital that meets the condition specified in paragraph (2) of this subsection will receive an application packet from HHSC.

(B) The application may request self-reported data that HHSC deems necessary to determine each hospital's eligibility. HHSC may audit self-reported data.

(C) A hospital that fails to submit a completed application by the deadline specified by HHSC will not be eligible to participate in the DSH program in the year being applied for or to appeal HHSC's decision.

(D) For purposes of DSH eligibility, a multi-site hospital is considered one provider unless it submits separate Medicaid cost reports for each site. If a multi-site hospital submits separate Medicaid cost reports for each site, for purposes of DSH eligibility, it must submit a separate DSH application for each site.

(E) HHSC will consider a merger of two or more hospitals for purposes of the DSH program for any hospital that submits documents verifying the merger status with Medicare prior to the deadline for submission of the DSH application. Otherwise, HHSC will determine the merged entity's eligibility for the subsequent DSH program year. Until the time that the merged hospitals are determined eligible for payments as a merged hospital, each of the merging hospitals will continue to receive any DSH payments to which it was entitled prior to the merger.

(d) Qualification. For each DSH program year, in addition to meeting the eligibility requirements, applicants must meet at least one of the following qualification criteria, which are determined using information from a hospital's application, from HHSC, or from HHSC's Medicaid contractors, as specified by HHSC:

(1) Medicaid inpatient utilization rate. A hospital's Medicaid inpatient utilization rate is calculated by dividing the hospital's total Medicaid inpatient days by its total inpatient census days for the DSH data year.

(A) A hospital located outside an MSA or PMSA must have a Medicaid inpatient utilization rate greater than the mean Medicaid inpatient utilization rate for all Medicaid hospitals.

(B) A hospital located inside an MSA or PMSA must have a Medicaid inpatient utilization rate that is at least one standard deviation above the mean Medicaid inpatient utilization rate for all Medicaid hospitals.

(2) Low-income utilization rate. A hospital must have a low-income utilization rate greater than 25 percent.

(A) The low-income utilization rate is the sum (expressed as a percentage) of the fractions calculated in clauses (i) and (ii) of this subparagraph:

(i) The sum of the total Medicaid inpatient hospital payments and the total state and local payments paid to the hospital for inpatient care in the DSH data year, divided by a hospital's gross inpatient revenue multiplied by the hospital's ratio of cost-to-charges (inpatient only) for the same period: (Total Medicaid Inpatient Hospital Payments + Total State and Local Payments)/(Gross Inpatient Revenue x Ratio of Costs to Charges (inpatient only)).

(ii) Inpatient charity charges in the DSH data year minus the amount of payments for inpatient hospital services received directly from state and local governments, excluding all Medicaid payments, in the DSH data year, divided by the gross inpatient revenue in the same period: (Total Inpatient Charity Charges - Total State and Local Payments)/Gross Inpatient Revenue).

(B) HHSC will determine the ratio of cost-to-charges (inpatient only) by using information from the appropriate worksheets of each hospital's Medicaid cost report or reports that correspond to the DSH data year. In the absence of a Medicaid cost report for that period, HHSC will use the latest available submitted Medicaid cost report or reports.

(3) Total Medicaid inpatient days.

(A) A hospital must have total Medicaid inpatient days at least one standard deviation above the mean total Medicaid inpatient days for all hospitals participating in the Medicaid program, except;

(B) A hospital in a county with a population of 290,000 persons or fewer, according to the most recent decennial census, must have total Medicaid inpatient days at least 70 percent of the sum of the mean total Medicaid inpatient days for all hospitals in this subset plus one standard deviation above that mean.

(C) Days for dually eligible patients are not included in the calculation of total Medicaid inpatient days under this paragraph.

(4) Children's hospitals, state-owned hospitals, and state chest hospitals. Children's hospitals, state-owned hospitals, state chest hospitals, and State IMDs that do not otherwise qualify as disproportionate share hospitals under this subsection will be deemed to qualify. A hospital deemed to qualify must still meet the eligibility requirements under subsection (c) of this section and the conditions of participation under subsection (e) of this section.

(5) Merged hospitals. Merged hospitals are subject to the application requirement in subsection (c)(3)(E) of this section. HHSC will aggregate the data used to determine qualification under this subsection from the merged hospitals to determine whether the single Medicaid provider that results from the merger qualifies as a Medicaid disproportionate share hospital.

(6) Hospitals that held a single Medicaid provider number during the DSH data year, but later added one or more Medicaid provider numbers. Upon request, HHSC will apportion the Medicaid DSH funding determination attributable to a hospital that held a single Medicaid provider number during the DSH data year (data year hospital), but subsequently added one or more Medicaid provider numbers (new program year hospital(s)) between the data year hospital and its associated new program year hospital(s). In these instances, HHSC will apportion the Medicaid DSH funding determination for the data year hospital between the data year hospital and the new program year hospital(s) based on estimates of the division of Medicaid inpatient and low income utilization between the data year hospital and the new program year hospital(s) for the program year, so long as all affected providers satisfy the Medicaid DSH conditions of participation under subsection (e) of this section and qualify as separate hospitals under subsection (d) of this section based on HHSC's Medicaid DSH qualification criteria in the applicable Medicaid DSH program year. In determining whether the new program year hospital(s) meet the Medicaid DSH conditions of participation and qualification, proxy program year data may be used.

(e) Conditions of participation. HHSC will require each hospital to meet and continue to meet for each DSH program year the following conditions of participation:

(1) Two-physician requirement.

(A) In accordance with Social Security Act §1923(e)(2), a hospital must have at least two licensed physicians (doctor of medicine or osteopathy) who have hospital staff privileges and who have agreed to provide nonemergency obstetrical services to individuals who are entitled to medical assistance for such services.

(B) Subparagraph (A) of this paragraph does not apply if the hospital:

(i) serves inpatients who are predominantly under 18 years of age; or

(ii) was operating but did not offer nonemergency obstetrical services as of December 22, 1987.

(C) A hospital must certify on the DSH application that it meets the conditions of either subparagraph (A) or (B) of this paragraph, as applicable, at the time the DSH application is submitted.

(2) Medicaid inpatient utilization rate. At the time of qualification and during the DSH program year, a hospital must have a Medicaid inpatient utilization rate, as calculated in subsection (d)(1) of this section, of at least one percent.

(3) Trauma system.

(A) The hospital must be in active pursuit of designation or have obtained a trauma facility designation as defined in §780.004 and §§773.111 - 773.120, Texas Health and Safety Code, respectively, and consistent with 25 TAC §157.125 (relating to Requirements for Trauma Facility Designation) and §157.131 (relating to the Designated Trauma Facility and Emergency Medical Services Account). A hospital that has obtained its trauma facility designation must maintain that designation for the entire DSH program year.

(B) HHSC will receive an annual report from the Office of EMS/Trauma Systems Coordination regarding hospital participation in regional trauma system development, application for trauma facility designation, and trauma facility designation or active pursuit of designation status before final qualification determination for interim DSH payments. HHSC will use this report to confirm compliance with this condition of participation by a hospital applying for DSH funds.

(C) The following hospital types are exempted from the condition of participation described in this paragraph: Children's Hospitals, IMDs, and State IMDs.

(4) Maintenance of local funding effort. A hospital district in one of the state's largest MSAs or in a PMSA must not reduce local tax revenues to its associated hospitals as a result of disproportionate share funds received by the hospital. For this provision to apply, the hospital must have more than 250 licensed beds.

(5) Retention of and access to records. A hospital must retain and make available to HHSC records and accounting systems related to DSH data for at least five years from the end of each DSH program year in which the hospital qualifies, or until an open audit is completed, whichever is later.

(6) Compliance with audit requirements. A hospital must agree to comply with the audit requirements described in subsection (o) of this section.

(7) Merged hospitals. Merged hospitals are subject to the application requirement in subsection (c)(3)(E) of this section. If HHSC receives documents verifying the merger status with Medicare prior to the deadline for submission of the DSH application, the merged entity must meet all conditions of participation. If HHSC does not receive the documents verifying the merger status with Medicare prior to the deadline for submission of the DSH application, any proposed merging hospitals that are receiving DSH payments must continue to meet all conditions of participation as individual hospitals to continue receiving DSH payments for the remainder of the DSH program year.

(8) Changes that may affect DSH participation. A hospital receiving payments under this section must notify HHSC's Rate Analysis Department within 30 days of changes in ownership, operation, provider identifier, designation as a trauma facility or as a children's hospital, or any other change that may affect the hospital's continued eligibility, qualification, or compliance with DSH conditions of participation. At the request of HHSC, the hospital must submit any documentation supporting the change.

(f) State payment cap and hospital-specific limit calculation. HHSC uses the methodology described in §355.8066 of this title to calculate a state payment cap for each Medicaid hospital that applies and qualifies to receive payments for the DSH program year under this section, and a hospital-specific limit for each hospital that received payments in a prior program year under this section. For payments for each DSH program year beginning before October 1, 2017, the state payment cap calculated as described in §355.8066 will be reduced by the amount of prior payments received by each participating hospital for that DSH program year. These prior payments will not be considered anywhere else in the calculation.

(g) Distribution of available DSH funds. HHSC will distribute the available DSH funds as defined in subsection (b)(2) of this section among eligible, qualifying DSH hospitals using the following priorities:

(1) State-owned teaching hospitals, state-owned IMDs, and state chest hospitals. HHSC may reimburse state-owned teaching hospitals, state-owned IMDs, and state chest hospitals an amount less than or equal to their state payment caps, except that aggregate payments to IMDs statewide may not exceed federally mandated reimbursement limits for IMDs.

(2) Other hospitals. HHSC distributes the remaining available DSH funds, if any, to other qualifying hospitals using the methodology described in subsection (h) of this section.

(A) The remaining available DSH funds equal the lesser of the funds as defined in subsection (b)(2) of this section less funds expended under paragraph (1) of this subsection or the sum of remaining qualifying hospitals' state payment caps.

(B) The remaining available general revenue funds equal the funds as defined in subsection (b)(3) of this section.

(h) DSH payment calculation.

(1) Data verification. HHSC uses the methodology described in §355.8066(e) of this title to verify the data used for the DSH payment calculations described in this subsection. The verification process includes:

(A) notice to hospitals of the data provided to HHSC by Medicaid contractors; and

(B) an opportunity for hospitals to request HHSC review of disputed data.

(2) Establishment of DSH funding pools. From the amount of remaining DSH funds determined in subsection (g)(2) of this section, HHSC will establish three DSH funding pools.

(A) Pool One.

(i) Pool One is equal to the sum of the remaining available general revenue funds and associated federal matching funds; and

(ii) Pool One payments are available to all non-state-owned hospitals, including non-state-owned public hospitals.

(B) Pool Two.

(i) Pool Two is equal to the lesser of:

(I) the amount of remaining DSH funds determined in subsection (g)(2) of this section less the amount determined in paragraph (2)(A) of this subsection multiplied by the FMAP in effect for the program year; or

(II) the federal matching funds associated with the intergovernmental transfers received by HHSC that make up the funds for Pool Three; and

(ii) Pool Two payments are available to all non-state-owned hospitals except for any urban public hospital as defined in subsection (b)(46) of this section; rural public hospital as defined in subsection (b)(36) of this section; or rural public-financed hospital as defined in subsection (b)(37) of this section owned by or affiliated with a governmental entity that does not transfer any funds to HHSC for Pool Three as described in subparagraph (C)(iii) of this paragraph.

(C) Pool Three.

(i) Pool Three is equal to the sum of intergovernmental transfers for DSH payments received by HHSC from governmental entities that own and operate Urban public hospitals - Class one, governmental entities that operate or are under lease contracts with an Urban public hospital - Class two, and non-urban public hospitals.

(ii) Pool Three payments are available to the hospitals that are operated by or under lease contracts with the governmental entities described in clause (i) of this subparagraph that provide intergovernmental transfers.

(iii) HHSC will allocate responsibility for funding Pool Three as follows:

(I) Urban public hospitals - Class two. Each governmental entity that operates or is under a lease contract with an Urban public hospital - Class two is responsible for funding an amount equal to the non-federal share of Pass One and Pass Two DSH payments from Pool Two (calculated as described in paragraphs (4) and (5) of this subsection) to that hospital.

(II) Non-urban public hospitals.

(-a-) Each governmental entity that operates or is under a lease contract with a non-urban public hospital is responsible for funding one-half of the non-federal share of the hospital's Pass One and Pass Two DSH payments from Pool Two (calculated as described in paragraphs (4) and (5) of this subsection) to that hospital.

(-b-) If general revenue available for Pool One does not equal at least one-half of the non-federal share of non-urban public hospitals' Pass One and Pass Two DSH payments from Pool Two, each governmental entity that operates or is under a lease contract with a non-urban public hospital is responsible for increasing its funding of the non-federal share of that hospital's Pass

One and Pass Two DSH payments from Pool Two by an amount equal to the Pool One general revenue shortfall associated with the hospital.

(III) Urban public hospitals - Class one. Each governmental entity that owns and operates an Urban public hospital - Class one is responsible for funding the non-federal share of the Pass One and Pass Two DSH payments from Pool Two (calculated as described in paragraphs (4) and (5) of this subsection) to its affiliated hospital and a portion of the non-federal share of the Pass One and Pass Two DSH payments from Pool Two to private hospitals. For funding payments to private hospitals, HHSC will initially suggest an amount in proportion to each Urban public hospital - Class one's individual state payment cap relative to total state payment caps for all Urban public hospitals - Class one. If an entity transfers less than the suggested amount, HHSC will take the steps described in paragraph (5)(F) of this subsection.

(IV) Following the calculations described in paragraphs (4) and (5) of this subsection, HHSC will notify each governmental entity of its allocated intergovernmental transfer amount.

(3) Weighting factors.

(A) HHSC will assign each non-urban public hospital a weighting factor that is calculated as follows:

(i) Determine the non-federal percentage in effect for the program year and multiply by 0.50.

(ii) Add 1.00 to the result from clause (i) of this subparagraph and round the result to two decimal places; this rounded sum is the non-urban public hospital weighting factor.

(iii) If paragraph (2)(C)(iii)(II)(-b-) of this subsection is invoked, the 0.50 referenced in clause (i) of this subparagraph will be increased to represent the increased proportion of the non-federal share of non-urban public hospitals' Pass One and Pass Two DSH payments from Pool Two required to be funded by these hospitals' associated governmental entities.

(B) All other DSH hospitals not described in subparagraph (A) of this paragraph will be assigned a weighting factor of 1.00, except for DSH program years beginning before October 1, 2017, HHSC will assign weighting factors as follows to each non-state DSH hospital:

(i) Other Insurance Weight. HHSC will divide the amount of third party commercial insurance payments for that hospital from the DSH data year by the state payment cap calculated according to §355.8066(c)(1)(D)(ii)(I)(-b-), except that costs are reduced by payments from all payors.

(I) The result, if greater than 1, will be used as a weighting factor.

(II) If the result is less than 1, no weighting factor will be applied.

(ii) Year-To-Date Payment Weight. HHSC will assign a weighting factor of 20 to any hospital that did not receive any prior payments for that DSH program year. This weighting factor will be added to the weighting factor calculated in clause (i) of this subparagraph.

(4) Pass One distribution and payment calculation for Pools One and Two.

(A) HHSC will calculate each hospital's total DSH days as follows:

(i) Weighted Medicaid inpatient days are equal to the hospital's Medicaid inpatient days multiplied by the appropriate weighting factors from paragraph (3) of this subsection.

(ii) Low-income days are equal to the hospital's low-income utilization rate as calculated in subsection (d)(2) of this section multiplied by the hospital's total inpatient days as defined in subsection (b)(18) of this section.

(iii) Weighted low-income days are equal to the hospital's low-income days multiplied by the appropriate weighting factors from paragraph (3) of this subsection.

(iv) Total DSH days equal the sum of weighted Medicaid inpatient days and weighted low-income days.

(B) Using the results from subparagraph (A) of this paragraph, HHSC will:

(i) Divide each hospital's total DSH days from subparagraph (A)(iv) of this paragraph by the sum of total DSH days for all non-state-owned DSH hospitals to obtain a percentage.

(ii) Multiply each hospital's percentage as calculated in clause (i) of this subparagraph by the amount determined in paragraph (2)(A) of this subsection to determine each hospital's Pass One projected payment amount from Pool One.

(iii) Multiply each hospital's percentage as calculated in clause (i) of this subparagraph by the amount determined in paragraph (2)(B)(i)(I) or (II) of this subsection, as appropriate, to determine each hospital's Pass One projected payment amount from Pool Two.

(iv) Sum each hospital's Pass One projected payment amounts from Pool One and Pool Two, as calculated in clauses (ii) and (iii) of this subparagraph respectively. The result of this calculation is the hospital's Pass One projected payment amount from Pools One and Two combined.

(v) Divide the Pass One projected payment amount from Pool Two as calculated in clause (iii) of this subparagraph by the hospital's Pass One projected payment amount from Pools One and Two combined as calculated in clause (iv) of this subparagraph. The result of this calculation is the percentage of the hospital's total Pass One projected payment amount accruing from Pool Two.

(5) Pass Two - Redistribution of amounts in excess of state payment caps from Pass One for Pools One and Two combined. In the event that the projected payment amount calculated in paragraph (4)(B)(iv) of this subsection plus any previous payment amounts for the program year exceeds a hospital's state payment cap, the payment amount will be reduced such that the sum of the payment amount plus any previous payment amounts is equal to the state payment cap. HHSC will sum all resulting excess funds and redistribute that amount to qualifying non-state-owned hospitals that have projected payments, including any previous payment amounts for the program year, below their state payment caps. For each such hospital, HHSC will:

(A) subtract the hospital's projected DSH payment from paragraph (4)(B)(iv) of this subsection plus any previous payment amounts for the program year from its state payment cap;

(B) sum the results of subparagraph (A) of this paragraph for all hospitals; and

(C) compare the sum from subparagraph (B) of this paragraph to the total excess funds calculated for all non-state-owned hospitals.

(i) If the sum of subparagraph (B) of this paragraph is less than or equal to the total excess funds, HHSC will pay all such hospitals up to their state payment cap.

(ii) If the sum of subparagraph (B) of this paragraph is greater than the total excess funds, HHSC will calculate payments to all such hospitals as follows:

(I) Divide the result of subparagraph (A) of this paragraph for each hospital by the sum from subparagraph (B) of this paragraph.

(II) Multiply the ratio from subclause (I) of this clause by the sum of the excess funds from all non-state-owned hospitals.

(III) Add the result of subclause (II) of this clause to the projected DSH payment for that hospital to calculate a revised projected payment amount from Pools One and Two after Pass Two.

(D) If a governmental entity that operates or leases to an Urban public hospital - Class two does not fully fund the amount described in paragraph (2)(C)(iii)(I) of this subsection, HHSC will reduce the hospital's Pass One and Pass Two DSH payment from Pool Two to the level supported by the amount of the intergovernmental transfer.

(E) If a governmental entity that operates or is under a lease contract with a non-urban public hospital does not fully fund the amount described in paragraph (2)(C)(iii)(II) of this subsection, HHSC will reduce that portion of the hospital's Pass One and Pass Two DSH payment from Pool Two to the level supported by the amount of the intergovernmental transfer.

(F) If a governmental entity that owns and operates an Urban public hospital - Class one does not fully fund the amount described in paragraph (2)(C)(iii)(III) of this subsection, HHSC will take the following steps:

(i) Provide an opportunity for the governmental entities affiliated with the other Urban public hospitals - Class one to transfer additional funds to HHSC;

(ii) Recalculate total DSH days for each Urban public hospital - Class one for purposes of the calculations described in paragraphs (4)(B) and (5)(A) - (C) of this subsection as follows:

(I) Divide the intergovernmental transfer made on behalf of each Urban public hospital - Class one by the sum of intergovernmental transfers made on behalf of all Urban public hospitals - Class one;

(II) Sum the total DSH days for all Urban public hospitals - Class one, calculated as described in paragraph (4)(A) of this subsection; and

(III) Multiply the result of subclause (I) of this clause by the result of subclause (II) of this clause to determine total DSH days for that hospital;

(iii) Recalculate Pass One payments from Pool Two and Pass Two payments from Pools One and Two for Urban public hospitals - Class one and private hospitals following the methodology described in paragraphs (4)(B) and (5)(A) - (C) of this subsection substituting the results from clause (ii) of this subparagraph for the results from paragraph (4)(A) of this subsection for Urban public hospitals - Class one;

(iv) Perform a second recalculation of Pass Two payments from Pools One and Two for Urban public hospitals - Class one as follows:

(I) Multiply each hospital's total Pass Two projected payment amount from Pools One and Two from paragraph (5) of this subsection, after performing the recalculation described in clause (iii) of this subparagraph, by the percentage of the hospital's total Pass One projected payment amount accruing from Pool Two from paragraph (4)(B)(v) of this subsection, after performing the recalculation described in clause (iii) of this subparagraph. The result is the hospital's Pass Two projected payment amount from Pool Two;

(II) Subtract the hospital's Pass Two projected payment amount from Pool Two from subclause (I) of this clause from the hospital's total Pass Two projected payment amount from Pools One and Two from paragraph (5) of this subsection, after performing the recalculation described in clause (iii) of this subparagraph. The result is the hospital's Pass Two projected payment amount from Pool One;

(III) Sum the total Pass Two projected payment amounts from Pool Two, calculated as described in subclause (I) of this clause, for all Urban public hospitals - Class one;

(IV) Multiply the result of clause (ii)(I) of this subparagraph for the hospital by the result of subclause (III) of this clause to determine the Pass Two payment from Pool Two for the hospital; and

(V) Sum the results of subclauses (II) and (IV) of this clause to determine the total Pass Two payment from Pools One and Two for that hospital; and

(v) Use the results of this subparagraph in the calculations described in paragraphs (6) and (7) of this subsection.

(6) Pass One distribution and payment calculation for Pool Three.

(A) HHSC will calculate the initial payment from Pool Three as follows:

(i) For each Urban public hospital - Class one and Class two--

(I) multiply its total Pool One and Pool Two payments after Pass Two from paragraph (5) of this subsection by the percentage of the hospital's total Pass One projected payment amount accruing from Pool Two from paragraph (4)(B)(v) of this subsection;

(II) divide the result from subclause (I) of this clause by the FMAP for the program year; and

(III) multiply the result from subclause (II) of this clause by the non-federal percentage. The result is the Pass One initial payment from Pool Three for these hospitals.

(ii) For each Non-urban public hospital--

(I) multiply its total Pool One and Pool Two payments after Pass Two from paragraph (5) of this subsection by the percentage of the hospital's total Pass One projected payment amount accruing from Pool Two from paragraph (4)(B)(v) of this subsection;

(II) divide the result from subclause (I) of this clause by the FMAP for the program year; and

(III) multiply the result from subclause (II) of this clause by the non-federal percentage and multiply by 0.50. The result is the Pass One initial payment from Pool Three for these hospitals.

(IV) If paragraph (2)(C)(iii)(II)(-b-) of this subsection is invoked, the 0.50 referenced in subclause (III) of this clause will be increased to represent the increased proportion of the non-fed-

eral share of non-urban public hospitals' Pass One and Pass Two DSH payments from Pool Two required to be funded by these hospitals' associated governmental entities.

(iii) For all other hospitals, the Pass One initial payment from Pool Three is equal to zero.

(B) HHSC will calculate the secondary payment from Pool Three for each Urban public hospital - Class one as follows:

(i) Sum the intergovernmental transfers made on behalf of all Urban public hospitals - Class one;

(ii) For each Urban public hospital - Class one, divide the intergovernmental transfer made on behalf of that hospital by the sum of the intergovernmental transfers made on behalf of all Urban public hospitals - Class one from clause (i) of this subparagraph;

(iii) Sum all Pass One initial payments from Pool Three from subparagraph (A) of this paragraph;

(iv) Subtract the sum from clause (iii) of this subparagraph from the total value of Pool Three; and

(v) Multiply the result from clause (ii) of this subparagraph by the result from clause (iv) of this subparagraph for each Urban public hospital - Class One. The result is the Pass One secondary payment from Pool Three for that hospital.

(vi) For all other hospitals, the Pass One secondary payment from Pool Three is equal to zero.

(C) HHSC will calculate each hospital's total Pass One payment from Pool Three by adding its Pass One initial payment from Pool Three and its Pass One secondary payment from Pool Three.

(7) Pass Two - Secondary redistribution of amounts in excess of state payment caps for Pool Three. For each hospital that received a Pass One initial or secondary payment from Pool Three, HHSC will sum the result from paragraph (5) of this subsection and the result from paragraph (6) of this subsection to determine the hospital's total projected DSH payment. In the event this sum plus any previous payment amounts for the program year exceeds a hospital's state payment cap, the payment amount will be reduced such that the sum of the payment amount plus any previous payment amounts is equal to the state payment cap. HHSC will sum all resulting excess funds and redistribute that amount to qualifying non-state-owned hospitals eligible for payments from Pool Three that have projected payments, including any previous payment amounts for the program year, below their state payment caps. For each such hospital, HHSC will:

(A) subtract the hospital's projected DSH payment plus any previous payment amounts for the program year from its state payment cap;

(B) sum the results of subparagraph (A) of this paragraph for all hospitals; and

(C) compare the sum from subparagraph (B) of this paragraph to the total excess funds calculated for all non-state-owned hospitals.

(i) If the sum of subparagraph (B) of this paragraph is less than or equal to the total excess funds, HHSC will pay all such hospitals up to their state payment cap.

(ii) If the sum of subparagraph (B) of this paragraph is greater than the total excess funds, HHSC will calculate payments to all such hospitals as follows:

(I) Divide the result of subparagraph (A) of this paragraph for each hospital by the sum from subparagraph (B) of this paragraph.

(II) Multiply the ratio from subclause (I) of this clause by the sum of the excess funds from all non-state-owned hospitals.

(III) Add the result of subclause (II) of this clause to the projected total DSH payment for that hospital to calculate a revised projected payment amount from Pools One, Two and Three after Pass Two.

(8) Pass Three - additional allocation of DSH funds for rural public and rural public-financed hospitals. Rural public hospitals or rural public-financed hospitals that met the funding requirements described in paragraph (2)(C) of this subsection may be eligible for DSH funds in addition to the projected payment amounts calculated in paragraphs (4) - (7) of this subsection.

(A) For each rural public hospital or rural public financed hospital that met the funding requirements described in paragraph (2)(C) of this subsection, HHSC will determine the projected payment amount plus any previous payment amounts for the program year calculated in accordance with paragraphs (4) - (7) of this subsection, as appropriate.

(B) HHSC will subtract each hospital's projected payment amount plus any previous payment amounts for the program year from subparagraph (A) of this paragraph from each hospital's state payment cap to determine the maximum additional DSH allocation.

(C) The governmental entity that owns the hospital or leases the hospital may provide the non-federal share of funding through an intergovernmental transfer to fund up to the maximum additional DSH allocation calculated in subparagraph (B) of this paragraph. These governmental entities will be queried by HHSC as to the amount of funding they intend to provide through an intergovernmental transfer for this additional allocation. The query may be conducted through e-mail, through the various hospital associations or through postings on the HHSC website.

(D) Prior to processing any full or partial DSH payment that includes an additional allocation of DSH funds as described in this paragraph, HHSC will determine if such a payment would cause total DSH payments for the full or partial payment to exceed the available DSH funds for the payment as described in subsection (b)(2) of this section. If HHSC makes such a determination, it will reduce the DSH payment amounts rural public and rural public-financed hospitals are eligible to receive through the additional allocation as required to remain within the available DSH funds for the payment. This reduction will be applied proportionally to all additional allocations. HHSC will:

(i) determine remaining available funds by subtracting payment amounts for all DSH hospitals calculated in paragraphs (4) - (7) of this subsection from the amount in subsection (g)(2) of this section;

(ii) determine the total additional allocation supported by an intergovernmental transfer by summing the amounts supported by intergovernmental transfers identified in subparagraph (C) of this paragraph;

(iii) determine an available proportion statistic by dividing the remaining available funds from clause (i) of this subparagraph by the total additional allocation supported by an intergovernmental transfer from clause (ii) of this subparagraph; and

(iv) multiply each intergovernmental transfer supported payment from subparagraph (C) of this paragraph by the pro-

portion statistic determined in clause (iii) of this subparagraph. The resulting product will be the additional allowable allocation for the payment.

(E) Rural public and rural public-financed hospitals that do not meet the funding requirements of paragraph (2)(C)(iii)(II) of this subsection are not eligible for participation on Pass Three.

(9) Reallocating funds if hospital closes, loses its license or eligibility, or files bankruptcy. If a hospital closes, loses its license, loses its Medicare or Medicaid eligibility, or files bankruptcy before receiving DSH payments for all or a portion of a DSH program year, HHSC will determine the hospital's eligibility to receive DSH payments going forward on a case-by-case basis. In making the determination, HHSC will consider multiple factors including whether the hospital was in compliance with all requirements during the program year and whether it can meet the audit requirements described in subsection (o) of this section. If HHSC determines that the hospital is not eligible to receive DSH payments going forward, HHSC will notify the hospital and reallocate that hospital's disproportionate share funds going forward among all DSH hospitals in the same category that are eligible for additional payments.

(10) HHSC will give notice of the amounts determined in this subsection.

(11) The sum of the annual payment amounts for state owned and non-state owned IMDs are summed and compared to the federal IMD limit. If the sum of the annual payment amounts exceeds the federal IMD limit, the state owned and non-state owned IMDs are reduced on a pro-rata basis so that the sum is equal to the federal IMD limit.

(12) For any DSH program year for which HHSC has calculated the hospital-specific limit described in §355.8066(c)(2) of this chapter, HHSC will compare the interim DSH payment amount as calculated in subsection (h) of this section to the hospital-specific limit.

(A) HHSC will limit the payment amount to the hospital-specific limit if the payment amount exceeds the hospital's hospital-specific limit.

(B) HHSC will redistribute dollars made available as a result of the capping described in subparagraph (A) of this paragraph to providers eligible for additional payments subject to their hospital-specific limits, as described in subsection (l) of this section.

(i) Hospital located in a federal natural disaster area. A hospital that is located in a county that is declared a federal natural disaster area and that was participating in the DSH program at the time of the natural disaster may request that HHSC determine its DSH qualification and interim reimbursement payment amount under this subsection for subsequent DSH program years. The following conditions and procedures will apply to all such requests received by HHSC:

(1) The hospital must submit its request in writing to HHSC with its annual DSH application.

(2) If HHSC approves the request, HHSC will determine the hospital's DSH qualification using the hospital's data from the DSH data year prior to the natural disaster. However, HHSC will calculate the one percent Medicaid minimum utilization rate, the state payment cap, and the payment amount using data from the DSH data year. The hospital-specific limit will be computed based on the actual data for the DSH program year.

(3) HHSC will notify the hospital of the qualification and interim reimbursement.

(j) HHSC determination of eligibility or qualification. HHSC uses the methodology described in §355.8066(e) of this title to verify the data and other information used to determine eligibility and qualification under this section. The verification process includes:

(1) notice to hospitals of the data provided to HHSC by Medicaid contractors; and

(2) an opportunity for hospitals to request HHSC review of disputed data and other information the hospital believes is erroneous.

(k) Disproportionate share funds held in reserve.

(1) If HHSC has reason to believe that a hospital is not in compliance with the conditions of participation listed in subsection (e) of this section, HHSC will notify the hospital of possible noncompliance. Upon receipt of such notice, the hospital will have 30 calendar days to demonstrate compliance.

(2) If the hospital demonstrates compliance within 30 calendar days, HHSC will not hold the hospital's DSH payments in reserve.

(3) If the hospital fails to demonstrate compliance within 30 calendar days, HHSC will notify the hospital that HHSC is holding the hospital's DSH payments in reserve. HHSC will release the funds corresponding to any period for which a hospital subsequently demonstrates that it was in compliance. HHSC will not make DSH payments for any period in which the hospital is out of compliance with the conditions of participation listed in subsection (e)(1) and (2) of this section. HHSC may choose not to make DSH payments for any period in which the hospital is out of compliance with the conditions of participation listed in subsection (e)(3) - (7) of this section.

(4) If a hospital's DSH payments are being held in reserve on the date of the last payment in the DSH program year, and no request for review is pending under paragraph (5) of this subsection, the amount of the payments is not restored to the hospital, but is divided proportionately among the hospitals receiving a last payment.

(5) Hospitals that have DSH payments held in reserve may request a review by HHSC.

(A) The hospital's written request for a review must:

(i) be sent to HHSC's Director of Hospital Rate Analysis, Rate Analysis Department;

(ii) be received by HHSC within 15 calendar days after notification that the hospital's DSH payments are held in reserve; and

(iii) contain specific documentation supporting its contention that it is in compliance with the conditions of participation.

(B) The review is:

(i) limited to allegations of noncompliance with conditions of participation;

(ii) limited to a review of documentation submitted by the hospital or used by HHSC in making its original determination; and

(iii) not conducted as an adversarial hearing.

(C) HHSC will conduct the review and notify the hospital requesting the review of the results.

(l) Recovery and redistribution of DSH funds. As described in subsection (p) of this section, HHSC will recoup any overpayment of DSH funds made to a hospital, including an overpayment that results

from HHSC error or that is identified in an audit. Recovered funds will be redistributed as described in subsection (r) of this section.

(m) Failure to provide supporting documentation. HHSC will exclude data from DSH calculations under this section if a hospital fails to maintain and provide adequate documentation to support that data.

(n) Voluntary withdrawal from the DSH program.

(1) HHSC will recoup all DSH payments made during the same DSH program year to a hospital that voluntarily terminates its participation in the DSH program. HHSC will redistribute the recouped funds according to the distribution methodology described in subsection (l) of this section.

(2) A hospital that voluntarily terminates from the DSH program will be ineligible to receive payments for the next DSH program year after the hospital's termination.

(3) If a hospital does not apply for DSH funding in the DSH program year following a DSH program year in which it received DSH funding, even though it would have qualified for DSH funding in that year, the hospital will be ineligible to receive payments for the next DSH program year after the year in which it did not apply.

(4) The hospital may reapply to receive DSH payments in the second DSH program year after the year in which it did not apply.

(o) Audit process.

(1) Independent certified audit. HHSC is required by the Social Security Act (Act) to annually complete an independent certified audit of each hospital participating in the DSH program in Texas. Audits will comply with all applicable federal law and directives, including the Act, the Omnibus Budget and Reconciliation Act of 1993 (OBRA '93), the Medicare Prescription Drug, Improvement and Modernization Act of 2003 (MMA), pertinent federal rules, and any amendments to such provisions.

(A) Each audit report will contain the verifications set forth in 42 CFR §455.304(d).

(B) The sources of data utilized by HHSC, the hospitals, and the independent auditors to complete the DSH audit and report include:

(i) The Medicaid cost report;

(ii) Medicaid Management Information System data; and

(iii) Hospital financial statements and other auditable hospital accounting records.

(C) A hospital must provide HHSC or the independent auditor with the necessary information in the time specified by HHSC or the independent auditor. HHSC or the independent auditor will notify hospitals of the required information and provide a reasonable time for each hospital to comply.

(D) A hospital that fails to provide requested information or to otherwise comply with the independent certified audit requirements may be subject to a withholding of Medicaid disproportionate share payments or other appropriate sanctions.

(E) HHSC will recoup any overpayment of DSH funds made to a hospital that is identified in the independent certified audit as described in this subsection and will redistribute the recouped funds to DSH providers that are eligible for additional payments, subject to their hospital-specific limits, as described in subsections (l) and (r) of this section.

(F) Review of preliminary audit finding of overpayment.

(i) Before finalizing the audit, HHSC will notify each hospital that has a preliminary audit finding of overpayment.

(ii) A hospital that disputes the finding or the amount of the overpayment may request a review in accordance with the following procedures.

(I) A request for review must be received by the HHSC Rate Analysis Department in writing by regular mail, hand delivery or special mail delivery, from the hospital within 30 calendar days of the date the hospital receives the notification described in clause (i) of this subparagraph.

(II) The request must allege the specific factual or calculation errors the hospital contends the auditors made that, if corrected, would change the preliminary audit finding.

(III) All documentation supporting the request for review must accompany the written request for review or the request will be denied.

(IV) The request for review may not dispute the federal audit requirements or the audit methodologies.

(iii) The review is:

(I) limited to the hospital's allegations of factual or calculation errors;

(II) solely a data review based on documentation submitted by the hospital with its request for review or that was used by the auditors in making the preliminary finding; and

(III) not an adversarial hearing.

(iv) HHSC will submit to the auditors all requests for review that meet the procedural requirements described in clause (ii) of this subparagraph.

(I) If the auditors agree that a factual or calculation error occurred and change the preliminary audit finding, HHSC will notify the hospital of the revised finding.

(II) If the auditors do not agree that a factual or calculation error occurred and do not change the preliminary audit finding, HHSC will notify the hospital that the preliminary finding stands and will initiate recoupment proceedings as described in this section.

(2) Additional audits. HHSC may conduct or require additional audits.

(p) Advance Payments

(1) In a DSH program year in which payments will be delayed pending data submission or for other reasons, HHSC may make advance payments to hospitals that meet the eligibility requirements described in subsection (c) of this section, meet a qualification in subsection (d) of this section, meet the conditions of participation in subsection (e) of this section, and submitted an acceptable disproportionate share hospital application for the preceding DSH program year from which HHSC calculated an annual maximum disproportionate share hospital payment amount for that year.

(2) Advance payments are considered to be prior period payments.

(3) A hospital that did not submit an acceptable disproportionate share hospital application for the preceding DSH program year is not eligible for an advance payment.

(4) If a partial year disproportionate share hospital application was used to determine the preceding DSH program year's payments, data from that application may be annualized for use in computation of an advance payment amount.

(5) The amount of the advance payments:

(A) are divided into three payments prior to a hospital receiving its final DSH payment amount; and

(B) in DSH program years 2020 and after a provider that received a payment in the previous DSH program year is eligible to receive an advanced payment, and the calculations for advanced payment 1, 2, and 3 are as follows:

(i) HHSC determines a percentage of the pool to pay out in the advanced payments; and

(ii) the pool amount is fed through the previous DSH program year calculation to determine the advanced payments.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 8, 2021.

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Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Effective date: June 28, 2021
Proposal publication date: April 16, 2021
For further information, please call: (737) 203-7842

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DIVISION 11. TEXAS HEALTHCARE TRANSFORMATION AND QUALITY IMPROVEMENT PROGRAM REIMBURSEMENT

1 TAC §355.8215

The Texas Health and Human Services Commission (HHSC) adopts new §355.8215, concerning Public Health Provider - Charity Care Program (PHP-CCP). New §355.8215 is adopted with changes to the proposed text as published in the March 19, 2021, issue of the *Texas Register* (46 TexReg 1715). The text of the rule will be republished.

BACKGROUND AND JUSTIFICATION

The purpose of the new rule is to authorize HHSC to implement the PHP-CCP under the 1115 waiver to reimburse certain costs for qualifying providers associated with providing care, including behavioral health, immunizations, chronic disease prevention, and other preventative services for the uninsured. This program was created as part of the 1115 waiver extension and will provide an opportunity for reimbursement of charity care costs (or Medicaid shortfall in the first year of the program).

The new rule describes the requirements for participation in the PHP-CCP.

In accordance with the Special Terms and Conditions of the 1115 waiver, to participate in the program, providers must be funded by a unit of government to be able to certify public expenditures. Publicly-owned and operated Community Mental Health Clinics (CMHCs), community centers, Local Behavioral Health Authorities (LBHAs), and Local Mental Health Authorities (LMHAs) that are established under the Texas Health and Safety Code Chapters 533 or 534 and are primarily providing behavioral health services, and Local Health Departments (LHDs) and Public Health Districts (PHDs) that are established under the Texas Health and Safety Code Chapter 121 are eligible to participate.

COMMENTS

The 31-day comment period ended April 19, 2021.

During this period, HHSC received feedback regarding the proposed rule from three (3) commenters: Texas Council of Community Centers, Houston Health Department (HHD), and Texas Association of City and County Health Officials (TACCHO).

A summary of comments relating to the rule and HHSC's response follows.

Comment: Multiple commenters expressed strong support for PHP-CCP and appreciate the effort to mitigate the loss of the Delivery System Reform Incentive Payment Program. PHP-CCP will help sustain access to services, with increased focus on quality programs.

Response: HHSC appreciates the support. No changes were made in response to this comment.

Comment: Multiple commenters recommended the term "Public Health Services" be included in the definition of preventative care services in the program and suggested additional services to be included as public health services.

Response: HHSC agrees with the comment to further specify what types of medically necessary public health services can be reimbursed. HHSC has updated §355.8215(a) to include public health services in the program and added the term "Public health services" to §355.8215(b) as paragraph (5). HHSC declines to include the following services because no specific procedure codes were associated with them: environmental health services, care transition programs, school and community-based programming (vision services, etc.), and enhanced services (care coordination, telehealth, home visitation, reminder recall, health education, provider technical assistance, and super utilizer services).

Comment: One commenter asked what the definition of preventive health services is and whether it is a broad definition that will include a wide range of services, including public health services, or there is a specific definition of what preventative health services are allowed.

Response: HHSC agrees with the commenter that a definition of preventative health services would be beneficial and amended the rule in response to the comment. HHSC added the term "preventative services" to §355.8215(b) as paragraph (3) for providers to reference when considering different services.

Comment: One commenter recommended HHSC to offer opportunities for multiple individuals with each PHP-CCP provider to receive training.

Response: HHSC agrees with the commenter that multiple individuals should be able to receive the PHP-CCP financial training and amended the rule in response to this comment. HHSC has updated §355.8215(c)(2)(A) to specify that multiple individuals from a qualifying provider are able to attend and receive credit for training for each program period.

Comment: One commenter asked for clarification on which training a financial contact is required to attend.

Response: HHSC agrees with the commenter that additional clarity would be beneficial and amended the rule in response to this comment. HHSC has updated §355.8215(c)(2)(B) to clarify that a financial contact must attend the training directly prior to the program period.

Comment: One commenter recommended a PHP-CCP provider have the authority to enter into an agreement wherein another PHP-CCP's trained financial contact may apply on behalf of a PHP-CCP that is without a trained financial contact.

Response: HHSC agrees with the commenter that an outside contractor may prepare the cost report on behalf of the PHP-CCP provider but declines to revise the rule to allow for a PHP-CCP provider to not have a trained PHP-CCP financial contact employed. HHSC has updated §355.8215(c)(2)(C) accordingly.

HHSC made a minor edit and added a period at the end of §355.8215(b)(6).

STATUTORY AUTHORITY

The new rule is adopted under Texas Government Code §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out HHSC's duties; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b-1), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Texas Human Resources Code Chapter 32.

§355.8215. Public Health Provider - Charity Care Program (PHP-CCP).

(a) Introduction. This section establishes the Public Health Provider - Charity Care Program (PHP-CCP). PHP-CCP is designed to allow qualified providers to receive reimbursement for the cost of delivering healthcare services, including behavioral health services, vaccine services, public health services, and other preventative services, when those costs are not reimbursed by another source. The program is authorized under the 1115 waiver.

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

(1) Centers for Medicare and Medicaid Services (CMS)--The federal agency within the United States Department of Health and Human Services responsible for overseeing and directing Medicare and Medicaid, or its successor.

(2) Medicaid shortfall--The unreimbursed cost to a qualifying provider of providing Medicaid services to Medicaid clients.

(3) Preventative services--For clients 21 years of age or older, services described in Section 9.2.56.3.2, Preventative Care Visits of the Texas Medicaid Provider Procedures Manual as of the effective date of this section. For clients birth through 20 years of age, services covered under the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) service.

(4) Program period--A period of time for which eligible and enrolled providers may receive the PHP-CCP amounts described in this section. Each PHP-CCP period is equal to a Federal Fiscal Year (FFY) beginning October 1 and ending September 30 of the following year.

(5) Public health services--Services designed to protect and promote the general population's health and to prevent higher cost interventions such as hospitalizations. These services include, but are not limited to, tuberculosis identification, diagnosis, and treatment; sexually transmitted diseases identification, diagnosis, and treatment; immunization (clinical services and administration); dental care; and chronic disease screening, monitoring, and self-management.

(6) Qualifying Providers--Publicly-owned and operated Community Mental Health Clinics (CMHCs), community centers, Local Behavioral Health Authorities (LBHAs) and Local Mental Health Authorities (LMHAs) that are established under the Texas Health & Safety Code Chapter 533 or 534 and are primarily providing behavioral health services, and publicly-owned and operated Local Health Departments (LHDs) and Public Health Districts (PHDs) that are established under the Texas Health and Safety Code Chapter 121.

(7) Total program value--The maximum amount available under PHP-CCP for a program period, as determined by the Texas Health and Human Services Commission (HHSC) and CMS.

(8) Uncompensated care costs--The sum of the Medicaid shortfall and the uninsured costs.

(9) Uncompensated care payments--Payments intended to defray the uncompensated costs of providing services.

(10) Uncompensated care tool--A form prescribed by HHSC to identify uncompensated costs for Medicaid-enrolled providers and used to enroll in the program.

(11) Uninsured costs--The unreimbursed cost to a qualifying provider of providing services that meet the definition of "medical assistance" in Social Security Act §1905(a) to uninsured patients as defined by CMS.

(12) Uninsured patient--An individual who has no health insurance or other source of third-party coverage for the services provided. The term includes an individual enrolled in Medicaid who received services that do not meet the definition of "medical assistance" in the Social Security Act §1905(a).

(13) Waiver--The Texas Healthcare Transformation and Quality Improvement Program Medicaid demonstration waiver under Social Security Act §1115.

(c) Participation requirements.

(1) Qualifying provider. A provider must indicate it is a qualifying provider as defined in subsection (b) of this section to be considered for reimbursement in the application process.

(2) PHP-CCP financial training. HHSC provides annual training to participating qualifying providers.

(A) A PHP-CCP financial contact must attend and receive credit for training for each program period in which the provider chooses to participate. Multiple individuals from a qualifying provider may attend and receive credit for training for each program period.

(B) Training is provided for each program period and is not retroactive. The qualifying provider must have at least one financial contact attend the annual training directly prior to the program period to participate.

(C) A provider that does not have a trained PHP-CCP financial contact who is an employee of the provider is prohibited from submitting a PHP-CCP application. Provider-contracted vendors are permitted to enter a provider's data into the cost report for any provider as a report preparer.

(3) Cost reports. Qualifying providers must submit an annual uncompensated care tool for uncompensated care costs. Uncompensated care tools must be completed for a full year based on the federal fiscal year.

(A) The uncompensated care tool format will be specified by HHSC. Qualifying providers certify through the cost report process their total actual federal and non-federal costs and expenditures for the program period. Costs must be reported in a manner that is consistent with the PHP-CCP protocol that is approved under the 1115 Waiver.

(B) The cost report is due on or before November 14 of the year of the program period ending date and must be certified in a manner specified by HHSC.

(i) If November 14 falls on a federal or state holiday or weekend, the due date is the first working day after November 14.

(ii) A provider whose cost report is not received by the due date is ineligible for PHP-CCP payment for the federal fiscal year.

(C) HHSC reserves the right to request a corrective action plan (CAP) from providers who submit incorrect cost reports or bill incorrectly. PHP-CCP payments will be withheld until the CAP is accepted by the HHSC.

(D) Costs for care delivered to persons who are incarcerated at the time of the care must be excluded from the cost report.

(E) Costs for care delivered as part of an Institution of Mental Disease (IMD) must be excluded from the cost report. If a provider includes costs for Crisis Stabilization Units on their cost report, and the unit is later determined by CMS to be an IMD, associated PHP-CCP payments are subject to recoupment.

(4) Certification. The provider must certify, on a form prescribed by HHSC, that no part of any PHP-CCP payment will be used to pay a contingent fee and that the entity's agreement with a billing entity or cost report preparer does not use a reimbursement methodology that contains any type of incentive, directly or indirectly, for inappropriately inflating, in any way, claims billed to the Medicaid program, including the provider's PHP-CCP funds. The certification must be received by HHSC with the enrollment application described in paragraph (3) of this subsection.

(d) Source of funding. The non-federal share of funding for payments under this section is limited to certified public expenditures from governmental entities.

(e) Payment frequency. HHSC will distribute uncompensated care payments on a schedule to be determined by HHSC and posted on HHSC's website.

(f) Calculation of supplemental payment.

(1) Supplemental payment. A qualifying provider may be eligible to receive a supplemental payment equal to a percentage of its Medicaid shortfall and uncompensated care costs for the cost reporting period.

(2) Funding limitations. Payments made under this section are limited by the amount of funds allocated to the total program value for the demonstration year. If payments for uncompensated care for the provider pool attributable to a demonstration year are expected to exceed the amount of funds allocated to that pool by HHSC for that demonstration year, HHSC will reduce payments to providers in the pool by the same percentage as required to remain within the pool allocation amount.

(g) Recoupment.

(1) Overpayment or disallowance. In the event of an overpayment identified by HHSC or a disallowance by CMS of federal financial participation related to a provider's receipt or use of payments under this section, HHSC may recoup an amount equivalent to the amount of the overpayment or disallowance.

(2) Adjustments. Payments under this section may be subject to adjustment for payments made in error, including, without limitation, adjustments under §371.1711 of this title (relating to Recoupment of Overpayments and Debts), 42 CFR Part 455, and Texas Government Code Chapter 403. HHSC may recoup an amount equivalent to any such adjustment.

(3) Recoupment method. HHSC may recoup from any current or future Medicaid payments as follows:

(A) HHSC will recoup from the provider against which any overpayment was made, or disallowance was directed.

(B) If, within 30 days of the provider's receipt of HHSC's written notice of recoupment, the provider has not paid the full amount of the recoupment or entered into a written agreement with HHSC to do so, HHSC may withhold any or all future Medicaid payments from the provider until HHSC has recovered an amount equal to the amount overpaid or disallowed. Electronic notice and electronic agreement may be used as alternative options at HHSC's discretion.

(h) Changes in operation. If an enrolled provider closes voluntarily or ceases to provide Medicaid services, the provider must notify the HHSC Provider Finance Department by hand delivery, United States (U.S.) mail, or special mail delivery within 10 business days of closing or ceasing to provide Medicaid services. Notification is considered to have occurred when the HHSC Provider Finance Department receives the notice.

(i) General information. In addition to the requirements of this section, the cost reporting guidelines will be governed by §355.101 of this chapter (relating to Introduction); §355.102 of this chapter (relating to General Principles of Allowable and Unallowable Costs); §355.103 of this chapter (relating to Specifications for Allowable and Unallowable Costs); §355.104 of this chapter (relating to Revenues); §355.105 of this chapter (relating to General Reporting and Documentation Requirements, Methods, and Procedures); §355.106 of this chapter (relating to Basic Objectives and Criteria for Audit and Desk Review of Cost Reports); §355.107 of this chapter (relating to Notification of Exclusions and Adjustments); §355.108 of this chapter (relating to Determination of Inflation Indices); §355.109 of this chapter (relating to Adjusting Reimbursement When New Legislation, Regulations, or Economic Factors Affect Costs); and §355.110 of this chapter (relating to Informal Reviews and Formal Appeals).

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Karen Ray
Chief Counsel
Texas Health and Human Services Commission
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For further information, please call: (512) 424-6637

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TITLE 13. CULTURAL RESOURCES

PART 1. TEXAS STATE LIBRARY AND ARCHIVES COMMISSION

CHAPTER 8. TEXSHARE LIBRARY CONSORTIUM

13 TAC §8.1

The Texas State Library and Archives Commission (Commission) adopts amendments to Chapter 8, TexShare Library Consortium, §8.1, Definitions, with no changes to the proposed text as published in the March 12, 2021, issue of the *Texas Register* (46 TexReg 1579). The rule will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS. The amendments clarify and update the definition of "eligible nonprofit library" by expanding TexShare affiliate membership to libraries that are components of federally recognized American Indian tribes or institutions of higher education accredited by accrediting agencies recognized by the Texas Higher Education Coordinating Board (THECB).

Specifically, the amendments to §8.1(14)(B)(iv) and §8.1(14)(C)(vii) clarify the criteria for tribal libraries. An omission in §8.1(14)(C) had previously excluded these institutions from affiliate membership. The amendment to §8.1(14)(C)(i) broadens the criteria for libraries that are components of institutions of higher education by removing the requirement that the institution of higher education hold a certificate of authorization from THECB. Instead, a library that is a component of an institution of higher education could be eligible if the institution is accredited by an accrediting agency recognized by THECB. The effect of this amendment would be that in addition to library components of institutions that hold certificates of authorization from THECB, library components of institutions that are exempt from THECB regulation may be eligible for affiliate membership, so long as they are accredited by a THECB recognized accreditor.

Additional nonsubstantive amendments clarify rule language and update punctuation for consistency with Texas Register preferences.

SUMMARY OF COMMENTS. The commission did not receive any comments on the proposed amendments.

STATUTORY AUTHORITY. These amendments are adopted under Government Code, §441.224, which authorizes the Commission to admit other types of libraries as members or as affiliated members of the consortium by rule.

CROSS REFERENCE TO STATUTE. Government Code, Chapter 441, Subchapter M.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 9, 2021.

TRD-202102241

Sarah Swanson
General Counsel
Texas State Library and Archives Commission
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Proposal publication date: March 12, 2021
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TITLE 16. ECONOMIC REGULATION

PART 9. TEXAS LOTTERY COMMISSION

CHAPTER 403. GENERAL ADMINISTRATION

16 TAC §§403.101, 403.110, 403.301, 403.600, 403.800

The Texas Lottery Commission (Commission) adopts amendments to 16 TAC §403.101 (Open Records), §403.110 (Petition for Adoption of Rule Changes), §403.301 (Historically Underutilized Businesses), §403.600 (Complaint Review Process), and §403.800 (Savings Incentive Program) without changes to the proposed text as published in the April 23, 2021, issue of the *Texas Register* (46 TexReg 2677). The rules will not be republished. The rule amendments are a result of the Commission's recent rule review conducted in accordance with Texas Government Code §2001.039.

The amendments to §403.101 (Open Records) make minor, nonsubstantive changes to terminology from "open records" to "public information".

The amendments to §403.110 (Petition for Adoption of Rule Changes) add language regarding the residency requirement for the petitioner as amended by the 84th Legislature, R.S., Ch. 343 (H.B. 763), Sec. 1, effective June 9, 2015.

The amendments to §403.301 (Historically Underutilized Businesses) make minor, non-substantive changes to update a citation to the Texas Comptroller's administrative rules.

The amendments to §403.600 (Complaint Review Process) address the availability of a dedicated voicemail system for the reporting and investigation of complaints without the requisite complaint information when the facts involve a significant risk to the public or to the integrity of lottery or bingo games.

The amendments to §403.800 (Savings Incentive Program) will address the statement that the Commission has no appropriated undedicated general revenue. The Charitable Bingo Operations Division currently is funded by general revenue. The Charitable Bingo program is supported only as required by bingo fees and the Commission does not foresee retaining any general revenue savings.

Finally, these amendments also include non-substantive stylistic changes including "agency" to "commission" and "Commission" to "commission."

The Commission received no written comments on the proposed amendments during the public comment period.

These amendments are adopted under the authority of Texas Government Code §552.230, which authorizes a state agency to promulgate reasonable rules of procedure under which public information may be inspected and copied efficiently, safely, and without delay; Texas Government Code §2001.004(1), which requires state agencies to adopt rules of practice; and Texas Gov-

ernment Code §467.102, which authorizes the Commission to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 10, 2021.

TRD-202102277
Bob Biard
General Counsel
Texas Lottery Commission
Effective date: June 30, 2021
Proposal publication date: April 23, 2021
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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 74. CURRICULUM REQUIREMENTS

SUBCHAPTER A. REQUIRED CURRICULUM

19 TAC §74.5

The State Board of Education (SBOE) adopts an amendment to §74.5, concerning academic achievement record (transcript). The amendment is adopted without changes to the proposed text as published in the March 5, 2021 issue of the *Texas Register* (46 TexReg 1447) and will not be republished. The adopted amendment updates the rule to require documentation of the new graduation requirement that a student complete and submit a free application for federal student aid (FAFSA) or a Texas application for state financial aid (TASFA).

REASONED JUSTIFICATION: The 86th Texas Legislature, 2019, passed House Bill 3, amending Texas Education Code (TEC), §28.025(c), and adding new TEC, §28.0256, to require a student to complete a financial aid application, FAFSA or TASFA, in order to graduate. In accordance with TEC, §28.0256(b), a student is not required to comply with the requirement to complete and submit a financial aid application if the student's parent or guardian submits a signed opt-out form authorizing the student to decline. The student may submit the opt-out form on the student's own behalf if the student is 18 years of age or older or is an emancipated youth under Texas Family Code, Chapter 31. A school counselor may also authorize the student to decline to complete and submit a financial aid application for good cause, as determined by the school counselor. The opt-out form must be approved by the Texas Education Agency. Each school district must report to the agency the number of students who meet the financial aid application requirement by either completing and submitting a financial aid application or opting out.

At the January 2021 SBOE meeting, the SBOE gave final approval to an amendment to 19 TAC Chapter 74, Curriculum Requirements, Subchapter B, Graduation Requirements, §74.11, High School Graduation Requirements, to update the rule to align with the new financial aid application graduation requirement.

The adopted amendment to §74.5 updates the rule for the academic achievement record to document the completion of the new financial aid application graduation requirement.

The SBOE approved the proposed amendment for first reading and filing authorization at its January 29, 2021 meeting and for second reading and final adoption at its April 16, 2021 meeting.

In accordance with TEC, §7.102(f), the SBOE approved the amendment for adoption by a vote of two-thirds of its members to specify an effective date earlier than the beginning of the 2021-2022 school year. The earlier effective date will allow districts of innovation that begin school prior to the statutorily required start date to implement the rule when they begin their school year. The effective date is 20 days after filing as adopted with the *Texas Register.*

SUMMARY OF COMMENTS AND RESPONSES: The public comment period on the proposal began March 5, 2021, and ended at 5:00 p.m. on April 9, 2021. The SBOE also provided an opportunity for registered oral and written comments at its April 2021 meeting in accordance with the SBOE board operating policies and procedures. Following is a summary of the public comments received and corresponding responses.

Comment. One counselor stated that some students will not attend college and, therefore, do not need to fill out the FAFSA or the TASFA.

Response. This comment is outside the scope of the proposed rulemaking.

Comment. Four counselors expressed concern that this rulemaking is creating more work for counselors without a clear benefit for students.

Response. The SBOE disagrees and has determined that there is a clear benefit to students' submitting a financial aid application, including promoting their postsecondary education and eligibility for state and federal funds.

Comment. One counselor asked what kind of proof will be required to document the financial aid application requirement.

Response. The SBOE provides the following clarification. Implementation of the financial aid application requirement is addressed in proposed new 19 TAC §74.1023, Financial Aid Application Requirement for High School Graduation,under the authority of the commissioner of education. TEC, §28.0256, requires the commissioner to adopt rules to identify the methods by which a student must provide to a school district or open-enrollment charter school proof that the student has completed and submitted a financial aid application.

Comment. One counselor expressed concern that it would be difficult for counselors to enforce the completion of the FAFSA or TASFA for families. The commenter stated that some families do not want to fill out the paperwork for different reasons such as the family makes too much money to qualify or the student is adopted and college is already funded for the student.

Response. This comment is outside the scope of the proposed rulemaking.

Comment. One member of the community expressed concern that students who complete their academic graduation requirements should not be barred from receiving a diploma simply because they did not fill out a form for financial aid purposes.

Response. This comment is outside the scope of the proposed rulemaking.

Comment. One counselor expressed concern that there is not enough guidance for schools in this piece of rulemaking.

Response. The SBOE disagrees and has determined that the amendment was sufficiently clear as proposed. The SBOE also provides the following clarification. Implementation of the financial aid application requirement is addressed in proposed new 19 TAC §74.1023, Financial Aid Application Requirement for High School Graduation, under the authority of the commissioner of education.

Comment. One counselor asked whether the requirement for students to complete the FAFSA could be delayed until after the new, shorter FAFSA is implemented in the 2023-2024 school year.

Response. This comment is outside the scope of the proposed rulemaking.

Comment. One counselor expressed concern that families do not want counselors to know how much the family makes.

Response. This comment is outside the scope of the proposed rulemaking.

Comment. One member of the community expressed concern that requiring submission for FAFSA as a graduation requirement is a violation of privacy.

Response. This comment is outside the scope of the proposed rulemaking.

STATUTORY AUTHORITY. The amendment is adopted under Texas Education Code (TEC), §7.102(c)(13), which requires the State Board of Education (SBOE) to adopt transcript forms and standards for differentiating high school performance for purposes of reporting academic achievement under TEC, §28.025; TEC, §28.025(e), which requires each school district to report the academic achievement record of students who have completed the foundation high school program on transcript forms adopted by the SBOE; and TEC, §28.0256(a), as added by House Bill 3, 86th Texas Legislature, 2019, which requires each student to complete and submit a free application for federal student aid (FAFSA) or a Texas application for state financial aid (TASFA) before graduating from high school.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code, §§7.102(c)(13); 28.025(e); and 28.0256(a), as added by House Bill 3, 86th Texas Legislature, 2019.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 11, 2021.

TRD-202102290
Cristina De La Fuente-Valadez
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Effective date: July 1, 2021
Proposal publication date: March 5, 2021
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SUBCHAPTER B. GRADUATION REQUIREMENTS

19 TAC §74.11

The State Board of Education (SBOE) adopts an amendment to §74.11, concerning high school graduation requirements. The amendment is adopted with changes to the proposed text as published in the December 18, 2020 issue of the *Texas Register* (45 TexReg 8956) and will be republished. The adopted amendment updates the rule to align with the requirement in House Bill (HB) 3, 86th Texas Legislature, 2019, that students complete and submit a free application for federal student aid (FAFSA) or a Texas application for state financial aid (TASFA) as a requirement for high school graduation. The adopted amendment also specifies when a student may demonstrate proficiency in certain communication skills required for graduation and adds a new option for an elective credit.

REASONED JUSTIFICATION: The 86th Texas Legislature, 2019, passed HB 3, amending Texas Education Code (TEC), §28.025(c), and adding new TEC, §28.0256, to require a student to complete a financial aid application, FAFSA or TASFA, in order to graduate. In accordance with TEC, §28.0256(b), a student is not required to comply with the financial aid application requirement if the student's parent or guardian submits a signed opt-out form authorizing the student to decline to complete and submit a financial aid application. The student may submit the opt-out form on the student's own behalf if the student is 18 years of age or older or is an emancipated youth under Texas Family Code, Chapter 31. A school counselor may also authorize the student to decline to complete and submit a financial aid application for good cause, as determined by the school counselor. The opt-out form must be approved by the Texas Education Agency.

The adopted amendment adds new subsection (b) to align with the financial aid application requirement and include options by which a student may opt out of the requirement.

Additionally, the adopted amendment establishes in subsection (a)(3) that students may satisfy the graduation requirement to demonstrate proficiency in certain speech skills in Grade 8 or higher.

The following changes were made to the proposed amendment to §74.11 since published as proposed.

Subsection (b) was amended by adding language to specify that the financial aid application requirement will become effective beginning with students enrolled in Grade 12 during the 2021-2022 school year.

Subsection (b) was also amended by moving the phrase "before graduating from high school" after the term "TASFA."

Subsection (h) was amended by adding new paragraph (5) that states, "College preparatory English language arts or mathematics courses developed and offered pursuant to the TEC, §28.014."

The SBOE approved the proposed amendment for first reading and filing authorization at its November 20, 2020 meeting and for second reading and final adoption at its January 29, 2021 meeting.

In accordance with TEC, §7.102(f), the SBOE approved the amendment for adoption by a vote of two-thirds of its members to specify an effective date earlier than the beginning of the 2021-2022 school year. The earlier effective date will allow districts of innovation that begin school prior to the statutorily required start date to implement the proposed rulemaking when

they begin their school year. The effective date is August 1, 2021.

SUMMARY OF COMMENTS AND RESPONSES: The public comment period on the proposal began December 18, 2020, and ended at 5:00 p.m. on January 22, 2021. The SBOE also provided an opportunity for registered oral and written comments at its January 2021 meeting in accordance with the SBOE board operating policies and procedures. Following is a summary of the public comments received and corresponding responses.

Comment. A counselor recommended that maintaining confidentiality should be included in the rule. The commenter expressed concern that many non-citizens fill out the TASFA and feared their status may be disclosed while wealthy families may avoid completing the FAFSA due to lack of trust.

Response. The SBOE disagrees and has determined that provisions related to confidentiality are appropriately addressed in proposed new 19 TAC §74.1023, Financial Aid Application Requirement for High School Graduation, under the authority of the commissioner of education. TEC, §28.0256, requires the commissioner to adopt rules to ensure compliance with federal law regarding confidentiality of student educational information, including the Family Educational Rights and Privacy Act of 1974, and any state law relating to the privacy of student information.

Comment. A counselor, two parents, and three members of the community expressed opposition to the requirement for students to complete a financial aid application in order to graduate.

Response. The SBOE disagrees and has determined that the requirement to complete and submit a financial aid application is aligned with state law, TEC, §28.0256, and appropriately included in the graduation requirements.

Comment. A parent expressed concern that the financial aid application requirement may prevent students from graduating if they do not fill out an application.

Response. The SBOE disagrees and has determined that the financial aid application graduation requirement does not pose a barrier to graduation as a student may opt out of the requirement by submitting a form signed by the parent or guardian, counselor, or student if age 18 or older authorizing the student to decline to submit a financial aid application.

Comment. A counselor expressed concern that this rule will be implemented for the students who are graduating in spring 2021. The commenter expressed a desire for this rule to become effective for the class of 2022.

Response. The SBOE agrees that language regarding the implementation of the rule is necessary. The SBOE took action to amend §74.11(b) to specify that the requirement applies beginning with students enrolled in Grade 12 during the 2021-2022 school year.

Comment. A counselor stated that some students enlist in the military and have no need to fill out a financial aid application.

Response. The SBOE provides the following clarification. A student may graduate without completing a financial aid application by submitting an opt-out form signed by the parent or guardian, counselor, or student if age 18 or older to authorize the student to decline to submit a financial aid application.

Comment. A parent stated that parents should not be required to fill out a FAFSA.

Response. The SBOE provides the following clarification. A student may graduate without completing a financial aid application by submitting an opt-out form signed by the parent or guardian, counselor, or student if age 18 or older to authorize the student to decline to submit a financial aid application.

Comment. A community member stated that students should not be required to ask for financial aid and families should not be required to release personal income information in order for their children to graduate from high school.

Response. The SBOE disagrees and has determined that the requirement to complete and submit a financial aid application is aligned with state law, TEC, §28.0256, and appropriately included in the graduation requirements. The SBOE also provides the following clarification. A student may graduate without completing a financial aid application by submitting an opt-out form signed by the parent or guardian, counselor, or student if age 18 or older to authorize the student to decline to submit a financial aid application.

Comment. A counselor and a community member stated that the completion of a financial aid application is a good option for students but should not be a requirement.

Response. The SBOE disagrees and has determined that the requirement to complete and submit a financial aid application is aligned with state law, TEC, §28.0256, and appropriately included in the graduation requirements.

Comment. A parent questioned why the completion of a financial aid application is a requirement for all students if students should be college, career, or military ready, not just college ready.

Response. The SBOE provides the following clarification. The financial aid application is required by state law, TEC, §28.0256. However, a student may graduate without completing a financial aid application by submitting an opt-out form signed by the parent or guardian, counselor, or student if age 18 or older to authorize the student to decline to submit a financial aid application.

Comment. A school administrator questioned why the college preparatory courses were not included in the electives identified under §74.11(h).

Response. The SBOE agrees that the college preparatory courses are appropriate elective courses and took action to amend §74.11(h) to add College Preparatory Mathematics and College Preparatory English Language Arts to the electives identified in rule.

STATUTORY AUTHORITY. The amendment is adopted under Texas Education Code (TEC), §7.102(c)(4), which requires the State Board of Education (SBOE) to establish curriculum and graduation requirements; TEC, §28.025(c), as amended by House Bill (HB) 3, 86th Texas Legislature, 2019, which requires that, in order to receive a high school diploma, a student must complete the curriculum requirements identified by the SBOE and comply with the financial aid application requirement in accordance with TEC, §28.0256; TEC, §28.0256(a), as added by HB 3, 86th Texas Legislature, 2019, which requires each student to complete and submit a free application for federal student aid or a Texas application for state financial aid before graduating from high school; TEC, §28.0256(b), as added by HB 3, 86th Texas Legislature, 2019, which provides an exception to students to opt out of the financial aid application requirement under TEC, §28.0256(a), by submitting a form signed by a parent, guardian, or student aged 18 years old or older, that

authorizes the student to decline to comply with the financial aid application graduation requirement. A high school counselor may also authorize a student to decline to comply with the financial aid application graduation requirement for good cause; and TEC, §28.0256(d), as added by HB 3, 86th Texas Legislature, 2019, which specifies that if a school counselor notifies a school district whether a student has complied with the requirement under TEC, §28.0256(a) or (b), the school counselor may only indicate whether the student has complied with this section and may not indicate the manner in which the student complied.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code, §§7.102(c)(4); 28.025(c), as amended by House Bill (HB) 3, 86th Texas Legislature, 2019; and 28.0256(a), (b), and (d), as added by HB 3, 86th Texas Legislature, 2019.

§74.11. High School Graduation Requirements.

(a) To receive a high school diploma, a student entering Grade 9 in the 2014-2015 school year and thereafter must complete the following:

(1) in accordance with subsection (d) of this section, requirements of the Foundation High School Program specified in §74.12 of this title (relating to Foundation High School Program);

(2) testing requirements for graduation as specified in Chapter 101 of this title (relating to Assessment); and

(3) demonstrated proficiency, in Grade 8 or higher, as determined by the district in which the student is enrolled, in delivering clear verbal messages; choosing effective nonverbal behaviors; listening for desired results; applying valid critical-thinking and problem-solving processes; and identifying, analyzing, developing, and evaluating communication skills needed for professional and social success in interpersonal situations, group interactions, and personal and professional presentations.

(b) Beginning with students enrolled in Grade 12 during the 2021-2022 school year, each student in Grade 12 must complete and submit a free application for federal student aid (FAFSA) or a Texas application for state financial aid (TASFA) before graduating from high school. A student may graduate under the Foundation High School Program without completing a financial aid application if:

(1) the student's parent or other person standing in parental relation submits a signed form, approved by the Texas Education Agency (TEA), indicating that the parent or other person authorizes the student to decline to complete and submit the financial aid application;

(2) the student signs and submits the form described by paragraph (1) of this subsection on the student's own behalf if the student is 18 years of age or older or has been emancipated under Texas Family Code, Chapter 31; or

(3) a school counselor authorizes the student to decline to complete and submit the financial aid application for good cause, as determined by the school counselor. If a school counselor notifies a school district that a student has declined to complete and submit a financial aid application for good cause, the school counselor may not indicate details regarding what constitutes good cause.

(c) A school district shall clearly indicate the distinguished level of achievement under the Foundation High School Program, an endorsement, and a performance acknowledgment on the transcript or academic achievement record (AAR) of a student who satisfies the applicable requirements.

(d) A student entering Grade 9 in the 2014-2015 school year and thereafter shall enroll in the courses necessary to complete the curriculum requirements for the Foundation High School Program specified in §74.12 of this title and the curriculum requirements for at least one endorsement specified in §74.13 of this title (relating to Endorsements).

(e) A student may graduate under the Foundation High School Program without earning an endorsement if, after the student's sophomore year:

(1) the student and the student's parent or person standing in parental relation to the student are advised by a school counselor of the specific benefits of graduating from high school with one or more endorsements; and

(2) the student's parent or person standing in parental relation to the student files with a school counselor written permission, on a form adopted by the TEA, allowing the student to graduate under the Foundation High School Program without earning an endorsement.

(f) A student may earn a distinguished level of achievement by successfully completing the curriculum requirements for the Foundation High School Program and the curriculum requirements for at least one endorsement required by the Texas Education Code (TEC), §28.025(b-15), including four credits in science and four credits in mathematics to include Algebra II.

(g) An out-of-state or out-of-country transfer student (including foreign exchange students) or a transfer student from a Texas nonpublic school is eligible to receive a Texas diploma but must complete all requirements of this section to satisfy state graduation requirements. Any course credit required in this section that is not completed by the student before he or she enrolls in a Texas school district may be satisfied through the provisions of §74.23 of this title (relating to Correspondence Courses and Distance Learning) and §74.24 of this title (relating to Credit by Examination) or by completing the course or courses according to the provisions of §74.26 of this title (relating to Award of Credit).

(h) Elective credits may be selected from the following:

(1) high school courses not required for graduation that are listed in the following chapters of this title:

(A) Chapter 110 of this title (relating to Texas Essential Knowledge and Skills for English Language Arts and Reading);

(B) Chapter 111 of this title (relating to Texas Essential Knowledge and Skills for Mathematics);

(C) Chapter 112 of this title (relating to Texas Essential Knowledge and Skills for Science);

(D) Chapter 113 of this title (relating to Texas Essential Knowledge and Skills for Social Studies);

(E) Chapter 114 of this title (relating to Texas Essential Knowledge and Skills for Languages Other Than English);

(F) Chapter 115 of this title (relating to Texas Essential Knowledge and Skills for Health Education);

(G) Chapter 116 of this title (relating to Texas Essential Knowledge and Skills for Physical Education);

(H) Chapter 117 of this title (relating to Texas Essential Knowledge and Skills for Fine Arts);

(I) Chapter 127 of this title (relating to Texas Essential Knowledge and Skills for Career Development); and

(J) Chapter 130 of this title (relating to Texas Essential Knowledge and Skills for Career and Technical Education);

(2) state-approved innovative courses as specified in §74.27 of this title (relating to Innovative Courses and Programs);

(3) Junior Reserve Officer Training Corps (JROTC)--one to four credits;

(4) Driver Education--one-half credit; and

(5) College preparatory English language arts or mathematics courses developed and offered pursuant to the TEC, §28.014.

(i) Courses offered for dual credit at or in conjunction with an institution of higher education that provide advanced academic instruction beyond, or in greater depth than, the essential knowledge and skills for the equivalent high school course required for graduation may satisfy graduation requirements, including requirements for required courses, advanced courses, and courses for elective credit as well as requirements for endorsements.

(j) A student may not be enrolled in a course that has a required prerequisite unless:

(1) the student has successfully completed the prerequisite course(s);

(2) the student has demonstrated equivalent knowledge as determined by the school district; or

(3) the student was already enrolled in the course in an out-of-state, an out-of-country, or a Texas nonpublic school and transferred to a Texas public school prior to successfully completing the course.

(k) A district may award credit for a course a student completed without meeting the prerequisites if the student completed the course in an out-of-state, an out-of-country, or a Texas nonpublic school where there was not a prerequisite.

(l) A district shall allow a student who successfully completes AP Computer Science A or IB Computer Science Higher Level to satisfy both one advanced mathematics requirement and one languages other than English requirement for graduation.

(m) Each school district shall annually report to the TEA the names of the locally developed courses, programs, institutions of higher education, and internships in which the district's students have enrolled as authorized by the TEC, §28.002(g-1). The TEA shall make available information provided under this subsection to other districts. If a district chooses, it may submit any locally developed course for approval under §74.27 of this title as an innovative course.

(n) Each school district shall annually report to the TEA the names of cybersecurity courses approved by the board of trustees for credit and the institutions of higher education in which the district's students have enrolled as authorized by the TEC, §28.002(g-3). The TEA shall make available information provided under this subsection to other districts. If a district chooses, it may submit any locally developed course for approval under §74.27 of this title as an innovative course.

(o) A school district shall permit a student to comply with the curriculum requirements under the Foundation High School Program by successfully completing appropriate courses in the core curriculum of an institution of higher education (IHE). A student who has completed the core curriculum of an IHE in accordance with TEC, §61.822, as certified by the IHE in accordance with §4.28 of this title (relating to Core Curriculum):

(1) is considered to have earned an endorsement by successfully completing the appropriate courses for that endorsement;

(2) is considered to have earned a distinguished level of achievement under the Foundation High School Program; and

(3) is entitled to receive a high school diploma.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 11, 2021.

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Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
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For further information, please call: (512) 475-1497

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CHAPTER 102. EDUCATIONAL PROGRAMS
SUBCHAPTER EE. COMMISSIONER'S RULES CONCERNING PILOT PROGRAMS

19 TAC §102.1054

The Texas Education Agency (TEA) adopts the repeal of §102.1054, concerning the intensive summer pilot program. The repeal is adopted without changes to the proposed text as published in the April 2, 2021 issue of the *Texas Register* (46 TexReg 2140) and will not be republished. The adopted repeal removes the rule because its authorizing statute no longer exists.

REASONED JUSTIFICATION: The 80th Texas Legislature, 2007, added Texas Education Code (TEC), §29.098, to establish a pilot program for students identified as being at risk of dropping out of school. The statute required the commissioner of education to adopt rules for awarding grants to participating campuses to provide intensive academic instruction during the summer.

Section 102.1054, adopted effective July 31, 2008, implemented the statute by establishing eligibility criteria, application requirements, and provisions for funding and operation of the intensive summer pilot program.

House Bill 3, 86th Texas Legislature, 2019, removed TEC, §29.098. The adopted repeal of §102.1054 is necessary since the authorizing statute no longer exists.

SUMMARY OF COMMENTS AND AGENCY RESPONSES: The public comment period on the proposal began March 5, 2021, and ended April 5, 2021. No public comments were received.

STATUTORY AUTHORITY. The repeal is adopted under House Bill 3, §4.001, which repealed Texas Education Code, §29.098, which required the commissioner to establish by rule procedures for awarding grants for intensive summer programs.

CROSS REFERENCE TO STATUTE. The repeal implements House Bill 3, §4.001, 86th Texas Legislature, 2019.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 9, 2021.

TRD-202102251

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Texas Education Agency
Effective date: June 29, 2021
Proposal publication date: April 2, 2021
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SUBCHAPTER FF. COMMISSIONER'S RULES CONCERNING EDUCATOR AWARD PROGRAMS

19 TAC §102.1071

The Texas Education Agency (TEA) adopts the repeal of §102.1071, concerning the Governor's Educator Excellence Award Program--Texas Educator Excellence Grant. The repeal is adopted without changes to the proposed text as published in the April 2, 2021 issue of the *Texas Register* (46 TexReg 2141) and will not be republished. The adopted repeal removes the rule because its authorizing statute no longer exists.

REASONED JUSTIFICATION: The 79th Texas Legislature, 2005, added Texas Education Code (TEC), Chapter 21, Subchapter N, to establish a program whereby classroom teachers and other campus personnel could receive an incentive award from an eligible campus through a student achievement program. The statute required that the commissioner establish a grant award program and adopt rules for developing a campus incentive plan and the awarding of funds.

Section 102.1071, adopted effective January 9, 2007, implemented TEC, Chapter 21, Subchapter N, by establishing the Governor's Educator Excellence Award Program--Texas Educator Excellence Grant.

House Bill 3646, 81st Texas Legislature, 2009, removed TEC, Chapter 21, Subchapter N. The adopted repeal of §102.1071 is necessary since the authorizing statute no longer exists.

SUMMARY OF COMMENTS AND AGENCY RESPONSES: The public comment period on the proposal began April 2, 2021, and ended May 3, 2021. No public comments were received.

STATUTORY AUTHORITY. The repeal is adopted under House Bill (HB) 3646, §105, 81st Texas Legislature, 2009, which repealed Texas Education Code (TEC), §21.652, which required the commissioner by rule to establish a student achievement award program under which an eligible campus may receive a grant from the agency in the manner provided by TEC, Chapter 21, Subchapter N, and adopt program guidelines for a campus to follow in developing a campus incentive plan. HB 3646 also repealed TEC, §21.658, which required the commissioner to adopt rules necessary to administer TEC, Chapter 21, Subchapter N.

CROSS REFERENCE TO STATUTE. The repeal implements House Bill 3646, §105, 81st Texas Legislature, 2009.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 9, 2021.

TRD-202102252

Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Effective date: June 29, 2021
Proposal publication date: April 2, 2021
For further information, please call: (512) 475-1497

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CHAPTER 109. BUDGETING, ACCOUNTING, AND AUDITING
SUBCHAPTER CC. COMMISSIONER'S RULES CONCERNING FEDERAL FISCAL COMPLIANCE AND REPORTING

19 TAC §109.3001, §109.3003

The Texas Education Agency (TEA) adopts amendments to §109.3001 and §109.3003, concerning federal fiscal compliance and reporting. The amendments are adopted without changes to the proposed text as published in the April 2, 2021 issue of the *Texas Register* (46 TexReg 2142) and will not be republished. The adopted amendments modify the existing rules to reflect changes to federal statutes, regulations, non-regulatory guidance, and delegation agreements.

REASONED JUSTIFICATION: Section 109.3001, Local Maintenance of Effort, outlines TEA's responsibility to monitor compliance by local educational agencies (LEAs) with Individuals with Disabilities Education Act, Part B (IDEA-B) LEA maintenance of effort (MOE) and Every Student Succeeds Act (ESSA) LEA MOE. The adopted amendment to §109.3001 updates the statutory and regulatory citations and removes the handbooks previously adopted as Figure: 19 TAC §109.3001(c)(1) and Figure: 19 TAC §109.3001(c)(2). TEA has determined that the handbooks do not need to be included in rule since they do not create new regulations or rules and instead provide guidance on how TEA applies existing federal statutes and regulations to determine LEA compliance.

Section 109.3003, Indirect Cost Rates, outlines TEA's responsibility to calculate and issue indirect cost rates to LEAs and education service centers. The adopted amendments update both the rule and Figure: 19 TAC §109.3003(d) to reflect revised statutory citations and a new delegation agreement from the United States Department of Education. In addition, Figure: 19 TAC §109.3003(d) only includes information on how organizations request and apply for an indirect cost rate. Information on how subrecipients use their indirect cost rates has been removed since that information is already outlined in existing federal regulations and nonregulatory guidance.

SUMMARY OF COMMENTS AND AGENCY RESPONSES: The public comment period on the proposal began April 2, 2021, and ended May 3, 2021. No public comments were received.

STATUTORY AUTHORITY. The amendments are adopted under Texas Education Code (TEC), §7.021(b)(1), which requires the Texas Education Agency (TEA) to administer and monitor compliance with education programs required by federal or state law, including federal funding; and TEC, §7.031(a), which establishes that TEA may seek, accept, and distribute grants awarded by the federal government, subject to the limitations or conditions imposed by the terms of the grants or by other law.

CROSS REFERENCE TO STATUTE. The amendments implement Texas Education Code, §7.021(b)(1) and §7.031(a).

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
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For further information, please call: (512) 475-1497

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SUBCHAPTER EE. COMMISSIONER'S RULES CONCERNING FINANCIAL ACCOUNTING GUIDELINES

19 TAC §109.5001

The Texas Education Agency (TEA) adopts new §109.5001, concerning financial accounting guidelines. The new section is adopted without changes to the proposed text as published in the March 5, 2021 issue of the *Texas Register* (46 TexReg 1451) and will not be republished. The new rule adopts by reference the *Financial Accountability System Resource Guide* (FASRG), dated June 2021. The FASRG provides accounting rules for school districts, open-enrollment charter schools, and education service centers. No changes were made to the rule at adoption; however, the FASRG adopted by reference in the rule includes changes to Modules 1-6 at adoption.

REASONED JUSTIFICATION: The FASRG describes the rules of financial accounting for school districts, charter schools, and education service centers. Requirements for financial accounting and reporting are derived from generally accepted accounting principles (GAAP). School districts and charter schools are required to adhere to GAAP. Legal and contractual considerations typical of the government environment are reflected in the fund structure basis of accounting.

An important function of governmental accounting systems is to enable administrators to assure and report on compliance with finance-related legal provisions. This assurance and reporting means that the accounting system and its terminology, fund structure, and procedures must be adapted to satisfy finance-related legal requirements. However, the basic financial statements of school districts and charter schools should be prepared in conformity with GAAP.

School district and charter school accounting systems shall use the accounting code structure presented in the account code section of the FASRG (Module 1). Funds shall be classified and identified on required financial statements by the same code number and terminology provided in the account code section of the FASRG (Module 1).

The FASRG, dated June 2021, contains six modules on the following topics: Module 1, Financial Accounting and Reporting (FAR) and FAR Appendices; Module 2, Special Supplement - Charter Schools; Module 3, Special Supplement - Non-profit Charter Schools Chart of Accounts; Module 4, Auditing; Module 5, Purchasing; and Module 6, Compensatory Education, Guidelines, Financial Treatment, and an Auditing and Reporting System.

State law provides authority for both the State Board of Education (SBOE) and the commissioner of education to adopt rules on financial accounting. To accomplish this, the SBOE and the commissioner each adopt the FASRG by reference under separate rules. The SBOE adopts the FASRG by reference under 19 TAC §109.41, and the commissioner adopts the FASRG by reference under new §109.5001.

During the April 2021 SBOE meeting, the SBOE approved §109.41 for second reading and final adoption. At that time, the SBOE approved the following changes to the FASRG since published as proposed. These changes impact the FASRG adopted by reference in new §109.5001.

Changes were made to Module 1 to implement recent changes to federal statutes and rules, accounting and auditing standards, fund codes, and authoritative guidance and add clarity through grammatical edits.

Changes were made to Module 2 to implement recent changes to federal statutes and rules, accounting and auditing standards, and authoritative guidance and add clarity through grammatical edits.

Changes were made to Module 3 to implement recent changes to federal statutes and rules, accounting and auditing standards, fund codes, and authoritative guidance and add clarity through grammatical edits.

Changes were made to Module 4 to implement recent changes to federal statutes and rules, accounting and auditing standards, and authoritative guidance; remove outdated references; and add clarity through grammatical edits.

Changes were made to Module 5 to implement recent legislative changes and changes to authoritative guidance, remove outdated references, provide clearer guidance, and add clarity through grammatical edits.

Changes were made to Module 6 to implement recent changes to state statutes and rules, remove outdated references, provide guidance for compliance, and add clarity through grammatical edits.

The FASRG is posted on the TEA website at https://tea.texas.gov/finance-and-grants/financial-accountability/financial-accountability-system-resource-guide.

SUMMARY OF COMMENTS AND AGENCY RESPONSES: The public comment period on the proposal began March 5, 2021, and ended April 5, 2021. No public comments were received.

STATUTORY AUTHORITY. The new section is adopted under Texas Education Code (TEC), §7.055(b)(32), which requires the commissioner to perform duties in connection with the public school accountability system as prescribed by TEC, Chapters 39 and 39A; TEC, §44.001(a), which requires the commissioner to establish advisory guidelines relating to the fiscal management of a school district; TEC, §44.001(b), which requires the commissioner to report annually to the State Board of Education (SBOE) the status of school district fiscal management as reflected by the advisory guidelines and by statutory requirements; TEC, §44.007(a), which requires the board of trustees of each school district to adopt and install a standard school fiscal accounting system that conforms with generally accepted accounting principles; TEC, §44.007(b), which requires the accounting

system to meet at least the minimum requirements prescribed by the commissioner, subject to review and comment by the state auditor; TEC, §44.007(c), which requires a record to be kept of all revenues realized and of all expenditures made during the fiscal year for which a budget is adopted. A report of the revenues and expenditures for the preceding fiscal year is required to be filed with the agency on or before the date set by the SBOE; TEC, §44.007(d), which requires each district, as part of the report required by TEC, §44.007, to include management, cost accounting, and financial information in a format prescribed by the SBOE in a manner sufficient to enable the board to monitor the funding process and determine educational system costs by district, campus, and program; and TEC, §44.008(b), which requires the independent audit to meet at least the minimum requirements and be in the format prescribed by the SBOE, subject to review and comment by the state auditor. The audit must include an audit of the accuracy of the fiscal information provided by the district through the Public Education Information Management System.

CROSS REFERENCE TO STATUTE. The new section implements Texas Education Code, §§7.055(b)(32), 44.001(a) and (b), 44.007(a)-(d), and 44.008(b).

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 9, 2021.

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Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
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For further information, please call: (512) 475-1497

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 295. OCCUPATIONAL HEALTH
SUBCHAPTER C. TEXAS ASBESTOS HEALTH PROTECTION

25 TAC §§295.31 - 295.73

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC), on behalf of the Department of State Health Services (DSHS), adopts the repeal of §§295.31 - 295.73, concerning Texas Asbestos Health Protection. The repeals of §§295.31 - 295.73 are adopted without changes to the proposed text as published in the March 26, 2021, issue of the *Texas Register* (46 TexReg 1868), and therefore will not be republished.

BACKGROUND AND JUSTIFICATION

The repeal of the rules located in 25 Texas Administrative Code, Chapter 295, Subchapter C, Texas Asbestos Health Protection, §§295.31 - 295.73 is necessary to replace with new rules in Chapter 296, Subchapters A-Q, Texas Asbestos Health Protection. The new Chapter 296 is adopted elsewhere in this issue of the *Texas Register.*

The repeal of Chapter 295, Subchapter C updates training, licensing, and work practice requirements; incorporates guidance from 22 separately-published rule clarifications; and implements amendments to Texas statutes in new Chapter 296.

COMMENTS

The 31-day comment period ended April 26, 2021.

During this period, DSHS did not receive any comments regarding the proposed repeal of Chapter 295.

STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code, §531.0055 and Texas Health and Safety Code, §1001.075, which authorizes the Executive Commissioner of HHSC to adopt rules and policies necessary for the operation and provision of health and human services by DSHS, for the administration of Texas Health and Safety Code, Chapter 1001, to implement Texas Occupations Code, Chapter 1954; Texas Health and Safety Code, §12.0111, which requires DSHS to collect fees for issuing or renewing a license; and Texas Health and Safety Code, §161.402, which requires the Executive Commissioner to adopt rules designating the materials or replacement parts for which a person must obtain a material safety data sheet before installing the materials or parts in a public building.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 10, 2021.

TRD-202102256
Barbara L. Klein
General Counsel
Department of State Health Services
Effective date: July 8, 2021
Proposal publication date: March 26, 2021
For further information, please call: (512) 834-6787

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CHAPTER 296. TEXAS ASBESTOS HEALTH PROTECTION

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC), on behalf of the Department of State Health Services (DSHS), adopts new §§296.1 - 296.4, 296.21, 296.31, 296.41 - 296.62, 296.71, 296.73, 296.91 - 296.94, 296.111 - 296.118, 296.131, 296.151, 296.171, 296.172, 296.191, 296.211 - 296.213, 296.231 - 296.234, 296.251, 296.271, 296.291, and 296.311 - 296.320, concerning Texas Asbestos Health Protection. New §§296.2, 296.21, 296.58, 296.59, 296.71, 296.191, 296.211 - 296.213, 296.232 - 296.234, and 296.291 are adopted with changes to the proposed text as published in the March 26, 2021, issue of the *Texas Register* (46 TexReg 1869). These rules will be republished. New §§296.1, 296.3, 296.4, 296.31, 296.41 - 296.57, 296.60 - 296.62, 296.73, 296.91 - 296.94, 296.111 - 296.118, 296.131, 296.151, 296.171, 296.172, 296.231, 296.251, 296.271, and 296.311 - 296.320 are adopted without changes to the proposed text and therefore will not be republished.

BACKGROUND AND JUSTIFICATION

The new Chapter 296 updates training, licensing, and work practice requirements; incorporates guidance from 22 separately-published rule clarifications; and implements amendments to Texas statutes. To implement new Chapter 296, the Texas Asbestos Health Protection rules in Chapter 295, Subchapter C are being repealed. The repeal of Chapter 295, Subchapter C is adopted elsewhere in this issue of the *Texas Register.*

The new rules in Chapter 296 control and minimize public exposure to airborne asbestos by regulating asbestos-related activities in public buildings, commercial buildings, and facilities.

The new rules update licensing fees, project manager work experience, and air sample analysis turnaround time requirements. The new rules also create a new asbestos air monitoring technician project monitor (AMT/PM) license type and three new alternative asbestos abatement methods that provide for a less expensive option for the removal of various types of asbestos-containing material while being protective of public health. The new chapter is divided into Subchapters A - Q.

Most of the rules in Chapter 295, Subchapter C have been updated in the new rules for Chapter 296. Some of the provisions in Chapter 295, Subchapter C have been determined to be obsolete or no longer necessary and have been omitted from the new rules in Chapter 296.

The new rules implement Texas Family Code, Chapter 232, relating to License Suspension for Failure to Comply with Court-Ordered Child Support; Texas Government Code, Chapter 2005, relating to Refund of Initial Application and Renewal Fees for Good Cause; and Texas Occupations Code, Chapter 55, relating to Licensing of Military Service Members, Military Veterans, and Military Spouses.

In addition, moving the rules to a new chapter allows DSHS to increase clarity and readability of the rules by making rules easy to find and access. DSHS has organized the new rules by topic, edited for plain language and consistency, updated citations, and eliminated redundancy.

COMMENTS

The 31-day comment period ended April 26, 2021.

During this period, DSHS received comments regarding the proposed rules from 10 commenters, including Garner and Associates, Inc., TRC Environmental, Formosa Plastics Corporation, Scientific Investigation & Instruction Institute, GEBCO Associates, LP, Dallas Fort Worth International Airport, Stratos Environmental Services, LLC, AEHS Incorporated, Texas Association of School Boards, and one individual commenter. A summary of comments relating to the rules and DSHS's responses follows.

Comment: A commenter suggested DSHS appoint an Asbestos Advisory Committee as required by House Bill 36, 1987 70 (R) Section 12(a) to review and evaluate the proposed rules before posting the rules for public comment.

Response: DSHS disagrees and declines to appoint an Asbestos Advisory Committee in response to this comment. The Asbestos Advisory Committee was abolished in August 2006. However, stakeholders are an important part of the rulemaking process which is why DSHS solicited stakeholder input regarding the asbestos rules in 2014, 2016, 2019, and 2021.

Comment: A commenter suggested that the method of using splash guards be added to the rules.

Response: DSHS disagrees and declines to revise the rule in response to this comment. The use of splash guards is neither prohibited nor specifically addressed in the previous or adopted rules. An asbestos consultant may vary from the minimum requirements of the rules to specify the use of splash guards as long as their use is as protective of public health as the minimum requirements of the rules.

Comment: Two commenters requested more time to review the proposed rules.

Response: DSHS disagrees and declines to extend the comment period in response to this comment. DSHS solicited stakeholder input on the 2021 proposed rules for the standard 31-day formal comment period. In addition, stakeholders were given a 60-day informal comment period to review the 2019 draft rules and a comparison document highlighting changes between the 2019 draft rules and 2021 proposed rules was posted on the asbestos website. DSHS also solicited stakeholder input regarding the asbestos rules in a 30-day recommendation period in 2014 and a standard 14-day informal comment period and extended 60-day formal comment period in 2016.

Comment: One commenter suggested adding the current rule specification in §295.60(d) for "six-mil" thickness plastic sheeting of a specific dart impact and tear resistance back into the proposed rule.

Response: DSHS disagrees and declines to revise the rule in response to this comment. DSHS removed the prescriptive language and kept the "6-mil" thick language to reduce confusion, as the prescriptive language is not found on labels for this product and it is much easier for asbestos abatement contractors to identify plastic sheeting that is labeled as meeting the "6 mil thick" requirement.

Comment: A commenter inquired whether industrial or manufacturing facilities in which access is controlled and limited principally to employees were still excluded from regulation under §296.1(b) of the rules and inquired whether DSHS intended for all provisions of the rule to apply to industrial and manufacturing facilities.

Response: DSHS declines to revise the rule in response to this comment. The definition of a public building excludes industrial and manufacturing buildings. However, an industrial or manufacturing building is subject to the National Emission Standard for Hazardous Air Pollutants (NESHAP) for Asbestos in the current and new asbestos rules.

Comment: One commenter inquired how asbestos-containing material (ACM) is defined for a public school building because ACM is defined in §296.21(4) of the proposed rules as either 1.0% or more for compliance with the Texas Asbestos Health Protection rules or greater than 1.0% asbestos for compliance with federal asbestos regulations. Another commenter inquired whether DSHS intended to write greater than 1.0% for compliance with the Texas Asbestos Health Protection rules, consistent with the federal regulations. A third commenter suggested DSHS leave the definition as it is in current rule to reduce confusion.

Response: DSHS declines to revise the rule in response to these comments. Schools are regulated under both the Asbestos Hazard Emergency Response Act (AHERA) and the Texas Asbestos Health Protection Act (Act). The Act defines asbestos as a material that contains 1% or more of an asbestiform variety of mineral and federal asbestos regulations define ACM as contain-

ing more than 1% asbestos. Therefore, for purposes of complying with the AHERA regulations, including school management plans, the definition of ACM would be greater than 1%. For purposes of complying with renovation and demolition operations under the Texas Asbestos Health Protection rules, the definition of ACM would be 1% or more asbestos.

Comment: A commenter suggested amending the definition of a public building in §296.21(74) to exclude buildings that were either used in the past or will be used in the future as a public building.

Response: DSHS disagrees and declines to revise the rule in response to this comment. The phrase the commenter recommends for deletion is in the current rules and comes from the Act and the NESHAP definition of a facility. DSHS is limited to the minimum requirements of the Act and NESHAP.

Comment: One commenter inquired whether the word "day" in the definition of school in §296.21(83) should be "facility" instead.

Response: DSHS disagrees and declines to revise the rule in response to this comment. The definition of school is from the reference in AHERA to the United States Education Code definition for elementary school. Day refers to any school being held for the day and children go home at the end of the school day as opposed to a residential school where students live on school property and remain on school property after the end of the school day.

Comment: A commenter suggested adding a glove bag as a measure of the amount of material that may be done as a repair involving encapsulation, enclosure, or removal under the definition of a small-scale short-duration (SSSD) activity in §296.21(87)(E).

Response: DSHS disagrees and declines to revise the rule in response to this comment. This definition is consistent with the definition in the AHERA Model Accreditation Plan (MAP).

Comment: One commenter suggested DSHS revise the definition of survey report in §296.21(93) to add "may include" a diagram of the boundaries of homogeneous areas and estimated amount of asbestos-containing building material (ACBM). The commenter also suggested revising the definition to include as a minimum, bulk sample locations, identification of discovered ACBM, and locations of ACBM in a narrative. Because the inspector does not know the outcome of the analytical results of the bulk sampling at the time of the survey, an inspector that attempts to identify boundaries and accurately estimate amounts of ACBM is required to identify all known suspect ACBMs throughout the building and estimate quantities of all suspect materials while conducting the survey which is very time consuming and costly.

Response: DSHS agrees with the suggested revision to delete the requirement for boundaries. A survey report as defined in the rule must contain a written description, diagram or both, therefore it is optional to provide a diagram. A written description (narrative) may be provided instead of a diagram. In addition, the definition is consistent with the AHERA inspector and inspection requirements.

Comment: A commenter suggested that DSHS add a definition for "no asbestos detected" in §296.21.

Response: DSHS disagrees and declines to revise the rule in response to this comment. The phrase "no asbestos detected" is only used once in §296.191(f)(1).

Comment: One commenter suggested restricting an architect or engineer from providing an asbestos certification on a project in which the architect or engineer is also providing architectural services or is employed by an architectural firm or building contractor providing services in §296.31.

Response: DSHS disagrees and declines to revise the rule in response to this comment. The recommended restriction is more stringent than what is allowed by the Act. In addition, an architect or engineer providing services for the project has direct knowledge of the material used in the building and is better able to match the material used in the construction of the building to the material safety data sheet (MSDS) or safety data sheet (SDS).

Comment: One commenter suggested that the requirement for a two-inch by two-inch photograph in §296.42(g)(2) be reduced to a one-inch by one-inch photograph that is typical in the industry and required by other governmental agencies and current rule.

Response: DSHS disagrees and declines to revise the rule in response to this comment. DSHS staff who print and issue licenses often have difficulty identifying individuals in photographs submitted with license applications because photographs vary in quality. The requirement for a two-inch by two-inch size photograph is to better enable DSHS staff to accurately identify an individual when reviewing an application and issuing a license. In addition, a two-inch by two-inch photograph is the standard passport size.

Comment: One commenter suggested the current minimum education requirement for an asbestos consultant stay the same instead of creating a pathway to licensure that allows for applicants with a lower level of education and a higher amount of work experience as described in §296.46(b)(6)(F)(iii) to assure that qualified professionals with the appropriate education and experience provide asbestos consulting services to the public to protect public health. Another commenter suggested that because one of the ways to meet the qualifications of an asbestos consultant is to have a current active status as a Texas-registered architect or a Texas-licensed professional engineer and both require a bachelor's degree, the minimum education requirement should be a bachelor's degree from an accredited college or university, including 30 credit hours in engineering or natural or physical science, and 9 credit hours in mathematics.

Response: DSHS disagrees and declines to revise the rule in response to this comment. The asbestos consultant requirements in the 2019 draft asbestos rules were changed to reduce barriers to licensure for applicants with less education and more work experience. As a result of discussion in stakeholder meetings held in 2019 and comments received in 2019, DSHS added the requirement for an applicant to provide a letter of recommendation from a supervising licensed asbestos consultant to qualify for a consultant's license with lower education requirements.

Comment: A commenter suggested that DSHS remove the requirements from §296.58 and §296.59 for an asbestos consultant to observe transport vehicles are marked as required by the proposed rules, to obtain a copy of the waste manifest from the asbestos abatement contractor, and to contact the contractor or the disposal site to determine the status of the waste shipment as the building owner's representative.

Response: DSHS disagrees and declines to revise the rule in response to this comment. These requirements from the 2019 draft rules were removed before publishing the 2021 proposed rules in the March 26, 2021, issue of the *Texas Register.*

Comment: A commenter suggested that DSHS delete the requirement in §296.58(c)(11)(A) for an asbestos consultant or the consultant's designated asbestos project manager or asbestos air monitoring technician project monitor (AMT/PM) to inspect the containment at the start of the abatement and replace the requirement with "shall inspect the containment as necessary throughout each day to observe the containment for compliance." The commenter is concerned that if licensees are required to inspect the containment at the start of the project each day then licensees will neglect to inspect the containment at other appropriate times.

Response: DSHS agrees and revises §296.58(c)(11)(A) to include the term "as necessary" to provide flexibility for the consultant to specify whether it is necessary to enter containment to adequately inspect work.

Comment: One commenter suggested deleting the requirement from §296.59(c)(1) and (2) for an asbestos consultant agency's responsible person to "ensure" compliance with the rules because the responsible person cannot "ensure" the acts of others.

Response: DSHS disagrees and declines to revise the rule in response to this comment. This requirement from the 2019 draft rules was removed before publishing the 2021 proposed rules in the March 26, 2021, issue of the *Texas Register.*

Comment: A commenter suggested removing the requirement in §296.59(c)(6) for an asbestos consultant to comply with abatement practices and procedures specified in the rule because asbestos consultants do not perform asbestos abatement.

Response: DSHS agrees with revising the rules in response to this comment. The abatement practice and procedures sections include responsibilities of the asbestos consultant or the consultant's designated project manager or AMT/PM in §§296.213(b)(6)(B)(vi), 296.232(a)(3), 296.232(b)(9), 296.232(b)(11), 296.233(c), 296.233(d)(9), and 296.234(b)(6) as well as the asbestos abatement contractor. DSHS amended §296.59(c)(7) - (10) to limit the requirements to an asbestos abatement consultant's responsibilities in the specified sections, as applicable.

Comment: A commenter suggested that the title of the project manager licensee in §296.62 be changed to project monitor and references to project management be changed to project monitoring or project administration to better match the duties of the current asbestos project manager and asbestos consultant license types and the federal accreditation type for project monitor in the Asbestos MAP that sets forth training requirements DSHS adopts in part. In addition, the commenter suggested replacing the word "verify" with "observation for general compliance" when referring to the relevant duties of these licensees.

Response: DSHS disagrees and declines to revise the rule in response to this comment. References to "verify" and "project management" made in the 2019 draft rules were removed before publishing the 2021 proposed rules in the March 26, 2021, issue of the *Texas Register.* Additionally, the Act §1954.102 authorizes DSHS to determine and specify the scope of any license it deems necessary in addition to those listed in that section. The section requires the air monitoring technician (AMT) license type but is silent as to a project monitor or project manager type of license. The "project monitor" accreditation type is not a mandated accreditation category in the Environmental Protection Agency MAP, and it includes the combined duties of both the DSHS project manager and AMT license types. Changing the name of the project manager license type to project monitor would not be consistent with the MAP accreditation type or the Act and would cause confusion. Most licensed project managers are also licensed AMTs, and although some may prefer a combined license type it isn't clear whether all individuals holding an AMT license can meet the project manager license qualifications or if they desire to hold both license types. It would be an added burden to licensees to force an AMT to meet the requirements of a project manager. For this reason, DSHS created a new license type to the proposed rules that combines the qualifications and responsibilities of the current project manager and AMT into the new AMT/PM license type and plans to phase out the project manager license type.

Comment: A commenter inquired what was meant by the approval number of the asbestos training instructor in §296.71(c)(1)(B) that the asbestos training provider is required to include when submitting a training course notification.

Response: DSHS agrees with revising the rule to delete the approval number in response to this comment.

Comment: One commenter suggested deleting the requirement in §296.71(c)(2)(A)(i) for a training provider to amend a training course notification for a change in training instructor because the training provider may change last minute due to illness, emergencies, or other scheduling conflicts.

Response: DSHS agrees with revising the rule to allow a training provider to provide an alternate training instructor that meets the qualifications and is approved to teach the notified course when submitting a training course notification.

Comment: A commenter suggested deleting the limitation in §296.71(c)(2)(B)(ii) for a training provider to amend a training course notification for a change in the language of the asbestos abatement worker training course.

Response: DSHS agrees with revising the rule to allow a training provider to amend a notification for a change in the language of the asbestos abatement worker training course and adds this language in §296.71(c)(2)(A)(v).

Comment: One commenter suggested adding the word "any" to §296.71(g) to clarify that a licensed asbestos training provider should submit only updated training material for each training course the training provider wished to continue teaching.

Response: DSHS agrees with adding the word "any" to clarify this requirement.

Comment: A commenter suggested adding clarification to §296.71(h)(1)(B)(i) to confirm that an approved asbestos training instructor remains approved without having to resubmit supporting documents.

Response: DSHS agrees with revising §296.71(h)(4) to specify that documents do not need to be resubmitted for an approved instructor for asbestos training instructors approved before the effective date of the rule.

Comment: One commenter suggested renumbering §296.73 to §296.72.

Response: DSHS disagrees with revising the rule in response to this comment. Section 296.72 is reserved for future rulemaking and intentionally skipped.

Comment: One commenter suggested that the requirement for a new training instructor license be deleted. Training providers are charged the highest licensing fee of $1,070 and in practice the new training instructor licensing fee of $100 will be paid by

the training provider in addition to the training provider's licensing fee.

Response: DSHS disagrees and declines to revise the rule in response to this comment. The referenced 2019 draft rule language for a new training instructor license was removed and the training provider licensing fee in §296.91(c)(15) was reduced from $1,070 to $963 before publishing the 2021 proposed rules in the *Texas Register.*

Comment: A commenter suggested adding definitions to the rule for the "delegated agent" and "authorized representative" of the building owner to specifically exclude a general contractor from acting in either of these roles as referenced in §296.191(a)(1) and §296.191(a)(5)(A). A general contractor acting on behalf of the building owner may hire the asbestos abatement contractor and the asbestos consultant agency that the commenter states is a conflict of interest.

Response: DSHS disagrees and declines to revise the rule in response to this comment. Neither NESHAP nor the Act prohibit a general contractor from acting as a building owner's delegated agent or authorized representative. Adding this restriction to the rule would be more stringent than both the Act and NESHAP.

Comment: One commenter suggested adding the phrase "and prior to conducting any asbestos-related activity" to §296.191(a)(2) to clarify that the requirement to have ACBM abated should be limited to material that may be disturbed by the operations and maintenance, renovation, or demolition activity.

Response: DSHS agrees with revising the rule to "have ACBM that may be disturbed by the operations and maintenance, renovation, or demolition activity abated" as referenced in §296.191(a)(2), §296.191(b) and (c) in response to this comment.

Comment: A commenter suggested adding a requirement to §296.191(a)(3) for an individual or company conducting a renovation or demolition activity in a public building at the direction of a tenant or subtenant responsible for complying with the rules. The recommended revision requires the building owner to notify those that perform renovation or demolition activities of the presence of ACBM and their responsibility to comply with the rules and relieves the building owner of the responsibility for complying with the rules for a renovation or demolition activity that is not directed or authorized by the building owner.

Response: DSHS disagrees with revising the rule in response to this comment. The suggestion imposes a new requirement to individuals and contractors and potentially small business owners. As federal and state law places responsibility for disturbance of building materials on the building owner the building owner must do what is necessary to comply with the rule. A building owner may set their own business practices in place to determine how to best comply with the rules.

Comment: One commenter suggested deleting §296.191(a)(5)(D) because it is repeated in §296.191(a)(3).

Response: DSHS agrees to revise the rule in response to this comment. Although the two referenced paragraphs have some of the same language, there are slight differences in the requirements. DSHS reorganized this subsection to eliminate the repetitive language.

Comment: A commenter questioned the rule requirement in §296.191(c) for a facility owner to ensure compliance with NESHAP during periods of vacancy. The commenter inquired why anyone would be in a building subject to NESHAP that is vacant.

Response: DSHS disagrees and declines to revise the rule in response to this comment. The requirement is consistent with current rule and is referring to compliance with the NESHAP requirements such as conducting an asbestos survey before any renovation or demolition even when the building is vacant.

Comment: One commenter suggested adding "must" to §296.191(d)(6) describing two ways to meet the mandatory asbestos survey requirement. The commenter reasoned that if there are only two ways then a public building owner must use one of them to comply with the rule.

Response: DSHS agrees to revise the rule as suggested.

Comment: A commenter suggested deleting §296.191(d)(6)(B) allowing a certification that no materials used to construct the building contains asbestos from a Texas-registered architect or Texas-licensed professional engineer be used in lieu of an asbestos survey. In addition, neither NESHAP nor the Occupational Safety and Hazard Administration (OSHA) with regard to asbestos allow for a certification to be used in lieu of an asbestos survey.

Response: DSHS agrees to revise the rule to clarify that the certification does not satisfy the NESHAP or OSHA requirement for an asbestos survey. This provision is specified in the Act §1954.259(b)(2) and cannot be deleted.

Comment: One commenter suggested specifying in §296.191(d)(6)(B) a cutoff date before which a certification written to be used in lieu of an asbestos survey cannot be used. In addition, the commenter suggested allowing a certification only if the original Texas-registered architect of record and all MSDSs or SDSs are available.

Response: DSHS disagrees and declines to revise the rule in response to this comment. The Act does not state that the asbestos certification provision applies only to buildings constructed after a specific date. The suggested revision would be more stringent than the Act.

Comment: A commenter suggested adding current rule language to §296.191(d)(6)(B) requiring that a certification used in lieu of an asbestos survey be accompanied by the supporting MSDS, SDS, or both and any asbestos survey reviewed by the Texas-registered architect or Texas-licensed professional engineer who made the certification. In addition, the commenter suggested creating a recordkeeping requirement for the building to retain the supporting records.

Response: DSHS agrees to revise the rule in response to this comment. Requiring that a certification be accompanied by the referenced supporting documents is more stringent that the Act. However, DSHS revised the rule to add a recordkeeping requirement for the building owner in §296.191(d)(6)(B) and in new §296.291(j).

Comment: One commenter suggested revising the asbestos abatement contractor's requirement in §296.211(h)(1)(D) and (h)(2)(B) to post the asbestos consultant's ambient air monitoring results the day after sampling if analyzed on site and no later than the third day after sampling if analyzed off site. Because a consultant represents and provides project documents to the building owner, the commenter suggests requiring the contractor post results only when there is an issue that needs correction. The commenter suggested as an alternative, revising the rule to

require air sampling results no later than 24 hours after receipt of analytical results for samples analyzed offsite and no later than 24 hours after analysis for samples analyzed onsite.

Response: DSHS disagrees and declines to revise the rule in response to this comment. The referenced 2019 draft rule language requiring the contractor to post air monitoring results was removed from the rule before publishing the 2021 proposed rules in the *Texas Register.* The rule requires the consultant to document that the consultant provide air monitoring results to the contractor verbally within the specified time frame. In addition, a consultant may design a sampling strategy that differs from the time frames if the consultant includes in the specifications and plans why the deviation is necessary and any additional controls put in place as a result of the deviation.

Comment: A commenter suggested that the flow range for Transmission Electron Microscopy (TEM) of 0.5 - 10 liters per minute (LPM) was left out of §296.211(h)(1).

Response: DSHS disagrees and declines to revise the rule in response to this comment. For consistency with federal regulations, the rule allows the use of the AHERA protocol to determine the volume and flow rate for TEM in accordance with Appendix A of AHERA.

Comment: One commenter suggested revising the rule to move the phrase "where feasible" in §296.211(h)(1)(B)(ii)(III). In some cases, such as when the negative air is discharged out of the second floor or higher, it is not possible to collect air samples from outside the discharge airstream. The current placement of "where feasible" in the rule would make it a violation in cases like these.

Response: DSHS agrees with the suggested edit to provide an option to the contractor when it is not possible to collect air samples outside the airstream for example when air is exhausted through a second-floor window.

Comment: A commenter inquired why DSHS specifies a minimum of two samples for clearance in §296.211(h)(1)(C)(ii).

Response: DSHS specified a minimum requirement of two samples for each containment to enable the asbestos consultant to compare results of at least two samples to reduce the margin of error and better determine if there is any discrepancy. However, an asbestos consultant may design a more stringent sampling strategy for projects that the consultant determines needs more sampling to achieve accurate clearance results, such as a large or irregularly shaped containment. In addition, if OSHA or AHERA regulations apply, DSHS revised the rule to clarify that the number of samples must be in accordance with those regulations.

Comment: One commenter suggested adding a requirement to §296.212(a)(5)(F) for a building owner entering a containment to have a medical examination as required by OSHA and be fit tested to wear a respirator before gaining access to a containment. The commenter indicated that it would be negligent and potentially expose the building owner to unsafe conditions if the owner did not have an exam and fit test to wear a respirator. In addition, an asbestos licensee may be held liable in the event of a health-related incident. Another commenter suggested this be deleted because it conflicts with other laws and standards, including OSHA.

Response: DSHS agrees to revise §§296.212(a)(5)(F), 296.213(b)(2)(F), 296.232(b)(1)(F), 296.233(d)(1)(F), and 296.234(b)(1)(F) of the rules to require a building owner comply with all other applicable health and safety procedures.

Comment: A commenter suggested adding the requirement that a HEPA vacuum meet the standard of ASTM F1977-04, the standard for HEPA vacuums to §296.212(b)(11).

Response: DSHS agrees to revise the rule to specify that a HEPA vacuum that meets the ASTM standard for HEPA vacuums meets the HEPA vacuum requirement of the rules.

Comment: One commenter suggested deleting the requirement from §296.212(b)(12) that HEPA units be operated with unrestricted exhaust. Asbestos abatement contractors typically tie the loose ends and put slits in them to allow air to flow out. If the required -0.02 inches of water column pressure is met that should be sufficient to comply with the rule.

Response: DSHS agrees to revise the rule to specify that HEPA units be operated with unrestricted exhaust unless it is not feasible. In addition, the consultant has the option to deviate from the minimum requirements if it is as protective of public health.

Comment: Two commenters suggested deleting the requirement in §296.212(b)(3) to put a critical barrier on a suspended ceiling that is open to an adjacent area. One of the commenters suggested adding a provision that specifies that if a minimum of -0.025 inches of water column pressure is achieved a critical barrier is not required on a suspended ceiling open to an adjacent area.

Response: DSHS disagrees and declines to revise the rule in response to this comment. This rule language clarifies the current rule requirement in §295.60(b)(3) for a critical barrier, such as impermeable plastic sheeting, to be used to separate regulated areas where abatement is conducted from adjacent areas, and which further specifies that all openings between containment areas and adjacent areas must be sealed. The rule language clarifies that a lay-in suspended ceiling grid system where the space above the grid is open to other rooms that are not part of the containment is an opening that must be sealed with a critical barrier. The critical barrier prevents asbestos fibers from escaping the containment and entering other areas of the building. In addition, §296.212(a)(1) allows a licensed asbestos consultant to specify work practices that vary from the minimum requirements of the section, including critical barriers on a suspended or drop-in ceiling, as long as the work practices specified are as protective of public health. Adding a provision is not required to allow for the suggested variance.

Comment: One commenter suggested deleting the new alternative method in §296.233 for small projects and repetitive tasks. This section requires a clearance-level assessment be conducted in a negative pressure containment to assess the potential fiber release when the procedure is conducted without a containment. However, the environment inside a negative pressure containment pulls asbestos fibers away from the work area and into the HEPA unit to filter the air and exhaust it to the outside creating negative pressure and lowering the fiber concentration. The commenter also suggested that there is too much falsification of air monitoring data conducted in the field and the clearance-level assessment will largely include false data.

Response: DSHS agrees and revises §296.233(c)(1) to remove the requirement for a clearance-level assessment be conducted in a negative pressure containment. A negative pressure environment will result in a lower asbestos fiber concentration than

what will be released when the alternative method is implemented with the use of the methods assessed by the asbestos abatement consultant. In addition, the rules do not require an AMT to conduct analysis in the field during the clearance-level assessment or when using the assessed methods.

Comment: Two commenters suggested deleting the removal of cement-asbestos panels from the list of eligible activities in §296.234, the new alternative procedure for removal of whole components. Cement fiberboard is typically very old, weather exposed, and deteriorated. The process of removing the bolts and washers will release fibers.

Response: DSHS disagrees and declines to revise the rule in response to this comment. Section 296.234(a)(2) specifies that if cement fiberboard is deteriorating as described by the commenters the method may not be used.

Comment: One commenter suggested that a supervisor not be allowed to conduct a final visual inspection due to a conflict of interest.

Response: DSHS disagrees and declines to revise the rule in response to this comment. The referenced 2019 draft rule language allowing a supervisor to do a final visual inspection was deleted before publishing the 2021 proposed rules in the *Texas Register*.

Comment: A commenter inquired what was meant by "each facility" in §296.251(l)(1) and questioned whether an independent school district had to submit a consolidated asbestos notification for each building on each campus.

Response: DSHS declines to revise the rule in response to this comment. DSHS explains that a facility may be notified on a single consolidated notification if the buildings are at the same address or location/campus. A large company or school having buildings located at a different location or street address must make consolidated notifications for each location/address.

Comment: One commenter suggested deleting the requirement in §296.291(g)(1) to label all slides with the project name, date and time of analysis, and sample location. This requirement is not practical due to the size of the slide. The commenter suggested adding the requirement to label the slides with a sample number corresponding to a sample data log to include the required information.

Response: DSHS disagrees and declines to revise the rule in response to this comment. The referenced 2019 draft rule language was revised to require identification of the information on the slide instead of requiring that information be on the slide itself before publishing the 2021 proposed rules in the *Texas Register.*

Comment: A commenter suggested adding a requirement to §296.311 that holds a Texas-registered architect or Texas-licensed professional engineer who makes a certification for the purposes of complying with the mandatory survey requirement responsible for the misuse of this method. DSHS should be able to cite a person who engages in the misconduct of an asbestos-related activity the same as it would one of its own licensees. The commenter also suggested adding a mechanism to relay evidence of misconduct by an architect or engineer to their respective boards for further investigation.

Response: DSHS declines to revise the rule to add a requirement for disciplinary action against an architect or engineer. However, DSHS referred allegations of licensee misconduct to the Texas licensing boards and regulatory agencies authorized to administrate complaints made against those they license and will continue to do so as needed. Additionally, DSHS added a revision to §296.191(d)(6)(B) that complaints against an architect or engineer will be referred as needed.

Comment: One commenter suggested revising §296.318(b) to say that DSHS "should" impose an administrative penalty against a person who violates this chapter, the Act, or "rules adopted or" an order issued under the Act or this chapter.

Response: DSHS disagrees with the suggested revision to replace "may" with "should" because it neither follows standard rule formatting nor creates a requirement for DSHS or the regulated community. In addition, this gives DSHS the flexibility to suspend or revoke a license or deny an application for licensure in addition to assessing an administrative penalty. DSHS disagrees with the suggested addition of "rules adopted" because this rule itself is the rule adopted under the referenced chapter.

A minor editorial change was made to §296.2(c) to insert "DSHS's" in place of "Texas Department of State Health Services'."

Minor editorial changes were made to §296.191(d)(3) and §296.191(d)(6)(A) to correct rule references for §296.21(93).

A minor editorial change was made to §296.233(b)(6) to delete a reference to incorrect license types.

SUBCHAPTER A. GENERAL PROVISIONS

25 TAC §§296.1 - 296.4

STATUTORY AUTHORITY

The new rules are authorized by Texas Government Code, §531.0055, and Texas Health and Safety Code, §1001.075, which authorizes the Executive Commissioner of HHSC to adopt rules and policies necessary for the operation and provision of health and human services by DSHS, for the administration of Texas Health and Safety Code, Chapter 1001, to implement Texas Occupations Code, Chapter 1954; Texas Health and Safety Code, §12.0111, which requires DSHS to collect fees for issuing or renewing a license; and Texas Health and Safety Code §161.402, which requires the Executive Commissioner to adopt rules designating the materials or replacement parts for which a person must obtain a material safety data sheet before installing the materials or parts in a public building.

§296.2. Reference of Federal Standards.

(a) Adoption by reference. The Executive Commissioner of the Health and Human Services Commission (executive commissioner) adopts by reference and enforces the following asbestos-related federal regulations as part of this chapter:

(1) the asbestos-specific provisions of the National Emission Standards of Hazardous Air Pollutants specific to asbestos, 40 CFR Part 61, Subpart M, regarding demolition and renovation activities: §61.140, adopted effective November 20, 1990; §61.141, amended effective June 19, 1995; §61.145, amended effective January 16, 1991; §61.146, amended effective June 19, 1995; §61.148, adopted effective November 20, 1990; §61.150, amended effective November 17, 2003; §61.152, amended effective November 20, 1990; §61.156, amended effective August 19, 2004; §61.157, adopted effective November 20, 1990; and Appendix A, amended effective June 19, 1995; and

(2) except as otherwise provided in this paragraph, 40 CFR Part 763, Subpart E, (relating to Asbestos-Containing Materials in Schools) adopted under the Asbestos Hazard Emergency Response

Act: §§763.80-763.86, adopted effective October 30, 1987; §763.87, amended effective June 19, 1995; §763.88, adopted effective October 30, 1987; §763.90, amended effective August 3, 2012; §763.91 and §763.92, amended effective November 15, 2000; §§763.93-763.97, adopted effective October 30, 1987; §763.98, amended effective October 13, 2005; §763.99, adopted effective October 30, 1987; Appendix A, adopted effective October 30, 1987; Appendix C and Appendix D, amended effective August 23, 2019; and Appendix E, amended effective June 19, 1995. The executive commissioner does not adopt from Appendix C (relating to Asbestos Model Accreditation Plan), the Environmental Protection Agency's (EPA) recommended project monitor accreditation category in its Asbestos Model Accreditation Plan.

(b) References to federal standards, guidance, and analytical methods. The executive commissioner references the following asbestos-related federal regulations, guidance documents, and analytical methods in this chapter:

(1) the provisions of the National Institute of Standards and Technology, 15 CFR Part 285, §§285.1-285.3, §§285.5-285.14, effective May 30, 2001, §285.4, amended effective December 20, 2011, and §285.15 amended effective July 3, 2007 (relating to National Voluntary Laboratory Accreditation Program);

(2) the provisions of OSHA, 29 CFR Part 1910, Subpart H, §1910.120, amended effective July 15, 2019 (relating to Hazardous waste operations and emergency response);

(3) the provisions of OSHA, 29 CFR Part 1910, Subpart I, §1910.132, amended effective January 17, 2017 (relating to General requirements);

(4) the provisions of OSHA, 29 CFR Part 1910, Subpart I, §1910.134, amended effective July 8, 2011 (relating to Respiratory protection);

(5) the provisions of OSHA, 29 CFR Part 1910, Subpart Z, §1910.1001, amended effective July 15, 2019, Appendix A, amended effective October 11, 1994, and Appendix B, amended effective June 29, 1995 (relating to Asbestos);

(6) the provisions of OSHA, 29 CFR Part 1910, Subpart Z, §1910.1200, amended effective February 8, 2013 (relating to Hazard Communication);

(7) the provisions of OSHA, 29 CFR Part 1926, Subpart C, §1926.32, amended effective June 30, 1993 (relating to Definitions);

(8) the provisions of OSHA, 29 CFR Part 1926, Subpart Z, §1926.1101, amended effective July 15, 2019 (relating to Asbestos);

(9) the provisions of EPA, 40 CFR Part 763, Subpart G, effective December 15, 2000 (relating to Asbestos Worker Protection);

(10) the provisions of Pipeline and Hazardous Materials Safety Administration, 49 CFR Part 172, Subpart H, §172.700 and §172.701, effective May 15, 1992, §172.702, amended effective, May 30, 1996, and §172.704, amended effective December 23, 2015 (relating to Hazardous materials table, special provisions, hazardous materials communications, emergency response and information, training requirements, and security plans);

(11) the NIOSH 7400 analytical method, entitled, "Asbestos and Other Fibers by PCM," published in the NIOSH Manual of Analytical Methods, Fifth Edition, Third Issue, June 14, 2019;

(12) the EPA/600/R-93/116 analytical method, entitled, "Method for the Determination of Asbestos in Bulk Building Materials," July 1993; and

(13) the EPA Publication for O&M activities entitled, "Managing Asbestos in Place: A Building Owner's Guide to Operations and Maintenance Programs," (also known as the EPA Green Book), July 1990.

(c) Availability. Links to the documents in subsection (a) and (b) of this section are available on the DSHS's Asbestos Program website, http://www.dshs.texas.gov/asbestos/. Copies of the documents listed in subsection (a) of this section are available for review during normal business hours at DSHS's Consumer Protection Division office in Austin, Texas, and at DSHS regional offices.

(d) State and federal standards. A requirement otherwise stated in applicable state statute or this chapter that is more stringent than a federal standard adopted by reference in subsection (a) of this section must be met.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 10, 2021.

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Barbara L. Klein
General Counsel
Department of State Health Services
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For further information, please call: (512) 834-6787

SUBCHAPTER B. DEFINITIONS

25 TAC §296.21

STATUTORY AUTHORITY

The new rule is authorized by Texas Government Code, §531.0055, and Texas Health and Safety Code, §1001.075, which authorizes the Executive Commissioner of HHSC to adopt rules and policies necessary for the operation and provision of health and human services by DSHS, for the administration of Texas Health and Safety Code, Chapter 1001, to implement Texas Occupations Code, Chapter 1954; Texas Health and Safety Code, §12.0111, which requires DSHS to collect fees for issuing or renewing a license; and Texas Health and Safety Code §161.402, which requires the Executive Commissioner to adopt rules designating the materials or replacement parts for which a person must obtain a material safety data sheet before installing the materials or parts in a public building.

§296.21. Definitions.

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

(1) Abatement preparation--Preparation before asbestos abatement begins, which includes the following activities:

(A) removing any movable objects from the interior space of a public building once an asbestos abatement contractor takes control of that space for the purpose of asbestos abatement;

(B) pre-cleaning, wet wiping, HEPA vacuuming, and sealing a penetration or opening;

(C) installing plastic sheeting, such as a critical barrier, any part of a decontamination system, or any part of the water line connections to a shower, drain, or filtration;

(D) setting-up or using a load-out or bag-out system;

(E) selecting, installing, or maintaining a respiratory system or fiber reduction system (such as misting or spraying);

(F) posting warning signs;

(G) installing engineering controls, including local exhaust ventilation equipped with a HEPA filter dust collection system, construction of a containment or isolation mechanism to control processes producing asbestos dust, and ventilation of the regulated area to move contaminated air away from the breathing zone of persons in containment and toward a filtration or collection device equipped with a HEPA filter;

(H) installing scaffolding in an area in which asbestos may be disturbed during the installation; and

(I) installing, setting-up, and calibrating monitoring devices, including sampling systems and manometers.

(2) ACBM--Asbestos-containing building material. Surfacing, TSI, or miscellaneous ACM that is found in, or on interior structural members or other parts of, a public or commercial building.

(3) Accredited person--A person who has attended and passed, within the last year, the appropriate asbestos course, as described in the MAP, that:

(A) has been approved by DSHS and offered by a DSHS-licensed asbestos training provider;

(B) has been approved by another state that has the authority from EPA to approve courses; or

(C) has been approved directly by EPA.

(4) ACM--Asbestos-containing material. Materials or products, including any single material component of a structure or any layer of a material sample that, when analyzed for asbestos using the method specified in 40 CFR Part 763, Subpart E, Appendix E, Section 1 (relating to Polarized Light Microscopy), by a laboratory accredited by the NVLAP for polarized light microscopy, or by using the EPA-recommended method listed in EPA/600/R-93/116 for transmission electron microscopy, are found to contain:

(A) for purposes of complying with this chapter's provisions relating to a public building, 1.0% or more asbestos;

(B) for purposes of complying with AHERA provisions relating to a school building, greater than 1.0% asbestos;

(C) for purposes of complying with NESHAP provisions relating to commercial buildings and facilities, greater than 1.0% asbestos; or

(D) for purposes of complying with OSHA provisions relating to occupational asbestos exposure, greater than 1.0% asbestos.

(5) Act--The Texas Asbestos Health Protection Act, Texas Occupations Code, Chapter 1954.

(6) ACWM--Asbestos-containing waste material. This term includes mill tailings or any waste material that contains asbestos and is generated by a source subject to the provisions of NESHAP or this chapter. This term includes filters from control devices, friable asbestos waste material, and bags or other similar packaging contaminated with asbestos. As applied to demolition and renovation operations, this term also includes RACM and materials contaminated with asbestos, including disposable equipment and clothing.

(7) Adequately wet--Sufficiently mixed or penetrated with liquid to prevent the release of particulates. If visible emissions are observed coming from ACM, then that material is not adequately wet. However, the absence of visible emissions is not sufficient evidence of being adequately wet.

(8) Aggressive air sampling--Collecting air samples after walls, ceilings, and floors are swept with the exhaust of an unaltered leaf blower that is operated per the manufacturer's instructions and is directed at all surfaces to cause loose asbestos fibers to become airborne.

(9) AHERA--For purposes of this chapter, the Asbestos Hazard Emergency Response Act of 1986, 15 USC §2641, et seq., and EPA's implementing regulations under 40 CFR Part 763, Subpart E (relating to Asbestos-Containing Materials in Schools), adopted by reference as part of this chapter.

(10) Airlock--A system for permitting movement into and out of the containment that controls air-flow patterns such that the air flows only towards the inside of the enclosure to which the decontamination system is attached. An airlock may consist of overlapping curtains, partitions to a separate chamber, or both.

(11) Air monitoring--The collection of air samples for the analysis of fibers.

(12) Amended water--Water to which a surfactant (wetting agent) has been added to increase the ability of the liquid to penetrate ACM.

(13) Asbestos--The asbestiform varieties of chrysotile, amosite, crocidolite, tremolite, anthophyllite, and actinolite.

(14) Asbestos abatement--Asbestos removal, encapsulation, or enclosure to reduce or eliminate, or that has the effect of reducing or eliminating, a concentration of asbestos fibers or an ACM.

(15) Asbestos abatement activity--Asbestos abatement, or any on-site abatement preparations or cleanup related to the abatement.

(16) Asbestos abatement project design--The design for an asbestos abatement project that includes, at minimum:

(A) the review of the survey report of a public building for ACBM;

(B) the evaluation and selection of appropriate asbestos abatement methods;

(C) the preparation of the project layout;

(D) the preparation of specifications and plans; and

(E) the determination of environmental controls, abatement procedures, and personal protection equipment to be employed every day of the asbestos abatement activity, from the start through the completion date of the project.

(17) Asbestos-related activity--Activities including:

(A) the removal, encapsulation, or enclosure of asbestos, whether intentional or unintentional;

(B) the preparations for final clearance;

(C) the performance of an asbestos survey;

(D) the development of an asbestos survey report, management plan, or response action;

(E) the design of an asbestos abatement project;

(F) the collection or analysis of a bulk asbestos sample;

(G) the monitoring for airborne asbestos; or

(H) any other activity for which a license is required under the Act.

(18) Asbestos removal--Any action that disturbs, dislodges, strips, or otherwise takes away asbestos fibers or ACM.

(19) ASTM E1494-18--The 2018 edition of the Standard Practice for Testing Physical Properties of Friable Surfacing Materials developed by ASTM International, www.astm.org.

(20) Bag-out area--An area distinct from the decontamination area that is used to decontaminate asbestos waste bags before placing them into outer bags.

(21) Building owner--The owner of record of a building.

(22) Category I nonfriable ACM--Asbestos-containing packings, gaskets, resilient floor-covering material, and asphalt roofing products determined to be ACM.

(23) Category II nonfriable ACM--Any material determined to be ACM, excluding Category I nonfriable ACM, that when dry, cannot be crumbled, pulverized, or reduced to powder by hand pressure.

(24) CFR--The Code of Federal Regulations.

(25) Commercial building--The interior space of any building that does not otherwise fall within the definition of a public building. Interior space includes exterior hallways connecting buildings, porticos, and mechanical systems used to condition interior space. This term includes industrial buildings, federal government-owned buildings, warehouses, and factories. This term does not include a detached single private residence or single apartment building with four or fewer dwelling units.

(26) Commissioner--The commissioner of the Department of State Health Services.

(27) Containment--A portion of the regulated area that has been sealed and placed under negative air pressure using negative air machines with HEPA filters.

(28) Critical barrier--An impermeable barrier, such as plastic sheeting or dividing wall, sealing any opening between the containment and adjacent areas.

(29) Decontamination area--An enclosed area consisting of an equipment room, shower room, and clean room that is used for the decontamination of persons, materials, and equipment that are contaminated with asbestos. This area is adjacent to, and where feasible, connected to, the containment.

(30) Demolition--The wrecking or removal of any load-supporting structural member of a public building or facility for the purpose of razing the building or portion of the building to the ground, or the intentional burning of any public building or facility. The removal of load-supporting structural members followed by resupport of the structure is considered renovation, not demolition. Moving a building from its foundation is considered demolition.

(31) Designated person--The individual designated by an LEA in accordance with, and to ensure compliance with, AHERA.

(32) Disturbance--Activities that disrupt the matrix of ACM, render ACM friable, or generate visible debris from ACM.

(33) DSHS--The Department of State Health Services.

(34) Emergency renovation operation--A renovation operation that was not planned but results from a sudden, unexpected event that, if not immediately attended to, presents a safety or public health hazard, is necessary to protect equipment from damage, or is necessary to avoid imposing an unreasonable financial burden. This term includes operations necessitated by nonroutine failures of equipment or systems, such as water, steam, and electrical systems.

(35) Emergency responder--Any person responsible for mitigation activities in a medical emergency, fire emergency, hazardous material emergency, or natural disaster.

(36) Employee--A person who works in expectation of compensation in the service of an employer and whose work performance is subject to the direction and control of the employer.

(37) Encapsulation--A method of control of asbestos fibers in which the surface of ACM is penetrated by or covered with a coating prepared for that purpose. Painting with a non-encapsulant that does not disturb asbestos is not an asbestos-related activity.

(38) Enclosure--The construction of an airtight, impermeable, permanent wall and ceiling or comparable barrier around ACM to prevent the release of asbestos fibers into the air.

(39) EPA--The United States Environmental Protection Agency.

(40) Exposure assessment--A determination by an employer in accordance with 29 CFR §1926.1101(f) of the level of employee exposure to asbestos fibers by analyzing breathing zone air samples that are representative of an 8-hour time-weighted average and a 30-minute representative short-term exposure of each employee.

(41) Facility--Any institutional, commercial, public, industrial, or residential structure, installation, or building (including any structure, installation, or building containing condominiums or individual dwelling units operated as a residential cooperative, but excluding a single residential building having four or fewer dwelling units); any ship; and any active or inactive waste disposal site. For purposes of this chapter, any building, structure, or installation that contains a loft used as a dwelling is not considered a residential structure, installation, or building.

(42) Facility owner or operator--Any person who owns, leases, operates, controls, or supervises the facility being demolished or renovated or any person who owns, leases, operates, controls, or supervises the demolition or renovation operation, or both.

(43) Federal government-owned building--Any building owned by the United States Federal Government. This term does not include space leased by the United States Federal Government.

(44) Friable asbestos material--Any ACM that, when dry, can be crumbled, pulverized, or reduced to powder by hand pressure.

(45) HEPA--A high-efficiency particulate air filtration, capable of trapping and retaining 99.97% of mono-dispersed airborne particles that are 0.3 micron or larger in diameter.

(46) HVAC--Heating, ventilation, and air conditioning.

(47) Independent third-party air monitor--A person retained to collect area air samples to be analyzed for the owner of the building or facility being abated.

(48) Installation--A building or structure, or group of buildings or structures, at a single demolition or renovation site controlled by the same owner or operator. A project involving a single private residence or a single apartment building with no more than four dwelling units is not considered an installation. When there are two or more residential buildings on the same site that are controlled by the same owner or operator, the buildings are considered an installation under NESHAP.

(49) Intact--As defined in 29 CFR §1926.1101(b), ACM that has not crumbled, been pulverized, or otherwise deteriorated so that the asbestos is no longer likely to be bound with its matrix.

(50) Layer--Any constituent of an asbestos bulk sample that exhibits different physical properties, such as color or composition, and can be separated from the rest of the sample with an instrument, such as a modeler's knife.

(51) LEA--Local education agency. An LEA includes:

(A) a public board of education or other public authority legally constituted within a state for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a state, or such combination of school districts or counties as are recognized in a state as an administrative agency for its public elementary or secondary schools;

(B) any other public institution or agency having administrative control and direction of a public elementary or secondary school; and

(C) the owner of any nonpublic, nonprofit elementary or secondary school building.

(52) License--Any license or registration issued under this chapter.

(53) Licensee--A person who has been issued a license or registration by DSHS under this chapter.

(54) Major fiber release episode--Any uncontrolled or unintentional disturbance of ACBM, resulting in a visible emission, which involves the falling or dislodging of more than three square feet or three linear feet of friable ACBM.

(55) Management plan--A written plan for a public building that describes appropriate actions for surveillance and management of ACM in the building.

(56) MAP--Asbestos Model Accreditation Plan. As described in Appendix C (relating to Asbestos Model Accreditation Plan) of AHERA and adopted by reference into this chapter, EPA's model accreditation plan that provides standards for initial training, examinations, refresher training courses, applicant qualifications, decertification, and reciprocity.

(57) Mini-containment--A small walk-in containment that accommodates no more than two people and conforms to its localized work area. A mini-containment is constructed of 6-mil thick plastic sheeting or the equivalent and is kept under negative pressure by means of a HEPA vacuum or similar ventilation unit as described for a mini-enclosure in 29 CFR §1926.1101(g)(5)(vi).

(58) MSDS--Material safety data sheet. (See also the definition of SDS.)

(59) Municipality--A general-law, home-rule, or special-law municipality as defined in the Texas Local Government Code §1.005 (relating to Definitions).

(60) Negative exposure assessment--A demonstration by an employer in accordance with 29 CFR §1926.1101(f) that employee exposure during an operation is expected to remain below the PELS for the duration of the applicable asbestos-related activity.

(61) NESHAP--The EPA National Emission Standards for Hazardous Air Pollutants specific to asbestos, in 40 CFR Part 61, Subpart M (relating to National Emission Standard for Asbestos), as adopted by reference in this chapter.

(62) NIOSH--The National Institute for Occupational Safety and Health.

(63) Nonfriable ACM--ACM that, when dry, cannot be crumbled, pulverized, or reduced to powder by hand pressure.

(64) Nonscheduled renovation operation--A renovation operation necessitated by the routine failure of equipment, which is expected to occur within a given period based on past operating experience, but for which an exact date cannot be predicted.

(65) NVLAP--National Voluntary Laboratory Accreditation Program. NVLAP is a federal program administered by the National Institute of Standards and Technology, an office of the U.S. Department of Commerce. NVLAP provides third-party accreditation to testing and calibration laboratories based on evaluation of their technical qualifications and competence to carry out specific calibrations or tests. Accreditation procedures and requirements are described in 15 CFR Part 285 (relating to National Voluntary Laboratory Accreditation Program), which references clauses 4 and 5 of the international standard, ISO/IEC 17025, as the criteria for accreditation.

(66) O&M activity--Operations and maintenance activity that includes repairs, maintenance, renovation, installation, replacement, or cleanup of building materials or equipment.

(67) OSHA--The Occupational Safety and Health Administration, part of the U.S. Department of Labor.

(68) OSHA regulations--Regulations found in 29 CFR (relating to Labor), including 29 CFR §1926.1101 and portions of 29 CFR Parts 1926 (relating to Safety and Health Regulations for Construction) and 1910 (relating to Occupational Safety and Health Standards), as referenced in this chapter or otherwise applicable to a person subject to this chapter.

(69) Owner or operator of a demolition or renovation activity--Any person who owns, leases, operates, controls, or supervises a facility being demolished or renovated, or any person who owns, leases, operates, controls, or supervises the demolition or renovation operation, or both.

(70) PELS--Permissible exposure limits, as described in 29 CFR §1926.1101(c).

(71) Permit--A license, certificate, approval, registration, consent, or other form of authorization that a person is required by law, rule, regulation, order, or ordinance to obtain to perform an action, or initiate, continue, or complete a project.

(72) Person--A person is:

(A) an individual, including a sole proprietorship; or

(B) a corporation, partnership, governmental subdivision or agency, association, or any other legal entity.

(73) Planned renovation operation--A renovation operation, or a number of renovation operations, in which some RACM will be removed or stripped within a given period of time and that can be predicted. Individual nonscheduled renovation operations are included if a number of renovation operations can be predicted to occur during a given period of time based on operating experience.

(74) Public building--The interior space of a building used, either in the past or at present, or to be used, for a purpose that involves public access or occupancy, such as a school, hospital, or prison. Interior space includes exterior hallways connecting buildings, porticos, and mechanical systems used to condition interior space. The term includes any such interior space during a period of vacancy, including

the period during preparations before demolition. The term does not include:

(A) an industrial facility to which access is limited principally to employees of the facility because of processes or functions that are hazardous to human safety or health;

(B) a federal government-owned building or installation (civilian or military);

(C) a private residence;

(D) an apartment building with no more than four dwelling units;

(E) a manufacturing facility or building that is part of a manufacturing facility, to which access is limited to workers and invited guests under controlled conditions;

(F) a building, facility, or any portion of which, before demolition, has been determined to be structurally unsound and in danger of imminent collapse by a professional engineer or a city, county, or state government official; or

(G) the portion of a building that has become structurally unsound due to demolition.

(75) Public school--An elementary or secondary school operated by publicly elected or appointed school officials in which the program and activities are under the control of these officials and that is supported primarily by public funds.

(76) RACM--Regulated asbestos-containing material. RACM means:

(A) friable asbestos material;

(B) Category I nonfriable ACM that has become friable;

(C) Category I nonfriable ACM that will be or has been subjected to sanding, grinding, cutting, or abrading; or

(D) Category II nonfriable ACM that has a high probability of becoming or has become crumbled, pulverized, or reduced to powder by the forces expected to act on the material in the course of demolition or renovation operations.

(77) Regulated area--An area where on-site asbestos-related activity is performed, and any adjoining area where debris and waste accumulate from such asbestos-related activity, including any area within which airborne concentrations of asbestos exceed or there is a reasonable possibility they may exceed the PELS, in accordance with 29 CFR §1926.1101 (relating to Asbestos).

(78) Renovation--Additions to or alterations of a building, including by removal, repairing, or rebuilding.

(79) Resilient floor-covering material--For purposes of this chapter, this term includes adhesives, sheet vinyl flooring, and resilient tile, such as vinyl composition tile, asphalt tile, and rubber tile.

(80) Response action--A method, including removal, encapsulation, enclosure, repair, and operations and maintenance that protects human health and the environment from friable ACBM.

(81) Responsible person--The individual that is appointed by the licensed asbestos abatement contractor, asbestos operations and maintenance contractor, asbestos laboratory, asbestos consultant agency, asbestos management planner agency, or asbestos training provider as responsible for compliance with the requirements for the licensee under this chapter.

(82) RFCI--Resilient Floor Covering Institute.

(83) School--Any day or residential public or private nonprofit elementary or secondary school, kindergarten through grade 12.

(84) School building--Any structure suitable for use as a classroom, including:

(A) a school facility, such as a laboratory, library, eating facility, or facility used for the preparation of food;

(B) a gymnasium or other facility that is specially designed for athletic or recreational activities for an academic course in physical education;

(C) a facility used for the instruction or housing of students or for the administration of educational or research programs;

(D) a maintenance, storage, or utility facility, including any hallway, essential to the operation of any of the preceding facilities described in this definition;

(E) a portico or covered exterior hallway or walkway; or

(F) an exterior portion of a mechanical system used to condition interior space.

(85) SDS--Safety data sheet. A written or printed material concerning a hazardous chemical that is prepared in compliance with OSHA regulations in 29 CFR §1910.1200(g) (relating to Hazard communication). This term reflects a change in terminology from MSDS and updated format requirements, based upon the adoption of the United Nations' Globally Harmonized System of Classification and Labeling of Chemicals.

(86) Specifications and plans--Site-specific asbestos abatement description, consisting of:

(A) a clear and understandable written description of the determinations made during the asbestos abatement project design, including the work to be performed, such as asbestos abatement methods and air clearance procedures to be used, abatement preparations to be made, and equipment to be used; and

(B) drawings, floor plans, or the equivalent, that distinctly display the location of asbestos abatement activities and equipment to be used with a level of detail and in a size sufficient to make each location visually discernable.

(87) SSSD activities--Small-scale, short-duration activities are work operations where a negative-pressure containment cannot be constructed because of the configuration of the work environment. SSSD activities include tasks, such as removal of asbestos-containing insulation on pipes, removal of small quantities of asbestos-containing insulation on beams or above ceilings, replacement of an asbestos-containing gasket on a valve, installation or removal of a small section of drywall, or installation of electrical conduits through or proximate to ACM. SSSD activities can be further defined as the following:

(A) removal of small quantities of ACM only if required in the performance of another maintenance activity not intended as asbestos abatement;

(B) removal of asbestos-containing TSI, not to exceed amounts greater than those that can be contained in a single, standard (60 inches by 60 inches) glove bag and not intended as asbestos abatement;

(C) minor repairs to damaged TSI that do not require removal;

(D) repairs to a piece of asbestos-containing wallboard; and

(E) repairs, involving encapsulation, enclosure, or removal, to small amounts of ACM only if required in the performance of emergency or routine maintenance activity and not intended solely as asbestos abatement. Such work may not exceed amounts greater than those which can be contained in a single prefabricated mini-containment.

(88) SSSD O&M activity--An O&M activity that is limited to SSSD activities.

(89) Start date--The date defined as:

(A) Asbestos abatement start date. For the purpose of notification to DSHS as required in §296.251 of this chapter (relating to Notifications), the date that the actual disturbance of asbestos begins. Abatement preparation that does not disturb asbestos is not the asbestos abatement start date.

(B) Demolition start date. The date that the demolition begins. Asbestos preparation that does not wreck or remove a load-bearing structural member or move a building from its foundation is not the demolition start date.

(90) Stop date--The date defined as:

(A) Asbestos abatement stop date (completion date).

(i) For the purpose of notification to DSHS as required in §296.251 of this chapter, the date that clearance is achieved as described in §296.211(h)(C)(iii) of this chapter (relating to General Requirements for Asbestos Abatement in a Public Building).

(ii) For removal of resilient floor-covering material in accordance with §296.171 of this chapter (relating to Removal of Resilient Floor-Covering Material), the asbestos abatement stop date is the date that the ACBM is removed from the substrate and properly containerized as required in the RFCI work practices.

(iii) For NESHAP projects, the asbestos abatement stop date is the date that all RACM is removed from the substrate and properly containerized.

(B) Demolition stop date (completion date). In public buildings, commercial buildings, or facilities that do not contain RACM, the date that the wrecking or removal operations of load-bearing structural components or both are completed. In structurally unsound buildings or facilities that contain RACM, the demolition stop date is the date that load-bearing structural components are removed and RACM is containerized or removed from the site in accordance with 40 CFR §61.150 (relating to Standard for waste disposal for manufacturing, fabricating, demolition, renovation, and spraying operations).

(91) Surfacing material--Material that is sprayed on, troweled on, or otherwise applied to surfaces, such as acoustical plaster on ceilings and fireproofing materials on structural members, or other materials on surfaces for acoustical, fireproofing, or other purposes.

(92) Survey--An inspection activity undertaken in a public building, commercial building, or facility to determine the quantities and locations of homogeneous areas of ACBM by assuming suspect material or collecting samples of such material and assessing its condition, whether by visual or physical examination.

(A) This term includes reinspections of friable and nonfriable known or assumed ACBM previously identified, as described in 40 CFR §763.85(b) (relating to Inspection and reinspections).

(B) This term does not include:

(i) a periodic surveillance as described in 40 CFR §763.92(b) (relating to Training and periodic surveillance) performed solely for the purpose of recording or reporting a change in the condition of known or assumed ACBM;

(ii) an inspection performed by an employee or agent of federal, state, or local government solely for the purpose of determining compliance with applicable statutes or regulations; or

(iii) a visual inspection of the type described in 40 CFR §763.90(i) (relating to Response actions) solely for the purpose of determining proper completion of a response action.

(93) Survey report--A report that contains:

(A) for a public building:

(i) a written description, diagram, or both that clearly and accurately identifies and reflects the location of each homogeneous area of suspected ACBM that is assumed to be ACM or was sampled for ACM, including the sampling location for each bulk sample and the dates that each sample was collected;

(ii) a written description of:

(I) the manner used to determine sampling locations;

(II) the estimated amount of ACBM in each homogeneous area in square feet or, for ACBM on piping, in linear feet;

(III) the type of material sampled; and

(IV) the condition and friability of the ACBM, and the assessment of ACBM must conform to generally accepted industry standards, such as the AHERA requirements specified in 40 CFR Part 763, Subpart E (relating to Asbestos-Containing Materials in Schools), §§763.85 - 763.88, which is the required method for schools;

(iii) the name, signature, and, as applicable, accreditation and state of accreditation or license number of the inspector performing each activity;

(iv) the name, signature, and as applicable, accreditation and state of accreditation or license number of the licensed management planner or consultant employing the licensed asbestos inspector performing each activity; and

(v) a copy of the analyses of any bulk samples, the dates of analyses, and a copy of any other laboratory reports pertaining to the analyses; or

(B) for a NESHAP facility, a record of the thorough inspection of the affected facility or part of the facility where the demolition or renovation operation will occur for the presence of asbestos, including Category I and Category II nonfriable ACM that identifies:

(i) the location of ACM; and

(ii) the inspector that performed the survey.

(94) TSI--Thermal system insulation. TSI is ACM applied to pipes, fittings, boilers, breeching, tanks, ducts, or other interior structural components to prevent heat loss or gain, water condensation, or for other similar purposes.

(95) USC--The United States Code.

(96) Working days--Monday through Friday, including a holiday that falls on one of those days.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Barbara L. Klein
General Counsel
Department of State Health Services
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For further information, please call: (512) 834-6787

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SUBCHAPTER C. STANDARDS OF CONDUCT

25 TAC §296.31

STATUTORY AUTHORITY

The new rule is authorized by Texas Government Code, §531.0055, and Texas Health and Safety Code, §1001.075, which authorizes the Executive Commissioner of HHSC to adopt rules and policies necessary for the operation and provision of health and human services by DSHS, for the administration of Texas Health and Safety Code, Chapter 1001, to implement Texas Occupations Code, Chapter 1954; Texas Health and Safety Code, §12.0111, which requires DSHS to collect fees for issuing or renewing a license; and Texas Health and Safety Code §161.402, which requires the Executive Commissioner to adopt rules designating the materials or replacement parts for which a person must obtain a material safety data sheet before installing the materials or parts in a public building.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Barbara L. Klein
General Counsel
Department of State Health Services
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SUBCHAPTER D. LICENSE AND REGISTRATION

25 TAC §§296.41 - 296.62

STATUTORY AUTHORITY

The new rules are authorized by Texas Government Code, §531.0055, and Texas Health and Safety Code, §1001.075, which authorizes the Executive Commissioner of HHSC to adopt rules and policies necessary for the operation and provision of health and human services by DSHS, for the administration of Texas Health and Safety Code, Chapter 1001, to implement Texas Occupations Code, Chapter 1954; Texas Health and Safety Code, §12.0111, which requires DSHS to collect fees for issuing or renewing a license; and Texas Health and Safety Code §161.402, which requires the Executive Commissioner to adopt rules designating the materials or replacement parts for which a person must obtain a material safety data sheet before installing the materials or parts in a public building.

§296.58. Asbestos Consultant.

(a) License required. A person must be licensed as an asbestos consultant to provide asbestos consulting services relating to a public building.

(b) Licensee scope of practice.

(1) An asbestos consultant may:

(A) design an asbestos abatement project;

(B) specify work practices that vary from the minimum requirements, as described in §296.212(a)(1)(A) of this chapter (relating to Standard Asbestos Abatement Practices and Procedures in a Public Building);

(C) collect bulk material samples and plan sampling strategies;

(D) develop a management plan;

(E) perform an asbestos survey and develop an asbestos survey report;

(F) provide consultation regarding compliance with asbestos regulations and standards;

(G) recommend abatement options, prepare contract documents for an asbestos abatement project, and provide technical specifications and plans;

(H) provide the building owner with asbestos project monitoring services, asbestos air monitoring services, or sampling strategies, alone or in combination, to be used during an asbestos abatement project;

(I) recommend appropriate personal protective equipment for an asbestos abatement activity;

(J) designate a project manager or an asbestos air monitoring technician project monitor (AMT/PM) to provide project monitoring and delegate specific responsibilities and authority to the project manager or AMT/PM in writing, for which the consultant, as well as the project manager or AMT/PM performing the delegated responsibility, are responsible;

(K) designate an asbestos air monitoring technician or AMT/PM to provide project air monitoring and delegate specific responsibilities and authority to the AMT or AMT/PM in writing, for which the consultant, as well as the AMT or AMT/PM performing the delegated responsibility, are responsible; and

(L) design, supervise, and direct an exposure assessment for purposes of §296.233(c) of this chapter (relating to Alternative Asbestos Practices and Procedures for Small Projects and Repetitive Tasks in a Public Building) that meet the requirements of that subsection.

(2) An asbestos consultant must not:

(A) design an asbestos abatement project that includes alterations to a building's structure, or its electrical, mechanical, or safety systems, or their components, unless the consultant is or works together with a licensed professional engineer in Texas and the specifications and plans are prepared in accordance with all applicable requirements of Texas Occupations Code, Chapter 1001 (relating to Engineers) and 22 TAC Part 6 (relating to Texas Board of Professional Engineers); or

(B) employ an asbestos inspector, asbestos project manager, asbestos air monitoring technician, AMT/PM, asbestos management planner, or any additional asbestos consultant to work in the capacity of that individual's license unless the asbestos consultant is li-

censed as an asbestos consultant agency, as required in §296.59 of this chapter (relating to Asbestos Consultant Agency).

(c) Licensee responsibilities. When providing the following professional services to the building owner or the building owner's authorized representative, an asbestos consultant must:

(1) provide the building owner or the building owner's authorized representative with a signed written asbestos survey report after completion of an asbestos survey or assessment, as described in §296.53(b) of this chapter (relating to Asbestos Inspector), which must advise the building owner of the recommendation to address ACBM or assumed ACBM that is damaged or separating and the requirement to address ACBM that will be disturbed as part of any renovation, demolition, or O&M activity;

(2) provide a management plan, as required in §296.56(c) of this chapter (relating to Asbestos Management Planner);

(3) design an asbestos abatement project, as described in §296.21(16) of this chapter related to (Definitions);

(4) design and supervise any clearance-level assessment that is performed under §296.233 of this chapter;

(5) prepare site-specific specifications and plans consisting of:

(A) a clear and understandable written description of the determinations made during the asbestos abatement project design including the work to be performed and:

(i) the location and total quantities of homogeneous areas of ACBM to be removed;

(ii) the asbestos abatement methods and air clearance procedures to be used;

(iii) the abatement preparations to be made;

(iv) the equipment to be used; and

(v) the appropriate selection of personal protective equipment to be used; and

(B) drawings, floor plans, or the equivalent, that distinctly display the location of asbestos abatement activities and equipment to be used with a level of detail and in a size sufficient to make each location visually discernable, including the approximate locations of:

(i) the negative air machines;

(ii) the decontamination unit;

(iii) the bag-out area, if used; and

(iv) the boundaries of the containment;

(C) a clear and understandable written description of ACWM disposal methods, including:

(i) labeling of ACWM containers, in accordance with 40 CFR §61.150(a)(1)(iv) and (v) (relating to Standard for waste disposal for manufacturing, fabricating, demolition, renovation, and spraying operations); and

(ii) marking ACWM transport vehicles, in accordance with 40 CFR §61.150(c);

(D) the consultant's signature on every page that addresses the scope of work or contains drawings related to the abatement work; and

(E) a cover page with the consultant's signature, date, license number, and license expiration date;

(6) if required under §296.212(a)(1)(A) of this chapter, receive written approval from DSHS for specifications and plans prepared for an asbestos abatement project design that includes dry removal or no negative air before releasing specifications and plans to the asbestos abatement contractor;

(7) review specifications and plans developed by another asbestos consultant or asbestos consultant agency, for which the consultant must:

(A) review every page that addresses the scope of work or contains drawings related to the asbestos abatement project for which the consultant is preparing documents, as required under this subparagraph;

(i) amend each page, as needed; and

(ii) sign every reviewed page; and

(B) prepare a separate cover page that indicates the adequacy of the specifications and plans, references any amendments, and includes the consultant's signature, date, license number, and license expiration date; the consultant assumes responsibility for the content by signing the cover page;

(8) provide the site-specific specifications and plans used for asbestos abatement and prepared by the consultant, developed by another asbestos consultant or asbestos consultant agency, or both to the building owner before the asbestos abatement begins;

(9) advise on the selection and use of appropriate personal protective equipment for each asbestos abatement activity;

(10) review suggested changes to the asbestos abatement specifications and plans recommended by the consultant's designated project manager or AMT/PM and, if amending specifications and plans:

(A) amend each relevant page of the specifications and plans in writing;

(B) sign every amended page; and

(C) provide the amended specifications and plans to the designated project manager or AMT/PM, building owner, and asbestos abatement supervisor for the project;

(11) provide project monitoring, either personally or through a project manager or AMT/PM to whom the consultant has specifically delegated authority and responsibility as required in subsection (b)(1)(J) of this section, as follows:

(A) enter and inspect the regulated area, containment, or both, as necessary to monitor that asbestos abatement activities are conducted, as required by regulations adopted by reference in §296.2 of this chapter (relating to Reference of Federal Standards), in Subchapter L of this chapter (relating to General Requirements, and Practices and Procedures for Asbestos Abatement in a Public Building), and Subchapter M of this chapter (relating to Alternative Asbestos Practices and Procedures in a Public Building), as applicable, for the duration of the project, every day of asbestos abatement activity, before the start of the asbestos abatement activity for the day, and routinely throughout the day, from the beginning of containment abatement preparation through completion of the removal of containment, final visual inspection of the project site, and loading of ACWM for transport, as applicable, to:

(i) monitor the asbestos abatement activity by observing, reporting, and documenting that the regulated area, contain-

ment, or both is in compliance with this chapter and with the specifications and plans, as applicable;

(ii) identify and document any issue of noncompliance and corrections needed;

(iii) document correction of any identified issue of noncompliance with asbestos abatement activity in a regulated area, containment, or both, as applicable, before work proceeds;

(iv) report any identified issue of noncompliance that was not corrected to DSHS, as required in §296.41(f) of this chapter (relating to License and Registration Requirements);

(B) consult with and notify the asbestos abatement supervisor of:

(i) any issue of noncompliance with the provisions of this chapter and the specifications and plans; and

(ii) corrections that must be made;

(C) remain on-site and in immediate proximity of the regulated area, or the regulated area and containment, as applicable, at all times when an asbestos abatement activity is being conducted and when ACWM is being loaded for transport into a dumpster or other transport container or vehicle;

(12) provide project air monitoring, as required in §296.54(b) of this chapter (relating to Asbestos Air Monitoring Technician), either personally or through an air monitoring technician or AMT/PM to whom the consultant has specifically delegated authority and responsibility as required in subsection (b)(1)(J) of this section;

(13) provide progress records and, when necessary, photographs relating to any professional services undertaken for the building owner;

(14) provide final close-out documents for each asbestos abatement project to the building owner or the building owner's authorized representative, including:

(A) baseline and area air monitoring results;

(B) clearance documentation, including visual inspection and clearance air monitoring results, as required in §296.211 of this chapter (relating to General Requirements for Asbestos Abatement in a Public Building);

(C) copies of each required license ID card and certification for the consultant's personnel involved in the asbestos abatement project; and

(D) the asbestos abatement consultant's daily logs;

(15) cooperate with DSHS personnel during any inspection or investigation, as required in §296.271 of this chapter (relating to Inspections and Investigations); and

(16) comply with recordkeeping requirements, as required in §296.291 of this chapter (relating to Recordkeeping).

(d) Consultant licensed before the effective date of this section. An asbestos consultant who is issued a license before the effective date of this section and qualified for licensure with full-qualification membership in a national professional organization may continue to perform work with and renew that license under the eligibility and renewal requirements of the Texas Asbestos Health Protection rules that were in effect when the license was issued. If the asbestos consultant fails to timely renew the license and the license remains expired for one year or more, the license may not be renewed. The asbestos consultant may re-apply for an initial license by meeting all education, work experience, and other application requirements for initial licensure under this section.

§296.59. Asbestos Consultant Agency.

(a) License required. A person employing an asbestos consultant and one or more asbestos inspectors, asbestos project managers, asbestos air monitoring technicians, asbestos air monitoring technician project monitors (AMT/PM), asbestos management planners, or additional asbestos consultants working in the capacity of their licenses must be licensed as an asbestos consultant agency.

(b) Licensee scope of practice.

(1) An asbestos consultant agency may:

(A) employ an asbestos consultant, asbestos inspector, asbestos project manager, asbestos air monitoring technician, AMT/PM, or asbestos management planner licensed as required in this chapter and working in the capacity of that individual's license; and

(B) represent a building owner by providing asbestos project monitoring services and asbestos air monitoring services during an asbestos abatement project.

(2) An asbestos consultant agency must employ a responsible person who has completed the training as referenced in §§296.46(b)(2)(G) and (c) of this chapter (relating to Initial and Renewal Licensure Requirements for an Individual) to engage in asbestos abatement activities.

(c) Licensee responsibilities. An asbestos consultant agency may be held responsible for a violation under this chapter by its employees or the responsible person. An asbestos consultant agency must:

(1) require the responsible person to:

(A) oversee the operations for the asbestos consultant agency activities; and

(B) comply with the applicable requirements of this chapter;

(2) require that its responsible person and any employee who performs an activity on behalf of the asbestos consultant agency comply with all applicable:

(A) responsibilities for licensed asbestos project managers, as required in §296.62 of this chapter (relating to Asbestos Project Manager), licensed asbestos air monitoring technicians, as required in §296.54 of this chapter (relating to Asbestos Air Monitoring Technician), licensed asbestos air monitoring technician project monitors, as required in §296.55 of this chapter (relating to Asbestos Air Monitoring Technician Project Monitor), and licensed asbestos consultants, as required in §296.58 of this chapter (relating to Asbestos Consultant); and

(B) requirements of this chapter;

(3) comply with standards of operation, including the EPA regulations adopted by reference in §296.2 of this chapter (relating to Reference of Federal Standards);

(4) comply with applicable OSHA regulations, including, as applicable, the work practices and controls in 29 CFR §1926.1101(g) (relating to Asbestos);

(5) comply with the relevant requirements in §296.211 of this chapter (relating to General Requirements for Asbestos Abatement in a Public Building);

(6) comply with the abatement practices and procedures in §296.212 of this chapter (relating to Standard Asbestos Abatement Practices and Procedures in a Public Building), as applicable;

(7) comply with the restrictions and required work practices described in §296.213 of this chapter (relating to Asbestos Operations and Maintenance (O&M) Practices and Procedures for O&M Licensees in a Public Building) for SSSD O&M activities conducted under that section, as applicable;

(8) comply with the restrictions and required work practices described in §296.232 of this chapter (relating to Alternative Asbestos Abatement Practices and Procedures for Certain Nonfriable Asbestos-Containing Building Material (ACBM) in a Public Building) for activities conducted under that section, as applicable;

(9) comply with the restrictions and required work practices described in §296.233 of this chapter (relating to Alternative Asbestos Practices and Procedures for Small Projects and Repetitive Tasks in a Public Building) for activities conducted under that section, as applicable;

(10) comply with the restrictions and required work practices described in §296.234 of this chapter (relating to Alternative Practices and Procedures for Removal of Whole Components of Intact Asbestos-Containing Material (ACM) in a Public Building) for activities conducted under that section, as applicable;

(11) at no cost to the employee, comply with personal protective equipment (PPE) requirements in 29 CFR §1910.132(h) (relating to General requirements), 29 CFR §1926.1101(h) and (i) and 40 CFR §763.122 (relating to What does this subpart require me to do?), as applicable, for employees who perform asbestos-related activities, including:

(A) providing and maintaining PPE for employees;

(B) training employees in the proper use, care, and inspection of PPE;

(C) documenting training in the proper use, care, and inspection of PPE;

(D) documenting respirator inspections; and

(E) ensuring compliance with the use of PPE;

(12) provide at no cost to the employee, an annual medical examination, as required in §296.42(i) of this chapter (relating to Initial and Renewal Applications), for each employee who performs an asbestos-related activity;

(13) ensure that each employee who performs asbestos-related activities has a current DSHS's Physician's Written Statement, as required in §296.42(i) of this chapter;

(14) ensure that each employee who performs asbestos-related activities is familiar with federal, state, and local standards for asbestos removal, encapsulation, and enclosure;

(15) ensure that each employee who performs an asbestos-related activity complies with the applicable training, as required in §296.73 of this chapter (relating to Asbestos Training Courses);

(16) provide and maintain in good working condition the necessary equipment for performing asbestos-related activities;

(17) report a change of the responsible person in writing to DSHS within 10 working days after the change;

(18) cooperate with DSHS personnel during any inspection or investigation, as required in §296.271 of this chapter (relating to Inspections and Investigations); and

(19) comply with recordkeeping requirements, in accordance with §296.291 of this chapter (relating to Recordkeeping).

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER E. TRAINING PROVIDER LICENSE AND TRAINING COURSES

25 TAC §296.71, §296.73

STATUTORY AUTHORITY

The new rules are authorized by Texas Government Code, §531.0055, and Texas Health and Safety Code, §1001.075, which authorizes the Executive Commissioner of HHSC to adopt rules and policies necessary for the operation and provision of health and human services by DSHS, for the administration of Texas Health and Safety Code, Chapter 1001, to implement Texas Occupations Code, Chapter 1954; Texas Health and Safety Code, §12.0111, which requires DSHS to collect fees for issuing or renewing a license; and Texas Health and Safety Code §161.402, which requires the Executive Commissioner to adopt rules designating the materials or replacement parts for which a person must obtain a material safety data sheet before installing the materials or parts in a public building.

§296.71. Asbestos Training Provider.

(a) License required. A person must be licensed as an asbestos training provider to offer training to an individual who seeks MAP accreditation or a DSHS license.

(b) Licensee scope of practice.

(1) Licensee practice and limitations.

(A) A licensed asbestos training provider may offer, schedule, and conduct any of the following courses for which the provider has received DSHS approval:

(i) one or more asbestos training courses designed to meet accreditation requirements in accordance with the MAP;

(ii) the Asbestos Air Monitoring Technician course, as required in §296.73 of this chapter (relating to Asbestos Training Courses); and

(iii) the Texas Asbestos Law and Rules course, as required in §296.73 of this chapter.

(B) An asbestos training provider must not:

(i) allow instructors to self-train in order to qualify for approval under subsection (f) of this section or accreditation;

(ii) combine course disciplines, hands-on training sessions, or other aspects of two courses, such as the Asbestos Abatement Worker course and the Asbestos Contractor/Supervisor course, that must not be taught in a combined course;

(iii) combine an initial training course with a refresher training course;

(iv) combine an Asbestos Abatement Worker course taught in one language with an Asbestos Abatement Worker course taught in another language;

(v) allow an instructor to teach the Asbestos Abatement Worker course in a language other than English unless the instructor can speak, read, and write effectively in that language;

(vi) allow a guest speaker to present more than 15% of a course;
or

(viii) allow an unapproved instructor to teach an asbestos training course.

(2) Licensee responsibilities. An asbestos training provider may be held responsible for a violation under this chapter by its employees or the responsible person. An asbestos training provider must:

(A) require the responsible person to:

(i) oversee the operations for the asbestos training provider activities; and

(ii) comply with the applicable requirements of this chapter;

(B) require that its responsible person and any employee who performs an activity on behalf of the asbestos training provider comply with all applicable:

(i) responsibilities for approved asbestos training instructors, as required in subsection (f) of this section; and

(ii) requirements of this chapter;

(C) provide for the course training equipment to be on-site and in proper working order;

(D) provide for training in an environment that is conducive to learning and without excessive or avoidable external distractions and must:

(i) not utilize a classroom for other purposes while training is being conducted; and

(ii) only use facilities that have the following:

(I) adequate lighting;

(II) adequate seating and workspace for each trainee;

(III) a climate-controlled environment in all areas used for training; and

(IV) clean restrooms that are readily accessible and in proper working order;

(E) provide training taught by only asbestos training instructors who:

(i) are approved by DSHS to teach the course; and

(ii) possess current accreditation or training for the course being taught;

(F) ensure that each approved asbestos training instructor employed by the asbestos training provider:

(i) presents all course materials as outlined in the syllabus and as presented to DSHS for approval;

(ii) provides a course review to improve comprehension before administering the course examination; and

(iii) administers a closed-book examination at the conclusion of each initial training course;

(G) comply with course notification requirements in subsection (c) of this section;

(H) specify in promotional materials the course prerequisites for admission, the content of the course and requirements for successful completion;

(I) comply with requirements for each asbestos training course for which the asbestos training provider is licensed, as required in §296.73 of this chapter, including requiring and verifying that:

(i) the number of trainees does not exceed the applicable trainee-to-instructor ratio; and

(ii) a trainee who has not met attendance standards or who has not passed the required final examination is not issued a training certificate;

(J) confirm that each trainee possesses current accreditation or is within the 12-month grace period before granting the trainee admission to a refresher training course;

(K) inform each prospective trainee, in the language of the course being taught, of the following:

(i) that requirements and qualifications apply to each category of license being sought under this chapter and that more information can be found on the DSHS website;

(ii) that, to maintain accreditation, refresher training must be taken before the accreditation expiration date, including:

(I) a 12-month grace period after the accreditation expiration date to take the refresher training course to renew the accreditation during which time an individual must not perform any activity for which accreditation is required until the refresher training course is successfully completed and the accreditation is renewed; and

(II) that if the accreditation is not timely renewed within the 12-month grace period, the initial training must be completed again in order to obtain accreditation; and

(iii) that a trainee may not complete the course if the trainee misses more than 10% of a training course;

(L) provide instructions for locating the registration form for the state licensing examination and the examination schedule on DSHS's website;

(M) record each trainee's examination score;

(N) maintain security of all training certificates to ensure that trainees do not have access to the certificates until successful completion of the course;

(O) at the conclusion of each training course, issue a training certificate that meets the requirements in subsection (d)(1)(Q) of this section to each trainee who has completed the course and passed the required final examination;

(P) at the conclusion of each training course, issue a wallet-size photograph identification (ID) card that meets the requirements in subsection (d)(1)(R) of this section to each trainee who has completed the course and passed the required examination;

(Q) submit a training course roster to DSHS within 10 working days after the completion date of each course, including:

(i) the name of each trainee;

(ii) the unique identifier of each trainee that is determined by the asbestos training provider;

(iii) specification of successful or unsuccessful course completion for each trainee; and

(iv) an attached color group photograph of all trainees who successfully completed the course that is:

(I) taken at the end of the training course; and

(II) of sufficient size and clarity to identify each trainee;

(R) report a change of the responsible person in writing to DSHS within 10 working days after the change;

(S) permit DSHS representatives to observe, evaluate, and monitor any training course;

(T) cooperate with DSHS personnel during any inspection or investigation, as required in §296.271 of this chapter (relating to Inspections and Investigations); and

(U) comply with recordkeeping requirements, as required in §296.291 of this chapter (relating to Recordkeeping).

(c) Course notification requirements.

(1) Course notifications. An asbestos training provider must notify DSHS of each scheduled course. DSHS must receive the notification at least 10 working days before the start date of the course. A notification may include multiple courses. The notification must include:

(A) the name, license number, and contact phone number of the asbestos training provider;

(B) the name, and contact phone number of the asbestos training instructor;

(C) the name of the course, and for the Asbestos Abatement Worker course, the language that the course is conducted in specified in the course name;

(D) the physical location (address and room number or name of the conference room) where the training will be held, including all off-site field trip locations;

(E) the start and end dates for the training course; and

(F) the start and end times for each day of training.

(2) Amendments.

(A) Notified courses must be amended by notifying DSHS by email or fax at least two working days before the start date of the course of the following course changes:

(i) instructor, unless an alternate approved instructor that meets the qualifications to teach the course is provided with the course notification as required in paragraph (1)(A) of this subsection;

(ii) location;

(iii) time;

(iv) date; and

(v) language of the asbestos abatement worker course.

(B) Amendments are not accepted for changes in course discipline.

(C) Notified courses must not be amended fewer than two working days before the start date of the course and must be cancelled if not timely amended as soon as possible, but no later than two hours after the scheduled start time.

(3) Emergency notifications. A training provider may request emergency approval of a course if unforeseen circumstances prevent the asbestos training provider from meeting the 10-working-day notification requirement. The emergency notification must be submitted to DSHS by email or fax and must include a justification of why the 10-working-day notification requirement could not be met and must contain the information required in subsection (c)(1)(A) - (F) of this section. The emergency notification must be submitted at least three working days before the start date of the course. The training provider must receive written approval from DSHS before conducting the course.

(4) Cancellation notifications. A training provider must notify DSHS of a course cancellation by email or fax as soon as possible, but no later than two hours after the scheduled start time of the course.

(d) Initial and renewal license requirements. To receive or renew a license as required in this section, an applicant must submit a completed application, as required in §296.42 of this chapter (relating to Initial and Renewal Applications) and the documentation required in this section. An out-of-state applicant must comply with §296.44 of this chapter (relating to Out-of-State Applicants).

(1) Initial requirements. An applicant for an initial license must submit the following:

(A) in relation to the applicant's franchise tax account status, whichever applies:

(i) a certificate of account status from the Texas Comptroller of Public Accounts regarding the applicant's franchise tax account status, if the applicant is a taxable entity, as defined in Texas Tax Code §171.0002; or

(ii) documentation that the applicant is not a taxable entity or is otherwise not subject to or exempt from franchise tax; and

(iii) any verification relating to clause (i) or (ii) of this subparagraph that is requested by DSHS;

(B) a copy of the applicant's assumed name certificate, with proof of required filing, if the applicant transacts business or renders professional services under an assumed name (commonly referred to as a DBA or "doing business as");

(C) if the applicant is an entity, as defined in Texas Business Organizations Code §1.002:

(i) documentation issued by the Secretary of State that verifies:

(I) a domestic entity's existence; or

(II) a foreign entity's registration and authorization to conduct business in Texas; or

(ii) if the applicant is a foreign entity to which §296.44(d) of this chapter applies, the applicant must submit a sworn affidavit that meets the requirements of that subsection;

(D) if the applicant is a nonfiling entity or a foreign nonfiling entity, as those terms are defined in Texas Business Organizations Code §1.002, documentation of that status on the application and any verification of that status that is requested by DSHS;

(E) a taxpayer identification number;

(F) the applicant's Texas sales tax permit number from the Texas Comptroller of Public Accounts, if applicable;

(G) the name and mailing address of each principal owner;

(H) a list of each course to be offered that includes the name of each asbestos instructor that will teach each course;

(I) the name of any guest speaker and the speaker's topics along with the completed asbestos guest speaker approval application form, as required in subsection (g) of this section;

(J) the name of the appointed responsible person;

(K) a description of any equipment and accessories that will be used for course instruction, such as hands-on items, audiovisual aids, and brochures;

(L) the applicant's refund and cancellation policies and if the applicant will provide the Asbestos Abatement Worker course in a language other than English, the refund and cancellation policies must be submitted in each language that the course will be offered;

(M) a detailed course outline for each day that includes start and end times for each topic covered, scheduled break times, and specific hands-on training activities for each course;

(N) student training manuals, instructor notebooks, handouts, and related course materials, including all required elements listed in §296.73 of this chapter for each initial and refresher training course to be offered; and

(i) if the applicant will provide the Asbestos Abatement Worker course in a language other than English, the training manuals and all related course materials must be submitted in each language in which the course will be offered; and

(ii) if the applicant will use an EPA-developed manual, the applicant may submit a statement attesting to its use in place of submitting the manual;

(O) the applicant's policy regarding the administration of the multiple-choice examination to be given at the conclusion of training, in accordance with §296.73 of this chapter, which at minimum, must state the following:

(i) each trainee must obtain a passing score of at least 70% on the multiple-choice examination before receiving a training certificate;

(ii) one multiple-choice re-examination is allowed per trainee for each course;

(iii) questions from the original examination that are randomly reordered or questions randomized from course to course may be used for the re-examination;

(iv) if a trainee fails the re-examination, the trainee must repeat the course and pass a new examination before issuance of the training certificate; and

(v) a trainee must read the examination and mark the answers on a score sheet unless the trainee requests a reasonable testing accommodation under the Americans with Disabilities Act of 1990, 42 USC 12101 et seq. and is a qualified individual with a disability;

(P) a copy of each examination and re-examination that will be administered at the end of each course and if the applicant will provide the Asbestos Abatement Worker course in a language other than English, examinations must be submitted in each language that the course is offered;

(Q) a sample of the training certificate that will be issued to each trainee who completes the course and passes the final course examination, including:

(i) a unique certificate number;

(ii) the asbestos training provider's name, a field for the asbestos training provider's license number, phone number, and address;

(iii) the printed name of the accredited person;

(iv) the discipline (name) of the training course completed;

(v) the printed name and signature of the asbestos instructor;

(vi) the start and end dates of the training course;

(vii) the expiration date of one year after the date upon which the person successfully completed the training course;

(viii) the printed name and signature of the responsible person, principal officer, owner, or chief executive officer of the asbestos training provider; and

(ix) a statement, as applicable, that the trainee:

(I) "has successfully completed the requisite training for asbestos accreditation under Title II of the Toxic Substances Control Act, 15 USC, Chapter 53, Subchapter II that meets the requirements of the Texas Asbestos Health Protection rules" (applicable to a MAP training course for which accreditation is issued); or

(II) "has successfully completed training that meets the requirements of the Texas Asbestos Health Protection rules" (applicable to the Asbestos Air Monitoring Technician course or the Texas Asbestos Law and Rules course);

(R) a sample of the training ID card that must be issued to each trainee who completes the course and passes the final course examination; the training ID card must include:

(i) the name of the asbestos training provider;

(ii) a color photo of the trainee's face (without tinted glasses, hats, bandanas, or other articles that may obscure the head or any part of the face) taken on a white background;

(iii) the name of the accredited person;

(iv) the discipline of the training course completed;

(v) the effective date of the accreditation; and

(vi) the unique certificate number shown on the training certificate for the accredited person; and

(S) verifiable documentation that each asbestos training instructor that will teach an asbestos training course and is employed by the applicant meets the qualifications listed in subsection (h)(1)(B) of this section.

(2) Renewal requirements. An applicant renewing a license must submit the following:

(A) documentation as required for the initial application in subsection (d)(1)(A) - (F) of this section;

(B) a copy of all policies, training resources, training certificates, or training manuals that the applicant seeks approval to amend with a detailed description of the specific changes that must be approved by DSHS before the training provider may implement the changes; and

(C) a list of all approved asbestos instructors and guest speakers the training provider intends to use in the asbestos training courses, including the courses that each instructor will teach, proof that the accreditation of each instructor is current and valid for each course the instructor will teach, and the topics that each guest speaker will present.

(e) Online asbestos refresher training course. An online asbestos refresher training course presented to a student by a licensed asbestos training provider may be conducted if the course meets the requirements of this subsection.

(1) Scope.

(A) For purposes of this subsection:

(i) an asynchronous online course means a course type that can be taken at any time;

(ii) a synchronous online course means an online course type that is taken live;

(iii) conducting an initial asbestos training course online is prohibited; and

(iv) an online course under this section will only be approved if it is a synchronous online course; an asynchronous online course will not be approved.

(B) A training provider must not provide, offer, or claim to provide an online refresher course without applying for and receiving approval from DSHS as required under this subsection.

(C) An application for an online course must be submitted separately from an application for approval for an in-person refresher course.

(D) A licensed training provider may apply for approval to conduct an online asbestos refresher course that the training provider is approved to teach in-person.

(2) Online refresher course requirements. A training provider that offers an online course must have a system in place that:

(A) authenticates the identity of the student taking the training and their eligibility to enroll in the course to deter fraud and falsification of student identity;

(B) uses encryption technology to protect sensitive user information;

(C) ensures that the student is focusing on the training material throughout the entire training period, such as a strong interactive component to ensure continued student focus through discussion between the student and approved instructor or approved guest speaker, or interactive video clips, or both;

(D) monitors and records a student's actual time spent online, including applicable breaks;

(E) allows the student to ask questions of an approved instructor or approved guest speaker and allows the instructor or guest speaker to provide a response to the student's question during the course;

(F) provides technical support to the student during the course to address any technical issue as soon as possible but no later than the end of the course day, and if a student is inadvertently logged out of an online session due to a technical issue, the student must be given credit for the portion of the course completed and be required to make-up the portion of the course missed;

(G) reduces the opportunity for document fraud by providing a distinct course certificate that contains all the requirements of subsection (d)(1)(Q) of this section and specifies the course type and that the course is online; and

(H) provides DSHS unrestricted access to an online course for auditing purposes at no charge at any time the course is being given.

(3) Approval requirements.

(A) A licensed training provider must submit an application for approval of an online course to DSHS that includes, in addition to the requirements of subsection (d)(2) of this section and §296.73 of this chapter, the following:

(i) that the application is for an online asbestos refresher course;

(ii) the type and discipline of the course;

(iii) documentation of the systems in place required by paragraph (2) of this subsection;

(iv) a technical support plan that describes potential technical issues that may occur and how the issues will be immediately handled; and

(v) a description of the method used to verify student's attendance as required in paragraph (4)(B) of this subsection.

(B) Upon receipt of a complete application and the required application fee, DSHS will issue the training provider contingent course approval. DSHS will conduct an audit of the online course. If DSHS finds that the course:

(i) meets the requirements of this chapter, DSHS will remove the contingent course approval status within 45 days of the course audit.

(ii) does not meet the requirements of this chapter, DSHS will issue a deficiency notice within 45 days of the course audit.

(I) If the training provider does not submit the corrections identified in the deficiency notice, if applicable, and request a second audit by the deadline provided in the deficiency notice, DSHS will issue a notice of withdrawal of contingent approval of the training course.

(II) A training provider may request two audits to remove the contingent course status.

(III) If the training provider fails to meet the requirements of this chapter after the third audit, DSHS will issue a notice of withdrawal of contingent approval of the training course and the training provider must reapply for approval of the course.

(C) If approved by DSHS to conduct online training, the training provider must clearly identify that the course is approved by DSHS when advertising or registering a student for the course.

(4) Additional notification, course, and roster requirements.

(A) The course type must be submitted with the course notification.

(B) Training instructors must:

(i) view each student during the course to ensure student focus;

(ii) validate student identity during registration and after each break and lunch period; and

(iii) have at least one support staff member assist the instructor to monitor online students during an in-person course that is also being presented online.

(C) The group photograph may include multiple frames or photographs, if a single group photograph is not feasible, to meet the requirement of subsection (b)(2)(Q)(iv) of this section.

(5) Recordkeeping requirements. A licensed training provider that is approved to administer an online course is subject to the following additional recordkeeping requirements.

(A) Student identity authentication and verification data.

(B) Student online time tracking data.

(C) Training instructor, guest speaker, and technical support contact data.

(6) Disciplinary action.

(A) For purposes of license or registration renewal, DSHS will not accept certificates from an online course that was not approved by DSHS.

(B) Failure to obtain approval before conducting an online course and failure to meet the requirements of this subsection may result in disciplinary action against the licensed training provider.

(C) DSHS will withdraw course approval if the training provider fails to meet the requirements of this subsection.

(f) Approval of additional training courses.

(1) A licensed training provider must request approval to provide any additional training course that was not submitted as part of the initial application for the training provider's license. To apply for approval, the training provider must submit:

(A) an Asbestos Course Approval Application for each course;

(B) the fee as outlined in §296.91 of this chapter (relating to Fees);

(C) student training manuals, instructor notebooks, handouts, and related course materials, including all required elements listed in §296.73 of this chapter for each initial and refresher training course to be offered; and

(i) if the applicant will provide the Asbestos Abatement Worker course in a language other than English, the training manuals and all related course materials must be submitted in each language in which the course will be offered; and

(ii) if the applicant will use an EPA-developed manual, the applicant may submit a statement attesting to its use in place of submitting the manual;

(D) a detailed course outline for each day that includes start and end times for each topic covered, scheduled break times, and specific hands-on training activities for each course;

(E) a copy of each required examination that will be administered at the end of each course and if the applicant will provide the Asbestos Abatement Worker course in a language other than English, examinations must be submitted in each language in which the course will be offered;

(F) the name of the approved asbestos instructor who will teach each additional course; and

(G) the name of any guest speaker and the speaker's topics along with the completed asbestos guest speaker approval application form, as required in subsection (i) of this section.

(2) DSHS will provide written notice to the licensed training provider whether DSHS grants approval of the additional course. Training providers must not add the additional training course to their schedule, advertise, accept payment for, or conduct the course without approval by DSHS.

(g) Training providers licensed before the effective date of this section. A training provider that is licensed before the effective date of this section must submit any updated training material to DSHS and receive approval six months after the effective date of this section or with the license renewal application, whichever is later, in order to continue teaching the course.

(h) Asbestos training instructor approval, qualifications, responsibilities, and withdrawal of approval.

(1) Asbestos training instructor approval and qualifications.

(A) DSHS must approve an asbestos training instructor to teach an asbestos training course.

(B) An asbestos training instructor must meet the following qualifications to teach an asbestos training course.

(i) An asbestos training instructor must have one of the following combinations of education and work experience, as described in §296.41(b)(2) of this chapter (relating to License and Registration Requirements):

(I) a bachelor's degree in a natural or physical science;

(II) a bachelor's degree with at least six months of experience performing asbestos-related activities with any required license or accreditation;

(III) an associate's degree or successful completion of 60 college credit hours with at least one year of experience performing asbestos-related activities; or

(IV) a high school diploma or equivalent with at least two years of experience performing asbestos-related activities with any required licensure or accreditation.

(ii) An asbestos training instructor must have the following teaching experience:

(I) at least three months of teaching experience at the secondary or post-secondary education level;

(II) at least three months of teaching adult learners at a vocational school, trade school, or equivalent formal educational or professional setting as approved by DSHS; or

(III) successful completion of a train-the-trainer course approved by DSHS.

(C) Acceptable documentation of the relevant education, work, and teaching experience, as described in subparagraph (B)(i) and (ii) of this paragraph must include each of the following or an equivalent alternative approved by DSHS:

(i) an official academic transcript or diploma that verifies the major;

(ii) a description of experience performing asbestos-related activities including:

(I) the project name and location;

(II) the start and end date;

(III) a description of duties performed; and

(IV) the name and contact information of the individual or office that can verify the experience;

(iii) a description of the applicant's teaching experience including:

(I) the course title and description;

(II) the start and end date;

(III) the location or institution; and

(IV) the name and contact information of the individual or office that can verify the teaching experience; and

(iv) proof of licensure or accreditation or both; and

(D) training certificates for the initial asbestos training courses and all subsequent refresher training courses to show current accreditation under §296.73 of this chapter for each course the instructor will teach, if applicable.

(2) Approved training instructor scope of practice.

(A) Approved training instructor practice and limitations.

(i) An asbestos training instructor must:

(I) teach only DSHS-approved asbestos training courses for which the instructor holds current MAP accreditation, for an Asbestos Air Monitoring Technician (AMT) course, holds a Texas AMT training certificate, or if only teaching the Texas Asbestos Law and Rules course, holds a Texas Asbestos Law and Rules training certificate;

(II) teach each DSHS-approved asbestos training course in accordance with the MAP and as required in this subchapter;

(III) be able to read, write, and communicate in the language that the course is taught; and

(IV) be employed by a licensed training provider.

(ii) An approved asbestos training instructor must not:

(I) teach a course for accreditation under the MAP or a course required for a license from DSHS if notification has not been submitted to DSHS, in accordance with subsection (c) of this section; or

(II) self-train in order to qualify to teach a training course or qualify for a license or accreditation.

(B) Approved asbestos training instructor responsibilities. An asbestos training instructor must:

(i) coordinate with the responsible person to verify that there is documented confirmation that:

(I) each trainee possesses current accreditation, or is within the 12-month grace period for accreditation renewal, before granting admission to a refresher training course;

(II) necessary training equipment is on-site and in good working order; and

(III) the number of trainees does not exceed the applicable trainee-to-instructor ratio, as required in §296.73(a)(8) of this chapter;

(ii) confirm with each trainee that the training provider has informed the trainee of each required information item, as required in subsection (b)(2)(K) of this section;

(iii) inform each trainee of the following:

(I) for an initial training course, each trainee must achieve a score of at least 70% on the course examination to receive a training certificate;

(II) if a trainee fails the course examination, a second examination will be administered; and

(III) a trainee must retake the initial training course if the trainee does not achieve a score of at least 70% on the second examination;

(iv) comply with requirements for training courses, as required in §296.73 of this chapter;

(v) present all course materials as outlined in the syllabus and as presented to DSHS for approval;

(vi) implement and enforce attendance and course completion requirements;

(vii) take an attendance record at the beginning of each four-hour segment of course instruction;

(viii) document a trainee's absence from the course on the attendance record;

(ix) provide instructions for locating the registration form for the state licensing examination and examination schedule on DSHS's website;

(x) provide a course review to improve and reinforce comprehension before administering the examination;

(xi) administer a closed-book examination at the conclusion of each initial training course;

(xii) administer one re-examination to each trainee who fails the first examination, as required under the policy and practices required under subsection (d)(1)(O) of this section;

(xiii) record each trainee's examination score;

(xiv) provide attendance records to the training provider upon completion of each course; and

(xv) cooperate with DSHS personnel during inspections, audits, and investigations, as required in §296.271 of this chapter.

(3) Withdrawal of instructor approval. DSHS may withdraw instructor approval if the instructor does not meet the requirements in this subsection, does not provide training that meets the requirements of the MAP or this chapter, or no longer possesses valid or current qualifications.

(4) Instructors approved before the effective date of this section. An instructor who is approved to teach before the effective date of this section does not need to meet additional education, work experience, and teaching experience required under subsection (h)(1)(B) of this section that was not required when the instructor was approved and does not need to resubmit documents for approval. A certificate for the Texas Law and Rules course is not required to teach that course until six months after the effective date of this section. If, within six months after the effective date of this section, the instructor has not received a certificate for the Texas Law and Rules course, the instructor may not continue teaching under the instructor's prior approval. Any future instructor approval will be subject to the education, work experience, and teaching experience otherwise required under this section.

(i) Guest speaker approval and withdrawal of approval.

(1) Approval. Prior approval of a guest speaker is required. A guest speaker may be used to supplement and enhance learning objectives but must not present more than 15% of any course. A guest speaker must have knowledge based on education, research, or experience in a particular area of study related to the course content being taught. Training providers seeking approval for a guest speaker must submit a completed Asbestos Guest Speaker Approval Application Form and sufficient documentation to show the person's knowledge, experience, and expertise. Acceptable documentation may include:

(A) official copies of any applicable academic transcript or diploma specifying the guest speaker's major;

(B) technical experience;

(C) a verifiable resume; and

(D) relevant, verifiable work experience, as described in §296.41(b)(2) of this chapter (relating to License and Registration Requirements).

(2) Withdrawal of guest speaker approval. DSHS may withdraw guest speaker approval if the guest speaker is not providing training that meets the requirements of the MAP or this chapter or if the guest speaker's qualifications are no longer valid or current.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Barbara L. Klein
General Counsel
Department of State Health Services
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SUBCHAPTER F. LICENSE AND REGISTRATION FEES

25 TAC §§296.91 - 296.94

STATUTORY AUTHORITY

The new rules are authorized by Texas Government Code, §531.0055, and Texas Health and Safety Code, §1001.075, which authorizes the Executive Commissioner of HHSC to adopt rules and policies necessary for the operation and provision of health and human services by DSHS, for the administration of Texas Health and Safety Code, Chapter 1001, to implement Texas Occupations Code, Chapter 1954; Texas Health and Safety Code, §12.0111, which requires DSHS to collect fees for issuing or renewing a license; and Texas Health and Safety Code §161.402, which requires the Executive Commissioner to adopt rules designating the materials or replacement parts for which a person must obtain a material safety data sheet before installing the materials or parts in a public building.

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SUBCHAPTER G. STATE LICENSING EXAMINATION

25 TAC §§296.111 - 296.118

STATUTORY AUTHORITY

The new rules are authorized by Texas Government Code, §531.0055, and Texas Health and Safety Code, §1001.075, which authorizes the Executive Commissioner of HHSC to adopt rules and policies necessary for the operation and provision of health and human services by DSHS, for the administration of Texas Health and Safety Code, Chapter 1001, to implement Texas Occupations Code, Chapter 1954; Texas Health and Safety Code, §12.0111, which requires DSHS to collect fees for issuing or renewing a license; and Texas Health and Safety Code §161.402, which requires the Executive Commissioner to adopt rules designating the materials or replacement parts for which a person must obtain a material safety data sheet before installing the materials or parts in a public building.

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SUBCHAPTER H. LICENSE AND REGISTRATION PROVISIONS RELATED TO MILITARY SERVICE MEMBERS, MILITARY VETERANS, AND MILITARY SPOUSES

25 TAC §296.131

STATUTORY AUTHORITY

The new rule is authorized by Texas Government Code, §531.0055, and Texas Health and Safety Code, §1001.075, which authorizes the Executive Commissioner of HHSC to adopt rules and policies necessary for the operation and provision of health and human services by DSHS, for the administration of Texas Health and Safety Code, Chapter 1001, to implement Texas Occupations Code, Chapter 1954; Texas Health and Safety Code, §12.0111, which requires DSHS to collect fees

for issuing or renewing a license; and Texas Health and Safety Code §161.402, which requires the Executive Commissioner to adopt rules designating the materials or replacement parts for which a person must obtain a material safety data sheet before installing the materials or parts in a public building.

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SUBCHAPTER I. ACCREDITATION

25 TAC §296.151

STATUTORY AUTHORITY

The new rule is authorized by Texas Government Code, §531.0055, and Texas Health and Safety Code, §1001.075, which authorizes the Executive Commissioner of HHSC to adopt rules and policies necessary for the operation and provision of health and human services by DSHS, for the administration of Texas Health and Safety Code, Chapter 1001, to implement Texas Occupations Code, Chapter 1954; Texas Health and Safety Code, §12.0111, which requires DSHS to collect fees for issuing or renewing a license; and Texas Health and Safety Code §161.402, which requires the Executive Commissioner to adopt rules designating the materials or replacement parts for which a person must obtain a material safety data sheet before installing the materials or parts in a public building.

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SUBCHAPTER J. EXEMPTIONS

25 TAC §296.171, §296.172

STATUTORY AUTHORITY

The new rules are authorized by Texas Government Code, §531.0055, and Texas Health and Safety Code, §1001.075, which authorizes the Executive Commissioner of HHSC to adopt rules and policies necessary for the operation and provision of health and human services by DSHS, for the administration of Texas Health and Safety Code, Chapter 1001, to implement Texas Occupations Code, Chapter 1954; Texas Health and Safety Code, §12.0111, which requires DSHS to collect fees for issuing or renewing a license; and Texas Health and Safety Code §161.402, which requires the Executive Commissioner to adopt rules designating the materials or replacement parts for which a person must obtain a material safety data sheet before installing the materials or parts in a public building.

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SUBCHAPTER K. ASBESTOS MANAGEMENT IN A PUBLIC BUILDING, COMMERCIAL BUILDING, OR FACILITY

25 TAC §296.191

STATUTORY AUTHORITY

The new rule is authorized by Texas Government Code, §531.0055, and Texas Health and Safety Code, §1001.075, which authorizes the Executive Commissioner of HHSC to adopt rules and policies necessary for the operation and provision of health and human services by DSHS, for the administration of Texas Health and Safety Code, Chapter 1001, to implement Texas Occupations Code, Chapter 1954; Texas Health and Safety Code, §12.0111, which requires DSHS to collect fees for issuing or renewing a license; and Texas Health and Safety Code §161.402, which requires the Executive Commissioner to adopt rules designating the materials or replacement parts for which a person must obtain a material safety data sheet before installing the materials or parts in a public building.

§296.191. Asbestos Management in a Public Building, Commercial Building, or Facility.

(a) Public building owner responsibilities.

(1) The public building owner is responsible for compliance with this chapter in relation to the presence, condition, disturbance, renovation, demolition, and disposal of any ACBM and ACWM that is encountered in the construction, operations, maintenance, or furnishing of that public building, including when the building is under management by others.

(2) Before operations and maintenance, renovation, or demolition, the public building owner is required to have an asbestos survey performed, identify the presence of asbestos, and have ACBM that may be disturbed by the operations and maintenance, renovation, or demolition activity abated, as required in this chapter.

(3) The public building owner must fulfill the following obligations, either personally or through the building owner's authorized representative, including when the building is under management by others:

(A) inform anyone who performs any type of construction, maintenance, installation, repairs, custodial services, renovation, or demolition work in the owner's building of:

(i) the presence and location of ACBM before the start of any asbestos-related activity;

(ii) that the ACBM could be disturbed or dislodged by those activities; and

(iii) that the person conducting those activities must arrange for proper handling of ACBM and ACWM;

(B) hire or otherwise permit only a person holding the required license to perform asbestos-related activity in the building;

(C) require each person described under subparagraph (B) of this paragraph to comply with all applicable requirements of this chapter;

(D) ensure compliance with this chapter during periods of vacancy; and

(E) confirm that the regulated area meets the clearance level of 0.01 f/cc before reoccupancy of that area.

(4) The building owner or the building owner's authorized representative may provide the information described in paragraph (3) of this subsection in writing or through documented oral communication.

(b) Commercial building owner responsibilities. The commercial building owner is responsible for compliance with this chapter in relation to the presence, condition, disturbance, renovation, demolition, and disposal of any asbestos that is encountered in the construction, operations, maintenance, or furnishing of that commercial building, including when the building is under management by others. Before operations and maintenance, renovation, or demolition, the commercial building owner is required to have a thorough inspection performed, identify the presence of asbestos, and have the RACM that may be disturbed by the operations and maintenance, renovation, or demolition activity abated in accordance with NESHAP. The commercial building owner must also ensure compliance with this chapter during periods of building vacancy.

(c) Facility owner responsibilities. The facility owner is responsible for compliance with this chapter in relation to the presence, condition, disturbance, renovation, demolition, and disposal of any asbestos that is encountered in the construction, operations, maintenance, or furnishing of that facility, including when the facility is under management by others. Before operations and maintenance, renovation, or demolition, the facility owner is required to have a thorough inspection performed, identify the presence of asbestos, and have the RACM that may be disturbed by the operations and maintenance, renovation, or demolition activity abated in accordance with NESHAP. The facility owner must also ensure compliance with NESHAP during periods of vacancy.

(d) Mandatory survey for ACBM before renovation or demolition.

(1) Before any renovation or dismantling outside of or within a public building, commercial building, or facility, including preparations for partial or complete demolition, the owner must have an asbestos survey performed.

(2) The work area and all immediately surrounding areas that could foreseeably be disturbed by the actions necessary to perform the project must be thoroughly surveyed and, as applicable, sampled before renovation or demolition.

(3) A copy of the asbestos survey report that includes the contents described in §296.21(93) of this chapter (relating to Definitions), as applicable, must be produced upon request by DSHS within 10 working days after the request.

(4) A building may be demolished with RACM in place if a state or local government orders the demolition because the building is structurally unsound and in danger of imminent collapse, as determined by a professional engineer or a city, county, or state government official who is qualified to make that decision.

(A) The owner must maintain documentation of such order.

(B) If an owner is unable to obtain a survey because the building is structurally unsound and unsafe to enter, and the owner is unable to obtain an order for demolition and has a letter from a professional engineer stating the building is structurally unsound and in danger of imminent collapse, the owner may contact DSHS to request a waiver from the survey requirement. Documentation supporting the inability to obtain an order must be submitted with the request.

(C) If a survey cannot be performed before demolition starts due to the building being structurally unsound and unsafe to enter, all suspect material must be treated as RACM, in accordance with NESHAP requirements in 40 CFR §61.141 (relating to Definitions), §61.145(a)(3) and (c)(4) - (9) (relating to Standards for demolition and renovation), and §61.150(a)(3) (relating to Standard for waste disposal for manufacturing, fabricating, demolition, renovation, and spraying operations).

(5) Without otherwise limiting the scope of an asbestos survey, each survey for a public building must treat any building material listed in subsection (o)(2) of this section as suspect ACBM and include all such materials in the asbestos survey if the materials could foreseeably be disturbed during the renovation or demolition activities.

(6) In a public building, the mandatory survey requirement must be met in one of the following two ways.

(A) A person appropriately licensed as required in this chapter and the Act performs a survey which conforms to generally accepted industry standards, such as the AHERA requirements specified in 40 CFR Part 763, Subpart E (relating to Asbestos-Containing Materials in Schools), §§763.85 - 763.88, the required method for schools. The licensee must prepare a survey report that includes the contents described in §296.21(93) of this chapter. To demonstrate that there is no ACBM, the licensed individual must collect a minimum of three samples from each suspect homogeneous area.

(B) A Texas-registered architect or a Texas-licensed professional engineer certifies that the architect or engineer has compiled and reviewed the information from MSDSs and SDSs of the materials used in the original construction of the building and the renovations or alterations of all parts of the building affected by the planned renovation or demolition, matches the MSDSs and SDSs to materials on-site, reviews any asbestos survey reports of the building previously conducted as required at the time of the survey, and certifies that in the architect's or engineer's professional opinion, no part of the building, including the building materials, affected by the planned renovation or demolition contain asbestos. This certification must also clearly identify the name of the building, the street address and specific area of the building that applies to the certification, the survey report date of each previous asbestos survey report reviewed, whether the relevant work was new construction or renovation, and the specific dates of completion of all original construction and renovations or alterations that apply to the certification. A Texas-registered architect must prepare this certification in accordance with the rules of profes-

sional conduct in 22 TAC Chapter 1. A Texas-licensed professional engineer must prepare this certification in accordance with the rules of professional conduct in 22 TAC Chapter 137. A complaint that a certification was not performed as required in this paragraph will be referred to the Texas licensing boards or another government agency with jurisdiction over the complaint as needed. A building owner that meets the mandatory survey requirement, as described in this subparagraph, must keep the certification, copies of the MSDSs or SDSs or both, and any previous asbestos surveys as required in §296.291(j) of this chapter (relating to Recordkeeping) that were reviewed by the architect or engineer. A certification prepared as described in this paragraph does not meet the OSHA or NESHAP requirement for an asbestos survey.

(7) In a commercial building, an accredited inspector who has completed the MAP inspector training may perform the asbestos survey.

(8) In a facility that is not a public or commercial building, the survey must conform to 40 CFR §61.145. OSHA regulations or other EPA regulations may apply.

(e) Asbestos survey.

(1) A limited asbestos survey may be performed to address a specific area of a building, such as an area identified for renovation. A limited asbestos survey may not be substituted for a thorough asbestos survey of the entire building.

(2) A comprehensive asbestos survey covering the entire building is required before demolition of a building.

(3) An asbestos survey report remains acceptable if the asbestos survey is done in compliance with the applicable law, including the Texas Asbestos Health Protection rules in effect at the time the asbestos survey is completed and the asbestos survey addresses and accurately represents ACM and ACBM, as applicable, for the building affected by the planned renovation, demolition, or O&M activity, including its location, type, and condition.

(4) An environmental assessment report may not be used as an asbestos survey report unless it is conducted by an appropriately accredited or licensed person and contains all of the required elements of an asbestos survey report, as applicable.

(f) Sampling for asbestos in a public building. A licensed asbestos inspector must perform an asbestos survey in accordance with generally accepted standards, such as the methods described in 40 CFR §§763.85 - 763.88. The survey and survey report must identify, including its location, type, and condition, all ACBM that is found to be ACM. To assess the presence of ACBM and determine the need for any O&M activity or abatement, the licensed asbestos inspector must collect a minimum of three samples from each homogeneous area. The samples must be evaluated by a licensed asbestos laboratory. If one sample from a homogeneous area is found to be ACM, the remaining samples from that homogeneous area do not have to be analyzed. Building materials that have not been surveyed as required in this subsection and are suspected of containing asbestos must be treated as ACBM.

(1) When conducting core sample analysis, each layer must be analyzed and reported separately. Core sample analysis in a public building must not be reported as an average or a composite result.

(2) A result of visual estimation by polarized light microscopy (PLM) analysis of 0% asbestos or no asbestos detected does not require further analysis for the detection of asbestos in friable or nonfriable suspect materials.

(3) Point counting may be used to analyze either a friable or nonfriable material. Nonfriable materials, such as mastics and floor tile where fibers are occluded by a binding matrix must be processed using a technique that renders the material friable, such as acid washing and ashing outlined in EPA/600/R-93/116.

(4) A result of visual estimation by PLM analysis of greater than 0% and less than 10% asbestos may be demonstrated to be material that is not ACBM only if the material is further analyzed using other analysis based upon the hierarchy and terms of the following:

(A) The result of point counting by PLM analysis of a sample supersedes and replaces the initial result of visual estimation by PLM.

(B) The result of gravimetric preparation, followed by point counting or transmission electron microscopy (TEM) visual estimation analysis of a sample, supersedes and replaces the result of visual estimation by PLM and the result of point counting by PLM.

(g) Conditions requiring mandatory abatement. Before any renovation or dismantling of a public building, commercial building, or facility, including preparations for partial or complete demolition, the building owner must have ACBM abated, as required in this section.

(1) Demolition or renovation of a public building. Before performing any demolition in a public building, the building owner must ensure that all suspect ACBM is surveyed and RACM is abated in accordance with NESHAP and as required in this chapter. Before performing any renovation in a public building, the building owner must ensure that all suspect ACBM that could foreseeably be disturbed in the area to be renovated is surveyed and ACBM is abated, as required in this chapter.

(2) Demolition or renovation of a commercial building. Before performing any demolition, renovation, or O&M activity in a commercial building, the owner or operator must ensure that all suspect ACBM is surveyed and RACM is abated in accordance with NESHAP by a person accredited, as required §296.151 of this chapter (relating to Accreditation for Asbestos-Related Activities in a Commercial Building) and in accordance with the MAP.

(3) Demolition or renovation of a facility. Before performing any demolition, renovation, or O&M activity in a facility, the owner or operator must ensure that all suspect ACM is surveyed and RACM is abated in accordance with NESHAP. Any structure, installation, or building that was previously subject to NESHAP is not excluded, regardless of its current use or function.

(4) Demolition or renovation of a residential building that contains four or fewer dwelling units.

(A) Two or more residential buildings that contain four or fewer dwelling units are considered an installation and are subject to NESHAP if they are on the same site and under the control of the same owner or operator or owner or operator under common control as part of the same renovation or demolition project. Residential buildings are considered to be on the same site if they are within 660 feet of each other. Demolitions planned at the same time or as part of the same planning or scheduling period, that is often a calendar year, fiscal year, or the term of a contract, are considered to be part of the same project. Each owner or operator of the residential buildings must ensure that all suspect ACM is surveyed and RACM is abated in accordance with NESHAP.

(B) A residential building that is being demolished together with any other type of building as part of a larger private or public project, such as an urban renewal, shopping mall, or highway

construction project is subject to NESHAP and each owner or operator must ensure that all suspect ACM in the residential building, as well as in the other building types, is surveyed and RACM is abated in accordance with NESHAP. If one residential building that contains four or fewer dwelling units is the only building being demolished, NESHAP regulations do not apply.

(C) Any renovation or demolition of a residential building is subject to NESHAP if the residence contains greater than four dwelling units or if it meets the conditions described in subparagraphs (A) or (B) of this paragraph.

(h) Demolition with ACM left in place.

(1) Category I nonfriable ACM may be left in place if it is not in poor condition, has not become friable, and will not become RACM during demolition.

(2) Category II nonfriable ACM may be left in place if the probability is low that the material will become RACM, or be crumbled, pulverized, or reduced to a powder during demolition.

(3) RACM on a facility component that is encased in concrete or other similarly hard material and is adequately wet whenever exposed during demolition may be left in place.

(4) RACM that is not accessible for testing and is, therefore, not discovered until after demolition begins and, because of the demolition the material, cannot be safely removed may be left in place. If not removed for safety reasons, the exposed RACM and any asbestos-contaminated debris must be treated as ACWM and adequately wet at all times until disposed of.

(i) Mandatory asbestos abatement project design for friable ACBM in a public building. An asbestos abatement project design is required and must be conducted by a licensed asbestos consultant for a project that involves any of the following activities:

(1) a response action other than an SSSD activity;

(2) a maintenance activity that disturbs friable ACBM other than an SSSD activity or a small project or repetitive task described in §296.233 of this chapter (relating to Alternative Asbestos Practices and Procedures for Small Projects and Repetitive Tasks in a Public Building); or

(3) a response action for a major fiber release episode.

(j) Asbestos abatement project design for friable ACM in a commercial building. An asbestos abatement project design for a response action in a commercial building must be conducted by a person appropriately accredited to conduct a project design in accordance with AHERA.

(k) Mandatory asbestos abatement project design for nonfriable ACBM in a public building.

(1) An asbestos abatement project design is required and must be conducted by a licensed asbestos consultant for an abatement project in a public building that has a combined amount of nonfriable ACBM to be removed in excess of 160 square feet of surface area, 260 linear feet of pipe length, or 35 cubic feet of material.

(2) Only individual amounts of nonfriable ACBM to be removed that are in the same unit of measurement require combination for purposes of determining whether a project design is required.

(3) An asbestos abatement project that has a combined amount of nonfriable ACBM to be removed equal to or less than 160 square feet of surface area, 260 linear feet of pipe length, or 35 cubic feet of material; and a project conducted as described in §296.231 of this chapter (relating to Alternative Practices and Procedures for Removal of Asbestos-Containing Resilient Floor-Covering Material in a Public Building); §296.232 of this chapter (relating to Alternative Asbestos Abatement Practices and Procedures for Certain Nonfriable Asbestos-Containing Building Material (ACBM) in a Public Building); §296.233 of this chapter; and §296.234 of this chapter (relating to Alternative Practices and Procedures for Removal of Whole Components of Intact Asbestos-Containing Material (ACM) in a Public Building) does not require an asbestos abatement project design.

(4) In a commercial building, nonfriable material does not require a project design, but must be treated in accordance with NESHAP.

(l) Asbestos control and abatement in a public building. The public building owner must manage the asbestos found in the owner's building in accordance with the following requirements.

(1) The building owner must hire a licensed asbestos consultant, licensed asbestos consultant agency, licensed asbestos management planner, or licensed asbestos management planner agency to perform an asbestos survey that may be used for O&M activities, renovation, or demolition.

(2) The building owner must hire a licensed asbestos abatement contractor to conduct:

(A) asbestos abatement in accordance with §296.212 of this chapter (Standard Asbestos Abatement Practices and Procedures in a Public Building);

(B) asbestos abatement of nonfriable ACBM using the work practices described in §296.232 of this chapter, where applicable;

(C) small projects or repetitive tasks involving the disturbance of friable ACBM, under the conditions and using the work practices described in §296.233 of this chapter; and

(D) an activity described and conducted in accordance with §296.234 of this chapter.

(3) The building owner must hire or retain a licensed asbestos abatement contractor or a licensed asbestos O&M contractor to conduct an SSSD O&M activity or cleanup affecting asbestos, in accordance with in §296.213 of this chapter (relating to Asbestos Operations and Maintenance (O&M) Practices and Procedures for O&M Licensees in a Public Building). When utility work is to be performed, the building owner must either have the affected ACM removed before the work of a utility contractor or require the utility contractor to be licensed to handle ACM.

(4) A building owner licensed as an asbestos abatement contractor, as required in §296.50 of this chapter (relating to Asbestos Abatement Contractor) or as an asbestos O&M contractor, as required in §296.52 of this chapter (relating to Asbestos Operations and Maintenance Contractor) may conduct the activities described in paragraphs (2) and (3) of this subsection, as applicable.

(5) The building owner must hire a licensed asbestos management planner, licensed asbestos management planner agency, licensed asbestos consultant, or licensed asbestos consultant agency to develop a management plan to control ACM during O&M, renovation, and demolition, if applicable.

(m) Mandatory notification. Notification is required under §296.251 of this chapter (relating to Notifications) under the following conditions.

(1) Notification is required for any demolition of a facility or public building, whether or not asbestos has been identified.

(2) In a public building, a notification to abate any amount of ACBM must be submitted to DSHS by the public building owner or operator or delegated agent.

(3) In a facility, a notification to abate an amount of RACM described in NESHAP must be submitted to DSHS by the facility owner or operator.

(n) Requirement for survey and management plan. A building owner or the building owner's authorized representative, if required by certified letter from DSHS, must immediately obtain an asbestos survey report and asbestos management plan completed by a licensed asbestos inspector, licensed asbestos management planner, or licensed asbestos consultant, if, in the opinion of DSHS following a site inspection of a public building, there appears to be a danger or potential danger from ACBM in poor condition to the workers or occupants of the building or to the general public. A copy of the management plan must be submitted for review and approval to DSHS within 90 days after receipt of the certified letter. A copy of the plan must be on file with the owner or management agency and in the possession of the supervisor in charge of building operations and maintenance.

(o) Installation of new materials in a public building. Texas Health and Safety Code, Chapter 161, Subchapter Q (relating to Installation of Asbestos), requires the following:

(1) A person who installs a building material or replacement part designated in paragraph (2) of this subsection in a public building must obtain an MSDS or SDS before the installation. A person must not install a material or part designated in paragraph (2) of this subsection that requires an MSDS or SDS under this paragraph unless:

(A) the person obtains an MSDS or SDS for the material proposed to be installed showing that the material or replacement part is not ACM; or

(B) the material or replacement part, according to the MSDS or SDS, is ACM, but the building owner or contractor can demonstrate that there is no alternative material or part.

(2) A person must obtain an MSDS or SDS before installing the following building materials or replacement parts:

(A) surfacing materials:

(i) acoustical plaster;

(ii) decorative plaster/stucco;

(iii) textured paint/coating;

(iv) spray applied insulation;

(v) blown-in insulation;

(vi) fireproofing insulation;

(vii) joint compound; and

(viii) spackling compounds;

(B) TSI:

(i) taping compounds (thermal);

(ii) HVAC duct insulation;

(iii) boiler insulation;

(iv) breaching insulation;

(v) pipe insulation; and

(vi) thermal paper products;

(C) miscellaneous material:

(i) cement pipes;

(ii) cement wallboard/siding;

(iii) asphalt/vinyl floor tile;

(iv) vinyl sheet flooring/vinyl wall coverings;

(v) floor backing;

(vi) construction mastic;

(vii) ceiling tiles/lay-in ceiling panels;

(viii) packing materials;

(ix) high temperature gaskets;

(x) laboratory hoods/table tops;

(xi) fire blankets/curtains;

(xii) elevator equipment panels;

(xiii) elevator brake shoes;

(xiv) ductwork flexible fabric connections;

(xv) cooling towers;

(xvi) heating and electrical ducts;

(xvii) electrical panel partitions;

(xviii) electrical cloth/electrical wiring insulation;

(xix) chalkboards;

(xx) roofing shingles/tiles;

(xxi) roofing felt;

(xxii) base flashing;

(xxiii) fire doors;

(xxiv) caulking/putties;

(xxv) adhesives/mastics;

(xxvi) wallboard; and

(xxvii) vermiculite.

(p) Application for exemption. An owner or licensee may apply to DSHS for an exemption of a demolition or renovation project from any rule under this chapter relating to demolition and renovation activities, that DSHS, in its sole discretion, may grant if the rule exemption is not inconsistent with the Act and it meets one of the following conditions:

(1) the EPA has exempted the project from federal regulations; or

(2) DSHS determines that:

(A) the project will use a method for the abatement or removal of asbestos that provides protection for the public health and safety at least equivalent to the protection provided by the procedure required in this chapter for the abatement or removal of asbestos; and

(B) the project does not violate federal law.

(q) Survey or certification required for municipal permit. A municipality that requires a person to obtain a permit before renovating or demolishing a public or commercial building must not issue the permit unless the applicant provides one of the following types of documentation:

(1) written evidence acceptable to the municipality that an asbestos survey of all parts of the building affected by the planned reno-

vation or demolition has been completed by a person licensed in accordance with the Act and this chapter (for a public building) or accredited under the MAP (for a nonpublic building) to perform a survey; or

(2) written certification from a Texas-registered architect or Texas-licensed professional engineer that:

(A) identifies the name of the building, the street address, and the specific area of the building that applies to the certification;

(B) certifies that the Texas-registered architect or Texas-licensed professional engineer has compiled and reviewed the information from:

(i) MSDSs and SDSs of the materials used in the original construction of the building and any renovations or alterations of all parts of the building affected by the planned renovation or demolition, has matched them by manufacturer to materials on-site in the construction; and

(ii) any previous asbestos survey report of the building that is conducted as required at the time of the survey;

(C) certifies based upon review of the information in subparagraph (B) of this paragraph that in the architect's or engineer's professional opinion, no part of the building, including the building materials, affected by the planned renovation or demolition contain asbestos;

(D) specifies the dates of each asbestos survey report reviewed;

(E) specifies whether the relevant work was new construction or renovation; and

(F) specifies the dates of completion of all original construction and renovations or alterations that apply to the certification.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER L. GENERAL REQUIREMENTS, AND PRACTICES AND PROCEDURES FOR ASBESTOS ABATEMENT IN A PUBLIC BUILDING

25 TAC §§296.211 - 296.213

STATUTORY AUTHORITY

The new rules are authorized by Texas Government Code, §531.0055, and Texas Health and Safety Code, §1001.075, which authorizes the Executive Commissioner of HHSC to adopt rules and policies necessary for the operation and provision of health and human services by DSHS, for the administration of Texas Health and Safety Code, Chapter 1001, to implement Texas Occupations Code, Chapter 1954; Texas Health and Safety Code, §12.0111, which requires DSHS to collect fees for issuing or renewing a license; and Texas Health and Safety Code §161.402, which requires the Executive Commissioner to adopt rules designating the materials or replacement parts for which a person must obtain a material safety data sheet before installing the materials or parts in a public building.

§296.211. General Requirements for Asbestos Abatement in a Public Building.

(a) Responsibility. The public building owner or the owner's delegated agent must engage persons licensed as required in this chapter to perform any asbestos-related activity.

(b) Project supervision and monitoring.

(1) Every asbestos abatement project undertaken by a licensed asbestos abatement contractor in a public building under this section must be supervised by at least one licensed asbestos abatement supervisor and monitored by a licensed asbestos consultant or the consultant's designated licensed project manager or licensed asbestos air monitoring technician project monitor (AMT/PM). Except as described in the following subparagraphs, these supervisory and monitoring requirements extend to all projects performed in a public building under Subchapter K of this chapter (relating to Asbestos Management in a Public Building, Commercial Building, or Facility), Subchapter L of this chapter (relating to General Requirements, and Practices and Procedures for Asbestos Abatement in a Public Building), and Subchapter M of this chapter (relating to Alternative Asbestos Practices and Procedures in a Public Building).

(A) A licensed asbestos consultant or a licensed project manager or licensed AMT/PM designated by the consultant is not required to monitor or assess an SSSD O&M activity conducted under §296.213 of this chapter (relating to Asbestos Operations and Maintenance (O&M) Practices and Procedures for O&M Licensees in a Public Building), except that, for a project involving the use of a mini-containment, visual clearance must be performed by a licensed asbestos consultant or a licensed project manager or licensed AMT/PM designated by the consultant and third-party air clearance monitoring must be performed by a licensed air monitoring technician (AMT), licensed AMT/PM, or a licensed asbestos consultant before the mini-containment is removed.

(B) An asbestos abatement supervisor, consultant, or designated project manager or AMT/PM licensed under this chapter is not required to supervise, monitor, or assess, as applicable, a project conducted in accordance with §296.231 of this chapter (relating to Alternative Practices and Procedures for Removal of Asbestos-Containing Resilient Floor-Covering Material in a Public Building).

(2) Except as otherwise provided under paragraph (1) of this subsection:

(A) A licensed asbestos abatement supervisor and a licensed asbestos consultant or the consultant's designated licensed asbestos project manager or licensed AMT/PM must remain on-site and in immediate proximity to the abatement activity during all periods of that activity.

(B) A licensed asbestos abatement supervisor must supervise the asbestos abatement activity from inside the containment area during at least 25% of each day on which asbestos abatement activity occurs in a containment.

(C) A licensed asbestos consultant or the consultant's designated licensed asbestos project manager or licensed AMT/PM must enter and inspect the containment and monitor asbestos abatement activities, conducted as required in Subchapter L of this chap-

ter and Subchapter M of this chapter, as applicable, every day of the asbestos abatement activity, before the start of asbestos abatement activity for the day, routinely throughout the day, for the duration of the project from the beginning of containment to the final visual inspection of the project site and loading of ACWM for transport, as applicable, to:

(i) monitor the asbestos abatement activity by observing, reporting, and documenting that the regulated area, containment, or both is in compliance with this chapter and the specifications and plans, as applicable;

(ii) identify and document any correction needed;

(iii) document correction of any identified issue of noncompliance with asbestos abatement activity in a regulated area, containment, or both, as applicable, before work proceeds; and

(iv) report any identified issue of noncompliance that was not corrected to DSHS, as required in §296.41(f) of this chapter (relating to License and Registration Requirements).

(D) At least one licensed asbestos O&M supervisor or licensed asbestos abatement supervisor must supervise every SSSD O&M activity performed as described in §296.213 of this chapter during all periods of asbestos abatement activity.

(c) Employees. If an employee or delegated agent of any licensee who is an employer must intentionally disturb, handle, or otherwise work with ACBM, or engage in an asbestos abatement project, asbestos SSSD O&M activity, or other asbestos-related activity, the employee must have an annual medical examination and respirator fit-test that meets the requirements stated in the asbestos regulations of the EPA or OSHA, as applicable, and be properly equipped, trained, and licensed as required in this chapter.

(d) Records. Project records for each asbestos-related activity in a public building must be kept for 30 years from the date of project completion and made available for inspection and review upon request from DSHS. Project records include all findings of violation and disciplinary action issued against a licensee by the EPA, OSHA, or a state agency. The recordkeeping responsibilities for licensees are described in §296.291 of this chapter (relating to Recordkeeping).

(e) Inspections and investigations. Each licensee, RFCI contractor, and building owner must assist and cooperate with all properly identified representatives of DSHS in the conduct of an asbestos inspection or investigation, as described in §296.271 (relating to Inspections and Investigations) of this chapter at any reasonable time, with or without prior notice or permission.

(f) Respiratory protection program. Each employer with one or more employees who perform any asbestos-related activity must comply with the requirements in 29 CFR §1910.134 (relating to Respiratory protection) for establishing and following a written respiratory protection program, with worksite-specific procedures, and in accordance with 29 CFR §1926.1101(h)(2) (relating to Asbestos), 29 CFR §1910.1001(g)(2) (relating to Asbestos), and 40 CFR Part 763, Subpart G (relating to Asbestos Worker Protection), whichever is applicable. Each employer must maintain a current copy of the respiratory protection program at all project locations. Required respirators must be properly worn at all times in containment and as otherwise required during asbestos abatement activity.

(1) The employer must provide for personal air monitoring to determine airborne concentrations of asbestos exposure to its employees in compliance with 40 CFR Part 763, Subpart G (relating to Asbestos Worker Protection), or 29 CFR §1926.1101, whichever is applicable, unless the employer has obtained a negative exposure assessment in compliance with 29 CFR §1926.1101.

(2) The employer must maintain, in a safe working condition, a sufficient number of respirators of the types and styles approved by NIOSH to meet all requirements for the employees. The employer and any representative of the employer must not permit any person whose facial characteristics, hair, mustache, or beard preclude the tight fit of a negative-pressure respirator to enter the containment during any asbestos abatement activity. The employer must select and provide an appropriate respirator that correctly fits the employee, such as a positive pressure or supplied-air respirator designed for usage with facial hair.

(g) Suspect ACBM found during the asbestos abatement project. A suspect building material found during an asbestos abatement project that has not been surveyed must be treated as ACBM. The material may be proven to be non-asbestos-containing by laboratory analysis, as required in §296.191(f) of this chapter (relating to Asbestos Management in a Public Building, Commercial Building, or Facility).

(h) Project air monitoring, personal air monitoring, and project work practice monitoring. The licensed asbestos consultant for an abatement project in a public building must specify in writing the duties, responsibilities, and authority of the licensed project manager, air monitoring technician, and AMT/PM. When asbestos is abated under an alternative work practice established in Subchapter M of this chapter, the project monitoring requirements for the chosen work practice apply and air sampling and analysis must comply with the NIOSH 7400 requirements outlined in paragraph (1) of this subsection, as applicable.

(1) Ambient air sampling. Air samples must be collected by a licensed asbestos air monitoring technician, AMT/PM, or asbestos consultant. The sample pumps must be monitored throughout the day during the sampling period by the person collecting the samples. For all projects, samples must be collected and analyzed using the NIOSH 7400 method, counting rules A, Phase-contrast Microscopy (PCM). Samples must be collected at a flow rate between 0.5 to 16 liters per minute on 0.8 micron mixed cellulose ester (MCE) filters in cassettes with electrically conductive extension cowls. Only one cassette may be placed on a pump at a time. PCM must be used in accordance with the NIOSH 7400 method to determine the fiber concentration present. Alternatively, the AHERA protocol may be used to determine volume and flow rate needed for transmission electron microscopy (TEM) analysis in accordance with the mandatory provisions of Appendix A (relating to Interim Transmission Electron Microscopy Analytical Methods--Mandatory and Nonmandatory--and Mandatory Section to Determine Completion of Response Actions) of AHERA.

(A) Baseline.

(i) Baseline air samples must be collected before the start of any asbestos abatement project that requires a design as described in §296.191(i) and (j) of this chapter. The samples must be collected from inside the space that will become the regulated area for the project before any asbestos abatement activity that disturbs ACBM begins. A minimum of three samples must be collected on 0.8 micron (MCE) filters loaded in cassettes with electrically conductive extension cowls. The locations from which baseline air samples are collected must provide suitable data for comparison with indoor air monitoring samples collected after asbestos abatement activities begin. Sampling and, if any, analysis must conform to the NIOSH 7400 method, counting rules A. For each sample, a sample volume of at least 1,250 liters must be drawn. Only one cassette may be placed on a pump at a time.

(ii) Baseline air samples must be kept for no fewer than 30 days after clearance is achieved.

(B) Air sampling during the project.

(i) Ambient air samples must be collected continually during disturbance of ACM or when asbestos abatement is being conducted in a containment. Air samples must be analyzed in accordance with the NIOSH 7400 method, counting rules A and only one cassette may be placed on a pump at a time.

(ii) Ambient air samples must be collected:

(I) inside containment adjacent to the abatement activities;

(II) outside containment but inside the building, if applicable;

(III) within 10 feet of the unobstructed exhaust from the negative air unit discharge, but not directly in the airstream, where feasible;

(IV) immediately outside the entrance to the decontamination area used to enter the containment (representative of the air being drawn into the containment area) or in the case of a remote decontamination area, immediately outside the entrance to the containment;

(V) immediately outside the entrance of the bag-out area, if applicable; and

(VI) at any other location required by the specifications and plans.

(C) Clearance.

(i) Project clearance must consist of an initial visual inspection, followed by air clearance sampling, removal of containment, and a final visual inspection.

(ii) Clearance air samples must be collected inside the containment, as specified by a licensed asbestos consultant, with a minimum of two samples per containment or in accordance with AHERA and OSHA regulations, as applicable. Only one cassette may be placed on a pump at a time.

(iii) All project activities, except an SSSD O&M activity performed as described in §296.213 of this chapter, must be cleared by using aggressive air sampling. For each sample, a sample volume of at least 1,250 liters must be drawn. All air sampling and analysis must comply with the NIOSH 7400 requirements. Clearance is achieved if no sample is reported greater than 0.01 f/cc by the analysis report from the licensed laboratory.

(D) Air sample results. The licensed air monitoring technician, AMT/PM, or licensed asbestos consultant must record in writing the results of area, baseline, and clearance air samples that are analyzed and document that the results are provided to the asbestos abatement contractor verbally by the following time frames, unless the consultant designs a sampling strategy that deviates from these time frames, as described in paragraph (4) of this subsection:

(i) the next working day after the date of sampling, for any air sample analyzed on-site; or

(ii) for asbestos abatement of friable ACBM, the third working day after the date of initial sampling, for any air sample analyzed in an asbestos laboratory off-site.

(2) Personal air monitoring.

(A) Unless a negative exposure assessment is made in compliance with 29 CFR §1926.1101(f)(2)(iii) (relating to Asbestos), personal air samples must be collected, monitoring conducted, and employees informed of results, in compliance with 40 CFR Part 763, Subpart G (related to Asbestos Worker Protection) or 29 CFR §1926.1101 (relating to Asbestos), as applicable, and subsection (f) of this section.

(B) Without limiting the requirements of 40 CFR Part 763, Subpart G or 29 CFR §1926.1101, as applicable, a licensed air monitoring technician, AMT/PM, or asbestos consultant must record in writing the results of personal air samples that are analyzed and document that the results are provided to the asbestos abatement contractor in writing by the following time frames, unless the asbestos consultant designs a sampling strategy that deviates from these time frames, as described in paragraph (4) of this subsection:

(i) the next working day after the date of sampling, for any air sample analyzed on-site; or

(ii) for asbestos abatement of friable ACBM, the third working day after the date of initial sampling for any air sample analyzed in an asbestos laboratory off-site.

(3) Other monitoring requirements.

(A) Initial visual inspection. The licensed asbestos abatement supervisor must perform an initial visual inspection of the abatement area to confirm that all specified ACM was removed, encapsulated, or enclosed. The asbestos abatement supervisor must ensure that all abatement-related items are removed from the containment, excluding negative air machines and equipment essential to maintain the containment and to perform the visual inspection. Once the asbestos abatement supervisor confirms that all specified ACM is addressed, a licensed asbestos consultant, or a licensed asbestos project manager or licensed AMT/PM whom the asbestos consultant has given written authorization to perform the visual inspection, must perform a visual inspection to determine that all specified ACM was removed, encapsulated, or enclosed. The initial visual inspection must be performed to ensure compliance with this chapter, the site-specific specifications and plans, AHERA, and NESHAP.

(B) Final visual inspection. A final visual inspection must be performed after the removal of containment and the initial visual inspection to determine if any ACM escaped the containment or any ACWM remains. This visual inspection must be conducted by a licensed asbestos consultant or the consultant's designated licensed asbestos project manager or licensed AMT/PM and as required in subsection (b)(1) of this section. The licensed asbestos abatement contractor must abate all ACM and remove any ACWM discovered by the final visual inspection, as required in this chapter.

(4) Deviations. A licensed asbestos consultant must design the air monitoring strategies and may deviate from this subsection or from the time frames required under §296.54(c)(4) of this chapter (relating to Asbestos Air Monitoring Technician) and paragraphs (1)(D) and (2)(B) of this subsection for reporting air sampling results only if the consultant demonstrates in writing in the specifications and plans that the engineering controls are at least as protective of public health as the requirements of this subsection, or for deviations from the time frames, why the deviation is necessary and any additional controls put in place as a result of the deviation. The deviation must be documented on the notification form and described in the project specifications and plans. The asbestos consultant must, upon request by DSHS, provide documentation and justification to support any deviation and must be able to demonstrate that the design is as protective of public health as the requirements of this subsection, paragraphs (1)(D) and (2)(B) of this subsection, or §296.54(c)(4) of this chapter, as applicable.

(i) Posting documents. Each licensed asbestos abatement contractor, licensed O&M contractor, and RFCI contractor must post the following documents visible to the public at the entrance to the regulated area:

(1) the Violation Notification Procedure poster issued by DSHS; and

(2) a copy of any asbestos-related order issued by DSHS or any other order from a federal or state asbestos-regulating authority; each order must be posted for a period of 12 months after the effective date of the order or for a federal asbestos-related order, the period required by the federal asbestos-regulating authority.

§296.212. Standard Asbestos Abatement Practices and Procedures in a Public Building.

(a) General provisions. The general work practices in this section are minimum requirements for protection of public health for standard projects using full containment in a public building and do not constitute complete or sufficient specifications and plans for an asbestos abatement project. An asbestos abatement project may have specifications and plans for an asbestos abatement activity that are specific to the project and are more detailed or stringent than the requirements of this section so long as the work practices specified are as protective of the public health as the general requirements in this section. These specifications and plans, to the extent they do not conflict with other applicable federal and state law must be followed as a requirement of this chapter. Otherwise, the general work practices described in this section must be used for asbestos removal that does not meet the conditions required to use alternative methods described in Subchapter M (relating to Alternative Asbestos Practices and Procedures in a Public Building).

(1) Subject to the following conditions, and if otherwise consistent with other applicable federal and state law, a licensed asbestos consultant may specify work practices that vary from the requirements of this section as long as the work practices specified are as protective of public health.

(A) A licensed asbestos consultant who designs a project that includes dry removal or no negative air must submit a written request for approval to DSHS, including the project specifications and plans or a written description of the design. The request must include the licensed asbestos consultant's certification that the design is as protective of public health as the work practices described in this section and the consultant's basis for that conclusion. The request must include documentation that a certified industrial hygienist or a professional engineer licensed in Texas approved the design. The consultant must not begin the project without written approval from DSHS. The licensee must clearly describe the approved variance on the notification form.

(B) A licensed asbestos consultant who designs a project with work practices other than dry removal or no negative air that differ from this section must document the variance on DSHS's notification form. The licensee must clearly describe on the notification form the work practices and demonstrate how the specific work practices are as protective of public health as the work practices in this section. DSHS may disapprove the proposed variation after receiving notice or documentation under this subparagraph or any other information related to the variation if DSHS does not or cannot determine that the work practice variance is as protective of public health as the work practices in this section.

(C) The asbestos consultant must, upon request by DSHS, provide additional documentation and justification to support any variance.

(2) A licensed asbestos contractor must follow the specifications and plans for a design that varies from the general work practices in compliance with this section.

(3) In addition to the requirements of this section, abatement practices must be carried out in accordance with federal standards for asbestos abatement and waste disposal in 40 CFR §61.145 (relating to Standard for demolition and renovation) and §61.150 (relating to Standard for waste disposal for manufacturing, fabricating, demolition, renovation, and spraying operations).

(4) ACBM must be removed, encapsulated, or enclosed within a regulated area that is demarcated. Except as provided in §296.213 of this chapter (relating to Asbestos Operations and Maintenance (O&M) Practices and Procedures for O&M Licensees in a Public Building), §296.231 of this chapter (relating to Alternative Practices and Procedures for Removal of Asbestos-Containing Resilient Floor-Covering Material in a Public Building), §296.232 of this chapter (relating to Alternative Asbestos Abatement Practices and Procedures for Certain Nonfriable Asbestos-Containing Building Material (ACBM) in a Public Building), and §296.234 of this chapter (relating to Alternative Practices and Procedures for Removal of Whole Components of Intact Asbestos-Containing Material (ACM) in a Public Building), or, after a clearance-level assessment is completed as required in §296.233 of this chapter (relating to Alternative Asbestos Practices and Procedures for Small Projects and Repetitive Tasks in a Public Building), removal of ACBM must take place within a containment.

(5) Except as otherwise provided in this paragraph or by other applicable law, access to the regulated area must be limited to:

(A) licensees;

(B) emergency responders;

(C) licensed, registered, or accredited building professionals required for emergency situations, as determined by a licensed asbestos consultant;

(D) appropriate governmental inspectors;

(E) authorized personnel, in accordance with 29 CFR §1926.1101(e) (relating to Asbestos); and

(F) a building owner or building owner's authorized representative, if authorized by the licensed asbestos abatement contractor, and may enter a containment if accompanied by the contractor, licensed asbestos abatement supervisor, licensed asbestos consultant, or the consultant's designated licensed asbestos project manager or licensed AMT/PM. A building owner or building owner's authorized representative who enters containment must wear at a minimum the personal protective equipment required for workers performing the asbestos-related activity, must follow the specified decontamination procedures when exiting the containment, and must comply with all other applicable health and safety procedures.

(b) Containment construction.

(1) Plastic sheeting. When specified by a licensed asbestos consultant that fire retardant plastic sheeting must be used, it must be certified by the Underwriters Laboratory (UL) as being fire retardant.

(2) Objects within containment. All uncontaminated movable objects must be removed from the containment before the start of asbestos abatement. Contaminated non-porous items that are to be salvaged or reused must be decontaminated. Porous items that are contaminated must be disposed of as ACWM. All non-movable objects that remain in the containment must be decontaminated and covered

with a minimum of 4-mil thick plastic sheeting attached securely in place.

(3) Critical barriers. A regulated area within which asbestos abatement is to be conducted must be separated from adjacent areas by a minimum of one impermeable barrier, such as plastic sheeting attached securely in place. Any opening between a containment and adjacent areas must be sealed, including a window, doorway, elevator opening, corridor entrance, ventilation opening, drain, duct, grill, grate, diffuser, skylight, and lay-in suspended ceiling grid system where the space above the grid is open to other rooms. The HVAC system must be isolated from the regulated area, as required in paragraph (9) of this subsection. A penetration of the sheeting that could permit air infiltration or an air leak through the barrier must be sealed, except the make-up air provision and the means of entry and exit. When a critical barrier is placed over a large opening, such as a corridor entrance or when isolating a portion of a hallway or a room, the critical barrier becomes the containment wall and the plastic sheeting requirements in paragraphs (4) and (5) of this subsection apply in addition to the requirements of this paragraph.

(4) Floor abatement preparation. Floors must be sealed to prevent water leakage by performing the following floor abatement preparation. All floor surfaces must be completely covered by a minimum of two layers of 6-mil thick plastic sheeting. Floor sheeting must extend up sidewalls at least 12 inches and be sized to minimize the number of seams. Seams must not be located at wall-to-floor joints. When asbestos abatement includes wall removal, the asbestos consultant must specify how removal will occur and how the practice will be at least as protective of public health as the minimum requirements of this section.

(5) Wall abatement preparation. All wall surfaces must be completely covered by a minimum of two layers of 4-mil thick plastic sheeting. Wall sheeting must be installed so as to minimize seams and must extend beyond wall-to-floor joints at least 12 inches. The wall sheeting must overlap the floor sheeting. Seams must not be located at wall-to-wall joints. Where feasible, a viewing window must be included in the wall for each 260 linear feet or fraction of that distance that permits the viewing of at least 51% of the abatement work area. At least one viewing window must be included in the wall, unless a licensed asbestos consultant specifies that a viewing window is not feasible. The window must be constructed of a transparent, shatter-resistant panel, also called acrylic or acrylic glass, which measures approximately 18 inches by 18 inches. The window must be at a reasonable height for viewing.

(6) Bag-out area. A licensed asbestos consultant must specify when a bag-out area is required as part of containment. At a minimum, a bag-out area is a two-stage area connected to the containment, separated by airlocks, with a rinse station separated from the bagging-room. A bag-out area must not be used to decontaminate personnel.

(7) Prohibited activities in a regulated area. The asbestos abatement contractor and asbestos consultant must ensure that their employees do not eat, drink, smoke, chew tobacco or gum, or apply cosmetics in the regulated area. Food or drink containers, coolers, tobacco products, gum, and cosmetics are not permitted in the regulated area.

(8) Decontamination area. The containment must include an attached personnel decontamination area. The area must consist of a clean room, shower room, and equipment room. Each room must be at least 30 inches by 30 inches wide and 75 inches tall. Each room must be separated from the other and from the containment by airlocks so that air does not escape outside the containment and that air flows from the outside to the inside of containment through the decontamination area. The shower room must be provided with soap and water and, where feasible, hot and cold water where the temperature can be adjusted by the user. A licensed asbestos consultant must specify a remote decontamination area when it is not feasible to attach the decontamination area to the containment. The consultant must specify procedures for minimizing the migration of fibers from the containment to the remote decontamination area. Except where remote decontamination area is specified, all persons must exit the containment through the shower before entering the clean room. An asbestos-contaminated individual or item must not enter the clean room. A licensed asbestos abatement supervisor must ensure that the decontamination area is fully operational before and during any asbestos abatement activity. Any person exiting containment must:

(A) remove all gross contamination and debris from protective clothing before entering the equipment room;

(B) remove protective clothing in the equipment room and deposit the clothing in impermeable plastic bags or containers labeled as required in subsection (c)(4) of this section;

(C) not remove respirators in the equipment room;

(D) shower before entering the clean room; and

(E) enter the clean room before changing into street clothes.

(9) HVAC equipment. The HVAC system must be isolated from the regulated area. Any supply and return opening and any seam in system components must be sealed with either impermeable plastic sheeting, tape, or both. An old filter must be disposed of as asbestos waste.

(10) Warning signs. A warning sign that complies with 29 CFR §1926.1101, must be displayed at all entrances to regulated area, including an area requiring a critical barrier that can be used to gain entrance to the containment, such as a door, window, or hallway. To protect the public from accidental entry, a warning sign must be displayed, at minimum, in both Spanish and English at the same location. Asbestos caution tape must not be substituted for a warning sign.

(11) Cleaning. Cleaning procedures must include wet methods and HEPA vacuuming. A HEPA vacuum designed and equipped with a HEPA filter must remain on-site during any asbestos abatement activity. HEPA vacuums must be operated and maintained in accordance with the manufacturer's instructions. A HEPA vacuum that meets the standard of ASTM F1977-04 and is operated according to manufacturer's specifications will meet the requirement of this section.

(12) Containment-area ventilation. HEPA filtration units must be operated continuously from the time containment is established through the time acceptable final air clearance is achieved, maintaining negative pressure with a manometric reading of at least -0.02 inches inside the containment. There must be HEPA units in sufficient number to provide negative pressure within the containment relative to the non-containment area, as indicated by a water column differential that produces a manometric instrument reading of at least -0.02 inches. HEPA units must, in combination, provide a minimum of four containment air changes per hour. Units must be operated with unrestricted exhaust, unless it is not feasible, and must be in a location that draws air across the containment area so that asbestos fibers are captured and minimizes areas without air movement. These units must exhaust filtered air to the outside of the building wherever feasible.

(c) Removal of ACBM.

(1) All ACBM must be adequately wetted using amended water before removal or other handling. A consultant may specify the

use of water without surfactant if it is as protective of public health. The ACBM must then be placed in bags (or other suitable containers) that must be marked in accordance with applicable NESHAP and OSHA regulations and paragraph (4) of this subsection. All ACWM must be double-bagged into 6-mil thick plastic bags or placed into a leak-tight drum.

(2) A bag must not be filled to a level that tears or breaks the bag. Excess air in a bag must be removed before entering the bag-out area. The top of the bag must be twisted closed, folded over, and sealed with duct tape. The bag must be rinsed off or HEPA-vacuumed in the bag-out area to remove asbestos contamination and placed inside another bag or leak-tight drum. If an outer bag is used, excess air must be removed, and the bag must be closed and sealed in the same manner as the inner bag.

(3) If a bag leaks, the bag must be placed into a third bag and sealed as required in paragraphs (1) and (2) of this subsection. If a drum leaks, the drum must be wrapped in a minimum of one layer of 6-mil thick plastic sheeting and sealed.

(4) The exterior bag, wrapping, or leak-tight drum must have warning and generator labels applied as specified in 40 CFR §61.150(a)(1)(iv) and (v) (relating to Standard for waste disposal for manufacturing, fabricating, demolition, renovation, and spraying operations). Generator labels must be printed in letters of sufficient size and contrast to be readily visible and legible. All required labeling of ACWM containers must be done before removal from the regulated area. Any container or wrapped component labeled as asbestos must be containerized and labeled as ACWM before removal from the regulated area.

(5) A component covered with, coated with, or containing ACM that is going to be removed from the building may either, after being adequately wetted, be stripped in place, cleaned, and pass a visual inspection by the asbestos consultant, or the ACBM may be adequately wetted and the entire component wrapped in two layers of 6-mil thick plastic sheeting or equivalent, labeled, and sealed, provided that:

(A) any component, such as a section of metal lath, that cannot be safely lowered to the floor must, after being adequately wetted, be stripped in place;

(B) any component that cannot be lowered or handled without presenting an excessive fiber release or safety hazard must be stripped in place; and

(C) a sharp edge of any component must be protected to preclude tearing the plastic wrapping and causing injury.

(6) ACBM must be removed as a wrapped unit or in small sections and containerized while wet. Material must not be allowed to accumulate on the floor or become dry. Any structural component or piping must be adequately wetted before wrapping it in plastic sheeting for disposal.

(7) At the conclusion of the removal, the licensed asbestos abatement contractor must perform a visual inspection to confirm that all ACBM required to be removed was removed and containerized, in accordance with this section, and that the containment is free of all residual dust and debris.

(8) Temporary storage of ACWM must be provided (for example, a dedicated roll-off box, dumpster, or storage room lined with 6-mil thick plastic sheeting). All temporary storage must be sealed to prevent unauthorized access and safeguarded to keep the storage container sealed and leak tight. Final disposal of ACWM must be within 30 days after project completion, or when the receiving container is full, whichever is sooner.

(9) A vehicle used to transport ACWM must be marked in accordance with 40 CFR §61.149(d)(1)(i) - (iii), (relating to Standard for waste disposal for asbestos mills) and §61.150(c) during the loading and unloading of ACWM so that the signs are visible.

(10) ACWM transported by a licensed asbestos transporter off the asbestos abatement project site must be disposed of in accordance with 40 CFR §61.150(d).

(d) Requirements for the encapsulation of ACBM.

(1) Any product used for encapsulation must be clearly labeled or described in writing by the manufacturer as being designed for the particular asbestos-related activity. A product that is not clearly labeled or described as an asbestos encapsulant must be tested before use, and found to conform to ASTM E1494-12, if the intended use is to encapsulate ACBM.

(2) Any encapsulation must be performed within a containment.

(3) Loose and hanging ACBM must be removed before encapsulation. Filler material applied to any gap in existing material must contain no asbestos, adhere well to the substrate, and provide an adequate base for the encapsulating agent.

(4) Encapsulant must be applied using only airless spray equipment with the nozzle pressure and tip size set according to the manufacturer's recommendations.

(5) Any encapsulated material must be specifically designated by sign, label, color coding, or other mechanism to warn any individual who may in the future be required to disturb the material.

(e) Requirements for the enclosure of ACBM.

(1) Acceptable enclosure must be airtight and of permanent construction so that the material enclosed is inaccessible.

(2) Any area of ACBM that can be reasonably anticipated to be disturbed during the installation of a hanger, bracket, or any other portion of the enclosure must be wetted within containment before such activity.

(3) Before building the enclosure, loose and hanging ACBM that may be disturbed must be removed.

(4) Any enclosure for ACBM must be specifically designated by sign, label, color coding, or other mechanism to warn any individual who may in the future be required to disturb the material.

(f) Safety requirements and prohibitions. The following safety requirements must be in effect for an abatement project:

(1) Fire safety. A minimum of one fire extinguisher with a minimum National Fire Protection Association rating of 10BC (dry chemical) must be placed within each abatement project containment for every 3,000 square feet, or fraction thereof, of containment. One fire extinguisher must be placed at each entrance inside of the containment. Each fire extinguisher must be maintained in a fully charged and operable condition with a current annual inspection tag securely attached reflecting that maintenance was performed by an appropriately licensed individual. Where more than one fire extinguisher is required, they must be distributed proportionately throughout the containment and their locations clearly marked.

(2) Electrical safety. An active electrical service line within a regulated area and containment must be connected through ground-fault circuit interrupter devices (GFCI). An electrical appliance must not be plugged into an outlet unless equipped with a GFCI.

(3) Prohibitions. Use of any solvent with a flash point of 140 degrees Fahrenheit or below is prohibited.

§296.213. Asbestos Operations and Maintenance (O&M) Practices and Procedures for O&M Licensees in a Public Building.

(a) Restrictions. An O&M licensee is limited to performing the practices and procedures described in this section for O&M activities in a public building that involve friable and nonfriable ACBM and are SSSD activities. These activities are subject to the following conditions:

(1) the practices and procedures must be performed by individuals licensed or registered to perform the applicable activity and supervised by a licensed O&M supervisor or a licensed asbestos abatement supervisor;

(2) an asbestos O&M licensee may perform or supervise, as applicable, an SSSD O&M activity following the practices and procedures described in this section;

(3) if the practices and procedures are supervised by an O&M supervisor, the public building must be under the control of the O&M supervisor's employer who is a licensed asbestos O&M contractor or a licensed asbestos abatement contractor;

(4) a larger project must not be broken down into smaller projects or tasks in order to qualify under this section as an SSSD O&M project to circumvent the restricted applicability of this section or other applicable requirements of this chapter;

(5) an activity conducted under, or a licensee or public building owner acting under, this section remains subject to all applicable requirements of §296.191 of this chapter (relating to Asbestos Management in a Public Building, Commercial Building, or Facility), including, without limitation, the requirement of an asbestos survey performed by an individual licensed to conduct it and the requirement to provide DSHS with written notification, as required in §296.251 of this chapter (relating to Notifications) and §296.211 of this chapter (relating to General Requirements for Asbestos Abatement in a Public Building); and

(6) the practices and procedures described in this section do not limit and must be used only to the extent that they are consistent with the requirements of any other applicable law, including 29 CFR §1926.1101 (relating to Asbestos).

(b) Work practices. Work practices under this section must comply with the following requirements.

(1) An employer must furnish and require the use of a respirator, protective clothing, HEPA vacuum machines, glove bags, and other necessary equipment for an employee who performs an SSSD O&M activity.

(2) A regulated area must be established where an SSSD O&M activity will be conducted and at minimum, asbestos caution tape must be used to demarcate the regulated area. Except as otherwise provided by other applicable law, access to the regulated area must be limited to:

(A) licensees;

(B) emergency responders;

(C) licensed, registered, or accredited building professionals required for emergency situations;

(D) appropriate governmental inspectors;

(E) authorized personnel, in accordance with 29 CFR §1926.1101(e) (relating to Asbestos); and

(F) a building owner or building owner's authorized representative, if authorized by the O&M contractor and accompanied by a licensed O&M contractor, licensed asbestos abatement contractor, licensed O&M supervisor, licensed asbestos abatement supervisor, licensed asbestos consultant, or the consultant's designated licensed asbestos project manager or licensed asbestos air monitoring technician project monitor. A building owner or building owner's authorized representative who enters the regulated area must have at a minimum the personal protective equipment required for workers performing the SSSD O&M activity and must comply with all other applicable health and safety procedures.

(3) A warning sign that complies with 29 CFR §1926.1101, must be displayed at all entrances to regulated area. To protect the public from accidental entry, a warning sign must be displayed, at minimum, in both Spanish and English at the same location. Asbestos caution tape must not be substituted for a warning sign.

(4) Before beginning the SSSD O&M activity, all uncontaminated movable objects must be removed from the regulated area or covered with 4-mil thick plastic sheeting. Any object that is already contaminated must:

(A) be cleaned with a HEPA-filtered vacuum or wet-wiped before removal; or

(B) be completely encased in two layers of 6-mil thick plastic sheeting and treated as ACWM.

(5) Asbestos material must be wetted with amended water or another wetting agent and remain wet throughout the work operation and until final disposal, unless wet methods are not feasible because the asbestos work is being performed on live electrical equipment or in other areas where water will seriously damage materials or equipment.

(6) A small amount of ACM may be removed by using a glove bag, removing the entire asbestos-covered pipe or structure, or constructing a mini-containment, as appropriate, in accordance with the following procedures for the method utilized.

(A) Glove bags.

(i) A glove bag made of transparent 6-mil thick plastic, and seamless at the bottom, must be installed so that it completely covers the pipe or other structure where asbestos work is to be done. The open edges must be folded together and securely sealed with tape. All openings in the glove bag must be sealed with duct tape or equivalent material and the integrity of the bag must be maintained at all times.

(ii) Respirator use and selection must comply with 29 CFR §1910.134 (relating to Respiratory protection) and it's required written respiratory protection program, in accordance with 29 CFR §1926.1101(h)(2), 29 CFR §1910.1001(g)(2) (relating to Asbestos), and 40 CFR Part 763, Subpart G (relating to Asbestos Worker Protection), whichever is applicable. An employee who performs asbestos removal with a glove bag or in close contact with the glove bag must properly wear required respirators at all times during SSSD O&M activity.

(iii) The ACM must be thoroughly wetted with amended water before it is removed from the pipe (applied with a sprayer through the precut port provided in most glove bags or applied through a small hole in the bag). A razor knife must be used to cut any painted canvas covering ACM and peel it away from the ACM. Nips, tin snips, or other appropriate tool must be used to cut and remove any wire mesh covering the ACM. If the ACM beneath the canvas or wire mesh is dry, it must be resprayed with a wetting agent, including any

layer of dry material that is exposed beneath the mesh, the surface of the stripped underlying structure, and the inside of the glove bag.

(iv) Once the ACM is removed from the pipe it must be thoroughly wetted with amended water.

(v) After removal of the layer of ACM, the surface from which asbestos was removed must be thoroughly cleaned with a wire brush and wet-wiped with a wetting agent until no traces of the ACM are visible.

(vi) An asbestos-containing insulation edge that was exposed as a result of the removal or maintenance activity must be encapsulated with a bridging encapsulant that creates a membrane over the surface before the glove bag is removed.

(vii) When the asbestos removal and encapsulation is complete, the glove bag must be vacuumed with a HEPA-filtered vacuum by inserting the vacuum's hose into the glove bag through the port. Once the air has been removed from the bag, the bag, after being squeezed tightly as close to the top as possible and twisted, must be sealed with tape. Once the HEPA vacuum is then removed from the bag, the glove bag itself must be removed from the work area for proper disposal. A glove bag must only be used once and must not be moved.

(B) Mini-containments.

(i) A mini-containment must completely contain any disturbance or removal of ACM and must be constructed of 6-mil thick plastic sheeting by:

(I) affixing the plastic sheeting to the walls with spray adhesive and tape;

(II) covering the floor with plastic, and sealing that plastic floor covering to the plastic on the walls; and

(III) sealing any penetration, such as pipes or electrical conduit, with tape; or

(IV) using equivalent methods that effectively establish a leak-proof and puncture-resistant mini-containment; and

(V) constructing a change room, contiguous to the mini-containment, made of 6-mil thick plastic sheeting, supported by 2-inch by 4-inch lumber, or equivalent, to which the plastic is attached with staples or spray adhesive and tape, or which otherwise complies with 29 CFR §1926.1101(j) and 40 CFR Part 763, Subpart G, whichever is applicable.

(ii) Before use, the mini-containment must be checked for leaks and any leaks sealed.

(iii) The mini-containment must be placed under negative pressure by means of a HEPA-filtered vacuum or similar ventilation unit.

(iv) Appropriate protective clothing and respiratory protection must be worn within the mini-containment.

(v) A visual inspection must be performed by a licensed O&M supervisor before removing a mini-containment.

(vi) If the mini-containment will be reused, the interior must be completely washed with amended water and HEPA-vacuumed. Air clearance must be performed by a licensed asbestos consultant or the consultant's designated licensed AMT.

(vii) If the mini-containment will not be reused, it must be removed by sealing the door, collapsing the containment using a HEPA-equipped vacuum and disposal as ACWM.

(C) Removal of entire structures.

(i) Before removing an asbestos-insulated pipe or an asbestos-containing or covered structure in its entirety, the structure must be wrapped with 6-mil thick plastic sheeting and securely sealed with duct tape or wrapped and sealed in a manner that provides equivalent protection.

(ii) If the entire structure cannot be removed without disturbing ACM, but a small section can be stripped of the ACM to allow for cutting and removal of the entire structure at the stripped sections, the glove-bag method described in subparagraph (A) of this paragraph must be used to strip the small section of ACM to allow for removal of the entire structure.

(7) Enclosure of ACM must be performed in accordance with the following requirements.

(A) To enclose a structure with ACM, rather than removing the ACM, a solid structure with airtight walls and ceiling must be built around the asbestos-covered structure. A suspended ceiling with laid-in panels does not constitute an airtight ceiling for purposes of this paragraph.

(B) If enclosure is the control method used, electrical conduits, telephone lines, recessed lights, and pipes in the area to be enclosed must be moved before construction of the enclosure to ensure that the enclosure will not have to be re-opened.

(C) The enclosure must:

(i) be permanent;

(ii) be built of new construction materials;

(iii) be impact resistant; and

(iv) be airtight.

(D) Enclosure walls must be made of tongue-and-groove boards, boards with spine joints, or gypsum boards having taped seams. The underlying structure must be able to support the weight of the enclosure.

(E) All joints adjoining the walls and ceiling of the enclosure must be caulked.

(F) Tools used during the installation of the enclosure must be equipped with a HEPA-filtered vacuum.

(8) Asbestos exposed as a result of any spot repair must be properly enclosed or encapsulated.

(9) HEPA vacuuming, wet cleaning, or both must be used to decontaminate regulated areas and equipment until there is no visible debris.

(10) ACWM must be double-bagged into 6-mil thick plastic bags or sealed in leak-tight drums that must be marked in accordance with applicable NESHAP and OSHA regulations and paragraph (13) of this subsection and disposed of in accordance with NESHAP and as required in paragraphs (15) - (17) of this subsection.

(11) A bag must not be filled to a level that tears or breaks the bag. Excess air in a bag must be removed before exiting a mini-containment or removing a glove bag. The top of the bag must be twisted closed, folded over, and sealed with duct tape. The bag must be rinsed off or HEPA-vacuumed in the regulated area to remove asbestos contamination and placed inside another bag or leak-tight drum. If an outer bag is used, excess air must be removed, and the bag must be closed and sealed in the same manner as the inner bag.

(12) If a bag leaks, the bag must be placed into a third bag and sealed as required in paragraphs (10) and (11) of this subsection.

If a drum leaks, the drum must be wrapped in a minimum of one layer of 6-mil thick plastic sheeting and sealed.

(13) The exterior bag, wrapping, or leak-tight drum must have warning and generator labels applied as specified in 40 CFR §61.150(a)(1)(iv) and (v) (relating to Standard for waste disposal for manufacturing, fabricating, demolition, renovation, and spraying operations). Generator labels must be printed in letters of sufficient size and contrast to be readily visible and legible. All required labeling of ACWM containers must be done before removal from the regulated area. Any container or wrapped component labeled as asbestos must be containerized and labeled as ACWM before removal from the regulated area.

(14) ACBM must be removed as a wrapped unit or in small sections and containerized while wet. Material must not be allowed to accumulate on the floor or become dry. Any structural component or piping must be adequately wetted before wrapping it in plastic sheeting for disposal.

(15) Temporary storage of ACWM must be provided (for example, a dedicated roll-off box, dumpster, or storage room lined with 6-mil thick plastic sheeting). All temporary storage must be sealed to prevent unauthorized access and safeguarded to keep the storage container sealed and leak tight. Final disposal of ACWM must be within 30 days after project completion, or when the receiving container is full, whichever is sooner.

(16) A vehicle used to transport ACWM must be marked in accordance with 40 CFR §61.149(d)(1)(i) - (iii), (relating to Standard for waste disposal for asbestos mills) and §61.150(c) during the loading and unloading of ACWM so that the signs are visible.

(17) ACWM transported by a licensed asbestos transporter off the asbestos operations and maintenance abatement project site must be disposed of in accordance with 40 CFR §61.150(d).

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER M. ALTERNATIVE ASBESTOS PRACTICES AND PROCEDURES IN A PUBLIC BUILDING

25 TAC §§296.231 - 296.234

STATUTORY AUTHORITY

The new rules are authorized by Texas Government Code, §531.0055, and Texas Health and Safety Code, §1001.075, which authorizes the Executive Commissioner of HHSC to adopt rules and policies necessary for the operation and provision of health and human services by DSHS, for the administration of Texas Health and Safety Code, Chapter 1001, to implement Texas Occupations Code, Chapter 1954; Texas Health and Safety Code, §12.0111, which requires DSHS to collect fees for issuing or renewing a license; and Texas Health and Safety Code §161.402, which requires the Executive Commissioner to adopt rules designating the materials or replacement parts for which a person must obtain a material safety data sheet before installing the materials or parts in a public building.

§296.232. Alternative Asbestos Abatement Practices and Procedures for Certain Nonfriable Asbestos-Containing Building Material (ACBM) in a Public Building.

(a) Scope and limitations.

(1) The alternative work practices under subsection (b) of this section may be used for the removal of the following intact, nonfriable ACBM:

(A) any packing;

(B) any gaskets; and

(C) any cements and mastics.

(2) The work practices described in subsection (b) of this section do not limit, and must be followed in their entirety to the extent that they are consistent with, the requirements of any other applicable law, including 29 CFR §1926.1101 (relating to Asbestos) and must not be used if the ACBM listed in paragraph (1) of this subsection becomes friable during the removal project. Unless those work practices are followed, or if the ACBM becomes friable or becomes RACM, all abatement activity must stop, and the area prepared and abated in accordance with §296.213 of this chapter (relating to Asbestos Operations and Maintenance (O&M) Practices and Procedures for O&M Licensees in a Public Building), if applicable, or §296.212 of this chapter (relating to Standard Asbestos Abatement Practices and Procedures in a Public Building).

(3) Only a person who is a licensed asbestos abatement contractor, licensed asbestos abatement supervisor, or registered asbestos abatement worker may conduct asbestos abatement of nonfriable ACBM using the work practices outlined in subsection (b) of this section. A licensed asbestos abatement supervisor must supervise any registered asbestos abatement worker. A licensed asbestos consultant or the consultant's designated licensed asbestos project manager or licensed asbestos air monitoring technician project monitor (AMT/PM) must monitor the project for compliance with the requirements of this section. A project design is not required for a project using this alternative method.

(4) Written notification must be provided, as required in §296.251 of this chapter (relating to Notifications).

(b) Work practices.

(1) A regulated area must be established where asbestos abatement will be conducted, and at minimum, asbestos caution tape must be used to demarcate the regulated area. Except as otherwise provided by other applicable law, access to the regulated area must be limited to:

(A) licensees;

(B) emergency responders;

(C) licensed, registered, or accredited building professionals required for emergency situations;

(D) appropriate governmental inspectors;

(E) authorized personnel, in accordance with 29 CFR §1926.1101(e) (relating to Asbestos); and

(F) a building owner or building owner's authorized representative, if authorized by the licensed asbestos abatement contractor and accompanied by the contractor, licensed asbestos abatement supervisor, licensed asbestos consultant, or the consultant's designated licensed asbestos project manager or licensed AMT/PM. A building owner or building owner's authorized representative who enters the regulated area must have at a minimum the personal protective equipment required for workers performing the asbestos-related activity and must comply with all other applicable health and safety procedures.

(2) A warning sign that complies with 29 CFR §1926.1101, must be displayed at all entrances to regulated area. To protect the public from accidental entry, the warning sign must be displayed, at minimum, in both Spanish and English at the same location. Asbestos caution tape must not be substituted for a warning sign.

(3) All HVAC equipment in or passing through the regulated area must be shut down, and preventative measures taken to prevent accidental start-ups. Supply and return openings and seams in system components must be sealed with at least 6-mil thick plastic sheeting, tape, or both.

(4) All active electrical service lines within the regulated area must be connected through ground-fault circuit interrupter devices (GFCI). An electrical appliance must not be plugged into an outlet unless equipped with a GFCI.

(5) ACBM must be wetted with amended water and remain wet throughout the abatement activity.

(6) Work practices must not include grinding, abrading, sanding, or pulverizing ACBM.

(7) HEPA vacuuming, wet cleaning, or both must be used to decontaminate the regulated area and equipment until there is no visible debris.

(8) ACWM must be double-bagged into 6-mil thick plastic bags or sealed in leak-tight drums as required in §296.212(c) of this chapter and disposed of as required in §296.212(c)(8) - (10) of this chapter.

(9) Ambient air must be monitored and analyzed on-site by a licensed asbestos consultant or the consultant's designated licensed asbestos air monitoring technician (AMT) or AMT/PM employed by a licensed asbestos laboratory and as required in §296.211(h)(1) of this chapter (relating to General Requirements for Asbestos Abatement in a Public Building). Samples must be taken throughout the regulated area and adjacent to any active asbestos abatement activity and the asbestos consultant or the asbestos consultant's designated AMT or AMT/PM must provide the result of any ambient air analysis that exceeds a concentration of 0.01 f/cc (fibers per cubic centimeter) to the asbestos abatement supervisor. All asbestos abatement activity must be stopped and cleanup conducted as described in subsection (a)(2) of this section if at any time the result of ambient air analysis exceeds a concentration of 0.01 f/cc (fibers per cubic centimeter) for any sample, when measured by phase contrast microscopy using the NIOSH 7400 method.

(10) A licensed asbestos abatement supervisor must perform an initial visual inspection upon completion of the project to confirm that all ACBM required to be removed was removed and containerized as required in this chapter and that the abatement work area is free of all residual dust and debris. This paragraph does not affect otherwise applicable requirements for personal air monitoring.

(11) A licensed asbestos consultant or the consultant's designated licensed asbestos project manager or licensed AMT/PM must:

(A) monitor the project for compliance with the requirements of this section; and

(B) perform a final visual inspection upon completion of the project and the asbestos abatement contractor's initial visual inspection to observe and determine if all ACBM required to be removed was removed and containerized as required in this chapter and the abatement work area is free of all residual dust and debris.

(12) The licensed asbestos abatement contractor must abate all ACM and remove any ACWM discovered by the final visual inspection as required in this chapter.

(13) Work practices must be performed in accordance with 29 CFR §1926.1101 (relating to Asbestos), as applicable.

§296.233. Alternative Asbestos Practices and Procedures for Small Projects and Repetitive Tasks in a Public Building.

(a) Purpose. The purpose of this section is to describe the requirements that must be met to permit a small project or repetitive task described under this section to be performed without containment in a public building.

(b) Scope and limitations.

(1) This section applies only to a maintenance or installation project or task:

(A) that is incident to another activity that has a primary purpose other than asbestos abatement;

(B) that disturbs 10 square feet or less of ACBM for each small project or task; and

(C) that is the same task performed by licensees without deviation from a documented procedure as described in subsection (c) of this section, and with material containing the same type and similar content of asbestos.

(2) A small project or repetitive task, as described, and limited under this section, may be performed without using a negative pressure glove bag, glove box, or mini-containment only if all requirements of this section are met and a clearance-level assessment has been conducted as required in subsection (c) of this section showing that the work practices will not result in a concentration of asbestos fibers in excess of 0.01 f/cc at any time during the duration of the project.

(3) A larger project must not be broken down into smaller projects or tasks in order to fall within the scope of this section or to circumvent the restricted applicability of this section or other applicable requirements of this chapter.

(4) A registered asbestos abatement worker may perform a small project or repetitive task that disturbs ACBM, as described in paragraph (2) of this subsection, using the work practices outlined in subsection (d) of this section only when supervised by a licensed asbestos abatement supervisor who is employed by a licensed asbestos abatement contractor and a clearance-level assessment was done, as required in subsection (c) of this section showing that the work practices do not result in a concentration of fibers in excess of 0.01 f/cc at any time during the duration of the project.

(5) A licensed asbestos abatement supervisor employed by an asbestos abatement contractor may perform and supervise a small project or repetitive task that disturbs ACBM as described in paragraph (2) of this subsection using the work practices outlined in subsection (d) of this section.

(6) If a clearance-level assessment was done, as required in subsection (c) of this section, and the requirements and limitations of this section are otherwise met in performing a small project or repetitive

task described in this section, a licensed consultant is not required to design the small project or repetitive task.

(7) Written notification must be provided, as required in §296.251 of this chapter (relating to Notifications).

(c) Clearance-level assessment. A project or task may be performed under this section only if, within the previous 12-month period, an assessment has been conducted on-site using a method permitted under paragraph (3) of this subsection, that demonstrates that the work practices used to perform the project or task do not result in a concentration of asbestos fibers in excess of 0.01 f/cc at any time during the duration of the project. The assessment method and results must be documented and clearly indicated on, and submitted with, the notification for the small project or repetitive task planned to be performed as described in this section.

(1) The clearance-level assessment must be conducted as required §296.213 of this chapter (relating to Asbestos Operations and Maintenance (O&M) Practices and Procedures for O&M Licensees in a Public Building) and by performing the project or task as it would be performed under this section.

(2) A person must hold the required license to conduct the components of the assessment.

(A) A licensed asbestos consultant must design the clearance-level assessment and directly observe the performance of the project or task being assessed and the assessment methods and activities conducted under this subsection.

(B) During an assessment under this subsection, a licensed consultant or a licensed air monitoring technician or licensed AMT/PM must conduct air monitoring in accordance with §296.211 of this chapter (relating to General Requirements for Asbestos Abatement in a Public Building).

(3) To establish, for purposes of this subsection, that clearance-level concentrations will be maintained throughout the project, the assessment method and results must be documented and submitted with the notification for the small project or repetitive task planned to be performed as described in this section. The documented assessment methods and results submitted must:

(A) be consistent with procedures described:

(i) for exposure assessments described under 29 CFR §1926.1101(f) (relating to Asbestos), including the engineering controls, work practices, and other safeguards described in connection with exposure assessments conducted under that subsection; or

(ii) in ASTM D7886-14 Standard Practice for Asbestos Exposure Assessments for Repetitive Maintenance and Installation Tasks - ASTM International, www.astm.org; or

(B) be equivalent to a procedure described in subparagraph (A)(i) and (ii) of this paragraph and capable of reliably determining whether clearance levels will be maintained throughout the project.

(4) A licensed asbestos abatement supervisor must be in the containment directly performing the task or monitoring the registered asbestos abatement worker for purposes of the clearance-level assessment.

(d) Work practices. Without limiting the restrictions of 29 CFR §1926.1101, work practices must include the following:

(1) A regulated area must be established where asbestos abatement will be conducted and at minimum, asbestos caution tape must be used to demarcate the regulated area. Except as otherwise provided by other applicable law, access to the regulated area must be limited to:

(A) licensees;

(B) emergency responders;

(C) licensed, registered, or accredited building professionals required for emergency situations;

(D) appropriate governmental inspectors;

(E) authorized personnel, in accordance with 29 CFR §1926.1101(e); and

(F) a building owner or building owner's authorized representative, if authorized by the licensed asbestos abatement contractor and accompanied by the contractor, licensed asbestos abatement supervisor, licensed asbestos consultant, or the consultant's designated project manager or AMT/PM. A building owner or building owner's authorized representative who enters the regulated area must have at a minimum the personal protective equipment required for workers performing the asbestos-related activity and must comply with all other applicable health and safety procedures.

(2) A warning sign that complies with 29 CFR §1926.1101, must be displayed at all entrances to regulated area. To protect the public from accidental entry, a warning sign must be displayed, at minimum, in both Spanish and English at the same location. Asbestos caution tape must not be substituted for a warning sign.

(3) All HVAC equipment in or passing through the regulated area must be shut down and preventative measures taken to prevent accidental start-ups. Supply and return openings and any seam in system components must be sealed with at least 6-mil thick plastic sheeting, tape, or both.

(4) An active electrical service line within the regulated area must be connected through ground-fault circuit interrupter devices (GFCI). An electrical appliance must not be plugged into an outlet unless equipped with a GFCI.

(5) ACBM must be wetted with amended water or foam agents intended to control airborne fiber release and must remain wet throughout project.

(6) HEPA vacuuming, wet cleaning, or both must be used to decontaminate the regulated area and equipment until there is no visible debris.

(7) ACWM must be double-bagged into 6-mil thick plastic bags or sealed in leak-tight drums as required in §296.212(c) of this chapter and disposed of as required in §296.212(c)(8) - (10) of this chapter and NESHAP. Final disposal of ACWM must be within 30 days after project completion or when the receiving container is full, whichever is sooner.

(8) A licensed asbestos abatement supervisor must monitor the project or task and perform an initial visual inspection upon completion of the project or task to confirm that all ACBM required to be removed was removed and containerized as required in this chapter and AHERA, if applicable, and the regulated area is free of all residual dust and debris. This paragraph does not affect otherwise applicable requirements for personal air monitoring.

(9) A licensed asbestos consultant or the consultant's designated licensed asbestos project manager or licensed AMT/PM must:

(A) monitor the project or task for compliance with the requirements of this section and AHERA, if applicable; and

(B) perform a final visual inspection upon completion of the project or task and the asbestos abatement supervisor's initial visual inspection to:

(i) observe and determine if all ACBM required to be removed was removed and containerized as required in this chapter and AHERA, if applicable; and

(ii) the regulated area is free of all residual dust and debris.

(10) The licensed asbestos abatement contractor must abate ACM and remove ACWM discovered by the final visual inspection, as required in this chapter.

§296.234. Alternative Practices and Procedures for Removal of Whole Components of Intact Asbestos-Containing Material (ACM) in a Public Building.

(a) Scope and limitations.

(1) Eligible activities. The alternative work practices described in the following subparagraphs may be used for the removal of the following intact ACM if the conditions of paragraph (2) of this subsection are met and the work practices required under subsection (b) of this section are followed. Other requirements of §296.212 of this chapter (relating to Standard Asbestos Abatement Practices and Procedures in a Public Building) are not mandatory for the following activities:

(A) removal of an asbestos cement sheet or wall panel by unbolting or unscrewing and removing the whole sheet or panel intact;

(B) removal of a lab-type asbestos cement desktop by either unbolting or unscrewing and removing the whole desktop intact;

(C) removal of a nonfriable countertop or backsplash by completely removing the whole unit intact;

(D) removal of a window unit with window glazing, if the window glazing is secured with tape or a similar material before removal, and the whole window unit with window glazing is removed intact;

(E) picking up one or more loose floor tiles that have become completely disassociated from the floor and are either whole or slightly broken, but which are still intact and not RACM;

(F) picking up a loose miscellaneous nonfriable item, such as a roll of linoleum, a loose gasket, or a loose shingle;

(G) removal of a fire door with asbestos-containing insulation from its hinges by removing the whole door, including its hardware, intact;

(H) removal of any other nonfriable building component by removing it as a whole component and keeping it intact; and

(I) removal of any packings, gaskets and mastics by removing them whole and intact, if not otherwise removed using the alternate method described in §296.232 of this chapter (relating to Alternative Asbestos Abatement Practices and Procedures for Certain Nonfriable Asbestos-Containing Building Material (ACBM) in a Public Building).

(2) Restrictions. If the following conditions are met and the work practices required under subsection (b) of this section are followed, other requirements of §296.212 of this chapter are not mandatory for an activity described in paragraph (1) of this subsection.

(A) ACM must be in good condition and removed as a whole component, keeping the component intact with no breakage or generation of dust during the removal or collection.

(B) ACM must not be RACM.

(C) If the ACM becomes RACM or cannot be removed as a whole component and kept intact, all abatement activities must be stopped, and the area must be prepared and abated as required in §296.213 of this chapter (relating to Asbestos Operations and Maintenance (O&M) Practices and Procedures for O&M Licensees in a Public Building) or §296.212 of this chapter, as applicable.

(D) Only a licensed asbestos abatement contractor or licensed asbestos abatement supervisor employed by a licensed asbestos abatement contractor may perform an activity under this section. A registered asbestos abatement worker may perform an activity under this section only when supervised by a licensed asbestos abatement supervisor. A licensed consultant is not required to design a project that uses this alternative method and is conducted in accordance with the requirements and restrictions of this section.

(E) Written notification must be provided, as required in §296.251 of this chapter (relating to Notifications).

(b) Work practices. Work practices must include the following:

(1) A regulated area must be established where asbestos abatement will be conducted and, at minimum, asbestos caution tape must be used to demarcate the regulated area. Except as otherwise provided by other applicable law, access to the regulated area must be limited to:

(A) licensees;

(B) emergency responders;

(C) licensed, registered, or accredited building professionals required for emergency situations;

(D) appropriate governmental inspectors;

(E) authorized personnel, in accordance with 29 CFR §1926.1101(e) (relating to Asbestos); and

(F) a building owner or building owner's authorized representative, if authorized by the licensed asbestos abatement contractor and accompanied by the contractor, licensed asbestos abatement supervisor, licensed asbestos consultant, or the consultant's designated licensed asbestos project manager or licensed air monitoring technician project monitor (AMT/PM). A building owner or building owner's authorized representative who enters the regulated area must have at a minimum the personal protective equipment required for workers performing the asbestos-related activity and must comply with all other applicable health and safety procedures.

(2) A warning sign that complies with 29 CFR §1926.1101, must be displayed at all entrances to the regulated area. To protect the public from accidental entry, a warning sign must be displayed, at minimum, in both Spanish and English at the same location. Asbestos caution tape must not be substituted for a warning sign.

(3) Asbestos material must be kept wet during removal and disposal.

(4) Ambient air monitoring is not required.

(5) A licensed asbestos abatement supervisor must perform an initial visual inspection upon completion of the project to confirm that all ACBM required to be removed was removed and containerized as required in this chapter and AHERA, if applicable, and the regulated area is free of all residual dust and debris. This paragraph does not affect otherwise applicable requirements for personal air monitoring.

(6) A licensed asbestos consultant or the consultant's designated licensed asbestos project manager or AMT/PM must:

(A) monitor the project for compliance with the requirements of this section; and

(B) perform a final visual inspection upon completion of the project and the asbestos abatement supervisor's initial visual inspection to:

(i) observe and determine if all ACBM required to be removed was removed and containerized as required in this chapter and AHERA, if applicable; and

(ii) the regulated area is free of all residual dust and debris.

(7) The licensed asbestos abatement contractor must abate all ACM and remove any ACWM discovered by the final visual inspection as required in this chapter.

(8) ACWM must be double-wrapped in 6-mil thick plastic sheeting, double-bagged into 6-mil thick plastic bags, or sealed in leaktight drums as required in §296.212(c) of this chapter and disposed of as required in §296.212(c)(8) - (10) of this chapter and in accordance with NESHAP.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER N. NOTIFICATIONS

25 TAC §296.251

STATUTORY AUTHORITY

The new rule is authorized by Texas Government Code, §531.0055, and Texas Health and Safety Code, §1001.075, which authorizes the Executive Commissioner of HHSC to adopt rules and policies necessary for the operation and provision of health and human services by DSHS, for the administration of Texas Health and Safety Code, Chapter 1001, to implement Texas Occupations Code, Chapter 1954; Texas Health and Safety Code, §12.0111, which requires DSHS to collect fees for issuing or renewing a license; and Texas Health and Safety Code §161.402, which requires the Executive Commissioner to adopt rules designating the materials or replacement parts for which a person must obtain a material safety data sheet before installing the materials or parts in a public building.

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SUBCHAPTER O. INSPECTIONS AND INVESTIGATIONS

25 TAC §296.271

STATUTORY AUTHORITY

The new rule is authorized by Texas Government Code, §531.0055, and Texas Health and Safety Code, §1001.075, which authorizes the Executive Commissioner of HHSC to adopt rules and policies necessary for the operation and provision of health and human services by DSHS, for the administration of Texas Health and Safety Code, Chapter 1001, to implement Texas Occupations Code, Chapter 1954; Texas Health and Safety Code, §12.0111, which requires DSHS to collect fees for issuing or renewing a license; and Texas Health and Safety Code §161.402, which requires the Executive Commissioner to adopt rules designating the materials or replacement parts for which a person must obtain a material safety data sheet before installing the materials or parts in a public building.

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SUBCHAPTER P. RECORDKEEPING

25 TAC §296.291

STATUTORY AUTHORITY

The new rule is authorized by Texas Government Code, §531.0055, and Texas Health and Safety Code, §1001.075, which authorizes the Executive Commissioner of HHSC to adopt rules and policies necessary for the operation and provision of health and human services by DSHS, for the administration of Texas Health and Safety Code, Chapter 1001, to implement Texas Occupations Code, Chapter 1954; Texas Health and Safety Code, §12.0111, which requires DSHS to collect fees for issuing or renewing a license; and Texas Health and Safety Code §161.402, which requires the Executive Commissioner to adopt rules designating the materials or replacement parts for which a person must obtain a material safety data sheet before installing the materials or parts in a public building.

§296.291. Recordkeeping.

(a) Recordkeeping requirements. Without limiting any federal or state requirement to which a licensee or record may otherwise be subject, a person regulated by this chapter must maintain, retain, and make available to DSHS for inspection or produce, upon request, including for copying on or off-site, records and documents as required by this section and each applicable subsection. For purposes of this chapter, records that are required to be maintained at a central location are not required to be maintained at the licensees principal place of business and may be located off-site if the records are readily accessible. A person that ceases to do business must notify DSHS in writing within 30 days after such event and must make appropriate arrangements for retention and maintenance of records, as required under this section. The person must provide DSHS with the details of such arrangement or comply with DSHSs alternative instructions within 60 days after ceasing to do business or receiving instructions from DSHS, whichever is later.

(b) Asbestos abatement contractors, asbestos O&M contractors, and RFCI contractors.

(1) Central location. A contractor described in this subsection must maintain the following records and documents for any project performed in a public building at a central location for a period of at least 30 years after the date of project completion:

(A) records and documents which comply with applicable recordkeeping requirements under 29 CFR Part 1910 (relating to Occupational Safety and Health Standards), 29 CFR §1926.1101 (relating to Asbestos), NESHAP, and AHERA;

(B) the name, address, and asbestos training certificate number of each employee, past and present, including dates of employment and a description of each employee's involvement in each asbestos project while employed by the contractor; records must include the name, physical address, and duration of each project;

(C) a copy of all regulatory agency correspondence, including each required asbestos abatement/demolition notification form, inspection form, letter, notice, and order;

(D) a copy of each waste shipment record (manifest), including a copy of the manifest, signed in accordance with 40 CFR §61.150(d)(5) (relating to Standard for waste disposal for manufacturing, fabricating, demolition, renovation, and spraying operations) by the owner or operator of the designated waste disposal site and each receipt and documentation of disposal of asbestos waste showing the date, location, and amount of asbestos waste disposed and identifying each source of the asbestos waste and each transporter of the waste, including the company name or driver name, if the driver is an employee of the contractor;

(E) a copy of each laboratory report and sample analysis documenting required air monitoring for the project, including a copy of each consultant report provided to the contractor regarding project monitoring; and

(F) a copy of all contracts and project specifications and plans for each asbestos abatement project.

(2) On-site. Without limiting the retention requirements of paragraph (1) of this subsection, the records and documents described under this paragraph must be maintained on-site at the asbestos project location for the duration of the project. RFCI contractors and DSHS-licensed asbestos abatement and O&M contractors are responsible for their employees documents to be on-site. The following records and documents, at a minimum, must be maintained on-site as required in this paragraph:

(A) each current applicable state-issued license or registration for every person conducting an asbestos-related activity for the contractor on the project site and a full-sized copy of each applicable training certificate, that must be current, for each person;

(B) a copy of the current license for the licensed asbestos abatement contractor or O&M contractor;

(C) a current copy of the contractors standard operating procedures;

(D) a copy of the asbestos project specifications and plans, or if project specifications and plans are not required, a scope of work that outlines the location and describes operations and abatement procedures for the project;

(E) a listing of each employee working on the project by name and all applicable asbestos license or registration numbers and training certificate numbers for each employee;

(F) name and address of each contractor, project supervisor, consultant, project manager, air monitoring technician project monitor (AMT/PM), waste transporter, waste disposal site, and building owner for the asbestos project;

(G) a daily sign-in/sign-out log for the containment or the regulated area if no containment is present; sign-in/sign-out logs must identify each person by name and the length of time each spent in the containment or regulated area;

(H) results of personal air monitoring samples, as required in §296.211(h) of this chapter (relating to General Requirements for Asbestos Abatement in a Public Building);

(I) a written respiratory protection program that complies with 29 CFR §1910.134(c) (relating to Respiratory protection);

(J) a description of personal safety practices;

(K) a current copy of DSHSs Physicians Written Statement form and each respirator fit-test performed within the past 12 months for any individual who enters a regulated area;

(L) a copy of the current asbestos abatement/demolition notification;

(M) a copy of this chapter;

(N) a copy of any federal regulation adopted by reference in §296.2 of this chapter (relating to Reference of Federal Standards) that applies to the asbestos-related activity that is being performed;

(O) the EPA Publication for O&M activities entitled, "Managing Asbestos in Place: A Building Owner's Guide to Operations and Maintenance Programs" (also known as the EPA Green Book) if such activities are being performed;

(P) a copy of the recommended work practices for resilient floor-covering removal published by the Resilient Floor Covering Institute if the project involves removal of resilient floor-covering materials using that method;

(Q) the Violation Notification Procedure poster issued by DSHS, that must be posted and visible to the public at the entrance to the regulated area, as required in §296.211(i) of this chapter; and

(R) a copy of any asbestos-related order issued by DSHS, EPA, or OSHA, that must be posted for 12 months or for a federal asbestos-related order, the period of time required by the federal asbestos-regulating authority from the date the order becomes effective and visible to the public at the entrance to the regulated area, as required in §296.211(i) of this chapter.

(c) Asbestos management planners. A licensed asbestos management planner who undertakes and performs an activity independent of an agency, must maintain each of the licensees asbestos survey reports, bulk sampling results, and management plans for that activity for 30 years after the date of project completion. These records and documents must be maintained at a central location.

(d) Asbestos management planner agencies. A licensed asbestos management planner agency must maintain each of its asbestos survey reports, bulk sampling results, and management plans for 30 years from the date of project completion. These records and documents must be maintained at a central location.

(e) Asbestos consultants. A licensed asbestos consultant who undertakes and performs an activity independent of an agency, must maintain for that activity each of the licensees asbestos survey reports, assessments, bulk sampling results, asbestos management plans, O&M plans, specifications and plans, air monitoring records, each written designation of a project manager or AMT/PM and the project managers or AMT/PMs responsibilities and authority, and a copy of every other asbestos abatement project document for 30 years after the date of project completion. These records and documents must be maintained at a central location. While a project is in process and until final visual inspection has been completed, all asbestos abatement project documents for the project must be kept at the asbestos project site.

(f) Asbestos consultant agencies. A licensed asbestos consultant agency must maintain each of its asbestos survey reports, assessments, bulk sampling results, asbestos management plans, O&M plans, specifications and plans, air monitoring records, each written designation of a project manager or AMT/PM and the project managers or AMT/PMs responsibilities and authority, and a copy of every other asbestos abatement project document for 30 years after the date of project completion. These records and documents must be maintained at a central location. While a project is in process and until final visual inspection has been completed, all asbestos abatement project documents for the project must be kept at the asbestos project site.

(g) Asbestos air monitoring technicians and asbestos air monitoring technician project monitors. A licensed air monitoring technician (AMT) or asbestos air monitoring technician project monitors (AMT/PM) who performs phase contrast microscopy (PCM) analysis in the field as an employee of a licensed asbestos laboratory must maintain on-site for the duration of the project:

(1) all analyzed slides, each labeled so that the AMT or AMT/PM can provide the project name, date, and time of sample collection and analysis, and sample location;

(2) documentation of the AMTs or AMT/PMs relative standard of deviation, in accordance with the NIOSH 7400 method; and

(3) a copy of:

(A) the AMTs or AMT/PMs NIOSH 582 or NIOSH 582 Equivalent training certificate and documentation of current participation in the American Industrial Hygiene Association (AIHA) Proficiency Analytical Testing Program; or

(B) documentation of current registration with the AIHA Asbestos Analyst Registry (AAR).

(h) Asbestos laboratories. A licensed asbestos laboratory must maintain a copy of all analyses performed and all other records and documents required by this chapter for 30 years after the date of analysis, including the sample identification number and analytical results.

(1) An analyzing laboratory must keep all samples from a public building received for analysis for 30 days following completion of the analysis. Sample grids must be maintained for one year after the date of the analysis.

(2) An analyzing laboratory must maintain a copy of individual records for each analyst to document the individual analyst's relative standard of deviation in accordance with the NIOSH 7400 method for three years after the date the calculation was made. Records must be kept in the laboratory indicating which samples were used to meet the 10% quality-control analysis requirement.

(i) Asbestos training providers.

(1) Central location. The following records and documents must be maintained at a central location for a period of three years after the date of the course:

(A) Training course materials. A licensed training provider must retain a copy of each instructional material used in the delivery of a classroom training, such as student training manuals, instructor notebooks, and handouts. Each instructional material must be kept for three years after the last date of the most recent training for which it was used.

(B) Training courses. Records must indicate the name of the course, date of the course, each instructor who taught the course, and list the students who attended the course.

(C) Instructor qualifications. A licensed training provider must retain a copy of each instructors resume and the documents approving each instructor issued by DSHS or EPA for three years after the conclusion of their last classroom training.

(D) Examinations. A licensed training provider must document that each person who receives an accreditation certificate for an initial training course has achieved a minimum passing score of 70% correct on the written examination, as required in §296.73(b) of this chapter (relating to Asbestos Training Courses). These records must include a copy of the exam and clearly indicate the date on which the exam was administered, the training course and discipline for which the exam was given, the name of the person who proctored the exam, and the name, examination answer sheet, and test score of each person taking the exam. All information from the training course and examination, including the topic and dates of the training course, must correspond to the information listed on each person's accreditation certificate. All records required to be maintained in accordance with this section must be maintained for three years after the date of the examination and immediately upon conclusion of the course and administration of the examination, must be made available for DSHS inspection..

(E) Accreditation certificates. A licensed training provider must maintain records that document the names of each individual who has been awarded one or more training certificate, the certificate number applicable to each certificate awarded to an individual, each discipline for which accreditation was conferred, each applicable training and expiration date, and the training location.

(2) Records access. A licensed training provider must allow DSHS reasonable access to all of the records required by the MAP and any other records required by DSHS for the approval of an asbestos training provider or the accreditation of an asbestos training course.

(j) Public building owners. A building owner that meets the mandatory survey requirement using the method described in §296.191(d)(6)(B) of this chapter (relating to Asbestos Management in a Public Building, Commercial Building, or Facility) and uses the certification in lieu of an asbestos survey must maintain the following records;

(1) the Texas-registered architects or Texas-licensed professional engineers certification; and

(2) copies of the MSDSs or SDSs or both and any previous asbestos surveys reviewed by the Texas-registered architect or Texas-licensed professional engineer to prepare the certification.

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SUBCHAPTER Q. COMPLIANCE

25 TAC §§296.311 - 296.320

STATUTORY AUTHORITY

The new rules are authorized by Texas Government Code, §531.0055, and Texas Health and Safety Code, §1001.075, which authorizes the Executive Commissioner of HHSC to adopt rules and policies necessary for the operation and provision of health and human services by DSHS, for the administration of Texas Health and Safety Code, Chapter 1001, to implement Texas Occupations Code, Chapter 1954; Texas Health and Safety Code, §12.0111, which requires DSHS to collect fees for issuing or renewing a license; and Texas Health and Safety Code §161.402, which requires the Executive Commissioner to adopt rules designating the materials or replacement parts for which a person must obtain a material safety data sheet before installing the materials or parts in a public building.

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendments to §§116.12, 116.150, 116.151, 116.160, 116.910, 116.911, 116.920, 116.1010, 116.1011, and 116.1530; and the repeal of §§116.16, 116.128, 116.770 - 116.781, 116.783, 116.785 - 116.788, 116.790, 116.793 - 116.807, 116.810 - 116.814, 116.816, 116.820, 116.840 - 116.842, 116.850, 116.860, and 116.870.

The amendments to §§116.12, 116.150, 116.151, 116.160, 116.910, 116.911, 116.920, 116.1010, 116.1011, and 116.1530; and the repeal of §§116.16, 116.128, 116.770 - 116.781, 116.783, 116.785 - 116.788, 116.790, 116.793 - 116.807, 116.810 - 116.814, 116.816, 116.820, 116.840 - 116.842, 116.850, 116.860, and 116.870 are adopted *without changes* to the proposed text as published in the January 1, 2021, issue of the *Texas Register* (46 TexReg 123) and, therefore, will not be republished.

The amendments to §§116.12, 116.150, 116.151, 116.160, 116.910, 116.911, 116.920 and 116.1530, and the repeal of §§116.770 - 116.772, 116.774, 116.775, and §§116.777 - 116.781, 116.783, 116.785 - 116.788, and 116.790, 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 Adopted Rules

The adopted rulemaking will revise Chapter 116 to encourage emissions decreases and the installation of pollution controls that might not otherwise occur or would be delayed and to harmonize TCEQ rules consistent with EPA guidance and regulations regarding the requirements that apply to sources proposing to undertake a physical or operational change under the New Source Review (NSR) preconstruction permitting program. Under this program an existing major source proposing to undertake a project must determine whether that project will constitute a major modification using a two-step applicability test.

The major NSR preconstruction permitting provisions contain the requirements for the preconstruction review and permitting of new and modified stationary sources of regulated NSR air pollutants. These requirements differ depending on the area in which the source is located. The Prevention of Significant Deterioration Program (PSD) requirements apply to new major sources or major modification of existing sources for pollutants in areas meeting the National Ambient Air Quality Standards (NAAQS) (attainment areas) and in areas for which there is insufficient information to classify an area as either attainment or nonattainment (unclassifiable areas). The Nonattainment New Source Review (NNSR) program requirements apply to new major sources or major modifications at existing sources for pollutants in areas not meeting the NAAQS (nonattainment areas).

TCEQ implements the federally-required NNSR and PSD programs through its EPA-approved preconstruction permitting program. TCEQ also implements the federal requirement for a minor NSR preconstruction program for those stationary sources that do not trigger NNSR or PSD.

Under EPA regulations, the process for determining if a project at an existing major stationary source triggers PSD or NNSR is a two-step process. Step 1 requires a determination of whether the proposed project, by itself, is projected to result in a significant emissions increase of a regulated NSR pollutant. If the project will result in a significant emissions increase, then in Step 2, a determination is made as to whether the project would result in a significant net emissions increase. In other words, Step 1 considers the effect of the project alone and Step 2 considers the effect of the project and any other emissions changes at the

major stationary source that are contemporaneous to the project (generally within a five-year period) and creditable.

This adopted rulemaking will allow consideration of both emissions increases and decreases that result from a given proposed project to be considered during Step 1 of the NSR major modification applicability test. The adopted amendments do not change requirements for minor NSR in Texas.

The EPA has previously referred to Step 1 as "project netting," but now refers to this step as "project emissions accounting." The EPA refers to Step 2 as "netting" or "contemporaneous netting." An emissions increase of a regulated NSR pollutant is considered significant if the increase is equal to or greater than the pollutant-specific significance levels in the applicable regulation. For regulated NSR pollutants that are not listed, any increase is significant. The TCEQ adopts amendments to include EPA's most recent terminology of "project emissions accounting" for Step 1 in the adopted rules, and notes that the current rules already refer to "netting" or the "de minimis threshold test" (Step 2).

After considerable review of the regulatory history, past agency interpretations, recent public comments, and legal analysis with regard to project netting, (step 1), the EPA issued a guidance memorandum on March 13, 2018 (March 2018 Memorandum), relating to major NSR applicability titled "Project Emissions Accounting under the New Source Review Preconstruction Permitting Program." This memorandum was issued in accord with presidential priorities for streamlining regulatory permitting requirements for manufacturing, and to address opportunities to simplify the NSR process. The memorandum announced the EPA's current interpretation that the federal NSR regulations provided that any emission decreases that may result from a proposed project at an existing major source are to be considered when performing the Step 1 evaluation of whether the proposed project would result in a significant emissions increase, provided that the emissions were from a single project. On August 9, 2019, the EPA published proposed amendments (84 *Federal Register* (FR) 39244) to 40 Code of Federal Regulations (CFR) Parts 51 and 52 to codify the interpretation outlined in the March 13, 2018 memorandum. The EPA published final amendments on November 24, 2020 (85 FR 74890). More information on the EPA's final rule is available at the following link: https://www.epa.gov/nsr/project-emissions-accounting-2.

The EPA grounded its current interpretation on the principle that the plain language of the federal Clean Air Act (FCAA or CAA) indicates that Congress intended major NSR to apply to changes that increase *actual* emissions, citing to *State of New York v. EPA,* 413 F. 3d 3 (D.C. Cir. 2005). Specifically, the EPA discussed the interpretation of the statutory phrase "increases the amount of any air pollutant emitted" which is contained in the definition of "modification" (42 United States Code (USC), §7411(a)(4)). This definition is cross referenced in both Part C (PSD) and Part D (NNSR) of Title I of the FCAA. This interpretation is grounded in the principle that the 'plain language of the CAA indicates that Congress intended to apply NSR *changes that increase actual emissions.'* ...Central to the CAA's definition of 'modification' is that there must be a causal link between the physical or operational change at issue - i.e., the 'project' - and any change in emissions that may ensue. In other words, it is necessary to account for the full and direct effect of the proposed change itself. Accordingly, at the very outset of the process for determining whether NSR may be triggered, the EPA should give attention to not only whether emissions may increase from those units that are part of the project but also whether emissions may at the same time decrease at other units that are also part of the project. (March 2018 Memorandum at page 6.)

Because the FCAA does not specifically identify how to determine and calculate whether a physical change or change in the method of operation 'increases the amount' of an air pollutant, the EPA relied on its authority to fill in any "gaps" in the FCAA in administering the NSR program, *Chevron U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837 (1984). Thus, under its authority pursuant to *Chevron,* the EPA chose an interpretation that considers both increases and decreases from the project in Step 1 as being the most consistent with congressional intent to include only projects with non-*de minimis* increases in emissions in the preconstruction programs. As the EPA noted, if both increases and decreases were not considered in Step 1, then it would be possible to subject a project to pre-construction review even if the actual effect of that project would be to reduce emissions. The EPA determined that such a result would be contrary to the congressional intent for the program. Finally, the EPA also supported its interpretation on sound policy because it encourages emissions decreases and the installation of pollution controls that might not otherwise occur or would be delayed given the regulatory barriers of excluding consideration of decreases in Step 1 and the resulting complexities that applicants would face in the netting process in Step 2.

On February 7, 2020, TCEQ received a petition for rulemaking from Baker Botts, L.L.P., which requested that the commission amend Chapter 116 to implement the EPA's guidance and proposed rules (at the time of the petition) relating to project emissions accounting. The commission approved this petition for rulemaking on March 25, 2020. In several areas, the commission's current Chapter 116 rules stipulate that emission decreases may not be considered when evaluating the project emissions increase, so it is necessary to revise portions of the Chapter 116 rules to provide consistency with the federal guidance and the adopted 40 CFR Parts 51 and 52 rules for project emissions accounting. In addition, it is necessary to revise the Chapter 116 rules to remove existing barriers that discourage or delay environmentally beneficial projects that reduce emissions.

Although the adopted rulemaking is intended to harmonize TCEQ and EPA regulations, comply with congressional intent for the federal PSD and NNSR programs, and encourage emissions decreases and the installation of pollution controls that might not otherwise occur or would be delayed, it is possible that a small number of projects which would have triggered PSD or NNSR under previous Chapter 116 rules may instead be processed as a "non-major" permit amendment. However, as noted by the EPA in the finalized rule, even though certain projects may not be subject to the NSR major modification requirements, they may still be subject to the applicable minor NSR program permitting requirements (85 FR 74896). Thus, the commission emphasizes that the adopted changes are not expected to significantly affect human health or ambient air quality, due to the requirements for minor NSR in Texas. TCEQ's rules governing non-major NSR permit amendments are an approved part of the Texas SIP. Sources undergoing construction or modification which are not subject to PSD best available control technology (BACT) or lowest achievable emission rate (LAER) under major NSR requirements must still comply with Texas' BACT requirements in §116.111(a)(2)(C). Every permit amendment, including non-major permit amendments, undergoes a review process to evaluate the impact of

the project on human health and evaluate compliance with ambient air quality standards. Even non-major permitting projects are evaluated to ensure that they do not cause or contribute to an exceedance of the NAAQS and meet any applicable state property line standards. This evaluation may consist of both air dispersion modeling predictions and ambient air monitoring data. A detailed description of the required NAAQS analysis is available in TCEQ's "Air Quality Modeling Guidelines" (APDG 6232), and a detailed description of the health effects review is available in TCEQ's "Modeling and Effects Review Applicability" (APDG 5874). These documents are available through the commission's website.

Because the effects of the adopted rule changes on the Step 1 evaluation are highly project-dependent, it is not possible to directly determine how many future projects might be processed as non-major permit actions under the adopted rules. Likewise, it is also not possible to forecast how many environmentally beneficial emissions reduction projects that will also now be filed that were discouraged under the previous rules. In addition, the TCEQ does not have access to, nor requires, the reporting of any information regarding decisions made for projects that were not pursued. Nevertheless, TCEQ undertook a review of historical permit application over the last three years to evaluate the potential impact of the proposed rule changes for step 1 evaluations.

During that time, TCEQ processed an average of 17 amendments per year resulting in NNSR and/or PSD major modifications. Based on staff experience and available data, it is believed that only a small fraction of these projects would have been categorized as a non-major permit amendment if they had been submitted under the adopted rules. The majority of the sample of historical projects reviewed either had no reductions associated with the project or the reductions would not have influenced the outcome of the determination based on the adopted rules.

However, the adopted rules will provide a greater incentive for source owners or operators to implement emission reductions as part of a project. In addition, the majority of emission reductions associated with such projects are expected to be real reductions in actual emissions that have contributed to the airshed. In contrast, the potential increases for a facility are often greater than the actual emissions for the facility, due to conservative assumptions made by applicants, and therefore potential increases often do not contribute appreciably to the airshed. Therefore, increasing incentives for emission reductions are expected to have a net positive effect on air quality. While it is difficult to estimate the degree of air quality benefits that would result from this effect, these additional emission reductions would tend to offset any emission increases associated with individual projects that would be processed as a non-major permit amendment under the adopted rules.

Independently of the Texas NSR permitting program, sources in nonattainment areas and certain near-nonattainment areas are also subject to SIP control requirements and regulations designed to achieve and maintain the NAAQS, such as (but not limited to) TCEQ's regulations under Chapter 115, Control of Air Pollution from Volatile Organic Compounds, and Chapter 117, Control of Air Pollution from Nitrogen Compounds. These SIP requirements are periodically adjusted based on air quality monitoring data and the attainment classifications assigned by the EPA. In addition, commission rules in Chapter 101, General Air Quality Rules, §101.21, state that the NAAQS will be enforced throughout all parts of Texas.

The effects of the adopted amendments will be highly project-specific and there is insufficient data to calculate the precise effect on ambient air quality. However, considering the TCEQ's SIP-approved permit review process discussed previously, the limited number of projects that historically might have been affected, the increased incentive for pursuing emission reductions and the installation of pollution controls that might not otherwise occur or would be delayed, the realization of reductions in actual emissions in the airshed from environmentally beneficial projects, and the other regulations and SIP programs TCEQ has in place to protect air quality, the commission has determined that the adopted Chapter 116 amendments to implement Project Emissions Accounting will not have a significant adverse effect on overall air quality, attainment, or achieving reasonable further progress.

The adopted rulemaking will also repeal all sections in Chapter 116, Subchapter H, Permits for Grandfathered Facilities, and associated §116.16, which contains definitions associated with the Voluntary Emission Reduction Permit regulations in Subchapter H, Division 4. The Subchapter H rules were adopted to support the permitting of previously-grandfathered facilities which were not required to have an air permit under federal requirements. Under §116.770, owners or operators of grandfathered facilities were required to apply for a permit, qualify for a permit by rule, or submit a notice of shutdown before September 1, 2003, for facilities in the East Texas region; or before September 1, 2004, for facilities in the West Texas region. In 2019, the commission completed a review of Chapter 116 as required by Texas Government Code, §2001.039, and determined that the Subchapter H rules and associated definitions in §116.16 are effectively obsolete and no longer necessary as the deadlines for obtaining permits or shutting down passed long ago. The adopted rulemaking will also revise various other rule sections throughout Chapter 116 to take into account the adopted repeal of the rules in Subchapter H.

The adopted rulemaking will also repeal §116.128, Amendment Application, Public Notice and Contested Case Hearing Procedures for Certain Electric Generating Facilities, because the underlying statute, Texas Health and Safety Code (THSC), §382.059, associated with the rules expired in 2018.

Section by Section Discussion

The commission adopts amendments to make various stylistic changes, such as grammatical or reference corrections to the rule sections addressed by this proposal. These changes are non-substantive and are not specifically discussed in this preamble.

Subchapter A: Definitions

§116.12, Nonattainment and Prevention of Significant Deterioration Review Definitions

The commission adopts the amendment to the definition of "Project emissions increase" in §116.12(32). The adopted amendment revises the definition to encourage environmentally beneficial emissions reduction projects and the installation of pollution controls that might not otherwise occur or would be delayed and to harmonize TCEQ rules consistent with EPA guidance and regulations on Project Emissions Accounting. The adopted revisions will allow applicants to include emission decreases, as well as increases, when determining if a proposed project could cause a significant emissions increase of the regulated NSR pollutant or in calculating the project emissions increase (step 1 of the applicability test). Under

adopted §116.12(32)(A) - (C), for each new facility, an applicant will calculate the difference between the potential to emit and the baseline actual emission rate. For each existing facility that is modified or affected as part of the project, the applicant will either: 1) calculate the difference between the projected actual emission rate and the baseline actual emission rate; or, 2) calculate the difference between the potential to emit following the project and the baseline actual emission rate. In this process, if the difference results in a negative number, the emission decreases may be considered when calculating the project emissions increase.

Adopted §116.12(32)(A) - (D) is modified to use the phrase "sum of the differences" in relation to determining the project emissions increase. (The term "differences" is used because a project may involve changes to multiple facilities, each of which would have a "difference.") The EPA's March 13, 2018, guidance memorandum further explains this concept of the "sum of the difference" as follows:

"The 'difference' between a unit's projected actual emissions or potential to emit (following the completion of the project) and its baseline actual emissions (prior to the project) may be either a positive number (representing a projected increase) or a negative number (representing a projected decrease). In either case, the values that result from 'summing' the 'difference' are to be taken into consideration at Step 1 in determining the emissions impact of the project."

A simple example of determining the project emission increase for a project involving multiple facilities with increases and decreases of one regulated pollutant is provided in Table 1.

Figure: 30 TAC Chapter 116 - Preamble

Note that the adopted amendment will only affect how emission increases and decreases associated with the project, itself, are evaluated. The adopted amendment is not intended to affect or change the scope or meaning of the term "project." Federal NSR regulations implementing Nonattainment NSR and PSD permitting define a "project" at 40 CFR §51.165(a)(1)(xxxix) and §51.166(b)(51) as "a physical change in, or change in method of operation of, an existing major stationary source." As a point of clarification for existing language in §116.12(32)(A) and (B), the phrases "following the project" and "following completion of the project" are intended to mean the point in time when the construction and/or modifications associated with the project have been completed and the facility begins or resumes regular operation.

In adopted §116.12(32)(D), the commission is including a restriction that will prohibit the inclusion of emission decreases when calculating the project emissions increase for purposes of the definition of "Project net" at §116.12(30) and for purposes of §116.150(c)(3). Those specific rules comprise a "net to zero" option (also known as "netting within a project") which is a distinct feature of the TCEQ NNSR program that already provides for the consideration of certain emission decreases associated with a project. Under the adopted rule, when determining if a project meets the conditions of §116.150(c)(3), emission decreases are included in the calculation of "project net" provided they meet the conditions of creditability and timing contained in the "Project net" definition at §116.12(30). The commission is adopting this restriction to preserve the original design and functioning of the "net to zero" option in §116.150(c)(3).

§116.16, Voluntary Emission Reduction Permit Definitions

The commission adopts the repeal of §116.16. This section contains definitions which support the Voluntary Emission Reduction Permit rules in Chapter 116, Subchapter H. As discussed elsewhere in the Section by Section portion of this preamble, the Subchapter H rules were recently found to be obsolete. The Subchapter H rules are adopted for repeal as part of this adopted rulemaking, so the corresponding definitions in §116.16 are also adopted for repeal.

Subchapter B: New Source Review Permits

§116.128, Amendment Application, Public Notice and Contested Case Hearing Procedures for Certain Electric Generating Facilities

The commission adopts the repeal of §116.128. This section was created to implement House Bill 2694, 82nd Legislature, 2011, and corresponding THSC, §382.059, which established public notice and contested case hearing requirements for permit amendment applications necessary to comply with a maximum achievable control technology (MACT) standard promulgated under Federal Clean Air Act (FCAA), §112. Both THSC, §382.059 and §116.128 contain provisions for the expiration of the statute and rule on the sixth anniversary of the date the EPA administrator adopts standards for existing electric generating facilities under the FCAA, §112, unless a stay of the rule is granted. The EPA published standards for new and existing electric generating facilities under FCAA, §112 on February 16, 2012, (77 FR 9304) so the six-year expiration date passed on February 16, 2018. Since this rule no longer applies, the repeal of this section is adopted.

§116.150, New Major Source or Major Modification in Ozone Nonattainment Areas

The commission adopts the amendment to §116.150(c)(1) and (2) to explicitly refer to the project emissions increase, and adopts the deletion of text in these rules which excludes consideration of emission decreases. This change is necessary to encourage environmentally beneficial emissions reduction projects and the installation of pollution controls that might not otherwise occur or would be delayed and to harmonize TCEQ rules consistent with EPA guidance and regulations on project emissions accounting, which allows consideration of decreases as well as increases when determining the project emissions increase. Note that the "net to zero" provisions of §116.150(c)(3) will not be amended, and the evaluation of the "project net" will continue to be conducted based on the criteria for increases and decreases provided in the existing definition of "Project net" at §116.12(30). The commission also adopts minor editorial revisions to this section to correct spacing errors in existing rule text.

§116.151, New Major Source or Major Modification in Nonattainment Area Other Than Ozone

The commission adopts the amendment to §116.151(b) to explicitly refer to the project emissions increase, and adopts the deletion of text in the rule which excludes consideration of emission decreases. This change is necessary to encourage environmentally beneficial emissions reduction projects and the installation of pollution controls that might not otherwise occur or would be delayed and to harmonize TCEQ rules consistent with EPA guidance and regulations on project emissions accounting, which allows for consideration of decreases as well as increases when determining the project emissions increase.

§116.160, Prevention of Significant Deterioration Requirements

The commission adopts the amendment to §116.160(b)(1) and (2) to explicitly refer to the project emissions increase, and adopts the deletion of text in these rules which excludes consideration of emission decreases. This change is necessary to encourage environmentally beneficial emissions reduction projects and the installation of pollution controls that might not otherwise occur or would be delayed and to harmonize TCEQ rules consistent with EPA guidance and regulations on project emissions accounting, which allows for consideration of decreases as well as increases when determining the project emissions increase.

Subchapter H, Permits for Grandfathered Facilities

§§116.770 - 116.781, 116.783, 116.785 - 116.788, 116.790, 116.793 - 116.807, 116.810 - 116.814, 116.815, 116.816, 116.820, 116.840 - 116.842, 116.850, 116.860, and 116.870

The commission adopts the repeal of all sections within Chapter 116, Subchapter H. Subchapter H addresses permitting of grandfathered facilities. Grandfathered facilities are defined in §116.10 as facilities which are not new facilities and have not been modified since August 30, 1971. The Subchapter H rules required owners or operators of grandfathered facilities to apply for permit authorization or submit a notification of shutdown by September 1, 2003, or September 1, 2004, depending on the location of the facility. If a facility was required to install additional controls, the deadline for installing those controls was either March 1, 2007, or March 1, 2008, depending on the location of the facility. In 2019, the commission conducted a review of Chapter 116 pursuant to Texas Government Code, §2001.039 and determined that the Subchapter H rules were obsolete and no longer needed (44 TexReg 4750, August 30, 2019).

Subchapter I: Electric Generating Facility Permits

§116.910, Applicability

The commission adopts the amendment to §116.910(e) by deleting language that refers to permits issued under Subchapter H, which is adopted for repeal in this action. Subsection (e) was created to allow an applicant for a Subchapter H Voluntary Emission Reduction Permit (VERP) to consolidate that permit with an Electric Generating Facility Permit (EGFP) issued under Chapter, 116, Subchapter I. The deadline to apply for a VERP was September 1, 2001, and the commission has not issued a VERP since July 28, 2008. Subsection (e) is to be deleted because this option to consolidate these types of permits is no longer allowed, and because Subchapter H is adopted to be repealed. Existing subsection (f) is adopted to be re-lettered as subsection (e) to account for the deletion of existing subsection (e).

§116.911, Electric Generating Facility Permit Application

The commission adopts the amendment to §116.911 by deleting text that references additional controls which are subject to the schedule outlined in §116.771 in Subchapter H. The deadline for installing additional controls under §116.771 passed in 2008. This text is to be deleted because §116.771 is adopted to be repealed along with all of Subchapter H. The commission also adopts minor editorial revisions to this section to correct spacing errors in existing rule text.

§116.920, Public Participation for Initial Issuance

The commission adopts the amendment to §116.920 by deleting the existing text in subsection (b), which currently allows an applicant to combine the public notice for an EGFP and a VERP. The deadline to apply for a VERP was September 1, 2001, and the commission has not issued VERPs for many years. Subsection (b) is adopted to be deleted because this option to combine public notice for VERP and EGFP is no longer permissible and because Subchapter H is adopted to be repealed. Existing subsections (c) - (f) are re-lettered to account for the deletion of existing subsection (b).

Subchapter J: Multiple Plant Permits

§116.1010, Applicability

The commission adopts the amendment to §116.1010. The commission adopts the revised existing text in subsection (a)(1) and deletes existing text in subsection (a)(1)(A) and (B). The adopted amendment is necessary to remove obsolete text referring to facilities authorized by Subchapter H permits, which are no longer issued, and reorganize the remaining text.

§116.1011, Multiple Plant Permit Application

The commission adopts the amendment to §116.1011 by deleting the existing text in subsection (a)(2). Subsection (a)(2) requires that applicants seeking a multiple plant permit (MPP) for a grandfathered facility provide certain information specified in §116.811(3), which is being repealed along with all of Subchapter H. Subsection (a)(2) applies to grandfathered facilities which file an application for an MPP prior to September 1, 2001. The commission adopts the deletion of subsection (a)(2) because this rule is no longer relevant and because §116.811 is being repealed in this action. Existing paragraphs (3) and (4) are renumbered to account for the adopted deletion of paragraph (2).

Subchapter M: Best Available Retrofit Technology (BART)

§116.1530, Best Available Retrofit Technology (BART) Control Implementation

The commission adopts the amendment to §116.1530(b) by deleting text that refers to the requirements of Subchapter H, which is adopted to be repealed in this action. This reference to Subchapter H is no longer necessary because the commission no longer issues permits under Subchapter H.

Final Regulatory Impact Determination

The commission reviewed 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 Texas Government Code, §2001.0225 because it does not meet the definition of a "Major environmental rule" as defined in that statute. 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.

As previously discussed in the Background and Summary of the Factual Basis of this preamble, the intent of the adopted revisions is to revise the Chapter 116 rules to provide consistency with the EPA's guidance entitled, "Project Emissions Accounting under the New Source Review Preconstruction Program," and the adopted 40 CFR Parts 51 and 52 rules for project emissions accounting, comply with congressional intent of federal permitting programs, and to encourage environmentally beneficial emissions reduction projects and the installation of pollution controls that might not otherwise occur or would be delayed. The adopted repeal of all sections in Chapter 116, Subchapter H, associated §116.16, which contains definitions associated with the Voluntary Emission Reduction Permit regulations in Subchapter

H, Division 4, revisions to various other rules sections in Chapter 116 that reference Subchapter H, and the repeal of §116.128 are intended to remove obsolete rules.

In addition, a regulatory impact analysis is not required because the adopted rulemaking does not meet any of the applicability criteria for requiring a regulatory analysis of a "Major environmental rule" as defined in the Texas Government Code. 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 authority of the commission. This rulemaking does not exceed a standard set by federal law. Additionally, this rulemaking does not exceed an express requirement of state law or a requirement of a delegation agreement and was not developed solely under the general powers of the agency but is authorized by specific sections of the THSC that are cited in the Statutory Authority section of this preamble. Therefore, this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. No comments on the Draft Regulatory Impact Analysis Determination were received.

Takings Impact Assessment

The commission evaluated the adopted rulemaking and performed an analysis of whether the adopted rulemaking constitutes a taking under Texas Government Code, Chapter 2007. The commission's assessment indicates Texas Government Code, Chapter 2007, does not apply.

Under Texas Government Code, §2007.002(5), taking means: (A) 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 Section 17 or 19, Article I, Texas Constitution; or (B) a governmental action that: (i) 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 (ii) 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.

Promulgation and enforcement of the adopted rulemaking will be neither a statutory nor a constitutional taking of private real property. The intent of the adopted changes is to revise the Chapter 116 rules to encourage environmentally beneficial emissions reduction projects and the installation of pollution controls that might not otherwise occur or would be delayed, to harmonize TCEQ rules consistent with the EPA's guidance entitled, "Project Emissions Accounting under the New Source Review Preconstruction Program," and the adopted 40 CFR Part 51 and 52 rules for project emissions accounting, and comply with congressional intent of federal permitting programs. The adopted repeal of all sections in Chapter 116, Subchapter H, associated §116.16, which contains definitions associated with the Voluntary Emission Reduction Permit regulations in Subchapter H, Division 4, revisions to various other rules sections in Chapter 116 that reference Subchapter H, and the repeal of §116.128 are intended to remove obsolete rules. The adopted rulemaking does not affect a landowner's rights in private real property because this rulemaking does not burden, restrict, or limit the owner's right to property, nor does it reduce the value of any private real property by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, these adopted rules do not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the adopted rulemaking and found that the adoption is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.,* and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the adopted rules in accordance with Coastal Coordination Act implementation rules, 31 Texas Administrative Code (TAC) §505.22 and found the adopted rulemaking is consistent with the applicable CMP goals and policies.

The CMP goal applicable to this adopted rulemaking is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). In accordance with EPA guidance and adopted rules, the adopted amendments to Chapter 116 will revise applicability procedures for determining whether changes to an existing major facility are subject to NNSR permitting requirements or PSD permitting requirements. If it is determined that a project is not subject to such requirements, the project would still undergo a permit review to ensure protection of public health and compliance with air quality standards. The adopted rulemaking also includes the repeal of a number of obsolete rules in Chapter 116 which are no longer relevant. The CMP policy applicable to the adopted rulemaking 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 §501.32). This rulemaking complies with 40 CFR Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because the adopted rules are consistent with these CMP goals and policies, and because these rules do not create or have a direct or significant adverse effect on any coastal natural resource areas.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments regarding consistency with the CMP were received.

Effect on Sites Subject to the Federal Operating Permits Program

The adopted rulemaking will have no adverse effect on sites subject to the Federal Operating Permits Program. Owners or operators of such sites may benefit from the adopted rules if they initiate future projects which would have been subject to PSD or Nonattainment NSR permitting requirements under the regulations previously in effect, but the benefits would be highly

case-specific depending on the site and the project. Owners or operators of sites subject to the Federal Operating Permits Program must still comply with any applicable requirements of Chapter 122 that apply when changes are made to a facility.

Public Comment

The commission offered a virtual public hearing on January 26, 2021, but no persons registered to provide comments at the hearing. The comment period closed on February 3, 2021. The commission received written comments from DiSorbo Environmental Consulting (DEC), the Texas Chemical Council (TCC), the Texas Industry Project (TIP), and the Texas Oil and Gas Association (TXOGA). TCC, TIP, and TXOGA commented in support of the proposed rules. DEC suggested changes to the proposed rules.

Response to Comments

Comment

TCC, TIP, and TXOGA expressed support for the proposed rules, and stated that the proposed rules would encourage emission decreases, environmentally beneficial efficiency improvements, and the installation of state of the art pollution controls at regulated facilities. TCC commented that the rulemaking is necessary because current rules discourage companies from undertaking projects that might otherwise result in increased efficiency and reduced emissions. TIP commented that the proposed rules are sound environmental policy because they will encourage companies to implement projects that will result in increased efficiency and reduce emissions through the installation of state-of-the-art pollution controls. TXOGA commented that the proposed rules will help Texas continue its environmental progress in reducing emissions and remove barriers to implementation of environmentally beneficial projects.

TIP also identified several types of replacement projects, retrofits, and other environmentally-beneficial improvements which could be incentivized or facilitated under the proposed rules. For example, TIP discussed the effects of the current rules on companies considering the replacement of old, inefficient fired equipment with new equipment that could reduce emissions on a per unit output basis. TIP commented that if installation of that new equipment triggered PSD requirements, the permitting would take longer, assuming the project was pursued at all, and the old equipment would continue to emit at higher levels while the PSD permit was being processed. TIP stated that allowing emission increases and decreases to be considered at Step 1 would reduce the likelihood that the replacement equipment would trigger major NSR and would therefore encourage the installation of the replacement equipment. TIP also noted that the replacement equipment would still be subject to state BACT permit requirements. Similarly, TIP commented that the retrofit of an external floating roof tank with a geodesic dome cover to reduce volatile organic compound emissions, the retrofit of a cooling tower with improved drift eliminators to reduce particulate matter emissions, or the installation of dual-seal pumps to reduce fugitive emissions would all be encouraged and incentivized under the proposed rules. TIP stated that all of these examples would increase efficiency and reduce emissions.

TIP also commented on the effects of both the current and proposed rules on companies seeking expansion in a Texas ozone nonattainment area. TIP stated that, under the proposed rules, the company could choose to undertake a site-wide energy audit at the same time as the expansion in order to uncover ways to maximize production and reduce the energy consumption of increased operations. TIP stated that, under the current rules, if the expansion triggers major NNSR and LAER controls on new or modified equipment as well as the requirement to obtain offsets because decreases cannot be considered in Step 1, the company would have little incentive to evaluate or pursue energy efficiency projects at the time of the expansion,

TIP also commented that applicants typically make conservative assumptions regarding emissions on permit applications, which often results in the potential increases for equipment being greater than the actual emissions once the equipment is installed or modified. In contrast, TIP stated that companies would need to identify real project reductions to sufficiently net against potential project increases. TIP stated that, for all these reasons, the proposed rule should have a net positive effect on air quality.

Response

The commission appreciates the support. The commission's historical experience with permitting of major sources is consistent with the examples and scenarios described by the commenter, and the commission agrees that the ability to include emission reductions from replacement and retrofit projects in the project determination will encourage and incentivize environmentally beneficial improvements and emission reductions. In addition, the commission agrees that the realization of actual emission reductions, combined with the commission's stringent minor NSR permitting requirements and existing SIP regulations, will prevent an adverse effect on overall air quality. No changes to the rules were made in response to these comments.

Comment

TIP stated that TCEQ's proposed rules would not impact Texas' minor NSR program, and that Texas has one of the most stringent minor NSR programs in the United States. TIP noted that Texas does not set a threshold amount for pollutants below which those emissions are not subject to NSR permitting requirements nor does Texas have a large list of de minimis facilities and activities that are excluded from permitting requirements. TIP stated that projects that would not be subject to NSR major modification requirements as a result of the proposed rule would still be subject to the applicable minor NSR permitting requirements, including BACT. TIP stated that, due to the stringency of the Texas minor NSR program, the proposed rule will not significantly affect human health or ambient air quality.

Response

The commission agrees that Texas' stringent NSR requirements for non-major sources and modifications will remain in effect and are not impacted by the proposed rules. Texas' minor NSR requirements will continue to provide a mechanism to ensure that projects are reviewed to ensure protection of human health and compliance with air quality standards, and that required emission control technology is applied. No changes to the rules were made in response to this comment.

Comment

TIP and TXOGA stated that the rulemaking is necessary to ensure that TCEQ's permitting program is consistent with EPA guidance and rules for evaluating project emissions for purposes of PSD and NNSR applicability. TCC also expressed support for the proposed rulemaking because it aligns TCEQ rules for PSD and NNSR with the recent regulatory changes from the EPA and is consistent with the initial congressional intent for these rules.

Response

The commission agrees that the rulemaking provides consistency with EPA guidance and regulations governing major NSR applicability and complies with congressional intent of the PSD and NNSR programs. If the proposed rules to implement project emissions accounting were not adopted, it could result in confusion for the regulated community and place facilities in Texas at a competitive disadvantage relative to facilities in other states which have implemented project emissions accounting in their major NSR permitting programs. In addition to, and independently from, harmonizing TCEQ and EPA regulations and guidance and complying with congressional intent, the commission also agrees that the rulemaking is beneficial and will encourage and incentivize emissions decreases and the installation of pollution controls that might not otherwise occur, or would be delayed. No changes to the rules were made in response to this comment.

Comment

TIP stated that the proposed rules would help ensure that the regulated community in Texas is not placed at an economic disadvantage for project siting as compared to other states, especially along the Gulf Coast.

Response

The commission agrees with this comment. No changes to the rules were made in response to this comment.

Comment

TIP stated that they supported the TCEQ's interpretation (as described in the proposal preamble) of the scope of a project, which is not a defined term in TCEQ rules, but is defined in federal NSR regulations as "a physical change in, or change in method of operation of, an existing major stationary source." TIP stated that TCEQ has consistently interpreted the scope of a project to encompass all facilities which would be constructed, modified, or otherwise affected as part of the changes proposed by an applicant. TIP stated that this interpretation will encourage companies to undertake projects that will reduce overall emissions. DEC commented that that it understands TCEQ's comments in the proposal preamble about the defined term "project" to be that TCEQ generally subscribes to EPA's definition of that term (40 CFR § 52.21(b)(52), etc.). DEC stated that if TCEQ is amending its rules for compatibility with EPA's Project Emissions Accounting rule interpretation, it is important that TCEQ clarify in some manner whether it expects to use the term "project" in the same manner as EPA does, and codify this in its rules.

Response

The description of a project in the proposal preamble was meant to provide a general illustration of the concept, not as a formal interpretation or definition. The proposed rulemaking is not intended to establish a definition for "project" in TCEQ rules or to change the meaning of what constitutes a project for purposes of major NSR applicability. The commission will continue to evaluate the scope of projects as we have historically, on a case-by-case basis, and does not agree that a formal definition is necessary at this time. No changes to the rules were made in response to this comment.

Comment

DEC commented on a statement in the proposal preamble that "the current rules already refer to 'netting' or the 'de minimis threshold test' (Step 2)." (46 TexReg 123.) DEC stated that it understands the comment to refer specifically to the current phrasing of §116.150(c), which uses the phrase "de minimis threshold test (netting)" to refer to what EPA terms "Step 2" of the Major NSR applicability calculus. DEC stated that the term "netting" has not always been used to refer narrowly to a "Step 2" calculation. DEC noted that pre-2002 EPA publications (notably, the 1990 NSR Workshop Manual) have used the term "netting" to refer to both steps of the applicability determination, as the concept of a "project emissions increase" was not codified in EPA's rules until 2002. DEC stated that, therefore, "netting" can refer narrowly to "Step 2" (as it does in current usage) or broadly to both Steps 1 and 2 (as it does in pre-2002 materials). DEC stated that "netting" as used in §116.116(e)(1)(B) ("A separate netting analysis shall be made..") has the original, broader sense of the term. DEC stated that TCEQ revised its Qualified Facilities Guidance Document in February 2020 to delete a sentence equating "netting" in the rule text with "contemporaneous netting," consistent with this interpretation.

Response

The proposed rulemaking intends to revise Step 1 of the federal major source applicability analysis at existing major sources to allow both emission increases and decreases associated with a project to be considered when determining whether contemporaneous netting is triggered as defined in proposed revisions to §116.12(32) for the definition of "Project emissions increase." The proposed rulemaking does not intend to revise the definition of Step 2 of the analysis for contemporaneous netting, specifically as set forth in §116.12(22) for the definition of "Net emissions increase." Similarly, the commission is proposing to revise the de minimis threshold tests to allow both emission increases and decreases in Step 1 of the analysis as specified in §116.160(b) for PSD applicability and §116.150(c) and §116.151(b) for NNSR applicability. The discussion in the rule preamble (both proposal and this adoption) discussing step 2 contemporaneous netting was meant to provide background information only. No changes to the rules were made in response to this comment.

Comment

DEC stated that it understands that TCEQ intends to keep the Project Emissions Accounting provisions completely separate from the "Net-to-Zero" provisions. DEC also provided a table describing its understanding of various aspects of the project emissions accounting provisions as compared with the commission's existing "net to zero" requirements.

Response

The commission concurs with the commenter that the proposed project emissions accounting rule changes are distinct and separate from the "net to zero" provisions of §116.150(c)(3). However, the commission notes an error in the table submitted by DEC. The commission declines to comment on existing rules which are not within the scope of this rulemaking. The commission did not propose to revise the "net to zero" rules and project emissions accounting will be implemented as described in this rulemaking. No changes to the rules were made in response to this comment.

Comment

DEC noted that the proposed definition of "Project emissions increase" states that unrelated emissions increases that could have been legally and physically accommodated during the baseline period "may be excluded from the project emissions

increase." Therefore, DEC understands that the proposed rule does not permit exclusion of emissions when calculating project changes at modified and affected emissions units/facilities undergoing an emissions decrease. DEC stated that, for example, in calculating the emissions change from an affected upstream unit such as a site boiler, a source owner can exclude unrelated emissions increases or decreases from the boiler, but only if the projected emissions change for the boiler is positive.

Response

The proposed rulemaking does not change the existing rule language within §116.12(32)(A) that allows the exclusion of the portion of the existing facility's unrelated emissions following the project that could have been accommodated during the consecutive 24-month period used to establish the baseline actual emissions and that are also unrelated to the particular project. No changes to the rules were made in response to this comment.

Comment

DEC noted that a petition was filed in the D.C. Court of Appeals for review of the EPA's project emissions accounting regulations. DEC stated that if TCEQ finalizes this proposal and EPA's effective rule text changes as a result of the litigation, TCEQ would be unlikely to receive SIP approval for the rule, and would eventually have to undertake rulemaking to reverse the changes. The commenter stated that TCEQ might consider hedging against this uncertainty by revising its proposal to conform to the version of EPA's PSD rules that EPA's March 13, 2018, memorandum interpreted, such that if EPA's interpretation should change, TCEQ would not have to undertake rulemaking to address the change in interpretation. DEC suggested that this could entail, for example, removing proposed §116.12(32)(D), whose correspondent EPA only introduced in its late rulemaking for avoidance of doubt.

Response

The commission is aware that certain parties have filed petitions for judicial review of EPA's final project emission accounting rule. While the commission is monitoring the status of the ongoing petitions, it is not possible nor prudent to address possible contingencies for hypothetical, future EPA actions or court decisions. TCEQ believes that this rulemaking is necessary because the commission has determined that the rules are beneficial for several reasons. The rulemaking will achieve and maintain consistency with federal regulations and comply with congressional intent for the PSD and NNSR programs. In addition, the commission has independently determined that this rulemaking will yield benefits in emission reductions and air quality. Finally, the implementation of the revisions suggested by the commenter would require a substantial rework of the proposed rules and additional public comment. The commission respectfully declines to make the suggested changes at this time.

Comment

TIP expressed support for TCEQ's proposal to delete obsolete sections of Chapter 116 relating to the permitting of grandfathered facilities and related amendments to update or remove cross references.

Response

The commission appreciates the support. No changes to the rules were made in response to this comment.

Comment

TXOGA stated that they supported the comments submitted by TCC and TIP. TCC stated that they supported the comments submitted by TIP.

Response

The commission acknowledges this and in preparing this response to comments, has considered that TCC and TXOGA support the comments submitted by TIP. No changes to the rules were made in response to this comment.

SUBCHAPTER A. DEFINITIONS

30 TAC §116.12

Statutory Authority

The amendment is adopted 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; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendment is also adopted 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; 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; 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, §382.051, 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. The amendment is also adopted 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 standards will be achieved and maintained within each air quality control region of the state.

The adopted amendment implements TWC, §§5.102, 5.103, 5.105; THSC, §§382.002, 382.011, 382.012, 382.017, 382.051 and 42 USC, §§7401 *et seq.*

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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30 TAC §116.16

Statutory Authority

The repeal of the section is adopted under Texas Water Code (TWC), §5.102, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state; and TWC, §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission. The repeal of the section is also adopted under Texas Health and Safety Code (THSC), Texas Clean Air Act, §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the THSC; 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, which authorizes the commission to establish the level of quality to be maintained in the state's air and to control the quality of the state's air; THSC, §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air.

The adopted repeal implements TWC, §§5.102, 5.103, and 5.105; THSC, §§382.002, 382.011, 382.012, and 382.017.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER B. NEW SOURCE REVIEW PERMITS

DIVISION 1. PERMIT APPLICATION

30 TAC §116.128

Statutory Authority

The repeal of the section is adopted under Texas Water Code (TWC), §5.102, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state; and TWC, §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission. The repeal of the section is also adopted under Texas Health and Safety Code (THSC), Texas Clean Air Act, §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the THSC; 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, which authorizes the commission to establish the level of quality to be maintained in the state's air and to control the quality of the state's air; and THSC, §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air.

The adopted repeal implements TWC, §§5.102, 5.103, and 5.105; THSC, §§382.002, 382.011, 382.012, and 382.017.

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DIVISION 5. NONATTAINMENT REVIEW PERMITS

30 TAC §116.150, §116.151

Statutory Authority

The amendments are adopted 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 adopted 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; 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, §382.051, 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, §382.0512, concerning Modification of Existing Facility, which prescribes how the commission will evaluate modifications of existing facilities; 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 adopted 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 adopted amendments implement TWC, §§5.102, 5.103, 5.105; THSC, §§382.002, 382.011, 382.012, 382.017, 382.051, 382.0512, 382.0518; and 42 USC, §§7401 *et seq.*

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DIVISION 6. PREVENTION OF SIGNIFICANT DETERIORATION REVIEW

30 TAC §116.160

Statutory Authority

The amendment is adopted 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 adopted 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, §382.051, 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, §382.0512, concerning Modification of Existing Facility, which prescribes how the commission will evaluate modifications of existing facilities; and THSC, §382.0518, concerning Preconstruction Permit, which authorizes the commission to issue preconstruction permits. The amendment is also adopted 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 adopted amendment implements TWC, §§5.102, 5.103, 5.105; THSC, §§382.002, 382.011, 382.012, 382.017, 382.051, 382.0512, 382.0518; and 42 USC, §§7401 *et seq.*

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SUBCHAPTER H. PERMITS FOR GRANDFATHERED FACILITIES
DIVISION 1. GENERAL APPLICABILITY

30 TAC §§116.770 - 116.773

Statutory Authority

The repeal of the sections is adopted under Texas Water Code (TWC), §5.102, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state; and TWC, §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission. The repeal of the sections is also adopted under Texas Health and Safety Code (THSC), Texas Clean Air Act, §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the THSC; 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, which authorizes the commission to establish the level of quality to be maintained in the state's air and to control the quality of the state's air; and THSC, §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air.

The adopted repeals implement TWC, §§5.102, 5.103, 5.105; THSC, §§382.002, 382.011, 382.012, and 382.017.

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DIVISION 2. SMALL BUSINESS STATIONARY SOURCE PERMITS, PIPELINE FACILITIES PERMITS, AND EXISTING FACILITY PERMITS

30 TAC §§116.774 - 116.781, 116.783, 116.785 - 116.788, 116.790

Statutory Authority

The repeal of the sections is adopted under Texas Water Code (TWC), §5.102, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state; and TWC, §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission. The repeal of the sections is also adopted under Texas Health and Safety Code (THSC), Texas Clean Air Act, §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the THSC; 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, which authorizes the commission to establish the level of quality to be maintained in the state's air and to control the quality of the state's air; and THSC, §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air.

The adopted repeals implement TWC, §§5.102, 5.103, 5.105; THSC, §§382.002, 382.011, 382.012, and 382.017.

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DIVISION 3. EXISTING FACILITY FLEXIBLE PERMITS

30 TAC §§116.793 - 116.807

Statutory Authority

The repeal of the sections is adopted under Texas Water Code (TWC), §5.102, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state; and TWC, §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission. The repeal of the sections is also adopted under Texas Health and Safety Code (THSC), Texas Clean Air Act, §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the THSC; 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, which authorizes the commission to establish the level of quality to be maintained in the state's air and to control the quality of the state's air; and THSC, §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air.

The adopted repeals implement TWC, §§5.102, 5.103, 5.105; THSC, §§382.002, 382.011, 382.012, and 382.017.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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DIVISION 4. VOLUNTARY EMISSION REDUCTION PERMITS

30 TAC §§116.810 - 116.814, 116.816, 116.820, 116.840 - 116.842, 116.850, 116.860, 116.870

Statutory Authority

The repeal of the sections is adopted under Texas Water Code (TWC), §5.102, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state; and TWC, §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission. The repeal of the sections is also adopted under Texas Health and Safety Code (THSC), Texas Clean Air Act, §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the THSC; 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, which authorizes the commission to establish the level of quality to be maintained in the state's air and to control the quality of the state's air; and THSC, §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air.

The adopted repeals implement TWC, §§5.102, 5.103, 5.105; THSC, §§382.002, 382.011, 382.012, and 382.017.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER I. ELECTRIC GENERATING FACILITY PERMITS

30 TAC §§116.910, 116.911, 116.920

Statutory Authority

The amendments are adopted 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 adopted 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. The amendments are also adopted 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 adopted amendments implement TWC, §§5.102, 5.103, 5.105; THSC, §§382.002, 382.011, 382.012, 382.017, and 42 USC, §§7401 *et seq.*

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SUBCHAPTER J. MULTIPLE PLANT PERMITS

30 TAC §116.1010, §116.1011

Statutory Authority

The amendments are adopted 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 adopted 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; and THSC, §382.05197, which authorizes the issuance of a multiple plant permit. The amendments are also adopted 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 adopted amendments implement TWC, §§5.102, 5.103, 5.105; THSC, §§382.002, 382.011, 382.012, 382.017, 382.05197; and 42 USC, §§7401 *et seq.*

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SUBCHAPTER M. BEST AVAILABLE RETROFIT TECHNOLOGY (BART)

30 TAC §116.1530

Statutory Authority

The amendment is adopted 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 adopted 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. The amendment is also adopted 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 adopted amendment implements TWC, §§5.102, 5.103, 5.105; THSC, §§382.002, 382.011, 382.012, 382.017; and 42 USC, §§7401 *et seq.*

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For further information, please call: (512) 239-2678

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 4. COMMERCIAL VEHICLE REGULATIONS AND ENFORCEMENT PROCEDURES

SUBCHAPTER A. REGULATIONS GOVERNING HAZARDOUS MATERIALS

37 TAC §4.1

The Texas Department of Public Safety (the department) adopts amendments to §4.1, concerning Transportation of Hazardous Materials. This rule is adopted without changes to the proposed text as published in the May 7, 2021, issue of the *Texas Register* (46 TexReg 3003) and will not be republished.

The proposed amendments harmonize updates to Title 49, Code of Federal Regulation with those laws adopted by Texas.

No comments were received regarding the adoption of this rule.

This rule is adopted pursuant to Texas Transportation Code, §644.051, which authorizes the director to adopt rules regulating the safe transportation of hazardous materials and the safe operation of commercial motor vehicles; and authorizes the director to adopt all or part of the federal safety regulations, by reference.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 9, 2021.

TRD-202102238
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Effective date: June 29, 2021
Proposal publication date: May 7, 2021
For further information, please call: (512) 424-5848

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SUBCHAPTER B. REGULATIONS GOVERNING TRANSPORTATION SAFETY

37 TAC §4.11

The Texas Department of Public Safety (the department) adopts amendments to §4.11, concerning Applicability and Definitions. This rule is adopted without changes to the proposed text as published in the May 7, 2021, issue of the *Texas Register* (46 TexReg 3004) and will not be republished.

The proposed amendments harmonize updates to Title 49, Code of Federal Regulation with those laws adopted by Texas.

No comments were received regarding the adoption of this rule.

This rule is adopted pursuant to Texas Transportation Code, §644.051, which authorizes the director to adopt rules regulating the safe transportation of hazardous materials and the safe operation of commercial motor vehicles; and authorizes the director to adopt all or part of the federal safety regulations, by reference.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 9, 2021.

TRD-202102239
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Effective date: June 29, 2021
Proposal publication date: May 7, 2021
For further information, please call: (512) 424-5848

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SUBCHAPTER C. COMMERCIAL VEHICLE REGISTRATION AND INSPECTION ENFORCEMENT

37 TAC §4.37

The Texas Department of Public Safety (the department) adopts amendments to §4.37, concerning Acceptance of Out-of-State Commercial Vehicle Inspection Certificate. This rule is adopted

without changes to the proposed text as published in the May 7, 2021, issue of the *Texas Register* (46 TexReg 3006). The rule will not be republished.

The proposed amendments harmonize updates to Title 49, Code of Federal Regulation with those laws adopted by Texas.

No comments were received regarding the adoption of this rule.

This rule is adopted pursuant to Texas Transportation Code, §644.051, which authorizes the director to adopt rules regulating the safe transportation of hazardous materials and the safe operation of commercial motor vehicles; and authorizes the director to adopt all or part of the federal safety regulations, by reference.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 9, 2021.

TRD-202102240
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Effective date: June 29, 2021
Proposal publication date: May 7, 2021
For further information, please call: (512) 424-5848

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.

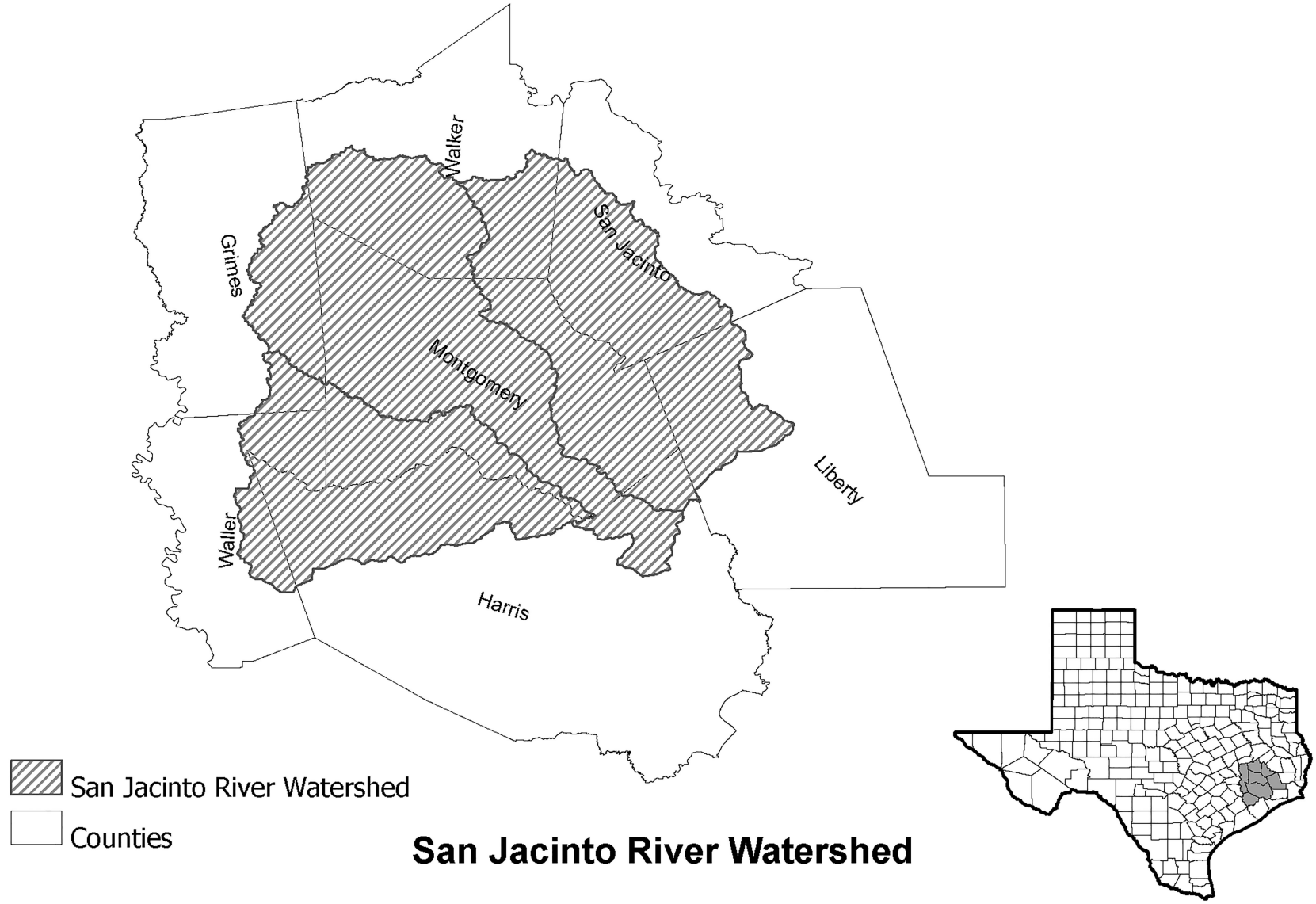
Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 30 TAC Chapter 116 - Preamble

Table 1: Example of Determining a Project Emissions Increase

Source ID	Current VOC PTE (tpy)	Baseline Actual Emissions (tpy)	Proposed PTE (tpy)	Projected Actual Emissions (tpy)	Difference (tpy)
Facility 1 (new)	0	0	6	N/A	6
Facility 2 (existing)	5	4	6		2
Facility 3 (removed)	2	1	0	N/A	-1
Facility 4 (existing)	6	5	6	4	-1
Facility 5 (existing but in operation less than 2 years)	6	6	4		-2
Total Project Emission Increase					**4 tpy**

Figure: 30 TAC §311.101(a)(7)



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.

Texas State Affordable Housing Corporation

Notice of Request for Proposals for Website Services

Notice is hereby given of an RFP by the Texas State Affordable Housing Corporation ("TSAHC") to identify and contract professional services to provide ongoing website maintenance and enhancements for TSAHC's website. A copy of the RFP can be found on TSAHC's website at www.tsahc.org.

The deadline for submissions in response to this RFP is **Friday, July 16, 2021, at 5:00 p.m.** Responses should be emailed to Michael Wilt at mwilt@tsahc.org. For questions or comments about the RFP, please contact Michael Wilt at (512) 334-2157 or by email at mwilt@tsahc.org.

TRD-202102357
David Long
President
Texas State Affordable Housing Corporation
Filed: June 16, 2021

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Texas Alcoholic Beverage Commission

Annual Production Limit Order

ADJUSTMENT OF PRODUCTION LIMITS PURSUANT TO ALCOHOLIC BEVERAGE CODE SECTIONS 12.052 AND 62.122	§ § § § §	**BEFORE THE TEXAS ALCOHOLIC BEVERAGE COMMISSION**

ANNUAL PRODUCTION LIMIT ORDER

Alcoholic Beverage Code Sections 12.052(f) and 62.122(f) require the Texas Alcoholic Beverage Commission (Commission) to annually adjust the production limit prescribed by Subsection (c)(2) of those sections in an amount that is equal to the percentage of the state's population growth for the previous year, as determined by the State Demographer.

According to the State Demographer, the population of the State of Texas grew by 1.29 percent from January 1, 2020 to December 31, 2020.

The annual production limit prescribed by Order of the Commission dated January 28, 2020 was 179,544 barrels. Applying the 1.29 percent 2020 population growth figure to the 179,544 -barrel production limit set forth in the 2020 Commission Order equals 2729 barrels.

IT IS THEREFORE ORDERED THAT THE ANNUAL PRODUCTION LIMIT FOR 2021 UNDER ALCOHOLIC BEVERAGE CODE SECTIONS 12.052(c)(2) AND 62.122(c)(2) IS 182,273 BARRELS.

ENTERED AND EFFECTIVE on this the 25 day of May, 2021.

TEXAS ALCOHOLIC BEVERAGE COMMISSION

DEBORAH GRAY MARINO
ACTING PRESIDING OFFICER

TRD-202102348
Shana Horton
Rules Attorney
Texas Alcoholic Beverage Commission
Filed: June 15, 2021

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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 and §303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 06/21/21 - 06/27/21 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 06/21/21 - 06/27/21 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-202102327
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: June 15, 2021

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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 Plus4 Credit Union (Houston) seeking approval to merge with Houston Metropolitan Federal Credit Union (Houston), with Plus4 Credit Union 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-202102359
John J. Kolhoff
Commissioner
Credit Union Department
Filed: June 16, 2021

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Application to Expand Field of Membership

Notice is given that the following applications has been filed with the Credit Union Department (Department) and is under consideration.

An application was received from Community Service Credit Union #1, Huntsville, Texas, to expand its field of membership. The proposal would permit persons who reside, worship, attend school or work in and businesses and entities located in Houston County, Texas, to be eligible for membership in the credit union.

An application was received from Community Service Credit Union #2, Huntsville, Texas, to expand its field of membership. The proposal would permit persons who reside, worship, attend school or work in and businesses and entities located in San Jacinto County, Texas, to be eligible for membership in the credit union.

An application was received from Community Service Credit Union #3, Huntsville, Texas, to expand its field of membership. The proposal would permit persons who reside, worship, attend school or work in and businesses and entities located in Grimes County, Texas, to be eligible for membership in the credit union.

An application was received from Brazos Star Credit Union, College Station, Texas, to expand its field of membership. The proposal would permit persons who live, work, attend school or worship in and businesses located in Grimes County, Texas, to be eligible for membership in the credit union.

An application was received from Hockley County School Employees Credit Union, Levelland, Texas, to expand its field of membership. The proposal would permit employees of South Plains Community Action Association of Levelland, Texas, to be eligible for membership in the credit union.

An application was received from InvesTex Credit Union, Humble, Texas, 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 InvesTex Credit Union office located at: 8404 FM 1960 Bypass Rd W., Humble, Texas, 77338, 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.cud.texas.gov/page/bylaw-charter-applications. 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-202102358
John J. Kolhoff
Commissioner
Credit Union Department
Filed: June 16, 2021

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Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ, agency, 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. TWC, §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. TWC, §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 **July 27, 2021.** TWC, §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 **July 27, 2021.** Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission's enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, TWC, §7.075, provides that comments on the AOs shall be submitted to the commission in writing.

(1) COMPANY: 2MORROW RENTALS, LLC dba B Happy Store; DOCKET NUMBER: 2021-0149-PST-E; IDENTIFIER: RN102713815; LOCATION: Concan, Uvalde County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.7(d)(1)(F) - (H) and (3), by failing to provide an amended registration for any change or additional information to the agency regarding the underground storage tank (UST) system within 30 days from the date of the occurrence of the change or addition, also, the facility has flow restrictor valves for overfill prevention, but the facility is registered as having automatic shut-off valves, additionally, the Respondent uses monthly inventory control and automatic tank gauging release detection for the UST system, but the facility is registered as using groundwater monitoring release detection method; and 30 TAC §334.50(d)(1)(B)(ii) and TWC, §26.3475(c)(1), by failing to conduct reconciliation of detailed inventory control records at least once every 30 days in a manner sufficiently accurate to detect a release as small as the sum of 1.0% of the total substance flow-through for the 30-day period plus 130 gallons; PENALTY: $3,251; ENFORCEMENT COORDINATOR: Hailey Johnson, (512) 239-1756; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(2) COMPANY: Aqua Texas, Incorporated; DOCKET NUMBER: 2020-1541-PWS-E; IDENTIFIER: RN102692662; LOCATION: Fulshear, Fort Bend County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.42(m), by failing to protect each water treatment plant and all appurtenances with an intruder-resistant fence with a lockable gate or a locked building in the fence line; 30 TAC §290.46(l), by failing to flush all dead-end mains at monthly intervals; 30 TAC §290.46(m), by failing to initiate maintenance and housekeeping practices to ensure the good working condition and general appearance of the system's facilities and equipment; and 30 TAC §290.46(n)(2), by failing to make available an accurate and up-to-date map of the distribution system so that valves and mains can be easily located during emergencies; PENALTY: $1,808; ENFORCEMENT COORDINATOR: Carlos Molina, (512) 239-2557; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(3) COMPANY: Aqua Utilities, Incorporated; DOCKET NUMBER: 2020-1551-PWS-E; IDENTIFIER: RN102689395; LOCATION: Dayton, Liberty County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.46(n)(3), by failing to keep on file copies of well completion data as defined in 30 TAC §290.41(c)(3)(A) for as long as the well remains in service, additionally, the well completion data and granted exceptions for Well Number 2 had not been submitted for approval; PENALTY: $80; ENFORCEMENT COORDINATOR: Julianne Matthews, (817) 588-5861; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(4) COMPANY: Ashlyn Homes, Incorporated; DOCKET NUMBER: 2021-0146-WQ-E; IDENTIFIER: RN111143061; LOCATION: Weatherford, Parker County; TYPE OF FACILITY: operator; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a construction general permit (stormwater); PENALTY: $875; ENFORCEMENT COORDINATOR: Alyssa Loveday, (512) 239-5540; REGIONAL OFFICE: 2309 Gravel Drive, Forth Worth, Texas 76118-6951, (817) 588-5800.

(5) COMPANY: Beth Puryear dba Emerald Estates, Carol Decker dba Emerald Estates, and Wayne Williams dba Emerald Estates; DOCKET NUMBER: 2021-0110-PWS-E; IDENTIFIER: RN102975778; LOCATION: Huntsville, San Jacinto County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.108(f)(1) and Texas Health and Safety Code, §341.0315(c), by failing to comply with the maximum contaminant level (MCL) of 5 picoCuries per liter (pCi/L) for combined radium-226 and -228 and with the MCL of 15 pCi/L for gross alpha particle activity based on the running annual average; PENALTY: $1,755; ENFORCEMENT COORDINATOR: Miles Wehner, (512) 239-2813; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(6) COMPANY: Burleson Sand LLC; DOCKET NUMBER: 2020-0870-WQ-E; IDENTIFIER: RN110378031; LOCATION: Caldwell, Burleson County; TYPE OF FACILITY: surface mining facility; RULES VIOLATED: 30 TAC §305.125(1), TWC, §26.121(a), Texas Pollutant Discharge Elimination System (TPDES) General Permit Number TXR15749L, Part III, Section G, and TPDES Multi-Sector General Permit Number TXR05EF69, Part III, Section A, Number 4, by failing to install and maintain best management practices at the facility which resulted in a discharge of pollutants; PENALTY: $1,000; ENFORCEMENT COORDINATOR: Caleb Olson, (817) 588-5856; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(7) COMPANY: BW GRAYSON BUSINESS PARK ASSOCIATION, INCORPORATED; DOCKET NUMBER: 2021-0139-PWS-E; IDENTIFIER: RN108521550; LOCATION: Houston, Harris County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.106(f)(3)(C) and Texas Health and Safety Code, §341.0315(c), by failing to comply with the maximum contaminant level of 0.010 milligrams per liter for arsenic, based on the running annual average; PENALTY: $862; ENFORCEMENT COORDINATOR: Ecko Beggs, (915) 834-4968; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(8) COMPANY: Christian Life Center of Lubbock; DOCKET NUMBER: 2021-0156-PWS-E; IDENTIFIER: RN101184257; LOCATION: Lubbock, Lubbock County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.107(f)(1) and Texas Health and Safety Code, §341.0315(c), by failing to comply with the maximum contaminant level of 0.007 milligram per liter for 1,1-Dichloroethylene based on the running annual average; PENALTY: $1,177; ENFORCEMENT COORDINATOR: Carlos Molina, (512) 239-2557; REGIONAL OFFICE: 5012 50th Street, Suite 100, Lubbock, Texas 79414-3426, (806) 796-7092.

(9) COMPANY: City of Bartlett; DOCKET NUMBER: 2019-0955-WQ-E; IDENTIFIER: RN100835487; LOCATION: Bartlett, Bell County; TYPE OF FACILITY: wastewater treatment facility with an associated collection system; RULES VIOLATED: 30 TAC §305.125(1), TWC, §26.121(a)(1), and Texas Pollutant Discharge Elimination System Permit Number WQ0010880001, Permit Conditions Number 2.g, by failing to prevent an unauthorized discharge of untreated wastewater into or adjacent to any water in the state; PENALTY: $1,937; ENFORCEMENT COORDINATOR: Katelyn Tubbs, (512) 239-2512; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(10) COMPANY: City of Gregory; DOCKET NUMBER: 2021-0150-MWD-E; IDENTIFIER: RN101917623; LOCATION: Gregory, San Patricio County; TYPE OF FACILITY: wastewater treatment facility; RULES VIOLATED: 30 TAC §305.125(1), TWC, §26.121(a)(1), and Texas Pollutant Discharge Elimination System Permit Number WQ0010092001, Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with permitted effluent limitations;

PENALTY: $7,812; ENFORCEMENT COORDINATOR: Stephanie Frederick, (512) 239-1001; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(11) COMPANY: City of Taft; DOCKET NUMBER: 2021-0091-MWD-E; IDENTIFIER: RN103124079; LOCATION: Taft, San Patricio County; TYPE OF FACILITY: wastewater treatment facility; RULES VIOLATED: 30 TAC §305.125(1), TWC, §26.121(a)(1), and Texas Pollutant Discharge Elimination System Permit Number WQ0010705001, Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with permitted effluent limitations; PENALTY: $1,125; ENFORCEMENT COORDINATOR: Alyssa Loveday, (512) 239-5504; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(12) COMPANY: COLUMBIA MEDICAL CENTER OF LAS COLINAS, INCORPORATED; DOCKET NUMBER: 2021-0136-PST-E; IDENTIFIER: RN102375474; LOCATION: Irving, Dallas County; TYPE OF FACILITY: emergency generator; RULES VIOLATED: 30 TAC §334.50(b)(1)(A) and (2) and TWC, §26.3475(a) and (c)(1), by failing to monitor the underground storage tank (UST) for releases in a manner which will detect a release at a frequency of at least once every 30 days, and failing to provide release detection for the pressurized piping associated with the UST system; PENALTY: $3,124; ENFORCEMENT COORDINATOR: John Fennell, (512) 239-2616; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(13) COMPANY: Comanche County Water Supply Corporation; DOCKET NUMBER: 2021-0154-PWS-E; IDENTIFIER: RN102675337; LOCATION: De Leon, Comanche County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.110(b)(4) and (f)(6) and Texas Health and Safety Code, §341.0315(c), by failing to maintain a minimum disinfectant residual of 0.5 milligram per liter total chlorine throughout the distribution system in more than 5.0% of the samples collected each month, for any two consecutive months; 30 TAC §290.110(e)(4)(A) and (f)(3), by failing to submit a Disinfection Level Quarterly Operating Report (DLQOR) to the executive director (ED) by the tenth day of the month following the end of each quarter for the first and third quarters of 2020; 30 TAC §290.115(e)(2), by failing to conduct an operation evaluation and submit an operation evaluation report to the ED within 90 days after being notified of the analytical results that caused an exceedance of the operational evaluation level for total trihalomethanes for Stage 2 Disinfection Byproducts at Site 1 during the fourth quarter of 2019; 30 TAC §290.117(i)(6) and (j), by failing to provide a consumer notification of lead tap water monitoring results to persons served at the sites that were tested, and failing to mail a copy of the consumer notification of tap results to the ED along with certification that the consumer notification has been distributed in a manner consistent with TCEQ requirements for the January 1, 2015 - December 31, 2017 and January 1, 2018 - December 31, 2018, monitoring periods; and 30 TAC §290.122(c)(2)(A) and (f), by failing to provide public notification and submit a copy of the public notification, accompanied with a signed Certificate of Delivery, to the ED regarding the failure to submit a DLQOR to the ED by the tenth day of the month following the end of each quarter for the second quarter of 2017 and regarding the failure to collect lead and copper tap samples at the required ten sample sites, have the samples analyzed, and report the results to the ED for the January 1, 2015 - December 31, 2017, monitoring period; PENALTY: $1,345; ENFORCEMENT COORDINATOR: Samantha Salas, (512) 239-1543; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(14) COMPANY: ExxonMobil Pipeline Company; DOCKET NUMBER: 2021-0118-AIR-E; IDENTIFIER: RN100212984; LOCATION: Irving, Dallas County; TYPE OF FACILITY: bulk fuel terminal; RULES VIOLATED: 30 TAC §116.115(c) and §122.143(4), New Source Review Permit Number 48243, Special Conditions Number 3, Federal Operating Permit Number O2757, General Terms and Conditions and Special Terms and Conditions Number 12, and Texas Health and Safety Code, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $5,625; SUPPLEMENTAL ENVIRONMENTAL PROJECT OFFSET AMOUNT: $2,250; ENFORCEMENT COORDINATOR: Mackenzie Mehlmann, (512) 239-2572; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(15) COMPANY: Hector S. de la Garza III and Coby Allen de la Garza; DOCKET NUMBER: 2020-0705-MLM-E; IDENTIFIER: RN110828688; LOCATION: Ozona, Crockett County; TYPE OF FACILITY: RV park; RULES VIOLATED: 30 TAC §285.3(a) and (b)(1), and Texas Health and Safety Code, §366.051(a), by failing to obtain authorization to construct, alter, extend, operate or repair an on-site sewage facility (OSSF); 30 TAC §285.4(c), by failing to submit planning materials for an OSSF development plan to the permitting authority and receive approval; and 30 TAC §330.15(a) and (c), by failing to not cause, suffer, allow, or permit the unauthorized disposal of municipal solid waste; PENALTY: $2,250; ENFORCEMENT COORDINATOR: Katelyn Tubbs, (512) 239-2512; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7035, (325) 655-9479.

(16) COMPANY: Jackie Reaves; DOCKET NUMBER: 2020-1433-AIR-E; IDENTIFIER: RN110075488; LOCATION: Sunset, Wise County; TYPE OF FACILITY: property used as pasture for cattle; RULES VIOLATED: 30 TAC §101.4 and Texas Health and Safety Code, §382.085(a) and (b), by failing to prevent nuisance conditions; PENALTY: $3,750; ENFORCEMENT COORDINATOR: Danielle Porras, (713) 767-3682; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(17) COMPANY: Lone Star NGL Fractionators LLC; DOCKET NUMBER: 2021-0145-AIR-E; IDENTIFIER: RN109902494; LOCATION: Mont Belvieu, Chambers County; TYPE OF FACILITY: natural gas processing plant; RULES VIOLATED: 30 TAC §116.115(c) and §116.615(2), Standard Permit Registration Number 148115, and Texas Health and Safety Code, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $938; ENFORCEMENT COORDINATOR: Yuliya Dunaway, (210) 403-4077; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(18) COMPANY: MEHAT ENTERPRISES, INCORPORATED dba PDQ Fast Stop; DOCKET NUMBER: 2018-1593-PST-E; IDENTIFIER: RN102713740; LOCATION: San Antonio, Bexar County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.50(b)(1)(A) and (2) and TWC, §26.3475(a) and (c)(1), by failing to monitor the underground storage tanks (USTs) for releases at a frequency of at least once every month, and failing to provide release detection for the pressurized piping associated with the UST system; and 30 TAC §334.602(a), by failing to identify and designate for each UST facility at least one named individual for each class of operator, Class A, Class B, and Class C; PENALTY: $4,627; ENFORCEMENT COORDINATOR: John Fennell, (512) 239-2616; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(19) COMPANY: Mutual First, LLC; DOCKET NUMBER: 2021-0148-MSW-E; IDENTIFIER: RN104256136; LOCATION: Denton, Denton County; TYPE OF FACILITY: unauthorized shingle

disposal site; RULES VIOLATED: 30 TAC §330.15(a) and (c), by failing to not cause, suffer, allow, or permit the unauthorized disposal of municipal solid waste; PENALTY: $6,000; ENFORCEMENT COORDINATOR: Tyler Richardson, (512) 756-3994; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(20) COMPANY: SI Group, Incorporated; DOCKET NUMBER: 2021-0008-AIR-E; IDENTIFIER: RN100218999; LOCATION: Freeport, Brazoria County; TYPE OF FACILITY: chemical manufacturing plant; RULES VIOLATED: 30 TAC §116.115(c) and §122.143(4), New Source Review Permit Number 2341, Special Conditions Number 5.D, Federal Operating Permit Number O1431, General Terms and Conditions and Special Terms and Conditions Number 11, and Texas Health and Safety Code, §382.085(b), by failing to maintain the minimum 28% by volume fuel gas mixture for combustion in the flare; PENALTY: $18,675; ENFORCEMENT COORDINATOR: Danielle Porras, (713) 767-3682; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(21) COMPANY: Town of San Felipe; DOCKET NUMBER: 2021-0151-MLM-E; IDENTIFIER: RN100631282; LOCATION: San Felipe, Austin County; TYPE OF FACILITY: unauthorized municipal solid waste disposal site; RULES VIOLATED: 30 TAC §111.201 and Texas Health and Safety Code, §382.085(b), by failing to not cause, suffer, allow, or permit outdoor burning within the State of Texas; and 30 TAC §330.15(a) and (c), by failing to not cause, suffer, allow, or permit the unauthorized disposal of municipal solid waste; PENALTY: $2,625; ENFORCEMENT COORDINATOR: Hailey Johnson, (512) 239-1756; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

TRD-202102323
Charmaine Backens
Deputy Director, Litigation
Texas Commission on Environmental Quality
Filed: June 15, 2021

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Notice of Correction to Agreed Order Number 20

In the August 28, 2020, issue of the *Texas Register* (45 TexReg 6138), the Texas Commission on Environmental Quality (commission) published notice of Agreed Orders, specifically Item Number 20, for ZAM, INCORPORATED and ZNJ ENTERPRISES, INCORPORATED dba Circle A Grocery, Docket Number 2019-0879-PST-E. The error is as submitted by the commission.

The reference to the penalty should be corrected to read: "$3,684."

For questions concerning the error, please contact Michael Parrish at (512) 239-2548.

TRD-202102324
Charmaine Backens
Deputy Director, Litigation
Texas Commission on Environmental Quality
Filed: June 15, 2021

♦ ♦ ♦

Notice of District Petition

Notice issued June 10, 2021

TCEQ Internal Control No. D-03022021-002; Magnolia 221 Development Partners, LP., (Petitioner) filed a petition for creation of Montgomery County Municipal Utility No. 197 (District) with the Texas Commission on Environmental Quality (TCEQ). The petition was filed pursuant to Article XVI, §59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ. The petition states that: (1) the Petitioner holds title to a majority in value of the land to be included in the proposed District; (2) there are no lienholders on the property to be included in the proposed District; (3) the proposed District will contain approximately 221.597 acres located within Montgomery County, Texas; and (4) none of the land within the proposed District is within the corporate limits or extraterritorial jurisdiction of any city. The petition further states that the proposed District will: (1) purchase, design, construct, acquire, maintain, own, operate, repair, improve and extend waterworks and sanitary sewer system for residential and commercial purposes; (2) construct, acquire, improve, extend, maintain and operate works, improvements, facilities, plants, equipment and appliances helpful or necessary to provide more adequate drainage for the proposed District; (3) control, abate and amend local storm waters or other harmful excesses of waters; (4) purchase, construct, acquire, maintain, own, operate, repair, improve and extend additional facilities, including roads, parks and recreation facilities, systems, plants and enterprises as shall be consistent with all of the purposes for which the proposed District is created.

According to the petition, a preliminary investigation has been made to determine the cost of the project, and it is estimated by the Petitioners that the cost of said project will be approximately $53,890,000. However, the financial analysis in the application was based on an estimated $50,765,000 ($28,750,000 for water, wastewater, and drainage plus $4,350,000 for recreation plus $17,665,000 for roads) at the time of submittal.

INFORMATION SECTION

To view the complete issued notice, view the notice on our website at www.tceq.texas.gov/agency/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

The TCEQ may grant a contested case hearing on the petition if a written hearing request is filed within 30 days after the newspaper publication of the notice. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) the name of the Petitioner and the TCEQ Internal Control Number; (3) the statement "I/we request a contested case hearing"; (4) a brief description of how you would be affected by the petition in a way not common to the general public; and (5) the location of your property relative to the proposed District's boundaries. You may also submit your proposed adjustments to the petition. Requests for a contested case hearing must be submitted in writing to the Office of the Chief Clerk at the address provided in the information section below. The Executive Director may approve the petition unless a written request for a contested case hearing is filed within 30 days after the newspaper publication of this notice. If a hearing request is filed, the Executive Director will not approve the petition and will forward the petition and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. If a contested case hearing is held, it will be a legal proceeding similar to a civil trial in state district court. Written hearing requests should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Districts Review Team, at (512) 239-4691. Si desea información en español, puede llamar al

(512) 239-0200. General information regarding TCEQ can be found at our website at www.tceq.texas.gov.

TRD-202102304
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: June 14, 2021

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Notice of District Petition

Notice issued June 10, 2021

TCEQ Internal Control No. D-12032020-009; Aubrey 64 North LP, a Texas Limited Partnership, (Petitioner) filed a petition for creation of Spring Hill Municipal Utility District No. 1 of Denton County (District) with the Texas Commission on Environmental Quality (TCEQ). The petition was filed pursuant to Article XVI, § 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ. The petition states that: (1) the Petitioner holds title to a majority in value of the land in the proposed District; (2) there are no lienholders on the property to be included in the proposed District; (3) the proposed District will contain approximately 57.865 acres located within Denton County, Texas; and (4) none of the land within the proposed District is within the corporate limits of any city. The petition further states that the proposed District will purchase, design, construct, acquire, maintain, operate, improve, and extend water, wastewater, drainage, and roadway system for residential purposes.

According to the petition, a preliminary investigation has been made to determine the cost of the project, and it is estimated by the Petitioner, from the information available at this time, that the cost of said project will be approximately $9,375,000.

INFORMATION SECTION

To view the complete issued notice, view the notice on our website at www.tceq.texas.gov/agency/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the website, type in the issued date range shown at the top of this document to obtain search results.

The TCEQ may grant a contested case hearing on the petition if a written hearing request is filed within 30 days after the newspaper publication of the notice. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) the name of the Petitioner and the TCEQ Internal Control Number; (3) the statement "I/we request a contested case hearing"; (4) a brief description of how you would be affected by the petition in a way not common to the general public; and (5) the location of your property relative to the proposed District's boundaries. You may also submit your proposed adjustments to the petition. Requests for a contested case hearing must be submitted in writing to the Office of the Chief Clerk at the address provided in the information section below. The Executive Director may approve the petition unless a written request for a contested case hearing is filed within 30 days after the newspaper publication of this notice. If a hearing request is filed, the Executive Director will not approve the petition and will forward the petition and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. If a contested case hearing is held, it will be a legal proceeding similar to a civil trial in state district court. Written hearing requests should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Districts Review Team, at (512) 239-4691. Si desea información en español, puede llamar al (512) 239-0200. General information regarding TCEQ can be found at our website at www.tceq.texas.gov.

TRD-202102305
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: June 14, 2021

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Notice of Hearing on Kali Kate Services Inc.: SOAH Docket No. 582-21-2525; TCEQ Docket No. 2021-0057-MWD; Permit No. WQ0015843001

APPLICATION.

Kali Kate Services Inc., 4550 Farm-to-Market Road 967, Buda, Texas 78610, has applied to the Texas Commission on Environmental Quality (TCEQ) for new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0015843001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 34,300 gallons per day. TCEQ received this application on December 10, 2019.

The facility will be located approximately 0.3 mile northeast of the intersection of Farm-to-Market Road 1102 and Havenwood Boulevard, in Comal County, Texas 78130. The treated effluent will be discharged via pipe to an unnamed tributary of Water Hole Creek, thence to Water Hole Creek, thence to Soil Conservation Service (SCS) Site 3 Reservoir, thence to Water Hole Creek, thence to York Creek, thence to the Lower San Marcos River in Segment No. 1808 of the Guadalupe River Basin. The unclassified receiving water uses are limited aquatic life use for the unnamed tributary of Water Hole Creek and Water Hole Creek, and high aquatic life use for SCS Site 3 Reservoir. The designated uses for Segment No. 1808 are primary contact recreation, public water supply, and high aquatic life use. In accordance with 30 Texas Administrative Code §307.5 and the TCEQ implementation procedures (June 2010) for the Texas Surface Water Quality Standards, an antidegradation review of the receiving waters was performed. A Tier 1 antidegradation review has preliminarily determined that existing water quality uses will not be impaired by this permit action. Numerical and narrative criteria to protect existing uses will be maintained. A Tier 2 review has preliminarily determined that no significant degradation of water quality is expected in SCS Site 3 Reservoir, which has been identified as having high aquatic life use. Existing uses will be maintained and protected. The preliminary determination can be reexamined and may be modified if new information is received. As a public courtesy, we have provided the following Web page to an online map of the site or the facility's general location. The online map is not part of the application or the notice: https://tceq.maps.arcgis.com/apps/webappviewer/index.html?id=db5bac44afbc468bbddd360f8168250f&marker=-98.05635%2C29.787254&level=12. For the exact location, refer to the application.

The TCEQ Executive Director has prepared a draft permit which, if approved, would establish the conditions under which the facility must operate. The Executive Director has made a preliminary decision that this permit, if issued, meets all statutory and regulatory requirements. The permit application, Executive Director's preliminary decision, and draft permit are available for viewing and copying at New Braunfels Public Library, 700 East Common Street, New Braunfels, Texas.

CONTESTED CASE HEARING.

Considering directives to protect public health, the State Office of Administrative Hearings (SOAH) will conduct a preliminary hearing via Zoom videoconference. A Zoom meeting is a secure, free meeting held over the internet that allows video, audio, or audio/video conferencing.

10:00 a.m. - July 26, 2021

To join the Zoom meeting via computer:

https://soah-texas.zoomgov.com/j/1613401135?pwd=blhrdDNmcjBpV1I3QVFlSXhCRnpPZz09

Meeting ID: 161 340 1135

Password: 2525pRe!

or

To join the Zoom meeting via telephone:

(669) 254-5252 or (646) 828-7666

Meeting ID: 161 340 1135

Password: 11274670

Visit the SOAH website for registration at: http://www.soah.texas.gov/

or call SOAH at (512) 475-4993.

The purpose of a preliminary hearing is to establish jurisdiction, name the parties, establish a procedural schedule for the remainder of the proceeding, and to address other matters as determined by the judge. The evidentiary hearing phase of the proceeding, which will occur at a later date, will be similar to a civil trial in state district court. The hearing will address the disputed issues of fact identified in the TCEQ order concerning this application issued on May 7, 2021. In addition to these issues, the judge may consider additional issues if certain factors are met.

The hearing will be conducted in accordance with Chapter 2001, Texas Government Code; Chapter 26, Texas Water Code; and the procedural rules of the TCEQ and SOAH, including 30 TAC Chapter 80 and 1 TAC Chapter 155. The hearing will be held unless all timely hearing requests have been withdrawn or denied.

To request to be a party, you must attend the hearing and show you would be adversely affected by the application in a way not common to members of the general public. Any person may attend the hearing and request to be a party. Only persons named as parties may participate at the hearing.

In accordance with 1 Texas Administrative Code §155.401(a), Notice of Hearing, "Parties that are not represented by an attorney may obtain information regarding contested case hearings on the public website of the State Office of Administrative Hearings at www.soah.texas.gov, or in printed format upon request to SOAH."

INFORMATION.

If you need more information about the hearing process for this application, please call the Public Education Program, toll free, at (800) 687-4040. General information about the TCEQ can be found at our website at www.tceq.texas.gov.

Further information may also be obtained from Kali Kate Services Inc. at the address stated above or by calling Mr. Trevor Tast, P.E., TX2 Engineering, at (816) 510-9151.

Persons with disabilities who need special accommodations at the hearing should call the SOAH Docketing Department at (512) 475-4993, at least one week prior to the hearing.

Issued: June 10, 2021

TRD-202102275
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: June 10, 2021

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Notice of Opportunity to Comment on a Default Order 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 Order (DO). The commission staff proposes a DO when the staff has sent the Executive Director's Preliminary Report and Petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; 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 **July 27, 2021.** 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 the proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. 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 July 27, 2021.** Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission's attorney is available to discuss the DO and/or the comment procedure at the listed phone number; however, TWC, §7.075, provides that comments on the DO shall be submitted to the commission in **writing.**

(1) COMPANY: Raymond W. Blair, Jr. dba Last Resort Properties; DOCKET NUMBER: 2020-0374-PWS-E; TCEQ ID NUMBER: RN102689452; LOCATION: 423 Buladora Drive near Lakewood Village, Little Elm, Denton County; TYPE OF FACILITY: public water system; RULES VIOLATED: 30 TAC §290.46(m)(1)(B), by failing to inspect the interior of the facility's pressure tank at least once every five years; 30 TAC §290.110(c)(4)(A), by failing to monitor the disinfectant residual at representative locations throughout the distribution system at least once every seven days; 30 TAC §290.46(s)(1), by failing to calibrate the facility's well meter at least once every three years; 30 TAC §290.46(m)(1)(B), by failing to inspect the exterior of the facility's pressure tank annually; 30 TAC §290.110(d)(1) and TCEQ Agreed Order (AO) Docket Number 2017-0108-PWS-E, Ordering Provision Number 2.a.vi., by failing to measure the free chlorine residual to a minimum accuracy of plus or minus 0.1 milligram per liter using methods approved by the executive director (ED); 30 TAC

§290.46(l) and TCEQ AO Docket Number 2017-0108-PWS-E, Ordering Provision Number 2.c., by failing to flush all dead-end mains at monthly intervals or more often as needed if water quality complaints are received from water customers or if disinfectant residuals fall below acceptable levels; 30 TAC §290.46(f)(2) and (3)(A)(i)(III) and TCEQ AO Docket Number 2017-0108-PWS-E, Ordering Provision Number 2.a.iii., by failing to properly maintain water works operation and maintenance records and make them available for review to the ED during the investigation; 30 TAC §290.121(a) and (b) and TCEQ AO Docket Number 2017-0108-PWS-E, Ordering Provision Number 2.a.iv., by failing to maintain an up-to-date chemical and microbiological monitoring plan that identifies all sampling locations, describes the sampling frequency, and specifies the analytical procedures and laboratories the facility will use to comply with monitoring requirements; and 30 TAC §290.46(n)(2) and TCEQ AO Docket Number 2017-0108-PWS-E, Ordering Provision Number 2.a.v., by failing to provide an accurate and up-to-date map of the distribution system so that valves and mains can be easily located during emergencies; PENALTY: $6,900; STAFF ATTORNEY: Taylor Pearson, Litigation, MC 175, (512) 239-5937; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-202102322
Charmaine Backens
Deputy Director, Litigation
Texas Commission on Environmental Quality
Filed: June 15, 2021

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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. TWC, §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. TWC, §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 **July 27, 2021.** TWC, §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 July 27, 2021.** Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorneys are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, TWC, §7.075, provides that comments on an AO shall be submitted to the commission in **writing.**

(1) COMPANY: Garisham Inc dba Family Mart; DOCKET NUMBER: 2020-1095-PST-E; TCEQ ID NUMBER: RN102038916; LOCATION: 1799 East Lancaster Avenue, Fort Worth, Tarrant County; TYPE OF FACILITY: underground storage tank (UST) system and a convenience store with retail sales of gasoline; RULES VIOLATED: TWC, §26.3475(c)(1) and 30 TAC §334.50(b)(1)(A), by failing to monitor the UST in a manner which will detect a release at a frequency of at least once every 30 days; TWC, §26.3475(c)(2) and 30 TAC §334.51(b)(2)(C), by failing to install overfill prevention - specifically, no overfill prevention equipment was installed on UST Numbers 1 - 3; and 30 TAC §334.602(a), by failing to designate, train, and certify at least one named individual for each class of operator - Class A - C for the facility - specifically, the respondent had not designated, trained, and certified a Class C operator for the facility; PENALTY: $6,900; STAFF ATTORNEY: Roslyn Dubberstein, Litigation, MC 175, (512) 239-0683; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: HOMELAND ENTERPRISES, INC.; DOCKET NUMBER: 2020-0447-PST-E; TCEQ ID NUMBER: RN103049912; LOCATION: 35427 State Highway 249, Pinehurst, Montgomery County; TYPE OF FACILITY: underground storage tank (UST) system and a convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §115.246(a)(7), by failing to maintain Stage II decommissioning records at the station; Texas Health and Safety Code, §382.085(b) and 30 TAC §115.241(b)(3), by failing to perform and complete all decommissioning activities, as applicable for the particular Stage II vapor recovery system equipment installed at the station - specifically, the Station was unable to verify that all Stage II decommissioning activities had been completed; TTWC, §26.3475(c)(2) and 30 TAC §334.42(i), by failing to inspect all sumps, manways, overspill containers, or catchment basins associated with the UST system at least once every 60 days to assure that their sides, bottoms, and any penetration points are maintained liquid tight - specifically, the bill buckets contained liquid; 30 TAC §334.7(d)(1)(A), (C), and (3), by failing to provide an amended registration for any change or additional information regarding the USTs within 30 days from the date of the occurrence of the change or addition - specifically, information about UST Number 5 has not been updated indicating that it contains diesel fuel and the current operator information has not been updated; TWC, §26.3475(d) and 30 TAC §334.49(a)(1), by failing to provide corrosion protection for the UST system; TWC, §26.3475(a) and 30 TAC §334.50(b)(2), by failing to provide release detection for the pressurized piping associated with the UST system - specifically, respondent had not conducted the annual piping tightness and line leak detector tests; TWC, §26.3475(c)(2) and 30 TAC §334.51(b)(2), by failing to equip the UST system with overfill prevention equipment; TWC, §26.3475(c)(1) and 30 TAC §334.48(c) and §334.50(d)(1)(B), by failing to conduct effective manual or automatic inventory control procedures for the UST system; 30 TAC §334.72, by failing to report a suspected release to the agency within 24 hours of discovery - specifically, Automatic Tank Gauge (ATG) reports for the unleaded tank for the months of August 2018, December 2018, January 2019, March 2019, and April 2019 were inconclusive; and 30 TAC §334.74, by failing to investigate and confirm all suspected releases of regulated substances requiring reporting under 30 TAC §334.72 (relating to Reporting of Suspected Releases) within 30 days of discovery - specifically ATG reports for the unleaded tank of the UST system indicated suspected releases that were not investigated; PENALTY: $23,469; STAFF ATTORNEY: Benjamin Warms, Litigation, MC 175, (512) 239-5144; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(3) COMPANY: Longhorn Ranch Motel, Inc.; DOCKET NUMBER: 2020-0846-PWS-E; TCEQ ID NUMBER: RN101276442; LOCA-

TION: State Highway 118 South Terrace near Terlingua, Brewster County; TYPE OF FACILITY: public water system; RULES VIOLATED: 30 TAC §290.122(c)(2)(A) and (f), by failing to issue public notification and submit a copy of each public notification to the executive director (ED) regarding the failure to collect, within 24 hours of notification of the routine distribution total coliform-positive samples at least one raw groundwater source *Escherichia coli* (or other approved fecal indicator) sample from each active groundwater source in use at the time of the distribution coliform-positive samples were collected; and 30 TAC §290.106(e), by failing to report the results of nitrate sampling to the ED; PENALTY: $427; STAFF ATTORNEY: Judy Bohr, Litigation, MC 175, (512) 239-5807; REGIONAL OFFICE: El Paso Regional Office, 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1212, (915) 834-4949.

(4) COMPANY: Los Botines Water Supply Corporation; DOCKET NUMBER: 2019-0220-PWS-E; TCEQ ID NUMBER: RN106716442; LOCATION: west side of United States Highway 83, approximately 1,000 feet northwest of the intersection of United States Highway 83 and Los Botines Lane, Botines, Webb County; TYPE OF FACILITY: public water system; RULES VIOLATED: 30 TAC §§290.46(f)(4), 290.106(e), 290.107(e), 290.108(e), and 290.122(c)(2)(A) and (f), by failing to report the results for metals, minerals, and cyanide, synthetic organic chemical (SOC) contaminants (Methods 504, 515, 531, and Group SOC5), and radionuclides sampling to the executive director (ED) for the January 1, 2014 - December 31, 2016 monitoring period, and failing to provide public notification and submit a copy of the public notification, accompanied with a signed Certificate of Delivery to the ED regarding the failure to report the results of metals, minerals, and cyanide, SOC contaminants (Methods 504, 515, 531, and Group SOC5), and radionuclides sampling for the January 1, 2014 - December 31, 2016 monitoring period - specifically, the results for metals, minerals, and cyanide, SOC contaminants (Methods 504, 515, 531, and Group SOC5), and radionuclides sampling were requested to be submitted within ten days of the letter dated May 18, 2017, but were not provided; 30 TAC §290.122(c)(2)(A) and (f), by failing to provide public notification and submit a copy of the public notification, accompanied with a signed Certificate of Delivery, to the ED regarding the failure to submit a Disinfectant Level Quarterly Operating Report for the first and second quarters of 2017, regarding the failure to collect lead and copper tap samples for the January 1, 2017 - June 20, 2017 monitoring period, and regarding the failure to report the results of volatile organic chemical contaminants sampling for the January 1, 2016 - December 31, 2016 monitoring period; and TWC, §5.702 and 30 TAC §290.51(a)(6), by failing to pay Public Health Service fees and associated late fees for TCEQ Financial Administration Account Number 92400043 for Fiscal Year 2018; PENALTY: $675; STAFF ATTORNEY: Ben Warms, Litigation, MC 175, (512) 239-5144; REGIONAL OFFICE: Laredo Regional Office, 707 East Calton Road, Suite 304, Laredo, Texas 78041-3887, (956) 791-6611.

(5) COMPANY: VAISHNAVI GROUP LLC dba Snappy Mart 1; DOCKET NUMBER: 2020-0478-PST-E; TCEQ ID NUMBER: RN101699114; LOCATION: 1112 West Koenig Lane, Austin, Travis County; TYPE OF FACILITY: underground storage tank (UST) system and a convenience store with retail sales of gasoline; RULES VIOLATED: TWC, §26.3475(c)(1) and 30 TAC §334.50(b)(1)(A), by failing to monitor the USTs for releases at a frequency of at least once every 30 days - specifically, the monthly inventory control records provided had the same date, and they were missing leak checks; 30 TAC §334.72, by failing to report a suspected release to TCEQ within 24 hours of discovery - specifically, Automatic Tank Gauge (ATG) test results provided, documented that testing conducted on January 19, 2020 for Tank Number 1 and Tank Number 2 indicated suspected releases that were not reported; and 30 TAC §334.74, by failing to investigate and confirm all suspected releases of regulated substances requiring reporting under 30 TAC §334.72 (relating to Reporting of Suspected Releases) within 30 days - specifically, ATG tests conducted on January 19, 2020 for Tank Number 1 and Tank Number 2 indicated suspected releases that were not investigated; PENALTY: $9,050; STAFF ATTORNEY: Roslyn Dubberstein, Litigation, MC 175, (512) 239-0683; REGIONAL OFFICE: Austin Regional Office, 12100 Park 35 Circle, Building A, Room 179, Austin, Texas 78753, (512) 339-2929.

TRD-202102321
Charmaine Backens
Deputy Director, Litigation
Texas Commission on Environmental Quality
Filed: June 15, 2021

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Notice of Public Hearing on Assessment of Administrative Penalties and Requiring Certain Actions of Dario Jaime Gonzalez DBA Dario's Tire Shop: SOAH Docket No. 582-21-2503; TCEQ Docket No. 2018-0832-MSW-E

The Texas Commission on Environmental Quality (TCEQ or the Commission) has referred this matter to the State Office of Administrative Hearings (SOAH). An Administrative Law Judge with the State Office of Administrative Hearings will conduct a public hearing at:

10:00 a.m. - July 15, 2021

William P. Clements Building

300 West 15th Street, 4th Floor

Austin, Texas 78701

The purpose of the hearing will be to consider the Executive Director's Preliminary Report and Petition mailed May 8, 2020 concerning assessing administrative penalties against and requiring certain actions of Dario Jaime Gonzalez dba Dario's Tire Shop, for violations in Hidalgo County, Texas, of: Texas Health & Safety Code § 361.122(a) and 30 Texas Administrative Code §§328.56(a)(1) and (d)(4), 328.58(a), 328.60(a), 328.63(b) and (c).

The hearing will allow Dario Jaime Gonzalez dba Dario's Tire Shop, the Executive Director, and the Commission's Public Interest Counsel to present evidence on whether a violation has occurred, whether an administrative penalty should be assessed, and the amount of such penalty, if any. The first convened session of the hearing will be to establish jurisdiction, afford Dario Jaime Gonzalez dba Dario's Tire Shop, the Executive Director of the Commission, and the Commission's Public Interest Counsel an opportunity to negotiate and to establish a discovery and procedural schedule for an evidentiary hearing. Unless agreed to by all parties in attendance at the preliminary hearing, an evidentiary hearing will not be held on the date of this preliminary hearing. **Upon failure of Dario Jaime Gonzalez dba Dario's Tire Shop to appear at the preliminary hearing or evidentiary hearing, the factual allegations in the notice will be deemed admitted as true, and the relief sought in the notice of hearing may be granted by default. The specific allegations included in the notice are those set forth in the Executive Director's Preliminary Report and Petition, attached hereto and incorporated herein for all purposes.** Dario Jaime Gonzalez dba Dario's Tire Shop, the Executive Director of the Commission, and the Commission's Public Interest Counsel are the only designated parties to this proceeding.

Legal Authority: Tex. Water Code §7.054 and Tex. Water Code chs. 7, Tex. Health & Safety Code ch. 361, and 30 Texas Administrative Code chs. 70 and 328; Tex. Water Code §7.058, and the Rules of Proce-

dure of the Texas Commission on Environmental Quality and the State Office of Administrative Hearings, including 30 Texas Administrative Code §70.108 and §70.109 and ch. 80, and 1 Texas Administrative Code ch. 155.

Further information regarding this hearing may be obtained by contacting Roslyn Dubberstein, Staff Attorney, Texas Commission on Environmental Quality, Litigation Division, Mail Code 175, P.O. Box 13087, Austin, Texas 78711-3087, telephone (512) 239-3400. Information concerning your participation in this hearing may be obtained by contacting Vic McWherter, Public Interest Counsel, Mail Code 103, at the same P.O. Box address given above, or by telephone at (512) 239-6363.

Any document filed prior to the hearing must be filed with TCEQ's Office of the Chief Clerk and SOAH. Documents filed with the Office of the Chief Clerk may be filed electronically at www.tceq.texas.gov/goto/efilings or sent to the following address: TCEQ Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087. Documents filed with SOAH may be filed via fax at (512) 322-2061 or sent to the following address: SOAH, 300 West 15th Street, Suite 504, Austin, Texas 78701. When contacting the Commission or SOAH regarding this matter, reference the SOAH docket number given at the top of this notice.

In accordance with 1 Texas Administrative Code §155.401(a), Notice of Hearing, "Parties that are not represented by an attorney may obtain information regarding contested case hearings on the public website of the State Office of Administrative Hearings at www.soah.texas.gov, or in printed format upon request to SOAH."

Persons who need special accommodations at the hearing should call the SOAH Docketing Department at (512) 475-3445, at least one week before the hearing.

Issued: June 15, 2021

TRD-202102355
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: June 16, 2021

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Notice of Public Hearing on Assessment of Administrative Penalties and Requiring Certain Actions of Dario Jaime Gonzalez: SOAH Docket No. 582-21-2504; TCEQ Docket No. 2019-1085-MSW-E

The Texas Commission on Environmental Quality (TCEQ or the Commission) has referred this matter to the State Office of Administrative Hearings (SOAH). An Administrative Law Judge with the State Office of Administrative Hearings will conduct a public hearing at:

10:00 a.m. - July 15, 2021

William P. Clements Building

300 West 15th Street, 4th Floor

Austin, Texas 78701

The purpose of the hearing will be to consider the Executive Director's First Amended Report and Petition mailed April 13, 2021, concerning assessing administrative penalties against and requiring certain actions of Dario Jaime Gonzalez, for violations in Hidalgo County, Texas, of: 30 Texas Administrative Code §330.15.

The hearing will allow Dario Jaime Gonzalez, the Executive Director, and the Commission's Public Interest Counsel to present evidence on whether a violation has occurred, whether an administrative penalty should be assessed, and the amount of such penalty, if any. The first convened session of the hearing will be to establish jurisdiction, afford Dario Jaime Gonzalez, the Executive Director of the Commission, and the Commission's Public Interest Counsel an opportunity to negotiate and to establish a discovery and procedural schedule for an evidentiary hearing. Unless agreed to by all parties in attendance at the preliminary hearing, an evidentiary hearing will not be held on the date of this preliminary hearing. **Upon failure of Dario Jaime Gonzalez to appear at the preliminary hearing or evidentiary hearing, the factual allegations in the notice will be deemed admitted as true, and the relief sought in the notice of hearing may be granted by default. The specific allegations included in the notice are those set forth in the Executive Director's First Amended Report and Petition, attached hereto and incorporated herein for all purposes.** Dario Jaime Gonzalez, the Executive Director of the Commission, and the Commission's Public Interest Counsel are the only designated parties to this proceeding.

Legal Authority: Tex. Water Code §7.054, Tex. Water Code ch. 7, Tex. Health & Safety Code ch. 361, and 30 TAC chs. 70 and 330; Tex. Water Code §7.058, and the Rules of Procedure of the Texas Commission on Environmental Quality and the State Office of Administrative Hearings, including 30 TAC §70.108 and §70.109 and ch. 80, and 1 TAC ch. 155.

Further information regarding this hearing may be obtained by contacting Roslyn Dubberstein, Staff Attorney, Texas Commission on Environmental Quality, Litigation Division, Mail Code 175, P.O. Box 13087, Austin, Texas 78711-3087, telephone (512) 239-3400. Information concerning your participation in this hearing may be obtained by contacting Vic McWherter, Public Interest Counsel, Mail Code 103, at the same P.O. Box address given above, or by telephone at (512) 239-6363.

Any document filed prior to the hearing must be filed with TCEQ's Office of the Chief Clerk and SOAH. Documents filed with the Office of the Chief Clerk may be filed electronically at www.tceq.texas.gov/goto/efilings or sent to the following address: TCEQ Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087. Documents filed with SOAH may be filed via fax at (512) 322-2061 or sent to the following address: SOAH, 300 West 15th Street, Suite 504, Austin, Texas 78701. When contacting the Commission or SOAH regarding this matter, reference the SOAH docket number given at the top of this notice.

In accordance with 1 Texas Administrative Code §155.401(a), Notice of Hearing, "Parties that are not represented by an attorney may obtain information regarding contested case hearings on the public website of the State Office of Administrative Hearings at www.soah.texas.gov, or in printed format upon request to SOAH."

Persons who need special accommodations at the hearing should call the SOAH Docketing Department at (512) 475-3445 at least one week before the hearing.

Issued: June 15, 2021

TRD-202102356
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: June 16, 2021

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Notice of Public Hearing on Proposed Revisions to 30 TAC Chapter 311

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 311, Watershed Protection Rules, §§311.101 - 311.103, under the requirements of Texas Water Code, §26.0135 and Texas Government Code, Chapter 2001, Subchapter B.

The proposed rulemaking would require the executive director to develop a guidance document of best management practices and establish requirements for sand mining facilities in the San Jacinto River Watershed to implement the best management practices. In addition, the proposed rulemaking would establish requirements for sand mining facilities in the San Jacinto River Watershed to submit to the executive director a final stabilization report prior to terminating operations at the site or portion(s) of the site.

Virtual Public Hearing

The commission will hold a *virtual* public hearing on this proposal on **July 22, 2021 at 2:00 P.M.** 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, staff will be available to discuss the proposal 30 minutes prior to the hearing.

Registration

The hearing will be conducted remotely using an internet meeting service. Individuals who plan to attend the hearing and want to provide oral comments and/or want their attendance on record must **register by Friday, July 16, 2021.** To register for the hearing, please email ***Rules@tceq.texas.gov*** and provide the following information: your name, your affiliation, your email address, your phone number, and whether or not you plan to provide oral comments during the hearing. Instructions for participating in the hearing will be sent on **July 19, 2021,** to those who register for the hearing.

For the public who do not wish to provide oral comments but would like to view the hearing may do so at no cost at:

https://teams.microsoft.com/l/meetup-join/19%3ameeting_YWQ-1MGNjOTQtYTNjNi00OGQ3LTg1MDktZGQ0NTk0OTgwNjY3%40thread.v2/0?context=%7b%22Tid%22%3a%22871a83a4-a1ce-4b7a-8156-3bcd93a08fba%22%2c%22Oid%22%3a%22bf237360-1655-4724-96f6-ba9493e841ba%22%2c%22IsBroadcastMeeting%22%3atrue%7d&btype=a&role=a.

Persons who have special communication or other accommodation needs who are planning to register to provide formal oral comments and/or attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or (800) RELAY-TX (TDD). Requests should be made as far in advance as possible.

Written Comments

Written comments may be submitted to Ms. Lee Bellware, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to *fax4808@tceq.texas.gov.* Electronic comments may be submitted at: ***https://www6.tceq.texas.gov/rules/ecomments/.*** File size restrictions may apply to comments being submitted via the *eComments* system. **All comments should reference Rule Project Number 2020-048-311-OW. The comment period closes July 27, 2021.** Please choose one form of submittal when submitting *written* comments.

Copies of the proposed rulemaking can be obtained from the commission's website at *https://www.tceq.texas.gov/rules/propose_adopt.html.* For further information, please contact Macayla Coleman, Wastewater Permitting Section, (512) 239-3925.

TRD-202102293
Robert Martinez
Deputy Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: June 11, 2021

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Notice of Public Meeting on an Application for a Water Use Permit: Application No. 13630

Port of Corpus Christi Authority of Nueces County seeks a Water Use Permit to divert and use not to exceed 101,334 acre-feet of water per year from a diversion point on Corpus Christi Bay, San Antonio-Nueces Coastal Basin, at a maximum diversion rate of 140.12 cfs (62,890 gpm) for industrial purposes in San Patricio County. More information on the application and how to participate in the permitting process is given below.

APPLICATION. Port of Corpus Christi Authority of Nueces County (Applicant), P.O. Box 1541, Corpus Christi, Texas 78403, has applied to the Texas Commission on Environmental Quality (TCEQ) for a Water Use Permit pursuant to Texas Water Code (TWC) §11.121 and TCEQ Rule Title 30 Texas Administrative Code (TAC) §§295.151, et seq. Notice was published and mailed to the water rights holders of record in the San Antonio-Nueces Coastal Basin pursuant to Title 30 TAC §295.151.

Port of Corpus Christi Authority of Nueces County (Applicant) seeks a Water Use Permit to divert and use not to exceed 101,334 acre-feet of water per year from a point on Corpus Christi Bay, San Antonio-Nueces Coastal Basin, at a maximum diversion rate of 140.12 cfs (62,890 gpm) for industrial purposes in San Patricio County.

The proposed diversion point is located on Corpus Christi Bay at Latitude 27.873741° N, Longitude 97.294987° W, in San Patricio County. There is no Zone Improvement Plan (ZIP) code currently assigned and the nearest assigned ZIP Code is 78374.

The application was received on September 3, 2019. Additional information and fees were received on December 3, 2019, January 28, 2020, February 4, 2020, and March 18, 2020. The application was declared administratively complete and accepted for filing with the Office of the Chief Clerk on May 11, 2020. Additional information was also received on July 22, 2020, and August 17, 2020.

The Executive Director has completed the technical review of the application and prepared a draft permit. The draft permit, if granted, would include special conditions including, but not limited to, installation of measuring devices. The application, technical memoranda, and Executive Director's draft permit are available for viewing on the TCEQ web page at: www.tceq.texas.gov/permitting/water_rights/wr-permitting/wr-apps-pub-notice. Alternatively, you may request a copy of the documents by contacting the TCEQ Office of the Chief Clerk at (512) 239-3300 or by mail at TCEQ OCC, Notice Team (MC-105), P.O. Box 13087, Austin, Texas 78711.

PUBLIC COMMENT / PUBLIC MEETING. You may submit public comments to the Office of the Chief Clerk at the address below. A public meeting will be held and will consist of two parts, an Informal Discussion Period and a Formal Comment Period. A public meeting is not a contested case hearing under the Administrative Procedure Act. During the Informal Discussion Period, the public is encouraged to ask questions of the applicant and TCEQ staff concerning the permit application and the Executive Director's recommendations, but the comments and questions submitted orally during the Informal Discussion Period will not be considered by the Commissioners and no formal response will be made. Responses will

be provided orally during the Informal Discussion Period. During the Formal Comment Period, members of the public may state their formal comments orally into the official record. The Executive Director will subsequently summarize the formal comments and prepare a written response which will be considered by the Commissioners before they reach a decision on the application. The Executive Director's written response will be available to the public online or upon request. The public comment period on this application concludes at the close of the public meeting.

The Public Meeting is to be held:

Tuesday, July 13, 2021 at 7:00 p.m.

Members of the public who would like to ask questions or provide comments during the meeting may access the meeting via webcast by following this link: https://www.gotomeeting.com/webinar/join-webinar and entering Webinar ID 443-664-835. It is recommended that you join the webinar and register for the public meeting at least 15 minutes before the meeting begins. You will be given the option to use your computer audio or to use your phone for participating in the webinar.

Those without internet access may call (512) 239-1201 at least one day prior to the meeting for assistance in accessing the meeting and participating telephonically. Members of the public who wish to only listen to the meeting may call, toll free, (415) 655-0052 and enter access code 384-784-632. Additional information will be available on the agency calendar of events at the following link: https://www.tceq.texas.gov/agency/decisions/hearings/calendar.html.

INFORMATION. Citizens are encouraged to submit written comments anytime before and during the public meeting. Citizens may mail their comments to the Office of the Chief Clerk, TCEQ, Mail Code MC-105, P.O. Box 13087, Austin, Texas 78711-3087 or submit them electronically at https://www14.tceq.texas.gov/epic/eComment/ by entering WRPERM 13630 in the search field. If you need more information about the permit application or the permitting process, please call the TCEQ Public Education Program, toll free, at (800) 687-4040. General information can be found at our website at www.tceq.texas.gov. *Si desea información en español, puede llamar al (800) 687-4040 o por el internet al http://www.tceq.texas.gov.*

Persons with disabilities who need special accommodations at the public meeting should call the Office of the Chief Clerk at (512) 239-3300 or (800) RELAY-TX (TDD) at least five business days prior to the meeting.

Issued: June 11, 2021

TRD-202102303
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: June 14, 2021

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Notice of Water Rights Application

Notice Issued June 09, 2021

APPLICATION NO. 14-2488D; The Kathryn and Bill Powell Family Limited Partnership, 704 West 12th, Brady, Texas 76825, seeks to amend Certificate of Adjudication No. 14-2488 to maintain a dam and reservoir on the Colorado River, Colorado River Basin and impound therein not to exceed 5.4 acre-feet of water for domestic and livestock purposes in Coleman County. More information on the application and how to participate in the permitting process is given below. The application and partial fees were received on January 11, 2013. Additional information and fees were received on August 26, 2013, March 7, 2016, March 9, 2016, March 14, 2016, March 16, 2016, and March 13, 2017. The application was declared administratively complete and accepted for filing with the Office of the Chief Clerk on April 28, 2017.

The Executive Director completed the technical review of the application and prepared a draft amendment. The draft amendment, if granted, would contain special conditions including, but not limited to, streamflow restrictions. The application, technical memoranda, and Executive Director's draft amendment are available for viewing on the TCEQ web page at: www.tceq.texas.gov/permitting/water_rights/wr-permitting/wr-apps-pub-notice. Alternatively, you may request a copy of the documents by contacting the TCEQ Office of the Chief Clerk by phone at (512) 239-3300 or by mail at TCEQ OCC, Notice Team (MC-105), P.O. Box 13087, Austin, Texas 78711. Written public comments and requests for a public meeting should be submitted to the Office of the Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice. A public meeting is intended for the taking of public comment and is not a contested case hearing. A public meeting will be held if the Executive Director determines that there is a significant degree of public interest in the application.

To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) applicant's name and permit number; (3) the statement "[*I/we*] request a contested case hearing;" (4) a brief and specific description of how you would be affected by the application in a way not common to the general public; and (5) the location and distance of your property relative to the proposed activity. You may also submit proposed conditions for the requested permit which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the Office of the Chief Clerk at the address provided in the information section below.

If a hearing request is filed, the Executive Director will not issue the permit and will forward the application and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087 or electronically at https://www14.tceq.texas.gov/epic/eComment/ by entering ADJ 2488 in the search field. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address.

For additional information, individual members of the general public may contact the Public Education Program at (800) 687-4040. General information regarding the TCEQ can be found at our website at http://www.tceq.texas.gov./ Si desea información en español, puede llamar al (800) 687-4040 o por el internet al http://www.tceq.texas.gov.

TRD-202102255
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: June 10, 2021

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Texas Ethics Commission

List of Late Filers

Below is a list from the Texas Ethics Commission naming the filers who failed to pay the penalty fine for failure to file the report, or filing a late report, in reference to the specified filing deadline. If you have any questions, you may contact Scarlett Scalzo at (512) 463-5800.

Deadline: Semiannual Report due July 15, 2019

Jarvis Johnson, 1051 Cottage Oak, Houston, Texas 77091

Deadline: Semiannual Report due January 15, 2020

Jarvis Johnson, 1051 Cottage Oak, Houston, Texas 77091

Deadline: Semiannual Report due July 15, 2020

Ricardo R. Godinez, 2415 N. 10th Street , McAllen, Texas 78501 (SCC)

Ricardo R. Godinez, 2415 N. 10th Street , McAllen, Texas 78501 (JCOH)

Deadline: 30-Day Pre-Election Report due October 5, 2020

Jeff Antonelli, 2528 Ball St., Galveston, Texas 77550

Deadline: 8-Day Pre-Election Report due October 26, 2020

Ruben V. Falcon, 303 Hadden Dr, Fort Stockton, Texas 79735

Deadline: Semiannual Report due January 15, 2021

Jason D. Rowe, 1720 Bissonnet, Houston, Texas 77005

Ronald E. Reynolds, 6140 Hwy. 6 South, Ste. 233, Missouri City, Texas 77459

Sara M. Stapleton-Barrera, 711 N. Sam Houston, San Benito, Texas 78586

Likeithia D. Williams, P.O. Box 2019, Harker Heights, Texas 76548

Jennifer V. Ramos, 3401 South Presa, San Antonio, Texas 78210

Shawn W. Jones, 4408 Fremont Ln, Plano, Texas 75093

Jessica M. Pallett, 1308 Kiowa Dr., Arlington, Texas 76012

Christopher A. Cox, 6088 Old Decatur Road, Alvord, Texas 76225

Jerry V. Davis, 5517 Pickfair, Houston, Texas 77026

Karen Nicole Sprabary, 182 Southlake Drive, Gun Barrel City, Texas 75156

Jeff Antonelli, 2528 Ball St., Galveston, Texas 77550

Michael D. Antalan, 9550 Spring Green Blvd #123, Katy, Texas 77494

Nicole H. Garza, 435 W. Nakoma St., Ste. 101, San Antonio, Texas 78216-2627

Teresa Hudson, P.O. Box 987, Friendswood, Texas 77549

Alexandra Smoots-Thomas, 5619 Feagan, Houston, Texas 77007

Theresa Bui Creevy, P.O. Box 452274, Dallas, Texas 75045

Kelli Johnson, P.O. Box 924891, Houston, Texas 77292

Monica Ramirez Alcantara, 26041 Cypress Oaks, San Antonio, Texas 78255

Amy Hedtke, 106 Vanderbilt, Waxahachie, Texas 75165

Ruben V. Falcon, 303 Hadden Dr, Fort Stockton, Texas 79735

Brenda D. Davis, P.O. Box 132, Honey Grove, Texas 75446

Will L. Douglas, P.O. Box 496955, Garland, Texas 75043

Angela R. Bado, 7002 Old York Rd., McKinney, Texas 75072

Byron K. Ross, 3223 North park Dr., Missouri City, Texas 77459

Lawrence A. Allen, 3717 Cork , Houston, Texas 77047

Ricardo R. Godinez, 2415 N. 10th Street , McAllen, Texas 78501 (SCC)

Ricardo R. Godinez, 2415 N. 10th Street , McAllen, Texas 78501 (JCOH)

TRD-202102274
Anne Temple Peters
Executive Director
Texas Ethics Commission
Filed: June 10, 2021

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Texas Facilities Commission

Request for Proposals (RFP) #303-2-20710

The Texas Facilities Commission (TFC), on behalf of the Texas Department of Criminal Justice (TDCJ), announces the issuance of Request for Proposals (RFP) #303-2-20710. TFC seeks a five (5) or ten (10) year lease of approximately 6,739 square feet of office space in Harlingen, Texas.

The deadline for questions is July 6, 2021, and the deadline for proposals is July 28, 2021, at 3:00 p.m. The award date is September 1, 2021. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of an RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting the Program Specialist, Jenny Ruiz, at jenny.ruiz@tfc.texas.gov. A copy of the RFP may be downloaded from the Electronic State Business Daily at http://www.txsmartbuy.com/esbddetails/view/303-2-20710.

TRD-202102363
Rico Gamino
Procurement Director
Texas Facilities Commission
Filed: June 16, 2021

♦ ♦ ♦

General Land Office

Official Notice to Vessel Owner/Operator

(Pursuant to §40.254, Tex Nat. Res. Code)

PRELIMINARY REPORT

Authority

This preliminary report and notice of violation was issued by the Deputy Director, Oil Spill Prevention and Response Division (OSPR), Texas General Land Office, on June 9, 2021.

Facts

Based on an investigation conducted by Texas General Land Office-Region 2 staff on June 8, 2021, the Commissioner of the General Land Office (GLO), has determined that a 25' sailboat, vessel identified as **GLO Vessel Tracking Number 2-85529** is in a wrecked, derelict and substantially dismantled condition without the consent of the Commissioner. The vessel is located next to the 61st Boat ramp in Galveston, Texas. There are no names, markings or identification numbers on the vessel, consequently, it is impossible to determine the vessel's owner of record.

The GLO determined that pursuant to OSPRA §40.254(b)(2)(B), that the vessel does have intrinsic value. Finally, the GLO determined that, because of the vessel's location and condition, the vessel poses an un-

reasonable threat to public health & safety and welfare, and is a threat to navigation.

Violation

YOU ARE HEREBY GIVEN NOTICE, pursuant to the provisions of §40.254 of the Texas Natural Resources Code, (OSPRA) that you are in violation of OSPRA §40.108(a) that prohibits a person from leaving, abandoning, or maintaining any structure or vessel in or on coastal waters, on public or private lands, or at a public or private port or dock if the structure or vessel is in a wrecked, derelict, or substantially dismantled condition, and the Commissioner determines the vessel is involved in an actual or threatened unauthorized discharge of oil; a threat to the public health, safety, and welfare; a threat to the environment; or a navigational hazard. The Commissioner is authorized by OSPRA §40.108(b) to dispose of or contract for the disposal of any vessel described in §40.108(a).

Recommendation

The Commissioner recommends that the vessel be removed from Texas coastal waters and disposed of in accordance with OSPRA §40.108.

The owner or operator of this vessel can request a hearing to contest the violation and the removal and disposal of the vessel. If the owner or operator wants to request a hearing, a request in writing must be made within ten (10) days of this notice being posted on the vessel. The request for a hearing must be sent to: Texas General Land Office, Oil Spill Prevention and Response Division, P.O. Box 12873, Austin, Texas 78711. Failure to request a hearing may result in the removal and disposal of the vessel by the GLO. If the GLO removes and disposes of the vessel, the GLO has authority under TNRC §40.108(b) to recover the costs of removal and disposal from the vessel's owner or operator. For additional information contact us at (512) 463-2613.

TRD-202102354
Mark A. Havens
Chief Clerk
General Land Office
Filed: June 16, 2021

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Texas Health and Human Services Commission

Notice of Post Award Forum for the 1115 Texas Healthcare Transformation Quality Improvement Program Waiver (THTQIP Waiver)

Hearing. The Health and Human Services Commission (HHSC) will conduct a virtual post award forum and public hearing on July 14, 2021, beginning at 9:30 a.m. (CDT) to provide updates and to solicit feedback and receive comment on the progress of the extension of the 1115 Texas Healthcare Transformation Quality Improvement Program (THTQIP) Waiver extension that was approved January 15, 2021.

Due to the COVID-19 pandemic, this hearing will be conducted virtually using GoToWebinar only. To join the hearing, go to https://attendee.gotowebinar.com/register/5517627940174108940.

There is not a physical location for this hearing.

The agenda for the hearing is:

1. Welcome and introductions;

2. Post-Award Forum on the THTQIP Waiver extension approved January 15, 2021;

3. Public comment; and

4. Adjournment.

Public Testimony. Public testimony and comment will be taken virtually.

During the hearing, attendees who wish to provide public comment may indicate their intention through the GoToWebinar chat feature. The moderator will enable these attendees to provide oral comments virtually during the public comment portion of the hearing.

Written Comments: Written comments may be submitted instead of, or in addition to, oral testimony until 5:00 p.m. on Wednesday July 14th, 2021. Written comments may be submitted by U.S. mail to the Texas Health and Human Services Commission, Attention: Basundhara Raychaudhuri, Waiver Coordinator, Policy Development Support, Mail Code H-600, P.O. Box 13247, Austin, Texas 78711-3247; by fax to Basundhara Raychaudhuri at (512) 206-3975; or by e-mail to TX_Medicaid_Waivers@hhsc.state.tx.us.

Contact: To ask questions, or obtain additional information, please contact the HHSC Waiver Coordination Office at (512) 487-3318 or TX_Medicaid_Waivers@hhsc.state.tx.us.

TRD-202102299
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Filed: June 14, 2021

♦ ♦ ♦

Notice of Public Hearing on Proposed Payment Rates for Pediatric Long-term Care Facilities

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on July 12, 2021, at 9:00 a.m., to receive public comments on the proposed payment rates for Pediatric Long-term Care Facilities.

Due to the declared state of disaster stemming from COVID-19, this hearing will be conducted online only. Physical entry to the hearing will not be permitted. To join the hearing from your computer, tablet, or smartphone, register for the hearing in advance using the following link:

https://attendee.gotowebinar.com/register/825080537950819086.

After registering, you will receive a confirmation email containing information about joining the hearing. You can also dial in using your phone at (415) 655-0060, access code: 451-524-012.

If you are new to GoToWebinar, please download the GoToMeeting app at *https://global.gotomeeting.com/install/626873213* before the hearing starts.

The hearing will be held in compliance with Texas Human Resources Code §32.0282, which requires public notice of and hearings on proposed Medicaid reimbursements. HHSC will archive the public hearing; the archive can be accessed on demand after the hearing at *https://hhs.texas.gov/about-hhs/communications-events/live-archived-meetings.*

Proposal. HHSC proposes to increase the per diem rate for Pediatric Long-term Care Facilities to $383.08, effective September 1, 2021.

Methodology and Justification. The rate increase is proposed in order to comply with the 2022-2023 General Appropriations Act, Senate Bill (S.B.) 1, 87th Legislature, Regular Session, 2021, (Article II, HHSC, Rider 40), which requires a rate methodology revision for pediatric long-term care facilities to mirror Medicare rates. HHSC intends to revise the rate methodology published in Title 1 of the Texas Admin-

istrative Code, §355.307, relating to Reimbursement Setting Methodology, in accordance with Rider 40 so that the rate for all facilities in this special reimbursement class of nursing facilities will be based upon the unadjusted federal per diem rate for rural Medicare skilled nursing facilities for the most recent federal fiscal year. HHSC also intends to propose a new rule as part of this methodological revision.

Rider 40 appropriates funds for state fiscal year 2022-23 to support the rate increases for Pediatric Long-term Facilities.

Briefing Packet. A briefing packet describing the proposed payment rates is available at *https://rad.hhs.texas.gov/proposed-rate-packets.* Interested parties may also obtain a copy of the briefing packet prior to the hearing by contacting the HHSC Provider Finance Department by telephone at (512) 424-6637, by fax at (512) 730-7475, or by e-mail at *PFD-LTSS@hhs.texas.gov.*

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the Texas Health and Human Services Commission, Attention: Provider Finance, Mail Code H-400, P.O. Box 149030, Austin, Texas 78714-9030; by fax to Provider Finance at (512) 730-7475; or by email to *PFD-LTSS@hhs.texas.gov.* In addition, written comments may be sent by overnight mail or hand delivered to Texas Health and Human Services Commission, Attention: Provider Finance, Mail Code H-400, North Austin Complex Building, 4601 W. Guadalupe St., Austin, Texas 78751.

Preferred Communication. During the current state of disaster due to COVID-19, physical forms of communication are checked with less frequency than during normal business operations. For the quickest response, please use email or phone, if possible, for communication with HHSC related to this public hearing.

TRD-202102353
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Filed: June 16, 2021

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Notice of Public Hearing on Proposed Rate Actions for HCS and TxHmL and the FY 2020-21 Quarter 4 Biennial Fee Review

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on July 14, 2021, at 9:00 a.m., to receive public comments on proposed rate actions for the fiscal year 2020-21 quarter 4 biennial fee review and Home and Community-Based Waiver (HCS) and Texas Home Living Waiver (TxHmL) respite and day habilitation services.

Due to the declared state of disaster stemming from COVID-19, this hearing will be conducted online only. Physical entry to the hearing will not be permitted. Join the meeting from your computer, tablet, or smartphone at the following link:

https://attendee.gotowebinar.com/register/1792567207796862733

After registering, you will receive a confirmation email containing information about joining the webinar. You can also dial in using your phone at (562) 247-8422, access code 688-125-053.

If you are new to GoToWebinar, download the GoToMeeting app at https://global.gotomeeting.com/install/626873213 before the hearing starts.

The hearing will be held in compliance with Texas Human Resources Code §32.0282, which requires public notice of and hearings on proposed Medicaid reimbursement rates. HHSC will archive the public hearing; the archive can be accessed on-demand after the hearing at https://hhs.texas.gov/about-hhs/communications-events/live-archived-meetings.

Proposal. HHSC proposes to include two groups of rate updates during the rate hearing.

As part of the biennial fee review, which includes existing services with rates that are reviewed at least once every two years, HHSC is proposing rates for Emergency Response Services and for Preadmission Screening and Resident Review Intellectual and Developmental Disabilities Habilitative Specialized Services, proposed to be effective September 1, 2021.

HHSC is also proposing rates for in-home and out-of-home day habilitation and in-home and out-of-home respite in HCS and TxHmL to comply with Electronic Visit Verification requirements. The HCS and TxHmL rates are proposed to be effective August 1, 2021.

Methodology and Justification. The proposed payment rates for these topics are guided by the following sections in Title 1 of the Texas Administrative Code: §355.510, related to the Reimbursement Methodology for Emergency Response Services (ERS); §355.315 related to the Reimbursement Methodology for Preadmission Screening and Resident Review (PASRR) Specialized Services; §355.723, related to the Reimbursement Methodology for Home and Community-Based Services and Texas Home Living Programs; and §355.9090, related to the Reimbursement Methodology for Community First Choice.

The billing codes for day habilitation and respite in HCS and TxHmL are being modified to comply with EVV requirements, and the proposed rates will follow these modified billing codes.

Briefing Packet. A briefing packet describing the proposed payment rates will be available at https://rad.hhs.texas.gov/proposed-rate-packets on or after June 30, 2021. Interested parties may obtain a copy of the briefing packet before the hearing by contacting the HHSC Provider Finance Department by telephone at (512) 424-6637; by fax at (512) 730-7475; or by e-mail at pfd-ltss@hhs.texas.gov.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the Texas Health and Human Services Commission, Attention: Provider Finance, Mail Code H-400, P.O. Box 149030, Austin, Texas 78714-9030; by fax to Provider Finance at (512) 730-7475; or by email to pfd-ltss@hhs.texas.gov. In addition, written comments may be sent by overnight mail or hand-delivered to Texas Health and Human Services Commission, Attention: Provider Finance, Mail Code H-400, North Austin Complex, 4601 W Guadalupe St., Austin, Texas 78751.

Preferred Communication. During the current state of disaster due to COVID-19, physical forms of communication are checked with less frequency than during normal business operations. For the quickest response, please use email or phone, if possible, for communication with HHSC related to this public hearing.

TRD-202102350
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Filed: June 16, 2021

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Department of State Health Services

The Drug Enforcement Administration issued a final rule placing cyclopentyl fentanyl (*N*-(1-phenethylpiperidin-4-yl)-*N*-phenylcyclopentanecarboxamide), isobutyryl fentanyl (*N*-(1-phenethylpiperidin-4-yl)-*N*-phenylisobutyramide), *p*-chloroisobutyryl fentanyl (*N*-(4-chlorophenyl)-*N*-(1-phenethylpiperidin-4-yl)isobutyramide), *p*-methoxybutyryl fentanyl (*N*-(4-methoxyphenyl)-*N*-(1-phenethylpiperidin-4-yl)butyramide), and valeryl fentanyl (*N*-(1-phenethylpiperidin-4-yl)-*N*-phenylpentanamide), including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers whenever the existence of such isomers, esters, ethers, and salts is possible, into Schedule I of the Controlled Substances Act. This final rule was published in the November 25, 2020 issue of the *Federal Register*, Volume 85, Number 228, pages 75231-75235 and was effective November 25, 2020.

The Acting Administrator of the Drug Enforcement Administration issued an order temporarily placing brorphine (1-(1-(1-(4-bromophenyl)ethyl)piperidin-4-yl)-1,3-dihydro-2*H*-benzo[d]imidazol-2-one), including its isomers, esters, ethers, salts, and salts of isomers, esters, and ethers whenever the existence of such isomers, esters, ethers, and salts is possible into Schedule I of the Controlled Substances Act. This order was published in the March 1, 2021 issue of the *Federal Register*, Volume 86, Number 38, pages 11862-11867, and was effective March 1, 2021. This action was based on the following:

1. Brorphine has a high potential for abuse;
2. Brophine has no currently accepted medical use in treatment in the United States; and,
3. Brorphine has a lack of accepted safety for use under medical supervision.

The Drug Enforcement Administration issued a final rule adopting, without change, an interim final rule placing lemborexant ((1*R*,2*S*)-2-[(2,4-dimethylpyrimidin-5-yl)oxymethyl]-2-(3-fluorophenyl)-*N*-(5-fluoropyridin-2-yl)cyclopropane-1-carboxamide), including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible, in Schedule IV of the Controlled Substances Act.

This final rule was published in the March 3, 2021 issue of the *Federal Register*, Volume 86, Number 40, pages 12257-12260 and was effective March 3, 2021.

Pursuant to Section 481.034(g), as amended by the 75th legislature, of the Texas Controlled Substances Act, Health and Safety Code, Chapter 481, at least thirty-one days have expired since notice of the above referenced actions were published in the *Federal Register*. In the capacity as Commissioner of the Texas Department of State Health Services, John Hellerstedt, M.D., does hereby order that the substances cyclopentyl fentanyl, isobutyryl fentanyl, *p*-chloroisobutyryl fentanyl, *p*-methoxybutyryl fentanyl and valeryl fentanyl be placed into schedule I; brorphine be placed temporarily into schedule I; and lemborexant be permanently placed into schedule IV.

-Schedule I opiates

The following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, unless specifically excepted, if the existence of these isomers, esters, ethers, and salts are possible within the specific chemical designation:

(1) Acetyl-α-methylfentanyl (*N*-[1-(1-methyl-2-phenethyl)-4-piperidinyl]-*N*-phenylacetamide);
(2) Acetylmethadol;
(3) Acetyl fentanyl (*N*-(1-phenethylpiperidin-4-yl)-*N*-phenylacetamide);
(4) Acryl fentanyl (*N*-(1-phenethylpiperidin-4-yl)-*N*-phenylacrylamide) (Other name: acryloylfentanyl);
(5) AH-7921 (3,4-dichloro-*N*-[1-(dimethylamino) cyclohexymethyl]benzamide);
(6) Allylprodine;
(7) Alphacetylmethadol (except levo-α-cetylmethadol, levo-α-acetylmethadol, levomethadyl acetate, or LAAM);
(8) α-Methylfentanyl or any other derivative of fentanyl;
(9) α-Methylthiofentanyl (*N*-[1-methyl-2-(2-thienyl)ethyl-4-piperidinyl] *N*-phenylpropanamide);
(10) Benzethidine;
(11) β-Hydroxyfentanyl (*N*-[1-(2-hydroxy-2-phenethyl)-4-piperidinyl]-*N*-phenylpropanamide);
(12) β-Hydroxy-3-methylfentanyl (*N*-[1-(2-hydroxy-2-phenethyl)-3-methyl-4-piperidinyl]-*N*-phenylpropanamide);

(13) β-Hydroxythiofentanyl (Other names: *N*-[1-[2-hydroxy-2-(thiophen-2-yl)ethyl]piperidin-4-yl]-*N*-phenylproprionamide; *N*-[1-[2-hydroxy-2-(2-thienyl)ethyl]-4-piperidnyl]-*N*-phenylpropanamide);
(14) Betaprodine;
(15) Butyryl fentanyl (*N*-(1-phenethylpiperidin-4-yl)-*N*-phenylbutanamide);
(16) Clonitazene;
(17) Crotonyl fentanyl ((E)-*N*-(1-Phenethylpiperidin-4-yl)-*N*-phenylbut-2-enamide);
*(18) Cyclopentyl fentanyl (*N*-(1-phenethylpiperidin-4-yl)-*N*-Phenylcyclopentanecarboxamide;
(19) Cyclopropyl fentanyl (*N*-(1-phenethylpiperidin-4-yl)-*N*-phenylcyclopropanecarboxamide);
(20) Diampromide;
(21) Diethylthiambutene;
(22) Difenoxin;
(23) Dimenoxadol;
(24) Dimethylthiambutene;
(25) Dioxaphetyl butyrate;
(26) Dipipanone;
(27) Ethylmethylthiambutene;
(28) Etonitazene;
(29) Etoxeridine;
(30) 4-Fluoroisobutyryl fentanyl (*N*-(4-fluorophenyl)-*N*-(1-phenethylpiperidin-4-yl)isobutyramide) (Other name: *p*-fluoroisobutyryl fentanyl);
(31) Furanyl fentanyl (*N*-(1-phenethylpiperdin-4-yl)-*N*-phenylfuran-2-carboxamide);
(32) Furethidine;
(33) Hydroxypethidine;
*(34) Isobutyryl fentanyl (*N*-(1-phenethylpiperidin-4-yl)-*N*-phenylisobutyramide
(35) Ketobemidone;
(36) Levophenacylmorphan;
(37) Meprodine;
(38) Methadol;
(39) Methoxyacetyl fentanyl (2-methoxy-*N*-(1-phenethylpiperidin-4-yl)-*N*-phenylacetamide);
(40) 3-Methylfentanyl (*N*-[3-methyl-1-(2-phenylethyl)-4-piperidyl]-*N*-phenylpropanamide);
(41) 3-Methylthiofentanyl (*N*-[3-methyl-1-(2-thienyl)ethyl-4-piperidinyl]-*N*-phenylpropanamide);
(42) Moramide;
(43) Morpheridine;
(44) MPPP (1-methyl-4-phenyl-4-propionoxypiperidine);

(45) MT-45 (1-cyclohexyl-4-(1,2-diphenylethyl)piperazine);
(46) Noracymethadol;
(47) Norlevorphanol;
(48) Normethadone;
(49) Norpipanone;
(50) Ocfentanil (*N*-(2-fluorophenyl)-2-methoxy-*N*-(1-phenethylpiperidin-4-yl)acetamide);
(51) *o*-Fluorofentanyl (*N*-(2-fluorophenyl)-*N*-(1-phenethylpiperidin-4-yl)propionamide) (Other name: 2-fluorofentanyl);
*(52) *p*-Chloroisobutyryl fentanyl (*N*-(4-chlorophenyl)-*N*-(1-phenethylpiperidin-4-yl)isobutyramide;
(53) *p*-Fluorobutyryl fentanyl (*N*-(4-fluorophenyl)-*N*-(1-phenethylpiperidin-4-yl)butyramide);
(54) *p*-Fluorofentanyl (*N*-(4-fluorophenyl)-*N*-[1-(2-phenethyl)-4 piperidinyl] propanamide);
*(55) *p*-Methoxybutyryl fentanyl (*N*-(4-methoxyphenyl)-*N*-(1-phenethylpiperidin-4-yl)butyramide;
(56) PEPAP (1-(2-phenethyl)-4-phenyl-4-acetoxypiperidine);
(57) Phenadoxone;
(58) Phenampromide;
(59) Phencyclidine;
(60) Phenomorphan;
(61) Phenoperidine;
(62) Piritramide;
(63) Proheptazine;
(64) Properidine;
(65) Propiram;
(66) Tetrahydrofuranyl fentanyl (*N*-(1-phenethylpiperidin-4-yl)-*N*-phenyltetrahydrofuran-2-carboxamide);
(67) Thiofentanyl (*N*-phenyl-*N*-[1-(2-thienyl)ethyl-4-piperidinyl]-propanamide);
(68) Tilidine;
(69) Trimeperidine;
(70) U-47700 (3,4-dichloro-*N*-[2-(dimethylamino)cyclohexyl]-*N*-methylbenzamide; and,
*(71) Valeryl fentanyl (*N*-(1-phenethylpiperidin-4-yl)-*N*-phenylpentanamide).

-Schedule I temporarily listed substances subject to emergency scheduling by the U.S. Drug Enforcement Administration.

Unless specifically excepted or unless listed in another schedule, a material, compound, mixture, or preparation that contains any quantity of the following substances or that contains any of the substance's salts, isomers,

esters, and ethers and salts of isomers, esters, and ethers if the existence of the salts, isomers, esters, and ethers and salts of isomers, esters, and ethers is possible within the specific chemical designation:

(1) Fentanyl-related substances.

(1-1) Fentanyl-related substance means any substance not otherwise listed under another Administration Controlled Substance Code Number, and for which no exemption or approval is in effect under Section 505 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 355], that is structurally related to fentanyl by one or more of the following modifications:

(1-1-1) Replacement of the phenyl portion of the phenethyl group by any monocycle, whether or not further substituted in or on the monocycle;

(1-1-2) Substitution in or on the phenethyl group with alkyl, alkenyl, alkoxyl, hydroxyl, halo, haloalkyl, amino or nitro groups;

(1-1-3) Substitution in or on the piperidine ring with alkyl, alkenyl, alkoxyl, ester, ether, hydroxyl, halo, haloalkyl, amino or nitro groups;

(1-1-4) Replacement of the aniline ring with any aromatic monocycle whether or not further substituted in or on the aromatic monocycle; and/or

(1-1-5) Replacement of the *N*-propionyl group by another acyl group.

(1-2) This definition includes, but is not limited to, the following substances:

(1-2-1) *N*-(1-(2-Fluorophenethyl)piperidin-4-yl)-*N*-(2-fluorophenyl)propionamide (Other name: 2′-fluoro-*o*-fluorofentanyl);

(1-2-2) *N*-(2-Methylphenyl)-*N*-(1-phenethylpiperidin-4-yl)acetamide (Other name: *o*-methyl acetylfentanyl);

(1-2-3) *N*-(1-Phenethylpiperidin-4-yl)-*N*,3-diphenylpropanamide (Other names: β′-phenyl fentanyl; hydrocinnamoyl fentanyl); and,

(1-2-4) *N*-(1-Phenethylpiperidin-4-yl)-*N*-phenylthiophene-2-carboxamide (Other name: thiofuranyl fentanyl).

(2) Naphthalen-1-yl-1-(5-fluoropentyl)-1*H*-indole-3-carboxylate (Other names: NM2201; CBL2201);

(3) *N*-(1-Amino-3-methyl-1-oxobutan-2-yl)-1-(5-fluoropentyl)-1*H*-indazole-3-carboxamide (Other name: 5F-AB-PINACA);

(4) 1-(4-Cyanobutyl)-*N*-(2-phenylpropan-2-yl)-1*H*-indazole-3-carboxamide (Other names: 4-CN-CUMYL-BUTINACA; 4-cyano-CUMYL-BUTINACA; 4-CN-CUMYL-BINACA; CUMYL-4CN-BINACA; SGT-78);

(5) Methyl 2-(1-(cyclohexylmethyl)-1*H*-indole-3-carboxamido)-3-methylbutanoate (Other names: MMB-CHMICA; AMB-CHMICA);

(6) 1-(5-Fluoropentyl)-*N*-(2-phenylpropan-2-yl)-1*H*-pyrrolo[2,3-b]pyridine-3-carboxamide (Other name: 5F-CUMYL-P7AICA);
(7) *N*-ethylpentylone (Other names: ephylone, 1-(1,3-benzodioxil-5-yl)-2-(ethylamino)-pentan-1-one);
(8) Ethyl 2-(1-(5-fluoropentyl)-1*H*-indazole-3-carboxamido)-3,3-dimethylbutanoate (Other name: 5F-EDMB-PINACA);
(9) Methyl 2-(1-(5-fluoropentyl)-1*H*-indole-3-carboxamido)-3,3-dimethylbutanoate (Other name: 5F-MDMB-PICA);
(10) *N*-(Adamantan-1-yl)-1-(4-fluorobenzyl)-1*H*-indazole-3-carboxamide (Other names: FUB-AKB48; FUB-APINACA; AKB48 *N*-(4-FLUOROBENZYL));
(11) 1-(5-Fluoropentyl)-*N*-(2-phenylpropan-2-yl)-1*H*-indazole-3-carboxamide (Other names: 5F-CUMYL-PINACA; SGT-25);
(12) (1-(4-Fluorobenzyl)-1*H*-indol-3-yl)(2,2,3,3-tetramethylcyclopropyl)methanone (Other name: FUB-144);
(13) *N*-Ethylhexedrone (Other name: 2-(ethylamino)-1-phenylhexan-1-one);
(14) α-Pyrrolidinohexanophenone (Other names: α-PHP; α-pyrrolidinohexiophenone; 1-phenyl-2-(pyrrolidin-1-yl)hexan-1-one);
(15) 4-Methyl-α-ethylaminopentiophenone (Other names: 4–MEAP; 2-(ethylamino)-1-(4-methylphenyl)pentan-1-one);
(16) 4-Methyl-α-pyrrolidinohexiophenone (Other names: MPHP, 4'-methyl-α-pyrrolidinohexanophenone; 1-(4-methylphenyl)-2-(pyrrolidin-1-yl)hexan-1-one);
(17) α-Pyrrolidinoheptaphenone (Other names: PV8; 1-phenyl-2-(pyrrolidin-1-yl)heptan-1-one);
(18) 4-Chloro-α-pyrrolidinovalerophenone (Other names: 4-chloro-α-PVP; 4-chloro-α-pyrrolidinopentiophenone; 1-(4-chlorophenyl)-2-(pyrrolidin-1-yl)pentan-1-one);
(19) *N,N*-diethyl-2-(2-(4 isopropoxybenzyl)-5-nitro-1*H*-benzimidazol-1-yl)ethan-1-amine (Other names: isotonitazene; *N,N*-diethyl-2-[[4-(1-methylethoxy)phenyl]methyl]-5-nitro-1*H*-benzimidazole-1-ethanamine); and,
*(20) Brorphine (1-(1-(1-(4-bromophenyl)ethyl)piperidin-4-yl)-1,3-dihydro-2*H*-benzo[d]imidazol-2-one (Other name: 1-[1-[1-(4-bromophenyl)ethyl]-4-piperidinyl]-1,3-dihydro-2*H*-benzimidazol-2-one)

-Schedule IV depressants

Except as provided by the Texas Controlled Substances Act, Health and Safety Code, Section 481.033, a material, compound, mixture, or preparation that contains any quantity of the following substances or any of the substance's salts, isomers, and salts of isomers if the existence of the salts, isomers, and salts of isomers is possible within the specific chemical designation having a potential for abuse associated with a depressant effect on the central nervous system:

(1) Alfaxalone (5α-pregnan-3α-ol-11,20-dione);
(2) Alprazolam;
(3) Barbital;
(4) Brexanolone (3α-hydroxy-5α-pregnan-20-one) (Other name: allopregnanolone);
(5) Bromazepam;
(6) Camazepam;
(7) Chloral betaine;
(8) Chloral hydrate;
(9) Chlordiazepoxide;
(10) Clobazam;
(11) Clonazepam;
(12) Clorazepate;
(13) Clotiazepam;
(14) Cloxazolam;
(15) Delorazepam;
(16) Diazepam;
(17) Dichloralphenazone;
(18) Estazolam;
(19) Ethchlorvynol;
(20) Ethinamate;
(21) Ethyl loflazepate;
(22) Fludiazepam;
(23) Flunitrazepam;
(24) Flurazepam;
(25) Fospropofol;
(26) Halazepam;
(27) Haloxazolam;
(28) Ketazolam;
*(29) Lemborexant;
(30) Loprazolam;
(31) Lorazepam;
(32) Lormetazepam;
(33) Mebutamate;
(34) Medazepam;
(35) Meprobamate;
(36) Methohexital;
(37) Methylphenobarbital (mephobarbital);
(38) Midazolam;
(39) Nimetazepam;
(40) Nitrazepam;
(41) Nordiazepam;
(42) Oxazepam;

(43) Oxazolam;
(44) Paraldehyde;
(45) Petrichloral;
(46) Phenobarbital;
(47) Pinazepam;
(48) Prazepam;
(49) Quazepam;
(50) Remimazolam;
(51) Suvorexant;
(52) Temazepam;
(53) Tetrazepam;
(54) Triazolam;
(55) Zaleplon;
(56) Zolpidem; and
(57) Zopiclone.

TRD-202102317
Barbara L. Klein
General Counsel
Department of State Health Services
Filed: June 14, 2021

♦ ♦ ♦

Texas Lottery Commission

Scratch Ticket Game Number 2317 "DOUBLE YOUR MONEY"

1.0 Name and Style of Scratch Ticket Game.

A. The name of Scratch Ticket Game No. 2317 is "DOUBLE YOUR MONEY". The play style is "key number match".

1.1 Price of Scratch Ticket Game.

A. The price for Scratch Ticket Game No. 2317 shall be $5.00 per Scratch Ticket.

1.2 Definitions in Scratch Ticket Game No. 2317.

A. Display Printing - That area of the Scratch 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 Scratch Ticket.

C. Play Symbol - The printed data under the latex on the front of the Scratch 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: 01, 02, 03, 04, 05, 06, 07, 08, 09, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, $$ SYMBOL, MONEY BAG SYMBOL, $5.00, $10.00, $20.00, $50.00, $100, $500, $1,000 and $100,000.

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. 2317 - 1.2D

PLAY SYMBOL	CAPTION
01	ONE
02	TWO
03	THR
04	FOR
05	FIV
06	SIX
07	SVN
08	EGT
09	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
25	TWFV

26	TWSX
27	TWSV
28	TWET
29	TWNI
30	TRTY
31	TRON
32	TRTO
33	TRTH
34	TRFR
35	TRFV
36	TRSX
37	TRSV
38	TRET
39	TRNI
40	FRTY
41	FRON
42	FRTO
43	FRTH
44	FRFR
45	FRFV
46	FRSX
47	FRSV
48	FRET
49	FRNI
$$ SYMBOL	DBL
MONEY BAG SYMBOL	WINPRZS
$5.00	FIV$
$10.00	TEN$

$20.00	TWY$
$50.00	FFTY$
$100	ONHN
$500	FVHN
$1,000	ONTH
$100,000	100TH

E. Serial Number - A unique thirteen (13) digit number appearing under the latex scratch-off covering on the front of the Scratch Ticket. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 0000000000000.

F. Bar Code - A twenty-four (24) 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 Scratch Ticket.

G. Game-Pack-Ticket Number - A fourteen (14) digit number consisting of the four (4) digit game number (2317), a seven (7) digit Pack number, and a three (3) digit Ticket number. Ticket numbers start with 001 and end with 075 within each Pack. The format will be: 2317-0000001-001.

H. Pack - A Pack of the "DOUBLE YOUR MONEY" Scratch Ticket Game contains 075 Tickets, packed in plastic shrink-wrapping and fan-folded in pages of one (1). The Packs will alternate. One will show the front of Ticket 001 and back of 075 while the other fold will show the back of Ticket 001 and front of 075.

I. Non-Winning Scratch Ticket - A Scratch Ticket which is not programmed to be a winning Scratch Ticket or a Scratch 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.

J. Scratch Ticket Game, Scratch Ticket or Ticket - Texas Lottery "DOUBLE YOUR MONEY" Scratch Ticket Game No. 2317.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general Scratch Ticket validation requirements set forth in Texas Lottery Rule 401.302, Scratch Ticket Game Rules, these Game Procedures, and the requirements set out on the back of each Scratch Ticket. A prize winner in the "DOUBLE YOUR MONEY" Scratch Ticket Game is determined once the latex on the Scratch Ticket is scratched off to expose forty-four (44) Play Symbols. In each GAME, if the player matches any of the YOUR NUMBERS Play Symbols to the WINNING NUMBER Play Symbol, the player wins the prize for that number. If the player reveals a "$$" Play Symbol, the player wins DOUBLE the prize for that symbol. If the player reveals a "MONEY BAG" Play Symbol, the player WINS ALL 5 PRIZES FOR THAT GAME INSTANTLY! Each game is played separately. No portion of the Display Printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Scratch Ticket.

2.1 Scratch Ticket Validation Requirements.

A. To be a valid Scratch Ticket, all of the following requirements must be met:

1. Exactly forty-four (44) Play Symbols must appear under the Latex Overprint on the front portion of the Scratch 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 Scratch Ticket shall be intact;

6. The Serial Number and Game-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 Scratch Ticket;

8. The Scratch Ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The Scratch Ticket must not be counterfeit in whole or in part;

10. The Scratch Ticket must have been issued by the Texas Lottery in an authorized manner;

11. The Scratch Ticket must not have been stolen, nor appear on any list of omitted Scratch Tickets or non-activated Scratch Tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number and Game-Pack-Ticket Number must be right side up and not reversed in any manner;

13. The Scratch Ticket must be complete and not miscut, and have exactly forty-four (44) Play Symbols under the Latex Overprint on the front portion of the Scratch Ticket, exactly one Serial Number and exactly one Game-Pack-Ticket Number on the Scratch Ticket;

14. The Serial Number of an apparent winning Scratch Ticket shall correspond with the Texas Lottery's Serial Numbers for winning Scratch Tickets, and a Scratch Ticket with that Serial Number shall not have been paid previously;

15. The Scratch Ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the forty-four (44) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the forty-four (44) Play Symbols on the Scratch Ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the Scratch 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 Game-Pack-Ticket Number must be printed in the Game-Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The Display Printing on the Scratch Ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The Scratch Ticket must have been received by the Texas Lottery by applicable deadlines.

B. The Scratch 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 Scratch 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 Scratch Ticket. In the event a defective Scratch Ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective Scratch Ticket with another unplayed Scratch Ticket in that Scratch Ticket Game (or a Scratch Ticket of equivalent sales price from any other current Texas Lottery Scratch Ticket Game) or refund the retail sales price of the Scratch Ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. A Ticket can win up to twenty (20) times in accordance with the approved prize structure.

B. Consecutive Non-Winning Tickets within a Pack will not have matching patterns, in the same order, of either Play Symbols or Prize Symbols.

C. The top Prize Symbol will appear on every Ticket, unless restricted by other parameters, play action or prize structure.

D. Each Ticket will have four (4) different WINNING NUMBER Play Symbols.

E. Non-winning YOUR NUMBERS Play Symbols will all be different.

F. There will be no matching non-winning GAMEs on a Ticket. GAMEs are considered matching if they have the same Play Symbols in the same spots.

G. The "$$" (DBL) and "MONEY BAG" (WINPRZS) Play Symbols will never appear in the WINNING NUMBER Play Symbol spots.

H. The "$$" (DBL) and "MONEY BAG" (WINPRZS) Play Symbols will only appear on winning Tickets as dictated by the prize structure.

I. On GAMEs that contain the "MONEY BAG" (WINPRZS) Play Symbol, none of the YOUR NUMBERS Play Symbols will match the WINNING NUMBER Play Symbol within that GAME.

J. On GAMEs that contain the MONEY BAG (WINPRZS) Play Symbol, the $$ (DBL) Play Symbol will not appear.

K. Across all GAMEs, non-winning Prize Symbols will never appear more than three (3) times.

L. There will be no YOUR NUMBERS Play Symbols in a GAME that match a WINNING NUMBER Play Symbol from another GAME.

2.3 Procedure for Claiming Prizes.

A. To claim a "DOUBLE YOUR MONEY" Scratch Ticket Game prize of $5.00, $10.00, $20.00, $50.00, $100 or $500, a claimant shall sign the back of the Scratch Ticket in the space designated on the Scratch Ticket and may present the winning Scratch 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 Scratch Ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $50.00, $100 or $500 Scratch Ticket Game. 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 "DOUBLE YOUR MONEY" Scratch Ticket Game prize of $1,000 or $100,000, the claimant must sign the winning Scratch Ticket and may 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 Scratch 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 "DOUBLE YOUR MONEY" Scratch Ticket Game prize the claimant may submit the signed winning Scratch Ticket and a thoroughly completed claim form via mail. If a prize value is $1,000,000 or more, the claimant must also provide proof of Social Security number or Tax Payer Identification (for U.S. Citizens or Resident Aliens). Mail all to: Texas Lottery Commission, P.O. Box 16600, Austin, Texas 78761-6600. The Texas Lottery is not responsible for Scratch Tickets lost in the mail. 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 the amount of a delinquent tax or other money from the winnings of a prize winner who has been finally determined to be:

1. delinquent in the payment of a tax or other money to a state agency and that delinquency is reported to the Comptroller under Government Code §403.055;

2. in default on a loan made under Chapter 52, Education Code;

3. in default on a loan guaranteed under Chapter 57, Education Code; or

4. delinquent in child support payments in the amount determined by a court or a Title IV-D agency under Chapter 231, Family 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 Scratch 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 under $600 from the "DOUBLE YOUR MONEY" Scratch Ticket 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 $600 or more from the "DOUBLE YOUR MONEY" Scratch Ticket 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 Scratch Ticket Claim Period. All Scratch Ticket prizes must be claimed within 180 days following the end of the Scratch Ticket Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any rights to a prize that is not claimed within that period, and in the manner specified in these Game Procedures and on the back of each Scratch Ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of Scratch Tickets ordered. The number of actual prizes available in a game may vary based on number of Scratch Tickets manufactured, testing, distribution, sales and number of prizes claimed. A Scratch Ticket Game may continue to be sold even when all the top prizes have been claimed.

3.0 Scratch Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of a Scratch Ticket in the space designated, a Scratch Ticket shall be owned by the physical possessor of said Scratch Ticket. When a signature is placed on the back of the Scratch Ticket in the space designated, the player whose signature appears in that area shall be the owner of the Scratch 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 Scratch Ticket in the space designated. If more than one name appears on the back of the Scratch 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 Scratch Tickets and shall not be required to pay on a lost or stolen Scratch Ticket.

4.0 Number and Value of Scratch Prizes. There will be approximately 7,200,000 Scratch Tickets in Scratch Ticket Game No. 2317. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 2317 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in **
$5.00	576,000	12.50
$10.00	1,152,000	6.25
$20.00	288,000	25.00
$50.00	46,500	154.84
$100	9,600	750.00
$500	720	10,000.00
$1,000	90	80,000.00
$100,000	6	1,200,000.00

*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 3.47. 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 Scratch Tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Scratch Ticket Game. The Executive Director may, at any time, announce a closing date (end date) for the Scratch Ticket Game No. 2317 without advance notice, at which point no further Scratch Tickets in that game may be sold. The determination of the closing date and reasons for closing will be made in accordance with the Scratch Ticket closing procedures and the Scratch Ticket Game Rules. See 16 TAC §401.302(j).

6.0 Governing Law. In purchasing a Scratch Ticket, the player agrees to comply with, and abide by, these Game Procedures for Scratch Ticket Game No. 2317, 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-202102331
Bob Biard
General Counsel
Texas Lottery Commission
Filed: June 15, 2021

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North Central Texas Council of Governments

Request for Proposals for Predictive Crash Analysis Software

The North Central Texas Council of Governments (NCTCOG) is requesting proposals from developers or qualified firms of a predictive crash analysis software capable of: screening and identifying intersections and roadway segments with a higher than expected or higher than predicted number of crashes, identifying an overrepresentation of specific crash types at a particular location, selection of appropriate safety countermeasures, performing a cost/benefit analysis to determine which countermeasures will be most cost effective, and performing a before and after analysis to determine the real-world effectiveness of implemented countermeasures.

Proposals must be received no later than 5:00 p.m., Central Time, on Friday, July 30, 2021, to Kevin Kroll, Senior Transportation Planner, North Central Texas Council of Governments, 616 Six Flags Drive, Arlington, Texas 76011 and electronic submissions to TransRFPs@nctcog.org. The Request for Proposals will be available at www.nctcog.org/rfp by the close of business on Friday, June 25, 2021.

NCTCOG encourages participation by disadvantaged business enterprises and does not discriminate on the basis of age, race, color, religion, sex, national origin, or disability.

TRD-202102352
R. Michael Eastland
Executive Director
North Central Texas Council of Governments
Filed: June 16, 2021

♦ ♦ ♦

Panhandle Regional Planning Commission

Village of Lake Tanglewood - Notice of Request for Proposals for Governmental Financial Audit Services

Public Notice

The Village of Timbercreek Canyon (Village) is requesting proposals in response to this Request for Proposals (RFP) from qualified firms of certified public accountant to audit the Village's financial statements for the fiscal year ending September 30, 2021 with the option of auditing its financial statements for each of the two subsequent fiscal years. These audits are to be performed in accordance with Generally Accepted Auditing Standards. All services provided will be in accordance with the RFP. A separate contract detailing the terms and conditions of the services will be duly executed between the Village and the selected firm.

A copy of the Request for Proposals may be obtained from the Village of Timbercreek Canyon at kpaul@theprpc.org, ATTN: Katie Paul, (806) 372-3381.

Please submit your response for these proposed services to the address below:

Katie Paul

Contract City Manager

415 SW 8th

Amarillo, Texas 79105

Responses must be received no later than 5:00 p.m. on Monday, July 12th, 2021 to be considered. The Village of Timbercreek Canyon will hold a meeting of the Board of Aldermen at 6:00 p.m., at the gatehouse, 101 N. Timbercreek Drive, Amarillo, Texas 79118 on Thursday, August 12th, 2021, and may award the contract at that time.

TRD-202102328
Katie Paul
Local Government Services Coordinator and Contract City Manager
Panhandle Regional Planning Commission
Filed: June 15, 2021

♦ ♦ ♦

Village of Timbercreek Canyon - Notice of Request for Proposals for Governmental Financial Audit Services

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TRD-202102329

Katie Paul
Local Government Services Coordinator and Contract City Manager
Panhandle Regional Planning Commission
Filed: June 15, 2021

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Texas Parks and Wildlife Department

Notice of a Public Comment Hearing on an Application for a Sand and Gravel Permit

Union Pacific Railroad has applied to the Texas Parks and Wildlife Department (TPWD) for an Individual Permit pursuant to Texas Parks and Wildlife Code, Chapter 86, to remove or disturb up to 5,920 cubic yards of sedimentary material within the Brazos River in Fort Bend County. The purpose of the disturbance is replacement of the existing bridge on the Glidden Subdivision. The location is approximately 8.2 miles downstream of the FM 723 crossing and 500 feet upstream of the U.S. Highway 90A crossing. Notice is being published and mailed pursuant to Title 31 TAC §69.105(d).

TPWD will hold a public comment hearing regarding the application at 11:00 a.m. on July 23, 2021. Due to COVID-19 transmission concerns with travelling and person-to-person gatherings, the public comment hearing will be conducted via Microsoft Teams and remote participation is required. Potential attendees should contact Tom Heger at (512) 389-4583 or at tom.heger@tpwd.texas.gov for information on how to participate in the hearing remotely. The hearing is not a contested case hearing under the Texas Administrative Procedure Act. Oral and written public comment will be accepted during the hearing.

Written comments may be submitted directly to TPWD and must be received no later than 30 days after the date of publication of this notice in the *Texas Register* or a newspaper, whichever is later. A written request for a contested case hearing from an applicant or a person with a justiciable interest may also be submitted and must be received by TPWD prior to the close of the public comment period. Timely hearing requests shall be referred to the State Office of Administrative Hearings. Submit written comments, questions, requests to review the application, or requests for a contested case hearing to: Tom Heger, TPWD, by mail: 4200 Smith School Road, Austin, Texas 78744; fax (512) 389-4405; or e-mail tom.heger@tpwd.texas.gov.

TRD-202102300
James Murphy
General Counsel
Texas Parks and Wildlife Department
Filed: June 14, 2021

♦ ♦ ♦

South East Texas Regional Planning Commission

Request for Proposals: Household Hazardous Waste Collection Events

The South East Texas Regional Planning Commission (SETRPC) announces that it is seeking proposals for the purpose of conducting five (5) consecutive annual one day HHW collection events for Hardin, Jasper, Jefferson, and Orange Counties. It is hereby understood that SETRPC expects the Proposer to conduct and complete all aspects of the event including mobilization/demobilization, collection, handling, treatment, packaging, transportation, and disposal of appropriate waste collected at the event. A complete Request for Proposal package may be obtained by accessing our website at www.setrpc.org **on June 28, 2021 or later. Final proposals will be due by 3:00 p.m. CST on Friday, July 30, 2021. For additional information contact Bob Dickinson, Director of the Transportation and Environmental Resources Department, (409) 899-8444, ext. 7520 or by e-mail, bdickinson@setrpc.org.**

TRD-202102351
Bob Dickinson
Director
South East Texas Regional Planning Commission
Filed: June 16, 2021

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South Texas Development Council

Request for Proposal

The Area Agency on Aging of the South Texas Development Council is currently seeking contractors who are qualified entities to provide Congregate Meals, Home Delivered Meals, Demand/Response Transportation, Residential Repair, Homemaker, Personal Assistance, In-home Respite, Emergency Response and Health Maintenance Services.

These services are provided to individuals 60 years of age and older, their family members and other caregivers under the Older Americans Act of 1965 as amended with funding administered by Health and Human Service Commission in the Counties of Jim Hogg, Starr, Webb and Zapata.

Parties interested in providing services within our service area must contact the Area Agency on Aging and request an application during the closed enrollment period June 1, 2021, through July 31, 2021, for consideration.

To request an application package contact:

South Texas Development Council

Area Agency on Aging

1002 Dickey Ln.

P.O. Box 2187

Laredo, Texas 78044-2187

(956) 722-3995

(800) 292-5426

TRD-202102330
Nancy Rodriguez
Director
South Texas Development Council
Filed: June 15, 2021

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Texas Windstorm Insurance Association

Request for Proposal Announcement

On June 25, 2021, the Texas Windstorm Insurance Association (TWIA) will issue a Request for Proposals (the "RFP") to solicit proposals from vendors who are qualified to conduct statutory and GAAP/GASB annual financial statement audits of Property and Casualty Insurance Organizations.

Proposal Forms

The RFP and submission forms will be published on the TWIA website on or about June 25, 2021, by close of business.

Approval Process

Proposals will be evaluated by the RFP coordinator and an Evaluation Committee selected by TWIA. The evaluators will consider how well

the vendor's proposed solution meets TWIA's needs as described in the RFP. It is important that all responses be clear and complete so that the evaluators can adequately understand all aspects of the proposal. The evaluation process is not designed to simply award the contract to the lowest cost vendor. Rather, it is intended to help TWIA select the vendor with the best combination of attributes, including price, based on all evaluation factors.

Rights and Obligations

TWIA accepts no obligation for any costs incurred in responding to the RFP and reserves the right to accept or reject any or all proposals. TWIA is under no obligation to award a contract on the basis of the RFP. TWIA reserves the right to modify this RFP and/or to issue alternate or additional RFPs at its discretion.

Target dates

June 25, 2021, RFP issued

July 2, 2021, Deadline for submission of questions/requests for clarification

July 9, 2021, Responses to Written Questions Posted on the TWIA Website

July 16, 2021, Deadline for submission of responses

Contact Information

Any requests for information should be directed to:

Texas Windstorm Insurance Association

Attention: Stuart Harbour sharbour@twia.org

TRD-202102362
Sonya Palmer
Staff Attorney
Texas Windstorm Insurance Association
Filed: June 16, 2021


TEXAS

How to Use the Texas Register

Information Available: The 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.

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.

Review of Agency Rules - notices of state agency rules review.

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.

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 46 (2021) is cited as follows: 46 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 "46 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 46 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, 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 *Texas Register* is available in an .html version as well as a .pdf 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 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
26. Health and Human 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
1 TAC §91.1…….....950 *(P)*

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