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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 December 15, 2021

Appointed to the Task Force on Infectious Disease Preparedness and Response, for a term to expire at the pleasure of the Governor, Duke Appiah, Ph.D. of Lubbock, Texas (Dr. Appiah is appointed pursuant to SB 984, 87th Legislature, Regular Session).

Appointed to the Task Force on Infectious Disease Preparedness and Response, for a term to expire at the pleasure of the Governor, John B. Scott of Fort Worth, Texas (replacing Ruth Ruggero Hughs of Austin).

Appointed to the Task Force on Infectious Disease Preparedness and Response, for a term to expire at the pleasure of the Governor, Marc D. Williams of Austin, Texas (replacing James M. Bass of Austin).

Appointments for December 17, 2021

Appointed to the Texas Workforce Investment Council, for a term to expire September 1, 2027, Paloma Z. Ahmadi of Shavano Park, Texas (replacing Gina Aguirre Adams of Jones Creek, whose term expired).

Appointments for December 20, 2021

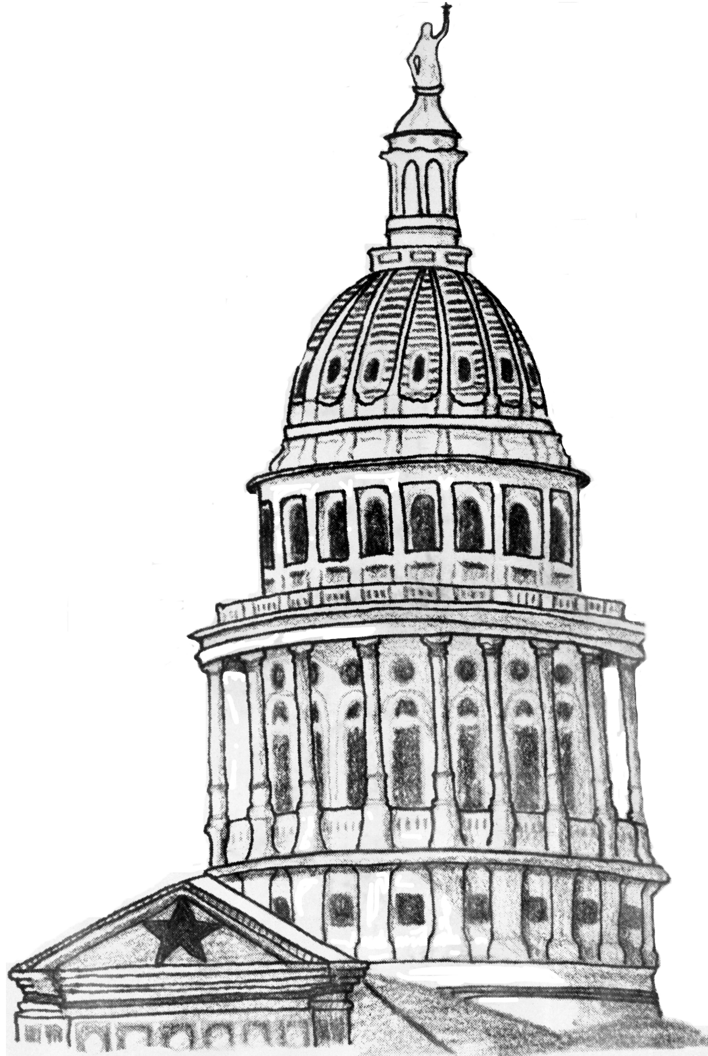
Appointed to the Texas State Board of Pharmacy, for a term to expire August 31, 2027, Ian N. Shaw of Dallas, Texas (replacing Isaac L. "Chip" Thornsburg of Hondo, whose term expired).

Appointed to the Texas State Board of Pharmacy, for a term to expire August 31, 2027, Rebecca "Suzette" Tijerina of Castle Hills, Texas (Ms. Tijerina is being reappointed).

Appointed to the Texas State Board of Pharmacy, for a term to expire August 31, 2027, Jennifer D. "Jenny" Yoakum of Kilgore, Texas (Ms. Yoakum is being reappointed).

Greg Abbott, Governor

TRD-202105206



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-0443-KP

Requestor:

The Honorable Tracy O. King

Chair, House Committee on Natural Resources

Texas House of Representatives

Post Office Box 2910

Austin, Texas 78768

Tracy.king@house.texas.gov

Re: Whether the Lone Star Infrastructure Protection Act prohibits a business or government entity from entering into an agreement to provide utility service to a factory owned by a company that meets one of the criteria under the Act (RQ-0443-KP)

Briefs requested by January 17, 2022

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

TRD-202105201
Austin Kinghorn
General Counsel
Office of the Attorney General
Filed: December 21, 2021

Opinions

Opinion No. KP-0396

The Honorable Charles Perry

Chair, Senate Committee on Water, Agriculture & Rural Affairs

Texas State Senate

Post Office Box 12068

Austin, Texas 78711-2068

Re: Whether the NCAA's policies on transgender student-athletes violate Title IX (RQ-0414-KP)

S U M M A R Y

The National Collegiate Athletic Association has adopted a policy that allows certain transgender athletes who have received medical intervention to participate in sex-separated sports activities other than in accordance with their biological sex. Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in any education program or activity receiving federal funding. A court would have a basis to conclude that a transgender athlete policy like that adopted by the NCAA discriminates on the basis of sex in violation of Title IX.

Membership in the NCAA is voluntary, but the NCAA may penalize member schools that do not comply with its constitution, bylaws, and rules. How a court would determine whether a violation of Title IX occurred if the NCAA imposed penalties against a university must be analyzed on a case-by-case basis after fact finding, which is beyond the scope of an Attorney General opinion.

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

TRD-202105195
Austin Kinghorn
General Counsel
Office of the Attorney General
Filed: December 21, 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 26. HEALTH AND HUMAN SERVICES

PART 1. HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 553. LICENSING STANDARDS FOR ASSISTED LIVING FACILITIES

SUBCHAPTER K. COVID-19 EMERGENCY RULE

26 TAC §553.2003

The Health and Human Services Commission is renewing the effectiveness of emergency new §553.2003 for a 60-day period. The text of the emergency rule was originally published in the September 3, 2021, issue of the *Texas Register* (46 TexReg 5483).

Filed with the Office of the Secretary of State on December 17, 2021.

TRD-202105145
Nycia Deal
Attorney
Health and Human Services Commission
Original effective date: August 21, 2021
Expiration date: February 16, 2022
For further information, please call: (512) 438-3161

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 9. INTELLECTUAL DISABILITY SERVICES--MEDICAID STATE OPERATING AGENCY RESPONSIBILITIES

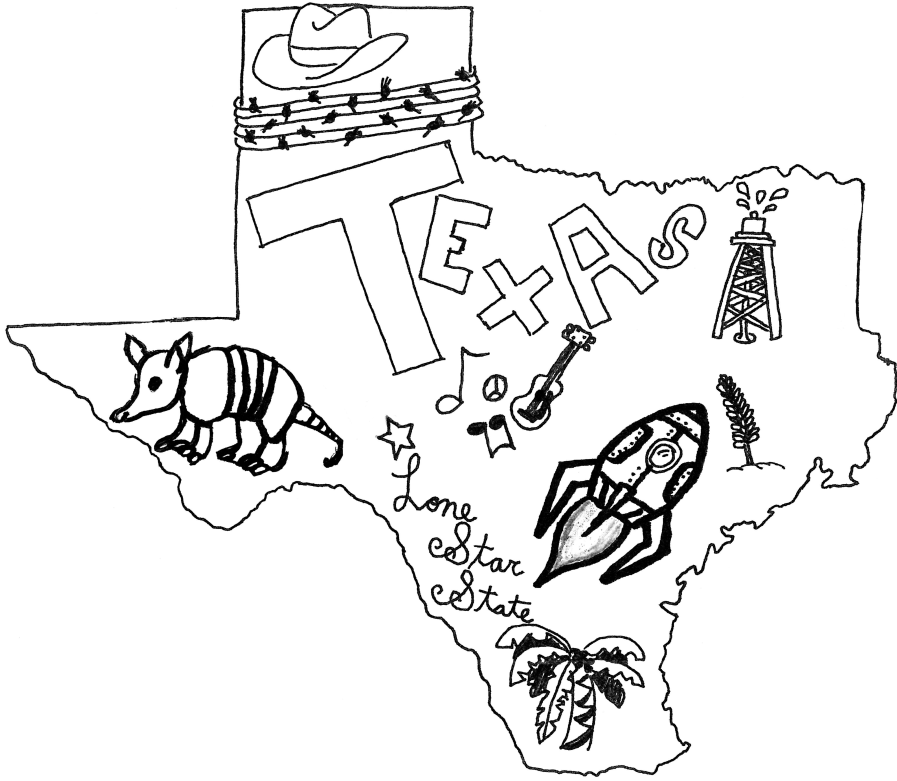
SUBCHAPTER D. HOME AND COMMUNITY-BASED SERVICES (HCS) PROGRAM AND COMMUNITY FIRST CHOICE (CFC)

40 TAC §9.198, §9.199

The Department of Aging and Disability Services is renewing the effectiveness of emergency new §9.198 and §9.199 for a 60-day period. The text of the emergency rules was originally published in the September 3, 2021, issue of the *Texas Register* (46 TexReg 5486).

Filed with the Office of the Secretary of State on December 17, 2021.

TRD-202105146
Nycia Deal
Attorney
Department of Aging and Disability Services
Original effective date: August 21, 2021
Expiration date: February 16, 2022
For further information, please call: (512) 438-3161


Texas
Lone Star State

PROPOSED RULES

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

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

TITLE 7. BANKING AND SECURITIES

PART 5. OFFICE OF CONSUMER CREDIT COMMISSIONER

CHAPTER 85. PAWNSHOPS AND CRAFTED PRECIOUS METAL DEALERS

SUBCHAPTER B. RULES FOR CRAFTED PRECIOUS METAL DEALERS

DIVISION 1. REGISTRATION PROCEDURES

7 TAC §85.1011

The Finance Commission of Texas (commission) proposes amendments to §85.1011 (relating to Fees) in 7 TAC, Chapter 85, concerning Pawnshops and Crafted Precious Metal Dealers.

The rules in 7 TAC Chapter 85, Subchapter B govern crafted precious metal dealers. In general, the purpose of the proposed rule changes to 7 TAC §85.1011 is to implement SB 1132 (2021) by adjusting annual registration fees for crafted precious metal dealers.

The OCCC distributed an early precomment draft of proposed changes to interested stakeholders for review, and then held a stakeholder webinar regarding the rule changes. The OCCC received no informal precomments on the rule text draft.

The Texas Legislature passed SB 1132 in the 2021 legislative session. SB 1132 amended Texas Occupations Code, Chapter 1956, Subchapter B by adding new Section 1956.06131, which authorizes the OCCC to examine the places of business of crafted precious metal dealers, and requires the OCCC to examine at least 10 dealers each calendar year. SB 1132 also amended Texas Occupations Code, §1956.0612(c), to specify that the OCCC shall prescribe a registration processing fee in an amount necessary to cover the costs of administering Chapter 1956, Subchapter B. The OCCC is responsible for the costs of its operations. Under Texas Finance Code, §16.002 and §16.003, the OCCC is a self-directed, semi-independent agency, and may set fees in amounts necessary for the purpose of carrying out its functions.

The proposed amendments to §85.1011 would implement SB 1132 by adjusting annual registration fees for crafted precious metal dealers. A proposed amendment to subsection (a) would increase the annual registration fee for permanent locations from $50 to $70. A proposed amendment to subsection (b) would increase the annual registration fee for temporary locations from $25 to $40.

The OCCC believes that a $20 increase to registration fees will enable the OCCC to cover the additional costs resulting from examinations of crafted precious metal dealers, as required by SB 1132. The OCCC currently employs financial examiners who examine licensed nondepository financial institutions throughout Texas. To implement SB 1132, some of these examiners will receive training on requirements for crafted precious metal dealers, and will spend a portion of their time traveling and examining dealers. Based on its previous experience in conducting financial examinations, the OCCC anticipates that the new examinations will result in approximately $19,950 of additional costs for the first year, and approximately $11,970 of additional costs for subsequent years. Based on an average total number of crafted precious metal dealer registrations of 600, the OCCC anticipates that the $20 increase would provide $12,000 of revenue per year to cover the cost of the examination program.

Huffman Lewis, Director of Consumer Protection, has determined that for the first five-year period the proposed rule changes are in effect, there will be fiscal implications for state government as a result of administering the rules. The proposed amendments to §85.1011 would increase annual registration fees for crafted precious metal dealers by $20. In the last two fiscal years, the average total number of crafted precious metal dealer registrants (including both permanent and temporary locations) has been approximately 600. This suggests that if the proposed rule changes are adopted, the OCCC would receive additional revenue of approximately $12,000 per year for the first five fiscal years the rule changes are in effect. There is no additional estimated cost to the state as a result of enforcing or administering the rule changes. Any additional costs to the state for examining crafted precious metal dealers would result from the legislative changes in SB 1132 (2021), not from the proposed rule changes. Mr. Lewis has determined that for the first five-year period the proposed rule changes are in effect there will be no fiscal implications for local government as a result of administering the rules.

Huffman Lewis, Director of Consumer Protection, has determined that for each year of the first five years the proposed rule changes are in effect, the public benefit anticipated as a result of the changes will be that annual registration fees will cover the cost of examining crafted precious metal dealers.

The OCCC anticipates some costs for crafted precious metal dealer registrants required to comply with the rule changes as proposed, due to the adjustments to the annual registration fees in §85.1011. If the proposed changes go into effect, each crafted precious metal dealer would experience an annual fee increase of $20 per registered location.

The OCCC anticipates that the proposed rule changes will have some economic impact on small businesses and micro-businesses. Currently, approximately 615 different businesses hold crafted precious metal dealer registrations. The OCCC estimates that all or nearly all of these businesses are small or

micro-businesses. If the proposed rule changes are adopted, each business would experience an annual fee increase of $20 per registered location. The OCCC considered potential alternatives, including a smaller increase and different fee amounts for different registrants. However, the OCCC determined that a smaller increase would not satisfy the statutory objective of ensuring that registration fees cover the cost of administering Texas Occupations Code, Chapter 1956, Subchapter B. In addition, gathering the information necessary to charge different fee amounts for different registrants would impose additional burdens on registrants. The OCCC believes that a $20 increase is an appropriate way to recover the costs of examining crafted precious metal dealers. The OCCC does not anticipate an adverse economic effect on rural communities apart from other effects described in this paragraph.

During the first five years the proposed rule changes will be in effect, the rules will not create or eliminate a government program. Implementation of the rule changes will not require the creation of new employee positions or the elimination of existing employee positions. Implementation of the rule changes will not require an increase or decrease in future legislative appropriations to the OCCC, because the OCCC is a self-directed, semi-independent agency that does not receive legislative appropriations. The proposed amendments to §85.1011 require an increase in fees paid to the OCCC. The proposal would not create a new regulation. The proposal would not expand, limit, or repeal an existing regulation. The proposed rule changes do not increase or decrease the number of individuals subject to the rule's applicability. The OCCC does not anticipate that the proposed rule changes will have an effect on the state's economy.

Comments on the proposal may be submitted in writing to Matthew Nance, Deputy General Counsel, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705 or by email to rule.comments@occc.texas.gov. To be considered, a written comment must be received on or before the 30th day after the date the proposal is published in the *Texas Register.* After the 30th day after the proposal is published in the *Texas Register,* no further written comments will be considered or accepted by the commission.

The rule changes are proposed under Texas Occupations Code, §1956.0611, which authorizes the commission to adopt rules to implement and enforce Texas Occupations Code, Chapter 1956, Subchapter B. In addition, Texas Occupations Code, §1956.0612(c) (as amended by SB 1132) authorizes the OCCC to prescribe a registration fee in an amount necessary to cover the costs of administering Texas Occupations Code, Chapter 1956, Subchapter B. Texas Finance Code, §16.003(c) authorizes the OCCC to set fees as necessary to carry out its functions.

The statutory provisions affected by the proposal are contained in Texas Occupations Code, Chapter 1956, Subchapter B.

§85.1011. Fees.

(a) Fee for permanent registered locations. In connection with a new application or an annual renewal, a crafted precious metal dealer must pay a $70 [$50] fee for each permanent registered location.

(b) Fee for temporary locations. In connection with a new application for a temporary location, a crafted precious metal dealer must pay a $45 [$25] fee for each temporary location.

(c) Amendments to permanent registered location. In order to amend a registration by changing the assumed name of the registrant or relocating a permanent registered location, a crafted precious metal dealer must pay a $25 fee.

(d) Amendments to temporary location. In order to amend a registration by relocating a temporary location, a crafted precious metal dealer must pay a fee of $25 for each amended location.

(e) Fees nonrefundable, nontransferable, and not prorated. All fees paid relating to a crafted precious metal dealer's registration with the OCCC are nonrefundable and nontransferable. All fees are fixed and will not be prorated based on the date of the dealer's application.

(f) Nonsufficient funds fee. As provided by Texas Business and Commerce Code, §3.506, the OCCC may charge a fee for nonsufficient funds if an applicant provides a payment device that is dishonored.

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 December 17, 2021.

TRD-202105131
Matthew Nance
Deputy General Counsel
Office of Consumer Credit Commissioner
Earliest possible date of adoption: January 30, 2022
For further information, please call: (512) 936-7660

CHAPTER 88. CONSUMER DEBT MANAGEMENT SERVICES

The Finance Commission of Texas (commission) proposes amendments to §88.104 (relating to Updating Application and Contact Information), §88.110 (relating to Denial, Suspension, or Revocation Based on Criminal History), §88.202 (relating to Annual Report), §88.304 (relating to Credit Counseling Standards), and §88.306 (relating to Fees for Debt Management Services), in 7 TAC, Chapter 88, concerning Consumer Debt Management Services.

The rules in 7 TAC Chapter 88 govern debt management providers. In general, the purpose of the proposed rule changes to 7 TAC Chapter 88 is to implement changes resulting from the commission's review of the chapter under Texas Government Code, §2001.039. Notice of the review of 7 TAC Chapter 88 was published in the *Texas Register* on October 1, 2021 (46 TexReg 6547). The commission received no comments in response to that notice.

The OCCC distributed an early precomment draft of proposed changes to interested stakeholders for review, and then held a stakeholder webinar regarding the rule changes. The OCCC received no informal precomments on the rule text draft.

Proposed amendments to §88.104 would add a new subsection (b) specifying that debt management registrants must provide certain updated information within 30 calendar days after the registrant has knowledge of a change in the information. The information includes the name or operating name of the registrant, location of any offices, websites, names of principal parties, and criminal history. Current subsection (b) already provides that registrants are responsible for ensuring that all contact information on file with the OCCC is current and correct, but the

current rule does not provide a deadline for providing updated contact information. The proposed new subsection would specify a 30-day deadline for providing update information, similar to other OCCC rules that contain a 30-day deadline for licensees to provide updated contact information. The OCCC requires current and correct information about registrants in order to carry out its responsibilities under Texas Finance Code, Chapter 394.

Proposed amendments to §88.110 relate to the OCCC's review of the criminal history of a debt management applicant or registrant. The OCCC is authorized to review criminal history of debt management applicants and registrants under Texas Occupations Code, Chapter 53; Texas Finance Code, §14.109 and §394.204; and Texas Government Code, §411.095. The proposed amendments to §88.110 would ensure consistency with HB 1342, which the Texas Legislature enacted in 2019. HB 1342 included the following changes in Texas Occupations Code, Chapter 53: (1) the bill repealed a provision that generally allowed denial, suspension, or revocation for any offense occurring in the five years preceding the application, (2) the bill added provisions requiring an agency to consider correlation between elements of a crime and the duties and responsibilities of the licensed occupation, as well as compliance with conditions of community supervision, parole, or mandatory supervision, and (3) the bill removed previous language specifying who could provide a letter of recommendation on behalf of an applicant. Proposed amendments throughout subsections (c) and (f) of §88.110 would implement these statutory changes from HB 1342. Other proposed amendments to §88.110 include technical corrections, clarifying changes, and updates to citations.

Proposed amendments to §88.202 would specify information that debt management registrants must submit with annual reports. Proposed amendments throughout §88.202 would add descriptions of information that registrants must provide annually under Texas Finance Code, §394.205 and §394.206, and would add citations to these statutory provisions. These amendments are intended to help registrants comply with reporting requirements by clearly identifying information required by the statute. The proposal would remove current §88.202(b)(2), which requires a registrant to provide a list of all owners and principal parties with the annual report. The OCCC anticipates that this list will no longer be necessary based on the proposed amendments to §88.104 described earlier in this proposal, and believes that removing this list will simplify the reporting process. Proposed new §88.202(d) would specify that the annual report must be verified by oath or affirmation, as required by Texas Finance Code, §394.205(c), and would require registrants to certify that they have reviewed contact information and submitted any updates in accordance with the OCCC's instructions.

A proposed amendment to §88.304(b) would remove language that currently requires providers to submit documentation of the certification of the provider's credit counselors with the annual report. The OCCC believes that removing this requirement will simplify the reporting process. The proposal would maintain current language requiring a provider to provide this information upon request by the OCCC. The proposal would also replace "commissioner" with "OCCC" in this subsection to ensure consistency with other rules.

Proposed amendments to §88.306 would add citations to statutory limitations on fees for debt management services. Currently, this section states that a provider may not charge for services unrelated to debt management or financial education unless approved by the commissioner. Under Texas Finance Code, §394.210(a), a debt management provider may not charge any fees other than fees that are authorized by Texas Finance Code, §394.210. Proposed new §88.306(a) would include a reference to this statutory section and explain that providers may not impose a fee or other charge except as authorized by the statute. The proposal would remove the phrase "unless approved by the commissioner in advance" from the current rule, because fees for services unrelated to debt management or financial education are not authorized by Texas Finance Code, §394.210. Although the commissioner may authorize certain counseling and education fees under Texas Finance Code, §394.210(d), this does not include fees for unrelated services. Proposed new §88.603(c) would explain that the OCCC will periodically compute and publish adjustments to debt management fees, as provided by Texas Finance Code, §394.2101.

Huffman Lewis, Director of Consumer Protection, has determined that for the first five-year period the proposed rule changes are in effect, there will be no fiscal implications for state or local government as a result of administering the rule changes.

Huffman Lewis, Director of Consumer Protection, has determined that for each year of the first five years the proposed amendments are in effect, the public benefits anticipated as a result of the changes will be that the commission's rules will be more easily understood by registrants required to comply with the rules, will be consistent with legislation recently passed by the legislature, will better enable registrants to comply with Chapter 394 of the Texas Finance Code, and will simplify annual reporting requirements for registrants.

The OCCC does not anticipate economic costs to persons who are required to comply with the rule changes as proposed.

The OCCC is not aware of any adverse economic effect on small businesses, micro-businesses, or rural communities resulting from this proposal. But in order to obtain more complete information concerning the economic effect of these rule changes, the OCCC invites comments from interested stakeholders and the public on any economic impacts on small businesses, as well as any alternative methods of achieving the purpose of the proposal while minimizing adverse impacts on small businesses, micro-businesses, and rural communities.

During the first five years the proposed rule changes will be in effect, the rules will not create or eliminate a government program. Implementation of the rule changes will not require the creation of new employee positions or the elimination of existing employee positions. Implementation of the rule changes will not require an increase or decrease in future legislative appropriations to the OCCC, because the OCCC is a self-directed, semi-independent agency that does not receive legislative appropriations. The proposal does not require an increase or decrease in fees paid to the OCCC. The proposal would not create a new regulation. The proposal would expand current §88.104 by specifying that registrants are required to provide certain updated contact information to the OCCC within 30 calendar days of a change. The proposal would limit current §88.110 by amending grounds on which the OCCC may deny, suspend, or revoke a license on grounds of criminal history; would limit current §88.202 by removing a requirement to provide a list of all owners and principal parties each year; and would limit current §88.304 by removing a requirement to provide counselor certification documentation each year. The proposal would not repeal an existing regulation. The proposed rule changes do not increase or decrease

the number of individuals subject to the rule's applicability. The agency does not anticipate that the proposed rule changes will have an effect on the state's economy.

Comments on the proposal may be submitted in writing to Matthew Nance, Deputy General Counsel, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705 or by email to rule.comments@occc.texas.gov. To be considered, a written comment must be received on or before the 30th day after the date the proposal is published in the *Texas Register.* After the 30th day after the proposal is published in the *Texas Register,* no further written comments will be considered or accepted by the commission.

SUBCHAPTER A. REGISTRATION PROCEDURES

7 TAC §88.104, §88.110

The rule changes are proposed under Texas Finance Code, §394.214(a), which authorizes the commission to adopt rules to carry out Texas Finance Code, Chapter 394, Subchapter C.

The statutory provisions affected by the proposal are contained in Texas Finance Code, Chapter 394.

§88.104. Updating Application and Contact Information.

(a) Applicant's updates to registered provider application information. Before an application for registration is approved, an applicant must report to the OCCC any information that would require a materially different answer than that given in the original registered provider application and which relates to the qualifications for registration within 14 calendar days after the person has knowledge of the information.

(b) Registrant's updates to registration application information. A registrant must report to the OCCC any information that would require a different answer than that given in the original registration application within 30 calendar days after the registrant has knowledge of the information, if the information relates to any of the following:

(1) the name or any operating name of the registrant;

(2) the location of any additional offices;

(3) the registrant's website address;

(4) the names of principal parties;

(5) criminal history;

(6) actions by regulatory agencies; or

(7) court judgments.

(c) [~~(b)~~] Contact information. Each applicant or registered provider is responsible for ensuring that all contact information on file with the OCCC is current and correct, including all mailing addresses, all phone numbers, and all e-mail addresses. It is a best practice for registered providers to regularly review contact information on file with the OCCC to ensure that it is current and correct.

§88.110. Denial, Suspension, or Revocation Based on Criminal History.

(a) Criminal history record information. After an applicant submits a complete registration application, including all required fingerprints, and pays the fees required by §88.107 of this title (relating to Fees), the OCCC will investigate the applicant. The OCCC will obtain criminal history record information from the Texas Department of Public Safety and the Federal Bureau of Investigation based on the applicant's fingerprint submission. The OCCC will continue to receive information on new criminal activity reported after the fingerprints have been initially processed.

(b) Disclosure of criminal history. The applicant must disclose all criminal history information required to file a complete application with the OCCC. Failure to provide any information required as part of the application or requested by the OCCC reflects negatively on the belief that the business will be operated lawfully and fairly. The OCCC may request additional criminal history information from the applicant, including the following:

(1) information about arrests, charges, indictments, and convictions;

(2) reliable documents or testimony necessary to make a determination under subsection (c) of this section, including letters of recommendation from prosecution, law enforcement, and correctional authorities;

(3) proof that the applicant has maintained a record of steady employment, has supported the applicant's dependents, and has otherwise maintained a record of good conduct; and

(4) proof that all outstanding court costs, supervision fees, fines, and restitution as may have been ordered have been paid or are current.

(c) Crimes directly related to registered occupation. The OCCC may deny a registration application, or suspend or revoke a registration, if the applicant or registrant has been convicted of an offense that directly relates to the duties and responsibilities of a debt management services provider, as provided by Texas Occupations Code, §53.021(a)(1).

(1) Providing debt management services involves making representations to consumers regarding the terms of the services, holding money entrusted to the provider, remitting money to third parties, collecting charges in a legal manner, and compliance with reporting requirements to government agencies. Consequently, the following crimes are directly related to the duties and responsibilities of a registered provider and may be grounds for denial, suspension, or revocation:

(A) theft;

(B) assault;

(C) any offense that involves misrepresentation, deceptive practices, or making a false or misleading statement (including fraud or forgery);

(D) any offense that involves breach of trust or other fiduciary duty;

(E) any criminal violation of a statute governing credit transaction or debt collection;

(F) failure to file a government report, filing a false government report, or tampering with a government record;

(G) any greater offense that includes an offense described in subparagraphs (A) - (F) of this paragraph as a lesser included offense;

(H) any offense that involves intent, attempt, aiding, solicitation, or conspiracy to commit an offense described in subparagraphs (A) - (G) of this paragraph.

(2) In determining whether a criminal offense directly relates to the duties and responsibilities of holding a registration, the OCCC will consider the following factors, as specified in Texas Occupations Code, §53.022:

(A) the nature and seriousness of the crime;

(B) the relationship of the crime to the purposes for requiring a registration to engage in the occupation;

(C) the extent to which a registration might offer an opportunity to engage in further criminal activity of the same type as that in which the person previously had been involved; [~~and~~]

(D) the relationship of the crime to the ability or [~~,~~] capacity [~~, or fitness~~] required to perform the duties and discharge the responsibilities of a registrant; and [~~.~~]

(E) any correlation between the elements of the crime and the duties and responsibilities of the licensed occupation.

(3) In determining whether a conviction for a crime renders an applicant or a registrant unfit to be a registrant, the OCCC will consider the following factors, as specified in Texas Occupations Code, §53.023:

(A) the extent and nature of the person's past criminal activity;

(B) the age of the person when the crime was committed;

(C) the amount of time that has elapsed since the person's last criminal activity;

(D) the conduct and work activity of the person before and after the criminal activity;

(E) evidence of the person's rehabilitation or rehabilitative effort while incarcerated or after release, or following the criminal activity if no time was served; [~~and~~]

(F) evidence of the person's compliance with any conditions of community supervision, parole, or mandatory supervision; and

(G) [~~(F)~~] evidence of the person's current circumstances relating to fitness to hold a registration, which may include letters of recommendation. [~~from one or more of the following:~~]

~~[(i) prosecution, law enforcement, and correctional officers who prosecuted, arrested, or had custodial responsibility for the person;]~~

~~[(ii) the sheriff or chief of police in the community where the person resides; and]~~

~~[(iii) other persons in contact with the convicted person.]~~

(d) Offenses involving moral turpitude. The OCCC may deny a registration application, or suspend or revoke a registration, if the applicant, [~~or~~] registrant, or a principal party has been convicted of or found civilly liable for an offense involving moral turpitude, as provided by Texas Finance Code, §394.204(i)(1), (k)(1)-(2). Offenses involving moral turpitude include the following:

(1) forgery;

(2) embezzlement;

(3) obtaining money under false pretenses;

(4) larceny;

(5) extortion;

(6) conspiracy to defraud; and

(7) any other similar offense or violation.

(e) Revocation on imprisonment. A registration will be revoked on the registrant's imprisonment following a felony conviction, felony community supervision revocation, revocation of parole, or revocation of mandatory supervision, as provided by Texas Occupations Code, §53.021(b).

(f) Other grounds for denial, suspension, or revocation. The OCCC may deny a registration application, or suspend or revoke a registration, based on any other ground authorized by statute, including the following:

~~[(1) a conviction for an offense that does not directly relate to the duties and responsibilities of the occupation and that was committed less than five years before the date of application, as provided by Texas Occupations Code, §53.021(a)(2);]~~

(1) [~~(2)~~] a conviction for an offense listed in Texas Code of Criminal Procedure, art. 42A.054, or art. 62.001(6), as provided by Texas Occupations Code, §53.021(a)(2)-(3) [~~§53.021(a)(3)-(4)~~];

(2) [~~(3)~~] errors or incomplete information in the registration application, as provided by Texas Finance Code, §394.204(h);

(3) [~~(4)~~] a fact or condition that would have been grounds for denying the registration application, and that either did not exist at the time of the application or the OCCC was unaware of at the time of application, as provided by Texas Finance Code, §394.204(k)(1)-(2); and

(4) [~~(5)~~] any other information warranting the belief that the business will not be operated lawfully and fairly, as provided by Texas Finance Code, §394.204(i)(3), (k)(9).

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 December 17, 2021.

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Matthew Nance
Deputy General Counsel
Office of Consumer Credit Commissioner
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For further information, please call: (512) 936-7660

SUBCHAPTER B. ANNUAL REQUIREMENTS

7 TAC §88.202

The rule changes are proposed under Texas Finance Code, §394.214(a), which authorizes the commission to adopt rules to carry out Texas Finance Code, Chapter 394, Subchapter C.

The statutory provisions affected by the proposal are contained in Texas Finance Code, Chapter 394.

§88.202. Annual Report.

(a) General requirement. Each authorized debt management services provider must file an annual report under this section and must comply with all instructions from the OCCC relating to submitting the report.

(b) Annual report. Each year, at the time of annual renewal, an authorized debt management services provider must file with the OCCC, in a form prescribed by the OCCC, a report that contains the following:

(1) if the provider is a nonprofit or tax exempt organization, the assets and liabilities at the beginning and end of the reporting period, as required by Texas Finance Code, §394.205(b)(1);

[(1) the information required by Texas Finance Code, §394.205 (the OCCC may allow a provider to certify current use of previously submitted information required by this paragraph);]

(2) the total number of debt management plans the provider has initiated on behalf of consumers in Texas during the reporting period, as required by Texas Finance Code, §394.205(b)(2); and

[(2) a list of all owners and principal parties, including any change in ownership that occurred during the preceding calendar year; and]

(3) the total and average fees charged to consumers, including all voluntary contributions received from consumers, as required by Texas Finance Code, §394.205(b)(3).

[(3) information regarding the provider's credit counselors, including the number of credit counselors employed at the time the annual report is prepared, and the accreditation organization or program that certifies the provider's counselors.]

(c) Required documents. A provider must submit the following additional documents with the annual report, in accordance with the OCCC's instructions:

(1) a blank copy of any debt management services agreement used by the provider, as required by Texas Finance Code, §394.205(d) (the OCCC may allow a provider to certify current use of a previously submitted agreement);

(2) blank copies of the provider's consumer educational information, individualized financial analysis, initial debt management plan, and any other required disclosures relating to credit counseling, as required by Texas Finance Code, §394.205(d) (the OCCC may allow a provider to certify current use of previously submitted information);

(3) a copy of the provider's surety bond or a compliant insurance policy, as required by Texas Finance Code, §394.206(a); and

(4) information regarding the provider's credit counselors, including the number of credit counselors employed at the time the annual report is prepared, and the accreditation organization or program that certifies the provider's counselors.

(d) Certification. An annual report must be verified by the oath or affirmation of the owner, manager, president, chief executive officer, or chairman of the board of directors of the provider. The provider must certify that the provider has reviewed all contact information and principal party information on file with the OCCC, and has submitted any updates to this information in accordance with the OCCC's instructions.

(e) [(c)] Other information. Upon request by the OCCC, the provider must provide any other information the commissioner deems relevant concerning the provider's business and operations during the preceding calendar year.

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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Matthew Nance
Deputy General Counsel
Office of Consumer Credit Commissioner
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For further information, please call: (512) 936-7660

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SUBCHAPTER C. OPERATIONAL REQUIREMENTS

7 TAC §88.304, §88.306

The rule changes are proposed under Texas Finance Code, §394.214(a), which authorizes the commission to adopt rules to carry out Texas Finance Code, Chapter 394, Subchapter C.

The statutory provisions affected by the proposal are contained in Texas Finance Code, Chapter 394.

§88.304. Credit Counseling Standards.

(a) For purposes of Texas Finance Code, §394.202(2) and §394.208(a)(2), a provider must be accredited by an independent, third-party accreditation organization that covers, at a minimum, competency in the following core areas:

(1) service environment and planning;

(2) service accessibility and delivery;

(3) training and supervision;

(4) quality management and improvement;

(5) ethical standards; and

(6) financial education.

(b) Each provider must provide the name and contact information of the accreditation organization or program that certifies its counselors. The provider must maintain documentation of the certification of the provider's credit counselors, which must be submitted [with the annual report and] upon request by the OCCC [commissioner]. The commissioner may issue an order disapproving the accreditation organization or program if the commissioner determines that the organization or program does not provide comprehensive education training on the following:

(1) alternatives available to resolve an indebted consumer's credit problems;

(2) how to analyze a consumer's current financial condition;

(3) budget development;

(4) money management; and

(5) wise use of credit.

(c) The provider must maintain documentation of individualized counseling and analysis that has been provided under Texas Finance Code, §394.208(a)(2).

§88.306. Fees for Debt Management Services.

(a) Limitation on fees. The maximum fees for debt management services are described by Texas Finance Code, §394.210. A provider may not impose a fee or other charge, or receive payment from a consumer or other person on behalf of a consumer, except as allowed under Texas Finance Code, §394.210.

(b) Fees for unrelated services. A provider may not charge a consumer for or provide credit or other insurance, coupons for goods

or services, membership in a club, access to computers or the Internet, or any other matter not directly related to debt management services or educational services concerning personal finance [~~, unless approved by the commissioner in advance~~].

(c) Adjustment of fee amounts. As provided by Texas Finance Code §394.2101, the OCCC will periodically compute and publish dollar amounts of fees specified in Texas Finance Code, §394.210, to reflect inflation as measured by the Consumer Price Index for All Urban Consumers. These adjustments will be published on the OCCC's website.

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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Matthew Nance
Deputy General Counsel
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TITLE 13. CULTURAL RESOURCES

PART 3. TEXAS COMMISSION ON THE ARTS

CHAPTER 35. A GUIDE TO PROGRAMS AND SERVICES

13 TAC §35.1

The Texas Commission on the Arts (Commission) proposes an amendment to §35.1, concerning a Guide to Programs and Services.

The purpose of the proposed amendment is to ensure that the guidelines comply with changes to federal law pertaining to grants, clarify and modernize them, and correct minor grammatical errors.

Fiscal impact on State and Local Government

Gary Gibbs, Executive Director of the Commission, has determined that for the first five years the amendment is in effect, there is no foreseeable economic implications relating to costs or revenues of the state or local governments as a result of enforcing or administering the proposed amendment.

Public Benefit

Gary Gibbs, Executive Director, has determined that for each of the first five years the proposed amendment is in effect, the public benefit anticipated as a result of the amendment is to update the guidelines to conform with changes in federal law, modernize and clarify them, and correct minor grammatical errors.

Probable Economic Costs to Persons Required to Comply with the Rule

The Executive Director has further determined that for the first five years the amended rule is in effect, there are no substantial costs anticipated as a result of the proposed rule.

One-for-One Rule Analysis

Given the rules do not have a fiscal note which imposes a cost on regulated persons, including another state agency, a special district, or local government, the Commission asserts proposal and adoption of the amended rule is not subject to the requirements of Government Code §2001.0045.

Government Growth Impact Statement

For each of the first five years the proposed rule is in effect, the agency has determined the following: (1) the amended rule does not create or eliminate a government program; (2) implementation of the amended rule does not require the creation of new employee positions or the elimination of existing employee positions; (3) implementation of the amended rule does not require an increase or decrease in future legislative appropriations to the agency; (4) the amended rule does not require an increase or decrease in fees paid to the agency, (5) the amended rule does not create a new regulation; (6) the amended rule does not expand existing regulations; (7) the amended rule does not increase the number of individuals subject to it and (8) the amended rule does not adversely affect this state's economy.

Local Employment Impact Statement

Mr. Gibbs has determined that no local economies are substantially affected by the amended rule, and, as such, the Commission is exempted from preparing a local employment impact statement pursuant to Government Code §2001.022.

Fiscal Impact on Small and Micro-Businesses, and Rural Communities

Mr. Gibbs has determined that the proposed rule will not have an adverse effect on small or micro-businesses, or rural communities. The Commission is not a regulatory agency. As a result, the Commission asserts preparation of an economic impact statement and a regulatory flexibility analysis, as provided by Government Code §2006.002, are not required.

Takings Impact Assessment

The Commission has determined that there are no private real property interests affected by the amended rule; thus, the Commission asserts preparation of a takings impact assessment, as provided by Government Code §2007.043, is not required.

Environmental Rule Analysis

The Commission has determined that this proposal is not brought with the specific intent to protect the environment or reduce risks to human health from environmental exposure; thus, the Commission asserts this proposal is not a "major environmental rule" as defined by Government Code §2001.0225. As a result, the Commission asserts preparation of an environmental impact analysis, as provided by said §2001.0225, is not required.

Public Comments

Written comments on the proposal may be submitted to Dana Swann, Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711-3406, or by email to dana.swann@arts.texas.gov with the subject line "Guideline Amendment." All comments will be accepted for 30 days upon publication of this proposal in the *Texas Register.*

Statutory Authority

The amendment is proposed under the Government Code, §444.009, which provides the Texas Commission on the Arts

with the authority to make rules and regulations for its government and that of its officers and committees, and §444.024, which authorizes the Commission to award grants.

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

§35.1. A Guide to Programs and Services.

The Commission adopts by reference a Guide to Programs and Services (revised December 2021 [~~September 2016~~]). This document is published by and available from the Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711. This document is also available online at www.arts.texas.gov [~~www.arts.state.tx.us~~].

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 December 16, 2021.

TRD-202105113
Gary Gibbs
Executive Director
Texas Commission on the Arts
Earliest possible date of adoption: January 30, 2022
For further information, please call: (512) 936-6570

PART 7. STATE PRESERVATION BOARD

CHAPTER 111. RULES AND REGULATIONS OF THE BOARD

13 TAC §111.13

1. INTRODUCTION: The State Preservation Board (SPB) proposes the repeal of 13 TAC §111.13, concerning exhibitions in the Capitol and Capitol Extension. Section 111.13 sets forth a process for members of the public to formally request their representatives display exhibits in designated indoor spaces, subject to the approval of the SPB. The rule was amended June 26, 2020, *(Texas Register,* (45 TexReg 4843)) in an effort to clarify the process and promote educational exhibits that would be meaningful to all Texans and Capitol visitors.

The SPB proposes repeal of 13 TAC §111.13 because the agency does not need the rule in order to serve its intended purpose of providing for the display of government speech on the Capitol grounds that educates, informs, and unites.

2. Fiscal Note: Ms. Cindy Provine, Chief Financial Officer, has determined for each year of the first five years the proposed repeal is in effect, there will be no adverse fiscal impact to state or local governments because of this proposal. There will be no measurable effect on local employment or the local economy because of the proposal. Therefore, a local employment impact statement under Government Code §2001.022 is not required.

3. Public Benefit/Cost Note: Ms. Provine has also determined that for each year of the first five years the proposal repeal is in effect, the public benefit will be increased efficiency in government activities and reduction in litigation. She has further determined that there will be no economic cost to any member of the public or any other public or private entity. Government Code §2001.0045 requires a state agency to offset any costs associated with a proposed rule by (1) repealing a rule imposing a total cost that is equal to or greater than that of the proposed rule; or (2) amending a rule to decrease the total costs imposed by an amount that is equal to or greater than the cost of thee proposed rule. As described above, the SPB has determined that the proposed repeal with not impose any cost on anyone, and so §2001.0045 does not apply.

4. Government Growth Impact Statement: Government Code §2001.0221 requires that a state agency prepare a government growth impact statement that reasonably describes what effects a proposed rule may have during the first five years it is in effect. The SPB has determined that the proposed repeal will not create or eliminate a government program, and will not require an increase or decrease in fees paid to the agency. Implementation of the proposal will not require the creation or elimination of employee positions and will not require an increase or decrease in further legislative appropriations to the agency. The proposal does repeal an existing procedural rule regarding voluntary conduct, but it does not create a new prescriptive or proscriptive regulation, or expand, limit, or repeal such a regulation. Though the public's ability to seek the display of exhibits in the Capitol through this program will be eliminated, the regulation was not prescriptive. Thus, the number of individuals whose conduct is subject to the rule's applicability is neither increased nor decreased by the proposal, and the proposal has no impact on the state's economy.

5. Economic Impact Statement and Regulatory Flexibility Analysis: The SPB has determined the proposed rule will not have an economic effect on small businesses, micro businesses, or rural communities. Therefore, an economic impact statement and regulatory flexibility analysis are not required under Government Code §2006.002(c).

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

7. Request for Public Comment: Written comments on the proposed change may be directed to SPBAdmin via email at SPBAdmin@tspb.texas.gov , with the words rule comment on the subject line, or mail, State Preservation Board, ATTN: Leslie Pawelka, P.O. Box 13286, Austin, Texas, 78711. A request for public hearing must be in writing and sent separately from any written comments. Comments will be accepted for 30 days after date of publication in the *Texas Register.*

Statutory Authority and Sections Affected. The repeal is proposed pursuant to Texas Government Code §443.007, which authorizes the Board to adopt rules concerning the buildings, their contents, and their grounds; and Texas Government Code §443.018, which authorizes the Board to adopt rules that regulate the actions of visitors in the Capitol or on the grounds of the Capitol.

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

§111.13. Exhibitions in the Capitol and Capitol Extension.

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 December 15, 2021.

TRD-202105083
Rod Welsh
Executive Director
State Preservation Board
Earliest possible date of adoption: January 30, 2022
For further information, please call: (512) 463-4180

13 TAC §111.45

The State Preservation Board proposes amendments to 13 TAC §111.45, Sick Leave Pool, retitling it Employee Leave Pools and adding new §111.45(b). The proposed new subsection is necessary to implement House Bill (HB) 2063, 87th Leg., R.S. (2021), which created a state employee family leave pool by the addition of new Subchapter A-1 to Chapter 661. The additional proposed amendments are necessary to update the existing rule relating to the sick leave pool for consistency with the proposed new subsection.

SUMMARY. The purpose of the state employee family leave pool is to provide eligible state employees more flexibility in bonding with and caring for children during a child's first year following birth, adoption, or foster placement and for caring for a seriously ill family member or the employee. The pool must allow employees to voluntarily transfer sick or vacation leave earned by the employee to the pool and allow employees to apply for leave time under the pool. Government Code, §661.022(c) requires the governing body of a state agency to adopt rules and prescribe procedures relating to the operation of the pool. Requirements and procedures regarding employee contribution to the pool, use of time in the pool, and withdrawal from the pool are detailed in Government Code, §§662.023 - 661.025. New §111.45(b) states the purpose of the state employee family leave pool, designates the human resources manager or designee as administrator of the pool, establishes that the procedures relating to the operation of the pool will be published in the agency's Employee handbook, and states the operation of the pool will be consistent with Government Code, Chapter 661, Subchapter A-1 (relating to State Employee Family Leave Pool). Amendments to §111.45 are nonsubstantive, providing both employee leave pools in the same location.

FISCAL NOTE. Cynthia Provine, Chief Financial Officer, has determined that for each of the first five years the proposed amendments are in effect, there will not be a fiscal impact on state or local government as a result of enforcing or administering the amendments and new rule, as proposed.

PUBLIC BENEFIT/COST NOTE. Ms. Provine has also determined that for the first five-year period the amendments and new rule are in effect, the public benefit will be consistency and clarity in the agency's sick leave pool and state employee family leave pool rules.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT. There are no anticipated economic costs to persons who are required to comply with the amendments and new rule, as proposed. There is no effect on local economy for the first five years that the proposed amendments and new rule are in effect; therefore, no local employment impact statement is required under Government Code, §2001.022 and 2001.024(a)(6).

ENVIRONMENTAL IMPACT STATEMENT. The SPB has determined that the proposed amendments and new rule do not require an environmental impact analysis because the amendments and new rule are not major environmental rules under the Government Code, §2001.0225.

COSTS TO REGULATED PERSONS. The proposed amendments and new rule do not impose a cost on regulated persons, including another state agency, a special district, or a local government and, therefore, are not subject to Government Code, §2001.0045. ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES, MICROBUSINESSES, AND RURAL COMMUNITIES. Ms. Provine has also determined that there will be no impact on rural communities, small businesses, or micro-businesses as a result of implementing these amendments and new rule and therefore no regulatory flexibility analysis, as specified in Government Code, §2006.002, is required.

GOVERNMENT GROWTH IMPACT STATEMENT. During the first five years that the proposed amendments and new rule would be in effect, the proposed amendments and new rule: will not create or eliminate a government program; will not result in the addition or reduction of employees; will not require an increase or decrease in future legislative appropriations; will not lead to an increase or decrease in fees paid to a state agency; will create a new regulation as required by HB 2063 and Government Code, §661.022(c); will not repeal existing regulations; and will not result in an increase or decrease in the number of individuals subject to the rule. During the first five years that the amendments and new rule would be in effect, the proposed amendments will not positively or adversely affect the Texas economy.

TAKINGS IMPACT ASSESSMENT. No private real property interests are affected by this proposal and 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 Government Code, §2007.043.

REQUEST FOR PUBLIC COMMENT. Written comments on the proposed amendments and new rule may be directed to SPBAdmin via email at SPBAdmin@tspb.texas.gov , with the words rule comment on the subject line, or mail, State Preservation Board, ATTN: Leslie Pawelka, P.O. Box 13286, Austin, Texas 78711. A request for public hearing must be in writing and sent separately from any written comments. Comments will be accepted for 30 days after date of publication in the *Texas Register.*

STATUTORY AUTHORITY. The amendments and new rule are proposed under Government Code, §661.022(c), as added by HB 2063, which requires state agencies to adopt rules relating to the operation of the agency family leave pool, and Government Code, §661.002(c), which requires state agencies to adopt rules relating to the operation of the agency sick leave pool.

The proposed amendment affects Government Code, Chapter 661.

§111.45. Employee [~~Sick~~] Leave Pools [~~Pool~~].

(a) Sick Leave Pool. A sick leave pool is established according to requirements and conditions of Tex. Gov. Code, Chapter 661 to provide for the alleviation of hardship caused to an employee and the employee's family if a catastrophic illness or injury forces the employee to exhaust all leave time earned by that employee and to lose compensation from the state.

(1) The human resources manager [~~senior staff services officer~~] is designated as the pool administrator.

(2) The pool administrator, with the advice and consent of the executive director, will establish operating procedures consistent with the requirements of this section and relevant law governing operation of the pool. The pool administrator will ensure procedures are contained and made available to all agency employees in the agency's HR policy manual.

(3) An employee may contribute to the pool only [~~Donations to the pool must be made~~] by written request in which the employee certifies [~~containing a certification~~] that the contribution [~~donation~~] is strictly voluntary.

(4) This policy is subject to change unless prohibited by statute.

(b) Family Leave Pool. A family leave pool is established according to requirements and conditions of Tex. Gov. Code, Chapter 661, Subchapter A-1. The family leave pool is separate from the sick leave pool. An employee may withdraw leave time from the pool if certain conditions are met and if the employee has exhausted all leave time and will otherwise go into unpaid status.

(1) The human resources manager is designated as the pool administrator.

(2) The pool administrator, with the advice and consent of the executive director, will establish operating procedures consistent with the requirements of this section and relevant law governing operation of the pool. The pool administrator will ensure procedures are contained and made available to all agency employees in the agency's HR policy manual.

(3) An employee may contribute to the pool only by written request in which the employee certifies that the contribution is strictly voluntary.

(4) This policy is subject to change unless prohibited by statute.

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 December 15, 2021.

TRD-202105087
Rod Welsh
Executive Director
State Preservation Board
Earliest possible date of adoption: January 30, 2022
For further information, please call: (512) 463-4180

TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER C. INFRASTRUCTURE AND RELIABILITY

16 TAC §25.57

The Public Utility Commission of Texas (commission) proposes new 16 Texas Administrative Code (TAC) §25.57 relating to Power Outage Alert Criteria. This proposed rule will establish the criteria for the content, activation, and termination of regional and statewide power outage alerts as required by Tex. Gov't. Code §411.301(b), enacted by the 87th Texas Legislature as Senate Bill 3.

Growth Impact Statement

The agency provides the following governmental growth impact statement for the proposed rule, as required by Tex. Gov't. Code §2001.0221. The agency has determined that for each year of the first five years that the proposed rule is in effect, the following statements will apply:

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

(2) implementation of the proposed rule will not require the creation of new employee positions and will not require the elimination of existing employee positions;

(3) implementation of the proposed rule will not require an increase and will not require a decrease in future legislative appropriations to the agency;

(4) the proposed rule will not require an increase and will not require a decrease in fees paid to the agency;

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

(6) the proposed rule will not expand, limit, or repeal an existing regulation;

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

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

Fiscal Impact on Small and Micro-Businesses and Rural Communities

There is no adverse economic effect anticipated for small businesses, micro-businesses, or rural communities as a result of implementing the proposed rule. Accordingly, no economic impact statement or regulatory flexibility analysis is required under Tex. Gov't. Code §2006.002(c).

Takings Impact Analysis

The commission has determined that the proposed rule will not be a taking of private property as defined in chapter 2007 of the Texas Government Code.

Fiscal Impact on State and Local Government

Ms. Mariah Benson, Economist, Market Analysis Division, has determined that for the first five-year period the proposed rule is in effect, there will be no fiscal implications for the state or for units of local government under Tex. Gov't. Code §2001.024(a)(4) as a result of enforcing or administering the sections.

Public Benefits

Ms. Benson has determined that for each year of the first five years the proposed section is in effect the public benefit anticipated as a result of enforcing this section will be greater public

awareness of the potential for electricity outages. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this section.

Local Employment Impact Statement

For each year of the first five years the proposed section is in effect, there should be no effect on a local economy; therefore, no local employment impact statement is required under Tex. Gov't. Code §2001.022.

Costs to Regulated Persons

Tex. Gov't. Code §2001.0045(b) does not apply to this rulemaking because the commission is expressly excluded under subsection §2001.0045(c)(7).

Public Hearing

The commission staff will conduct a public hearing on this rulemaking on January 14, 2022, at 10:00 a.m. in the Commissioners' Hearing Room, 7th floor, William B. Travis Building if requested in accordance with Tex. Gov't. Code §2001.029. The request for a public hearing must be received by January 11, 2022. If a request for public hearing is received, commission staff will file in this project a notice of hearing.

Public Comments

Interested persons may file comments electronically through the interchange on the commission's website. Comments must be filed by January 11, 2022. Comments should be organized in a manner consistent with the organization of the proposed rules. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed rule. The commission will consider the costs and benefits in deciding whether to modify the proposed rules on adoption. Commission staff strongly encourages commenters to include a bulleted executive summary to assist Commission Staff in reviewing the filed comments in a timely fashion. All comments should refer to Project Number 52287.

Statutory Authority

The new rule is proposed under PURA §14.002, which provides the Public Utility Commission with the authority to make adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction. The amended rule is also proposed under Tex. Gov't. Code §2261.253, which requires each state agency to establish a procedure, by rule, to identify each contract that requires enhanced contract monitoring.

Cross Reference to Statute: Public Utility Regulatory Act §14.002 and Tex. Gov't. Code §2261.253.

§25.57. Power Outage Alert Criteria.

(a) Purpose and Applicability. This section establishes criteria for the activation, content, and termination of power outage alerts (POAs) as required by Texas Government Code §411.301(b). This section applies to the Electric Reliability Council of Texas (ERCOT) and transmission service providers in power regions in Texas other than the ERCOT power region.

(b) Definitions.

(1) Load shed instructions--Directions given by a reliability coordinator to a transmission service provider to reduce electricity usage along its systems by a described amount to prevent longer and larger outages for an entire power region.

(2) System-wide--The entirety of a power region.

(c) Issuance of a POA. The commission may recommend the Texas Department of Public Safety issue a POA based on information received from ERCOT and transmission service providers in power regions other than ERCOT. The issuance of a POA may be recommended when load shed instructions have been issued or are likely to be issued because the system-wide power supply in one or more power regions within Texas may be inadequate to meet demand.

(1) The commission may recommend the Texas Department of Public Safety issue a POA statewide or for one or more specific power regions in Texas.

(2) In conjunction with or as an alternative to recommending the issuance of a system-wide POA, the commission may disseminate information by contacting the media, posting on social media, notifying government officials, or via other available means of communication.

(3) In determining whether to recommend the issuance of a POA, the commission will consider the likelihood of system-wide load shed instructions being issued, the expected length of time the load shed instructions will be in effect, and any other relevant information.

(d) POA for the ERCOT power region.

(1) ERCOT must notify the commission when:

(A) ERCOT's forecasts indicate system-wide generation supply may be insufficient to meet demand within the next 48 hours; or

(B) ERCOT issues or is preparing to issue load shed instructions.

(2) A notice under paragraph (1) of this subsection must include any available, relevant information to assist the commission in determining whether to recommend the issuance of a POA and what information should be in a POA. The notice must include, but is not limited to:

(A) Whether load shed instructions have been issued;

(B) Whether capacity is forecasted to be insufficient to meet demand and, if so, an estimated time when load shed instructions may be necessary;

(C) If applicable and known, an estimated time when load shed instructions may be recalled; and

(D) If applicable and known, the initiating event or circumstances that prompted the load shed instructions.

(3) ERCOT must notify the commission when any of the applicable conditions listed under paragraph (1) of this subsection are no longer applicable. This notice must include information on any of the remaining conditions listed under paragraph (1) of this subsection that are still applicable.

(4) ERCOT must establish a procedure, in consultation with commission staff, to provide the commission with notifications required under this subsection.

(5) The commission may:

(A) Request additional information and updates from ERCOT;

(B) Recommend the issuance of a POA;

(C) Recommend the issuance of updates to a POA; and

(D) Recommend the termination of a POA.

(e) POA for power regions other than ERCOT.

(1) A transmission service provider in a power region other than ERCOT must notify the commission when it has received load shed instructions from the applicable reliability coordinator to shed load in Texas.

(2) A notice provided under paragraph (1) of this subsection must include:

(A) Whether load shed instructions have been issued;

(B) If applicable and known, an estimated time when load shed instructions will be recalled; and

(C) If applicable and known, the cause or initiating event of the load shed instructions.

(3) The transmission service provider must notify the commission when the applicable reliability coordinator has recalled the load shed instructions. The transmission service provider's notice must include any available information regarding power outages and the expectation for power restoration within its service territory.

(4) A transmission service provider covered by this subsection must establish a procedure, in consultation with commission staff, to provide the commission with notifications required under this subsection.

(5) The commission may:

(A) Request additional information and updates from the transmission service provider;

(B) Recommend the issuance of a POA;

(C) Recommend the issuance of updates to a POA; and

(D) Recommend the termination of a POA.

(f) POA Content. When known and as applicable, the POA must provide the following information:

(1) Whether system-wide load shed is occurring or expected to occur imminently;

(2) A brief explanation of the circumstances surrounding the load shed event or expected load shed event;

(3) A statement that an electricity customer may experience a power outage;

(4) Where an electricity customer can seek assistance while the electricity customer's power may be out; and

(5) Any other information deemed relevant and of assistance to electricity customers.

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 December 17, 2021.

TRD-202105114
Melissa Ethridge
Assistant Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: January 30, 2022
For further information, please call: (512) 936-7299

SUBCHAPTER I. TRANSMISSION AND DISTRIBUTION
DIVISION 2. TRANSMISSION AND DISTRIBUTION APPLICABLE TO ALL ELECTRIC UTILITIES

16 TAC §25.218

The Public Utility Commission of Texas (commission) proposes new 16 Texas Administrative Code (TAC) §25.218, relating to Middle Mile Broadband. This proposed rule will implement Public Utility Regulatory Act (PURA) Chapter 43 as revised by HB 3853 during the Texas 87th Regular Legislative Session. This rule will allow amenable utilities with excess fiber capacity to establish Middle Mile Broadband Service with internet service providers (ISPs) in unserved and underserved areas of Texas.

The commission also requests comment from interested persons on the following questions:

1. Should the terms "unserved area" and "underserved area" be defined in the proposed rule? If so, how should the terms "unserved area" and "underserved area" be defined and determined?

Comments responding to these questions should be filed in accordance with the instructions below under the heading "*Public Comments."*

Growth Impact Statement

The agency provides the following governmental growth impact statement for the proposed rule, as required by Texas Government Code §2001.0221. The agency has determined that for each year of the first five years that the proposed rule is in effect, the following statements will apply:

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

(2) implementation of the proposed rule will not require the creation of new employee positions and will not require the elimination of existing employee positions;

(3) implementation of the proposed rule will not require an increase and will not require a decrease in future legislative appropriations to the agency;

(4) the proposed rule will not require an increase and will not require a decrease in fees paid to the agency;

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

(6) the proposed rule will not expand, limit, or repeal an existing regulation;

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

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

Fiscal Impact on Small and Micro-Businesses and Rural Communities

There is no adverse economic effect anticipated for small businesses, micro-businesses, or rural communities as a result of implementing the proposed rule. Accordingly, no economic impact statement or regulatory flexibility analysis is required under Texas Government Code §2006.002(c).

Takings Impact Analysis

The commission has determined that the proposed rule will not be a taking of private property as defined in chapter 2007 of the Texas Government Code.

Fiscal Impact on State and Local Government

Shawnee Claiborn-Pinto, Sr. Economist, Market Analysis Division, has determined that for the first five-year period the proposed rule is in effect, there will be no fiscal implications for the state or for units of local government under Texas Government Code §2001.024(a)(4) as a result of enforcing or administering the sections.

Public Benefits

Ms. Claiborn-Pinto has determined that for each year of the first five years the proposed section is in effect, the public benefit anticipated as a result of enforcing the section will be the potential for additional high speed broadband internet services to become available throughout the state. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this section.

Local Employment Impact Statement

For each year of the first five years the proposed section is in effect, there should be no effect on a local economy; therefore, no local employment impact statement is required under Texas Government Code §2001.022.

Costs to Regulated Persons

Texas Government Code §2001.0045(b) does not apply to this rulemaking because the commission is expressly excluded under paragraph §2001.0045(c)(7).

Public Hearing

The commission staff will conduct a public hearing on this rulemaking on February 3, 2022, at 9:00 A.M. in the Commissioners' Hearing Room, 7th floor, William B. Travis Building if requested in accordance with Tex. Gov't. Code §2001.029. The request for a public hearing must be received by January 31, 2022. If a request for public hearing is not received, commission staff will file in this project a memo canceling the hearing.

Public Comments

Interested persons may file comments electronically through the interchange on the commission's website. Comments must be filed by 3:00 p.m., Tuesday, January 18, 2022. Reply Comments are due by 3:00 p.m., Monday January 31, 2022. *Commission staff strongly encourages commenters to include a bulleted executive summary to assist Commission Staff in reviewing the filed comments in a timely fashion.* Comments should be organized in a manner consistent with the organization of the proposed rule. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed rule. The commission will consider the costs and benefits in deciding whether to modify the proposed rule on adoption. All comments should refer to Project Number 52845.

Statutory Authority

The proposed rule is adopted under PURA §14.001, which provides the commission the general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by PURA that is necessary and convenient to the exercise of that power and jurisdiction; §14.002, which provides the Public Utility Commission with the authority to make adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction; and PURA Chapter 43, which provides a framework for implementation of middle mile broadband in Texas.

Cross Reference to Statute: Public Utility Regulatory Act §14.001, 14.002 and Chapter 43.

§25.218. Middle Mile Broadband Service.

(a) Purpose and application. This section implements Public Utility Regulatory Act (PURA) Chapter 43, permitting an electric utility to implement middle mile broadband service for excess fiber capacity. This section applies to an electric utility and a transmission and distribution utility regardless of whether the utility is offering customer choice under PURA Chapter 39.

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

(1) Affected property owner--an owner of real property that is burdened by an easement or other property right owned or leased by an electric utility whose property is listed on the most recent tax roll of each county authorized to levy property taxes against the property and will be affected by the installation or operation of middle mile broadband service on an electric delivery system or other facilities of the electric utility. A property owner whose real property is burdened by an existing easement or other property right that permits the provision of third-party middle mile broadband service on an electric utility delivery system is not an affected property owner.

(2) Broadband service--retail internet service provided by a commercial internet service provider with the capability of providing a download speed of at least 25 megabits per second and an upload speed of at least 3 megabits per second.

(3) Internet service provider--a commercial entity that provides internet services to end-use customers on a retail basis.

(4) Electric delivery system--the power lines and related transmission and distribution facilities constructed to deliver electric energy to the electric utility's customers.

(5) Middle mile broadband service--the provision of excess fiber capacity on an electric utility's electric delivery system or other facilities to an internet service provider to provide broadband service. The term does not include provision of internet service to end-use customers on a retail basis.

(c) Authorization for middle mile broadband service.

(1) An electric utility may own, construct, maintain, and operate fiber optic cables and other facilities for providing middle mile broadband service primarily for unserved and underserved areas consistent with the requirements of this section. The electric utility has the right to decide, in its sole discretion, whether to implement middle mile broadband service and may not be penalized for deciding to implement or not to implement that service.

(2) An electric utility that elects to provide middle mile broadband service must determine on a nondiscriminatory basis which internet service providers may access excess fiber capacity on the electric utility's electric delivery system or other facilities and provide access points to allow connection between the electric utility's electric delivery system or other facilities and the systems of those internet service providers. An electric utility is prohibited from leasing excess fiber capacity to provide middle mile broadband service to an affiliated internet service provider.

(3) The electric utility must provide access to excess fiber capacity only on reasonable and nondiscriminatory terms and conditions that assure the electric utility the unimpaired ability to comply with and enforce all applicable federal and state requirements regarding the safety, reliability, and security of the electric delivery system.

(4) Nothing in this section is intended to restrict an electric utility from owning, constructing, maintaining, or operating fiber optic cables or a broadband system for the electric utility's own use to support the operation of the electric utility's electric delivery system or for other lawful purposes.

(d) Charges. An electric utility that owns and operates facilities to provide middle mile broadband service may lease excess fiber capacity on the electric utility's electric delivery system or other facilities to an internet service provider on a wholesale basis and must charge the internet service provider for the use of the electric utility's system for all costs associated with that use. The rates, terms, and conditions of a lease of excess fiber capacity described by this section must be nondiscriminatory. An electric utility may not lease excess fiber capacity to provide middle mile broadband service to an affiliated internet service provider.

(e) Participation by electric utility.

(1) An electric utility may install and operate facilities to provide middle mile broadband service on any part of its electric delivery system or other facilities for internet service providers but may not construct new electric delivery facilities for the purpose of expanding the electric utility's middle mile broadband service.

(2) An electric utility that owns and operates middle mile broadband service:

(A) may lease excess fiber capacity on the electric utility's electric delivery system or other facilities to an internet service provider on a wholesale basis; and

(B) may not provide internet service to end-use customers on a retail basis.

(f) Commission review of utility middle mile plan.

(1) Filing requirements. An electric utility that plans a project to deploy middle mile broadband service must submit to the commission a written plan that includes:

(A) a demonstration that the middle mile broadband service will be used only for unserved and underserved areas;

(B) a sworn statement by a cybersecurity expert attesting that cybersecurity has been properly addressed for implementing and providing middle mile broadband service;

(C) the route of the middle mile broadband service infrastructure proposed for the project;

(D) the location of the electric utility's infrastructure that will be used in connection with the project;

(E) an estimate of potential unserved or underserved broadband customers that would be served by the internet service provider;

(F) the capacity, number of fiber strands, and any other facilities of the middle mile broadband service that will be available to lease to internet service providers;

(G) the estimated cost of the project, including an itemization of engineering costs, construction costs, permitting costs, right-of-way costs, a reasonable allowance for funds used during construction, and all other costs associated with the lease and use of the electric utility's system for middle mile broadband service by ISPs;

(H) the proposed schedule of construction for the project;

(I) testimony, exhibits, and other evidence that demonstrates the project will allow for the provision and maintenance of middle mile broadband service to unserved and underserved areas with a sworn statement attesting compliance with subsection (e) of this section;

(J) a copy of the lease with the ISP for middle mile broadband service and a statement attesting that the lease is in compliance with subsection (c)(2) and (c)(3) of this section, and subsection (d) of this section;

(K) a copy of the final order for the electric utility's last comprehensive base-rate proceeding and associated Interchange number for said base-rate proceeding;

(L) a disclosure of all state and federal funds, including but not limited to, subsidies, grants, and tax benefits, credits, or deductions, utilized by the electric utility and ISP in association with the provision of middle mile broadband service;

(M) a demonstration that the revenues received from the provision of middle mile broadband service under the plan offset all construction, maintenance, operations, and other costs and all return associated with the service;

(N) any other information that the applicant considers relevant.

(2) Notice and intervention deadline. On or before the day after it files its plan, the electric utility must provide notice as required below and must include in the notice the docket number for the new proceeding. Failure by an electric utility to provide timely notice, as determined by the commission or presiding officer, will toll the intervention deadline under subsection (f)(2)(C) of this section until the date timely notice is issued.

(A) Notice to affected property owners under this section must:

(i) Be sent by first class mail to the last known address of each affected property owner and, if available, by electronic service.

(ii) State whether any new fiber optic cables used for middle mile broadband service will be located above or below ground in the easement or other property right.

(B) Notice to all parties in the electric utility's last comprehensive base-rate proceeding must be sent by first class mail to the last known address of each party in the electric utility's last comprehensive base-rate proceeding or by electronic service, if available.

(C) The intervention deadline is 45 days from the date service of notice is completed.

(D) Not later than the 60th day after the date an electric utility mails notice to potential intervenors under this section:

(i) An affected property owner may submit to the electric utility a written protest of the intended use of the easement or other property right for middle mile broadband service. Within three working days of receipt of a written protest by an affected property owner, the electric utility must file the protest with the commission.

(ii) An electric utility that receives a timely written protest from an affected property owner may not use the easement

or other property right for middle mile broadband service unless the protester later agrees in writing to that use or that use is authorized by law. If an affected property owner fails to submit a timely written protest, an electric utility may proceed with its plan to provide middle mile broadband service without modifying or expanding the easement for the property owner.

(E) An electric utility that receives a timely written protest from an affected property owner regarding the proposed middle mile broadband service plan may cancel the project at any time.

(3) Commission processing of electric utility's plan.

(A) The commission must approve, modify, or reject an electric utility's middle mile plan submitted to the commission under this section not later than the 181st day after the date the plan is deemed sufficient.

(B) Following the filing of a plan by an electric utility under this section, the commission may review the electric utility's plan for middle mile broadband service under subsection (f) of this section or refer the application to the State Office of Administrative Hearings (SOAH). Upon referral to SOAH:

(i) The commission delegates authority to the presiding officer to deem plans sufficient, approve plans, and modify approved plans filed under this subsection through a notice of approval under §22.35(b)(1) (relating to Information Disposition) of this title.

(ii) The presiding officer will review for sufficiency the electric utility's plan for middle mile broadband service under paragraph (1) of this subsection and notice to potential intervenors under paragraph (2) of this subsection.

(iii) The presiding officer must establish a procedural schedule that will enable the commission to, approve, modify, or reject the plan not later than the 181st day after the date the plan is deemed sufficient.

(C) A motion to find a plan filing materially deficient must be filed no later than seven days after the intervention deadline. The motion must specify the nature of the deficiency and the relevant portions of the plan and cite the particular requirement under paragraph (1) of this subsection with which the plan is alleged not to comply. The electric utility's response to a motion to find a plan materially deficient must be filed no later than five working days after such motion is received.

(D) An approved plan may be updated or amended subject to commission approval in accordance with this subsection.

(g) Cost recovery for deployment of middle mile broadband facilities.

(1) Where an electric utility installs facilities used to provide middle mile broadband service under a plan approved by the commission under this section, the electric utility's investment in those facilities is eligible for inclusion in the electric utility's invested capital. Any fees or operating expenses that are reasonable and necessary are eligible for inclusion as operating expenses for purposes of any proceeding under PURA Chapter 36.

(2) In a proceeding under PURA Chapter 36, revenue received by an electric utility from an internet service provider for the use of middle mile broadband service must be applied as a revenue credit to customers in proportion to the customers' funding of the underlying infrastructure.

(3) An electric utility submitting a plan must ensure that revenues received from the provision of middle mile broadband service offset all construction, maintenance, operations, and other costs and all return associated with the service.

(h) Reliability of electric systems maintained.

(1) An electric utility that installs and operates facilities to provide middle mile broadband service must employ all reasonable measures to ensure that the operation of the middle mile broadband service does not interfere with or diminish the reliability of the utility's electric delivery system.

(2) If a disruption in the provision of electric service occurs, the electric utility is governed by the terms and conditions of the retail electric delivery service tariff.

(3) The electric utility may take all necessary actions regarding its middle mile broadband service and the facilities required in the provision of that service to address circumstances that may pose health, safety, security, or reliability concerns.

(4) At all times, the provision of broadband service is secondary to the reliable provision of electric delivery services.

(5) Except as provided by contract or tariff, an electric utility is not liable to any person, including an internet service provider, for any damages, including direct, indirect, physical, economic, exemplary, or consequential damages, including loss of business, loss of profits or revenue, or loss of production capacity caused by a fluctuation, disruption, or interruption of middle mile broadband service that is caused in whole or in part by:

(A) force majeure; or

(B) the electric utility's provision of electric delivery services, including actions taken by the electric utility to ensure the reliability and security of the electric delivery system and actions taken in response to address all circumstances that may pose health, safety, security, or reliability concerns.

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 December 17, 2021.

TRD-202105136
Andrea Gonzalez
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: January 30, 2022
For further information, please call: (512) 936-7244

TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 61. SCHOOL DISTRICTS

SUBCHAPTER AA. COMMISSIONER'S RULES ON SCHOOL FINANCE

19 TAC §61.1009

The Texas Education Agency (TEA) proposes an amendment to §61.1009, concerning the fast growth allotment. The proposed amendment would implement changes to Texas Education Code

(TEC), Chapter 48, by House Bill (HB) 1525, 87th Texas Legislature, Regular Session, 2021.

BACKGROUND INFORMATION AND JUSTIFICATION: TEC, §48.111, as amended by HB 1525, 87th Texas Legislature, Regular Session, 2021, establishes categories of tiered funding weights, as defined by the commissioner of education, for each student enrolled in a district eligible for an annual allotment. The fast growth allotment to which a school district may be entitled is equal to the basic allotment multiplied by the applicable funding weight for each enrolled student equal to a difference greater than zero that results from subtracting 250 from the difference between the number of students enrolled in the district during the school year immediately preceding the current school year and the number of students enrolled in the district during the school year six years preceding the current school year.

The proposed amendment would reflect the new calculation and establish specific weights for each growth category beginning with the 2021-2022 school year and continuing through the subsequent school years. The total statewide allocations for the 2021-2022, 2022-2023, and 2023-2024 school years are subject to limitations.

The proposed amendment to §61.1009(c) would implement the amended mathematical calculation of the allotment by redefining the student enrollment growth value to cumulative enrollment growth over 250 to derive the percentile of growth for each district, while freezing the hold harmless calculations for the 2021-2022 school year and assigning different funding weights per enrolled student in the top, middle, and bottom tier of districts.

FISCAL IMPACT: Leo Lopez, associate commissioner for school finance, 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 expand an existing regulation and increase the number of individuals subject to the rule's applicability. The proposed amendment would update the definition of "fast growth district" in alignment with statute, which would increase the number of school districts to which the rule would apply.

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 create a new regulation; would not limit or repeal an existing regulation; would not 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. Lopez 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 the rule reflects changes to the fast growth allotment made by HB 1525, 87th Texas Legislature, Regular Session, 2021. 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 December 31, 2021, and ends January 31, 2022. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the Texas Register on December 31, 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/.

STATUTORY AUTHORITY. The amendment is proposed under Texas Education Code (TEC), §48.111, as amended by House Bill 1525, 87th Texas Legislature, Regular Session, 2021, which provides a fast growth allotment to school districts whose total enrollment growth, based on a prior six-year period, exceeds 250; and TEC, §12.106(a), which excludes open-enrollment charter schools from receiving the fast growth allotment.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code, §48.111 and §12.106(a).

§61.1009. Fast Growth Allotment.

(a) Definitions. The following definitions apply to the fast growth allotment in accordance with the Texas Education Code (TEC), §48.111.

(1) Fast growth district--A school district with total enrollment growth, based on a prior six-year period, that exceeds 250 [~~in which the percentage growth in student enrollment in the district over the preceding three school years is in the top quartile of student enrollment growth in school districts in the state for that period~~].

(2) Enrollment--The number of students reported by the school district in the fall submission to the Texas Student Data System Public Education Information Management System (TSDS PEIMS).

[~~(3) Enrollment growth--The percentage difference between the number of students enrolled in the most recent preceding school year and the number of students enrolled in the school year two years prior to the preceding school year.~~]

[~~(4) Basic allotment--The amount determined for the district under TEC, §48.051.~~]

(3) [~~(5)~~] Applicable school year--The school year in which the Texas Education Agency (TEA) will deliver the fast growth allotment to the district.

(b) Eligibility. School districts are eligible for this allotment. TEC, §12.106(a), excludes charter holders from eligibility for the fast growth allotment.

(c) Determination of allotment. The commissioner of education will determine a district's eligibility and calculate the allotment to which a district is entitled in the following manner.

(1) Prior to the start of the applicable school year, each school district's enrollment for the preceding school year, and for the six school [~~year three~~] years prior to the applicable school year, will be obtained from TSDS PEIMS.

(2) The student enrollment growth value as defined by TEC, §48.111(a), [~~percentage~~] for each district will be calculated by subtracting 250 from the difference in the number of students enrolled in the district during the school year preceding the current school year and the number of students enrolled in the district six years prior to the current school year, excluding from the comparison students enrolled in a full-time accredited virtual campus through the Texas Virtual School Network under TEC, Chapter 30A [~~dividing the preceding year enrollment by the enrollment from three years prior to the applicable school year~~].

(3) The cumulative growth value over 250 for each district will be the sum of all current year growth values that are sorted in the order of lowest to highest, ending with the growth value for that district.

(4) The percentile of growth for each district will be calculated by dividing the district's cumulative growth value over 250 by the statewide total value of cumulative growth over 250.

(5) For the 2021-2022 school year, TEA will freeze the hold harmless comparison between the district's fast growth allotment for the 2019-2020 school year and the district's fast growth allotment for the 2021-2022 school year on January 1, 2022, and the fast growth allotment hold harmless amount that a district receives for the 2021-2022 school year under TEC, §48.111(d) and (d-1), will not change after that date.

(6) Using the sorting methodology described in paragraphs (3) and (4) of this subsection:

(A) school districts whose percentile of growth is greater than or includes 60.00% are determined to be in the tier with the highest funding weight;

(B) school districts whose percentile of growth is greater than or includes 30.00% and less than 60.00% are determined to be in the tier with the middle funding weight; and

(C) school districts whose percentile of growth is less than 30.00% are determined to be in the tier with the lowest funding weight.

[~~(3) Enrollment growth percentage will be sorted from lowest-growth percentage to highest-growth percentage.~~]

[~~(4) The cumulative enrollment for the preceding year will be summed in the order prescribed by paragraph (3) of this subsection. Cumulative enrollment is the sum of all preceding year enrollment values up to and including the current point in the sorted data.~~]

[~~(5) The percentile for each district will be calculated by dividing the cumulative preceding year enrollment by the statewide total preceding year enrollment.~~]

[~~(6) The school districts that have a percentile that is greater than or includes 75.00% are determined to be in the top quartile of student enrollment growth.~~]

[~~(7) For those districts determined to be in the top quartile of student enrollment growth, the basic allotment for each student in average daily attendance will be multiplied by 0.04 to determine the allotment to which the district is entitled.~~]

(7) [~~(8)~~] A determination of the commissioner made under this section is final and not subject to appeal.

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 December 20, 2021.

TRD-202105171
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Earliest possible date of adoption: January 30, 2022
For further information, please call: (512) 475-1497

PART 7. STATE BOARD FOR EDUCATOR CERTIFICATION

CHAPTER 228. REQUIREMENTS FOR EDUCATOR PREPARATION PROGRAMS

19 TAC §§228.2, 228.10, 228.30, 228.35

The State Board for Educator Certification (SBEC) proposes amendments to 19 Texas Administrative Code (TAC) §228.2, 228.10, 228.30, and 228.35, concerning requirements for educator preparation programs (EPPS). The proposed amendments would implement Senate Bills (SBs) 226 and 1590 and House Bills (HBs) 139 and 159, 87th Texas Legislature, Regular Session, 2021. The proposed amendments would allow EPPs the flexibility to conduct certain required formal observations virtually; would provide for training requirements for all educators with regard to students with disabilities and virtual instruction and virtual learning; and would allow service members, spouses, and veterans to get credit toward educator certification requirements for clinical and professional experience.

BACKGROUND INFORMATION AND JUSTIFICATION: The SBEC rules in 19 TAC Chapter 228, Requirements for Educator Preparation Programs, establish the requirements for EPPs in the preparation of candidates for Texas educator certification. The proposed amendments to Chapter 228 would implement SBs 1590 and 226 and HBs 139 and 159, 87th Texas Legislature, Regular Session, 2021. The following is a description of the proposed amendments.

§228.2. Definitions.

The proposed new §228.2(34) would implement HB 159, 87th Texas Legislature, Regular Session, 2021, to add *students with disabilities* for purposes of EPP requirements in preparing can-

didates for educator certification and to parallel its definition with that of *student with a disability* in Texas Education Code (TEC), §21.001(4), as added by HB 159.

A technical edit would renumber §228.2(34) and (35) to §228.2(35) and (36).

§228.10. Approval Process.

The proposed new §228.10(a)(1)(J) would implement HB 159, 87th Texas Legislature, Regular Session, 2021, by conditioning EPP approval and renewal of approval on the program, proving that it has met the requirements prescribed in TEC, §21.0443(b)(1) and (2), by showing that it has incorporated proactive instructional planning techniques throughout course work and across content areas, and that it has integrated inclusive practices for all students, including students with disabilities. The rule references TEC, §21.0443(b)(1) and (2), to incorporate by reference the statute's specific requirements for instructional planning techniques and inclusive practices.

Figure: 19 TAC §228.10(b)(1)

Under Component II: Admission, the proposed amendment to the figure would reflect the current requirement in §227.10(a)(5) that an EPP has informed non-teacher applicants in writing of any certificate issuance deficiencies prior to admission by specifying the evidence that an EPP must provide during a continuing approval review to demonstrate compliance. The proposed amendments would also reflect a technical edit to update the figure to match the current §227.10(a)(6)-(9). A technical edit that would renumber the figure to match the renumbering of §228.35(g)(1)-(9) is proposed in these amendments.

Proposed new Component X: Candidate Training and Support on Inclusive Practices for Students with Disabilities in Figure: 19 TAC §228.10(b)(1) would implement HB 159, 87th Texas Legislature, Regular Session, 2021, by specifying the evidence that an EPP must provide during a continuing approval review to demonstrate compliance with §228.30(c)(9) and §228.35(e)(2)(A)(iii), (e)(2)(B)(ix), and (e)(8), which set out requirements for EPPs related to candidate training and support on instruction regarding students with disabilities, to the use of proactive instructional planning techniques and to evidence-based inclusive instructional practices.

§228.30. Educator Preparation Curriculum.

The proposed amendment to §228.30(c)(8) would implement SB 226, 87th Texas Legislature, Regular Session, 2021, by adding virtual instruction and virtual learning to the list of topics that EPPs must include in their curriculum. The proposed amendment specifically references TEC, §21.001, to clarify that the definitions of *virtual instruction, virtual learning, digital literacy,* and *digital learning* are the same in the rule as in the statute.

The proposed new §228.30(c)(9) would implement HB 159, 87th Texas Legislature, Regular Session, 2021, by specifying that EPP curriculum must include subject matter related to educating students with disabilities, including the use of proactive instructional planning techniques and evidence-based instructional practices. The rule references TEC, §21.044(a-1), to incorporate by reference the statute's specific requirements for the training an educator candidate must receive regarding teaching students with disabilities, including proactive instructional techniques and evidence-based instructional practices.

Two technical edits that are proposed in §228.30(d)(4) and (e) would further define the cross reference to commissioner of education rules in 19 TAC Chapter 149.

§228.35. Preparation Program Coursework and/or Training.

The proposed amendment to §228.35(a)(5)(A) would implement HB 139, 87th Texas Legislature, Regular Session, 2021, by adding "clinical and professional experience" training to the list of appropriate credit toward certification requirements that EPPs must develop criteria and procedures to allow. HB 139 allows state licensing agencies to give military service members, spouses, and veterans credit toward certification requirements for clinical and professional experience.

SB 1590, 87th Texas Legislature, Regular Session, 2021, requires the SBEC to propose rules allowing options for candidate observations that require EPPs to provide for no fewer than three in-person observations, or two in-person observations and two virtual observations that are equivalent in rigor to in-person observations. The proposed amendment to §228.35(g) would implement SB 1590's requirement that virtual observations be equivalent in rigor to in-person options for formal observations by ensuring that virtual and in-person observations are similar in procedure and documentation. The proposed amendment would clarify that for each formal observation, whether face-to-face or virtual, the field supervisor at the EPP must participate in an individualized pre-observation conference with the candidate; document educational practices observed; provide written feedback through an individualized, synchronous, and interactive post-observation conference with the candidate; and provide a copy of the written feedback to the candidate's cooperating teacher or mentor.

Proposed new §228.35(g)(2) and proposed amendment to §228.35(g)(1)-(9) would implement SB 1590 by providing for flexible options for EPPs to conduct some formal observations virtually for educator candidates. The proposed amendment to §228.35(g)(1) and the proposed addition of new §228.35(g)(2) would maintain the current requirements for formal in-person observations and would ensure the virtual observations are as rigorous as in-person observations, as required by SB 1590. The proposed amendment would include renumbering paragraphs (2)-(8) to paragraphs (3)-(9) in §228.35(g) to accommodate the addition of proposed new §228.35(g)(2). In addition, the text in renumbered paragraphs (4)(A), (5)(A), (6)(A) and (B), (7)(A), and (9)(A) reflect the same text as in rule but was formatted with underlined text to meet *Texas Register* requirements.

Proposed amendment to renumbered §228.35(g)(5)-(8), where the rules currently require three in-person observations, would allow EPPs to conduct two in-person observations and two virtual observations instead. This would implement the provision of SB 1590 that requires the options for candidate observations to provide for at least two observations to occur in person and two additional observations to occur in virtual settings that are equivalent in rigor to in-person observations, or three observations to occur in person.

Proposed amendment to renumbered §228.35(g)(4) and (9) would provide that where the rules currently require EPPs to provide four or five in-person formal observations, EPPs could conduct two of those formal observations virtually. The proposed amendment would not increase the total number of required formal observations. The proposed amendment to §228.35(g)(4) and (9) would align SBEC rules with SB 1590

while still requiring EPPs to provide first-year teacher candidates in the classroom with five formal observations to support them in their teaching positions. The table below reflects the implications of the proposed rule for EPPs conducting formal observations.

Figure: 19 TAC Chapter 228 - Preamble

FISCAL IMPACT: Emily Garcia, associate commissioner for educator preparation, certification, and enforcement, has determined that for the first five-year period the proposal is in effect, there are potential fiscal implications to state and local governments and small businesses as a result of the proposed amendments to 19 TAC Chapter 228. The proposed amendments allowing EPPs to conduct virtual candidate observations are likely to create cost savings for each year of the first five years the proposed rule is in effect for the EPPs run by state or local government entities or small businesses from reduced staff travel time and expenses. TEA staff estimates that virtual observations will save EPPs approximately $50 per observation in EPP staff travel time and expenses when compared to the cost of in-person observations. However, it is impossible to estimate the total cost savings because it is unknowable how many EPPs will choose to offer virtual observations. The proposed new requirements for EPPs to include curriculum regarding virtual instruction, virtual learning, and educating students with disabilities are likely to increase costs for EPPs run by state or local government entities associated with developing that curriculum for each year of the first five years the proposed amendment is in effect, but that impact is created by the statutory requirement from HB 159 and SB 226, 87th Texas Legislature, Regular Session, 2021, and not the agency regulation. There are no additional costs or savings to entities required to comply with the proposal beyond that which the authorizing statute requires.

LOCAL EMPLOYMENT IMPACT: The proposal has no effect on local economy; therefore, no local employment impact statement is required under Texas Government Code (TGC), §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 TGC, §2006.002, is required.

COST INCREASE TO REGULATED PERSONS: The proposed new requirements for EPPs to include curriculum regarding virtual instruction, virtual learning, and educating students with disabilities are likely to increase costs for EPPs, including those run by state or local government entities, associated with developing that curriculum for each year of the first five years the proposed rule is in effect. However, these costs are necessary to implement legislation, specifically HB 159 and SB 226, 87th Texas Legislature, Regular Session, 2021. The proposal, therefore, is not subject to TGC, §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: The 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, the TEA staff has determined that the proposed amendments would create a new regulation that requires EPPs to include curriculum regarding virtual instruction, virtual learning, and educating students with disabilities, but that impact is created by the statutory requirements of HB 159 and SB 226, 87th Texas Legislature, Regular Session, 2021. The proposed amendments would also limit an existing regulation by allowing EPPs to conduct some candidate observations virtually rather than in-person.

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 or repeal 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: The public benefit anticipated as a result of the proposal would be clear guidance to EPPs on requirements for providing preparation to an individual seeking certification as an educator. There is no anticipated cost to persons who are required to comply with the proposal.

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

PRINCIPAL AND CLASSROOM TEACHER PAPERWORK REQUIREMENTS: The TEA staff 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 December 31, 2021, and ends January 31, 2022. A form for submitting public comments is available on the TEA website at https://tea.texas.gov/About_TEA/Laws_and_Rules/SBEC_Rules_(TAC)/Proposed_State_Board_for_Educator_Certification_Rules/. The SBEC will take registered oral and written comments on the proposal at the February 11, 2022 meeting in accordance with the SBEC board operating policies and procedures. All requests for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the Department of Educator Preparation, Certification, and Enforcement, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, Attention: Ms. Emily Garcia, associate commissioner for educator preparation, certification, and enforcement, not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on December 31, 2021.

STATUTORY AUTHORITY. The amendments are proposed under Texas Education Code (TEC), §21.031, which authorizes the SBEC to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators, and states that in proposing rules under the TEC, Chapter 21, Subchapter B, which states the SBEC shall ensure that all candidates for certification or renewal of certification demonstrate the knowledge and skills necessary to improve the performance of the diverse student population of this state; TEC, §21.041(b)(1), which requires the SBEC to propose rules that provide for the regulation of educators and the general administration of the TEC, Chapter 21, Subchapter B, in a manner consistent with the TEC, Chapter 21, Subchapter B; TEC, §21.041(b)(2), which requires the SBEC to propose rules that specify the classes of educator certificates to be issued, including emergency certificates; TEC, §21.044, as amended by HB 159 and SB 226, 87th Texas Legislature, Regular Session, 2021, which requires the SBEC to propose rules establishing training requirements a person must accomplish to obtain a certificate, enter an internship, or enter

an induction-year program; TEC, §21.0442(c), which requires the SBEC to ensure that an EPP requires at least 80 hours of instruction for a candidate seeking a Trade and Industrial Workforce Training certificate; TEC, §21.0443, as amended by HB 159, 87th Texas Legislature, Regular Session, 2021, which requires the SBEC to establish rules for the approval and renewal of EPPs, including requiring programs to incorporate proactive instructional planning techniques in their coursework, and to integrate inclusive practices, evidence-based instruction and intervention strategies throughout course work, clinical experience, and student teaching; TEC, §21.045(a), as amended by HB 159, 87th Texas Legislature, Regular Session, 2021, which requires the SBEC to establish standards to govern the approval and continuing accountability of all educator preparation programs; TEC, §21.0453, as amended by HB 159, 87th Texas Legislature, Regular Session, 2021, which states that the SBEC may propose rules as necessary to ensure that all EPPs provide the SBEC with accurate information; TEC, §21.0454, which requires the SBEC to develop a set of risk factors to assess the overall risk level of each EPP and use the set of risk factors to guide the TEA in conducting monitoring, inspections, and evaluations of EPPs; TEC, §21.0455, which requires the SBEC to propose rules necessary to establish a process for complaints to be directed against an EPP; TEC, §21.046(b), as amended by HB 159, 87th Texas Legislature, Regular Session, 2021, which states that the qualifications for certification as a principal must be sufficiently flexible so that an outstanding teacher may qualify by substituting approved experience and professional training for part of the educational requirements; TEC, §21.048(a), which states the SBEC shall propose rules prescribing the comprehensive examinations for each class of certificate issued by the board; TEC, §21.0485, which states the issuance requirements for certification to teach students with visual impairments; TEC, §21.0487(c), which states that because an effective principal is essential to school improvement, the SBEC shall ensure that each candidate for certification as a principal is of the highest caliber and that multi-level screening processes, validated comprehensive assessment programs, and flexible internships with successful mentors exist to determine whether a candidate for certification as a principal possesses the essential knowledge, skills, and leadership capabilities necessary for success; TEC, §21.0489(c), which states the eligibility for an Early Childhood: Prekindergarten-Grade 3 certificate; TEC, §21.049(a), which authorizes the SBEC to adopt rules providing for educator certification programs as an alternative to traditional EPPs; TEC, §21.0491, which requires the SBEC to create a probationary and standard trade and industrial workforce training certificate; TEC, §21.050(a), which states that a person who applies for a teaching certificate for which board rules require a bachelor's degree must possess a bachelor's degree with an academic major that is related to the curriculum as prescribed under Subchapter A, Chapter 28; TEC, §21.050(b), which states that the SBEC may not require more than 18 semester credit hours of education courses at the baccalaureate level for the granting of a teaching certificate; TEC, §21.050(c), which states that a person who receives a bachelor's degree required for a teaching certificate on the basis of higher education coursework completed while receiving an exemption from tuition and fees under the TEC, §54.363, may not be required to participate in any field experience or internship consisting of student teaching to receive a teaching certificate; TEC, §21.051, as amended by HB 159 and SB 1590, 87th Texas Legislature, Regular Session, 2021, which provides a requirement that before a school may employ a certification candidate as a teacher of record, the candidate must have completed at least 15 hours of field-based experience in which the candidate was actively engaged at an approved school in instructional or educational activities involving a diverse student population under supervision, and gives SBEC rulemaking authority to propose rules providing flexible options for field-based experiences or internships required for certification that involve interaction with a diverse student population and options for candidate observations; Texas Occupations Code (TOC), §55.004, as amended and added by HB 139, 87th Texas Legislature, Regular Session, 2021, which requires state agencies to adopt rules for issuance of licensure to members of the military community and provides alternatives to become eligible for licensure; and TOC, §55.007, which provides that verified military service, training, and education be credited toward licensing requirements.

CROSS REFERENCE TO STATUTE. The amendments implement Texas Education Code, §§21.031; 21.041(b)(1) and (2); 21.044, as amended by HB 159 and SB 226, 87th Texas Legislature, Regular Session, 2021; 21.0442(c); 21.0443, as amended by HB 159, 87th Texas Legislature, Regular Session, 2021; 21.045(a), as amended by HB 159, 87th Texas Legislature, Regular Session, 2021; 21.0453, as amended by HB 159, 87th Texas Legislature, Regular Session, 2021; 21.0454; 21.0455; 21.046(b), as amended by HB 159, 87th Texas Legislature, Regular Session, 2021; 21.048(a); 21.0485; 21.0487(c); 21.0489(c); 21.049(a); 21.0491; 21.050(a)-(c); and 21.051, as amended by HB 159 and SB 1590, 87th Texas Legislature, Regular Session, 2021; and the Texas Occupations Code (TOC), §55.004, as amended and added by HB 139, 87th Texas Legislature, Regular Session; and §55.007.

§228.2. Definitions.

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

(1) Academic year--If not referring to the academic year of a particular public, private, or charter school or institution of higher education, September 1 through August 31.

(2) Accredited institution of higher education--An institution of higher education that, at the time it conferred the degree, was accredited or otherwise approved by an accrediting organization recognized by the Texas Higher Education Coordinating Board.

(3) Alternative certification program--An approved educator preparation program, delivered by entities described in §228.20(a) of this title (relating to Governance of Educator Preparation Programs), specifically designed as an alternative to a traditional undergraduate certification program, for individuals already holding at least a bachelor's degree from an accredited institution of higher education.

(4) Benchmarks--A record similar to a transcript for each candidate enrolled in an educator preparation program documenting the completion of admission, program, certification, and other requirements.

(5) Campus supervisor--A school administrator or designee responsible for the annual performance appraisal of an intern.

(6) Candidate--An individual who has been formally or contingently admitted into an educator preparation program; also referred to as an enrollee or participant.

(7) Candidate coach--A person as defined in §228.33(b)(1)-(3) of this title (relating to Intensive Pre-Service) who participates in a minimum of four observation/feedback coaching cycles provided by program supervisors, completes a Texas Education

Agency-approved observation training or has completed a minimum of 150 hours of observation/feedback training, and has current certification in the class in which supervision is provided.

(8) Certification category--A certificate type within a certification class, as described in Chapter 233 of this title (relating to Categories of Classroom Teaching Certificates).

(9) Certification class--A certificate, as described in §230.33 of this title (relating to Classes of Certificates), that has defined characteristics; may contain one or more certification categories, as described in Chapter 233 of this title.

(10) Classroom teacher--An educator who is employed by a school or district and who, not less than an average of four hours each day, teaches in an academic instructional setting or a career and technical instructional setting. This term does not include an educational aide or a full-time administrator.

(11) Clinical teaching--A supervised educator assignment through an educator preparation program at a public school accredited by the Texas Education Agency (TEA) or other school approved by the TEA for this purpose that may lead to completion of a standard certificate; also referred to as student teaching.

(12) Clock-hours--The actual number of hours of coursework or training provided; for purposes of calculating the training and coursework required by this chapter, one semester credit hour at an accredited institution of higher education is equivalent to 15 clock-hours. Clock-hours of field-based experiences, clinical teaching, internship, and practicum are actual hours spent in the required educational activities and experiences.

(13) Contingency admission--Admission as described in §227.15 of this title (relating to Contingency Admission).

(14) Cooperating teacher--For a clinical teacher candidate, an educator who is collaboratively assigned by the educator preparation program (EPP) and campus administrator; who has at least three years of teaching experience; who is an accomplished educator as shown by student learning; who has completed cooperating teacher training, including training in how to coach and mentor teacher candidates, by the EPP within three weeks of being assigned to a clinical teacher; who is currently certified in the certification category for the clinical teaching assignment for which the clinical teacher candidate is seeking certification; who guides, assists, and supports the candidate during the candidate's clinical teaching in areas such as planning, classroom management, instruction, assessment, working with parents, obtaining materials, district policies; and who reports the candidate's progress to that candidate's field supervisor.

(15) Educator preparation program--An entity that must be approved by the State Board for Educator Certification to recommend candidates in one or more educator certification classes.

(16) Entity--The legal entity that is approved to deliver an educator preparation program.

(17) Field-based experiences--Introductory experiences for a classroom teacher certification candidate involving, at the minimum, reflective observation of Early Childhood-Grade 12 students, teachers, and faculty/staff members engaging in educational activities in a school setting.

(18) Field supervisor--A currently certified educator, hired by the educator preparation program, who preferably has advanced credentials, to observe candidates, monitor their performance, and provide constructive feedback to improve their effectiveness as educators. A field supervisor shall have at least three years of experience and current certification in the class in which supervision is provided. A field supervisor shall be an accomplished educator as shown by student learning. A field supervisor with experience as a campus-level administrator and who holds a current certificate that is appropriate for a principal assignment may also supervise classroom teacher, master teacher, and reading specialist candidates. A field supervisor with experience as a district-level administrator and who holds a current certificate that is appropriate for a superintendent assignment may also supervise principal candidates. If an individual is not currently certified, an individual must hold at least a master's degree in the academic area or field related to the certification class for which supervision is being provided and comply with the same number, content, and type of continuing professional education requirements described in §232.11 of this title (relating to Number and Content of Required Continuing Professional Education Hours)[~~, §232.13 of this title (relating to Number of Required Continuing Professional Education Hours by Classes of Certificates),~~] and §232.15 of this title (relating to Types of Acceptable Continuing Professional Education Activities). A field supervisor shall not be employed by the same school where the candidate being supervised is completing his or her clinical teaching, internship, or practicum. A mentor, cooperating teacher, or site supervisor, assigned as required by §228.35(f) of this title (relating to Preparation Program Coursework and/or Training), may not also serve as a candidate's field supervisor.

(19) Formal admission--Admission as described in §227.17 of this title (relating to Formal Admission).

(20) Head Start Program--The federal program established under the Head Start Act (42 United States Code, §9801 et seq.) and its subsequent amendments.

(21) Initial certification--The first Texas certificate in a class of certificate issued to an individual based on participation in an approved educator preparation program.

(22) Intensive Pre-Service--An educator assignment supervised by an educator preparation program accredited and approved by the State Board for Educator Certification prior to a candidate meeting the requirements for issuance of intern and probationary certificates.

(23) Intern certificate--A type of certificate as specified in §230.36 of this title (relating to Intern Certificates) that is issued to a candidate who has passed all required content pedagogy certification examinations and is completing initial requirements for certification through an approved educator preparation program.

(24) Internship--A paid supervised classroom teacher assignment for one full school year at a public school accredited by the Texas Education Agency (TEA) or other school approved by the TEA for this purpose that may lead to completion of a standard certificate.

(25) Late hire--An individual who has not been accepted into an educator preparation program before the 45th day before the first day of instruction and who is hired for a teaching assignment by a school after the 45th day before the first day of instruction or after the school's academic year has begun.

(26) Mentor--For an internship candidate, an educator who is collaboratively assigned by the campus administrator and the educator preparation program (EPP); who has at least three years of teaching experience; who is an accomplished educator as shown by student learning; who has completed mentor training, including training in how to coach and mentor teacher candidates, by an EPP within three weeks of being assigned to the intern; who is currently certified in the certification category in which the internship candidate is seeking certification; who guides, assists, and supports the candidate during the internship in areas such as planning, classroom management, instruction, assessment, working with parents, obtaining materials, district policies; and who reports the candidate's progress to that candidate's field supervisor.

(27) Pedagogy--The art and science of teaching, incorporating instructional methods that are developed from scientifically-based research.

(28) Post-baccalaureate program--An educator preparation program, delivered by an accredited institution of higher education and approved by the State Board for Educator Certification to recommend candidates for certification, that is designed for individuals who already hold at least a bachelor's degree and are seeking an additional degree.

(29) Practicum--A supervised educator assignment at a public school accredited by the Texas Education Agency (TEA) or other school approved by the TEA for this purpose that is in a school setting in the particular class for which a certificate in a class other than classroom teacher is sought.

(30) Probationary certificate--A type of certificate as specified in §230.37 of this title (relating to Probationary Certificates) that is issued to a candidate who has passed all required certification examinations and is completing requirements for certification through an approved educator preparation program.

(31) School day--If not referring to the school day of a particular public or private school, a school day shall be at least seven hours (420 minutes) each day, including intermissions and recesses.

(32) School year--If not referring to the school year of a particular public or private school, a school year shall provide at least 180 days (75,600 minutes) of instruction for students.

(33) Site supervisor--For a practicum candidate, an educator who has at least three years of experience in the aspect(s) of the certification class being pursued by the candidate; who is collaboratively assigned by the campus or district administrator and the educator preparation program (EPP); who is currently certified in the certification class in which the practicum candidate is seeking certification; who has completed training by the EPP, including training in how to coach and mentor candidates, within three weeks of being assigned to a practicum candidate; who is an accomplished educator as shown by student learning; who guides, assists, and supports the candidate during the practicum; and who reports the candidate's progress to the candidate's field supervisor.

(34) Students with disabilities--A student who is eligible to participate in a school district's special education program under Texas Education Code, §29.003, is covered by Section 504, Rehabilitation Act of 1973 (29 U.S.C. Section 794), or is covered by the Individuals with Disabilities Education Act (20 U.S.C. Section 1400 et seq.).

(35) [(34)] Texas Education Agency staff--Staff of the Texas Education Agency assigned by the commissioner of education to perform the State Board for Educator Certification's administrative functions and services.

(36) [(35)] Texas Essential Knowledge and Skills (TEKS)--The kindergarten-Grade 12 state curriculum in Texas adopted by the State Board of Education and used as the foundation of all state certification examinations.

§228.10. Approval Process.

(a) New entity approval. An entity seeking initial approval to deliver an educator preparation program (EPP) shall submit an application and proposal with evidence indicating the ability to comply with the provisions of this chapter, Chapter 227 of this title (relating to Provisions for Educator Preparation Candidates), Chapter 229 of this title (relating to Accountability System for Educator Preparation Programs), and Chapter 230 of this title (relating to Professional Educator Preparation and Certification). The proposal will be reviewed by the Texas Education Agency (TEA) staff and a pre-approval site visit will be conducted. The TEA staff shall recommend to the State Board for Educator Certification (SBEC) whether the entity should be approved. A post-approval site visit will be conducted after the first year of the EPP's operation.

(1) The proposal shall include the following program approval components:

(A) ownership and governance of the EPP;

(B) criteria for admission to the EPP;

(C) EPP curriculum;

(D) EPP coursework and/or training, including ongoing support during clinical teaching, internship, and practicum experiences;

(E) certification procedures;

(F) assessment and evaluation of candidates for certification and EPP improvement;

(G) professional conduct of EPP staff and candidates;

(H) EPP complaint procedures; [and]

(I) required submissions of information, surveys, and other accountability data; and [.]

(J) as required under Texas Education Code (TEC), §21.0443(b)(1) and (2), proactive instructional planning techniques throughout the course work for candidates and across content areas and inclusive practices for all students, including students with disabilities, throughout coursework and clinical experience for candidates.

(2) The proposal shall also include identification of the classes and categories of certificates proposed to be offered by the entity.

(b) Continuing entity approval. An entity approved by the SBEC under this chapter shall be reviewed at least once every five years; however, a review may be conducted at any time at the discretion of the TEA staff.

(1) At the time of the review, the entity shall submit to the TEA staff a status report regarding its compliance with existing standards and requirements for EPPs. An EPP is responsible for establishing procedures and practices sufficient to ensure the security of information against unauthorized or accidental access, disclosure, modification, destruction, or misuse prior to the expiration of the retention period. Evidence of compliance is described in the figure provided in this paragraph.
Figure: 19 TAC §228.10(b)(1)
[Figure: 19 TAC §228.10(b)(1)]

(2) Unless specified otherwise, the entity must retain evidence of compliance described in the figure in paragraph (1) of this subsection for a period of five years.

(3) TEA staff shall, at the minimum, use the following risk factors to determine the need for discretionary reviews and the type of five-year reviews:

(A) a history of the program's compliance with state law and board rules, standards, and procedures, with consideration given to:

(i) the seriousness of any violation of a rule, standard, or procedure;

(ii) whether the violation resulted in an action being taken against the program;

(iii) whether the violation was promptly remedied by the program;

(iv) the number of alleged violations; and

(v) any other matter considered to be appropriate in evaluating the program's compliance history;

(B) whether the program meets the accountability standards under TEC [~~Texas Education Code~~], §21.045; and

(C) whether a program is accredited by other organizations.

(c) Approval of clinical teaching for an alternative certification program. An alternative certification program seeking approval to implement a clinical teaching component shall submit a description of the following elements of the program for approval by the TEA staff on an application in a form developed by the TEA staff that shall include, at a minimum:

(1) general clinical teaching program description, including conditions under which clinical teaching may be implemented;

(2) selection criteria for clinical teachers;

(3) selection criteria for cooperating teachers;

(4) description of support and communication between candidates, cooperating teachers, and the alternative certification program;

(5) description of program supervision; and

(6) description of how candidates are evaluated.

(d) Addition of certificate categories and classes.

(1) An EPP that is rated "accredited," as provided in §229.4 of this title (relating to Determination of Accreditation Status), may request additional certificate categories be approved by TEA staff, by submitting an application in a form developed by the TEA staff that shall include, at a minimum, the curriculum matrix; a description of how the standards for Texas educators are incorporated into the EPP; and documentation showing that the program has the staff knowledge and expertise to support individuals participating in each certification category being requested. The curriculum matrix must include the standards, framework competencies, applicable Texas Essential Knowledge and Skills, course and/or module names, and the benchmarks or assessments used to measure successful program progress.

(2) An EPP rated "accredited" and currently approved to offer a certificate for which the SBEC is changing the grade level of the certificate may request to offer the preapproved category at different grade levels by submitting an application in a form developed by the TEA staff that shall include, at a minimum, a modified curriculum matrix that includes the standards, course and/or module names, and the benchmarks or assessments used to measure successful program progress. The requested additional certificate categories must be within the classes of certificates for which the EPP has been previously approved by the SBEC.

(3) An EPP that is not rated "accredited" may not apply to offer additional certificate categories or classes of certificates.

(4) An EPP that is rated "accredited" may request the addition of a certificate class that has not been previously approved by the SBEC, but must present a full proposal on an application in a form developed by the TEA staff for consideration and approval by the SBEC.

(e) Addition of program locations. An EPP that is rated "accredited," may open additional locations, provided the program informs the SBEC of any additional locations at which the program is providing educator preparation 60 days prior to providing educator preparation at the location. Additional program locations must operate in accordance with the program components under which the program has been approved to operate.

(f) Contingency of approval. Approval of an EPP by the SBEC, including each specific certificate class and category, is contingent upon approval by other lawfully established governing bodies such as the Texas Higher Education Coordinating Board, boards of regents, or school district boards of trustees. Continuing EPP approval is contingent upon compliance with superseding state and federal law.

(g) Notwithstanding any other provisions of this section, a program that is approved to offer certificates that the SBEC has replaced with new certificates, which require a science of teaching reading assessment, may be approved to offer the certificates by submitting on or before December 1, 2020, a request to offer the new certificates in a form developed by the TEA staff. This request must include at a minimum an attestation signed by the program's legal authority of the program's intent to modify its curriculum by January 1, 2021, as necessary to prepare candidates for the new certificate. Programs may be approved to offer the new certificates only for the route(s) for which they are approved to offer the existing certificates. A program that does not file a request for approval to offer the new certificates on or before December 1, 2020, may apply for authorization using the process described in subsection (d) of this section. The eligible certificates are as follows:

(1) a program approved to offer Core Subjects: Early Childhood-6 may request to offer Core Subjects with Science of Teaching Reading: Early Childhood-6;

(2) a program approved to offer Core Subjects: Grades 4-8 may request to offer Core Subjects with Science of Teaching Reading: Grades 4-8;

(3) a program approved to offer English Language Arts and Reading: Grades 4-8 may request to offer English Language Arts and Reading with Science of Teaching Reading: Grades 4-8; and

(4) a program approved to offer English Language Arts and Reading/Social Studies: Grades 4-8 may request to offer English Language Arts and Reading/Social Studies with Science of Teaching Reading: Grades 4-8.

§228.30. Educator Preparation Curriculum.

(a) The educator standards adopted by the State Board for Educator Certification shall be the curricular basis for all educator preparation and, for each certificate, address the relevant Texas Essential Knowledge and Skills (TEKS).

(b) The curriculum for each educator preparation program shall rely on scientifically-based research to ensure educator effectiveness.

(c) The following subject matter shall be included in the curriculum for candidates seeking initial certification in any certification class:

(1) the code of ethics and standard practices for Texas educators, pursuant to Chapter 247 of this title (relating to Educators' Code of Ethics), which include:

(A) professional ethical conduct, practices, and performance;

(B) ethical conduct toward professional colleagues; and

(C) ethical conduct toward students;

(2) instruction in detection and education of students with dyslexia, as indicated in the Texas Education Code (TEC), §21.044(b);

(3) instruction regarding mental health, substance abuse, and youth suicide, as indicated in the TEC, §21.044(c-1). Instruction acquired from the list of recommended best practice-based programs or from an accredited institution of higher education or an alternative certification program as part of a degree plan shall be implemented as required by the provider of the best practice-based program or research-based practice;

(4) the skills that educators are required to possess, the responsibilities that educators are required to accept, and the high expectations for students in this state;

(5) the importance of building strong classroom management skills;

(6) the framework in this state for teacher and principal evaluation;

(7) appropriate relationships, boundaries, and communications between educators and students; [and]

(8) instruction in digital learning, virtual instruction, and virtual learning, as defined in TEC, §21.001, including a digital literacy evaluation followed by a prescribed digital learning curriculum. The instruction required must:

(A) be aligned with the latest version of the International Society for Technology in Education's (ISTE) standards as appears on the ISTE website;

(B) provide effective, evidence-based strategies to determine a person's degree of digital literacy; and

(C) include resources to address any deficiencies identified by the digital literacy evaluation; and [.]

(9) instruction regarding students with disabilities, the use of proactive instructional planning techniques, and evidence-based inclusive instructional practices, as required under TEC, §21.044(a-1).

(d) The following subject matter shall be included in the curriculum for candidates seeking initial certification in the classroom teacher certification class:

(1) the relevant TEKS, including the English Language Proficiency Standards;

(2) reading instruction, including instruction that improves students' content-area literacy;

(3) for certificates that include early childhood and prekindergarten, the Prekindergarten Guidelines; and

(4) the skills and competencies as prescribed in Chapter 235 of this title (relating to Classroom Teacher Certification Standards) and captured in the Texas teacher standards in Chapter 149, Subchapter AA, of Part 2 of this title (relating to Teacher Standards).

(e) For candidates seeking certification in the principal certification class, the curriculum shall include the skills and competencies as prescribed in Chapter 241 of this title (relating to Certification as Principal) and captured in the Texas administrator standards, as indicated in Chapter 149, Subchapter BB, of Part 2 of this title (relating to Administrator Standards).

(f) The following educator content standards from Chapter 235 of this title shall be included in the curriculum for candidates who hold a valid standard, provisional, or one-year classroom teacher certificate specified in §230.31 of this title (relating to Types of Certificates) in a certificate category that allows the candidates who are seeking the Early Childhood: Prekindergarten-Grade 3 certificate to teach all subjects in Prekindergarten, Kindergarten, Grade 1, Grade 2, or Grade 3:

(1) Child Development provisions of the Early Childhood: Prekindergarten-Grade 3 Content Standards;

(2) Early Childhood-Grade 3 Pedagogy and Professional Responsibilities Standards; and

(3) Science of Teaching Reading Standards.

§228.35. Preparation Program Coursework and/or Training.

(a) Coursework and/or training for candidates seeking initial certification in any certification class.

(1) An educator preparation program (EPP) shall provide coursework and/or training to adequately prepare candidates for educator certification and ensure the educator is effective in the classroom.

(2) Coursework and/or training shall be sustained, rigorous, intensive, interactive, candidate-focused, and performance-based.

(3) All coursework and/or training shall be completed prior to EPP completion and standard certification.

(4) With appropriate documentation such as certificate of attendance, sign-in sheet, or other written school district verification, 50 clock-hours of training may be provided by a school district and/or campus that is an approved Texas Education Agency (TEA) continuing professional education provider to a candidate who is considered a late hire. The training provided by the school district and/or campus must meet the criteria described in the Texas Education Code (TEC), §21.451 (Staff Development Requirements) and must be directly related to the certificate being sought.

(5) Each EPP must develop and implement specific criteria and procedures that allow:

(A) military service member or military veteran candidates to credit verified military service, training, clinical and professional experience, or education toward the training, education, work experience, or related requirements (other than certification examinations) for educator certification requirements, provided that the military service, training, or education is directly related to the certificate being sought; and

(B) candidates who are not military service members or military veterans to substitute prior or ongoing service, training, or education, provided that the experience, education, or training is not also counted as a part of the internship, clinical teaching, or practicum requirements, was provided by an approved EPP or an accredited institution of higher education within the past five years, and is directly related to the certificate being sought.

(6) Coursework and training that is offered online must meet, or the EPP must be making progress toward meeting, criteria set for accreditation, quality assurance, and/or compliance with one or more of the following:

(A) Accreditation or Certification by the Distance Education Accrediting Commission;

(B) Program Design and Teaching Support Certification by Quality Matters;

(C) Part 1, Chapter 4, Subchapter P, of this title (relating to Approval of Distance Education Courses and Programs for Public Institutions); or

(D) Part 1, Chapter 7 of this title (relating to Degree Granting Colleges and Universities Other than Texas Public Institutions).

(b) Coursework and/or training for candidates seeking initial certification in the classroom teacher certification class. An EPP shall provide each candidate with a minimum of 300 clock-hours of coursework and/or training. An EPP shall provide a minimum of 200 clock-hours of coursework and/or training for a candidate seeking a Trade and Industrial Workforce Training certificate as specified by §233.14(e) of this title (relating to Career and Technical Education (Certificates requiring experience and preparation in a skill area)). Unless a candidate qualifies as a late hire, a candidate shall complete the following prior to any clinical teaching or internship:

(1) a minimum of 30 clock-hours of field-based experience. Up to 15 clock-hours of this field-based experience may be provided by use of electronic transmission or other video or technology-based method; and

(2) 150 clock-hours of coursework and/or training as prescribed in §228.30(d)(4) of this title (relating to Educator Preparation Curriculum) that allows candidates to demonstrate proficiency in:

(A) designing clear, well-organized, sequential, engaging, and flexible lessons that reflect best practice, align with standards and related content, are appropriate for diverse learners and encourage higher-order thinking, persistence, and achievement;

(B) formally and informally collecting, analyzing, and using student progress data to inform instruction and make needed lesson adjustments;

(C) ensuring high levels of learning, social-emotional development, and achievement for all students through knowledge of students, proven practices, and differentiated instruction;

(D) clearly and accurately communicating to support persistence, deeper learning, and effective effort;

(E) organizing a safe, accessible, and efficient classroom;

(F) establishing, communicating, and maintaining clear expectations for student behavior;

(G) leading a mutually respectful and collaborative class of actively engaged learners;

(H) meeting expectations for attendance, professional appearance, decorum, procedural, ethical, legal, and statutory responsibilities;

(I) reflect on his or her practice; and

(J) effectively communicating with students, families, colleagues, and community members.

(c) Coursework and/or training for candidates seeking initial certification in a certification class other than classroom teacher. An EPP shall provide coursework and/or training to ensure that the educator is effective in the assignment. An EPP shall provide a candidate with a minimum of 200 clock-hours of coursework and/or training that is directly aligned to the educator standards for the applicable certification class.

(d) Late hire provisions. A late hire for a school district teaching position may begin employment under an intern or probationary certificate before completing the pre-internship requirements of subsection (b) of this section, but shall complete these requirements within 90 school days of assignment.

(e) Educator preparation program delivery. An EPP shall provide evidence of ongoing and relevant field-based experiences throughout the EPP in a variety of educational settings with diverse student populations, including observation, modeling, and demonstration of effective practices to improve student learning.

(1) For initial certification in the classroom teacher certification class, each EPP shall provide field-based experiences, as defined in §228.2 of this title (relating to Definitions), for a minimum of 30 clock-hours. The field-based experiences must be completed prior to assignment in an internship or clinical teaching.

(A) Field-based experiences must include 15 clock-hours in which the candidate, under the direction of the EPP, is actively engaged in instructional or educational activities that include:

(i) authentic school settings in a public school accredited by the TEA or other school approved by the TEA for this purpose;

(ii) instruction by content certified teachers;

(iii) actual students in classrooms/instructional settings with identity-proof provisions;

(iv) content or grade-level specific classrooms/instructional settings; and

(v) written reflection of the observation.

(B) Up to 15 clock-hours of field-based experience may be provided by use of electronic transmission or other video or technology-based method. Field-based experience provided by use of electronic transmission or other video or technology-based method must include:

(i) direction of the EPP;

(ii) authentic school settings in an accredited public or private school;

(iii) instruction by content certified teachers;

(iv) actual students in classrooms/instructional settings with identity-proof provisions;

(v) content or grade-level specific classrooms/instructional settings; and

(vi) written reflection of the observation.

(C) Up to 15 clock-hours of field-based experience may be satisfied by serving as a long-term substitute. A long-term substitute is an individual who has been hired by a school or district to work at least 30 consecutive days in an assignment as a classroom teacher. Experience may occur after the candidate's admission to an EPP or during the two years before the date the candidate is admitted to the EPP. The candidate's experience in instructional or educational activities must be documented by the EPP and must be obtained at a public or private school accredited or approved for the purpose by the TEA.

(2) For initial certification in the classroom teacher certification class, each EPP shall also provide at least one of the following.

(A) Clinical Teaching. A candidate must have a clinical teaching assignment for each subject area in which the candidate is seeking initial certification.

(i) For a candidate seeking initial certification in only one subject area, the following provisions apply.

(I) Clinical teaching must meet one of the following requirements:

(-a-) a minimum of 14 weeks (no fewer than 70 full days), with a full day being 100% of the school day; or

(-b-) a minimum of 28 weeks (no fewer than 140 half days), with a half day being 50% of the school day.

(II) A clinical teaching assignment as described in subclause (I)(-a-) of this clause shall not be less than an average of four hours each day in the subject area and grade level of certification sought. The average includes intermissions and recesses but does not include conference and duty-free lunch periods.

(ii) For a candidate seeking initial certification in more than one subject area, the primary teaching assignment must meet the requirements of clause (i)(I)(-a-) of this subparagraph. Additional clinical teaching assignments in other subject areas may be less than an average of four hours each day during the 14 weeks of clinical teaching if:

(I) the primary assignment is not less than an average of four hours each day in the subject area and grade level of certification sought;

(II) the EPP is approved to offer preparation in the certification category required for the additional assignment;

(III) the EPP provides ongoing support for each assignment as prescribed in subsection (g) of this section;

(IV) the EPP provides coursework and training for each assignment to adequately prepare the candidate to be effective in the classroom; and

(V) the campus administrator agrees to assign a qualified cooperating teacher appropriate to each assignment.

(iii) Clinical teaching is successful when the candidate demonstrates proficiency in each of the educator standards for the assignment and the field supervisor and cooperating teacher recommend to the EPP that the candidate should be recommended for a standard certificate. If either the field supervisor or cooperating teacher do not recommend that the candidate should be recommended for a standard certificate, the person who does not recommend the candidate must provide documentation supporting the lack of recommendation to the candidate and either the field supervisor or cooperating teacher.

(iv) An EPP may permit a full day clinical teaching assignment up to 5 full days fewer than the minimum and a half day clinical teaching assignment up to 10 half days fewer than the minimum if due to maternity leave, military leave, illness, or bereavement.

(B) Internship. An internship must be for a minimum of one full school year for the classroom teacher assignment or assignments that match the certification category or categories for which the candidate is prepared by the EPP.

(i) An EPP may permit an internship of up to 30 school days fewer than the minimum if due to maternity leave, military leave, illness, bereavement, or if the late hire date is after the first day of the school year.

(ii) The beginning date for an internship for the purpose of field supervision is the first day of instruction with students in the school or district in which the internship takes place.

(iii) An internship assignment shall not be less than an average of four hours each day in the subject area and grade level of certification sought. The average includes intermissions and recesses but does not include conference and duty-free lunch periods. An EPP may permit an additional internship assignment of less than an average of four hours each day if:

(I) the primary assignment is not less than an average of four hours each day in the subject area and grade level of certification sought;

(II) the EPP is approved to offer preparation in the certification category required for the additional assignment;

(III) the EPP provides ongoing support for each assignment as prescribed in subsection (g) of this section;

(IV) the EPP provides coursework and training for each assignment to adequately prepare the candidate to be effective in the classroom; and

(V) the employing school or district notifies the candidate and the EPP in writing that an assignment of less than four hours will be required.

(iv) A candidate must hold an intern or probationary certificate while participating in an internship. A candidate must meet the requirements and conditions, including the subject matter knowledge requirement, prescribed in §230.36 of this title (relating to Intern Certificates) and §230.37 of this title (relating to Probationary Certificates) to be eligible for an intern or probationary certificate.

(v) An EPP may recommend an additional internship if:

(I) the EPP certifies that the first internship was not successful, the EPP has developed a plan to address any deficiencies identified by the candidate and the candidate's field supervisor, and the EPP implements the plan during the additional internship; or

(II) the EPP certifies that the first internship was successful and that the candidate is making satisfactory progress toward completing the EPP before the end of the additional internship.

(vi) An EPP must provide ongoing support to a candidate as described in subsection (g) of this section for the full term of the initial and any additional internship, unless, prior to the expiration of that term:

(I) a standard certificate is issued to the candidate during any additional internship under a probationary certificate;

(II) the candidate resigns, is non-renewed, or is terminated by the school or district; or

(III) the candidate is discharged or is released from the EPP; or

(IV) the candidate withdraws from the EPP; or

(V) the internship assignment does not meet the requirements described in this subparagraph.

(vii) If the candidate leaves the internship assignment for any of the reasons identified in clause (vi)(II)-(V) of this subparagraph:

(I) the EPP, the campus or district personnel, and the candidate must inform each other within one calendar week of the candidate's last day in the assignment; and

(II) TEA must receive the certificate deactivation request with all related documentation from the EPP within two calendar weeks of the candidate's last day of the assignment in a format determined by TEA.

(viii) The EPP must communicate the requirements in clause (vii) of this subparagraph to candidates and campus or district personnel prior to the assignment start date.

(ix) An internship is successful when the candidate demonstrates proficiency in each of the educator standards for the assignment and the field supervisor and campus supervisor recommend to the EPP that the candidate should be recommended for a standard certificate. If either the field supervisor or campus supervisor do not recommend that the candidate should be recommended for a standard certificate, the person who does not recommend the candidate must provide documentation supporting the lack of recommendation to the candidate and either the field supervisor or campus supervisor.

(x) An internship for a Trade and Industrial Workforce Training certificate may be at an accredited institution of higher education if the candidate teaches not less than an average of four hours each day, including intermissions and recesses, in a dual credit career and technical instructional setting as defined by Part 1, Chapter 4, Subchapter D of this title (relating to Dual Credit Partnerships Between Secondary Schools and Texas Public Colleges).

(3) An EPP may request an exception to the clinical teaching option described in this subsection.

(A) Submission of Exception Request. The request for an exception must include an alternate requirement that will adequately prepare candidates for educator certification and ensure the educator is effective in the classroom. The request for an exception must be submitted in a form developed by the TEA staff that shall include:

(i) the rationale and support for the alternate clinical teaching option;

(ii) a full description and methodology of the alternate clinical teaching option;

(iii) a description of the controls to maintain the delivery of equivalent, quality education; and

(iv) a description of the ongoing monitoring and evaluation process to ensure that EPP objectives are met.

(B) Review, Approval, and Revocation of Exception Request.

(i) Exception requests will be reviewed by TEA staff, and the TEA staff shall recommend to the State Board for Educator Certification (SBEC) whether the exception should be approved. The SBEC may:

(I) approve the request;

(II) approve the request with conditions;

(III) deny approval of the request; or

(IV) defer action on the request pending receipt of further information.

(ii) If the SBEC approves the request with conditions, the EPP must meet the conditions specified in the request. If the EPP does not meet the conditions, the approval is revoked.

(iii) If the SBEC approves the request, the EPP must submit a written report of outcomes resulting from the clinical teaching exception to the TEA by September 15 of each academic year. If the EPP does not timely submit the report, the approval is revoked.

(iv) If the SBEC does approve the exception or an approval is revoked, an EPP must wait at least six months from the date of the denial or revocation before submitting a new request.

(4) Candidates participating in an internship or a clinical teaching assignment need to experience a full range of professional responsibilities that shall include the start of the school year. The start of the school year is defined as the first 15 instructional days of the school year. If these experiences cannot be provided through clinical teaching or an internship, they must be provided through field-based experiences.

(5) An internship or clinical teaching experience for certificates that include early childhood may be completed at a Head Start Program with the following stipulations:

(A) a certified teacher is available as a trained mentor;

(B) the Head Start program is affiliated with the federal Head Start program and approved by the TEA;

(C) the Head Start program teaches three- and four-year-old students; and

(D) the state's prekindergarten curriculum guidelines are being implemented.

(6) An internship or clinical teaching experience must take place in an actual school setting rather than a distance learning lab or virtual school setting.

(7) An internship or clinical teaching experience shall not take place in a setting where the candidate:

(A) has an administrative role over the mentor or cooperating teacher; or

(B) is related to the field supervisor, mentor, or cooperating teacher by blood (consanguinity) within the third degree or by marriage (affinity) within the second degree.

(8) For certification in a class other than classroom teacher, each EPP shall provide a practicum for a minimum of 160 clock-hours whereby a candidate must demonstrate proficiency in each of the educator standards for the certificate class being sought.

(A) A practicum experience must take place in an actual school setting rather than a distance learning lab or virtual school setting.

(B) A practicum may not take place exclusively during a summer recess.

(C) A practicum shall not take place in a setting where the candidate:

(i) has an administrative role over the site supervisor; or

(ii) is related to the field supervisor or site supervisor by blood (consanguinity) within the third degree or by marriage (affinity) within the second degree.

(D) An intern or probationary certificate may be issued to a candidate for a certification class other than classroom teacher who meets the requirements and conditions, including the subject matter knowledge requirement, prescribed in §230.36 of this title and §230.37 of this title.

(i) A candidate for an intern or probationary certificate in a certification class other than classroom teacher must meet all requirements established by the recommending EPP, which shall be based on the qualifications and requirements for the class of certification sought and the duties to be performed by the holder of a probationary certificate in that class.

(ii) An EPP may recommend an additional practicum under a probationary certificate if:

(I) the EPP certifies that the first practicum was not successful, the EPP has developed a plan to address any deficiencies

identified by the candidate and the candidate's field supervisor, and the EPP implements the plan during the additional practicum; or

(II) the EPP certifies that the first practicum was successful and that the candidate is making satisfactory progress toward completing the EPP before the end of the additional practicum.

(E) A practicum is successful when the field supervisor and the site supervisor recommend to the EPP that the candidate should be recommended for a standard certificate. If either the field supervisor or site supervisor does not recommend that the candidate should be recommended for a standard certificate, the person who does not recommend the candidate must provide documentation supporting the lack of recommendation to the candidate and either the field supervisor or site supervisor.

(9) Subject to all the requirements of this section, the TEA may approve a school that is not a public school accredited by the TEA as a site for field-based experience, internship, clinical teaching, and/or practicum.

(A) All Department of Defense Education Activity (DoDEA) schools, wherever located, and all schools accredited by the Texas Private School Accreditation Commission (TEPSAC) are approved by the TEA for purposes of field-based experience, internship, clinical teaching, and/or practicum.

(B) An EPP may file an application, with the appropriate fee specified in §229.9(6) of this title (relating to Fees for Educator Preparation Program Approval and Accountability), with the TEA for approval, subject to periodic review, of a public school, a private school, or a school system located within any state or territory of the United States, as a site for field-based experience. The application shall be in a form developed by the TEA staff and shall include, at a minimum, evidence showing that the instructional standards of the school or school system align with those of the applicable Texas Essential Knowledge and Skills (TEKS) and SBEC certification standards.

(C) An EPP may file an application, with the appropriate fee specified in §229.9(6) of this title, with the TEA for approval, subject to periodic review, of a public or private school for a candidate's placement located within any state or territory of the United States, as a site for clinical teaching or practicum required by this chapter.

(i) The clinical teaching or practicum site may be approved for a candidate who must complete requirements outside the state of Texas due to the following reasons if they occur following admission to the EPP:

(I) military assignment of candidate or spouse;

(II) illness of candidate or family member for whom the candidate is the primary caretaker;

(III) candidate becomes the primary caretaker for a family member residing out of state; or

(IV) candidate or spouse transfer of employment.

(ii) The application shall identify the circumstances that necessitate the request to complete clinical teaching or a practicum outside of the state of Texas and be in a form developed by the TEA staff and shall include, at a minimum:

(I) the accreditation(s) held by the school;

(II) a crosswalk comparison of the alignment of the instructional standards of the school with those of the applicable TEKS and SBEC certification standards;

(III) the certification, credentials, and training of the field supervisor(s) who will supervise candidates in the school; and

(IV) the measures that will be taken by the EPP to ensure that the candidate's experience will be equivalent to that of a candidate in a Texas public school accredited by the TEA.

(D) An EPP may file an application, with the appropriate fee specified in §229.9(6) of this title, with the TEA for approval, subject to periodic review, of a public or private school for a candidate's placement located outside the United States, as a site for clinical teaching or a practicum required by this chapter.

(i) The site may be approved for a candidate who must complete requirements outside the United States due to the following reasons if they occur following admission to the EPP:

(I) military assignment of candidate or spouse;

(II) illness of candidate or family member for whom the candidate is the primary caretaker;

(III) candidate becomes the primary caretaker for a family member residing out of country; or

(IV) candidate or spouse transfer of employment.

(ii) The application shall identify the circumstances that necessitate the request to complete clinical teaching or a practicum outside of the United States and be in a form developed by the TEA staff and shall include, at a minimum, the same provisions required in subparagraph (C)(ii) of this paragraph for schools located within any state or territory of the United States, with the addition of a description of the on-site program personnel and program support that will be provided and a description of the school's recognition by the U.S. State Department Office of Overseas Schools.

(f) Mentors, cooperating teachers, and site supervisors. In order to support a new educator and to increase educator retention, an EPP shall collaborate with the campus or district administrator to assign each candidate a mentor during the candidate's internship, assign a cooperating teacher during the candidate's clinical teaching experience, or assign a site supervisor during the candidate's practicum. If an individual who meets the certification category and/or experience criteria for a cooperating teacher, mentor, or site supervisor is not available, the EPP and campus or district administrator shall assign an individual who most closely meets the criteria and document the reason for selecting an individual that does not meet the criteria. The EPP is responsible for providing mentor, cooperating teacher, and/or site supervisor training that relies on scientifically-based research, but the program may allow the training to be provided by a school, district, or regional education service center if properly documented.

(g) Ongoing educator preparation program support for initial certification of teachers. Supervision of each candidate shall be conducted with the structured guidance and regular ongoing support of an experienced educator who has been trained as a field supervisor. Supervision provided on or after September 1, 2017, must be provided by a field supervisor who has completed TEA-approved observation training. The initial contact, which may be made by telephone, email, or other electronic communication, with the assigned candidate must occur within the first three weeks of assignment. For each formal observation, whether in-person or virtual, the field supervisor shall participate in an individualized pre-observation conference with the candidate, document educational practices observed; provide written feedback through an individualized, synchronous, and interactive post-observation conference with the candidate; and provide a copy of the written feedback to the candidate's cooperating teacher or mentor. Neither the pre-observation conference nor the post-observation conference need to be onsite. For candidates participating in an internship, the field supervisor shall provide a copy of the written feedback to the candidate's supervising campus administrator. Formal observations by

the field supervisor conducted through collaboration with school or district personnel can be used to meet the requirements of this subsection. Informal observations and coaching shall be provided by the field supervisor as appropriate. In a clinical teaching experience, the field supervisor shall collaborate with the candidate and cooperating teacher throughout the clinical teaching experience. For an internship, the field supervisor shall collaborate with the candidate, mentor, and supervising campus administrator throughout the internship.

(1) Each formal in-person observation must be at least 45 minutes in duration, must be conducted by the field supervisor, and must be on the candidate's site in a face-to-face setting.

(2) Each formal virtual observation must be:

(A) at least 45 minutes in length;

(B) conducted by the field supervisor;

(C) followed by a post-observation conference within 72 hours of the educational activity; and

(D) conducted through use of an unedited electronic transmission, video, or technology-based method.

(3) [(2)] An EPP must provide the first formal observation within the first third of all clinical teaching assignments and the first six weeks of all internship assignments.

(4) [(3)] For an internship under an intern certificate or an additional internship described in subsection (e)(2)(B)(v)(I) of this section: [, an EPP must provide a minimum of three formal observations during the first half of the internship and a minimum of two formal observations during the last half of the internship.]

(A) an EPP must provide a minimum of three formal observations during the first half of the internship and a minimum of two formal observations during the last half of the internship; and

(B) at least three of the minimum formal observations must be in-person.

(5) [(4)] For a first-year internship under a probationary certificate or an additional internship described in subsection (e)(2)(B)(v)(II) of this section: [, an EPP must provide a minimum of one formal observation during the first third of the assignment, a minimum of one formal observation during the second third of the assignment, and a minimum of one formal observation during the last third of the assignment.]

(A) an EPP must provide a minimum of one formal observation during the first third of the assignment, a minimum of one formal observation during the second third of the assignment, and a minimum of one formal observation during the last third of the assignment;

(B) at least two of the minimum formal observations must be in-person; and

(C) if an EPP chooses to provide formal virtual observations, it must provide at least two formal virtual observations in addition to the two minimum formal in-person observations.

(6) [(5)] If an internship under an intern certificate or an additional internship described in subsection (e)(2)(B)(v)(I) of this section involves certification in more than one certification category that cannot be taught concurrently during the same period of the school day: [, an EPP must provide a minimum of three observations in each assignment. For each assignment, the EPP must provide at least two formal observations during the first half of the internship and one formal observation during the second half of the internship.]

(A) an EPP must provide a minimum of three observations in each assignment;

(B) for each assignment, the EPP must provide at least two formal observations during the first half of the internship and one formal observation during the second half of the internship;

(C) at least two of the minimum formal observations must be in-person for each assignment; and

(D) if an EPP chooses to provide formal virtual observations, it must provide at least two formal virtual observations in addition to the two minimum formal in-person observations for each assignment.

(7) [(6)] For a first-year internship under a probationary certificate or an additional internship described in subsection (e)(2)(B)(v)(II) of this section that involves certification in more than one certification category that cannot be taught concurrently during the same period of the school day: [, an EPP must provide a minimum of one formal observation in each of the assignments during the first half of the assignment and a minimum of one formal observation in each assignment during the second half of the assignment.]

(A) an EPP must provide a minimum of one formal observation in each of the assignments during the first half of the assignment and a minimum of one formal observation in each assignment during the second half of the assignment;

(B) at least two of the minimum formal observations must be in-person for each assignment; and

(C) if an EPP chooses to provide formal virtual observations, it must provide at least two formal virtual observations in addition to the two minimum formal in-person observations for each assignment.

(8) [(7)] For a 14-week, full-day clinical teaching assignment, an EPP must provide a minimum of one formal observation during the first third of the assignment, a minimum of one formal observation during the second third of the assignment, and a minimum of one formal observation during the last third of the assignment. For an all-level clinical teaching assignment in more than one location or in an assignment that involves certification in more than one certification category that cannot be taught concurrently during the same period of the school day, a minimum of two formal observations must be provided during the first half of the assignment and a minimum of one formal observation must be provided during the second half of the assignment. For either of these assignments:

(A) at least two of the minimum formal observations must be in-person for each assignment; and

(B) if an EPP chooses to provide formal virtual observations, it must provide at least two formal virtual observations in addition to the two minimum formal in-person observations for each assignment.

(9) [(8)] For a 28-week, half-day clinical teaching assignment or a full-day clinical teaching assignment that exceeds 14 weeks and extends beyond one semester: [, an EPP must provide a minimum of two formal observations during the first half of the assignment and a minimum of two formal observations during the last half of the assignment.]

(A) an EPP must provide a minimum of two formal observations during the first half of the assignment and a minimum of two formal observations during the last half of the assignment; and

(B) at least two of the minimum formal observations must be in-person for each assignment.

(h) Ongoing educator preparation program support for certification in a certification class other than classroom teacher. Supervision of each candidate shall be conducted with the structured guidance and regular ongoing support of an experienced educator who has been trained as a field supervisor. Supervision provided on or after September 1, 2017, must be provided by a field supervisor who has completed TEA-approved observation training. The initial contact, which may be made by telephone, email, or other electronic communication, with the assigned candidate must occur within the first quarter of the assignment. For each formal observation, the field supervisor shall participate in an individualized pre-observation conference with the candidate; document educational practices observed; provide written feedback through an individualized, synchronous, and interactive post-observation conference with the candidate; and provide a copy of the written feedback to the candidate's site supervisor. Neither the pre-observation conference nor the post-observation conference need to be onsite. Formal observations conducted through collaboration with school or district personnel can be used to meet the requirements of this subsection. Informal observations and coaching shall be provided by the field supervisor as appropriate. The field supervisor shall collaborate with the candidate and site supervisor throughout the practicum experience.

(1) An EPP must provide a minimum of one formal observation within the first third of the practicum, one formal observation within the second third of the practicum, and one formal observation within the final third of the practicum.

(2) The three required formal observations must be at least 135 minutes in duration in total throughout the practicum and must be conducted by the field supervisor.

(3) If a formal observation is not conducted on the candidate's site in a face-to-face setting, the formal observation may be provided by use of electronic transmission or other video or technology-based method. A formal observation that is not conducted on the candidates' site in a face-to-face setting must include a pre- and post-conference.

(i) Coursework and/or training for candidates seeking Early Childhood: Prekindergarten-Grade 3 certification.

(1) In support of the educator standards that are the curricular basis of the Early Childhood: Prekindergarten-Grade 3 certificate, an EPP shall integrate the following concepts and themes throughout the coursework and training:

(A) using planning and teaching practices that support student learning in early childhood, including:

(i) demonstrating knowledge and skills to support child development (birth-age eight) in the following areas:

(I) brain development;

(II) physical development;

(III) social-emotional learning; and

(IV) cultural development;

(ii) demonstrating knowledge and skills of effective, research supported, developmentally appropriate instructional approaches to support young students' learning, including, but not limited to:

(I) intentional instruction with clear learning goals;

(II) project-based learning;

(III) child-directed inquiry;

(IV) learning through play; and

(V) integration of knowledge across content areas;

(iii) demonstrating knowledge and skills in implementing instruction tailored to the variability in learners' needs, including, but not limited to, small group instruction;

(iv) demonstrating knowledge and skills in early literacy development and pedagogy, including:

(I) demonstrating effective ways to support language development, particularly oral language development, including, but not limited to, growth in academic vocabulary, comprehension, and inferencing abilities; and

(II) demonstrating effective ways to support early literacy development, including letter knowledge, phonological awareness, early writing, and decoding;

(v) demonstrating knowledge and skills in early mathematics and science development and pedagogy;

(vi) demonstrating knowledge and skills in developing and implementing pedagogical approaches for students who are English learners and/or bilingual; and

(vii) demonstrating knowledge and skills in developing and implementing pedagogical approaches for students who have or are at risk for developmental delays and disabilities;

(B) assessing the success of instruction and student learning through developmentally appropriate assessment, including:

(i) demonstrating knowledge of multiple forms of assessment, the information that each form of assessment can provide about a student's learning and development, and how to conceive, construct, and/or select an assessment aligned to standards that can demonstrate student learning to stakeholders;

(ii) demonstrating knowledge in how to use assessments to inform instruction to support student growth; and

(iii) demonstrating knowledge and application of children's developmental continuum in the analysis of assessment results utilizing a variety of assessment types to gain a full understanding of students' current development and assets;

(C) creating developmentally appropriate learning environments, including:

(i) demonstrating knowledge and skills in supporting learners' development of self-regulation and executive function (e.g., behavior, attention, goal setting, cooperation);

(ii) demonstrating knowledge and skills in designing, organizing, and facilitating spaces for learning, particularly small group learning, in both indoor and outdoor contexts; and

(iii) demonstrating knowledge and skills in developing learning environments that support English learners' development, including structures to support language development and communication;

(D) working with families, students, and the community through:

(i) teacher agency and teacher leadership;

(ii) research-based family engagement practices;

(iii) understanding the capabilities of students through parent and community input; and

(iv) the development and modeling of responsive relationships with children; and

(E) using a diversity and equity framework, such as:

(i) demonstrating knowledge and skills in creating early learning communities that capitalize on the cultural knowledge and strengths children bring to the classroom;

(ii) demonstrating knowledge and skills in creating an early learning environment that reflects the communities in which they work; and

(iii) demonstrating knowledge and skills in how to access the knowledge children and families bring to school.

(2) An EPP shall provide each candidate who holds a valid standard, provisional, or one-year classroom teacher certificate specified in §230.31 of this title (relating to Types of Certificates) in a certificate category that allows the applicant to teach all subjects in Prekindergarten, Kindergarten, Grade 1, Grade 2, or Grade 3 with a minimum of 150 clock-hours of coursework and/or training that is directly aligned to the educator standards as specified in Chapter 235, Subchapter B, of this title (relating to Elementary School Certificate Standards and that is based on the concepts and themes specified in subsection (i)(1) of this section. A clinical teaching, internship, or practicum assignment is not required for completion of program requirements.

(3) An EPP shall provide each candidate who holds a valid standard, provisional, or one year classroom teacher certificate specified in §230.31 of this title in a certificate category that does not allow the candidate to teach all subjects in Prekindergarten, Kindergarten, Grade 1, Grade 2, or Grade 3 coursework and/or training as specified in subsections (a) and (b) of this section that is directly aligned to the educator standards as specified in Chapter 235, Subchapter B, of this title and that is based on the concepts and themes specified in subsection (i)(1) of this section, a clinical experience as specified in subsection (e)(2) of this section, a mentor or cooperating teacher as specified in subsection (f) of this section, and ongoing support as specified in subsection (g) of this section.

(j) Coursework and/or training for candidates seeking a Teacher of Students with Visual Impairments (TVI) Supplemental: Early Childhood-Grade 12 certification.

(1) An EPP must provide a minimum of 300 hours of coursework and/or training related to the educator standards for that certificate adopted by the SBEC.

(2) An EPP shall provide a clinical experience of at least 350 clock-hours in a supervised educator assignment in a public school accredited by the TEA or other school approved by the TEA for this purpose. A TVI certification candidate must demonstrate proficiency in each of the educator standards for the certificate being sought during the clinical experience. A clinical experience is successful when the field supervisor recommends to the EPP that the TVI certification candidate should be recommended for a TVI supplemental certification.

(A) An EPP will provide guidance, assistance, and support for the TVI certification candidate by assigning a cooperating teacher and/or providing individual or group consultation. The EPP is responsible for providing training to cooperating teachers and/or consultation providers.

(B) An EPP will collaborate with the program coordinator for the Texas School for the Blind and Visually Impaired Statewide Mentor Program to assign a TVI mentor for the TVI certification candidate. The Texas School for the Blind and Visually Impaired Statewide Mentor Program is responsible for providing training for all TVI mentors.

(C) An EPP will provide ongoing support for the TVI certification candidate. Supervision of each candidate shall be conducted with the structured guidance and regular ongoing support of an experienced educator who has been trained as a field supervisor. Supervision must be provided by a field supervisor who has completed TEA-approved observation training. The initial contact, which may be made by telephone, email, or other electronic communication, with the assigned candidate must occur within the first quarter of the assignment. For each formal observation, the field supervisor shall participate in an individualized pre-observation conference with the candidate; document educational practices observed; and provide written feedback through an individualized, synchronous, and interactive post-observation conference with the candidate. Neither the pre-observation conference nor the post-observation conference need to be onsite. Formal observations conducted through collaboration with school or district personnel can be used to meet the requirements of this subsection. Informal observations and coaching shall be provided by the field supervisor as appropriate.

(i) Formal observations must be at least 135 minutes in duration in total throughout the clinical experience and must be conducted by the field supervisor.

(ii) If a formal observation is not conducted on the candidate's site in a face-to-face setting, the formal observation may be provided by use of electronic transmission or other video or technology-based method. A formal observation that is not conducted on the candidates' site in a face-to-face setting must include a pre- and post-conference.

(iii) An EPP must provide a minimum of one formal observation within the first third of the clinical experience, one formal observation within the second third of the clinical experience, and one formal observation within the final third of the clinical experience.

(k) Candidates employed as certified educational aides.

(1) Clinical Teaching Assignment. Candidates employed as certified educational aides may satisfy their clinical teaching assignment requirements through their instructional duties.

(A) If an EPP permits candidates employed as certified educational aides, as defined by Chapter 230, Subchapter E, of this title (relating to Educational Aide Certificate), to satisfy the clinical teaching assignment requirements through their instructional duties, the clinical teaching assignment must be for a minimum of 490 hours (14-week equivalent).

(B) An EPP may permit an educational aide employed in a clinical teaching to be excused from up to 35 of the required hours due to maternity leave, military leave, or illness.

(C) Clinical teaching is successful when the candidate demonstrates proficiency in each of the educator standards for the assignment and the field supervisor and cooperating teacher recommend to the EPP that the candidate should be recommended for a standard certificate. If either the field supervisor or cooperating teacher do not recommend that the candidate should be recommended for a standard certificate, the person who does not recommend the candidate must provide documentation supporting the lack of recommendation to the candidate and either the field supervisor or cooperating teacher.

(2) Coursework and Training. An EPP must provide coursework and/or training as specified in subsections (a) and (b) of this section, a clinical experience as specified in subsection (e) of this section, a cooperating teacher as specified in subsection (f) of this section, and ongoing support as specified in subsection (g) of this section. An EPP must provide a minimum of one formal observation during the first third of the assignment, a minimum of one formal

observation during the second third of the assignment, and a minimum of one formal observation during the last third of the assignment.

(l) Exemptions.

(1) Under the TEC, §21.050(c), a candidate who receives a bachelor's degree required for a teaching certificate on the basis of higher education coursework completed while receiving an exemption from tuition and fees under the TEC, §54.363, is exempt from the requirements of this chapter relating to field-based experience, internship, or clinical teaching.

(2) Under the TEC, §21.0487(c)(2)(B), a candidate's employment by a school or district as a Junior Reserve Officer Training Corps instructor before the person was enrolled in an EPP or while the person is enrolled in an EPP is exempt from any clinical teaching, internship, or field-based experience program requirement.

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 December 20, 2021.

TRD-202105178
Cristina De La Fuente-Valadez
Director, Rulemaking
State Board for Educator Certification
Earliest possible date of adoption: January 30, 2022
For further information, please call: (512) 475-1497

CHAPTER 230. PROFESSIONAL EDUCATOR PREPARATION AND CERTIFICATION
SUBCHAPTER H. TEXAS EDUCATOR CERTIFICATES BASED ON CERTIFICATION AND COLLEGE CREDENTIALS FROM OTHER STATES OR TERRITORIES OF THE UNITED STATES

19 TAC §230.111

The State Board for Educator Certification (SBEC) proposes amendments to 19 Texas Administrative Code (TAC) §230.111 and §230.113, concerning professional educator preparation and certification. Chapter 230, Subchapter H, serves as a foundation for the practices and procedures related to issuance of Texas certification to individuals licensed in other states. The proposed amendments would provide clarification and updates to requirements for individuals licensed in other states to obtain a standard Texas educator certificate.

BACKGROUND INFORMATION AND JUSTIFICATION: The SBEC rules in 19 TAC Chapter 230, Subchapter H, Texas Educator Certificates Based on Certification and College Credentials from Other States or Territories of the United States, outline the process for individuals already certified to teach in other states who are interested in obtaining Texas certification. Following is a description of the proposed amendments.

§230.111. General Provisions.

The proposed amendment to §230.111(d) would remove the outdated reference to a "certificate entitlement card" because that is not a document that has been presented recently by any individuals certified outside the state who submit applications for the review of their out-of-state credentials.

§230.113. Requirements for Texas Certificates Based on Certification from Other States or Territories of the United States.

The proposed amendment to §230.113(b) would add the word "legacy" to align with the correct title of Chapter 239, Student Services Certificates, Subsection E, that has been renamed Legacy Master Teacher Certificate, effective December 27, 2020. The title of Chapter 241 would also be updated in subsection (b) to align with the correct title.

The proposed amendment to §230.113(e) would clarify that the current process requires applicants issued the temporary, one-year certificate to obtain a Texas standard classroom teacher certificate prior to adding a supplemental certificate area to their record of certification. This is not a change in the process, only a clarification of current rule and procedures.

FISCAL IMPACT: Emily Garcia, associate commissioner for educator preparation, certification, and enforcement, has determined that for the first five-year period the proposal is in effect, there is no additional fiscal impact on state or local governments and that there are no additional costs to entities 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 (TGC), §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 TGC, §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 TGC, §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: The 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 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 create a new regulation; would not expand, limit, or repeal 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: The public benefit anticipated as a result of the proposal would be clearly defined rules and requirements for individuals to obtain Texas certification based on already being licensed to teach in other states or territories of the United States. There is no anticipated cost to persons who are required to comply with the proposal.

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

PRINCIPAL AND CLASSROOM TEACHER PAPERWORK REQUIREMENTS: The TEA staff 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 December 31, 2021, and ends January 31, 2022. A form for submitting public comments is available on the TEA website at https://tea.texas.gov/About_TEA/Laws_and_Rules/SBEC_Rules_(TAC)/Proposed_State_Board_for_Educator_Certification_Rules/. The SBEC will take registered oral and written comments on the proposal at the February 11, 2022 meeting in accordance with the SBEC board operating policies and procedures. All requests for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the Department of Educator Preparation, Certification, and Enforcement, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, Attention: Ms. Emily Garcia, associate commissioner for educator preparation, certification, and enforcement, not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on December 31, 2021.

STATUTORY AUTHORITY. The amendments are proposed under Texas Education Code (TEC), §21.040(4), which allows the SBEC authority to develop and implement policies that define responsibilities of the SBEC; TEC, §21.041(a), which allows the SBEC to adopt rules as necessary for its own procedures; TEC, §21.041(b)(1), which requires the SBEC to propose rules that provide for the regulation of educators and the general administration of the TEC, Chapter 21, Subchapter B, in a manner consistent with the TEC, Chapter 21, Subchapter B; TEC, §21.041(b)(4), which requires the SBEC to propose rules that specify the requirements for the issuance and renewal of an educator certificate; TEC, §21.041(b)(5), which requires the SBEC to propose rules that provide for the issuance of an educator certificate to a person who holds a similar certificate issued by another state or foreign country, subject to the TEC, §21.052; TEC, §21.041(c), which requires the SBEC to propose a rule adopting a fee for the issuance and maintenance of an educator certificate that, when combined with any fees imposed under subsection (d), is adequate to cover the cost of administration of this subchapter; TEC, §21.048, which states the SBEC shall propose rules prescribing comprehensive examinations for each class of certificate issued by the board that includes not requiring more than 45 days elapsing between examination retakes and that starting January 1, 2021, all candidates teaching prekindergarten through grade six must demonstrate proficiency in the science of teaching reading on a certification examination; TEC, §21.052(a), which states that the SBEC may issue a certificate to an educator who submits an application for certification and holds a degree issued by an institution accredited by a regional accrediting agency or group that is recognized by a nationally recognized accreditation board, or a degree issued by an institution located in a foreign country, if the degree is equivalent to a bachelor's degree issued in the United States, or holds an appropriate certificate or other credential issued in another state or country and has met all certification requirements for issuance of the credential; TEC, §21.052(b), which states that for purposes of §21.052(a)(2), a person is considered to hold a certificate or other credential if the credential is not valid solely because it has expired; TEC, §21.052(c), which states that the SBEC may issue a temporary certificate under this section to an educator who holds a degree required by §21.052(a)(1) and a certificate or other credential required by §21.052(a)(2) but who has not satisfied the requirements prescribed by §21.052(a)(3). Subject to subsections (d) and (d-1), the SBEC may specify the term of a temporary certificate issued under this subsection; TEC, §21.052(d), which states that a temporary certificate issued under §21.052(c) to an educator employed by a school district that has constructed or expanded at least one instructional facility as a result of increased student enrollment due to actions taken under the Defense Base Closure and Realignment Act of 1990 (10 U.S.C. Section 2687) may not expire before the first anniversary of the date on which the SBEC completes the review of the educator's credentials and informs the educator of the examination or examinations under the TEC, §21.048, on which the educator must perform successfully to receive a standard certificate; and TEC, §21.052(e), which states that an educator who has submitted all documents required by the board for certification and who receives a temporary certificate as provided by subsection (c) has one year to successfully complete examination requirements identified in the review of credentials and specified in Section 21.048, to receive a standard certificate.

CROSS REFERENCE TO STATUTE. The amendments implement Texas Education Code, §§21.040(4); 21.041(a), (b)(1), (4), and (5), and (c); 21.048; and 21.052(a), (b), (c), and (e).

§230.111. General Provisions.

(a) A Texas educator certificate may be issued to an individual who holds a college degree and an acceptable certificate or credential issued by the authorized licensing agency in another state or territory of the United States and who meets appropriate requirements specified in §230.11 of this title (relating to General Requirements) and elsewhere in this subchapter.

(b) The degree held by an applicant from another state or territory of the United States must be equivalent to at least a bachelor's degree or higher issued by an accredited institution of higher education.

(c) The certificate or other credential issued by the authorized licensing agency in another state or territory of the United States may not be a temporary permit, a credential issued by a city or school district, or a certificate for which academic or other program deficiencies are indicated. Specific examination or renewal requirements shall not be considered academic deficiencies.

(d) A statement or[~~,~~] approval letter[~~, or certification entitlement card~~] issued by the authorized licensing agency in another state or territory of the United States specifying eligibility for full certification upon employment or completion of specified examination requirements shall have the same standing as a certificate.

(e) The certificate and areas of certification issued by the authorized licensing agency in another state or territory of the United States must be equivalent to a certificate or grade level that is within the early childhood-Grade 12 level and approved by the State Board for Educator Certification (SBEC). Based on the certificates submitted with the application for review of credentials, the Texas Education Agency (TEA) staff shall identify the certification areas for which the applicant qualifies in Texas. The certificate(s) for which the applicant qualifies may be issued by the TEA staff under the authority of the SBEC.

(f) If a Texas examination or certification is scheduled to be eliminated, an individual requesting certification and examination comparability must ensure that the application and all review documentation, including examination scores, are received by TEA staff 60 calendar days before the application submission deadline for the examination and/or certification sought.

§230.113. Requirements for Texas Certificates Based on Certification from Other States or Territories of the United States.

(a) An applicant for a standard Texas certificate based on a certificate issued in accordance with §230.111 of this title (relating to General Provisions) must:

(1) pass the appropriate examination requirements prescribed in the Texas Education Code (TEC), §21.048(a), and §230.21 of this title (relating to Educator Assessment);

(2) achieve an acceptable level of performance on an examination(s) that has been determined to be similar to and at least as rigorous as that prescribed in the TEC, §21.048(a), and §230.21 of this title that was administered to the applicant under the authority of another state or territory of the United States. The applicant shall verify in a manner determined by the Texas Education Agency staff the level of performance on acceptable examinations administered under the authority of another state or territory of the United States; or

(3) qualify for an exemption from required Texas examinations through provisions in §152.1001 of Part 2 of this title (relating to Exceptions to Examination Requirements for Individuals Certified Outside the State).

(b) If all certification requirements are met except the appropriate examination requirements, the applicant may request issuance of a one-year certificate in one or more certification areas authorized on the out-of-state certificate. An applicant who holds only a student services, principal, or superintendent certificate issued in accordance with Chapter 239 of this title (relating to Student Services Certificates), with the exception of Subchapter E (relating to Legacy Master Teacher Certificate); Chapter 241 of this title (relating to Certification as Principal [~~Certificate~~]); or Chapter 242 of this title (relating to Superintendent Certificate) may be issued the equivalent Texas certificate. The applicant must verify two creditable years of service in an Early Childhood-Grade 12 public or accredited private school in the specific student services or administrative area sought.

(c) After satisfying all requirements, including all appropriate examination requirements, the applicant is eligible to receive the appropriate standard certificate issued under Subchapter D of this chapter (relating to Types and Classes of Certificates Issued).

(d) An applicant issued a one-year certificate under this section who does not complete the appropriate examination requirements to establish eligibility for a standard certificate during the validity of the one-year certificate, is not eligible for any type of certificate or permit authorizing employment for the same certificate until he or she has satisfied the appropriate examination requirements. If examination requirements are not met during the validity period of the one-year certificate due to circumstances beyond the control of the educator, the employing school district may request an extension not to exceed one calendar year in length.

(e) An applicant shall not be required to complete the content specialization portion of the certification examination in a certification area for which he or she does not seek standard certification unless the examination is required to establish a base classroom teaching certificate. A supplemental certificate, as described in Chapter 233 of this title (relating to Categories of Classroom Teaching Certificates), may not be issued as a standard certificate unless the educator has established a classroom teaching certificate and may not be added to a one-year certificate.

(f) An applicant issued a one-year certificate under this section who, during or subsequent to the validity of the certificate, establishes eligibility for a standard certificate may apply for:

(1) a new one-year certificate in another certification area based on an acceptable certificate from another state or territory of the United States; or

(2) a second one-year certificate in an area previously authorized on a one-year certificate provided the applicant was not assigned to the area and has not attempted the appropriate examination requirements for that area.

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 December 20, 2021.

TRD-202105175
Cristina De La Fuente-Valadez
Director, Rulemaking
State Board for Educator Certification
Earliest possible date of adoption: January 30, 2022
For further information, please call: (512) 475-1497

CHAPTER 232. GENERAL CERTIFICATION PROVISIONS

SUBCHAPTER A. CERTIFICATE RENEWAL AND CONTINUING PROFESSIONAL

19 TAC §232.7, §232.11

The State Board for Educator Certification (SBEC) proposes amendments to 19 Texas Administrative Code (TAC) §232.7 and §232.11, concerning general certification provisions. The proposed amendments would implement the statutory requirements of Senate Bills (SBs) 199, 1267, and 2066, 87th Texas Legislature, Regular Session, 2021. The proposed amendments would require that all educators receive continuing professional education (CPE) training in educating students with disabilities; would update the CPE training requirements for classroom teachers, principals, and school counselors; and would provide for the SBEC to determine the training guidelines for CPE credit regarding the use of an automated external defibrillator (AED). The proposed amendments would also allow for a school district to request a hardship exemption for an educator who has an invalid certificate due to not having the required CPE hours for certificate renewal; would require educators to receive dyslexia training for certificate renewal; and would add CPE activities to the list of topics that educators can receive for certificate renewal.

BACKGROUND INFORMATION AND JUSTIFICATION: The SBEC rules in 19 TAC Chapter 232, Subchapter A, Certificate Renewal and Continuing Professional Education Requirements, provide for rules that establish the requirements relating to types and classes of certificates issued, certificate renewal, and CPE.

As a result of the 87th Texas Legislature, Regular Session, 2021, SBs 199, 1267, and 2066 require the SBEC to update rules regarding CPE for educator certificate renewal. In addition to the statutory changes, Texas Education Agency (TEA) staff have received input from stakeholders regarding updating CPE provisions. At the October 1, 2021 SBEC meeting, the SBEC provided input regarding the implementation of the legislation and the stakeholder input. Following the October 2021 SBEC meet-

ing, TEA staff solicited additional stakeholder feedback on proposed rulemaking, which are reflected in this item.

Following is a description of topics for proposed amendments to 19 TAC Chapter 232, Subchapter A, that incorporate the 2021 enabling legislation and SBEC input. In addition to the following detailed descriptions, the proposed amendments would also provide relettering/numbering to conform with the *Texas Register* style and formatting requirements.

§232.7. Requirements for Certificate Renewal.

Proposed new §232.7(b)(4) would provide for a local school district to apply for a hardship exemption on behalf of an educator who has an invalid certificate due to not earning the required CPE hours for certificate renewal. The exemption would be valid for the academic year in which it is granted with the opportunity for the school district to renew the exemption for one additional year. The proposed amendment would require the application for a hardship exemption to be submitted by the superintendent or designee of the local district and would allow for a one-year renewal of the exemption. The exemption would allow school districts to hire educators who have left the classroom and allowed their CPE to lapse, while upholding the importance of educators obtaining SBEC-required CPE to remain abreast of new developments in teaching methods.

In §232.7, subsection (b) would be amended to change the cross reference to paragraphs (1)-(4) and subsection (b)(4) would be renumbered to subsection (b)(5) for technical formatting purposes. In addition, technical edits would be made in subsection (c)(1) and (7) to apply *Texas Register* style requirements for cross references and acronyms.

§232.11. Number and Content of Required Continuing Professional Education Hours.

Proposed new to §232.11(c)(1) would implement SB 1267 and reflect SBEC and stakeholder input by requiring all educators to receive CPE training in educating students with disabilities, and the training must include information particular to educating students with dyslexia. This will ensure that all educators are prepared to teach any student assigned to their class. Proposed new §232.11(c)(2) would maintain the current requirements regarding required CPE content.

Technical edits would reorder paragraphs (1) and (2) to subparagraphs (A) and (B).

SB 1267 limits the number of hours in certain specific topics that classroom teachers and principals can obtain in CPE for purposes of certificate renewal. The proposed amendment to §232.11(d)(2) and §232.11(e)(2) would provide a transition period of a certificate renewal date prior to September 1, 2023, for those classroom teachers and principals who have already obtained CPE hours in the topics identified in Texas Education Code (TEC), §21.054, as amended by SB 1267, in excess of the 25% limit introduced by SB 1267. It would allow educators who have already obtained in excess of 25% of their hours in these topics in reliance on the law and rules prior to SB 1267 to not lose credit for those hours, while allowing the flexibility in CPE topic areas intended by SB 1267.

Proposed new §232.11(d)(3) and §232.11(e)(3) would implement SB 1267 by removing some of the required topics in which classroom teachers and principals must obtain CPE hours and by capping the hours to no more than 25% of the total CPE hours required for certificate renewal for those renewing their certificate on or after September 1, 2023. The proposed new language would make the requirements of the rule parallel the requirements of TEC, §21.054, as amended by SB 1267.

Proposed new §232.11(e)(3)(F)(ii) would implement SB 2066 by requiring school principals to receive CPE training in educating emergent bilingual students, which were previously described as "students of limited English proficiency."

SB 1267 also limits the number of hours in all topics currently listed in TEC, §21.054, that counselors can obtain in CPE for purposes of certificate renewal. The proposed amendment to §232.11(f)(2) would allow counselors who have already obtained CPE hours in the topics identified in TEC, §21.054, as amended by SB 1267, in excess of the 25% limit introduced by SB 1267 to use those hours toward the requirements for certificate renewal prior to September 1, 2024. It would allow counselors who have already obtained in excess of 25% of their hours in these topics in reliance on the law and rules prior to SB 1267 to not lose credit for those hours, while allowing the flexibility in CPE topic areas intended by SB 1267. The proposed transition date for counselors is September 1, 2024, in contrast to the September 1, 2023 transition date proposed for classroom teachers and principals, because SB 1267 did not strike any of the required topics for counselors, so all of the training that counselors were previously encouraged to get in excess of 25% of their hours will now be capped at the 25%.

Proposed new §232.11(f)(3) would implement SB 1267 by capping the hours of CPE that counselors can obtain in the required list of topics to no more than 25% of the total CPE hours required for certificate renewal for those renewing their certificate on or after September 1, 2024. The proposed new language would make the requirements of the rule parallel the requirements of TEC, §21.054, as amended by SB 1267. The proposed implementation date of September 1, 2024, will allow counselors who have already taken excess hours in the required topics prior to the enactment of SB 1267 to get credit for those hours when renewing their certificates.

The proposed amendment to §232.11(l)(3) would implement SB 199 by amending the required AED training for CPE purposes. The proposed amendment removes the requirement that the training be approved under Texas Health and Safety Code, §779.002, as that requirement is no longer in TEC, §21.0541, as amended by SB 199. The proposed amendment would provide that the training be in accordance with the guidelines established by the device's manufacturer and approved by the American Heart Association, the American Red Cross, other nationally recognized associations, or the medical director of a local emergency medical services provider. This change would track the requirements of the Texas Department of Health and Human Services for AED training in 25 TAC, §157.41(d), Emergency Medical Services and Course Approval, to ensure that educators are trained in safe and effective methods of using the AED.

The proposed new §232.11(l)(5)-(7) would provide optional CPE training for educators in the following topics for purposes of certificate renewal: educating students with mental health conditions, including how grief and trauma affect student learning and behavior and how evidence-based, grief-informed, and trauma-informed strategies support the academic success of students affected by grief and trauma; for classroom teachers, educating emergent bilingual students; and educating students who engage in substance abuse.

These are topics that were previously required for CPE under TEC, §21.0541, before it was amended by SB 1267, but are no longer required. The proposed amendment would encourage educators to take continuing education in these important topics without requiring them. The proposed amendment will thus preserve the discretion for educators in choosing CPE hours, which was the intent of SB 1267 while still reminding educators of the significance of these topic areas.

A technical edit would be made to §232.11(l)(3) to remove the acronym "AED" because it is no longer needed.

FISCAL IMPACT: Emily Garcia, associate commissioner for educator preparation, certification, and enforcement, has determined that for the first five-year period the proposal is in effect, there is no additional fiscal impact on state or local governments and that there are no additional costs to entities 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 (TGC), §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 TGC, §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 TGC, §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: The 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, the proposed amendment in §232.11(c)(1) would create a new regulation for educators to receive CPE hours in educating students with disabilities for purposes of certificate renewal, as a result of SB 1267, 87th Texas Legislature, Regular Session, 2021. The proposed amendment also requires CPE to include educating students with dyslexia.

The proposed amendment in §232.7(b)(4) would limit an existing regulation by allowing individuals who have not completed the required CPE for certificate renewal to be able to teach for up to two years while completing those hours. The proposed amendment in §232.11(d)(3) would also limit an existing regulation by reducing the required topics that educators must obtain in CPE for purposes of certificate renewal and the number of hours that an educator can get in those hours, as a result of SB 1267, 87th Texas Legislature, Regular Session, 2021.

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 or repeal 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: The public benefit anticipated as a result of the proposal would be clear guidance for applicants, educators, school districts, and providers on CPE requirements. There is no anticipated cost to persons who are required to comply with the proposal.

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

PRINCIPAL AND CLASSROOM TEACHER PAPERWORK REQUIREMENTS: The TEA staff 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 December 31, 2021, and ends January 31, 2022. A form for submitting public comments is available on the TEA website at https://tea.texas.gov/About_TEA/Laws_and_Rules/SBEC_Rules_(TAC)/Proposed_State_Board_for_Educator_Certification_Rules/. The SBEC will take registered oral and written comments on the proposal at the February 11, 2022 meeting in accordance with the SBEC board operating policies and procedures. All requests for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the Department of Educator Preparation, Certification, and Enforcement, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, Attention: Ms. Emily Garcia, associate commissioner for educator preparation, certification, and enforcement, not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on December 31, 2021.

STATUTORY AUTHORITY. The amendments are proposed under Texas Education Code (TEC), §21.003(a), which states a person may not be employed as a teacher, teacher intern or teacher trainee, librarian, educational aide, administrator, educational diagnostician, or school counselor by a school district unless the person holds an appropriate certificate or permit issued as provided by the TEC, Chapter 21, Subchapter B; TEC, §21.0031(f), which clarifies and places certain limits on provisions authorizing termination of an educator's contract for failure to maintain a valid certificate; TEC, §21.031, which authorizes the SBEC to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public-school educators; TEC, §21.041(b)(1)-(4), which requires the SBEC to propose rules that provide for the regulation of educators and the general administration of the TEC, Chapter 21, Subchapter B, in a manner consistent with the TEC, Chapter 21, Subchapter B; and requires the SBEC to propose rules that specify the classes of educator certificates to be issued, including emergency certificates; the period for which each class of educator certificate is valid; and the requirements for the issuance and renewal of an educator certificate; TEC, §21.041(b)(7)-(8), which requires the SBEC to propose rules that provide for disciplinary proceedings, including the suspension or revocation of an educator certificate, as provided by Chapter 2001, Government Code; and provide for the adoption, amendment, and enforcement of an educator's code of ethics; TEC, §21.041(b)(9), which requires the SBEC to propose rules that provide for continuing education requirements; TEC, §21.054, as amended by SBs 1267 and 2066, 87th Texas Legislature, Regular Session, 2021, which requires the SBEC to propose rules establishing a process for identifying continuing education courses and programs that fulfill educators' continuing education requirements; TEC, §21.0541, as amended by SB 199, 87th Texas Legislature, Regular Session, 2021, which requires the SBEC to propose rules that allow an ed-

ucator to receive credit towards the educator's continuing education requirements for completion of an instructional course on the use of an AED; TEC, §21.0543, which requires the SBEC to propose rules that provide for CPE credit related to digital technology instruction; TEC, §22.0831(f)(1) and (2), which state SBEC may propose rules regarding the deadline for the national criminal history check and implement sanctions for persons failing to comply with the requirements; Texas Occupations Code (TOC), §55.002, which states a state agency that issues a license shall adopt rules to exempt an individual who holds a license issued by the agency from any increased fee or other penalty for failing to renew the license in a timely manner if the individual establishes the individual failed to renew the license in a timely manner because the individual was serving as a military service member; and TOC, §55.003, which states a military service member who holds a license is entitled to two years of additional time to complete any continuing education requirements and any other requirement related to the renewal of the military service member's license.

CROSS REFERENCE TO STATUTE. The amendments implement Texas Education Code, §§21.003(a); 21.0031(f); 21.031; 21.041(b)(1)-(4) and (7)-(9); 21.054, as amended by SBs 1267 and 2066, 87th Texas Legislature, Regular Session, 2021; 21.0541, as amended by SB 199, 87th Texas Legislature, Regular Session, 2021; 21.0543; and 22.0831(f); and Texas Occupations Code, §55.002 and §55.003.

§232.7. Requirements for Certificate Renewal.

(a) The Texas Education Agency (TEA) staff shall develop procedures to:

(1) notify educators at least six months prior to the expiration of the renewal period to the email address as specified in §230.91 of this title (relating to Procedures in General);

(2) confirm compliance with all renewal requirements pursuant to this subchapter;

(3) notify educators who are not renewed due to noncompliance with this section; and

(4) verify that educators applying for reactivation of certificate(s) under §232.9 of this title (relating to Inactive Status and Late Renewal) are in compliance with subsection (c) of this section.

(b) The TEA staff shall administratively approve each hardship exemption request that meets the criteria specified in paragraphs (1)-(4) [~~(1)-(3)~~] of this subsection.

(1) A hardship exemption must be due to one of the following circumstances that prevented the educator's completion of renewal requirements:

(A) catastrophic illness or injury of the educator;

(B) catastrophic illness or injury of an immediate family member; or

(C) military service of the educator.

(2) The request for a hardship exemption must include documentation from a licensed physician or verified military records.

(3) The request for the amount of time allowed for renewal is equal to:

(A) the amount of time that a licensed physician determined that the educator was not able to complete renewal requirements due to the educator's catastrophic illness or injury; or

(B) the amount of time that a licensed physician determined that the educator was not able to complete renewal requirements due to the catastrophic illness or injury of an immediate family member; or

(C) two years of additional time for a military service member, in accordance with the Texas Occupations Code, §55.003.

(4) A hardship exemption may be approved for a local education agency on behalf of an educator who has an invalid certificate due to lack of earning the required continuing professional education (CPE) hours as prescribed in §232.11 of this title (relating to Number of Content of Required Continuing Professional Education Hours). The hardship exemption is valid for the academic year of the application and may be renewed up to one additional academic year, provided that the superintendent or designee of the local education agency requests the extension.

(5) [~~(4)~~] If a hardship exemption request is approved, the educator must pay the appropriate renewal fee, pursuant to §230.101 of this title (relating to Schedule of Fees for Certification Services).

(c) To be eligible for renewal, an educator must:

(1) subject to §232.16(c) of this title (relating to Verification of Renewal Requirements), satisfy CPE [~~continuing professional education~~] requirements, pursuant to §232.11 of this title [~~(relating to Number and Content of Required Continuing Professional Education Hours)~~];

(2) hold a valid standard certificate that is not currently suspended and has not been surrendered in lieu of revocation or revoked by lawful authority;

(3) not be a respondent in a disciplinary proceeding under Chapter 249 of this title (relating to Disciplinary Proceedings, Sanctions, and Contested Cases);

(4) successfully resolve any reported criminal history, as defined by §249.3 of this title (relating to Definitions);

(5) not be in arrears of child support, pursuant to the Texas Family Code, Chapter 232;

(6) pay the renewal fee, provided in §230.101 of this title, which shall be a single fee regardless of the number of certificates being renewed; and

(7) submit fingerprints in accordance with §232.35(c) of this title (relating to Submission of Required Information) and the Texas Education Code [~~TEC~~], §22.0831.

(d) The TEA staff shall renew the certificate(s) of an educator who meets all requirements of this subchapter.

§232.11. Number and Content of Required Continuing Professional Education Hours.

(a) The appropriate number of clock-hours of continuing professional education (CPE) must be completed during each five-year renewal period.

(b) One semester credit hour earned at an accredited institution of higher education is equivalent to 15 CPE clock-hours.

(c) Required Content. [~~Other than hours earned to comply with subsections (d), (e), (f), (g), and (k) of this section, professional development activities shall be related to the certificate(s) being renewed and focus on the standards required for issuance of the certificate(s), including:~~]

(1) All educators must receive CPE training regarding educating students with disabilities. This training must include information particular to educating students with dyslexia.

(2) Other than hours earned to comply with subsections (d), (e), (f), (g), and (k) of this section, professional development activities shall be related to the certificate(s) being renewed and focus on the standards required for issuance of the certificate(s), including:

(A) [(1)] content area knowledge and skills; and

(B) [(2)] professional ethics and standards of conduct.

(d) Classroom Teacher.

(1) Classroom teacher certificate holders shall complete 150 clock-hours.

(2) A classroom teacher who renews a certificate prior to September 1, 2023, must attain some [at least 37.5] hours of CPE that includes training directly related to each of the following topics and may include two or more listed topics combined:

(A) collecting and analyzing information that will improve effectiveness in the classroom;

(B) recognizing early warning indicators that a student may be at risk of dropping out of school;

(C) digital learning, digital teaching, and integrating technology into classroom instruction;

(D) educating diverse student populations, including:

[*(i)* students who are eligible to participate in special education programs under Texas Education Code (TEC), Chapter 29, Subchapter A;]

[*(ii)* students who are eligible to receive educational services required under the Rehabilitation Act of 1973, Section 504 (29 United States Code (USC), Section 794);]

[*(iii)* students with mental health conditions or who engage in substance abuse;]

[*(iv)* students with intellectual or developmental disabilities;]

(i) [v] students who are educationally disadvantaged; and

[*(vi)* students of limited English proficiency; and]

(ii) [vii] students at risk of dropping out of school; and

(E) understanding appropriate relationships, boundaries, and communications between educators and students.[; and]

[(F) how mental health conditions, including grief and trauma, affect student learning and behavior and how evidence-based, grief-informed, and trauma-informed strategies support the academic success of students affected by grief and trauma. The instruction must:]

[*(i)* comply with the training required by TEC, §38.036(c)(1); and]

[*(ii)* be approved by the commissioner of education.]

(3) For a classroom teacher who renews a certificate on or after September 1, 2023, not more than 37.5 hours of CPE training shall include instruction in, and must be directly related to, each of the following topics and may include two or more listed topics combined:

(A) collecting and analyzing information that will improve effectiveness in the classroom;

(B) recognizing early warning indicators that a student may be at risk of dropping out of school;

(C) digital learning, digital teaching, and integrating technology into classroom instruction;

(D) educating diverse student populations, including:

(i) students who are educationally disadvantaged; and

(ii) students at risk of dropping out of school; and

(E) understanding appropriate relationships, boundaries, and communications between educators and students.

(e) Principal and Principal as Instructional Leader.

(1) Principal and Principal as Instructional Leader certificate holders shall complete 200 clock-hours.

(2) A principal and principal as instructional leader who renews a certificate prior to September 1, 2023, must attain some [at least 50] hours of CPE that include training directly related to each of the following topics:

(A) effective and efficient management, including:

(i) collecting and analyzing information;

(ii) making decisions and managing time; and

(iii) supervising student discipline and managing behavior;

(B) recognizing early warning indicators that a student may be at risk of dropping out of school;

(C) digital learning, digital teaching, and integrating technology into campus curriculum and instruction;

(D) effective implementation of the Texas Model for Comprehensive School Counseling Programs under TEC, §33.005;

(E) mental health programs addressing a mental health condition;

(F) educating diverse student populations, including:

[*(i)* students who are eligible to participate in special education programs under TEC, Chapter 29, Subchapter A;]

[*(ii)* students with intellectual or developmental disabilities;]

[*(iii)* students who are eligible to receive educational services required under the Rehabilitation Act of 1973, Section 504 (29 USC, Section 794);]

[*(iv)* students with mental health conditions or who engage in substance abuse;]

(i) [(v)] students who are educationally disadvantaged;

(ii) [(vi)] emergent bilingual students [of limited English proficiency]; and

(iii) [(vii)] students at risk of dropping out of school; and

(G) preventing, recognizing, and reporting any sexual conduct between an educator and student that is prohibited under Texas

Penal Code, §21.12, or for which reporting is required under TEC, §21.006; and

~~[(H) how mental health conditions, including grief and trauma, affect student learning and behavior and how evidence-based, grief-informed, and trauma-informed strategies support the academic success of students affected by grief and trauma. The instruction must be:]~~

~~[*(i)* based on relevant best practice-based programs and research-based practices; and]~~

~~[*(ii)* approved by the commissioner, in consultation with the Texas Health and Human Services Commission.]~~

(3) For a principal and principal as instructional leader who renews a certificate on or after September 1, 2023, not more than 50 hours of CPE training shall include instruction in, and must be directly related to, each of the following topics and may include two or more listed topics combined:

(A) effective and efficient management, including:

(i) collecting and analyzing information;

(ii) making decisions and managing time; and

(iii) supervising student discipline and managing behavior;

(B) recognizing early warning indicators that a student may be at risk of dropping out of school;

(C) digital learning, digital teaching, and integrating technology into campus curriculum and instruction;

(D) effective implementation of the Texas Model for Comprehensive School Counseling Programs under TEC, §33.005;

(E) mental health programs addressing a mental health condition;

(F) educating diverse student populations, including:

(i) students who are educationally disadvantaged;

(ii) emergent bilingual students; and

(iii) students at risk of dropping out of school; and

(G) preventing, recognizing, and reporting any sexual conduct between an educator and student that is prohibited under Texas Penal Code, §21.12, or for which reporting is required under TEC, §21.006.

(f) School Counselor.

(1) School Counselor certificate holders shall complete 200 clock-hours.

(2) A school counselor who renews a certificate prior to September 1, 2024, must attain some [at ~~least 50~~] hours of CPE that include training directly related to each of the following topics:

(A) assisting students in developing high school graduation plans;

(B) implementing dropout prevention strategies;

(C) informing students concerning:

(i) college admissions, including college financial aid resources and application procedures; and

(ii) career opportunities;

(D) counseling students concerning mental health conditions and substance abuse, including through the use of grief-informed and trauma-informed interventions and crisis management and suicide prevention strategies; and

(E) effective implementation of the Texas Model for Comprehensive School Counseling Programs under TEC, §33.005.

(3) For a school counselor who renews a certificate on or after September 1, 2024, not more than 50 hours of CPE training shall include instruction in, and must be directly related to, each of the following topics and may include two or more listed topics combined:

(A) assisting students in developing high school graduation plans;

(B) implementing dropout prevention strategies;

(C) informing students concerning:

(i) college admissions, including college financial aid resources and application procedures; and

(ii) career opportunities;

(D) counseling students concerning mental health conditions and substance abuse, including through the use of grief-informed and trauma-informed interventions and crisis management and suicide prevention strategies; and

(E) effective implementation of the Texas Model for Comprehensive School Counseling Programs under TEC, §33.005.

(g) Superintendent.

(1) Superintendent certificate holders shall complete 200 clock-hours.

(2) An individual who holds a superintendent certificate that is renewed on or after January 1, 2021, must complete at least 2.5 hours of training every five years on identifying and reporting potential victims of sexual abuse, human trafficking, and other maltreatment of children, in accordance with TEC, §21.054(h). For purposes of this subsection, "other maltreatment" has the meaning assigned by Human Resources Code, §42.002.

(h) School Librarian and Learning Resources Specialist certificate holders shall complete 200 clock-hours.

(i) Educational Diagnostician certificate holders shall complete 200 clock-hours.

(j) Reading Specialist certificate holders shall complete 200 clock-hours.

(k) The required CPE for educators who teach students with dyslexia must include training regarding new research and practices in educating students with dyslexia. The required training may be satisfied through an online course approved by Texas Education Agency staff.

(l) Professional development activities may include:

(1) an evidence-based mental health first aid training program or an evidence-based grief-informed and trauma-informed care program that is offered through a classroom instruction format that requires in-person attendance. A person receiving this training will receive twice the number of hours of instruction provided under that program, not to exceed 16 hours;

(2) suicide prevention training that meets the guidelines for suicide prevention training approved under the TEC, §21.451;

(3) an instructional course on the use of an automated external defibrillator in accordance with the guidelines established by the device's manufacturer and approved by the American Heart Association, the American Red Cross, other nationally recognized associations, or the medical director of a local emergency medical services provider [~~(AED) that meets the guidelines for AED training approved under Texas Health and Safety Code, §779.002~~], in accordance with the TEC, §21.0541; [~~and~~]

(4) education courses that:

(A) use technology to increase the educator's digital literacy; and

(B) assist the educator in the use of digital technology in learning activities that improve teaching, assessment, and instructional practices;[~~.~~]

(5) educating students with mental health conditions, including how grief and trauma affect student learning and behavior and how evidence-based, grief-informed, and trauma-informed strategies support the academic success of students affected by grief and trauma;

(6) for classroom teachers, educating emergent bilingual students; and

(7) educating students who engage in substance abuse.

(m) An educator holding multiple classes of certificates shall complete the higher number of required CPE clock-hours in the classes held during each five-year renewal period unless otherwise specified in applicable State Board for Educator Certification rules codified in the Texas Administrative Code, Title 19, Part 7.

(n) An educator eligible to renew multiple classes of certificates issued during the same renewal period may satisfy the requirements for any class of certificate issued for less than the full five-year period by completing a prorated number of the required CPE clock-hours. Educators must complete a minimum of one-fifth of the additional CPE clock-hours for each full calendar year that the additional class of certificate is valid.

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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Cristina De La Fuente-Valadez
Director, Rulemaking
State Board for Educator Certification
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CHAPTER 245. CERTIFICATION OF EDUCATORS FROM OTHER COUNTRIES

19 TAC §§245.1, 245.5, 245.10, 245.15

The State Board for Educator Certification (SBEC) proposes amendments to 19 Texas Administrative Code (TAC) §§245.1, 245.5, 245.10, and 245.15, concerning certification of educators from other countries. The proposed amendments would update the requirements for certification of educators from other countries. The proposed amendments reflect guidance provided by the SBEC at the July 2021 meeting.

BACKGROUND INFORMATION AND JUSTIFICATION: The SBEC is statutorily authorized to regulate and oversee all aspects of certification of public school educators. The SBEC is also statutorily authorized to ensure that all candidates for certification or renewal of certification demonstrate the knowledge and skills necessary to improve the performance of the diverse population of this state.

At the July 2021 SBEC meeting, the SBEC and Texas Education Agency (TEA) staff discussed the current pathway in which an individual certified in another country must comply to obtain a Texas educator certificate. Following is a description of the proposed amendments that incorporates feedback received by the SBEC as well as technical clean-up to update current cross-references.

§245.1. General Provisions.

The proposed amendment to §245.1(d) would remove the outdated reference to a "certificate entitlement card" as it is not a document that has been presented by individuals certified outside the state who submit applications for the review of out of state credentials. Candidates must submit other documents referenced in rule (statement or approval letter) that are sufficient proof of an individual's completion of requirements for licensure to teach in another state.

§245.5. Requirements for Issuance of a Texas Certificate Based on Certification from Another Country.

Proposed new §245.5(a)(3) would add a reference to the provisions in Chapter 152, Commissioner's Rules Concerning Examination Requirements, that may qualify an individual for exemption from required state examinations leading to issuance of the Texas standard certificate.

The proposed amendment to §245.5(b) would clarify that demonstration of English language proficiency is required prior to issuance of a Texas one-year certificate and would add the word "legacy" to align with the correct title to Chapter 239, Student Services Certificates, Subsection E, that has been renamed, Legacy Master Teacher Certificate, effective December 27, 2020. The title of Chapter 241 would also be updated in subsection (b) to align with the correct title.

The proposed amendment to §245.5(e) would clarify that the current process requires applicants issued the temporary, one-year certificate to obtain a Texas standard classroom teacher certificate prior to adding a supplemental certificate area to their record of certification. This is not a change in the certification process, only a clarification of current rule and procedures.

§245.10. Application Procedures.

The proposed amendment to §245.10(a) would delete the requirement in paragraph (3) that individuals licensed in other countries must obtain an original written statement, provided by the authorizing licensing agency in the issuing country, that the educator's certificate is in good standing, and has not been revoked, suspended, or sanctioned for misconduct and is not pending disciplinary or adverse action. The proposed amendment would reduce duplicative efforts and barriers for educators. The original written statements from foreign licensing agencies have been difficult for some foreign educators to obtain and difficult for TEA staff to verify. With the proposed amendment, educators licensed in other countries would still be required

to successfully complete Foreign Credential Evaluation and Texas background check and fingerprinting processes, which are the verifiable safeguards to ensure an educator applying for issuance of a Texas certificate is in good standing. These safeguards are sufficient to ensure that an applicant licensed by another country is qualified to be an educator in Texas.

The proposed amendment in §245.10(a) would provide technical edits to renumber paragraphs (4)-(6) to paragraphs (3)-(5).

§245.15. Evaluation of College Credentials.

The proposed amendment would add the phrase "Requests for" to the title of §245.15, which is the section that covers all requests to have college credentials reviewed by TEA staff, to match the title of §230.115, Requests for Evaluation of College Credentials, which is the rule specific to individuals certified in other states or territories of the United States. The proposed amendment would also establish the acronym "EPP" to align with Texas Register style requirements.

FISCAL IMPACT: Emily Garcia, associate commissioner for educator preparation, certification, and enforcement, has determined that for the first five-year period the proposal is in effect, there is no additional fiscal impact on state or local governments and that there are no additional costs to entities 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 (TGC), §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 TGC, §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 TGC, §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: The 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, the proposed amendment to §245.10 would repeal an existing regulation by removing the requirement that individuals must obtain a letter of professional standing by the issuing licensing country.

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 create a new regulation; would not expand or limit 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: The public benefit anticipated as a result of the proposal would be clearly defined rules and requirements for individuals to obtain Texas certification based on already being licensed to teach in other countries. There is no anticipated cost to persons who are required to comply with the proposal.

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

PRINCIPAL AND CLASSROOM TEACHER PAPERWORK REQUIREMENTS: The TEA staff 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 December 31, 2021, and ends January 31, 2022. A form for submitting public comments is available on the TEA website at https://tea.texas.gov/About_TEA/Laws_and_Rules/SBEC_Rules_(TAC)/Proposed_State_Board_for_Educator_Certification_Rules/. The SBEC will take registered oral and written comments on the proposal at the February 11, 2022 meeting in accordance with the SBEC board operating policies and procedures. All requests for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the Department of Educator Preparation, Certification, and Enforcement, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, Attention: Ms. Emily Garcia, associate commissioner for educator preparation, certification, and enforcement, not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on December 31, 2021.

STATUTORY AUTHORITY. The amendments are proposed under Texas Education Code (TEC), §21.041(b)(1), which states the SBEC must propose rules that provide for the regulation of educators and the general administration of the TEC, Chapter 21, Subchapter B, in a manner consistent with the TEC, Chapter 21, Subchapter B; TEC, §21.041(b)(4), which states the SBEC must propose rules that specify the requirements for the issuance and renewal of an educator certificate; TEC, §21.041(b)(5), which states the SBEC must propose rules that provide for the issuance of an educator certificate to a person who holds a similar certificate issued by another state or foreign country, subject to the TEC, §21.052; TEC, §21.048, which states the SBEC shall propose rules prescribing comprehensive examinations for each class of certificate issued by the board that includes not requiring more than 45 days elapsing between examination retakes and that starting January 1, 2021, all candidates teaching prekindergarten through grade six must demonstrate proficiency in the science of teaching reading on a certification examination; TEC, §21.052(a), which states that the SBEC may issue a certificate to an educator who submits an application for certification and holds a degree issued by an institution accredited by a regional accrediting agency or group that is recognized by a nationally recognized accreditation board, or a degree issued by an institution located in a foreign country, if the degree is equivalent to a bachelor's degree issued in the United States, or holds an appropriate certificate or other credential issued in another state or country and has met all certification requirements for issuance of the credential; TEC, §21.052(b), which states that for purposes of §21.052(a)(2), a person is considered to hold a certificate or other credential if the credential is not valid solely because it has expired; TEC, §21.052(c), which states that the SBEC may issue a temporary certificate under this section to an educator who holds a degree required by §21.052(a)(1) and a certificate or other credential required by §21.052(a)(2) but who has not satisfied the requirements prescribed by §21.052(a)(3). Subject to subsections (d) and (d-1), the SBEC may specify the term

of a temporary certificate issued under this subsection; TEC, §21.052(d), which states that a temporary certificate issued under §21.052(c) to an educator employed by a school district that has constructed or expanded at least one instructional facility as a result of increased student enrollment due to actions taken under the Defense Base Closure and Realignment Act of 1990 (10 U.S.C. Section 2687) may not expire before the first anniversary of the date on which the SBEC completes the review of the educator's credentials and informs the educator of the examination or examinations under the TEC, §21.048, on which the educator must perform successfully to receive a standard certificate; and TEC, §21.052(e), which states that an educator who has submitted all documents required by the board for certification and who receives a temporary certificate as provided by subsection (c) has one year to successfully complete examination requirements identified in the review of credentials and specified in Section 21.048, to receive a standard certificate.

CROSS REFERENCE TO STATUTE. The amendments implement Texas Education Code (TEC), §§21.041(b)(1), (4), and (5); 21.048; and 21.052(a), (b), (c), (d), and (e).

§245.1. General Provisions.

(a) A Texas educator certificate may be issued to an individual who holds a college degree and an acceptable certificate or other credential issued by the authorized licensing agency in another country and who meets appropriate requirements specified in §230.11 of this title (relating to General Requirements) and in this chapter.

(b) The degree held by an applicant from another country must be equivalent to at least a bachelor's degree or higher issued by an accredited institution of higher education in the United States accredited or otherwise approved by an accrediting organization recognized by the Texas Higher Education Coordinating Board or by the U.S. Department of Education.

(c) The certificate(s) or other credential(s) issued by the authorized licensing agency in another country may not be a temporary permit, a credential issued by a city or school district, or a certificate for which academic or other program deficiencies are indicated. Specific examination or renewal requirements shall not be considered academic or program deficiencies.

(d) A statement[,] or approval letter[, or certification entitlement card] issued by the authorized licensing agency in another country specifying eligibility for full certification upon employment or completion of specified examination requirements shall have the same standing as a certificate.

(e) The certificate(s) or other credential(s) and areas of certification issued by the authorized licensing agency in another country must be equivalent to a certificate or grade level that is within the early childhood-Grade 12 level and approved by the State Board for Educator Certification (SBEC). Based on the certificate(s) submitted with the application for review of credentials, the Texas Education Agency (TEA) staff shall identify the certification areas for which the applicant qualifies in Texas. The certificate(s) for which the applicant qualifies may be issued by the TEA staff under the authority of the SBEC.

(f) If a Texas examination or certification is scheduled to be eliminated, an individual requesting certification and examination comparability must ensure that the application and all review documentation, including examination scores, are received by TEA staff 60 calendar days before the application submission deadline for the examination and/or certification sought.

§245.5. Requirements for Issuance of a Texas Certificate Based on Certification from Another Country.

(a) The appropriate standard certificate issued under Chapter 230, Subchapter D, of this title (relating to Types and Classes of Certificates Issued), may be issued to an applicant holding an acceptable certificate or other credential and college degree as specified in §245.1 of this title (relating to General Provisions). The applicant must:

(1) pass the appropriate examination(s) prescribed in the Texas Education Code (TEC), §21.048(a), and §230.21 of this title (relating to Educator Assessment); [or]

(2) achieve an acceptable score on an examination(s) similar to and at least as rigorous as the requirements prescribed in the TEC, §21.048(a), and §230.21 of this title that was administered under the authority of another country. The applicant shall verify in a manner determined by the Texas Education Agency staff the level of performance on acceptable examinations administered under the authority of another country; or [.]

(3) qualify for an exemption from required Texas examinations through provisions in §152.1001 of Part 2 of this title (relating to Exceptions to Examination Requirements for Individuals Certified Outside the State).

(b) If all certification requirements are met, except successful completion of the appropriate certification examination(s), the applicant who has demonstrated English language proficiency as specified in §230.11 of this title (relating to General Requirements) may request issuance of a one-year certificate in one or more of the certification areas authorized by the certificate(s) or other credential(s) from another country. An applicant who holds only a credential that is equivalent to a student services, principal, or superintendent certificate issued in accordance with Chapter 239 of this title (relating to Student Services Certificates), with the exception of Subchapter E (relating to Legacy Master Teacher Certificate); Chapter 241 of this title (relating to Certification as Principal [Certificate]); or Chapter 242 of this title (relating to Superintendent Certificate) may be issued the equivalent Texas certificate. The applicant must verify two creditable years of public or private school experience, as defined in Chapter 153, Subchapter CC, of Part 2 of this title (relating to Commissioner's Rules on Creditable Years of Service) and the TEC, §5.001(2), in the specific student services or administrative area sought.

(c) After satisfying all certification requirements, including all appropriate examination requirements, the applicant is eligible to apply for issuance of the standard certificate issued under Chapter 230, Subchapter D, of this title (relating to Types and Classes of Certificates Issued).

(d) An applicant issued a one-year certificate under Chapter 230, Subchapter D, of this title and this chapter, who does not satisfy the appropriate examination requirements to establish eligibility for a standard certificate during the validity of the one-year certificate is not eligible for any type of certificate or permit authorizing employment for the same certification level or area until he or she has satisfied the examination requirements. If, due to extenuating circumstances beyond the control of the educator, examination requirements are not met during the validity period of the one-year certificate, the district may request an extension of the one-year certificate, not to exceed one calendar year in length.

(e) An applicant shall not be required to complete the content specialization portion of the certification examination in a certification area for which he or she does not seek standard certification unless the examination is required to establish a base classroom teaching certificate. A supplemental certificate, as described in Chapter 233 of this title (relating to Categories of Classroom Teaching Certificates), may not

be issued as a standard certificate unless the educator has established a classroom teaching certificate and may not be added to a one-year certificate.

(f) An applicant issued a one-year certificate under subsection (d) of this section who, during or subsequent to the validity of the one-year certificate, satisfies the appropriate examination requirements and establishes eligibility for a standard certificate may apply for:

(1) a new one-year certificate in another certification area based on a certificate or other credential issued by another country; or

(2) a second one-year certificate in an area previously authorized on a one-year certificate, provided the applicant was not assigned to the area and has not attempted the appropriate examination requirements for that area.

§245.10. Application Procedures.

(a) An individual who has been issued an appropriate certificate or other credential by the authorized licensing agency in another country as specified in §245.1 of this title (relating to General Provisions) may apply for a review of credentials by submitting the following items to the Texas Education Agency (TEA) staff:

(1) a completed application;

(2) the original detailed report or course-by-course evaluation for professional licensing of all college-level credits prepared by a foreign credential evaluation service recognized by the TEA staff. The evaluation must verify that the individual:

(A) holds, at a minimum, the equivalent of a baccalaureate degree issued by an accredited institution of higher education in the United States as specified in §245.1(b) of this title, including the date that the degree was conferred; and

(B) has completed an educator preparation program, including a teaching practicum;

[(3) an original written statement, provided by the authorized licensing agency in the issuing country, that the educator certificate(s) or other credential(s) specified in §245.1 of this title is currently in good standing and has not been revoked, suspended, or sanctioned for misconduct and is not pending disciplinary or adverse action. The statement must be written in the English language or must be accompanied by a translation in the English language from a foreign credential evaluation service recognized by the TEA staff or an accredited translation service;]

(3) [(4)] official transcripts of any additional college credits and/or degrees earned in the United States;

(4) [(5)] copies of any standard certificates issued by another state department of education; and

(5) [(6)] a nonrefundable review fee as specified in Chapter 230, Subchapter G, of this title (relating to Certificate Issuance Procedures).

(b) Pursuant to §245.5(b) of this title (relating to Requirements for Issuance of a Texas Certificate Based on Certification from Another Country) , an applicant may apply for a one-year certificate by submitting the following items to the TEA staff:

(1) a completed application; and

(2) the appropriate fee as specified in Chapter 230, Subchapter G, of this title.

(c) Pursuant to §245.5(a) of this title, an applicant may apply for a standard certificate by submitting the following items to the TEA staff:

(1) a completed application; and

(2) the appropriate fee as specified in Chapter 230, Subchapter G, of this title.

§245.15. Requests for Evaluation of College Credentials.

(a) A request to evaluate an applicant's credentials for areas of certification that are not identified on the certificate(s) or other credential(s) issued in accordance with §245.1 of this title (relating to General Provisions) must be directed to a State Board for Educator Certification (SBEC)-approved educator preparation program (EPP) for admission to and recommendation by the EPP [program] for certification.

(b) An individual who does not hold a certificate or other credential issued in accordance with §245.1 of this title must seek admission to an SBEC-approved EPP [educator preparation program] and be recommended by the EPP [program] for certification.

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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Cristina De La Fuente-Valadez
Director, Rulemaking
State Board for Educator Certification
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TITLE 22. EXAMINING BOARDS

PART 39. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS

CHAPTER 851. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS LICENSING AND ENFORCEMENT RULES

SUBCHAPTER B. P.G. LICENSING, FIRM REGISTRATION, AND GIT CERTIFICATION

22 TAC §851.80

The Texas Board of Professional Geoscientists (TBPG) proposes an amendment concerning the licensure and regulation of Professional Geoscientists in Texas. TBPG proposes an amendment to 22 TAC §851.80, regarding fees, by adding a fee for temporary firm registration in Texas.

BACKGROUND, PURPOSE, AND SUMMARY OF CHANGES

TBPG proposes an amendment that will allow the TBPG to charge a registration fee to a firm to temporarily be registered as a Geoscience Firm in Texas. The new fee, which is lower than the fee for a regular firm registration, would provide an incentive to qualified firms and ventures to engage in short term project(s) in the state.

FISCAL NOTE - STATE AND LOCAL GOVERNMENT

Rene D. Truan, Executive Director of the Texas Board of Professional Geoscientists, has determined that for each fiscal year of the first five years the section is in effect there is no economic

cost, loss, or other negative fiscal impact to the state and local governments as a result of enforcing or administering the section as proposed, except for the minimal administrative cost the agency will incur in issuing the few temporary licenses it anticipates will be requested. There are no estimated reductions in cost to the state and to local governments as a result of enforcing or administering the proposed sections. There is a potential minimal increase in revenue to the general revenue fund to offset the administrative cost to the agency, but no increase in revenue to local governments, from enforcing or administering these sections. The potential amount of increase in revenue cannot be estimated precisely because it is unknown whether any firms will apply for temporary licensure. TBPG has not received any requests for temporary firm registration in the past five years, so the increase in revenue to the state will likely be minimal.

PUBLIC BENEFIT AND COST

Mr. Truan has also determined that for each year of the first five years the section is in effect, the public will benefit from adoption of the section. The public benefit anticipated as a result of enforcing or administering the section includes the encouragement of economic activity in the state by ensuring that firms that wish to perform geoscience services to the public in Texas on a limited basis can apply for and receive a temporary firm registration to do so after showing they meet applicable requirements. The fee would allow the state to recover any costs associated with issuing temporary licenses and performing related administrative duties.

SMALL, MICRO-BUSINESS, LOCAL ECONOMY, AND RURAL COMMUNITIES ECONOMIC IMPACT ANALYSIS

Mr. Truan has determined that the proposed rule will not have an adverse effect on small businesses, micro-businesses, local economy, or rural communities because allowing temporary firm registration supports increased economic activity in an area in which the firm does business, such as potential employment opportunities in rural communities, subcontracting opportunities for small businesses. Consequently, neither an economic impact statement, a local employment impact statement, nor a regulatory flexibility analysis is required.

COST IN / COST OUT

This amendment is not subject to Government Code §2001.0045, which requires every rule that imposes a cost to be accompanied by a proposed rule to decrease or eliminate a cost in the same amount. Although the rule amendment represents a new fee category, the proposed amendment decreases the persons' cost to comply with the rule, as per §2001.0045(c)(2). Subject to certain statutory exceptions, a firm must obtain a firm registration from the board to engage in the practice of geoscience in Texas. Currently, a firm seeking a regular firm registration must pay a fee of $300. This amendment allows firms that are subject to the rule to pay a smaller fee of $250, thus resulting in a decreased cost to the firm. Firms that wish to obtain a temporary registration, perhaps to engage in a one-time, short-term project, can pay the lower fee this amendment proposes instead of paying the higher fee that the firm would need to pay for a regular registration.

GOVERNMENT GROWTH IMPACT STATEMENT

During the first five years that the rule would be in effect:

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

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

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

(4) the proposed rules do not require an increase or decrease in fees paid to the agency; although this is a new fee for a temporary firm registration, the Board does not expect this new fee to result in the absolute amount of fees the Board receives to go up or down in any meaningful way;

(5) the proposed rules do not create a new regulation;

(6) the proposed rules do not expand, limit, or repeal an existing regulation;

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

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

REGULATORY ANALYSIS OF MAJOR ENVIRONMENTAL RULES

Mr. Truan has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk 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 a state or a sector of the state. Although Professional Geoscientists and Registered Geoscience Firms play a key role in environmental protection for the state of Texas, this proposal is not specifically intended to protect the environment nor reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

Mr. Truan 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 COMMENT

Comments on the proposed amendment may be submitted in writing to Rene D. Truan, Executive Director, Texas Board of Professional Geoscientists, 333 Guadalupe Street, Tower I-530, Austin, Texas 78701 or by mail to P.O. Box 13225, Austin, Texas 78711 or by e-mail to rtruan@tbpg.texas.gov. Please indicate "Comments on Proposed Rules" in the subject line of all e-mails submitted. Please submit comments within 30 days following publication of the proposal in the *Texas Register.*

STATUTORY AUTHORITY

This section is proposed under the Texas Geoscience Practice Act, Occupations Code §1002.151, which authorizes the Board to adopt and enforce all rules and regulations consistent with the Act as necessary for the performance of its duties, and the regulation of the practice of geoscience in this state; §1002.152, which authorizes the board to set reasonable and necessary fees to be charged to applicants and license holders, and Occupations Code §1002.351, which authorizes the Board to adopt rules

related to the public practice of geoscience by a firm or corporation.

This section affects the Texas Geoscience Practice Act, Occupations Code §§1002.151 and 1002.351.

§851.80. Fees.

(a) All fees are non-refundable.

(b) P.G. application and license fee--$255.

(c) Examination processing fee--$25.

(d) Applicable examination fees:

(1) Geology--Fundamentals and Practice as determined by ASBOG®.

(2) Geophysics--Texas Fundamentals of Geophysics Examination--$75.

(3) Geophysics--Texas Geophysics Examination--$175.

(4) Soil Science--Fundamentals and Practice as determined by the Council of Soil Science Examiners (CSSE).

(e) Issuance of a revised or duplicate license wall certificate--$25.

(f) P.G. renewal fee--$223 or as prorated under §851.28(b) of this chapter. The fee for annual renewal of licensure for any individual sixty-five (65) years of age or older, permanently disabled, or under a significant medical hardship, as determined by the Executive Director as of the renewal date shall be half the current renewal fee.

(g) Late renewal penalty--$50.

(h) Fee for affidavit of licensure--$15.

(i) Verification of licensure--$15.

(j) Temporary license--$200/Temporary Firm Registration--$250.

(k) Firm registration application--$300.

(l) Firm registration renewal--$300.

(m) Insufficient funds fee--$25.

(n) Application for Geoscientist-in-Training certification--$25.

(o) Annual renewal of Geoscientist-in-Training certification--$25.

(p) Texas Geophysics Examination Proctored Review--$50.

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 December 14, 2021.

TRD-202105061
Rene Truan
Executive Director
Texas Board of Professional Geoscientists
Earliest possible date of adoption: January 30, 2022
For further information, please call: (512) 936-4405

TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 60. COMPLIANCE HISTORY

30 TAC §60.4

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes new §60.4.

Background and Summary of the Factual Basis for the Proposed Rule

Several large emergency incidents at industrial facilities in the past few years have caused significant impacts to public health and the environment, which have resulted in scrutiny of the compliance histories of the regulated entities involved in these incidents. The commission determined it is appropriate for the executive director to have the ability to make a designation to and reclassify a site's compliance history classification under Chapter 60 in a manner different than the rules currently allow. The commission proposes new §60.4. This section would provide a process for the executive director to initially designate a site's compliance history classification as "under review" and then later reclassify it to "suspended" if the executive director determines that exigent circumstances exist due to a significant emergency event at the site, such as a major explosion or fire, that causes major community disruption and substantial commitment of emergency response resources by federal or state authorities. Exigent circumstances must include those that significantly impact the surrounding community; result in significant emergency response efforts by federal or state authorities to address an actual, unauthorized release of pollutants, contaminants, or other materials regulated by the agency; and result in certain urgent consequences. The occurrence of such an emergency event requires immediate, significant response by the agency but currently does not impact the site's compliance history classification until it results in a compliance history component, as identified in §60.1(c), which is considered during an annual classification. The purpose of this proposed rulemaking is to communicate to the regulated entity and the public that a review of such a site's performance is underway, provide a more immediate and accurate measure of a site's performance in light of such an event, and make compliance history a more effective tool to provide oversight and ensure regulatory consistency.

For those sites subject to Chapter 60, the agency currently recalculates compliance history scores annually based on information from the previous five years and classifies sites as unsatisfactory, satisfactory, or high performers, or as unclassified if there is no compliance information about the site. Because compliance history scores are calculated on an annual basis, the impact of an emergency event with exigent circumstances on a site's compliance history will likely be delayed until any components related to the event are finalized and considered in an annual calculation, which may not happen for many months or years following the event. Therefore, the site's current classification may not accurately measure a site's performance in light of a significant emergency event at the site. To ensure the agency's compliance history program and dependent agency processes promote regulatory consistency through prompt recognition of such an event, the commission proposes new §60.4. This rule would authorize the executive director to make a designation to and reclassify the compliance history classification for a site where an emergency event has created exigent circumstances.

Section Discussion

§60.4, Site Classification Changes Due to Exigent Circumstances

The commission proposes new §60.4(a), concerning Site Classification Under Review, to establish that the executive director may designate a site's current compliance history classification as "under review" if the executive director determines that exigent circumstances exist due to a significant emergency event at the site. For circumstances to be "exigent," they must meet specified criteria as identified in three categories. For the executive director to move forward with the designation prescribed in this proposed rule, the event must meet all three categories of exigent circumstances.

First, the circumstances must result in significant disruption to one or more local communities of people. Whether community disruption is "significant" is intended to be determined on a case-by-case basis by looking at the event's impacts on the surrounding community. The extent of an event's impacts can depend on contextual factors. For example, communities vary in size and resources, and an event occurring in one community may not provide a significant disruption whereas a similar event may do so in another community.

Second, the circumstances must cause significant commitment of emergency response resources by a federal or state governmental authority to address an actual, unauthorized release of pollutants, contaminants, or other materials regulated by the agency.

Third, for circumstances to be "exigent," they must have resulted in the occurrence of at least one of the conditions listed in proposed subsection (a)(3)(A) - (C) or one of the conditions listed in proposed subsection (a)(3)(D)(i) - (iv). Each of the listed conditions is a potential result of the type of significant emergency event the commission determined must be urgently accounted for in a site's compliance history classification. For the purposes of proposed subsection (a)(3)(D)(iv), "injury or death of a person directly attributable to the release" is intended to capture injuries or death that are directly caused by the actual, unauthorized release of pollutants, contaminants, or other materials regulated by the agency. It is not intended to encompass injuries or death that are caused indirectly by any such event, such as an injury sustained by an individual slipping in a parking lot during an evacuation.

If all three of these categories are determined to be met, any designation of a site's compliance history classification as "under review" is effective immediately. The executive director will issue written notice of the "under review" designation to the site's known owner and operator. The "under review" designation shall thereafter expire on the 91st day after the date of the executive director's written notice of the designation unless the executive director beforehand initiates the process to reclassify the site to "suspended." Upon the initiation of the process to reclassify, the executive director will issue a Notice of Decision to Reclassify as proposed under subparagraph (b) of this section.

The commission proposes new §60.4(b), concerning Notice of Decision to Reclassify, to establish that the executive director may decide to reclassify a site's compliance history classification to "suspended." In making the decision, the executive director must consider available information including facts as to whether the event in question was caused through any fault of the site's owner or operator. If the initiation of the process to reclassify has been made by the executive director, a decision to reclassify to "suspended" must be made no sooner than 30 days and no later than 90 days after the site's classification is designated as "under review." The commission has determined that providing a time limit for the executive director's authority to make such a decision provides a measure of regulatory certainty. This subsection would also clarify that the site will not actually be reclassified until the effective date identified in proposed subsection (f), which would depend on whether the site owner or operator files a motion for the commission to review the executive director's decision to reclassify.

The commission proposes new §60.4(c), concerning Evaluation of Permit Applications, to prohibit the agency from taking action to issue, renew, amend, or modify a permit specific to a site for which the executive director has issued a Notice of Decision to Reclassify until the agency has evaluated the permitting action in light of the emergency event that caused or resulted in the exigent circumstances. The purpose of the required evaluation of pending permit applications is not to pause, prolong, or stop permitting actions that are appropriate in light of the event. For the purpose of this subsection, a "permit specific to a site" includes authorizations through standard permits, individual permits, or other authorizations that require affirmative action by the agency and that, if issued, would authorize regulated activities at the site where the event occurred. The evaluation under proposed §60.4(c) would not be required for other authorizations if the authorizations are claimed by regulated entities without the need for permit application review by the TCEQ--*e.g.,* certain general permits and permits by rule (PBRs). The purpose of this permit application evaluation is to ensure the site's proposed permitting actions are appropriate in light of the emergency event. Until the permit application evaluation is complete, the agency would not take action on proposed permit applications. The proposed evaluation would enable the agency to address concerns from the event by: (1) approving the permit; (2) approving the permit with changes to address conditions that caused or resulted from the event; or (3) denying the permit. As stated in proposed new §60.4(c) and (g)(1), this evaluation process applies to the processing of any permit applications for the site that are pending with the TCEQ at the time of the executive director's Notice of Decision to Reclassify, and it applies to the processing of any such applications that become pending unless and until the executive director's decision is withdrawn or set aside, or until a resulting "suspended" reclassification ends under proposed §60.4(h).

The commission proposes new §60.4(d), concerning Demonstration that Reclassification Not Warranted, to establish that the site owner or operator would have the opportunity to demonstrate to the executive director that reclassification of the site to suspended is not warranted. The commission recognizes that the site owner or operator may have additional information relevant to the executive director's decision to reclassify. The demonstration is not intended to be a formal procedure or a prerequisite to filing a motion for commission review, but rather to allow the site owner or operator an opportunity to provide additional information to the executive director. The executive director's decision to reclassify the site would be withdrawn if the executive director determines that reclassification is not warranted. If that happens, a written notice of the determination will be provided to the site owner or operator.

The commission proposes new §60.4(e), concerning Motion for Commission Review of the Executive Director's Decision, to provide a process for appealing the executive director's decision to reclassify a site's compliance history to suspended. Any motion for commission review under this proposed subsection would be

subject to the procedural requirements set forth in the subsection, including procedures for filing the motion, contents of the motion, disposition of the motion by commission action, disposition of the motion absent commission action, and provisions setting forth the effect of the reclassification during the pendency of any judicial review of the decision.

The commission proposes new §60.4(f), concerning Effective Date of Reclassification. Proposed new §60.4(f)(1) and (2) would set forth the dates upon which the executive director's decision to reclassify a site would become final and, therefore, when the reclassification would become effective. For purposes of judicial review, the agency action to reclassify a site's compliance history would be final and appealable on the effective date as proposed in new §60.4(f).

The commission proposes new §60.4(g), concerning Effects of Reclassification, to identify the effects of a site reclassification to suspended once the reclassification becomes effective. Under proposed new §60.4(g)(1), the agency would continue to evaluate a site's permitting applications in accordance with subsection (c) for the duration of the reclassification. Under proposed §60.4(g)(2), the site would also be treated as an unsatisfactory performer as identified in §60.3, Use of Compliance History. The commission does not intend for a site's reclassification to suspended, by itself, to change the underlying compliance history numerical points associated with the site.

The commission proposes new §60.4(h), concerning Duration of Reclassification, to establish that any reclassification of a site to suspended would be effective for at least one year from the effective date of reclassification and thereafter until the earlier of three conditions. Under proposed §60.4(h)(1), the site reclassification would end if the executive director decides that the reclassification is no longer warranted. The executive director's decision would be based on whether the exigent circumstances have been resolved, the cause of the event has been identified, and corrective actions have been implemented so as to appropriately reduce or eliminate the likelihood that the same or a similar event would reoccur. The commission intends for this decision to be in the sole discretion of the executive director. The commission intends this proposed subsection to be an additional incentive for the site owner or operator to resolve and address the significant emergency event as expeditiously as possible. Under proposed new §60.4(h)(2), the site reclassification would end when an enforcement action arising from the event either: (1) has resolved and resulted in a component in the site's compliance history that is accounted for in an annual classification; or (2) is neither pending nor anticipated to be brought by or on behalf of the agency. Alternatively, under proposed new §60.4(h)(3), the site reclassification would end three years after the effective date of the reclassification if the reclassification does not previously end by satisfying the conditions of subsection (h)(1) or (2). Once a suspended reclassification ends under the proposed rule, the site would be assigned a classification according to its site rating under existing §60.2, Classification.

The commission proposes that the new §60.4 would apply to events beginning on or after the effective date of the rule.

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 rule would be in effect, no fiscal implications are anticipated for the agency or the state.

Certain units of local government may experience fiscal implications as a result of administration or enforcement of the proposed rule if they have a site that is involved in a significant emergency event that results in exigent circumstances. The estimated fiscal impact resulting from this proposed rule would vary for each site that the executive director designates as "under review" and decides to reclassify as "suspended." Any potential costs would depend on the specific situation and whether the applicant is prevented from obtaining an authorization.

Public Benefits and Costs

Ms. Bearse determined that, for each year of the first five years the proposed rule would be in effect, the public benefit anticipated would be improved transparency and a more accurate compliance history classification for a site at which a significant emergency event results in exigent circumstances.

The proposed rulemaking may result in fiscal implications for businesses or individuals if they have a site that is involved in a significant emergency event that results in exigent circumstances. The estimated fiscal impact resulting from this proposed rule would vary for each site that the executive director decides to designate as "under review" and reclassify as "suspended." Any costs would depend on the specific situation and if the applicant is prevented from obtaining an authorization.

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 does not adversely affect a local economy in a material way for the first five years that the proposed rule would be in effect.

Rural Community Impact Statement

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 rule would be in effect. The rulemaking would apply statewide 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 rule for the first five-year period the proposed rule 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 rule does not adversely affect a small or micro-business in a material way for the first five years the proposed rule 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 or eliminate current employee positions, and it would not require an increase or decrease in fees paid to the agency. The proposed rulemaking alters an existing regulation by providing a way to designate a site's compliance history classification as "under re-

view" and creating an additional compliance history classification. The proposed rulemaking would not increase or decrease the number of individuals subject to its applicability. The proposed rule will not expand, limit, or repeal an existing rule. During the first five years, the proposed rule should not impact positively or negatively the state's economy.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and it determined that the rulemaking is not subject to Texas Government Code, §2001.0225, because the proposed rule does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The commission determined the proposed rule does not fall under the definition of a major environmental rule because the specific intent of the rule is to promote and ensure regulatory consistency in agency processes by creating a mechanism to designate site compliance history classifications as "under review" and by creating a new compliance history classification. The new designation and classification are appropriate for sites where an event occurred that causes or results in exigent circumstances, as described in the proposed rule; and if the executive director decides to designate a site classification as "under review" and reclassify it to "suspended," it ensures agency processes such as permitting actions are appropriately accounting for the event. The purpose of the proposed rulemaking is to provide a more immediate and accurate measure of a site's performance in light of such an event and to make compliance history a more effective tool to provide oversight and ensure regulatory consistency. By ensuring regulatory consistency, the TCEQ's compliance history program better effectuates its statutory purpose under Texas Water Code, §5.753 and §5.754.

Additionally, the commission determined the proposed rule is not a major environmental rule because it is not expected to adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The commission intends that designating a site's compliance history classification as "under review" and reclassifying it under the proposed rule would be a regulatory tool that is used sparingly and reserved as a response to rare and impactful events. Accordingly, any exercise by the executive director of the authority in the proposed rule is not expected to affect many regulated entities in the state. Furthermore, any directly attributable costs to regulated entities whose site is subject to a Notice of Decision to Reclassify under this rule would depend on the results of the agency's evaluation of any applications for permits specific to the site. Any such costs may also depend on whether the applicant is prevented from obtaining an authorization.

The commission invites public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. Written comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated the proposed rule and performed an analysis of whether Texas Government Code, Chapter 2007, is applicable. The specific purpose of the proposed rule is to provide a more immediate and accurate measure of a site's performance in light of certain events and to make compliance history a more effective tool to provide oversight and ensure regulatory consistency as required by Texas Water Code, §5.753. The proposed rule does not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Consequently, this proposed rule does not meet the definition of a taking under Texas Government Code, §2007.002(5), and therefore will not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found that the proposal is 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 proposed rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22, and found the proposed rulemaking consistent with the applicable CMP goals and policies.

CMP goals applicable to the proposed rule include: 31 TAC §501.12(1), to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); 31 TAC §501.12(2), to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone; 31 TAC §501.12(3), to minimize loss of human life and property due to the impairment and loss of protective features of CNRAs; 31 TAC §501.12(5), to balance the benefits from economic development and multiple human uses of the coastal zone, the benefits from protecting, preserving, restoring, and enhancing CNRAs, the benefits from minimizing loss of human life and property, and the benefits from public access to and enjoyment of the coastal zone; 31 TAC §501.12(6), to coordinate agency and subdivision decision-making affecting CNRAs by establishing clear, objective policies for the management of CNRAs; 31 TAC §501.12(7), to make agency and subdivision decision-making affecting CNRAs efficient by identifying and addressing duplication and conflicts among local, state, and federal regulatory and other programs for the management of CNRAs; and 31 TAC §501.12(8), to make agency and subdivision decision-making affecting CNRAs more effective by employing the most comprehensive, accurate, and reliable information and scientific data available and by developing, distributing for public comment, and maintaining a coordinated, publicly accessible geographic information system of maps of the coastal zone and CNRAs at the earliest possible date. The commission has reviewed the proposed rule for consistency with applicable goals of the CMP and determined that the proposed rule is consistent with the intent of the applicable goals and will not result in any significant adverse effect to CNRAs.

CMP policies applicable to the proposed rule include: 31 TAC §501.19, Construction and Operation of Solid Waste Treatment, Storage, and Disposal Facilities; 31 TAC §501.20, Prevention, Response, and Remediation of Oil Spills; 31 TAC §501.21, Discharge of Municipal and Industrial Wastewater to Coastal Waters; 31 TAC §501.22, Nonpoint Source (NPS) Water Pol-

lution; 31 TAC §501.23, Development in Critical Areas; 31 TAC §501.25, Dredging and Dredged Material Disposal and Placement; 31 TAC §501.28, Development Within Coastal Barrier Resource System Units and Otherwise Protected Areas on Coastal Barriers; and 31 TAC §501.32, Emission of Air Pollutants. This rulemaking does not relax existing standards for issuing permits related to the construction and operation of solid waste treatment, storage, and disposal facilities in the coastal zone or for governing the prevention of, response to, and remediation of coastal oil spills. This rulemaking does not relax existing commission rules and regulations governing the discharge of municipal and industrial wastewater to coastal waters, nor does it affect the requirement that the agency consult with the Department of State Health Services regarding wastewater discharges that could significantly adversely affect oyster reefs. This rulemaking does not relax the existing requirements that state agencies and subdivisions with the authority to manage NPS pollution cooperate in the development and implementation of a coordinated program to reduce NPS pollution in order to restore and protect coastal waters. Further, it does not relax existing requirements applicable to: areas with the potential to develop agricultural or silvicultural NPS water quality problems; on-site disposal systems; underground storage tanks; or Texas Pollutant Discharge Elimination System permits for stormwater discharges. This rulemaking does not relax the standards related to dredging; the discharge, disposal, and placement of dredge material; compensatory mitigation; and authorization of development in critical areas. This rulemaking does not relax existing standards for issuing permits related to development of infrastructure within Coastal Barrier Resource System Units and Otherwise Protected Areas. Rather, the intent of the rulemaking is to increase compliance with existing standards and rule requirements.

Promulgation and enforcement of this rule will not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rule is consistent with these CMP goals and policies and because this rule does not create or have a direct or significant adverse effect on any coastal natural resource areas.

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.

Effect on Sites Subject to the Federal Operating Permits Program

The commission determined that the proposed rule could impact sites subject to the Federal Operating Permits Program, but only if the executive director decides that a site's compliance history classification should be reclassified to "suspended" and the agency is scheduled to act on an application for a new or renewed federal operating permit for the site prior to the noticed reclassification being set aside or otherwise ended.

Announcement of Virtual Hearing

The commission will hold a *virtual* public hearing on this proposal on January 27, 2022, 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 virtual hearing; however, commission staff members 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 Tuesday, January 25, 2022. 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 January 25, 2022, 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, they may do so at no cost at:

https://teams.microsoft.com/l/meetup-join/19%3ameeting_MTRmYjg0NGYtYjhjYi00YWNjLThkNmUtMTUxZjk4MjUwYzli%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

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Gwen Ricco, 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 2020-049-060-CE. The comment period closes on February 1, 2022. Please choose one of the methods provided to submit your *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 Melissa Cordell, Office of Compliance and Enforcement, (512) 239-2483.

Statutory Authority

The new rule is proposed under the authority of Texas Water Code (TWC) §5.753, concerning Standards for Evaluating and Using Compliance History, and TWC, §5.754, concerning Classification and Use of Compliance History, which authorize rulemaking to establish compliance history standards, call upon the compliance history program to ensure consistency and authorize the commission to utilize a minimum of three classifications. These provisions do not restrict the application of such classifications to be at specific intervals. Additional authority exists under TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; and TWC, §5.103, concerning Rules, which provides the commission the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC and other laws of this state.

The proposed new rule implements TWC, §§5.102, 5.103, 5.753, and 5.754.

§60.4. Site Classification Changes Due to Exigent Circumstances.

(a) Site Classification Under Review. Regardless of any other section of Chapter 60 of this title (relating to Compliance History), the executive director may designate a site's current compliance history classification as "under review" if the executive director determines that exigent circumstances exist due to an event at the site. The designation as "under review" is effective immediately and written notice will be issued to the site's owner and operator. Unless a Notice of Decision to Reclassify is issued under subsection (b) of this section, the designation shall expire on the 91st day after the date of the written notice of designation. For the purpose of this section, exigent circumstances must include:

(1) Significant community disruption;

(2) Emergency response by a federal or state authority to address an actual, unauthorized release of pollutants, contaminants, or other materials regulated by the agency; and

(3) The event must have resulted in one or more of the following:

(A) the issuance of an emergency order by a federal or state governmental authority;

(B) the issuance of a temporary restraining order or temporary injunction at the request of the state, related to compliance with "applicable legal requirements" under the jurisdiction of the commission, as defined by §60.1(c)(1) of this title (relating to Compliance History);

(C) the use of significant federal or state resources, such as the activation of an incident command system; or

(D) an actual, unauthorized release of pollutants, contaminants, or other materials regulated by the agency, which causes:

(i) the evacuation of persons from homes, places of employment, or other locations;

(ii) the sheltering in place by persons in homes, places of employment, or other locations;

(iii) the creation of a traffic hazard or interference with normal use of a navigable waterway, railway, or road; or

(iv) injury or death of a person directly attributable to the release.

(b) Notice of Decision to Reclassify. The executive director may then decide to reclassify a site's compliance history to "suspended." The executive director will consider any available information concerning whether the event in question was caused through any fault of the site's owner or operator. The executive director may make such a decision no sooner than 30 days and no later than 90 days after a site's classification is designated as "under review," and the executive director shall send written notice to the site's owner or operator of the decision to reclassify the site's compliance history to suspended. The noticed reclassification shall not become final until the effective date under subsection (f) of this section.

(c) Evaluation of Permit Applications. To the extent any permit applications are pending for authorizations at the site, upon the executive director's written Notice of Decision to Reclassify a site's compliance history to "suspended" and until the agency has evaluated the pending permit application in light of the event, unless legally obligated otherwise or the decision is withdrawn or set aside, the agency shall not take action to issue, renew, amend, or modify a permit specific to the site. Based on the evaluation, the agency may:

(1) approve the permit;

(2) approve the permit with changes, which may include additional protective measures to address conditions that caused or resulted from the event; or

(3) deny the permit.

(d) Demonstration that Reclassification Not Warranted. At any time prior to filing a motion for commission review of the executive director's Notice of Decision to Reclassify, the site owner or operator may demonstrate to the executive director that reclassification is not warranted. If the executive director determines that reclassification is not warranted, the executive director shall withdraw the decision to reclassify the site's compliance history to suspended by providing written notice to the site owner or operator.

(e) Motion for Commission Review of the Executive Director's Decision. The executive director's decision to reclassify a site's compliance history to suspended under this section may be appealed to the commission only by persons who own or operate the site, and pursuant to the following procedures:

(1) A motion for commission review of the executive director's decision shall be filed with the Chief Clerk not later than 90 days after the date the executive director sends the written Notice of Decision to Reclassify under subsection (b) of this section.

(2) The commission or the general counsel may, by written order, extend the period of time for taking action on the motion so long as the period for taking action is not extended beyond 180 days after the date the executive director sends the written Notice of Decision to Reclassify under subsection (b) of this section.

(3) The motion shall provide the name, address, and daytime telephone number of the person filing the motion, and a brief explanation of the person's owner or operator status as it relates to the site being reclassified.

(4) The motion shall state the grounds for the appeal and the specific relief sought. The appeal must also include all documentation and argument in support of the motion.

(5) At the request of the general counsel or a commissioner, the motion for review of the executive director's decision to reclassify will be scheduled for consideration during a commission meeting. At the commission meeting, the commission may act on the motion by affirming or setting aside the executive director's decision to reclassify in whole or in part. A Commission Order for its action under this paragraph shall not contain conclusions of law.

(6) If the commission does not act on the motion under paragraph (5) of this subsection, then the motion will be addressed as follows:

(A) Unless an extension of time is granted, if a motion for review of the executive director's decision to reclassify is not acted on by the commission within 115 days after the date the executive director sends the written Notice of Decision to Reclassify under subsection (b) of this section, the motion is overruled by operation of law; or

(B) In the event of an extension, the motion is overruled by operation of law on the date fixed by the order granting the extension, or in the absence of a fixed date, 180 days after the date the executive director sends the written Notice of Decision to Reclassify under subsection (b) of this section.

(7) During the pendency of any judicial review of the reclassification to suspended, the reclassification shall remain for the purpose of this rule.

(f) Effective Date of Reclassification.

(1) If no timely motion for commission review is filed pursuant to subsection (e) of this section, the site's compliance history shall be reclassified to suspended on the 91st day after the date the executive director sends the written Notice of Decision to Reclassify under subsection (b) of this section; or

(2) If a timely motion for commission review is filed pursuant to subsection (e) of this section, the site's compliance history shall be reclassified to suspended on the date a commission order affirming the executive director's decision to reclassify is signed or, in the absence of such an order, on the date the motion is overruled by operation of law.

(g) Effects of Reclassification. While a site's compliance history is reclassified to suspended under this section:

(1) The agency shall continue to evaluate applications for permits specific to the site under subsection (c) of this section; and

(2) The site shall be treated as an unsatisfactory performer for the purposes of §60.3 of this title (relating to Use of Compliance History).

(h) Duration of Reclassification. A site's compliance history reclassification under this rule to suspended shall remain for at least one year after the effective date of reclassification, and then until the earliest of:

(1) the executive director provides written notice of the determination that the reclassification is no longer warranted, after the executive director decides that:

(A) the exigent circumstances have been resolved; and

(B) the cause of the event has been identified and corrective actions have been implemented that appropriately reduce or eliminate the likelihood that the same or a similar event will reoccur;

(2) an enforcement action arising from the event has been resolved and resulted in a component that is accounted for in the site's compliance history, or such enforcement case is neither pending nor anticipated by the executive director; or

(3) three years after the effective date of reclassification.

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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Charmaine Backens
Deputy Director, Litigation Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-2678

CHAPTER 331. UNDERGROUND INJECTION CONTROL

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §331.11

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §331.11.

Background and Summary of the Factual Basis for the Proposed Rule

This rulemaking implements House Bill (HB) 1284, 87th Texas Legislature, Regular Session (RS), 2021, addressing agency jurisdiction over regulation of injection and geologic storage of anthropogenic carbon dioxide (CO_2) in Texas.

Class VI underground injection control (UIC) wells are authorized under the federal Safe Drinking Water Act and are used to inject anthropogenic CO_2 into the subsurface for geologic sequestration and storage. Owners and operators of these wells must first obtain a permit from the United States Environmental Protection Agency (EPA) in order to inject and store anthropogenic CO_2, unless EPA has delegated permitting jurisdiction, known as "primacy," to a state to issue such permits. Texas has primacy over the permitting of all other classes of UIC wells, but not over Class VI wells. Prior to HB 1284, Chapter 27 of the Texas Water Code (TWC) split jurisdiction over Class VI wells between the Railroad Commission of Texas (RRC) and the TCEQ, depending on the type of project producing the anthropogenic CO_2 and the zone into which the anthropogenic CO_2 will be injected. In HB 1284, the legislature consolidated the jurisdiction over onshore and offshore Class VI UIC wells solely to the RRC and directed the RRC to apply for and obtain primacy of this permitting program from the EPA.

Although permitting of Class VI injection wells under HB 1284 is delegated solely to the RRC, the TCEQ will be required to issue a letter of determination to an applicant who is pursuing a Class VI permit from the RRC stating that Class VI injection operations will not impact or interfere with any previous or existing Class I injection well, including any associated waste plume, or any other injection well authorized or permitted by the TCEQ.

The Act is effective immediately and was signed by Governor Abbott on June 9, 2021.

Section Discussion

HB 1284 amends Chapter 27 of TWC; Chapter 382 of the Texas Health and Safety Code (THSC); Chapter 121 of the Natural Resources Code (NRC); and Chapter 202 of the Tax Code to give sole jurisdiction of the Class VI injection activities to the RRC.

The commission proposes to amend 30 Texas Administrative Code (TAC) §331.11 by removing subsection (d), which states "The commission has jurisdiction over the injection of carbon dioxide produced by a clean coal project into a zone that is below the base of usable quality water and that is not productive of oil, gas, or geothermal resources."

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 rule is 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 rule.

Public Benefits and Costs

Ms. Bearse determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated would be compliance with state law and the potential for a more streamlined application and permit approval process for Class VI injection well programs. The proposed rulemaking is not anticipated to result in fiscal implications for businesses or individuals.

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 does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

Rural Communities Impact Assessment

The commission reviewed this proposed rulemaking and determined that the proposed rulemaking does not adversely affect rural communities in a material way for the first five years that the proposed rule is in effect. The amendment would apply statewide and have the same effect in rural communities as in urban communities

Small Business and Micro-Business Assessment

The commission reviewed this proposed rulemaking and determined that no adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rule for the first five-year period the proposed rule is 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 rule does not adversely affect a small or micro-business in a material way for the first five years the proposed rule is in effect.

Government Growth Impact Statement

The commission prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does 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 does 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 removes 30 TAC §331.11(d) and its applicability to certain individuals. The proposed rulemaking would not create a new regulation or expand, limit, or repeal an existing rule. During the first five years, the proposed rule should not impact positively or negatively the state's economy.

Draft Regulatory Impact Analysis

The commission reviewed the rulemaking action in light of the regulatory analysis requirements of Texas Government Code (TGC), §2001.0225, and determined that the action is not subject to TGC, §2001.0225, because it does not meet the definition of a "Major environmental rule" as defined by 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. The proposed amendment implements legislation (HB 1284, 87th Texas Legislature, (RS), 2021) which consolidates the jurisdiction over onshore and offshore Class VI UIC wells solely to the RRC and directs the RRC to apply for and obtain primacy of this permitting program from the EPA. The proposed rule implements this change in jurisdiction and is not specifically intended to protect the environment or reduce risks to human health from environmental exposure, nor does it 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. Existing requirements for the management of underground injection wells in 30 TAC Chapter 331 are not changed by this rulemaking.

As defined in TGC, §2001.0225(a) only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; 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 adopt a rule solely under the general authority of the commission. The proposed amendment does not exceed an express requirement of state law or a requirement of a delegation agreement as there are no express requirements for underground injection control wells. These rules were not developed solely under the general powers of the agency as they are consistent with HB 1284, Chapter 27 of the TWC, Chapter 382 of THSC, Chapter 121 of the NRC, and Chapter 202 of the Tax Code. Therefore, this rulemaking is not subject to the regulatory analysis provision of TGC, §2001.0225(b).

The commission invites public comment regarding the Draft Regulatory Impact Analysis during the public comment period. 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 commission evaluated this rulemaking action and performed a preliminary assessment of whether TGC, Chapter 2007, is applicable. The proposed amendment implements legislative requirements in HB 1284, which consolidates the jurisdiction over onshore and offshore Class VI UIC wells solely to the RRC and directs the RRC to apply for and obtain primacy of this permitting program from the EPA.

The proposed rule would be neither a statutory nor a constitutional taking of private real property. The proposed amendment does not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Consequently, this rulemaking action does not meet the definition of a taking under TGC, §2207.002(5). The proposed rule does not directly prevent a nuisance or prevent an immediate threat to life or property. Therefore, this rulemaking action would not constitute a taking under TGC, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rule and found it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor would it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rule is not subject to the 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.

Virtual Public Hearing

The commission will hold a virtual public hearing on this proposal on January 25, 2022, at 10:00 a.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 virtual hearing; however, Commission staff members 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 January 24, 2022. 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 January 24, 2022, 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, they may do so at no cost at:

https://teams.microsoft.com/l/meetup-join/19%3ameeting_YzFiMTViZDMtMTllNC00NDRmLTgwNWYtNzA0ZGE4N2JiYTlz%40thread.v2/0?context=%7b%22Tid%22%3a%22871a83a4-a1ce-4b7a-8156-3bcd93a08fba%22%2c%22Oid%22%3a%2230ec010b-ff0b-4618-bbc4-622a14f9cb18%22%2c%22IsBroadcastMeeting%22%3atrue%7d&btype=a&role=a.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

Written Comments

Written comments may be submitted to Cecilia Mena, 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 2021-025-331-WS. The comment period closes on February 1, 2022. Please choose one of the methods provided to submit your 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 Dan Hannah, Radioactive Materials Division at (512) 239-2161.

Statutory Authority

The amended rule is 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; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under TWC and other laws of the state; and TWC, §27.019, which authorizes the commission to adopt rules to implement the statutes regarding injection wells.

The rulemaking implements House Bill 1284, 87th Texas Legislature, (RS), 2021; TWC, Chapter 27; Texas Health and Safety Code, Chapter 382; Natural Resources Code §121.003; and Tax Code §202.0545, which consolidate the jurisdiction over onshore and offshore Class VI UIC wells solely to the RRC and direct the RRC to apply for and obtain primacy of this permitting program from the EPA.

§331.11. Classification of Injection Wells.

(a) Injection wells within the jurisdiction of the commission are classified as follows.

(1) Class I:

(A) wells used by generators of hazardous wastes or owners or operators of hazardous waste management facilities to inject hazardous waste, other than Class IV wells;

(B) other industrial and municipal waste disposal wells which inject fluids beneath the lower-most formation which within 1/4 mile of the wellbore contains an underground source of drinking water (USDW); and

(C) radioactive waste disposal wells which inject fluids below the lower-most formation containing a USDW within 1/4 mile of the wellbore.

(2) Class III. Wells which are used for the extraction of minerals, including:

(A) mining of sulfur by the Frasch process; and

(B) solution mining of minerals which includes sodium sulfate, sulfur, potash, phosphate, copper, uranium and any other minerals which can be mined by this process.

(3) Class IV. Wells used by generators of hazardous wastes or of radioactive wastes, by owners or operators of hazardous waste management facilities, or by owners or operators of radioactive waste disposal sites to dispose of hazardous wastes or radioactive wastes into or above a formation which within 1/4 mile of the wellbore contains a USDW.

(4) Class V. Class V wells are injection wells not included in Classes I, II, III, or IV. Generally, wells covered by this paragraph inject nonhazardous fluids into or above formations that contain USDWs. Except for Class V wells within the jurisdiction of the Railroad Commission of Texas, all Class V injection wells are within the jurisdiction of the commission and include, but are not limited to:

(A) air conditioning return flow wells used to return to the supply aquifer the water used for heating or cooling in a heat pump;

(B) closed loop injection wells which are closed system geothermal wells used to circulate fluids including water, water with additives, or other fluids or gases through the earth as a heat source or heat sink;

(C) large capacity cesspools or other devices that receive greater than 5,000 gallons of waste per day, which have an open bottom and sometimes have perforated sides;

(D) cooling water return flow wells used to inject water previously used for cooling;

(E) drainage wells used to drain surface fluid, primarily storm runoff, into a subsurface formation;

(F) drywells used for the injection of wastes into a subsurface formation;

(G) recharge wells used to replenish the water in an aquifer;

(H) salt water intrusion barrier wells used to inject water into a freshwater aquifer to prevent the intrusion of salt water into the fresh water;

(I) sand backfill wells used to inject a mixture of water and sand, mill tailings, or other solids into mined out portions of subsurface mines;

(J) septic systems designed to inject greater than 5,000 gallons per day of waste or effluent;

(K) subsidence control wells (not used for the purpose of oil or natural gas production) used to inject fluids into a non-oil or gas producing zone to reduce or eliminate subsidence associated with the overdraft of fresh water;

(L) wells used for the injection of water for storage and subsequent retrieval for beneficial use as part of an aquifer storage and recovery project;

(M) motor vehicle waste disposal wells which are used or have been used for the disposal of fluids from vehicular repair or maintenance activities, such as an automotive repair shop, auto body shop, car dealership, boat, motorcycle or airplane dealership, or repair facility;

(N) improved sinkholes;

(O) aquifer remediation wells, temporary injection points, and subsurface fluid distribution systems used to inject nonhazardous fluids into the subsurface to aid in the remediation of soil and groundwater; and

(P) subsurface fluid distribution systems.

(b) Class II wells and Class III wells used for brine mining fall within the jurisdiction of the Railroad Commission of Texas.

(c) Baseline wells and monitor wells associated with Class III injection wells within the jurisdiction of the commission are also subject to the rules specified in this chapter.

~~[(d) The commission has jurisdiction over the injection of carbon dioxide produced by a clean coal project into a zone that is below the base of usable quality water and that is not productive of oil, gas, or geothermal resources.]~~

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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Guy Henry
Deputy Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-2809

TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 353. INTRODUCTORY PROVISIONS

SUBCHAPTER B. EMPLOYMENT PRACTICES

31 TAC §353.32

The Texas Water Development Board ("TWDB" or "board") proposes amendments to 31 Texas Administrative Code (TAC) §353.32, Sick Leave Pool, to incorporate provisions of a new employee family leave pool.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED AMENDMENTS.

The 87th Texas Legislature enacted House Bill 2063, amending Texas Government Code Chapter 661 to add new Subchapter A-1, State Employee Family Leave Pool. The new legislation requires state agencies to create and administer an employee family leave pool, and to adopt rules and prescribe procedures relating to the operation of the family leave pool.

SECTION BY SECTION DISCUSSION OF PROPOSED AMENDMENTS.

Subchapter B. Employment Practices

Section 353.32. Sick Leave Pool

The section name is proposed to be amended from Sick Leave Pool to Employee Leave Pools to allow for inclusion of the new employee family leave pool program.

Section 353.32(b)

Section 353.32(b) is added to outline the TWDB family leave pool program and appoint the TWDB Human Resources Director or other employee designated by the Executive Administrator as family leave pool administrator. The amended rule authorizes the family leave pool administrator to prescribe procedures relating to operation of the family leave pool program.

The remaining sections in §353.32 are relettered to accommodate the addition of §353.32(b) and amended to add references to the family leave pool program.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS

Ms. Rebecca Treviño, Chief Financial Officer, has determined that there will be no fiscal implications for state or local governments resulting from the proposed rulemaking. For the first five years these rule amendments are in effect, there is no expected additional cost to state or local governments resulting from their administration.

This proposed rulemaking is not expected to result in a reduction in costs to either state or local governments. There is no expected reduction in costs for state and local governments because the proposed amendments apply only to employees of TWDB and involve contributions of existing accrued leave. This proposed rulemaking is not expected to have any impact on state or local revenues. Administering the amendments will not require any increase in expenditures for state or local governments because the amendments apply only to employees of TWDB and involve contributions of accrued leave to a leave pool. Additionally, there are no foreseeable implications relating to state or local governments' costs or revenue resulting from this proposed rulemaking.

Because this rulemaking will not impose a cost on regulated persons, the requirement included in Texas Government Code §2001.0045 to repeal a rule does not apply. Furthermore, the

requirement in Texas Government Code §2001.0045 does not apply because this rulemaking is necessary to implement legislation.

The board invites public comment regarding this fiscal note. Written comments on the fiscal note may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

PUBLIC BENEFITS AND COSTS

Ms. Treviño also has determined that for each year of the first five years the proposed rulemaking is in effect, there will be no public benefit or cost from the rulemaking because it is only applicable to internal TWDB policy and procedure.

LOCAL EMPLOYMENT IMPACT STATEMENT

The board has determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect because it will impose no new requirements on local economies. The board also has determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities resulting from enforcement of these amendments. The board also has determined that there is no anticipated economic cost to persons who are required to comply with the rulemaking as proposed. Therefore, no regulatory flexibility analysis is necessary.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The board reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and determined that the rulemaking is not subject to Texas Government Code, §2001.0225, because it does not meet the definition of a "major environmental rule" as defined in the Administrative Procedure Act. A "major environmental rule" is defined as a rule with the specific intent to protect the environment or reduce risks to human health from environmental exposure, a rule that may adversely affect in a material way the economy or a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The intent of the rulemaking is to outline the TWDB family leave pool program.

Even if the proposed rulemaking were a major environmental rule, Texas Government Code §2001.0225 still would not apply to this rulemaking because Texas Government Code §2001.0225 only applies to a major environmental rule, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability criteria because it: (1) does not exceed a standard set by federal law or any other federal law; (2) does not exceed an express requirement of state law; (3) does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; and (4) is not proposed solely under the general powers of the agency, but rather under Texas Government Code §661.022. Therefore, this proposed rule does not fall under any of the applicability criteria in Texas Government Code §2001.0225.

The board invites public comment regarding this draft regulatory impact analysis determination. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

TAKINGS IMPACT ASSESSMENT

The board evaluated this proposed rulemaking and performed an analysis of whether it constitutes a taking under Texas Government Code Chapter 2007. The specific purpose of this rule revision is to outline the TWDB family leave pool program.

The board's analysis indicates that Texas Government Code Chapter 2007 does not apply to this proposed rulemaking because this is an action that is reasonably taken to fulfill an obligation mandated by state law, which is exempt under Texas Government Code §2007.003(b)(4). State agencies are required by Texas Government Code §661.002 to adopt rules relating to the operation of agency family leave pool programs.

Nevertheless, the board further evaluated this proposed rule and performed an assessment of whether it constitutes a taking under Texas Government Code, Chapter 2007. Promulgation and enforcement of this proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulation does not affect a landowner's rights in private real property because this rulemaking does not burden nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. Therefore, the proposed rule does not constitute a taking under Texas Government Code Chapter 2007.

GOVERNMENT GROWTH IMPACT STATEMENT

The board reviewed the proposed rulemaking in light of the government growth impact statement requirements of Texas Government Code §2001.0221 and has determined, for the first five years the proposed rule amendments would be in effect, the proposed amendments will not: (1) create or eliminate a government program; (2) require the creation of new employee positions or the elimination of existing employee positions; (3) require an increase or decrease in future legislative appropriations to the agency; (4) require an increase or decrease in fees paid to the agency; (5) create a new regulation; (6) expand, limit, or repeal an existing regulation; (7) increase or decrease the number of individuals subject to the rule's applicability; or (8) positively or adversely affect this state's economy.

SUBMISSION OF COMMENTS

Written comments on the proposed rulemaking may be submitted by mail to Office of General Counsel, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231; by email to rulescomments@twdb.texas.gov; or by fax to (512) 475-2053. Comments will be accepted until 5:00 p.m. of the 31st day following publication in the *Texas Register.* Include reference to Chapter 353 in the subject line of any comments submitted.

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Government Code §661.022, which requires state agencies to adopt rules and prescribe procedures relating to the operation of the employee family leave pool, and Texas Water Code §6.101, which provides TWDB with authority to adopt rules necessary

to carry out the powers and duties in the Texas Water Code and other laws of the State.

Cross reference to Texas Government Code Chapter 661.

§353.32. Employee [~~Sick~~] Leave Pools [~~Pool~~].

(a) A sick leave pool program is established to help alleviate the hardship caused to an employee and the employee's family if a catastrophic illness or injury forces the employee to exhaust all accrued leave time and to lose compensation from the state.

(b) A family leave pool program is established to provide eligible employees more flexibility to: bond with or care for a child in the child's first year after birth, adoption or foster placement; care for a person 18 or older in guardianship placement; care for a seriously ill family member or for the employee, including pandemic-related illnesses or complications caused by a pandemic; and provide essential care to a family member due to an extenuating circumstance created by an ongoing pandemic. Employees must have exhausted all eligible compensatory, discretionary, sick and vacation leave.

(c) [~~b~~] The Human Resources Director or other employee designated by the Executive Administrator will act as Sick Leave Pool and Family Leave Pool Administrator.

(d) [~~c~~] The Sick Leave Pool and Family Leave Pool Administrator, with the advice and consent of the Executive Administrator, will prescribe and implement policies [~~a policy~~] and procedures for operation of the sick leave pool and family leave pool programs [~~program~~] and include the policies [~~policy~~] in the Employee Handbook. The policies [~~policy~~] and procedures must be consistent with Texas Government Code Chapter 661.

(e) [~~d~~] Employee donations to the sick leave pool and family leave pool are strictly voluntary and must be made in writing.

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 December 16, 2021.

TRD-202105101
Ashley Harden
General Counsel
Texas Water Development Board
Earliest possible date of adoption: January 30, 2022
For further information, please call: (512) 463-5646

CHAPTER 357. REGIONAL WATER PLANNING

The Texas Water Development Board ("TWDB" or "board") proposes amendments to 31 Administrative Code (TAC) §§357.10 - 357.12, concerning General Information; §357.21, §357.22, concerning Guidance Principles and Notice Requirements; §§357.31 - 357.34, concerning Planning Activities for Needs Analysis and Strategy Recommendations; §§357.42 - 357.46, concerning Impacts, Drought Response, Policy Recommendations, and Implementation; §357.50, §357.51, concerning Adoption, Submittal, and Amendments to Regional Water Plans; and 357.62 in Subchapter F, concerning Consistency and Conflicts In Regional Water Plans.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED AMENDMENT.

The purpose of the proposed amendments to 31 TAC Chapter 357 is to reduce certain unessential reporting requirements, address stakeholder concerns raised during the previous planning cycle and preliminary input period, and clarify rule language by removing outdated references to past planning cycles and revising references to updated public notice rules in §357.21. The purpose of the proposed repeals of 31 TAC §357.44 and §357.46 is to implement legislative changes from House Bill (HB) 1905, 87th Legislative Session.

SECTION BY SECTION DISCUSSION OF PROPOSED AMENDMENTS.

Subchapter A. General Information.

Section 357.10. Definitions and Acronyms.

Section 357.10(18) is revised to reference the appropriate public notice rule in §357.21.

Section 357.10(43)(F) is revised to clarify the livestock water user group terminology.

Section 357.11. Designations.

Section 357.11(k)(5) is revised to remove a reference to past planning cycles.

Section 357.12. General Regional Water Planning Group Responsibilities and Procedures.

Section 357.12(a)(1) is revised to add a new requirement for regional water planning groups (RWPGs) to discuss their process for conducting interregional coordination at the pre-planning public input meeting.

Section 357.12(b) is revised to reference the appropriate public notice rule in §357.21 and add clarity to the rule.

Section 357.12(c) is revised to reference the appropriate public notice rule in §357.21.

Section 357.12(c)(7) is revised to remove an outdated reference and clarify that if the RWPG does not determine that any water management strategies (WMSs) or water management strategy projects (WMSPs) are infeasible in their previously adopted regional water plan (RWP), the Technical Memorandum shall include a statement that no infeasible WMSs or WMSPs were identified by the RWPG.

New §357.12(c)(8) is added to require that the Technical Memorandum include a summary of the RWPG's interregional coordination efforts to date regarding plan development efforts. Interregional coordination efforts may include but are not limited to, the region's use of regional liaisons, forming committees to meet with neighboring regions or their representatives, and authorizing RWPG administrators or planning group consultants to meet with neighboring regions or their representatives.

Previous §357.12(c)(8) is renumbered as §357.12(c)(9).

Section 357.12(d) is revised to reference the appropriate public notice rule in §357.21.

Section 357.12(g) is revised to reference the appropriate public notice rule in §357.21.

Section 357.12(h) is revised to reference the appropriate public notice rule in §357.21.

Subchapter B. Guidance Principles and Notice Requirements.

Section 357.21. Notice and Public Participation.

New §357.21(g)(1)(I) is added to specify that adoption of errata to RWPs is subject to a minimum seven-day public notice period. The rule also specifies the minimum time for posting meeting materials as three days prior to and seven days following the public meeting.

Previous §357.21(g)(1)(I) and (J) are renumbered as (J) and (K), respectively.

Section 357.22. General Considerations for Development of Regional Water Plans.

Section 357.22(b) is revised to remove a reference to §357.44 and revise the total number of RWP chapters to 10. Section 357.44 is removed to implement the repeal of Texas Water Code (TWC) §15.435(g)(2) and §16.053(q) made by HB 1905, 87th Legislative Session (relating to Infrastructure Financing Surveys).

Subchapter C. Planning Activities for Needs Analysis and Strategy Recommendations.

Section 357.31. Projected Population and Water Demands.

Section 357.31(e)(2) is revised to reference the appropriate public notice rule in §357.21.

Section 357.32. Water Supply Analysis.

Section 357.32(a)(2) is revised to provide clarity to the rule.

Section 357.32(c)(1) is revised to provide reference to the definition of Firm Yield in Section §357.10 in order to clarify that evaluations of existing stored water available during Drought of Record conditions are to use anticipated sedimentation rates and assume that all senior water rights will be totally utilized and all applicable permit conditions are met.

Section 357.32(e) is removed since it is duplicative of §357.32(a)(2).

Previous subsections (f) and (g) are renumbered as (e) and (f), respectively.

Section 357.33. Needs Analysis: Comparison of Water Supplies and Demands.

Section 357.33(b) is revised to remove the description of how results shall be reported for WUGs and MWPs. Reporting requirements for WUGs and MWPs are clarified and consolidated in new §357.33(c).

Previous §357.33(c) is removed because it is duplicative of §357.40(a).

Previous subsections (d) and (e) are renumbered as (c) and (d), respectively.

Section §357.34. Identification and Evaluation of Potentially Feasible Water Management Strategies and Water Management Strategy Projects.

Section 357.34(b) is revised to clarify rule language.

Section 357.34(d) is revised to remove the reference to RWPG project prioritization. The requirement for RWPGs to prioritize projects is removed by HB 1905, 87th Legislative Session.

Section 357.34(e)(3)(A) is revised to provide specific allowances for costs associated with distribution of water within a water user group after treatment for direct reuse and conservation WMSs. These specific, limited allowances will be detailed in the regional water planning grant contract technical guidance (Contract Exhibit C).

Section 357.34(e)(9) is removed because it is duplicative of §357.34(i)(2)(D), which requires RWPGs to consider information from water loss audits in their development of WMSs.

Section 357.34(e)(10) is renumbered as (9).

Section 357.34(j) is revised to substitute the word "may" for the word "shall" to align the rule more closely with statute and remove nonstatutorily required reporting. Model water conservation plans have been developed by the Texas Commission on Environmental Quality and are available on the agency's website.

Subchapter D. Impacts, Drought Response, Policy Recommendations, and Implementation.

Section §357.42. Drought Response Information, Activities, and Recommendations.

Section 357.42(c) is revised to align the rule more closely with statute, TWC §16.053(e)(3)(B) - (C), which requires RWPGs to identify factors specific to each source of water supply to be considered in determining whether to initiate a drought response and actions to be taken as part of the response;

Section 357.42(e) is revised to substitute the word "may" for the word "shall" to align the rule more closely with statute and remove nonstatutorily required reporting.

Section 357.42(i) is revised to substitute the word "may" for the word "shall" to align the rule more closely with statute and remove non-statutorily required reporting.

Section 357.42(j) is revised to substitute the word "may" for the word "shall" to align the rule more closely with statute and remove non-statutorily required reporting. Model drought contingency plans have been developed by the Texas Commission on Environmental Quality and are available on the agency's website.

Section 357.44. Infrastructure Financing Analysis.

Section 357.44 is repealed to implement the repeal of TWC §16.053(q) and the amendment of TWC §15.435(g) made by HB 1905, 87th Legislative Session (relating to Infrastructure Financing Surveys). The revision removes the requirement for RWPGs to perform an infrastructure financing analysis.

Section 357.46. Prioritization of Projects by Regional Water Planning Groups.

Section 357.46 is repealed to implement the repeal of TWC §15.436 made by HB 1905, 87th Legislative Session (related to Prioritization of Project by RWPGs). The revision removes the requirement for RWPGs to prioritize recommended WMSPs and removes the requirement for RWPGs to submit the prioritization with an adopted RWP.

Subchapter E. Adoption, Submittal, and Amendments to Regional Water Plans.

Section 357.50. Adoption, Submittal, and Approval of Regional Water Plans.

Section 357.50(c) is revised to reference the appropriate public notice rule in §357.21.

Section 357.50(f)(2) refers to outdated written comment requirements and is removed. The written comment period requirements for the IPP are outlined in §357.21(h)(3).

Previous §357.50(f)(3), (4), and (5) are renumbered as (2), (3), and (4), respectively.

Renumbered §357.50(f)(2) is revised to clarify rule language and reference the appropriate public notice rule in §357.21.

New §357.50(g)(1)(C) is added to require documentation of the RWPG's interregional coordination efforts regarding plan development efforts in the Initially Prepared Plan (IPP) and adopted RWPs. Interregional coordination efforts may include but are not limited to, the region's use of regional liaisons, forming committees to meet with neighboring regions or their representatives, and authorizing RWPG administrators or planning group consultants to meet with neighboring regions or their representatives.

Previous §357.50(g)(1)(C) is renumbered as (D) and revised to specify that a copy of the EA's comments on the IPP be included in the RWP.

Section 357.50(g)(2)(B) is revised to clarify rule language on data requirements.

Section §357.51. Amendments to Regional Water Plans.

Section 357.51(b) is revised to reference the appropriate public notice rule in §357.21.

Section 357.51(b)(2) is revised to clarify rule language and reference the appropriate public notice rule in §357.21.

Section 357.51(b)(4) is revised to clarify rule language and reference the appropriate public notice rule in §357.21.

Section 357.51(c)(2)(C) is revised to allow minor RWP amendments that remove infeasible recommended WMSs or WMSPs (in accordance with §357.51(g) and Texas Water Code §16.053(h)(10)) to include an increase in or new unmet needs. This change is made in an effort to provide an efficient process, with minimum administrative burden, for the removal of infeasible WMSs or WMSPs.

Section 357.51(c)(4) is revised to specify that an adopted minor amendment to a RWP shall include responses to comments received on the amendment. The rule is also revised to reference the appropriate public notice rule in Section §357.21.

Section 357.51(e) is revised to reference the appropriate public notice rule in §357.21.

Section 357.51(g) is revised to specify that RWP amendments for infeasible recommended WMSs or WMSPs shall be submitted to the Board by a date established by the EA and to require that these amendments detail any changes to unmet needs.

New subsection (i) is added in §357.51 to allow RWPGs to adopt an errata to a final RWP to correct minor, non-substantive errors identified after adoption of the final RWP but prior to adoption of the corresponding State Water Plan. Examples of minor, non-substantive errors that may be addressed in errata include corrections to typos or revisions to address inconsistencies between the RWP and the State Water Planning Database such as incorrect capital costs, online decades for WMSPs, incorrect WMSP components, or incorrect water user group and WMSP relationships. Prior to adopting errata to a final RWP, the RWPG must provide a minimum seven-day public notice in accordance with §357.21(g)(1). Once adopted, the RWPG shall submit errata containing revised pages to the final RWP and public comments received to the EA for review.

Subchapter F. Consistency and Conflicts in Regional Water Plans.

Section 357.62. Interregional Conflicts.

Section 357.62(b)(2) is revised to reference the appropriate public notice rule in §357.21.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS

Ms. Rebecca Treviño, Chief Financial Officer, has determined that there will be no fiscal implications for state or local governments as a result of the proposed rulemaking. For the first five years these rules are in effect, there is no expected additional cost to state or local governments resulting from their administration.

These rules are not expected to result in reductions in costs to either state or local governments. There is no change in costs for state or local governments to comply with the proposed revision. These rules are not expected to have any impact on state or local revenues. The rules do not require any increase in expenditures for state or local governments as a result of administering these rules. Additionally, there are no foreseeable implications relating to state or local governments' costs or revenue resulting from these rules.

Because these rules will not impose a cost on regulated persons, the requirement included in Texas Government Code Section 2001.0045 to repeal a rule does not apply. Furthermore, the requirement in Section 2001.0045 does not apply because these are necessary to implement legislation and protect water resources of this state as authorized by the Texas Water Code.

The board invites public comment regarding this fiscal note. Written comments on the fiscal note may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

PUBLIC BENEFITS AND COSTS

Ms. Rebecca Treviño also has determined that for each year of the first five years the proposed rulemaking is in effect, the public will benefit from the rulemaking as it clarifies rule language, implements statutory changes, and reduces non-statutory reporting requirements.

LOCAL EMPLOYMENT IMPACT STATEMENT

The board has determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect because it will impose no new requirements on local economies. The board also has determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of enforcing this rulemaking. The board also has determined that there is no anticipated economic cost to persons who are required to comply with the rulemaking as proposed. Therefore, no regulatory flexibility analysis is necessary.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The board reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225, because it does not meet the definition of a "major environmental rule" as defined in the Administrative Procedure Act. A "major environmental rule" is defined as a rule with the specific intent to protect the environment or reduce risks to human health from environmental exposure, a rule that may adversely affect in a material way the

economy or a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The intent of the rulemaking is to reduce non-statutory reporting requirements, implement statutory changes, and clarify rule language.

Even if the proposed rule were a major environmental rule, Texas Government Code, §2001.0225 still would not apply to this rulemaking because Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability criteria because it: (1) does not exceed the standard set by federal law or any other federal law; (2) does not exceed an express requirement of state law; (3) does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; and (4) is not proposed solely under the general powers of the agency, but rather under the authority of Texas Water Code §15.439 and §16.053. Therefore, this proposed rule does not fall under any of the applicability criteria in Texas Government Code, §2001.0225.

The board invites public comment regarding this draft regulatory impact analysis determination. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

TAKINGS IMPACT ASSESSMENT

The board evaluated this proposed rule and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this rule is to reduce non-statutory reporting requirements, implement statutory changes, and clarify rule language.

The board's analysis indicates that Texas Government Code, Chapter 2007 does not apply to this proposed rule because this is an action that is reasonably taken to fulfill an obligation mandated by state law, which is exempt under Texas Government Code, §2007.003(b)(4). The board is the agency that collects, analyzes, and disseminates water-related data and provides other services necessary to aid in planning and managing the state's water resources.

Nevertheless, the board further evaluated this proposed rule and performed an assessment of whether it constitutes a taking under Texas Government Code, Chapter 2007. Promulgation and enforcement of this proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulation does not affect a landowner's rights in private real property because this rulemaking does not burden nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. Therefore, the proposed rule does not constitute a taking under Texas Government Code, Chapter 2007.

GOVERNMENT GROWTH IMPACT STATEMENT

The board reviewed the proposed rulemaking in light of the government growth impact statement requirements of Texas Government Code §2001.0221 and has determined, for the first five years the proposed rule would be in effect, the proposed rule will not: (1) create or eliminate a government program; (2) require the creation of new employee positions or the elimination of existing employee positions; (3) require an increase or decrease in future legislative appropriations to the agency; (4) require an increase or decrease in fees paid to the agency; (5) create a new regulation; (6) expand, limit, or repeal an existing regulation; (7) increase or decrease the number of individuals subject to the rule's applicability; or (8) positively or adversely affect this state's economy.

SUBMISSION OF COMMENTS

Written comments on the proposed rulemaking may be submitted by mail to Mr. Ashley Harden, Office of General Counsel, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, by email to rulescomments@twdb.texas.gov, or by fax to (512) 475-2053. Comments will be accepted until 5:00 p.m. of the 31st day following publication in the *Texas Register.*

SUBCHAPTER A. GENERAL INFORMATION

31 TAC §§357.10 - 357.12

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of the Texas Water Code §6.101, which provides the TWDB with the authority to propose rules necessary to carry out the powers and duties in the Water Code and other laws of the State. The rulemaking is proposed under the additional authority of Texas Water Code §16.053, which provides the TWDB with the authority to propose rules necessary to carry out Regional Water Planning in accordance with the statute, and Texas Water Code §15.439, which provides the TWDB with the authority to propose rules providing for the use of money in the State Water Implementation Fund.

Texas Water Code §16.053 and §15.439 are affected by this rulemaking.

§357.10. Definitions and Acronyms.

The following words, used in this chapter, have the following meanings.

(1) Agricultural Water Conservation--Defined in §363.1302 of this title (relating to Definition of Terms).

(2) Alternative Water Management Strategy--A fully evaluated Water Management Strategy that may be substituted into a Regional Water Plan in the event that a recommended Water Management Strategy is no longer recommended.

(3) Availability--Maximum amount of raw water that could be produced by a source during a repeat of the Drought of Record, regardless of whether the supply is physically connected to or legally accessible by Water User Groups.

(4) Board--The Texas Water Development Board.

(5) Collective Reporting Unit--A grouping of utilities located in the Regional Water Planning Area. Utilities within a Collective Reporting Unit must have a logical relationship, such as being served by common Wholesale Water Providers, having common sources, or other appropriate associations.

(6) Commission--The Texas Commission on Environmental Quality.

(7) County-Other--An aggregation of utilities and individual water users within a county and not included in paragraph (43)(A) - (D) of this section.

(8) Drought Contingency Plan--A plan required from wholesale and retail public water suppliers and irrigation districts pursuant to Texas Water Code §11.1272 (relating to Drought Contingency Plans for Certain Applicants and Water Right Holders). The plan may consist of one or more strategies for temporary supply and demand management and demand management responses to temporary and potentially recurring water supply shortages and other water supply emergencies as required by the Commission.

(9) Drought Management Measures--Demand management activities to be implemented during drought that may be evaluated and included as Water Management Strategies.

(10) Drought Management Water Management Strategy--A drought management measure or measures evaluated and/or recommended in a State or Regional Water Plan that quantifies temporary reductions in demand during drought conditions.

(11) Drought of Record--The period of time when historical records indicate that natural hydrological conditions would have provided the least amount of water supply.

(12) Executive Administrator (EA)--The Executive Administrator of the Board or a designated representative.

(13) Existing Water Supply--Maximum amount of water that is physically and legally accessible from existing sources for immediate use by a Water User Group under a repeat of Drought of Record conditions.

(14) Firm Yield--Maximum water volume a reservoir can provide each year under a repeat of the Drought of Record using anticipated sedimentation rates and assuming that all senior water rights will be totally utilized and all applicable permit conditions met.

(15) Interbasin Transfer of Surface Water--Defined and governed in Texas Water Code §11.085 (relating to Interbasin Transfers) as the diverting of any state water from a river basin and transfer of that water to any other river basin.

(16) Interregional Conflict--An interregional conflict exists when:

(A) more than one Regional Water Plan includes the same source of water supply for identified and quantified recommended Water Management Strategies and there is insufficient water available to implement such Water Management Strategies; or

(B) in the instance of a recommended Water Management Strategy proposed to be supplied from a different Regional Water Planning Area, the Regional Water Planning Group with the location of the strategy has studied the impacts of the recommended Water Management Strategy on its economic, agricultural, and natural resources, and demonstrates to the Board that there is a potential for a substantial adverse effect on the region as a result of those impacts.

(17) Intraregional Conflict--A conflict between two or more identified, quantified, and recommended Water Management Strategies in the same Initially Prepared Plan that rely upon the same water source, so that there is not sufficient water available to fully implement all Water Management Strategies and thereby creating an over-allocation of that source.

(18) Initially Prepared Plan (IPP)--Draft Regional Water Plan that is presented at a public hearing in accordance with §357.21(h)[~~§357.21 (d)~~] of this title (relating to Notice and Public Participation) and submitted for Board review and comment.

(19) Major Water Provider (MWP)--A Water User Group or a Wholesale Water Provider of particular significance to the region's water supply as determined by the Regional Water Planning Group. This may include public or private entities that provide water for any water use category.

(20) Modeled Available Groundwater (MAG) Peak Factor--A percentage (e.g., greater than 100 percent) that is applied to a modeled available groundwater value reflecting the annual groundwater availability that, for planning purposes, shall be considered temporarily available for pumping consistent with desired future conditions. The approval of a MAG Peak Factor is not intended as a limit to permits or as guaranteed approval or pre-approval of any future permit application.

(21) Planning Decades--Temporal snapshots of conditions anticipated to occur and presented at even intervals over the planning horizon used to present simultaneous demands, supplies, needs, and strategy volume data. A Water Management Strategy that is shown as providing a supply in the 2040 decade, for example, is assumed to come online in or prior to the year 2040.

(22) Political Subdivision--City, county, district, or authority created under the Texas Constitution, Article III, §52, or Article XVI, §59, any other Political Subdivision of the state, any interstate compact commission to which the state is a party, and any nonprofit water supply corporation created and operating under Texas Water Code Chapter 67 (relating to Nonprofit Water Supply or Sewer Service Corporations).

(23) Regional Water Plan (RWP)--The plan adopted or amended by a Regional Water Planning Group pursuant to Texas Water Code §16.053 (relating to Regional Water Plans) and this chapter.

(24) Regional Water Planning Area (RWPA)--Area designated pursuant to Texas Water Code §16.053.

(25) Regional Water Planning Gallons Per Capita Per Day-- For Regional Water Planning purposes, Gallons Per Capita Per Day is the annual volume of water pumped, diverted, or purchased minus the volume exported (sold) to other water systems or large industrial facilities divided by 365 and divided by the permanent resident population of the Municipal Water User Group in the regional water planning process. Coastal saline and reused/recycled water is not included in this volume.

(26) Regional Water Planning Group (RWPG)--Group designated pursuant to Texas Water Code §16.053.

(27) RWPG-Estimated Groundwater Availability--The groundwater Availability used for planning purposes as determined by RWPGs to which §357.32(d)(2) of this title (relating to Water Supply Analysis) is applicable or where no desired future condition has been adopted.

(28) Retail Public Utility--Defined in Texas Water Code §13.002 (relating to Water Rates and Services) as "any person, corporation, public utility, water supply or sewer service corporation, municipality, Political Subdivision or agency operating, maintaining, or controlling in this state facilities for providing potable water service or sewer service, or both, for compensation."

(29) Reuse--Defined in §363.1302 of this title (relating to Definition of Terms).

(30) State Drought Preparedness Plan--A plan, separate from the State Water Plan, that is developed by the Drought Preparedness Council for the purpose of mitigating the effects of drought pursuant to Texas Water Code §16.0551 (relating to State Drought Preparedness Plan).

(31) State Drought Response Plan--A plan prepared and directed by the chief of the Texas Division of Emergency Management for the purpose of managing and coordinating the drought response component of the State Water Plan and the State Drought Preparedness Plan pursuant to Texas Water Code §16.055 (relating to Drought Response Plan).

(32) State Water Plan--The most recent state water plan adopted by the Board under the Texas Water Code §16.051 (relating to State Water Plan).

(33) State Water Planning Database--Database maintained by TWDB that stores data related to population and Water Demand projections, water Availability, Existing Water Supplies, Water Management Strategy supplies, and Water Management Strategy Projects. It is used to collect, analyze, and disseminate regional and statewide water planning data.

(34) Technical Memorandum--Documentation of the RWPG's preliminary analysis of Water Demand projections, water Availability, Existing Water Supplies, and Water Needs and declaration of the RWPG's intent of whether or not to pursue simplified planning.

(35) Unmet Water Need--The portion of an identified Water Need that is not met by recommended Water Management Strategies.

(36) Water Conservation Measures--Practices, techniques, programs, and technologies that will protect water resources, reduce the consumption of water, reduce the loss or waste of water, or improve the efficiency in the use of water that may be presented as Water Management Strategies, so that a water supply is made available for future or alternative uses. For planning purposes, Water Conservation Measures do not include reservoirs, aquifer storage and recovery, or other types of projects that develop new water supplies.

(37) Water Conservation Plan--The most current plan required by Texas Water Code §11.1271 (relating to Water Conservation Plans) from an applicant for a new or amended water rights permit and from any holder of a permit, certificate, etc. who is authorized to appropriate 1,000 acre-feet per year or more for municipal, industrial, and other non-irrigation uses and for those who are authorized to appropriate 10,000 acre-feet per year or more for irrigation, and the most current plan required by Texas Water Code §13.146 from a Retail Public Utility that provides potable water service to 3,300 or more connections. These plans must include specific, quantified 5-year and 10-year targets for water savings.

(38) Water Conservation Strategy--A Water Management Strategy with quantified volumes of water associated with Water Conservation Measures.

(39) Water Demand--Volume of water required to carry out the anticipated domestic, public, and/or economic activities of a Water User Group during drought conditions.

(40) Water Management Strategy (WMS)--A plan to meet a need for additional water by a discrete Water User Group, which can mean increasing the total water supply or maximizing an existing supply, including through reducing demands. A Water Management Strategy may or may not require associated Water Management Strategy Projects to be implemented.

(41) Water Management Strategy Project (WMSP)--Water project that has a non-zero capital costs and that when implemented, would develop, deliver, or treat additional water supply volumes, or conserve water for Water User Groups or Wholesale Water Providers. One WMSP may be associated with multiple WMSs.

(42) Water Need--A potential water supply shortage based on the difference between projected Water Demands and Existing Water Supplies.

(43) Water User Group (WUG)--Identified user or group of users for which Water Demands and Existing Water Supplies have been identified and analyzed and plans developed to meet Water Needs. These include:

(A) Privately-owned utilities that provide an average of more than 100 acre-feet per year for municipal use for all owned water systems;

(B) Water systems serving institutions or facilities owned by the state or federal government that provide more than 100 acre-feet per year for municipal use;

(C) All other Retail Public Utilities not covered in subparagraphs (A) and (B) of this paragraph that provide more than 100 acre-feet per year for municipal use;

(D) Collective Reporting Units, or groups of Retail Public Utilities that have a common association and are requested for inclusion by the RWPG;

(E) Municipal and domestic water use, referred to as County-Other, not included in subparagraphs (A) - (D) of this paragraph; and

(F) Non-municipal water use including manufacturing, irrigation, steam electric power generation, mining, and livestock [~~watering~~] for each county or portion of a county in an RWPA.

(44) Wholesale Water Provider (WWP)--Any person or entity, including river authorities and irrigation districts, that delivers or sells water wholesale (treated or raw) to WUGs or other WWPs or that the RWPG expects or recommends to deliver or sell water wholesale to WUGs or other WWPs during the period covered by the plan. The RWPGs shall identify the WWPs within each region to be evaluated for plan development.

§357.11. Designations.

(a) The Board shall review and update the designations of RWPAs as necessary but at least every five years, on its own initiative or upon recommendation of the EA. The Board shall provide 30 days notice of its intent to amend the designations of RWPAs by publication of the proposed change in the *Texas Register* and by mailing the notice to each mayor of a municipality with a population of 1,000 or more or which is a county seat that is located in whole or in part in the RWPAs proposed to be impacted, to each water district or river authority located in whole or in part in the RWPA based upon lists of such water districts and river authorities obtained from the Commission, and to each county judge of a county located in whole or in part in the RWPAs proposed to be impacted. After the 30 day notice period, the Board shall hold a public hearing at a location to be determined by the Board before making any changes to the designation of an RWPA.

(b) If upon boundary review the Board determines that revisions to the boundaries are necessary, the Board shall designate areas for which RWPs shall be developed, taking into consideration factors such as:

(1) River basin and aquifer delineations;

(2) Water utility development patterns;

(3) Socioeconomic characteristics;

(4) Existing RWPAs;

(5) Political Subdivision boundaries;

(6) Public comment; and

(7) Other factors the Board deems relevant.

(c) After an initial coordinating body for a RWPG is named by the Board, the RWPGs shall adopt, by two-thirds vote, bylaws that are consistent with provisions of this chapter. Within 30 days after the Board names members of the initial coordinating body, the EA shall provide to each member of the initial coordinating body a set of model bylaws which the RWPG shall consider. The RWPG shall provide copies of its bylaws and any revisions thereto to the EA. The bylaws adopted by the RWPG shall at a minimum address the following elements:

(1) definition of a quorum necessary to conduct business;

(2) method to be used to approve items of business including adoption of RWPs or amendments thereto;

(3) methods to be used to name additional members;

(4) terms and conditions of membership;

(5) methods to record minutes and where minutes will be archived as part of the public record; and

(6) methods to resolve disputes between RWPG members on matters coming before the RWPG.

(d) RWPGs shall maintain at least one representative of each of the following interest categories as voting members of the RWPG. However, if an RWPA does not have an interest category below, then the RWPG shall so advise the EA and no membership designation is required.

(1) Public, defined as those persons or entities having no economic interest in the interests represented by paragraphs (2) - (12) of this subsection other than as a normal consumer;

(2) Counties, defined as the county governments for the 254 counties in Texas;

(3) Municipalities, defined as governments of cities created or organized under the general, home-rule, or special laws of the state;

(4) Industries, defined as corporations, partnerships, sole proprietorships, or other legal entities that are formed for the purpose of making a profit and which produce or manufacture goods or services and which are not small businesses;

(5) Agricultural interests, defined as those persons or entities associated with production or processing of plant or animal products;

(6) Environmental interests, defined as those persons or groups advocating the conservation of the state's natural resources, including but not limited to soil, water, air, and living resources;

(7) Small businesses, defined as corporations, partnerships, sole proprietorships, or other legal entities that are formed for the purpose of making a profit, are independently owned and operated, and have fewer than 500 employees or less than $10 million in gross annual receipts;

(8) Electric generating utilities, defined as any persons, corporations, cooperative corporations, or any combination thereof, meeting each of the following three criteria: own or operate for compensation equipment or facilities which produce or generate electricity; produce or generate electricity for either wholesale or retail sale to others; and are neither a municipal corporation nor a river authority;

(9) River authorities, defined as any districts or authorities created by the legislature which contain areas within their boundaries of one or more counties and which are governed by boards of directors appointed or designated in whole or part by the governor or board, including, without limitation, San Antonio River Authority;

(10) Water districts, defined as any districts or authorities, created under authority of either Texas Constitution, Article III, §52(b)(1) and (2), or Article XVI, §59 including districts having the authority to regulate the spacing of or production from water wells, but not including river authorities;

(11) Water utilities, defined as any persons, corporations, cooperative corporations, or any combination thereof that provide water supplies for compensation except for municipalities, river authorities, or water districts; and

(12) Groundwater management areas, defined as a single representative for each groundwater management area that is at least partially located within an RWPA. Defined as a representative from a groundwater conservation district that is appointed by the groundwater conservation districts within the associated groundwater management area.

(e) The RWPGs shall add the following non-voting members, who shall receive meeting notifications and information in the same manner as voting members:

(1) Staff member of the Board to be designated by the EA;

(2) Staff member of the Texas Parks and Wildlife Department designated by its executive director;

(3) Member designated by each adjacent RWPG to serve as a liaison;

(4) One or more persons to represent those entities with headquarters located in another RWPA and which holds surface water rights authorizing a diversion of 1,000 acre-feet a year or more in the RWPA, which supplies water under contract in the amount of 1,000 acre-feet a year or more to entities in the RWPA, or which receives water under contract in the amount of 1,000 acre-feet a year or more from the RWPA;

(5) Staff member of the Texas Department of Agriculture designated by its commissioner; and

(6) Staff member of the State Soil and Water Conservation Board designated by its executive director.

(f) Each RWPG shall provide a current list of its members to the EA; the list shall identify the interest represented by each member including interests required in subsection (d) of this section.

(g) Each RWPG, at its discretion, may at any time add additional voting and non-voting representatives to serve on the RWPG for any new interest category, including additional representatives of those interests already listed in subsection (d) of this section that the RWPG considers appropriate for water planning.

(h) Each RWPG, at its discretion, may remove individual voting or non-voting members or eliminate RWPG representative positions in accordance with the RWPG bylaws as long as minimum requirements of RWPG membership are maintained in accordance with subsection (d) of this section.

(i) RWPGs may enter into formal and informal agreements to coordinate, avoid conflicts, and share information with other RWPGs or any other interests within any RWPA for any purpose the RWPGs consider appropriate including expediting or making more efficient water planning efforts. These efforts may involve any portion of

the RWPG membership. Any plans or information developed through these efforts by RWPGs or by committees may be included in an RWP only upon approval of the RWPG.

(j) Upon request, the EA will provide technical assistance to RWPGs, including on water supply and demand analysis, methods to evaluate the social and economic impacts of not meeting needs, and regarding Drought Management Measures and water conservation practices.

(k) The Board shall appoint an Interregional Planning Council during each state water planning cycle. The Interregional Planning Council will be subject to the following provisions:

(1) The Interregional Planning Council consists of one voting member from each RWPG, as appointed by the Board.

(2) Upon request by the EA, each RWPG shall submit at least one nomination for appointment, including a designated alternate for each nomination.

(3) Interregional Planning Council members will serve until adoption of the State Water Plan.

(4) The Interregional Planning Council, during each planning cycle to develop the State Water Plan, shall hold at least one public meeting and deliver a report to the Board. The report format may be determined by the Council. The report at a minimum shall include a summary of the dates the Council convened, the actions taken, minutes of the meetings, and any recommendations for the Board's consideration, based on the Council's work. Meeting frequency, location, and additional report content shall be determined by the Council.

(5) The Council's [~~For the planning cycle of the 2022 State Water Plan, the Council's report shall be delivered to the Board by a date established by the EA, which will be no later than adoption of the 2022 State Water Plan. Beginning with the planning cycle for the 2027 State Water Plan and each planning cycle thereafter, the~~] report shall be delivered to the Board no later than one year prior to the IPP deliverable date for the corresponding State Water Plan cycle, as set in regional water planning contracts.

§357.12. General Regional Water Planning Group Responsibilities and Procedures.

(a) Prior to the preparation for the RWPs, in accordance with the public participation requirements in §357.21 of this title (relating to Notice and Public Participation), the RWPGs shall:

(1) hold at least one public meeting at a central location readily accessible to the public within the regional water planning area to gather suggestions and recommendations from the public as to issues that should be addressed or provisions that should be included in the next regional or state water plan and to discuss the region's process for conducting interregional coordination;

(2) prepare a scope of work that includes a detailed description of tasks to be performed, identifies responsible parties for task execution, a task schedule, task and expense budgets, and describes interim products, draft reports, and final reports for the planning process;

(3) approve any amendments to the scope of work only in an open meeting of the RWPG where notice of the proposed action was provided in accordance with §357.21 of this title; and

(4) designate a Political Subdivision as a representative of the RWPG eligible to apply for financial assistance for scope of work and RWP development pursuant to Chapter 355, Subchapter C of this title (relating to Regional Water Planning Grants).

(b) In accordance with the requirements of §357.21(g)(2) of this title, [~~An~~] an RWPG shall hold a public meeting to determine the process for identifying potentially feasible WMSs; the process shall be documented and shall include input received at the public meeting; after reviewing the potentially feasible strategies using the documented process, then the RWPG shall list all possible WMSs that are potentially feasible for meeting a Water Need in the region. [~~The public meeting under this subsection shall be in accordance with the requirements of §357.21(b) of this title, for the development of RWPs previous to the 2026 RWP. Beginning with the development of the 2026 RWP, and every RWP thereafter, this meeting shall be held in accordance with the requirements of §357.21(c) of this title and~~] The public meeting shall also include a presentation of the results of the analysis of infeasible WMSs or WMSPs, as defined by Texas Water Code §16.053(h)(10), included in the most recently adopted [~~previous~~] RWP. Infeasible WMSs or WMSPs shall be identified based on project sponsor provided information or local knowledge, as acquired through plan development activities such as surveys, and as determined based on implementation schedules consistent with implementation by the project sponsors. The group shall provide notice to all associated project sponsors and amend its adopted RWP as appropriate based upon the analysis.

(c) The RWPGs shall approve and submit a Technical Memorandum to the EA after notice pursuant to §357.21(g)(2) [~~§357.21(c)~~] of this title. The Technical Memorandum shall include:

(1) The most recent population and Water Demand projections adopted by the Board;

(2) Updated source water Availability utilized in the RWPA, as entered into the State Water Planning Database;

(3) Updated Existing Water Supplies, as entered into the State Water Planning Database;

(4) Identified Water Needs and surpluses;

(5) The documented process used by the RWPG to identify potentially feasible WMSs;

(6) The potentially feasible WMSs identified as of the date of submittal of the Technical Memorandum to the EA, if any;

(7) A [~~Beginning with the development of the 2026 RWP and each RWP thereafter, a~~] listing of the infeasible WMSs and WMSPs, as determined by the RWPG pursuant to TWC §16.053(h)(10) and subsection (b) of this section, or a statement that no infeasible WMSs or WMSPs were identified by the RWPG; [~~and~~]

(8) A summary of the RWPG's interregional coordination efforts to date; and

(9) [~~(8)~~] During each off-census RWP development, the RWPG's declaration of intent to pursue simplified planning for that planning cycle. If the RWPG intends to pursue simplified planning, the RWPG shall document the process to authorize and initiate subsection (g) of this section.

(d) The EA shall evaluate the Technical Memorandum and any declaration of intent to pursue simplified planning, if applicable, and issue written approval prior to implementation of simplified planning by the RWPG. If an RWPG has not declared to pursue simplified planning in their Technical Memorandum, they may proceed without any additional approvals to develop their IPP. If the RWPG chooses to rescind their decision to pursue simplified planning, they must do so prior to executing a contract scope of work and budget amendment with the TWDB. The RWPG must discuss and act on the decision at a public meeting posted under notice requirements of §357.21(g)(1) [~~§357.21(b)~~] of this title.

(e) If applicable, and approved by the EA, an RWPG may implement simplified planning in off-census planning cycles in accordance with guidance to be provided by the EA. An RWPG may only pursue simplified planning if:

(1) the RWPG determines in its analysis of Water Needs that it has sufficient Existing Water Supplies in the RWPA to meet all Water Needs for the 50-year planning period while identifying Existing Water Supplies that are available for voluntary redistribution in the RWPA or to other RWPAs; or

(2) an RWPG determines, including based on its analysis of source water Availability, that there are no significant changes, as determined by the RWPG, to water Availability, Existing Water Supplies, or Water Demands in the RWPA. A determination that there have been no significant changes may not be based solely on an aggregated, region-wide basis without consideration of sub-regional changes.

(f) If an RWPG elects to pursue simplified planning, it must:

(1) Complete the Technical Memorandum in subsection (c) of this section and, based upon the analysis, determine and document whether significant changes have resulted from the most recently adopted RWP;

(2) Meet new statutory or other planning requirements that come into effect during the most recent planning cycle;

(3) where appropriate, adopt previous RWP or State Water Plan information, updated as necessary, as the IPP and RWP, in accordance with guidance to be provided by the EA; and

(4) conduct other activities upon approval of the EA necessary to complete an RWP that meets rule and statute requirements, including that no water supply sources to the RWPA be over-allocated.

(g) If an RWPG declares intention to pursue simplified planning with the submittal of its Technical Memorandum, in accordance with subsection (c) of this section, the RWPG shall hold a public hearing on the intent to pursue simplified planning for the RWPA, to be held after submitting the Technical Memorandum and in accordance with §357.21(g)(3) [~~in §357.21(d)~~] of this title. This public hearing is not required for RWPGs that state they will not pursue simplified planning in their Technical Memorandum.

(h) Following receipt of public comments, the RWPG shall hold a meeting in accordance with the requirements of §357.21(g)(1) [~~§357.21(b)~~] of this title to consider comments received and declare implementation of simplified planning.

(i) Each RWPG and any committee or subcommittee of an RWPG are subject to Chapters 551 (relating to Open Meetings) and 552 (relating to Public Information), Government Code.

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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Ashley Harden
General Counsel
Texas Water Development Board
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For further information, please call: (512) 463-7686

SUBCHAPTER B. GUIDANCE PRINCIPLES AND NOTICE REQUIREMENTS

31 TAC §357.21, §357.22

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of the Texas Water Code §6.101, which provides the TWDB with the authority to propose rules necessary to carry out the powers and duties in the Water Code and other laws of the State. The rulemaking is proposed under the additional authority of Texas Water Code §16.053, which provides the TWDB with the authority to propose rules necessary to carry out Regional Water Planning in accordance with the statute, and Texas Water Code §15.439, which provides the TWDB with the authority to propose rules providing for the use of money in the State Water Implementation Fund.

Texas Water Code §16.053 and §15.439 are affected by this rulemaking.

§357.21. Notice and Public Participation.

(a) Each RWPG and any committee or subcommittee of an RWPG are subject to Chapters 551 and 552, Government Code. A copy of all materials presented or discussed at an open meeting shall be made available for public inspection prior to and following the meetings and shall meet the additional notice requirements when specifically referenced as required under other subsections. In accordance with Texas Water Code §16.053(r), certain information regarding water infrastructure facilities is excepted from the Public Information Act, Texas Government Code, Chapter 552. In addition to the notice requirements of Chapter 551, Government Code, the following requirements apply to RWPGs.

(b) Each RWPG shall create and maintain a website that they will use to post public notices of all its full RWPG, committee, and subcommittee meetings and make available meeting agendas and related meeting materials for the public, in accordance with this section.

(c) Each RWPG shall provide a means by which it will accept written public comment prior to and after meetings. The RWPGs must also allow oral public comment during RWPG meetings and hearings.

(d) Each RWPG shall solicit interested parties from the public and maintain a list of emails of persons or entities who request to be notified electronically of RWPG activities.

(e) At a minimum, notices of all meetings, meeting materials, and meeting agendas shall be sent electronically, in accordance with the timelines and any additional notice requirements provided in subsections (g)(1) - (3) and (h) of this section or any additional notice requirements in the RWPG bylaws, to all voting and non-voting RWPG members and any person or entity who has requested notice of RWPG activities. Notice must also be provided to the following:

(1) if a recommended or Alternative WMS that is located outside of the RWPG is being considered, the RWPG where the recommended or Alternative WMS is located must also receive notice of any meeting or hearing where action or public input may be taken on the recommended or Alternative WMS.

(2) for hearings on declarations of intent to pursue simplified planning, if an RWPG shares a water supply source, WMS, or WMSP with another RWPG, the RWPG declaring intent to pursue simplified planning must notify the RWPG with shared source, WMS, or WMSP.

(3) each project sponsor of an infeasible WMS or WMSP must be provided notice of any meeting or hearing where action may be taken on the infeasible WMS or WMSP.

(f) At a minimum, all meeting and hearing notices must be posted to the RWPG website and on the secretary of state website and must include:

(1) the date, time, and location of the meeting;

(2) a summary of the proposed action(s) to be taken;

(3) the name, telephone number, email address, and physical address of a contact person to whom questions or requests for additional information may be submitted; and

(4) a statement of how and when comments will be received from the members and public.

(g) In addition to subsections (a) - (f) of this section, and the notice requirements of Chapter 551, Government Code, the following requirements apply:

(1) at a minimum, notice must be provided at least seven days prior to the meeting, and meeting materials must be made available on the RWPG website at least three days prior to and seven days following the meeting when the planning group will take the following actions:

(A) regular RWPG meetings and any RWPG committee or subcommittee meetings;

(B) approval of requests for funds from the Board;

(C) amendments to the scope of work or budget included in the regional water planning grant contract between the political subdivision and TWDB;

(D) approval of revision requests for draft population projections and Water Demand projections;

(E) adoption of the IPP;

(F) approval to submit a request to EA for approval of an Alternative WMS substitution or to request an EA determination of a minor amendment;

(G) declaration of implementation of simplified planning following public hearing on intent to pursue simplified planning;

(H) initiation of major amendments to RWPs and adoption of major amendments following a public hearing on the amendment;

(I) adoption of errata pursuant to §357.51(i) of this title (relating to Amendments to Regional Water Plans) to final RWPs.

(J) [~~(I)~~] approval of replacement RWPG members to fill voting and non-voting position vacancies; and

(K) [~~(J)~~] any other RWPG approvals required by the regional water planning grant contract between TWDB and the political subdivision.

(2) at a minimum, notice must be provided at least 14 days prior to the meeting, written comment must be accepted for 14 days prior to the meeting and considered by the RWPG members prior to taking the associated action, and meeting materials must be made available on the RWPG website for a minimum of seven days prior to and 14 days following the meeting, when the planning group will take the following actions:

(A) approval to submit revision requests to officially adopted Board population and Water Demand projections;

(B) approval of process of identifying potentially feasible WMSs and presentation of analysis of infeasible WMSs or WMSPs;

(C) approval to submit the Technical Memorandum;

(D) adoption of the final RWP;

(E) approval to substitute Alternative WMSs; and

(F) adoption of minor amendments to RWPs.

(3) at a minimum, notice must be provided at least 30 days prior to the hearing, written comment must be accepted for 30 days prior to and following the date of the hearing and considered by the RWPG members prior to taking the associated action, and meeting materials must be made available on the RWPG website for a minimum of seven days prior to and 30 days following the hearing, when the planning group will receive input from the public on the following items:

(A) declarations to pursue simplified planning; and

(B) major amendments to RWPs.

(h) when holding pre-planning public meetings to obtain public input on development of the next RWP, holding hearings on the IPP, or making revisions to RWPs based on interregional conflict resolutions, in addition to the requirements of subsection (e) of this section, the following additional public notice and document provisions must be met per TWC §16.053(h):

(1) notice shall be published in a newspaper of general circulation in each county located in whole or in part in the RWPA before the 30th day preceding the date of the public meeting or hearing.

(2) at a minimum, notice must be provided at least 30 days prior to the meeting or hearing.

(3) written comments to be accepted as follows:

(A) written comments submitted immediately following 30-day public notice posting and prior to and during meeting or hearing; and

(B) at least 60 days following the date of the public hearing on an IPP.

(4) if more than one hearing on the IPP is held, the notice and comment periods apply to the date of the first hearing.

(5) additional entities to be notified by mail under this subsection include:

(A) each adjacent RWPG;

(B) each mayor of a municipality, located in whole or in part in the RWPA, with a population of 1,000 or more or which is a county seat;

(C) each county judge of a county located in whole or in part in the RWPA;

(D) each special or general law district or river authority with responsibility to manage or supply water in the RWPA based upon lists of such water districts and river authorities obtained from the Commission; and

(E) each Retail Public Utility, defined as a community water system, that serves any part of the RWPA or receives water from the RWPA based upon lists of such entities obtained from the Commission; and

(F) each holder of record of a water right for the use of surface water the diversion of which occurs in the RWPA based upon lists of such water rights holders obtained from the Commission.

(6) the public hearings shall be conducted at a central location readily accessible to the public within the regional water planning area.

(7) RWPGs shall make copies of the IPP available for public inspection at least 30 days before the required public hearing by providing a copy of the IPP in at least one public library in each county and either the county courthouse's law library, the county clerk's office, or some other accessible place within the county courthouse of each county having land in the RWPA. The locations of such copies shall be included in the public hearing notice. For distribution of the IPP, the RWPG may consult and coordinate with county and local officials in determining the most appropriate public library and location in the county courthouse to ensure maximum accessibility to the public during business hours. According to the capabilities of the facility, the RWPG may provide the copy electronically, on electronic media, through an internet web link, or in hard copy. The RWPG shall make an effort to ensure ease of access to the public, including where feasible, posting the IPP on websites and providing notice of such posting. The public inspection requirement in this subsection applies only to IPPs; adopted RWPs are only required to be submitted to the Board pursuant to Texas Water Code, §16.053(i).

(8) Any additional meeting materials associated with meetings in this subsection must be made available on the RWPG website for a minimum of seven days prior to and 30 days following the meeting or hearing.

(i) All notice periods given are based on calendar days.

(j) Each RWPG shall include a statement in their draft and final adopted RWPs regarding the RWPG's conformance with this section.

§357.22. General Considerations for Development of Regional Water Plans.

(a) RWPGs shall consider existing local, regional, and state water planning efforts, including water plans, information and relevant local, regional, state and federal programs and goals when developing the RWP. The RWPGs shall also consider:

(1) Water Conservation Plans;

(2) drought management and Drought Contingency Plans;

(3) information compiled by the Board from water loss audits performed by Retail Public Utilities pursuant to §358.6 of this title (relating to Water Loss Audits);

(4) publicly available plans for major agricultural, municipal, manufacturing and commercial water users;

(5) local and regional water management plans;

(6) water availability requirements promulgated by a county commissioners court in accordance with Texas Water Code §35.019 (relating to Priority Groundwater Management Areas);

(7) the Texas Clean Rivers Program;

(8) the U.S. Clean Water Act;

(9) water management plans;

(10) other planning goals including, but not limited to, regionalization of water and wastewater services where appropriate;

(11) approved groundwater conservation district management plans and other plans submitted under Texas Water Code §16.054 (relating to Local Water Planning);

(12) approved groundwater regulatory plans;

(13) potential impacts on public health, safety, or welfare;

(14) water conservation best management practices available on the TWDB website; and

(15) any other information available from existing local or regional water planning studies.

(b) The RWP shall contain a separate chapter for the contents of §§357.30, 357.31, 357.32, 357.33, 357.42, 357.43, [~~357.44~~], 357.45, and 357.50 of this title and shall also contain a separate chapter for the contents of §357.34 and §§357.35, 357.40 and 357.41 of this title for a total of ten [~~eleven~~] separate chapters.

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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Ashley Harden
General Counsel
Texas Water Development Board
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SUBCHAPTER C. PLANNING ACTIVITIES FOR NEEDS ANALYSIS AND STRATEGY RECOMMENDATIONS

31 TAC §§357.31 - 357.34

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of the Texas Water Code §6.101, which provides the TWDB with the authority to propose rules necessary to carry out the powers and duties in the Water Code and other laws of the State. The rulemaking is proposed under the additional authority of Texas Water Code §16.053, which provides the TWDB with the authority to propose rules necessary to carry out Regional Water Planning in accordance with the statute, and Texas Water Code §15.439, which provides the TWDB with the authority to propose rules providing for the use of money in the State Water Implementation Fund.

Texas Water Code §16.053 and §15.439 are affected by this rulemaking.

§357.31. Projected Population and Water Demands.

(a) RWPs shall present projected population and Water Demands by WUG as defined in §357.10 of this title (relating to Definitions and Acronyms). If a WUG lies in one or more counties or RWPA or river basins, data shall be reported for each river basin, RWPA, and county split.

(b) RWPs shall present projected Water Demands associated with MWPs by category of water use, including municipal, manufacturing, irrigation, steam electric power generation, mining, and livestock for the RWPA.

(c) RWPs shall evaluate the current contractual obligations of WUGs and WWPs to supply water in addition to any demands projected for the WUG or WWP. Information regarding obligations to supply water to other users must also be incorporated into the water supply analysis in §357.32 of this title (relating to Water Supply Analysis) in order to determine net existing water supplies available for each WUG's own use. The evaluation of contractual obligations under this subsection is limited to determining the amount of water secured by the contract and the duration of the contract.

(d) Municipal demands shall be adjusted to reflect water savings due to plumbing fixture requirements identified in the Texas Health and Safety Code, Chapter 372. RWPGs shall report how changes in plumbing fixtures would affect projected municipal Water Demands using projections with plumbing code savings provided by the Board or by methods approved by the EA.

(e) Source of population and Water Demands. In developing RWPs, RWPGs shall use:

(1) Population and Water Demand projections developed by the EA that shall be contained in the next State Water Plan and adopted by the Board after consultation with the RWPGs, Commission, Texas Department of Agriculture, and the Texas Parks and Wildlife Department.

(2) RWPGs may request revisions of Board adopted population or Water Demand projections if the request demonstrates that population or Water Demand projections no longer represents a reasonable estimate of anticipated conditions based on changed conditions and or new information. Before requesting a revision to population and Water Demand projections, the RWPG shall discuss the proposed revisions at a public meeting for which notice has been posted in accordance with §357.21(g)(2) [~~§357.21(e)~~] of this title (relating to Notice and Public Participation). The RWPG shall summarize public comments received on the proposed request for projection revisions. The EA shall consult with the requesting RWPG and respond to their request within 45 days after receipt of a request from an RWPG for revision of population or Water Demand projections.

(f) Population and Water Demand projections shall be presented for each Planning Decade for WUGs in accordance with subsection (a) of this section and MWPs in accordance with subsection (b) of this section.

§357.32. Water Supply Analysis.

(a) RWPGs shall evaluate:

(1) source water Availability during Drought of Record conditions; and

(2) Existing Water Supplies [~~existing water supplies~~] that are legally and physically available to each WUG [~~WUGs~~] and WWP [~~wholesale water suppliers~~] within the RWPA for use during the Drought of Record.

(b) Evaluations shall consider surface water and groundwater data from the State Water Plan, existing water rights, contracts and option agreements relating to water rights, other planning and water supply studies, and analysis of water supplies existing in and available to the RWPA during Drought of Record conditions.

(c) For surface water supply analyses, RWPGs shall use most current Water Availability Models from the Commission to evaluate the adequacy of surface water supplies. As the default approach for evaluating existing supplies, RWPGs shall assume full utilization of existing water rights and no return flows when using Water Availability Models. RWPGs may use better, more representative, water availability modeling assumptions or better site-specific information with written approval from the EA. Information available from the Commission shall be incorporated by RWPGs unless better site-specific information is available and approved in writing by the EA.

(1) Evaluation of existing stored surface water available during Drought of Record conditions shall be based on Firm Yield as defined in §357.10 of this title (relating to Definitions and Acronyms). The analysis may be based on justified operational procedures other than Firm Yield. The EA shall consider a written request from an RWPG to use procedures other than Firm Yield.

(2) Evaluation of existing run of river surface water available for municipal WUGs during Drought of Record conditions shall be based on the minimum monthly diversion amounts that are available 100 percent of the time, if those run of river supplies are the only supply for the municipal WUG.

(d) RWPGs shall use modeled available groundwater volumes for groundwater Availability, as issued by the EA, and incorporate such information in its RWP unless no modeled available groundwater volumes are provided. Groundwater Availability used in the RWP must be consistent with the desired future conditions as of the most recent deadline for the Board to adopt the State Water Plan or, at the discretion of the RWPG, established subsequent to the adoption of the most recent State Water Plan.

(1) An RWP is consistent with a desired future condition if the groundwater Availability amount in the RWP and on which an Existing Water Supply or recommended WMS relies does not exceed the modeled available groundwater amount associated with the desired future condition for the relevant aquifers, in accordance with paragraph (2) of this subsection or as modified by paragraph (3) of this subsection, if applicable. The desired future condition must be either the desired future condition adopted as of the most recent deadline for the Board to adopt the State Water Plan or, at the option of the RWPG, a desired future condition adopted on a subsequent date.

(2) If no groundwater conservation district exists within the RWPA, then the RWPG shall determine the Availability of groundwater for regional planning purposes. The Board shall review and consider approving the RWPG-Estimated Groundwater Availability, prior to inclusion in the IPP, including determining if the estimate is physically compatible with the desired future conditions for relevant aquifers in groundwater conservation districts in the co-located groundwater management area or areas. The EA shall use the Board's groundwater availability models as appropriate to conduct the compatibility review.

(3) In RWPAs that have at least one groundwater conservation district, the EA shall consider a written request from an RWPG to apply a MAG Peak Factor in the form of a percentage (e.g., greater than 100 percent) applied to the modeled available groundwater value of any particular aquifer-region-county-basin split within the jurisdiction of a groundwater conservation district, or groundwater management area if no groundwater conservation district exists, to allow temporary increases in annual availability for planning purposes. The request must:

(A) Include written approval from the groundwater conservation district, if a groundwater conservation district exists in the particular aquifer-region-county-basin split, and from representatives of the groundwater management area;

(B) Provide the technical basis for the request in sufficient detail to support groundwater conservation district, groundwater management area, and EA evaluation; and

(C) Document the basis for how the temporary availability increase will not prevent the groundwater conservation district from managing groundwater resources to achieve the desired future condition.

[~~(e) RWPGs shall evaluate the Existing Water Supplies for each WUG and WWP.~~]

(e) [~~(f)~~] Water supplies based on contracted agreements shall be based on the terms of the contract, which may be assumed to renew upon contract termination if the contract contemplates renewal or extensions.

(f) [~~(g)~~] Evaluation results shall be reported by WUG in accordance with §357.31(a) of this title (relating to Projected Population and Water Demands) and MWP in accordance with §357.31(b) of this title.

§357.33. Needs Analysis: Comparison of Water Supplies and Demands.

(a) RWPs shall include comparisons of existing water supplies and projected Water Demands to identify Water Needs.

(b) RWPGs shall compare projected Water Demands, developed in accordance with §357.31 of this title (relating to Projected Population and Water Demands), with existing water supplies available to WUGs and WWPs in a planning area, as developed in accordance with §357.32 of this title (relating to Water Supply Analysis), to determine whether WUGs will experience water surpluses or needs for additional supplies. [~~Results shall be reported for WUGs by categories of use including municipal, manufacturing, irrigation, steam electric, mining, and livestock watering for each county or portion of a county in an RWPA. Results shall be reported for MWPs by categories of use including municipal, manufacturing, irrigation, steam electric, mining, and livestock watering for the RWPA.~~]

[~~(c) The social and economic impacts of not meeting Water Needs shall be evaluated by RWPGs and reported for each RWPA.~~]

(c) [~~(d)~~] Results of evaluations shall be reported by WUG in accordance with §357.31(a) of this title and by MWP in accordance with §357.31(b) of this title.

(d) [~~(e)~~] RWPGs shall perform a secondary water needs analysis for all WUGs and WWPs for which conservation WMSs or direct Reuse WMSs are recommended. This secondary water needs analysis shall calculate the Water Needs that would remain after assuming all recommended conservation and direct Reuse WMSs are fully implemented. The resulting secondary water needs volumes shall be presented in the RWP by WUG and MWP and decade.

§357.34. Identification and Evaluation of Potentially Feasible Water Management Strategies and Water Management Strategy Projects.

(a) RWPGs shall identify and evaluate potentially feasible WMSs and the WMSPs required to implement those strategies for all WUGs and WWPs with identified Water Needs.

(b) RWPGs shall identify potentially feasible WMSs to meet water supply needs identified in §357.33 of this title (relating to Needs Analysis: Comparison of Water Supplies and Demands) in accordance with the process in §357.12(b) of this title (relating to General Regional Water Planning Group Responsibilities and Procedures). Strategies shall be developed for WUGs and WWPs. WMS and WMSPs shall be developed for WUGs and WWPs that would provide water to meet water supply needs during Drought of Record conditions. [~~The strategies shall meet new water supply obligations necessary to implement recommended WMSs of WWPs and WUGs. RWPGs shall plan for water supply during Drought of Record conditions. In developing RWPs, RWPGs shall provide WMSs to be used during a Drought of Record.~~]

(c) Potentially feasible WMSs may include, but are not limited to:

(1) Expanded use of existing supplies including system optimization and conjunctive use of water resources, reallocation of reservoir storage to new uses, voluntary redistribution of water resources including contracts, water marketing, regional water banks, sales, leases, options, subordination agreements, and financing agreements, subordination of existing water rights through voluntary agreements, enhancements of yields of existing sources, and improvement of water quality including control of naturally occurring chlorides.

(2) New supply development including construction and improvement of surface water and groundwater resources, brush control, precipitation enhancement, seawater desalination, brackish groundwater desalination, water supply that could be made available by cancellation of water rights based on data provided by the Commission, rainwater harvesting, and aquifer storage and recovery.

(3) Conservation and Drought Management Measures including demand management.

(4) Reuse of wastewater.

(5) Interbasin Transfers of Surface Water.

(6) Emergency transfers of surface water including a determination of the part of each water right for non-municipal use in the RWPA that may be transferred without causing unreasonable damage to the property of the non-municipal water rights holder in accordance with Texas Water Code §11.139 (relating to Emergency Authorizations).

(d) All recommended WMSs and WMSPs that are entered into the State Water Planning Database [~~and prioritized by RWPGs~~] shall be designed to reduce the consumption of water, reduce the loss or waste of water, improve the efficiency in the use of water, or develop, deliver or treat additional water supply volumes to WUGs or WWPs in at least one planning decade such that additional water is available during Drought of Record conditions. Any other RWPG recommendations regarding permit modifications, operational changes, and/or other infrastructure that are not designed to reduce the consumption of water, reduce the loss or waste of water, improve the efficiency in the use of water, or develop, deliver or treat additional water supply volumes to WUGs or WWPs in at least one Planning Decade such that additional water is available during Drought of Record conditions shall be indicated as such and presented separately in the RWP and shall not be eligible for funding from the State Water Implementation Fund for Texas.

(e) Evaluations of potentially feasible WMSs and associated WMSPs shall include the following analyses:

(1) For the purpose of evaluating potentially feasible WMSs, the Commission's most current Water Availability Model with assumptions of no return flows and full utilization of senior water rights, is to be used. Alternative assumptions may be used with written approval from the EA who shall consider a written request from an RWPG to use assumptions other than no return flows and full utilization of senior water rights.

(2) An equitable comparison between and consistent evaluation and application of all WMSs the RWPGs determine to be potentially feasible for each water supply need.

(3) A quantitative reporting of:

(A) The net quantity, reliability, and cost of water delivered and treated for the end user's requirements during Drought of Record conditions, taking into account and reporting anticipated strategy water losses, incorporating factors used in calculating infrastructure debt payments and may include present costs and discounted present value costs. Costs do not include costs of infrastructure associated with distribution of water within a WUG after treatment, except for specific, limited allowances for direct reuse and conservation WMSs.

(B) Environmental factors including effects on environmental water needs, wildlife habitat, cultural resources, and effect of upstream development on bays, estuaries, and arms of the Gulf of Mexico. Evaluations of effects on environmental flows shall include consideration of the Commission's adopted environmental flow standards under 30 Texas Administrative Code Chapter 298 (relating to Envi-

ronmental Flow Standards for Surface Water). If environmental flow standards have not been established, then environmental information from existing site-specific studies, or in the absence of such information, state environmental planning criteria adopted by the Board for inclusion in the State Water Plan after coordinating with staff of the Commission and the Texas Parks and Wildlife Department to ensure that WMSs are adjusted to provide for environmental water needs including instream flows and bays and estuaries inflows.

(C) Impacts to agricultural resources.

(4) Discussion of the plan's impact on other water resources of the state including other WMSs and groundwater and surface water interrelationships.

(5) A discussion of each threat to agricultural or natural resources identified pursuant to §357.30(7) of this title (relating to Description of the Regional Water Planning Area) including how that threat will be addressed or affected by the WMSs evaluated.

(6) If applicable, consideration and discussion of the provisions in Texas Water Code §11.085(k)(1) for Interbasin Transfers of Surface Water. At minimum, this consideration shall include a summation of Water Needs in the basin of origin and in the receiving basin.

(7) Consideration of third-party social and economic impacts resulting from voluntary redistributions of water including analysis of third-party impacts of moving water from rural and agricultural areas.

(8) A description of the major impacts of recommended WMSs on key parameters of water quality identified by RWPGs as important to the use of a water resource and comparing conditions with the recommended WMSs to current conditions using best available data.

[~~(9) Consideration of water pipelines and other facilities that are currently used for water conveyance as described in §357.22(a)(3) of this title (relating to General Considerations for Development of Regional Water Plans).~~]

<u>(9)</u> [~~(10)~~] Other factors as deemed relevant by the RWPG including recreational impacts.

(f) RWPGs shall evaluate and present potentially feasible WMSs and WMSPs with sufficient specificity to allow state agencies to make financial or regulatory decisions to determine consistency of the proposed action before the state agency with an approved RWP.

(g) If an RWPG does not recommend aquifer storage and recovery strategies, seawater desalination strategies, or brackish groundwater desalination strategies it must document the reason(s) in the RWP.

(h) In instances where an RWPG has determined there are significant identified Water Needs in the RWPA, the RWP shall include an assessment of the potential for aquifer storage and recovery to meet those Water Needs. Each RWPG shall define the threshold to determine whether it has significant identified Water Needs. Each RWP shall include, at a minimum, a description of the methodology used to determine the threshold of significant needs. If a specific assessment is conducted, the assessment may be based on information from existing studies and shall include minimum parameters as defined in contract guidance.

(i) Conservation, Drought Management Measures, and Drought Contingency Plans shall be considered by RWPGs when developing the regional plans, particularly during the process of identifying, evaluating, and recommending WMSs. RWPs shall incorporate water conservation planning and drought contingency planning in the RWPA.

(1) Drought Management Measures including water demand management. RWPGs shall consider Drought Management Measures for each need identified in §357.33 of this title and shall include such measures for each user group to which Texas Water Code §11.1272 (relating to Drought Contingency Plans for Certain Applicants and Water Right Holders) applies. Impacts of the Drought Management Measures on Water Needs must be consistent with guidance provided by the Commission in its administrative rules implementing Texas Water Code §11.1272. If an RWPG does not adopt a drought management strategy for a need it must document the reason in the RWP. Nothing in this paragraph shall be construed as limiting the use of voluntary arrangements by water users to forgo water usage during drought periods.

(2) Water conservation practices. RWPGs must consider water conservation practices, including potentially applicable best management practices, for each identified Water Need.

(A) RWPGs shall include water conservation practices for each user group to which Texas Water Code §11.1271 and §13.146 (relating to Water Conservation Plans) apply. The impact of these water conservation practices on Water Needs must be consistent with requirements in appropriate Commission administrative rules related to Texas Water Code §11.1271 and §13.146.

(B) RWPGs shall consider water conservation practices for each WUG beyond the minimum requirements of subparagraph (A) of this paragraph, whether or not the WUG is subject to Texas Water Code §11.1271 and §13.146. If RWPGs do not adopt a Water Conservation Strategy to meet an identified need, they shall document the reason in the RWP.

(C) For each WUG or WWP that is to obtain water from a proposed interbasin transfer to which Texas Water Code §11.085 (relating to Interbasin Transfers) applies, RWPGs shall include a Water Conservation Strategy, pursuant to Texas Water Code §11.085(l), that will result in the highest practicable level of water conservation and efficiency achievable. For these strategies, RWPGs shall determine and report projected water use savings in gallons per capita per day based on its determination of the highest practicable level of water conservation and efficiency achievable. RWPGs shall develop conservation strategies based on this determination. In preparing this evaluation, RWPGs shall seek the input of WUGs and WWPs as to what is the highest practicable level of conservation and efficiency achievable, in their opinion, and take that input into consideration. RWPGs shall develop water conservation strategies consistent with guidance provided by the Commission in its administrative rules that implement Texas Water Code §11.085. When developing water conservation strategies, the RWPGs must consider potentially applicable best management practices. Strategy evaluation in accordance with this section shall include a quantitative description of the quantity, cost, and reliability of the water estimated to be conserved under the highest practicable level of water conservation and efficiency achievable.

(D) RWPGs shall consider strategies to address any issues identified in the information compiled by the Board from the water loss audits performed by Retail Public Utilities pursuant to §358.6 of this title (relating to Water Loss Audits).

(3) RWPGs shall recommend Gallons Per Capita Per Day goal(s) for each municipal WUG or specified groupings of municipal WUGs. Goals must be recommended for each planning decade and may be a specific goal or a range of values. At a minimum, the RWPs shall include Gallons Per Capita Per Day goals based on drought conditions to align with guidance principles in §358.3 of this title (relating to Guidance Principles).

(j) RWPs shall include a subchapter consolidating the RWPG's recommendations regarding water conservation. RWPGs may [~~shall~~] include in the RWPs model Water Conservation Plans pursuant to Texas Water Code §11.1271.

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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Ashley Harden
General Counsel
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SUBCHAPTER D. IMPACTS, DROUGHT RESPONSE, POLICY RECOMMENDATIONS, AND IMPLEMENTATION

31 TAC §357.42

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of the Texas Water Code §6.101, which provides the TWDB with the authority to propose rules necessary to carry out the powers and duties in the Water Code and other laws of the State. The rulemaking is proposed under the additional authority of Texas Water Code §16.053, which provides the TWDB with the authority to propose rules necessary to carry out Regional Water Planning in accordance with the statute, and Texas Water Code §15.439, which provides the TWDB with the authority to propose rules providing for the use of money in the State Water Implementation Fund.

Texas Water Code §16.053 and §15.439 are affected by this rulemaking.

§357.42. Drought Response Information, Activities, and Recommendations.

(a) RWPs shall consolidate and present information on current and planned preparations for, and responses to, drought conditions in the region including, but not limited to, Drought of Record conditions based on the following subsections.

(b) RWPGs shall conduct an assessment of current preparations for drought within the RWPA. This may include information from local Drought Contingency Plans. The assessment shall include:

(1) A description of how water suppliers in the RWPA identify and respond to the onset of drought; and

(2) Identification of unnecessary or counterproductive variations in drought response strategies among water suppliers that may confuse the public or impede drought response efforts. At a minimum, RWPGs shall review and summarize drought response efforts for neighboring communities including the differences in the implementation of outdoor watering restrictions.

(c) RWPGs shall identify [~~develop~~] drought response triggers and actions [~~recommendations~~] regarding the management of existing groundwater and surface water sources in the RWPA designated in accordance with §357.32 of this title (relating to Water Supply Analysis), including:

(1) Factors specific to each source of water supply to be considered in determining whether to initiate a drought response for each water source including specific recommended drought response triggers;

(2) Actions to be taken as part of the drought response by the manager of each water source and the entities relying on each source, including the number of drought stages; and

(3) Triggers and actions developed in paragraphs (1) and (2) of this subsection may consider existing triggers and actions associated with existing Drought Contingency Plans.

(d) RWPGs shall collect information on existing major water infrastructure facilities that may be used for interconnections in event of an emergency shortage of water. At a minimum, the RWP shall include a general description of the methodology used to collect the information, the number of existing and potential emergency interconnects in the RWPA, and a list of which entities are connected to each other. In accordance with Texas Water Code §16.053(r), certain information regarding water infrastructure facilities is excepted from the Public Information Act, Texas Government Code, Chapter 552. Any excepted information collected shall be submitted separately to the EA in accordance with guidance to be provided by EA.

(e) RWPGs may [~~shall~~] provide general descriptions of local Drought Contingency Plans that involve making emergency connections between water systems or WWP systems that do not include locations or descriptions of facilities that are disallowed under subsection (d) of this section.

(f) RWPGs may designate recommended and alternative Drought Management Water Management Strategies and other recommended drought measures in the RWP including:

(1) List and description of the recommended Drought Management Water Management Strategies and associated WUGs and WWPs, if any, that are recommended by the RWPG. Information to include associated triggers to initiate each of the recommended Drought Management WMSs;

(2) List and description of alternative Drought Management WMSs and associated WUGs and WWPs, if any, that are included in the plan. Information to include associated triggers to initiate each of the alternative Drought Management WMSs;

(3) List of all potentially feasible Drought Management WMSs that were considered or evaluated by the RWPG but not recommended; and

(4) List and summary of any other recommended Drought Management Measures, if any, that are included in the RWP, including associated triggers if applicable.

(g) The RWPGs shall evaluate potential emergency responses to local drought conditions or loss of existing water supplies; the evaluation shall include identification of potential alternative water sources that may be considered for temporary emergency use by WUGs and WWPs in the event that the Existing Water Supply sources become temporarily unavailable to the WUGs and WWPs due to unforeseeable hydrologic conditions such as emergency water right curtailment, unanticipated loss of reservoir conservation storage, or other localized drought impacts. RWPGs shall evaluate, at a minimum, municipal WUGs that:

(1) have existing populations less than 7,500;

(2) rely on a sole source for its water supply regardless of whether the water is provided by a WWP; and

(3) all County-Other WUGs.

(h) RWPGs shall consider any relevant recommendations from the Drought Preparedness Council.

(i) RWPGs may [~~shall~~] make drought preparation and response recommendations regarding:

(1) Development of, content contained within, and implementation of local Drought Contingency Plans required by the Commission;

(2) Current drought management preparations in the RWPA including:

(A) drought response triggers; and

(B) responses to drought conditions;

(3) The Drought Preparedness Council and the State Drought Preparedness Plan; and

(4) Any other general recommendations regarding drought management in the region or state.

(j) The RWPGs may [~~shall~~] develop region-specific model Drought Contingency Plans.

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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31 TAC §357.44, §357.46

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of the Texas Water Code §6.101, which provides the TWDB with the authority to propose rules necessary to carry out the powers and duties in the Water Code and other laws of the State. The rulemaking is proposed under the additional authority of Texas Water Code §16.053, which provides the TWDB with the authority to propose rules necessary to carry out Regional Water Planning in accordance with the statute, and Texas Water Code §15.439, which provides the TWDB with the authority to propose rules providing for the use of money in the State Water Implementation Fund.

Texas Water Code §16.053 and §15.439 are affected by this rulemaking.

§357.44. Infrastructure Financing Analysis.

§357.46. Prioritization of Projects by Regional Water Planning Groups.

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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SUBCHAPTER E. ADOPTION, SUBMITTAL, AND AMENDMENTS TO REGIONAL WATER PLANS

31 TAC §357.50, §357.51

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of the Texas Water Code §6.101, which provides the TWDB with the authority to propose rules necessary to carry out the powers and duties in the Water Code and other laws of the State. The rulemaking is proposed under the additional authority of Texas Water Code §16.053, which provides the TWDB with the authority to propose rules necessary to carry out Regional Water Planning in accordance with the statute, and Texas Water Code §15.439, which provides the TWDB with the authority to propose rules providing for the use of money in the State Water Implementation Fund.

Texas Water Code §16.053 and §15.439 are affected by this rulemaking.

§357.50. Adoption, Submittal, and Approval of Regional Water Plans.

(a) The RWPGs shall submit their adopted RWPs to the Board every five years on a date to be disseminated by the EA, as modified by subsection (g)(2) of this section, for approval and inclusion in the State Water Plan.

(b) Prior to the adoption of the RWP, the RWPGs shall submit concurrently to the EA and the public an IPP. The IPP submitted to the EA must be in the electronic and paper format specified by the EA. Each RWPG must certify that the IPP is complete and adopted by the RWPG. In the instance of a recommended WMS proposed to be supplied from a different RWPA, the RWPG recommending such strategy shall submit, concurrently with the submission of the IPP to the EA, a copy of the IPP, or a letter identifying the WMS in the other region along with an internet link to the IPP, to the RWPG associated with the location of such strategy.

(c) The RWPGs shall distribute the IPP in accordance with §357.21(h)(7) [~~§357.21(d)(4)~~] of this title (relating to Notice and Public Participation).

(d) Within 60 days of the submission of IPPs to the EA, the RWPGs shall submit to the EA, and the other affected RWPG, in writing, the identification of potential Interregional Conflicts by:

(1) identifying the specific recommended WMS from another RWPG's IPP;

(2) providing a statement of why the RWPG considers there to be an Interregional Conflict; and

(3) providing any other information available to the RWPG that is relevant to the Board's decision.

(e) The RWPGs shall seek to resolve conflicts with other RWPGs and shall promptly and actively participate in any Board sponsored efforts to resolve Interregional Conflicts.

(f) The RWPGs shall solicit, and consider the following comments when adopting an RWP:

(1) the EA's written comments, which shall be provided to the RWPG within 120 days of receipt of the IPP; and

[~~(2) written comments received from any federal agency or Texas state agency, which the RWPGs shall accept after the first public hearing notice is published pursuant to §357.21(d) of this title until at least 90 days after the public hearing is held pursuant to §357.21(d)of this title; and~~]

(2) [~~(3)~~] any written or oral comments received from any federal agency, Texas state agency, or the public after the first public hearing notice is published [~~pursuant to §357.21 (d) of this title~~] until at least 60 days after the public hearing is held pursuant to §357.21(h) [~~§357.21(d)~~] of this title.

(3) [~~(4)~~] The RWPGs shall revise their IPPs to incorporate negotiated resolutions or Board resolutions of any Interregional Conflicts into their final adopted RWPs.

(4) [~~(5)~~] In the event that the Board has not resolved an Interregional Conflict sufficiently early to allow an involved RWPG to modify and adopt its final RWP by the statutory deadline, all RWPGs involved in the conflict shall proceed with adoption of their RWP by excluding the relevant recommended WMS and all language relevant to the conflict and include language in the RWP explaining the unresolved Interregional Conflict and acknowledging that the RWPG may be required to revise or amend its RWP in accordance with a negotiated or Board resolution of an Interregional Conflict.

(g) Submittal of RWPs. RWPGs shall submit the IPP and the adopted RWPs and amendments to approved RWPs to the EA in conformance with this section.

(1) RWPs shall include:

(A) The technical report and data prepared in accordance with this chapter and the EA's specifications;

(B) An executive summary that documents key RWP findings and recommendations; [~~and~~]

(C) Documentation of the RWPG's interregional coordination efforts; and

(D) [~~(C)~~] A copy of the EA's comments on the IPP and summaries [~~Summaries~~] of all written and oral comments received pursuant to subsection (f) of this section, with a response by the RWPG explaining how the plan was revised or why changes were not warranted in response to written comments received under subsection (f) of this section.

(2) RWPGs shall submit RWPs to the EA according to the following schedule:

(A) IPPs are due every five years on a date disseminated by the EA unless an extension is approved, in writing, by the EA.

(B) Prior to submission of the IPP, the RWPGs shall upload all required [~~the~~] data, metadata and all other relevant digital information supporting the plan to the Board's State Water Planning Database. All changes and corrections to this information must be entered into the Board's State Water Planning Database prior to submittal of a final adopted plan.

(C) The RWPG shall transfer copies of all data, models, and reports generated by the planning process and used in developing the RWP to the EA. To the maximum extent possible, data shall be transferred in digital form according to specifications provided by the EA. One copy of all reports prepared by the RWPG shall be provided in digital format according to specifications provided by the EA. All digital mapping shall use a geographic information system according to specifications provided by the EA. The EA shall seek the input from the State Geographic Information Officer regarding specifications mentioned in this section.

(D) Adopted RWPs are due to the EA every five years on a date disseminated by the EA unless, at the discretion of the EA, a time extension is granted consistent with the timelines in Texas Water Code §16.053(i).

(E) Once approved by the Board, RWPs shall be made available on the Board website.

(h) Upon receipt of an RWP adopted by the RWPG, the Board shall consider approval of such plan based on the following criteria:

(1) verified adoption of the RWP by the RWPG; and

(2) verified incorporation of any negotiated resolution or Board resolution of any Interregional Conflicts, or in the event that an Interregional Conflict is not yet resolved, verified exclusion of the relevant recommended WMS and all language relevant to the conflict.

(i) Approval of RWPs by the Board. The Board may approve an RWP only after it has determined that the RWP complies with statute and rules.

(j) The Board shall consider approval of an RWP that includes unmet municipal Water Needs provided that the RWPG includes adequate justification, including that the RWP:

(1) documents that the RWPG considered all potentially feasible WMSs, including Drought Management WMSs and contains an explanation why additional conservation and/or Drought Management WMSs were not recommended to address the need;

(2) describes how, in the event of a repeat of the Drought of Record, the municipal WUGs associated with the unmet need shall ensure the public health, safety, and welfare in each Planning Decade that has an unmet need; and

(3) explains whether there may be occasion, prior to development of the next IPP, to amend the RWP to address all or a portion of the unmet need.

(k) Board Adoption of State Water Plan. RWPs approved by the Board pursuant to this chapter shall be incorporated into the State Water Plan as outlined in §358.4 of this title (relating to Guidelines).

§357.51. Amendments to Regional Water Plans.

(a) Local Water Planning Amendment Requests. A Political Subdivision in the RWPA may request an RWPG to consider specific changes to an adopted RWP based on changed conditions or new information. An RWPG must formally consider such request within 180 days after its receipt and shall amend its adopted RWP if it determines an amendment is warranted. If the Political Subdivision is not satisfied with the RWPG's decision on the issue, it may file a petition with the EA to request Board review the decision and consider changing the approved RWP. The Political Subdivision shall send a copy of the petition to the chair of the affected RWPG.

(1) The petition must state:

(A) the changed condition or new information that affects the approved RWP;

(B) the specific sections and provisions of the approved RWP that are affected by the changed condition or new information;

(C) the efforts made by the Political Subdivision to work with the RWPG to obtain an amendment; and

(D) the proposed amendment to the approved RWP.

(2) If the EA determines that the changed condition or new information warrants a change in the approved RWP, the EA shall request the RWPG to consider making the appropriate change and provide the reason in writing. The Political Subdivision that submitted the petition shall receive notice of any action requested of the RWPG by the EA. If the RWPG does not amend its plan consistent with the request within 90 days, it shall provide a written explanation to the EA, after which the EA shall present the issue to the Board for consideration at a public meeting. Before presenting the issue to the Board, the EA shall provide the RWPG, the Political Subdivision submitting the petition, and any Political Subdivision determined by the EA to be affected by the issue 30 days notice. At the public meeting, the Board may direct the RWPG to amend its RWP based on the local Political Subdivision's request.

(b) Major Amendments to RWPs and State Water Plan. An RWPG may amend an adopted RWP at any meeting, after giving notice for a major amendment and holding a hearing according to §357.21(g)(3) [~~§357.21(d)~~] of this title (relating to Notice and Public Participation). An amendment is major if it does not meet the criteria of subsection (c), (d) or (e) of this section. An RWPG may propose amendments to an approved RWP by submitting proposed amendments to the Board for its consideration and possible approval under the standards and procedures of this section.

(1) Initiation of a Major Amendment. An entity may request an RWPG amend its adopted RWP. An RWPG's consideration for action to initiate an amendment may occur at a regularly scheduled meeting.

(2) RWPG Public Hearing. The RWPG shall hold a public hearing on the amendment pursuant to §357.21(g)(3) [~~as defined in §357.21(d)~~] of this title. The amendment shall be available for agency and public comment at least seven [~~30~~] days prior to the public hearing and 30 days following the public hearing as required by §357.21(g)(3) [~~defined in §357.21(d)~~] of this title.

(3) The proposed major amendment:

(A) Shall not result in an over-allocation of an existing or planned source of water; and

(B) Shall conform with rules applicable to RWP development as defined in Subchapters C and D of this chapter.

(4) RWPG Major Amendment Adoption. The RWPG may adopt the amendment at a regularly scheduled RWPG meeting pursuant to §357.21(g)(1) after the public hearing held in accordance with §357.21(g)(3).[~~held in accordance with §357.21(b) of this title following the 30-day public comment period held in accordance with §357.21(d) of this title.~~] The amendment shall include response to comments received.

(5) Board Approval of Major Amendment. After adoption of the major amendment, the RWPG shall submit the amendment to the Board which shall consider approval of the amendment at its next regularly scheduled meeting following EA review of the amendment.

(c) Minor Amendments to RWPs and State Water Plan.

(1) An RWPG may amend its RWP by first providing a copy of the proposed amendment to the EA for a determination as to whether the amendment would be minor.

(2) EA Pre-Adoption Review. The EA shall evaluate the proposed minor amendment prior to the RWPG's vote to adopt the amendment. An amendment is minor if it meets the following criteria:

(A) does not result in over-allocation of an existing or planned source of water;

(B) does not relate to a new reservoir;

(C) does not increase unmet needs or produce new unmet needs in the adopted RWP unless the increase in unmet needs or new unmet needs is the result of removing infeasible WMSs and/or WMSPs in accordance with subsection (g) of this section and Texas Water Code §16.053(h)(10);

(D) does not have a significant effect on instream flows, environmental flows or freshwater flows to bays and estuaries;

(E) does not have a significant substantive impact on water planning or previously adopted management strategies; and

(F) does not delete or change any legal requirements of the plan.

(3) Determination by EA. If the EA determines that the proposed amendment is minor, EA shall notify, in writing, the RWPG as soon as practicable.

(4) RWPG Public Meeting. After receipt of the written determination from the EA, the RWPG shall conduct a public meeting in accordance with §357.21(g)(2) [~~§357.21(c)~~] of this title. The public shall have an opportunity to comment and the RWPG shall amend the proposed minor amendment based on public comments, as appropriate, and to comply with existing statutes and rules related to regional water planning responses. The adopted amendment shall include response to comments received.

(5) Board Approval of Minor Amendment. After adoption of the minor amendment, the RWPG shall submit the amendment to the Board which shall approve the amendment at its next regularly scheduled meeting unless the amendment contradicts or is in substantial conflict with statutes and rules relating to regional water planning.

(d) Amendment for Water Planning for a Clean Coal Project. An amendment to an RWP or the State Water Plan to facilitate planning for water supplies reasonably required for a clean coal project, as defined by Texas Water Code §5.001, relating to the Texas Commission on Environmental Quality, shall be adopted by the process described in this section. However, an RWPG may amend the RWP to accommodate planning for a clean coal project without a public meeting or hearing if the EA determines that:

(1) the amendment does not significantly change the RWP; or

(2) the amendment does not adversely affect other WMSs in the RWP.

(e) Substitution of Alternative WMSs. RWPGs may substitute one or more evaluated Alternative Water Management Strategies for a recommended strategy if the strategy originally recommended is no longer recommended and the substitution of the Alternative WMS is capable of meeting the same Water Need without over-allocating any source. Before substituting an Alternative WMS, the RWPG must provide public notice in accordance with §357.21(g)(1) [~~§357.21(b)~~] of this title and request written approval from the EA. If the EA approves the substitution, the RWPG must provide public notice in accordance with §357.21(g)(2) [~~§357.21(c)~~] of this title before taking action to substitute the Alternative WMS.

(f) In the instance of a substitution of an Alternative WMS or a proposed amendment with a recommended WMS to be supplied from a different RWPA, the RWPG recommending such strategy shall submit, concurrently with the submission of the substitution or proposed amendment to the EA, a copy of the substitution or proposed amendment to the RWPG for the location of such strategy. The provisions of §357.50(d), (e), (f), and (h) of this title (related to Adoption, Submittal, and Approval of Regional Water Plans) and §357.62 of this title (related to Interregional Conflicts) [sections 357.50(d), (e), (f), and (h), and 357.62, related to Interregional Conflicts], shall apply to substitution or amendment to the RWP in the same manner as those subdivisions apply to an IPP.

(g) Amendment for Infeasible Recommended WMSs or WMSPs. Following the results of the analysis presented at a public meeting in accordance with §357.12(b) of this title (relating to General Regional Water Planning Group Responsibilities and Procedures), an RWPG shall amend an adopted RWP to remove an infeasible recommended WMS or WMSP, as defined by Texas Water Code §16.053(h)(10). The RWPG will follow the amendment processes in accordance with subsections (b), (c), or (e) of this section. An amendment for infeasible recommended WMSs or WMSPs shall be submitted to the Board by a date established by the EA. The amendment shall summarize the project components and address why they were determined to be infeasible. The amendment must also summarize any changes to unmet needs as a result of removing the infeasible WMS or WMSP. Subsequent amendments during the planning cycle for infeasible recommended WMS or WMSP may occur at the discretion of the RWPG based upon information presented to the RWPG by project sponsors.

(h) Amending the State Water Plan. Following amendments of RWPs, including substitutions of Alternative WMSs, the Board shall make any necessary amendments to the State Water Plan as outlined in §358.4 of this title (relating to Guidelines).

(i) Errata to RWPs. RWPGs may adopt errata to the final RWP to correct minor, non-substantive errors identified after adoption of the final RWP but prior to adoption of the corresponding State Water Plan. Before adopting errata to a final RWP, the RWPG must provide public notice and receive comments in accordance with §357.21(g)(1) of this title. Upon adoption of the errata, the RWPG shall submit to the EA an errata package containing revised pages of the RWP and public comments received. The EA will notify the RWPG within 60 days whether the errata are acceptable as errata or will need to be made through the amendment process.

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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Ashley Harden
General Counsel
Texas Water Development Board
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SUBCHAPTER F. CONSISTENCY AND CONFLICTS IN REGIONAL WATER PLANS

31 TAC §357.62

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of the Texas Water Code §6.101, which provides the TWDB with the authority to propose rules necessary to carry out the powers and duties in the Water Code and other laws of the State. The rulemaking is proposed under the additional authority of Texas Water Code §16.053, which provides the TWDB with the authority to propose rules necessary to carry out Regional Water Planning in accordance with the statute, and Texas Water Code §15.439, which provides the TWDB with the authority to propose rules providing for the use of money in the State Water Implementation Fund.

Texas Water Code §16.053 and §15.439 are affected by this rulemaking.

§357.62. Interregional Conflicts.

(a) In the event an RWPG has asserted an interregional conflict and the Board has determined that there is a potential for a substantial adverse effect on that region, or the Board finds that an interregional conflict exists between IPPs, the EA may use the following process:

(1) notify the affected RWPGs of the nature of the interregional conflict;

(2) request affected RWPGs appoint a representative or representatives authorized to negotiate on behalf of the RWPG and notify the EA in writing of the appointment;

(3) request affected RWPGs' assistance in resolving the conflict; and

(4) negotiate resolutions of conflicts with RWPGs as determined by the EA.

(b) In the event the negotiation is unsuccessful, the EA may:

(1) determine a proposed recommendation for resolution of the conflict;

(2) provide notice of its intent to hold a public hearing on proposed recommendations for resolution of the conflict by publishing notice of the proposed change in the *Texas Register* [Texas Register] and in a newspaper of general circulation in each county located in whole or in part in the RWPAs involved in the dispute 30 days before the public hearing and by mailing notice of the public hearing 30 days before public hearing to those persons or entities listed in §357.21(h) [§357.21(d)] of this title (relating to Notice and Public Participation) in the RWPAs proposed to be impacted, and to each county judge of a county located in whole or in part in the RWPAs proposed to be impacted and to each affected RWPG;

(3) hold a public hearing on the proposed recommendation for resolution of the conflict at a time and place determined by the EA. At the hearing, the EA shall take comments from the RWPGs, Political Subdivisions, and members of the public on the issues identified by the Board as unresolved problems; and

(4) make a recommendation to the Board for resolution of the conflict.

(c) The Board shall consider the EA's recommendation and any written statements by a representative for each affected RWPG and determine the resolution of the conflict. The Board's decision is final and not appealable.

(d) The EA shall notify affected RWPGs of Board's decision and shall direct changes to the affected RWPs, to be incorporated in accordance with Texas Water Code §16.053(h)(6).

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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CHAPTER 358. STATE WATER PLANNING GUIDELINES

SUBCHAPTER A. STATE WATER PLAN DEVELOPMENT

31 TAC §358.3, §358.4

The Texas Water Development Board ("TWDB" or "board") proposes an amendment to 31 Administrative Code (TAC) §358.3 and §358.4.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED AMENDMENT.

The purpose of the proposed amendments to 31 TAC §358 are to address concerns raised by regional water planning group stakeholders, through preliminary input on guidance principles review as required by Texas Water Code §16.051(d), and the Interregional Planning Council to clarify that regional water planning groups may plan for drought conditions worse than the drought of record. The revisions also clarify language throughout the section including adding the term water management strategy project.

SECTION BY SECTION DISCUSSION OF PROPOSED AMENDMENTS.

Subchapter A. State Water Plan Development.

Section 358.3. Guidance Principles.

Section 358.3(2) is revised to clarify that regional water planning groups, at their discretion, may plan for drought conditions worse than the drought of record. This revision reflects and better accommodates recent planning efforts by some RWPGs to plan beyond the drought of record. It is also responsive to preliminary input received from stakeholders and addresses the 2020 Interregional Planning Council recommendations to the TWDB. The proposed revision does not require that regional water planning groups plan for drought conditions worse than the drought of record.

Section §358.3(8) is revised to include water management strategy projects. The term water management strategy projects is added through the section to align the state water planning guidance principles terminology with Regional Water Planning administrative rules. Water management strategy projects are distinct from the term water management strategy. As defined in Section §357.10(41) a water management strategy project is a "Water project that has a non-zero capital costs and that when implemented, would develop, deliver, or treat additional water supply volumes, or conserve water for Water User Groups or Wholesale Water Providers. One WMSP may be associated with multiple WMSs."

Section 358.3(9) is revised to include water management strategy projects and add clarity to the rule.

Section 358.3(20) is revised to add clarity to the rule.

Section 358.3(21) is revised to include water management strategy projects.

Section 358.3(22) is revised to include water management strategy projects.

Section 358.3(26) is revised to include water management strategy projects and reference the appropriate subsections of §357.34.

Section 358.4. Guidelines.

Section 358.4(b)(2) is revised to clarify the livestock water user group terminology and add clarity to the rule.

Section 358.4(b)(4)(G) is revised to clarify the livestock water user group terminology.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS

Ms. Rebecca Trevino, Chief Financial Officer, has determined that there will be no fiscal implications for state or local governments as a result of the proposed rulemaking. For the first five years these rules are in effect, there is no expected additional cost to state or local governments resulting from their administration.

These rules are not expected to result in reductions in costs to either state or local governments. There is no change in costs for state or local governments to comply with the proposed revision. These rules are not expected to have any impact on state or local revenues. The rules do not require any increase in expenditures for state or local governments as a result of administering these rules. Additionally, there are no foreseeable implications relating to state or local governments' costs or revenue resulting from these rules.

Because these rules will not impose a cost on regulated persons, the requirement included in Texas Government Code Section 2001.0045 to repeal a rule does not apply. Furthermore, the requirement in Section 2001.0045 does not apply because these rules are necessary to protect the health, safety, and welfare of the residents of this state.

The board invites public comment regarding this fiscal note. Written comments on the fiscal note may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

PUBLIC BENEFITS AND COSTS

Ms. Rebecca Trevino also has determined that for each year of the first five years the proposed rulemaking is in effect, the public will benefit from the rulemaking as it will clarify existing rule language, align the guidance principle terminology with regional water planning rule language, and clarify that regional water planning groups may plan for drought conditions worse than the drought of record.

LOCAL EMPLOYMENT IMPACT STATEMENT

The board has determined that a local employment impact statement is not required because the proposed rule does not ad-

versely affect a local economy in a material way for the first five years that the proposed rule is in effect because it will impose no new requirements on local economies. The board also has determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of enforcing this rulemaking. The board also has determined that there is no anticipated economic cost to persons who are required to comply with the rulemaking as proposed. Therefore, no regulatory flexibility analysis is necessary.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The board reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225, because it does not meet the definition of a "major environmental rule" as defined in the Administrative Procedure Act. A "major environmental rule" is defined as a rule with the specific intent to protect the environment or reduce risks to human health from environmental exposure, a rule that may adversely affect in a material way the economy or a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The intent of the rulemaking is to clarify existing language, align the guidance principle terminology with regional water planning rule language, and clarify that regional water planning groups may plan for drought conditions worse than the drought of record.

Even if the proposed rule were a major environmental rule, Texas Government Code, §2001.0225 still would not apply to this rulemaking because Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability criteria because it: (1) does not exceed the standard set by federal law or any other federal law; (2) does not exceed an express requirement of state law; (3) does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; and (4) is not proposed solely under the general powers of the agency, but rather under the authority of Texas Water Code §§ 16.051 and 16.053. Therefore, this proposed rule does not fall under any of the applicability criteria in Texas Government Code, §2001.0225.

The board invites public comment regarding this draft regulatory impact analysis determination. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

TAKINGS IMPACT ASSESSMENT

The board evaluated this proposed rule and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this rule is to clarify existing language, align the guidance principle terminology with regional water planning rule language, and clarify that regional water planning groups may plan for drought conditions worse than the drought of record. The board's analysis indicates that Texas Government Code, Chapter 2007 does not apply to this proposed rule because this is an action that is reasonably taken to fulfill an obligation mandated by state law, which is exempt under Texas Government Code, §2007.003(b)(4). The board is the agency that collects, analyzes, and disseminates water-related data and provides other services necessary to aid in planning and managing the state's water resources.

Nevertheless, the board further evaluated this proposed rule and performed an assessment of whether it constitutes a taking under Texas Government Code, Chapter 2007. Promulgation and enforcement of this proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulation does not affect a landowner's rights in private real property because this rulemaking does not burden nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. Therefore, the proposed rule does not constitute a taking under Texas Government Code, Chapter 2007.

GOVERNMENT GROWTH IMPACT STATEMENT

The board reviewed the proposed rulemaking in light of the government growth impact statement requirements of Texas Government Code §2001.0221 and has determined, for the first five years the proposed rule would be in effect, the proposed rule will not: (1) create or eliminate a government program; (2) require the creation of new employee positions or the elimination of existing employee positions; (3) require an increase or decrease in future legislative appropriations to the agency; (4) require an increase or decrease in fees paid to the agency; (5) create a new regulation; (6) expand, limit, or repeal an existing regulation; (7) increase or decrease the number of individuals subject to the rule's applicability; or (8) positively or adversely affect this state's economy.

SUBMISSION OF COMMENTS

Written comments on the proposed rulemaking may be submitted by mail to Mr. Ashley Harden, Office of General Counsel, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, by email to rulescomments@twdb.texas.gov, or by fax to (512) 475-2053. Comments will be accepted until 5:00 p.m. of the 31st day following publication the *Texas Register.*

STATUTORY AUTHORITY

This rulemaking is adopted under the authority of the Texas Water Code § 6.101 which provides the TWDB with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State. The rulemaking is adopted under the additional authority of Texas Water Code § 16.051 which provides the TWDB with the authority to adopt rules necessary to develop the state water plan and § 16.053 which provides the TWDB with the authority to adopt rules necessary to carry out Regional Water Planning in accordance with the statute.

Texas Water Code §§ 16.051 and 16.053 are affected by this rulemaking.

§358.3. Guidance Principles.
Development of the state water plan shall be guided by the following principles.

(1) The state water plan shall provide for the preparation for and response to drought conditions.

(2) The regional water plans and state water plan shall serve as water supply plans under drought of record conditions. RWPGs may, at their discretion, plan for drought conditions worse than the drought of record.

(3) Consideration shall be given to the construction and improvement of surface water resources and the application of principles that result in voluntary redistribution of water resources.

(4) Regional water plans shall provide for the orderly development, management, and conservation of water resources and preparation for and response to drought conditions so that sufficient water will be available at a reasonable cost to satisfy a reasonable projected use of water to ensure public health, safety, and welfare; further economic development; and protect the agricultural and natural resources of the affected regional water planning areas and the state.

(5) Regional water plans shall include identification of those policies and action that may be needed to meet Texas' water supply needs and prepare for and respond to drought conditions.

(6) RWPG decision-making shall be open to and accountable to the public with decisions based on accurate, objective and reliable information with full dissemination of planning results except for those matters made confidential by law.

(7) The RWPG shall establish terms of participation in its water planning efforts that shall be equitable and shall not unduly hinder participation.

(8) Consideration of the effect of policies, [~~or~~] water management strategies, or water management strategy projects on the public interest of the state, water supply, and those entities involved in providing this supply throughout the entire state.

(9) Consideration of all water management strategies the RWPG determined [~~regional water plan determines~~] to be potentially feasible when developing plans to meet future water needs and to respond to drought so that cost effective water management strategies and water management strategy projects which are consistent with long-term protection of the state's water resources, agricultural resources, and natural resources are considered and approved.

(10) Consideration of opportunities that encourage and result in voluntary transfers of water resources, including but not limited to regional water banks, sales, leases, options, subordination agreements, and financing agreements.

(11) Consideration of a balance of economic, social, aesthetic, and ecological viability.

(12) For regional water planning areas without approved regional water plans or water providers for which revised plans are not developed through the regional water planning process, the use of information from the adopted state water plan and other completed studies that are sufficient for water planning shall represent the water supply plan for that area or water provider.

(13) All surface waters are held in trust by the state, their use is subject to rights granted and administered by the Commission, and the use of surface water is governed by the prior appropriation doctrine, unless adjudicated otherwise.

(14) Existing water rights, water contracts, and option agreements shall be protected. However, potential amendments of water rights, contracts and agreements may be considered and evaluated. Any amendments will require the eventual consent of the owner.

(15) The production and use of groundwater in Texas is governed by the rule of capture doctrine unless and to the extent that such production and use is regulated by a groundwater conservation district, as codified by the legislature at Texas Water Code §36.002 (relating to Ownership of Groundwater).

(16) Consideration of recommendations of river and stream segments of unique ecological value to the legislature for potential protection.

(17) Consideration of recommendation of sites of unique value for the construction of reservoirs to the legislature for potential protection.

(18) Consideration of water planning and management activities of local, regional, state, and federal agencies, along with existing local, regional, and state water plans and information and existing state and federal programs and goals.

(19) Designated water quality and related water uses as shown in the state water quality management plan shall be improved or maintained.

(20) RWPGs shall actively coordinate water planning and management activities to identify common needs, issues, and opportunities for interregional water management strategies and water management strategy projects to achieve efficient use of water supplies. The Board will support RWPGS coordination to identify common needs, issues, and opportunities while working with RWPGs [~~Coordination of water planning and management activities of RWPGs to identify common needs and issues and achieve efficient use of water supplies, including the Board and other relevant RWPGs, working together to identify common needs, issues, and challenges while working together~~] to resolve conflicts in a fair, equitable, and efficient manner.

(21) The water management strategies and water management strategy projects identified in approved RWPs to meet needs shall be described in sufficient detail to allow a state agency making a financial or regulatory decision to determine if a proposed action before the state agency is consistent with an approved RWP.

(22) The evaluation of water management strategies and water management strategy projects shall use environmental information in accordance with the Commission's adopted environmental flow standards under 30 TAC Chapter 298 (relating to Environmental Flow Standards for Surface Water) where applicable or, in basins where standards are not available or have not been adopted, information from existing site-specific studies or state consensus environmental planning criteria.

(23) Consideration of environmental water needs including instream flows and bay and estuary inflows, including adjustments by the RWPGs to water management strategies to provide for environmental water needs including instream flows and bay and estuary needs. Consideration shall be consistent with the Commission's adopted environmental flow standards under 30 TAC Chapter 298 in basins where standards have been adopted.

(24) Planning shall be consistent with all laws applicable to water use for the state and regional water planning area.

(25) The inclusion of ongoing water development projects that have been permitted by the Commission or a predecessor agency.

(26) Specific recommendations of water management strategies and water management strategy projects shall be based upon identification, analysis, and comparison of all water management strategies the RWPG determines to be potentially feasible so that the cost effective water management strategies which are environmentally sensitive are considered and adopted unless the RWPG demonstrates that adoption of such strategies is not appropriate. To determine cost-effectiveness, the RWPGs will use the process described in §357.34(e)(3)(A) [~~§357.34(d)(3)(A)~~] of this title (relating to Identi-

fication and Evaluation of Potentially Feasible Water Management Strategies) and, to determine environmental sensitivity, the RWPGs shall use the process described in §357.34(e)(3)(B) [~~§357.34(d)(3)(B)~~] of this title.

(27) RWPGs shall conduct their planning to achieve efficient use of existing water supplies, explore opportunities for and the benefits of developing regional water supply facilities or providing regional management of water facilities, coordinate the actions of local and regional water resource management agencies, provide substantial involvement by the public in the decision-making process, and provide full dissemination of planning results.

(28) RWPGs must consider existing regional water planning efforts when developing their plans.

§358.4. Guidelines.

(a) The executive administrator shall prepare, develop, and formulate the state water plan and the Board shall adopt a state water plan pursuant to the schedule in Texas Water Code §16.051. The executive administrator shall identify the beginning of the 50-year planning period for the state and regional water plans. The executive administrator shall incorporate into the state water plan presented to the Board those regional water plans approved by the Board pursuant to Texas Water Code §16.053 and Chapter 357 of this title (relating to Regional Water Planning). The Board shall, not less than 30 days before adoption or amendment of the state water plan, publish notice in the *Texas Register* of its intent to adopt a state water plan and shall mail notice to each regional water planning group. The Board shall hold a hearing, after which it may adopt a water plan or amendments thereto.

(b) The state water plan shall include summaries for the state and from approved regional water plans, when available, which shall address, at a minimum, the following topics:

(1) Basis for planning, including sections on planning history, Texas water statutes, rules, regulations, and Texas' water supply institutions;

(2) Description of methods used for projecting [~~future water demands which shall include methods for projecting~~] future population and water demands for municipal and associated commercial and institutional uses, and projecting future water demands for manufacturing, irrigation, steam electric power generation, mining, and livestock water uses [~~watering~~];

(3) Description of methods to address water quality problems related to water supply, to ensure public health, safety and welfare, to further economic growth, to protect agricultural and natural resources, to determine water supply availability, and to address drought response planning;

(4) Description of future conditions which shall, at a minimum, include:

(A) Demands for water;

(B) Supplies currently available;

(C) Comparison of water demand and supply to identify surpluses or needs of water;

(D) Social and economic impact of not meeting needs;

(E) Recommended solutions to meet needs;

(F) Needs for which no feasible water management strategy exists; and

(G) descriptions in subparagraphs (A) - (F) of this paragraph shall be presented for each county and basin by the major providers of water for municipal uses and for the following water use categories: municipal and associated commercial and institutional uses; manufacturing; irrigation; steam electric power generation; mining; and livestock [~~watering~~];

(5) Consideration of recommendations of river and stream segments of unique ecological value and sites of unique value for construction of reservoirs to the legislature for potential protection;

(6) Regulatory, administrative, and legislative recommendations that the Board believes are needed and desirable to facilitate the orderly development, management, and conservation of water resources, to facilitate more voluntary water transfers, and the preparation for and response to drought conditions in order that sufficient water will be available at a reasonable cost to ensure public health, safety and welfare, further economic development, and protect the agricultural and natural resources of the entire state;

(7) The progress in meeting future water needs, including an evaluation of implementation of all water management strategies and projects that were recommended in the previous state water plan and projects funded by the Board;

(8) Current and planned preparations for, and responses to, drought conditions in the state to be used in the development of the state's drought preparedness plan by the Drought Preparedness Council; and

(9) With respect to projects included in the preceding state water plan that were given a high priority by the board for purposes of providing financial assistance under Texas Water Code, Chapter 15, Subchapter G:

(A) an assessment of the extent to which the projects were implemented in the decade in which they were needed; and

(B) an analysis of any impediments to the implementation of any projects that were not implemented in the decade in which they were needed.

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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CHAPTER 363. FINANCIAL ASSISTANCE PROGRAMS
SUBCHAPTER E. ECONOMICALLY DISTRESSED AREAS
DIVISION 1. ECONOMICALLY DISTRESSED AREAS PROGRAM

31 TAC §§363.502 - 363.506, 363.508, 363.510 - 363.514

The Texas Water Development Board ("TWDB" or "board") proposes adding new 31 Texas Administrative Code (TAC) §§363.504 - 363.506, 363.508, 363.510 - 363.512, 363.514,

and amending existing 31 TAC §§363.502, 363.503, 363.513, relating to the Economically Distressed Areas Program.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED AMENDMENT.

The purpose of the new rules and amendments is to implement legislative changes from Senate Bill 2452, 86th (R) Legislative Session and to implement changes in program management, including the use of an intended use plan to assist in administering the program. The specific provisions being amended or added and the reasons for the amendments are addressed in more detail below.

SECTION BY SECTION DISCUSSION OF PROPOSED NEW SECTIONS AND AMENDMENTS.

31 TAC §363.502 Definitions of Terms

Section 363. 502 is amended to delete the terms "capital component", "comparable service provider", "default rate", "living unit equivalents or lue", "long term capital debt", "payment rate", "regional capital component benchmark", and "regional payment benchmark" because the sections containing these terms are published for repeal elsewhere in this issue of the *Texas Register,* and to include the definition for "intended use plan" that will provide details on the uses of funds under this program.

31 TAC §363.503 Determination of Economically Distressed Area

Section 363.503 is amended to remove a determination that water service is considered inadequate based the project area being identified in the state water plan. This method applied to prior funding that is no longer available for the program and therefore is not applicable.

31 TAC §363.504 Intended Use Plan and Project Priority List

Section 363.504 is added to describe the purpose and contents of the intended use plan and project priority list in the administration of the program. The existing §363.504 is published for repeal elsewhere in this issue of the *Texas Register.*

31 TAC §363.505 Required Information for Full Applications

Section 363.505 is added to replace the rule previously numbered as 363.504. Several changes are made based on Senate Bill 2452, 86th (R) Legislative Session. The notarized statement from the county judge now indicates the county is enforcing the model rules and includes a description of any measures taken to mitigate any deficiencies in compliance. Further, the application must indicate the method for repayment of financial assistance to assist the board in assessing the political subdivision's ability to repay the financial assistance. The requirements of the notarized affidavit from the authorized representative related to the applicant having no outstanding judgments, orders, fines, penalties, taxes, assessment or other enforcement or compliance issue of any kind or nature now refers only to those not related to public health and safety issues resulting from water supply or sewer services. The reference to five years of compliance with the model subdivision rules is deleted to emphasize the requirement to enforce model subdivision rules. Additional application information required in statute is added. The existing §363.504 is published for repeal elsewhere in this issue of the *Texas Register.*

31 TAC §363.506 Review of Full Application and Assistance Conditions

Section 363.506 is added to replace the rule previously numbered as 363.505. The program now offers as an option funding construction activities at the same time as planning, acquisition, and design funding. The existing §363.505 is published for repeal elsewhere in this issue of the *Texas Register.*

31 TAC §363.508 Calculation of Financial Assistance

Section 363.508 is added to replace the rule previously numbered as 363.506. The program will use an intended use plan to describe the form of financial assistance being offered at a particular time, including the manner of calculating the amount and form of any repayments. The existing §363.506 is published for repeal elsewhere in this issue of the *Texas Register.*

31 TAC §363.510 Terms of Financial Assistance

Section 363.510 is added to replace the rule previously numbered as 363.507. Consistent with Senate Bill 2452, 86th (R) Legislative Session, repayment is based on the political subdivision's ability to repay the financial assistance. The board will consider among other things the ability to maximize the portion of financial assistance for which repayment is required based on the political subdivision's ability to repay the assistance and take into account the limit on the total amount of financial assistance that does not require repayment found in Texas Water Code §17.933. The existing §363.507 is published for repeal elsewhere in this issue of the *Texas Register.*

31 TAC §363.511 Required Sewer Connections

Section 363.511 is added to replace the rule previously numbered as 363.508. No changes were made to the existing language. The existing §363.508 is published for repeal elsewhere in this issue of the *Texas Register.*

31 TAC §363.512 Financial, Managerial, and Technical Training Requirements

Section 363.512 is added to replace the rule previously numbered as 363.510. No changes were made to the existing language. The existing §363.510 is published for repeal elsewhere in this issue of the *Texas Register.*

31 TAC §363.513 Residential Water and Sewer Connections

Section 363.513 is amended for a minor edit to the name of the Texas Water Code and formatting.

31 TAC §363.14 Reporting and Transparency Requirements

Section 363.14 is added to establish new reporting requirements to comply with Texas Water Code §17.937, as enacted by Senate Bill 2452, 86th (R) Legislative Session.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS (Texas Government Code §2001.024(a)(4))

Ms. Rebecca Trevino, Chief Financial Officer, has determined that there will be no fiscal implications for state or local governments as a result of the proposed rulemaking. For the first five years these rules are in effect, there is no expected additional cost to state or local governments resulting from their administration.

These rules are not expected to result in reductions in costs to either state or local governments. There is no change in costs for state and local governments because the proposed new rules and amendments implement statutory requirements. These rules are not expected to have any impact on state or local revenues. The rules do not require any increase in expenditures for state or local governments as a result of administering

these rules. Additionally, there are no foreseeable implications relating to state or local governments' costs or revenue resulting from these rules.

Because these rules will not impose a cost on regulated persons, the requirement included in Texas Government Code, §2001.0045 to repeal a rule does not apply. Furthermore, the requirement in §2001.0045 does not apply because these rules are necessary to implement legislation.

The board invites public comment regarding this fiscal note. Written comments on the fiscal note may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

PUBLIC BENEFITS AND COSTS (Texas Government Code §2001.024(a)(5))

Ms. Rebecca Trevino also has determined that for each year of the first five years the proposed rulemaking is in effect, the public will benefit from the rulemaking because it implements legislative changes that will enhance the effectiveness and administration of the program. Ms. Rebecca Trevino also has determined that for each year of the first five years the proposed rulemaking is in effect, the rules will not impose an economic cost on persons required to comply with the rule because participation in TWDB financial assistance programs is voluntary.

LOCAL EMPLOYMENT IMPACT STATEMENT (Texas Government Code §2001.022)

The board has determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect because it will impose no new requirements on local economies. The board also has determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of enforcing this rulemaking. The board also has determined that there is no anticipated economic cost to persons who are required to comply with the rulemaking as proposed. Therefore, no regulatory flexibility analysis is necessary.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION (Texas Government Code §2001.0225)

The board reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and determined that the rulemaking is not subject to Texas Government Code §2001.0225, because it does not meet the definition of a "major environmental rule" as defined in the Administrative Procedure Act. A "major environmental rule" is defined as a rule with the specific intent to protect the environment or reduce risks to human health from environmental exposure, a rule that may adversely affect in a material way the economy or a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The intent of the rulemaking is to implement legislative changes that will enhance the effectiveness and administration of the program.

Even if the proposed rule was a major environmental rule, Texas Government Code §2001.0225 still would not apply to this rulemaking because Texas Government Code §2001.0225 only applies to a major environmental rule, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability criteria because it: (1) does not exceed any federal law; (2) does not exceed an express requirement of state law; (3) does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; and (4) is not proposed solely under the general powers of the agency, but rather Texas Water Code §§17.921, 17.9225, 17.927, 17.9275, 17.933, and 17.936. Therefore, this proposed rule does not fall under any of the applicability criteria in Texas Government Code §2001.0225.

The board invites public comment regarding this draft regulatory impact analysis determination. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

TAKINGS IMPACT ASSESSMENT (Texas Government Code §2007.043)

The board evaluated this proposed rule and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this rule is to implement new requirements in state law and enhancements in program management. The proposed rule would substantially advance this stated purpose by ensuring consistency with current law and improving the effectiveness of the program.

The board's analysis indicates that Texas Government Code, Chapter 2007 does not apply to this proposed rule because this is an action that is reasonably taken to fulfill an obligation mandated by state law, which is exempt under Texas Government Code §2007.003(b)(4). The board is the agency that implements the Economically Distressed Areas Program.

Nevertheless, the board further evaluated this proposed rule and performed an assessment of whether it constitutes a taking under Texas Government Code Chapter 2007. Promulgation and enforcement of this proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulation 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 and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. In other words, this rule requires compliance with state law regarding financial assistance under the Economically Distressed Areas Program without burdening or restricting or limiting the owner's right to property and reducing its value by 25% or more. Therefore, the proposed rule does not constitute a taking under Texas Government Code, Chapter 2007.

GOVERNMENT GROWTH IMPACT STATEMENT (Texas Government Code §2001.0221)

The board reviewed the proposed rulemaking in light of the government growth impact statement requirements of Texas Government Code §2001.0221 and has determined, for the first five years the proposed rule would be in effect, the proposed rule will not: (1) create or eliminate a government program; (2) require the creation of new employee positions or the elimination of existing employee positions; (3) require an increase or decrease in future legislative appropriations to the agency; (4) require an increase or decrease in fees paid to the agency; (5) create a

new regulation; (6) expand, limit, or repeal an existing regulation; (7) increase or decrease the number of individuals subject to the rule's applicability; or (8) positively or adversely affect this state's economy.

SUBMISSION OF COMMENTS (Texas Government Code §2001.024(a)(7))

Written comments on the proposed rulemaking may be submitted by mail to Office of General Counsel, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, by email to rulescomments@twdb.texas.gov, or by fax to (512) 475-2053. Comments will be accepted until 5:00 p.m. of the 31st day following publication the *Texas Register.* Include Chapter 363 in the subject line of any comments submitted.

STATUTORY AUTHORITY (Texas Government Code §2001.024(a)(3))

The new sections and amendments are proposed under the authority of §6.101, which provides the TWDB with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, and also under the authority of Water Code §§15.439, 15.537, 17.921, 17.9225, 17.927, 17.9275, 17.933, and 17.936.

This rulemaking affects Water Code, Chapters 15 and 17.

§363.502. Definitions of Terms.

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

[~~(1) Capital component--That component of the existing rate of a provider utility for the applicable utility service used to retire the long term capital debt of the system determined by calculating a monthly average of the existing annual long term capital debt payments of the utility service provider divided by the total number of living unit equivalents (LUE).~~]

[~~(2) Comparable service provider--A service provider that provides the same type of service as the provider utility for the proposed project to a similarly sized population, with a similar treatment capacity, and serving a population that has a similar per capita income based on available census data adjusted pursuant to the calculation set forth in the §371.24(b)(7) of this title (relating to Disadvantaged Community Program through Loan Subsidies) for adjusted median household income.~~]

[~~(3) Default rate--The average monthly number of residential customers that are delinquent in payment in excess of six months for the service provided divided by the average monthly total number of residential customers.~~]

(1) [~~(4)~~] Economically distressed area--An area in which:

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

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

(C) an established residential subdivision was located on June 1, 2005, as determined by the board.

(2) Intended Use Plan--a document adopted by the board after public review and comment that identifies the uses of the funds under this program.

[~~(5) Living unit equivalents or LUE--The number of existing or projected residential rate payer equivalents for the provider utility in the area to be served by a proposed project which is calculated by dividing:~~]

[~~(A) for existing provider utilities, the total historical annual water use of the provider utility, which includes the residential, commercial and institutional water use, by the historical average annual water use of an average residential connection of the provider utility, provided however, that in no event shall the number of LUE's for the project area be less than the number of service connections of the provider utility for the project area; or~~]

[~~(B) for new provider utilities, the total estimated annual water use of the provider utility, which includes the residential, commercial and institutional water use, by the estimated average annual water use of an average residential connection of the provider utility, provided however, that in no event shall the number of LUE's for the project area be less than the estimated number of service connections of the provider utility for the project area.~~]

[~~(6) Long term capital debt--The total amount of outstanding indebtedness of an applicant that at the time the debt was incurred was intended to be repaid over a period longer than one year, the proceeds of such indebtedness being used for the purpose of acquiring, constructing, or improving a water or sewer system or a necessary component to the service, operation, or maintenance of such system, including long term capital leases of real property and provided that leases for personal property are excluded.~~]

(3) [~~(7)~~] Operating entity--(the individuals who compose) the governing body of a provider utility [~~(~~]and the individuals[~~)~~] who are employed by the provider utility to perform the financial, managerial, and technical tasks associated with the operation of the provider utility.

[~~(8) Payment rate--One minus the default rate of a service utility.~~]

(4) [~~(9)~~] Provider utility--The entity [~~which~~] will provide water supply or wastewater service to the economically distressed area.

[~~(10) Regional capital component benchmark--The average capital component of all customers of no less than three comparable service providers.~~]

[~~(11) Regional payment benchmark--The average of the payment rates of no less than three comparable service providers.~~]

§363.503. Determination of Economically Distressed Area.

To determine that an area is economically distressed, the board shall consider information and data presented with the application or otherwise available to the board to determine that the water or sewer services are inadequate to meet the minimal needs of residential users; that the financial resources of the residential users of the services are inadequate to provide water or sewer services that will satisfy those minimal needs; and that an established residential subdivision was located in the economically distressed area on June 1, 2005.

(1) Water service is inadequate to meet the minimal needs of the residential users in an economically distressed area if the board determines that water service:

(A) does not exist or is not provided;

(B) is provided by a community water system that does not meet drinking water standards established by the commission;

(C) is provided by individual wells that, after treatment, do not meet drinking water standards established by the commission; or

(D) does not meet applicable drinking water standards of any other governmental unit with jurisdiction over such area.

~~[(E) The water service is considered inadequate if the project area is identified in the water plan as having a water supply need and the project to address that need is identified as a recommended strategy in the state and regional water plan. Projects brought under this subparagraph shall follow the procedures outlined in Subchapter A of this chapter (relating to General Provisions) and paragraphs (3) and (4) of this section and §363.504 of this subchapter (relating to Required Application Information).]~~

(2) Sewer service is inadequate to meet the minimal needs of residential users in an economically distressed area if the board determines that sewer service:

(A) does not exist or is not provided;

(B) is provided by an organized sewage collection and treatment facility that does not comply with the standards and requirements established by the commission;

(C) is provided by on-site sewerage facilities that do not comply with the standards and requirements established by the commission; or

(D) does not meet applicable wastewater standards of any other governmental unit with jurisdiction over such area.

(3) The financial resources of the residential users in the economically distressed area are inadequate to provide the needed services if the board finds that the area to be served by a proposed project has a median household income that is not greater than 75% of the median state household income for the most recent year for which statistics are available.

(4) An established residential subdivision was located in the economically distressed area on June 1, 2005, if the board determines the following:

(A) either a plat of the area is recorded in the county plat or deed records; or a pattern of subdivision, without a recorded plat, is evidenced by the existence of multiple residential lots with roads, streets, utility easements, or other such incidents of common usage or origin;

(B) at least one occupied residential dwelling existed within the platted or subdivided area on June 1, 2005, and

(C) such other factors as may be determined relevant by the board.

(5) The boundary or limits of a water or sewage project to serve an economically distressed area may be determined by:

(A) a subdivision plat prepared by a registered engineer, whether recorded or not;

(B) a metes and bounds description, natural boundaries, roads, or other natural features that delineate an unplatted area within which a feasible cost-effective project can be developed; or

(C) inclusion of occupied dwellings with inadequate water or wastewater services in close proximity to an economically distressed area determined as provided in paragraph (4) of this section when such dwellings can be feasibly served by the proposed project.

§363.504. Intended Use Plan and Project Priority List.

(a) Periodically, the board will adopt an Intended Use Plan to determine the use of funds for the specified application period. The Intended Use Plan may include:

(1) structure and method of determining the financial assistance provided, including any subsidies;

(2) criteria to be used by the executive administrator in prioritization of abridged applications; and

(3) other requirements related to program administration.

(b) The executive administrator shall allow a period for public review and comment before the board considers adoption and approval of the Intended Use Plan and the initial project priority list or any substantive amendments to the Intended Use Plan. The executive administrator may make amendments to the project priority list after a 14-day public comment period without any public hearing.

(c) Eligible applicants who wish to submit a project for inclusion in the Intended Use Plan and on the initial project priority list must submit a complete and accurate abridged application by the date specified by the board.

(d) The information that must be included in an abridged application will be included in the Intended Use Plan. Failure to submit all required information specified in the Intended Use Plan may result in the project being ineligible for further board consideration and prioritization.

(e) Projects will be rated in the initial project prioritization based upon the information submitted by the applicant in the abridged application and any supporting documentation, with points being awarded by the executive administrator in amounts specified in the Intended Use Plan.

(f) If two or more projects receive the same number of points in the project prioritization, the executive administrator will use the tie-breaker procedures listed in the applicable Intended Use Plan.

(g) If sufficient funds are available, applicants with projects included on the priority list adopted by the board will be invited to submit a full application for consideration by the board in accordance with the Intended Use Plan and this chapter. Additional invitations to submit a full application may be extended from time to time while funds remain available.

(h) The applicant for a proposed project listed within the project priority list adopted by the board may be allowed certain changes without requiring a re-ranking in the following circumstances:

(1) the applicant for a proposed project changes but the project does not change; or

(2) the number of participants in a regional project changes and the change does not result in a change to the rating.

§363.505. Required Information for Full Applications.

A full application for planning, acquisition, design, construction, or a combination thereof, shall be in the form and numbers prescribed by §363.12 of this title (relating to General, Legal, and Fiscal Information). Full applications will be reviewed for administrative completeness, as determined by the executive administrator. In addition to any other information that may be required by the executive administrator or the board, the full application shall include:

(1) information to establish to the satisfaction of the executive administrator that the county in which the applicant is located has adopted and is enforcing the model rules adopted by the board pursuant to Texas Water Code §16.343 (model rules) and that, if any part of the project is located within the corporate limits of a municipality or its extraterritorial jurisdiction, the municipality has adopted and is enforcing the model rules, including the following information:

(A) A copy of the subdivision regulations adopted by the county and the municipality, if applicable;

(B) From the county and the municipality, if applicable, the lesser of either the three most recently approved residential subdivision plats, or all recently approved subdivision plats, that are within the jurisdiction of the county, and, if applicable, the municipality; provided that, if a county or municipality has not approved any residential subdivision plats within the last five years, the county judge and mayor, if applicable, shall submit a notarized statement to such effect;

(C) A notarized statement from the county judge that:

(i) the residential subdivision regulations adopted by the county and submitted with the statement fully incorporate the model rules;

(ii) any residential subdivision plats submitted with this statement fully comply with the county regulations;

(iii) the county is enforcing the applicable model rules developed under Texas Water Code §16.343, and a description of any measures taken to mitigate any deficiencies in compliance;

(iv) acknowledges that, if the executive administrator determines that the county is not enforcing the model rules, all funds provided by the board under this subchapter and committed for Economically Distressed Areas Program (EDAP) projects in the county shall be suspended; and

(v) Such statement shall be considered sufficient to establish compliance with the model rules unless the executive administrator identifies significant violations with the model rules and the county is unable to correct the deficiencies within 90 days of notification of the violations;

(D) If any part of the project is located within the corporate limits of a municipality or its extraterritorial jurisdiction, a notarized statement from the mayor that:

(i) the residential subdivision regulations adopted by the municipality and submitted with the statement fully incorporate the model rules;

(ii) any residential subdivision plats submitted with this statement fully comply with the municipality's regulations;

(iii) acknowledges that, if the executive administrator determines that the municipality is not enforcing the model rules, all funds provided by the board under this subchapter and committed for EDAP projects in the municipality or its extraterritorial jurisdiction shall be suspended; and

(iv) such statement shall be considered sufficient to establish compliance with the model rules unless the executive administrator identifies significant violations with the model rules and the municipality is unable to correct the deficiencies within 90 days of notification of the violations;

(E) If the county or municipality, if applicable, has only been required or authorized to adopt residential subdivision rules that enforce the model rules within one year of the submission of the application the executive administrator may require that each member of the applicable governing body:

(i) complete a course of training of not more than two hours on the implementation of the model rules prepared and provided by the executive administrator in a widely available medium at no cost; and

(ii) provide a notarized statement that the member has completed the training.

(2) Any relevant data or information identified in §355.73(b) of this title (relating to Scope of Facility Plan) that may be requested by the board or the executive administrator:

(3) a proposed project schedule and budget that includes estimated project costs, identifying the source of funds, and method for repayment of financial assistance;

(4) a resolution from its governing body which shall:

(A) request financial assistance and identify the amount of requested assistance;

(B) designate the authorized representative to act on behalf of the governing body; and

(C) authorize the representative to submit the application, appear before the board on behalf of the applicant, and submit such other documentation as may be required by the executive administrator or the board;

(5) a notarized affidavit from the authorized representative stating that:

(A) the decision to request financial assistance from the board was made in a public meeting held in accordance with the Open Meetings Act (Texas Government Code, §§551.001, et seq.,) and after providing all such notice as required by such Act as is applicable to the applicant or, for a corporation, that the decision to request financial assistance from the board was made in a meeting open to all customers and after providing all customers written notice at least 72 hours prior to such meeting that a decision to request public assistance would be made during such meeting;

(B) the information submitted in the application is true and correct according to best knowledge and belief of the representative;

(C) the applicant has no outstanding fines, penalties, taxes, assessment or other enforcement or compliance issue of any kind or nature by the Texas Comptroller, Texas Secretary of State, or any other federal, state or local government or identifying such judgments, orders, fines, penalties, taxes, assessment or other enforcement or compliance issue as may be outstanding for the applicant that are not related to public health and safety issues resulting from water supply or sewer services;

(D) the applicant warrants compliance with the representations made in the application in the event that the board provides the financial assistance; and

(E) the applicant will comply with all applicable federal laws, rules, and regulations as well as the laws of this state and the rules and regulations of the board;

(6) copies of any proposed or existing contracts with any appropriate consultants such as financial advisory, engineering, general counsel and bond counsel services to be used by the applicant in applying for financial assistance or constructing the proposed project. Contracts for engineering services should include the scope of services, level of effort, costs, schedules, and other information necessary for adequate review by the executive administrator;

(7) a citation to the specific legal authority in the Texas Constitution and statutes pursuant to which the applicant is authorized to provide the service for which the applicant is receiving financial assistance as well as the legal documentation identifying and establishing the legal existence of the applicant as may be deemed necessary by the executive administrator;

(8) if the applicant provides or will provide water supply or treatment or sewer service to another service provider, or receives such service from another service provider, the proposed agreement, contract, or other documentation which legally establishes such service relationship, with the final and binding agreements provided prior to closing;

(9) documentation of the ownership interest, with supporting legal documentation, of property on which proposed project shall be located, or if the property is to be acquired, certification that the applicant has the necessary legal power and authority to acquire the property;

(10) the name of the political subdivision and its principal officers;

(11) a preliminary facility engineering plan, prepared and certified by an engineer registered to practice in this state, that must:

(A) describe the proposed planning, design, and construction activities necessary to provide water supply and/or sewer services that meet minimum state standards provided by board rules;

(B) identify the households to which water supply and sewer services will be provided; and

(C) described the existing water supply and sewer facilities located in the area to be served by the proposed project, including a statement that the facilities do not meet minimum state standards;

(12) information identifying the median household income for the area to be served by the proposed project; and

(13) the water conservation plan required by Texas Water Code §16.4021.

§363.506. Review of Full Application and Assistance Conditions.

(a) The funds available for projects eligible for financial assistance from the Economically Distressed Areas Program Account under this subchapter shall be determined by the board.

(b) The board may provide financial assistance from the Economically Distressed Areas Program Account in the amount and manner provided in §363.508 of this title (relating to Calculation of Financial Assistance) for costs necessary to provide water or sewer services for the activities as defined in Texas Water Code §17.001(8), including:

(1) preliminary planning, including contingencies as determined by the board, to determine the feasibility of a water supply project or wastewater treatment works;

(2) engineering, architectural, legal, title, fiscal, or economic investigations or studies, surveys, designs, plans, working drawings, specifications, procedures, or other necessary actions;

(3) the expense of any acquisition, condemnation or other legal proceedings associated with real property acquisitions;

(4) construction including erecting, building, acquiring, altering, remodeling, improving, acquiring or extending a water supply project or water services, treatment works or sewer services or facilities;

(5) asset management planning; and

(6) the inspection or supervision of any of the items listed herein.

(c) A full application for construction funding only shall include all the requirements in §363.505 of this title (relating to Required Information for Full Applications) as well as a facility plan that includes all of the facility engineering data, studies, and analysis and any other relevant data or information as may be requested by the board or the executive administrator.

(d) The grant agreement may contain provisions for the board to retain a minimum of 5% of the progress payments otherwise due to the applicant until the funded deliverable, as defined in the grant agreement, is substantially complete and is authorized by the executive administrator.

(e) The board shall set the terms of the financial assistance provided under subsection (b) of this section, and such terms may be extended at the sole discretion of the board.

§363.508. Calculation of Financial Assistance.

The amount and form of financial assistance, including the amount and form of repayment, if any, will be calculated as specified in the Intended Use Plan.

§363.510. Terms of Financial Assistance.

(a) The board shall determine the amount and form of financial assistance and the amount and form of repayment, if applicable. The board shall establish repayment based on the political subdivision's ability to repay the financial assistance and shall consider:

(1) rates, fees, and charges that the average customer to be served by the project will be able to pay;

(2) sources of funding available to the political subdivision from federal and private funds and from other state funds;

(3) any local funds available from the political subdivision if the economically distressed area to be served by the board's financial assistance is within the boundary of the political subdivision;

(4) the just, fair, and reasonable charges for water and wastewater service as provided in the Texas Water Code;

(5) the ability of the board to maximize the portion of financial assistance for which repayment is required based on the political subdivision's ability to repay the assistance, as provided by board rule; and

(6) the limit on the total amount of financial assistance that does not require repayment pursuant to Texas Water Code §17.933.

(b) The board shall determine the method of evidence of debt.

(c) If the board determines non-performance of the terms of the grant by the political subdivision, the board may require reimbursement of all or part of the funds provided by grant assistance or impose sanctions such as prohibition of further board financial assistance.

§363.511. Required Sewer Connections.

Any applicant receiving financial assistance from the board for the construction of wastewater system improvements shall exercise the authority granted to such applicant pursuant to the Texas Water Code, §17.934, and require property owners that can be served by such wastewater system improvements to connect to the applicant's sewer system.

§363.512. Financial, Managerial, and Technical Training Requirements.

(a) The board may determine or request that the commission make a determination that an operating entity complete training to obtain the necessary financial, managerial, or technical capacity to ensure the project will provide adequate water or wastewater service or to maintain the financial viability of the provider utility in any of the following circumstances:

(1) upon receipt of an application from the provider utility for financial assistance under this subchapter;

(2) upon receipt of a request for amendment to the financial assistance commitment previously provided to the provider utility;

(3) upon a determination of the board that the provider utility which has received a commitment of financial assistance under this subchapter has failed to provide the board documentation required under state law, board rule, bond covenant or the grant agreement for the financial assistance provided by the board; or

(4) upon receipt of notification that the commission has determined that the provider utility has a history of compliance problems or that the commission has assessed a penalty in an enforcement action against the provider utility.

(b) The board may determine that an operating entity will be required to undertake financial, managerial, or technical training based on an assessment performed by the commission or an assessment performed by the executive administrator and approved by the board. In the event that the executive administrator prepares the assessment, the assessment as provided to the board will consist of:

(1) a summary of any documentation and information reviewed by the executive administrator relating to or developed for:

(A) an application for financial assistance from the provider utility;

(B) a request by the provider utility for an amendment to the terms or conditions of the financial assistance provided to the provider utility;

(C) compliance efforts of the provider utility with criteria and requirements identified in applicable state or federal law, board rule, bond covenants, loan agreements, or grant agreements; and

(D) any communication with the operating entity of the provider utility or its staff; and

(2) a recommendation from the executive administrator specifically identifying:

(A) any particular financial, managerial, or technical capability that the entity may lack;

(B) the basis for concluding that the entity lacks such capability by referencing the applicable state or federal law, board rule, and bond or grant agreement covenants and the action taken by the entity that suggests that training would be useful;

(C) the appropriate training course or curriculum from the approved training program and provider list; and

(D) the positions at the operating entity, whether governing body and/or employees of the operating entity, required to take the training.

(c) Upon review of an assessment by the commission or an assessment by the executive administrator recommending that training be required of an operating entity, the board will determine whether the governing body or employees of an operating entity shall be required to complete a course of training.

(1) In considering the action to be taken by the board on the assessment, the board may:

(A) decline to approve an application for financial assistance or the request for amendment to the terms or conditions of the financial assistance submitted by the provider utility based on the assessment provided to the board or for any reason identified by the board;

(B) table the action requested of the board by the operating entity based on the determination that the operating entity should complete training and that further action by the board on the request will be postponed until such time as the provider utility submits a certificate of completion of training;

(C) approve the action requested of the board by providing that the action of the board will not be implemented or performed until such time as the executive administrator is provided a certificate of completion of the required training;

(D) approve the request of the provider utility; or

(E) take such action as determined by the board.

(2) If an operating entity is required to complete training as part of the action taken by the board, the board will identify the financial, managerial, or technical capability which is to be addressed by the training and the course curriculum that the operating entity must complete.

(3) The provider utility which has an operating entity that is required to complete training as part of the action taken by the board will:

(A) select the training provider from the board approved list of training providers for required training curricula or request that the board approve an alternative curriculum or training provider by submitting to the board a proposed alternative curriculum or training provider, together with sufficient documentation for the board to evaluate the curriculum or training provider;

(B) make arrangements, including payment, with the selected training provider and assume the responsibility of insuring that the operating entity complete the training required by the board; and

(C) submit a certificate of completion from the approved training provider to the executive administrator. Upon receipt of the certificate of completion, the executive administrator shall take such actions as directed by the board in its resolution on the action requested by the provider utility.

(d) At such intervals as determined by the board, the board will consider and may approve a list of training providers that can provide any required financial, managerial, and technical training. In addition to any other information the board deems necessary or appropriate, the list shall identify:

(1) training providers identified by name and contact information that currently provide training that is intended to improve financial, managerial, or technical capabilities of water and wastewater utilities;

(2) the course curriculum offered by the training providers;

(3) which managerial, financial, or technical capability that the training addresses; and

(4) the method by which the training provider will determine that the operating entity has satisfactorily completed the required curriculum.

§363.513. Residential Water and Sewer Connections.

(a) EDAP funds may be used to provide financial assistance to political subdivisions for plumbing connections to residences pursuant to Texas Water Code §17.9225,[~~Water Code,~~] relating to residential water and sewer connection assistance.

(b) Definitions. The following words and terms shall have the following meanings when used in this section.

(1) Connection--joining the indoor water and wastewater plumbing of a residence to an existing public water supply or sanitary sewer system.

(2) Public System--a public water supply or sanitary sewer system.

(3) Public Water Supply System--a system that supplies safe drinking water as defined in Chapter 341, Health and Safety Code.

(4) Sanitary Sewer System--a system used to transport waste as defined by Chapter 26, Water Code.

(5) Yard Water Service--the residence supply piping that carries potable water from the water meter or other source of water supply to the point of connection to the residence.

(c) Financial assistance may be provided for first-time connection to a public system to pay for the following costs:

(1) the costs of connecting a residence to a public water supply system constructed with financial assistance;

(2) the costs of installing yard water service connections;

(3) the costs of installing indoor plumbing facilities and fixtures;

(4) the costs of connecting a residence to a sanitary sewer system constructed with financial assistance;

(5) necessary connection and permit fees; and

(6) necessary costs related to the design of plumbing improvements described by this subsection.

(d) Financial assistance under this section is limited to residences that demonstrate an inability to pay for the improvements. Proof of household income that does not exceed the definition of a low income family as defined by the Department of Housing and Urban Development shall constitute a demonstrated inability to pay for the improvements provided for purposes of this section.

(e) To document household income, the political subdivision shall use the board's Economically Distressed Areas Program Survey Instrument.

(f) The political subdivision shall determine the needs related to connection of residences in the area to be served by the project to water supply and sewer services during the planning phase of a project.

§363.514. Reporting and Transparency Requirements.

Annually, the board shall make publicly available a report on the agency website detailing each project for which the board has provided financial assistance under Texas Water Code, Chapter 17, Subchapter K. The report must meet the requirements listed in Texas Water Code §17.937.

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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Ashley Harden
General Counsel
Texas Water Development Board
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For further information, please call: (512) 463-7686

CHAPTER 363. FINANCIAL ASSISTANCE PROGRAMS

The Texas Water Development Board (TWDB) proposes to repeal 31 Texas Administrative Code (TAC) §§363.504 - 363.508, 31 TAC §§363.510 - 363.512, in Subchapter E, concerning Economically Distressed Areas, and also proposes amendments to 31 TAC §363.1304 and §363.1309 in Subchapter M, concerning the State Water Implementation Fund for Texas and State Water Implementation Revenue Fund for Texas.

BACKGROUND AND SUMMARY OF THE FACTUAL ISSUES FOR THE PROPOSED REPEALS.

The TWDB proposes to repeal and amend the rules because new rules 31 TAC §§363.504 - 363.508 and 31 TAC §§363.510 - 363.512 are being proposed elsewhere in this issue of the *Texas Register* to implement legislative changes from House Bill 2452, 86th Legislative Session. Repeals to 31 TAC §§363.1304(12) and language within §363.1309(b)(2) are also proposed to implement changes by House Bill 1905 from the 87th Texas Legislature relating to relieving regional water planning groups of certain duties.

SECTION BY SECTION DISCUSSION OF THE PROPOSED REPEALS AND AMENDMENTS

31 TAC §363.504 Required Application Information

Section 363.504 is proposed for repeal due to the addition of a new §363.504 covering the intended use plan and project priority list used for administering the program. The new §363.504 is proposed for adoption elsewhere in this issue of the *Texas Register.* The required application information for the full application is proposed for adoption under the new §363.505 found elsewhere in the *Texas Register.*

31 TAC §363.505 Application Review and Assistance Conditions

Section 363.505 is proposed for repeal due to addition of a new §363.505 covering required information for the full application used for administering the program. The new §363.505 is proposed for adoption elsewhere in this issue of the *Texas Register.* The full application review and assistance conditions are proposed for adoption under the new §363.506 found elsewhere in the *Texas Register.*

31 TAC §363.506 Calculation of Financial Assistance

Section 363.506 is proposed for repeal due to addition of a new §363.506 covering review of the full application and assistance conditions used for administering the program. The new §363.506 is proposed for adoption elsewhere in this issue of the *Texas Register.* The calculation of financial assistance is proposed for adoption under the new §363.508 found elsewhere in the *Texas Register.*

31 TAC §363.507 Terms of Financial Assistance

Section 363.507 is proposed for repeal due to addition of a new §363.507 that is reserved for future use. The new §363.507 is proposed for adoption elsewhere in this issue of the *Texas Register.* The terms of financial assistance are proposed for adoption under the new §363.510 found elsewhere in the *Texas Register.*

31 TAC §363.508 Required Sewer Connections

Section 363.508 is proposed for repeal due to addition of a new §363.508 covering calculation of financial assistance used for administering the program. The new §363.508 is proposed for adoption elsewhere in this issue of the *Texas Register.* The

requirements for required sewer connections are proposed for adoption under the new §363.511 found elsewhere in the *Texas Register.*

31 TAC §363.510 Financial, Managerial, and Technical Training Requirements

Section 363.510 is proposed for repeal due to addition of a new §363.510 covering terms of financial assistance used for administering the program. The new §363.510 is proposed for adoption elsewhere in this issue of the *Texas Register.* The financial, managerial, and technical training requirements are proposed for adoption under the new §363.512 found elsewhere in the *Texas Register.*

31 TAC §363.511 Temporary Continuation of Funding

Section 363.511 is proposed for repeal because the authorizing statute expired and was not renewed. The application of this section of the rule to the program expired by operation of law in on September 1, 2009.

31 TAC §363.512 Projects Related to Implementation of the Water Plan

Section 363.512 is proposed for repeal because the language related to the state water plan and prior funding that is no longer available is no longer needed for program administration.

31 TAC §363.1304(12) Prioritization Criteria

Section 363.1304(12) is proposed for removal because House Bill 1905 of the 87th Legislature removed the prioritization requirement for Regional Water Planning Groups and its inclusion would be inconsistent with statute.

31 TAC §363.1309(2) Findings Required

Section 363.1309(2) is modified to implement the repeal of Texas Water Code §16.053(q) and the amendment made by House Bill 1905, 87th Legislative Session (relating to Infrastructure Financing Surveys). The revision removes the requirement for Regional Water Planning Groups to perform an infrastructure financing analysis.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS (Texas Government Code §2001.024(a)(4))

Ms. Rebecca Trevino, Chief Financial Officer, has determined that there will be no fiscal implications for state or local governments as a result of the proposed rulemaking. For the first five years these rules are in effect, there is no expected additional cost to state or local governments resulting from their administration.

These rules are not expected to result in reductions in costs to either state or local governments. There is no change in costs for state and local governments because the proposed repeals implement statutory requirements. These rules are not expected to have any impact on state or local revenues. The rules do not require any increase in expenditures for state or local governments as a result of administering these rules. Additionally, there are no foreseeable implications relating to state or local governments' costs or revenue resulting from these rules.

Because these rules will not impose a cost on regulated persons, the requirement included in Texas Government Code, §2001.0045 to repeal a rule does not apply. Furthermore, the requirement in §2001.0045 does not apply because these rules are necessary to implement legislation.

The board invites public comment regarding this fiscal note. Written comments on the fiscal note may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

PUBLIC BENEFITS AND COSTS (Texas Government Code §2001.024(a)(5))

Ms. Rebecca Trevino also has determined that for each year of the first five years the proposed rulemaking is in effect, the public will benefit from the rulemaking as it implements legislative changes that will enhance the effectiveness and administration of the program. Ms. Rebecca Trevino also has determined that for each year of the first five years the proposed rulemaking is in effect, the rules will not impose an economic cost on persons required to comply with the rule because participation in TWDB financial assistance programs is voluntary.

LOCAL EMPLOYMENT IMPACT STATEMENT (Texas Government Code §2001.022)

The board has determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect because it will impose no new requirements on local economies. The board also has determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of enforcing this rulemaking. The board also has determined that there is no anticipated economic cost to persons who are required to comply with the rulemaking as proposed. Therefore, no regulatory flexibility analysis is necessary.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION (Texas Government Code §2001.0225)

The board reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and determined that the rulemaking is not subject to Texas Government Code §2001.0225, because it does not meet the definition of a "major environmental rule" as defined in the Administrative Procedure Act. A "major environmental rule" is defined as a rule with the specific intent to protect the environment or reduce risks to human health from environmental exposure, a rule that may adversely affect in a material way the economy or a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The intent of the rulemaking is to implement legislative changes that will enhance the effectiveness and administration of the program.

Even if the proposed rule was a major environmental rule, Texas Government Code §2001.0225 still would not apply to this rulemaking because Texas Government Code §2001.0225 only applies to a major environmental rule, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability criteria because it: (1) does not exceed any federal law; (2) does not exceed an express requirement of state law; (3) does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement

a state and federal program; and (4) is not proposed solely under the general powers of the agency, but rather Texas Water Code §§17.921, 17.9225, 17.927, 17.9275, 17.933, and 17.936. Therefore, this proposed rule does not fall under any of the applicability criteria in Texas Government Code §2001.0225.

The board invites public comment regarding this draft regulatory impact analysis determination. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

TAKINGS IMPACT ASSESSMENT (Texas Government Code §2007.043)

The board evaluated this proposed rule and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this rule is to implement new requirements in state law and enhancements in program management. The proposed rule would substantially advance this stated purpose by ensuring consistency with current law and improving the effectiveness of the program.

The board's analysis indicates that Texas Government Code, Chapter 2007 does not apply to this proposed rule because this is an action that is reasonably taken to fulfill an obligation mandated by state law, which is exempt under Texas Government Code §2007.003(b)(4). The board is the agency that implements the Economically Distressed Areas Program.

Nevertheless, the board further evaluated this proposed rule and performed an assessment of whether it constitutes a taking under Texas Government Code Chapter 2007. Promulgation and enforcement of this proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulation 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 and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. In other words, this rule requires compliance with state law regarding financial assistance under the Economically Distressed Areas Program without burdening or restricting or limiting the owner's right to property and reducing its value by 25% or more. Therefore, the proposed rule does not constitute a taking under Texas Government Code, Chapter 2007.

GOVERNMENT GROWTH IMPACT STATEMENT (Texas Government Code §2001.0221)

The board reviewed the proposed rulemaking in light of the government growth impact statement requirements of Texas Government Code §2001.0221 and has determined, for the first five years the proposed rule would be in effect, the proposed rule will not: (1) create or eliminate a government program; (2) require the creation of new employee positions or the elimination of existing employee positions; (3) require an increase or decrease in future legislative appropriations to the agency; (4) require an increase or decrease in fees paid to the agency; (5) create a new regulation; (6) expand, limit, or repeal an existing regulation; (7) increase or decrease the number of individuals subject to the rule's applicability; or (8) positively or adversely affect this state's economy.

SUBMISSION OF COMMENTS (Texas Government Code §2001.024(a)(7))

Written comments on the proposed rulemaking may be submitted by mail to Office of General Counsel, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, by email to rulescomments@twdb.texas.gov, or by fax to (512) 475-2053. Comments will be accepted until 5:00 p.m. of the 31st day following publication the *Texas Register.* Include Chapter 363 in the subject line of any comments submitted.

SUBCHAPTER E. ECONOMICALLY DISTRESSED AREAS

DIVISION 1. ECONOMICALLY DISTRESSED AREAS PROGRAM

31 TAC §§363.504 - 363.508, 363.510 - 363.512

STATUTORY AUTHORITY (Texas Government Code §2001.024(a)(3))

The repeals are proposed under the authority of the Texas Water Code §6.101, which provides the TWDB with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, and also under the authority of Water Code §§15.439, 15.537, 17.921, 17.9225, 17.927, 17.9275, 17.933, and 17.936.

Texas Water Code, Chapter 17, Subchapter K, Chapter 15.435(g), 15.437(d) are affected by this rulemaking.

§363.504. Required Application Information.
§363.505. Application Review and Assistance Conditions.
§363.506. Calculation of Financial Assistance.
§363.507. Terms of Financial Assistance.
§363.508. Required Sewer Connections.
§363.510. Financial, Managerial, and Technical Training Requirements.
§363.511. Temporary Continuation of Funding.
§363.512. Projects Related to Implementation of the Water Plan.

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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Ashley Harden
General Counsel
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SUBCHAPTER M. STATE WATER IMPLEMENTATION FUND FOR TEXAS AND STATE WATER IMPLEMENTATION REVENUE FUND FOR TEXAS

31 TAC §363.1304, §363.1309

The amendments are proposed under the authority of §6.101, which provides the TWDB with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, and also under the authority of Water Code §15.439.

This rulemaking affects Water Code, Chapter 15.

§363.1304. Prioritization Criteria.

The executive administrator will prioritize applications based on the following point system:

(1) Projects will be evaluated on the criteria provided in paragraphs (2) - (5) of this section. The points awarded for paragraphs (2) - (5) of this section shall be the lesser of the sum of the points for paragraph (2) - (5), or 50 points.

(2) Either stand-alone projects or projects in conjunction with other recommended water management strategies relying on the same volume of water that the project relies on, in accordance with Chapter 357 of this title (relating to Regional Water Planning), that will serve in total when the project water supply volume is fully operational:

(A) at least 10,000 population, but not more than 249,999 population, 6 points; or

(B) at least 250,000 population, but not more than 499,999 population, 12 points; or

(C) at least 500,000 population, but not more than 749,999 population, 18 points; or

(D) at least 750,000 population, but not more than 999,999 population, 24 points; or

(E) at least 1,000,000 population, 30 points; or

(F) less than 10,000 population, zero points.

(3) Projects that will serve a diverse urban and rural population:

(A) serves one or more urban populations and one rural population, 10 points; and

(B) for each additional rural population served, 4 points up to a maximum of 30 points; or

(C) serves only an urban population, or only a rural population, zero points.

(4) As specified in the application, projects which provide regionalization:

(A) serves additional entities other than the applicant, 5 points per each political subdivision served for a maximum of 30 points; or

(B) serves only applicant, zero points.

(5) Projects that meet a high percentage of the water supply needs of the water users to be served calculated from those served and needs that will be met during the first decade the project becomes operational, based on state water plan data:

(A) at least 50 percent of needs met, 10 points; or

(B) at least 75 percent of needs met, 20 points; or

(C) at least 100 percent of needs met, 30 points; or

(D) less than 50 percent of needs met, zero points.

(6) Projects will receive additional points of the project's score on each of the criteria of paragraphs (7) - (12) of this section.

(7) Local contribution to be made to implement the project, including federal funding, and including up-front capital, such as funds already invested in the project or cash on hand and/or in-kind services to be invested in the project, provided that points will not be given for principal forgiveness or grants from the board:

(A) other funding at least 10 percent, but not more than 19 percent, of total project cost, 1 point; or

(B) other funding at least 20 percent, but not more than 29 percent, of total project cost, 2 points; or

(C) other funding at least 30 percent, but not more than 39 percent, of total project cost, 3 points; or

(D) other funding at least 40 percent, but not more than 49 percent, of total project cost, 4 points; or

(E) other funding at least 50 percent of total project cost, 5 points; or

(F) other funding less than 10 percent of total project cost, zero points.

(8) Financial capacity of the applicant to repay the financial assistance provided:

(A) applicant's household cost factor is less than or equal to 1 percent, 2 points; or

(B) applicant's household cost factor is greater than 1 percent but not more than 2 percent, 1 point; or

(C) applicant's household cost factor is greater than 2 percent, zero points.

(9) Projects which address an emergency need:

(A) applicant, or entity to be served by the project, is included on the list maintained by the Commission of local public water systems that have a water supply that will last less than 180 days without additional rainfall, or is otherwise affected by a Commission emergency order, and drought contingency plan has been implemented by the applicant or entity to be served, 3 points; plus

(B) water supply need is anticipated to occur in an earlier decade than identified in the most recent state water plan, 1 point; plus

(C) applicant has used or applied for federal funding for emergency, 1 point; or

(D) none of the above, zero points.

(10) Projects which are ready to proceed:

(A) preliminary planning and/or design work (30 percent of project total) has been completed or is not required for the project, 3 points; plus

(B) applicant is able to begin implementing or constructing the project within 18 months of application deadline, 3 points; plus

(C) applicant has acquired all water rights associated with the project or no water rights are required for the project, 2 points; or

(D) none of the above, zero points.

(11) Entities that have demonstrated water conservation or projects which will achieve water conservation, including preventing the loss of water:

(A) for municipal projects, applicant has already demonstrated significant water conservation savings, as determined by comparing the highest rolling four-year average total gallons per capita per day within the last twenty years to the average total gallons per capita per day for the most recent four-year period based on board water use data; or significant water conservation savings will be achieved by implementing the proposed project, as determined

by comparing the conservation to be achieved by the project with the average total gallons per capita per day for most recent four-year period:

(i) 2 to 5.9 percent total gallons per capita per day reduction, 2 points; or

(ii) 6 to 9.9 percent total gallons per capita per day reduction, 4 points; or

(iii) 10 to 13.9 percent total gallons per capita per day reduction, 6 points; or

(iv) 14 to 17.9 percent total gallons per capita per day reduction, 8 points; or

(v) 18 percent or greater total gallons per capita per day reduction, 10 points; or

(vi) less than 2 percent total gallons per capita per day reduction, zero points.

(B) for municipal projects, applicant has achieved the water loss threshold established by §358.6 of this title (relating to Water Loss Audits), as demonstrated by most recently submitted water loss audit:

(i) less than the threshold, 5 points; or

(ii) at or above the threshold, zero points.

(C) for wholesale water providers, applicant has already demonstrated significant water conservation savings, as determined by comparing the highest rolling four-year average total gallons per capita per day within the last twenty years to the average total gallons per capita per day for the most recent four-year period based on board water use data for customers affiliated with the application; or significant water conservation savings will be achieved by implementing the proposed project, as determined by comparing the conservation to be achieved by the project with the average total gallons per capita per day for the most recent four-year period for customers affiliated with the application.

(i) 2 to 5.9 percent total gallons per capita per day reduction, 2 points; or

(ii) 6 to 9.9 percent total gallons per capita per day reduction, 4 points; or

(iii) 10 to 13.9 percent total gallons per capita per day reduction, 6 points; or

(iv) 14 to 17.9 percent total gallons per capita per day reduction, 8 points; or

(v) 18 percent or greater total gallons per capita per day reduction, 10 points; or

(vi) less than 2 percent total gallons per capita per day reduction, zero points.

(D) for agricultural projects, significant water efficiency improvements will be achieved by implementing the proposed project, as determined by the projected percent improvement:

(i) 1 to 1.9 percent increase in water use efficiency, 1 point; or

(ii) 2 to 5.9 percent increase in water use efficiency, 3 points; or

(iii) 6 to 9.9 percent increase in water use efficiency, 6 points; or

(iv) 10 to 13.9 percent increase in water use efficiency, 9 points; or

(v) 14 to 17.9 percent increase in water use efficiency, 12 points; or

(vi) 18 percent or greater increase in water use efficiency, 15 points; or

(vii) less than 1 percent increase in water use efficiency, zero points.

(12) [~~Priority assigned by the applicable regional water planning group within the project sponsor's primary planning region:~~]

[~~(A) top 80 to top 61 percent of regional project ranking, 3 points; or~~]

[~~(B) top 60 to top 41 percent of regional project ranking, 6 points; or~~]

[~~(C) top 40 to top 21 percent of regional project ranking, 9 points; or~~]

[~~(D) top 20 to top 11 percent of regional project ranking, 12 points; or~~]

[~~(E) top 10 percent of regional project ranking, 15 points; or~~]

[~~(F) less than 80 percent of regional project ranking, zero points.~~]

[~~(13)~~] If two or more projects receive the same priority ranking, priority will be assigned based on the relative score(s) from paragraph (11) of this section. If after considering the relative scores of the projects based on the criteria of paragraph (11) of this section, then priority will be assigned based on the relative score(s) from paragraph (9) of this section.

§363.1309. Findings Required.

(a) The executive administrator shall submit the application for financing under this subchapter to the board with comments concerning financial assistance. The application will be scheduled on the agenda for board consideration at the earliest practical date. The applicant and other interested parties known to the board shall be notified on the time and place of such meeting.

(b) The board shall grant the application only if the board finds that at the time the application for financial assistance was made that:

(1) the applicant has submitted and implemented a water conservation plan in accordance with Texas Water Code §16.4021 and §363.15 of this chapter; and

(2) [~~the applicant satisfactorily completed a request by the executive administer or a regional water planning group for information relevant to the project for which the financial assistance is sought, including a water infrastructure financing survey under Texas Water Code §16.053(q); and~~]

[~~(3)~~] the applicant has acknowledged its legal obligation to comply with any applicable requirements of federal law relating to contracting with disadvantaged business enterprises, and any applicable state law relating to contracting with historically underutilized businesses.

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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General Counsel
Texas Water Development Board
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For further information, please call: (512) 463-7686

TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 16. BROADBAND DEVELOPMENT

SUBCHAPTER A. BROADBAND POLE REPLACEMENT PROGRAM

34 TAC §§16.1 - 16.17

The Comptroller of Public Accounts proposes new §§16.1, concerning definitions; 16.2, concerning grant funds distribution methods; 16.3, concerning notice and applications; 16.4, concerning eligible applicants; 16.5, concerning authorized officials; 16.6, concerning federal funding; 16.7, concerning preferences; 16.8, concerning reimbursement awards; 16.9, concerning payment; 16.10, concerning requirements; 16.11, concerning reports; 16.12, concerning noncompliance; 16.13, concerning grant reduction or termination; 16.14, concerning records retention; 16.15, concerning request for records and audit; 16.16, concerning conflict with laws, rules, regulations, or guidance; and 16.17, concerning references. The new sections will be located in new Chapter 16 (Broadband Development), Subchapter A (Broadband Pole Replacement Program).

The new sections are proposed to comply with House Bill 1505, §1 and §4, 87th Legislature, 2021, R.S., which establish the broadband pole replacement fund and the Texas broadband pole replacement program, and require the comptroller to prescribe rules for the program.

Section 16.1 provides definitions.

Section 16.2 describes methods that the Broadband Development Office (office) may use to distribute grant funds.

Section 16.3 sets forth notice and application requirements.

Section 16.4 provides grant eligibility requirements.

Section 16.5 sets forth requirements for designating an applicant's authorized official.

Section 16.6 authorizes the office to establish eligibility and program requirements and preferences, and make award decisions, based upon any criteria required by federal law, regulation, or guidance applicable to the type of funding used to make a reimbursement award, if federal funding is used to make the reimbursement award.

Section 16.7 provides preferences that the office may use to make reimbursement award decisions.

Section 16.8 describes reimbursement award requirements.

Section 16.9 sets forth the time period within which a reimbursement award must be paid to a grantee after a notice of a reimbursement award is issued.

Section 16.10 sets forth requirements for the administration and use of a reimbursement award.

Section 16.11 provides requirements for the submission of reports and documentation by a grantee.

Section 16.12 describes the process for addressing a grantee's noncompliance with any term or condition of a reimbursement award or any applicable laws, rules, regulations, or guidance relating to the reimbursement award, and the remedies that could result from such noncompliance.

Section 16.13 sets forth requirements for reducing or terminating a reimbursement award.

Section 16.14 provides records retention requirements.

Section 16.15 describes requirements for providing records, documentation, or other information required by the office and authorizes the office, upon reasonable notice, to audit the activities of a grantee as necessary to ensure that grant funds are used for the intended purpose of the reimbursement award and that the grantee has complied with the terms, conditions, and requirements of the reimbursement award.

Section 16.16 requires that a state or federal law, rule, regulation, or guidance applicable to the type of funding used to make a reimbursement award prevails over this subchapter to the extent necessary to avoid a conflict between the relevant law, rule, regulation, or guidance and this subchapter.

Section 16.17 identifies the legislation that enacted the statutory provisions that apply to these rules so that it is clear which provisions apply because the legislature recently enacted two sets of statutory provisions that have the same numbers and are included in subchapters that have the same title ("Subchapter R").

Brad Reynolds, Chief Revenue Estimator, has determined that during the first five years that the proposed new rules are in effect, the rules: will not create or eliminate a government program; will not require the creation or elimination of employee positions; will not require an increase or decrease in future legislative appropriations to the agency; will not require an increase or decrease in fees paid to the agency; will not increase or decrease the number of individuals subject to the rules' applicability; and will not positively or adversely affect this state's economy.

Mr. Reynolds also has determined that the proposed new rules would have no fiscal impact on the state government, units of local government, or individuals. The proposed new rules would benefit the public by implementing the new program. There would be no anticipated significant economic cost to the public. The proposed new rules would have no significant fiscal impact on small businesses or rural communities.

Comments on the proposal may be submitted to Greg Conte, Director, Texas Broadband Development Office, Data Analysis and Transparency Division, at broadband@cpa.texas.gov or at P.O. Box 13528, Austin, Texas 78711. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

The new sections are proposed under Government Code, §403.503(c), as added by 87th Legislature, 2021, R.S., Chapter 659 (House Bill 1505), §1 and §4, which require the comptroller

to prescribe rules for the Texas broadband pole replacement program.

The new sections implement Government Code, Subchapter R, as added by 87th Legislature, 2021, R.S., Chapter 659 (House Bill 1505), §1, concerning infrastructure and broadband funding.

§16.1. Definitions.

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

(1) Applicant--A person that has submitted an application for a reimbursement award under this subchapter.

(2) CCPF--The Coronavirus Capital Projects Fund (42 U.S.C. §804), established by §604 of the Social Security Act, as added by §9901 of the American Rescue Plan Act of 2021, Pub. L. No. 117-2.

(3) Eligible broadband facility--Has the meaning assigned by Government Code, §403.503(a)(1).

(4) Eligible pole replacement cost--Has the meaning assigned by Government Code, §403.503(a)(2).

(5) Grantee--An applicant that receives a reimbursement award under this subchapter.

(6) Grant funds--Monies in the pole replacement fund.

(7) NOFA--Notice of Funding Availability.

(8) Office--The Broadband Development Office established within the comptroller's office under Government Code, Chapter 490I.

(9) Pole--Has the meaning assigned by Government Code, §403.503(a)(5).

(10) Pole owner--Has the meaning assigned by Government Code, §403.503(a)(6).

(11) Pole replacement fund--Has the meaning assigned by Government Code, §403.501(1).

(12) Pole replacement program--Has the meaning assigned by Government Code, §403.501(2).

(13) Qualifying broadband service--Has the meaning assigned by Government Code, §403.503(a)(3).

(14) Unserved area--Has the meaning assigned by Government Code, §403.503(a)(4).

§16.2. Grant Funds Distribution Method.

To ensure that grant funds are used to maximize the deployment of broadband services to the greatest number of unserved areas, the office may:

(1) distribute the funds by geographic location; and

(2) issue a NOFA for less than the amount available in the pole replacement fund.

§16.3. Notice and Applications.

(a) The office may, as necessary, publish a NOFA in the *Texas Register* or the Electronic Business Daily, and on the comptroller's website.

(b) The notice may include:

(1) the total amount of grant funds available for reimbursement awards;

(2) the minimum and maximum amount of grant funds available for each applicant;

(3) limitations on the geographic distribution of grant funds;

(4) eligibility requirements;

(5) application requirements;

(6) reimbursement award and evaluation criteria;

(7) the date by which applications must be submitted to the office;

(8) the anticipated date of reimbursement awards;

(9) pricing data related to the broadband service to be enabled through pole replacement; and

(10) any other information necessary for awarding the reimbursement as determined by the office.

(c) All applications for a reimbursement award submitted under this subchapter must comply with the requirements of Government Code, §403.503(g), and any requirements contained in a NOFA published by the office.

(d) Applicants must apply for a reimbursement award using the procedures, forms, and certifications prescribed by the office.

(e) The office may require applicants to submit preliminary information to the office prior to submitting a completed application for a reimbursement award to enable the office to determine each applicant's eligibility to apply for a reimbursement award and to compile aggregate information that applicants may use in determining whether to complete the application process.

(f) During the review of an application, an applicant may be instructed to submit to the office additional information necessary to complete the review. Such requests for information do not serve as notice that the office intends to fund an application.

§16.4. Eligible Applicants.

An applicant is eligible to apply to the office for a reimbursement award under this subchapter if the applicant:

(1) is a pole owner or a provider of qualifying broadband service; and

(2) pays or incurs eligible pole replacement costs of removing and replacing an existing pole in an unserved area for the purpose of accommodating the attachment of an eligible broadband facility.

§16.5. Authorized Officials.

(a) Each applicant/grantee must designate an authorized official to act on its behalf and the applicant/grantee must provide the office with:

(1) the authorized official's name, title, mailing address, telephone number, and email address; and

(2) the applicant's/grantee's physical address.

(b) An applicant/grantee shall notify the office as soon as practicable of any change in the information provided by it under subsection (a) of this section.

§16.6. Federal Funding.

If CCPF or any other federal funding is used to make a reimbursement award, the office may establish eligibility and program requirements and preferences, and make award decisions, based upon any criteria required by federal law, regulation, or guidance applicable to the type of funding used to make the reimbursement award.

§16.7. Preferences.

The office may give preference to applications and make awards decisions based upon the following factors:

(1) cost effectiveness and overall impact;

(2) geographic location;

(3) the latest state or federal broadband data;

(4) the number of households or businesses that will be served due to the reimbursement being requested;

(5) involvement of broadband networks owned, operated by, or affiliated with local governments, non-profits, or cooperatives;

(6) completion of the pole replacement and payment of all costs of the pole replacement;

(7) investments in fiber-optic infrastructure;

(8) achievement of last-mile connections or middle-mile projects that have commitments in place to support new or improved last-mile service;

(9) affordability of broadband services in a target area;

(10) participation in federal programs that provide low-income consumers with subsidies for broadband internet access services;

(11) documentation of existing broadband internet service performance;

(12) download speeds and upload speeds, including user speed tests resulting from completion of the pole replacement;

(13) community involvement in the pole replacement planning process, including feedback from community members, community organizations, and business owners;

(14) business practices and workforce information, including the following:

(A) the applicant's workforce meets high safety and training standards;

(B) the applicant prioritizes the hiring of local workers or workers from historically disadvantaged communities;

(C) the applicant ensures that its contractors and subcontractors meet high labor standards; and

(D) the applicant has no recent violations of federal and state labor and employment laws; and

(15) any additional factors listed in a NOFA published by the office.

§16.8. Reimbursement Awards.

(a) The office must provide a notice of a reimbursement award or a notice of denial to an applicant, in writing, not later than 60 calendar days after the date that the office receives a completed application from the applicant. An application will not be considered complete for purposes of this section unless an applicant has provided all the information necessary for the office to review the application, including any additional information requested by the office to complete the review.

(b) All grant funding decisions made by the office are final and are not subject to appeal.

(c) The approval of a reimbursement award shall not obligate the office to make any additional, supplemental, or other reimbursement award.

§16.9. Payment.

A reimbursement award must be paid to a grantee not later than 30 calendar days after the date the office issues a notice of a reimbursement award under §16.8(a) of this subchapter.

§16.10. Requirements.

(a) The administration and use of a reimbursement award are subject to:

(1) the terms and conditions of the reimbursement award;

(2) the requirements of Government Code, Chapter 403, Subchapter R; and

(3) any other state or federal law, rule, regulation, or guidance applicable to the type of funding used to make the reimbursement award.

(b) Grant funds may be used only for the purpose of supporting the pole replacement program, including the costs of program administration and operation.

(c) A grantee is the entity legally and financially responsible for compliance with state and federal laws, rules, regulations, and guidance applicable to the reimbursement award.

§16.11. Reports.

(a) A grantee shall submit reports and documentation as may be required by the office to substantiate that grant funds awarded were used for the intended purpose of the reimbursement award and that the grantee has complied with the terms, conditions, and requirements set forth in §16.10 of this subchapter.

(b) A grantee must submit reports and documentation to the office in the office-prescribed format no later than the office-designated deadlines for their submission.

§16.12. Noncompliance.

(a) If the office has reason to believe that a grantee has violated any term or condition of a reimbursement award or any applicable laws, rules, regulations, or guidance relating to the reimbursement award, the office shall provide written notice of the allegations to the grantee and provide the grantee with an opportunity to respond to the allegations.

(b) If the office finds on substantial evidence that a grantee has materially violated the requirements of Government Code, §403.503, with respect to reimbursements or portions of reimbursements, the office may direct the grantee to refund the reimbursement or a portion of the reimbursement with interest at the applicable federal funds rate as specified by Business and Commerce Code, §4A.506(b).

(c) If the office finds that a grantee has failed to comply with any term or condition of a reimbursement award, or any applicable laws, rules, regulations, or guidance relating to the reimbursement award, other than the requirements described in subsection (b) of this section, the office may:

(1) direct the grantee to refund the reimbursement award or a portion of the reimbursement award;

(2) withhold reimbursement award amounts to a grantee under this subchapter pending correction of the deficiency;

(3) disallow all or part of the cost of the activity or action that is not in compliance;

(4) terminate the reimbursement award in whole or in part;

(5) prohibit the grantee from being eligible for future reimbursement awards under the pole replacement program; or

(6) exercise any other legal remedies available at law.

§16.13. Grant Reduction or Termination.

(a) If a grantee seeks to terminate any approved reimbursement award, it must notify the office immediately.

(b) The office may reduce or terminate any reimbursement award when circumstances require reduction or termination, including when:

(1) a grantee is found to be noncompliant under §16.12(c) of this subchapter;

(2) the grantee and the office agree to the reduction or termination of a reimbursement award;

(3) grant funds are no longer available to the office; or

(4) conditions exist that make it unlikely that objectives of the reimbursement award will be accomplished.

(5) If a reimbursement award is reduced or terminated by the office, the office shall notify the grantee in writing.

§16.14. Records Retention.

(a) A grantee must maintain all financial records, supporting documents, and all other records pertinent to the reimbursement award for at least four years following the submission of a final report.

(b) If any litigation, claim, or audit is started, or any open records request is received, before the expiration of the four-year records retention period, a grantee must retain the records related to the litigation, claim, audit, or open records request until the completion of the litigation, claim, audit, or open records request and resolution of all issues which arise from it or until the end of the regular four-year records retention period, whichever is later.

(c) A grantee may retain records in an electronic format.

§16.15. Request for Records and Audit.

(a) A grantee shall, upon written request from the office or its designee, provide any records, documentation, or other information required by the office to verify that the grantee has complied with the terms, conditions, and requirements set forth in §16.10 of this subchapter. The office or its designee may make such a written request at any time before the end of the four-year records retention period set forth in §16.14 of this subchapter. If the office or its designee requests records, documentation, or other information from the grantee in writing, the grantee must submit the requested information within 30 calendar days.

(b) The office or its designee may, before the end of the four-year records retention period set forth in §16.14 of this subchapter, audit a grantee to ensure that grant funds are used for the intended purpose of the reimbursement award and that the grantee has complied with the terms, conditions, and requirements set forth in §16.10 of this subchapter.

§16.16. Conflict with Laws, Rules, Regulations, or Guidance.

If a state or federal law, rule, regulation, or guidance applicable to the type of funding used to make the reimbursement award conflicts with this subchapter, the state or federal law, rule, regulation, or guidance applicable to the type of funding used to make the reimbursement award prevails over this subchapter to the extent necessary to avoid the conflict.

§16.17. References.

All references in this subchapter to statutory provisions in Government Code, Chapter 403, Subchapter R, refer to the provisions added by 87th Legislature, 2021, R.S., Chapter 659 (House Bill 1505), §1.

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 December 20, 2021.

TRD-202105183
Victoria North
General Counsel for Fiscal and Agency Affairs
Comptroller of Public Accounts
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For further information, please call: (512) 475-2220

ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 2. TEXAS ETHICS COMMISSION

CHAPTER 18. GENERAL RULES CONCERNING REPORTS

1 TAC §18.31

The Texas Ethics Commission (the Commission) adopts amendments to Texas Ethics Commission rules in Chapter 18. Specifically, the Commission amends §18.31, regarding Adjustments to Reporting Thresholds. The amendment is adopted with changes to the proposed text as published in the October 22, 2021, issue of the *Texas Register* (46 TexReg 7115). The rule will be republished.

Section 571.064(b) of the Government Code requires the Commission to annually adjust reporting thresholds upward to the nearest multiple of $10 in accordance with the percentage increase for the previous year in the Consumer Price Index for Urban Consumers published by the Bureau of Labor Statistics of the United States Department of Labor. The laws under the Commission's authority that include reporting thresholds are Title 15 of the Election Code (campaign finance law), Chapter 305 of the Government Code (lobby law), Chapter 572 of the Government Code (personal financial statements), Chapters 302 and 303 of the Government Code (speaker election, governor for a day, and speaker's reunion day ceremony reports), and Section 2155.003 of the Government Code (reporting requirements applicable to the comptroller).

The Commission first adopted adjustments to reporting thresholds in 2019, which were effective on January 1, 2020. These new adjustments will be effective on January 1, 2022, to apply to contributions and expenditures that occur on or after that date.

There are two non-substantive changes to this rule from the proposed version to the adopted version. In Figure 1, the threshold description for section 254.095 of the Election Code was changed from "Local officeholders, contributions: Threshold over which reporting is not required" to "Local officeholders, contributions: Threshold under which reporting is not required." In Figure 2, the thresholds "305.003(1)" and "305.003(2)" have been changed to "305.003(a)(1)" and "305.003(a)(2)." Both changes were made to correct clerical errors in these charts.

No public comments were received on this amended rule.

The amended rule is adopted under Texas Government Code Section 571.062, which authorizes the Commission to adopt rules to administer Title 15 of the Election Code.

The amended rule affects Title 15 of the Election Code.

§18.31. Adjustments to Reporting Thresholds.

(a) Pursuant to section 571.064 of the Government Code, the reporting thresholds are adjusted as follows:
Figure 1: 1 TAC §18.31(a)
Figure 2: 1 TAC §18.31(a)
Figure 3: 1 TAC §18.31(a)
Figure 4: 1 TAC §18.31(a)

(b) The changes made by this rule apply only to conduct occurring on or after the effective date of this rule.

(c) The effective date of this rule is January 1, 2022.

(d) In this section:

(1) "CEC" means county executive committee;

(2) "DCE" means direct campaign expenditure-only filer;

(3) "GPAC" means general-purpose political committee;

(4) "MPAC" means monthly-filing general-purpose political committee;

(5) "PAC" means political committee;

(6) "PFS" means personal financial statement;

(7) "SPAC" means specific-purpose political committee; and

(8) "TA" means treasurer appointment.

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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Anne Temple Peters
Executive Director
Texas Ethics Commission
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CHAPTER 20. REPORTING POLITICAL CONTRIBUTIONS AND EXPENDITURES

The Texas Ethics Commission (the Commission) adopts amendments to Texas Ethics Commission rules in Chapter 20. Specifically, the Commission adopts amendments to §20.62, regarding Reporting Staff Reimbursement, and §20.65, regarding Reporting No Activity; §20.217, regarding Modified Reporting, §20.220, regarding Additional Disclosure for the Texas

Comptroller of Public Accounts, and §20.221, regarding Special Pre-Election Report by Certain Candidates; §20.275, regarding Exception from Filing Requirement for Certain Local Officeholders; §20.301, regarding Thresholds for Campaign Treasurer Appointment, §20.303, regarding Appointment of Campaign Treasurer, §20.313, regarding Converting to a General-Purpose Committee, §20.329, regarding Modified Reporting, and §20.333, regarding Special Pre-Election Report by Certain Specific-Purpose Committees; §20.401, regarding Thresholds for Appointment of Campaign Treasurer by a General-Purpose Committee, §20.405, regarding Campaign Treasurer Appointment for a General-Purpose Committee, §20.434, regarding Alternate Reporting Requirements for General-Purpose Committees, and §20.435, regarding Special Pre-Election Reports by Certain General-Purpose Committees; §20.553, regarding County Executive Committee Accepting Contributions or Making Expenditures Under Certain Amount, and §20.555, regarding County Executive Committee Accepting Contributions or Making Expenditures That Exceed Certain Amount. The amendments are adopted without changes to the proposed text as published in the October 22, 2021, issue of the *Texas Register* (46 TexReg 7116). The rules will not be republished.

Section 571.064(b) of the Government Code requires the Commission to annually adjust reporting thresholds upward to the nearest multiple of $10 in accordance with the percentage increase for the previous year in the Consumer Price Index for Urban Consumers published by the Bureau of Labor Statistics of the United States Department of Labor. The laws under the Commission's authority that include reporting thresholds are Title 15 of the Election Code (campaign finance law), Chapter 305 of the Government Code (lobby law), Chapter 572 of the Government Code (personal financial statements), Chapters 302 and 303 of the Government Code (speaker election, governor for a day, and speaker's reunion day ceremony reports), and section 2155.003 of the Government Code (reporting requirements applicable to the comptroller).

The Commission first adopted adjustments to reporting thresholds in 2019, which were effective on January 1, 2020. These new adjustments will be effective on January 1, 2022, to apply to contributions and expenditures that occur on or after that date. The thresholds contained in these amended rules are also duplicated in numerous statutes, as referenced above; amendments to the affected statutes are included with the amendments to Figures 1 through 4 of 1 TAC §18.31, which has been submitted concurrently with this proposal.

No public comments were received on these amended rules.

SUBCHAPTER B. GENERAL REPORTING RULES

1 TAC §20.62, §20.65

The amendments are adopted under Texas Government Code §571.062, which authorizes the Commission to adopt rules to administer Title 15 of the Election Code, and Texas Government Code §571.064, which requires the Commission to annually adjust reporting thresholds in accordance with that statute.

The amended rules affect Title 15 of the Election Code.

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 C. REPORTING REQUIREMENTS FOR A CANDIDATE

1 TAC §§20.217, 20.220, 20.221

The amendments are adopted under Texas Government Code §571.062, which authorizes the Commission to adopt rules to administer Title 15 of the Election Code, Texas Government Code §571.064, which requires the Commission to annually adjust reporting thresholds in accordance with that statute; and Texas Government Code §2155.003, which requires the Commission to adopt rules to implement that section.

The amended rules affect Title 15 of the Election Code.

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 D. REPORTING REQUIREMENTS FOR AN OFFICEHOLDER WHO DOES NOT HAVE A CAMPAIGN TREASURER APPOINTMENT ON FILE

1 TAC §20.275

The amendments are adopted under Texas Government Code §571.062, which authorizes the Commission to adopt rules to administer Title 15 of the Election Code, and Texas Government Code §571.064, which requires the Commission to annually adjust reporting thresholds in accordance with that statute.

The amended rule affects Title 15 of the Election Code.

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. REPORTS BY A SPECIFIC-PURPOSE COMMITTEE

1 TAC §§20.301, 20.303, 20.313, 20.329, 20.333

The amendments are adopted under Texas Government Code §571.062, which authorizes the Commission to adopt rules to administer Title 15 of the Election Code, and Texas Government Code §571.064, which requires the Commission to annually adjust reporting thresholds in accordance with that statute.

The amended rules affect Title 15 of the Election Code.

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 F. REPORTING REQUIREMENT FOR A GENERAL PURPOSE COMMITTEE

1 TAC §§20.401, 20.405, 20.434, 20.435

The amendments are adopted under Texas Government Code §571.062, which authorizes the Commission to adopt rules to administer Title 15 of the Election Code, and Texas Government Code §571.064, which requires the Commission to annually adjust reporting thresholds in accordance with that statute.

The amended rules affect Title 15 of the Election Code.

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. RULES APPLICABLE TO A POLITICAL PARTY'S COUNTY EXECUTIVE COMMITTEE

1 TAC §20.553, §20.555

The amendments are adopted under Texas Government Code §571.062, which authorizes the Commission to adopt rules to administer Title 15 of the Election Code, and Texas Government Code §571.064, which requires the Commission to annually adjust reporting thresholds in accordance with that statute.

The amended rules affect Title 15 of the Election Code.

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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CHAPTER 22. RESTRICTIONS ON CONTRIBUTIONS AND EXPENDITURES

1 TAC §22.1, §22.7

The Texas Ethics Commission (the Commission) adopts amendments to Texas Ethics Commission rules in Chapter 22. Specifically, the Commission adopts amendments to §22.1, regarding Certain Campaign Treasurer Appointments Required before Political Activity Begins, and §22.7, regarding Contribution from Out-of-State Committee. The amendments are adopted without changes to the proposed text as published in the October 22, 2021, issue of the *Texas Register* (46 TexReg 7122). The rules will not be republished.

Section 571.064(b) of the Government Code requires the Commission to annually adjust reporting thresholds upward to the nearest multiple of $10 in accordance with the percentage increase for the previous year in the Consumer Price Index for Urban Consumers published by the Bureau of Labor Statistics of the United States Department of Labor. The laws under the Commission's authority that include reporting thresholds are Title 15 of the Election Code (campaign finance law), Chapter 305 of the Government Code (lobby law), Chapter 572 of the Government Code (personal financial statements), Chapters 302 and 303 of the Government Code (speaker election, governor for a

day, and speaker's reunion day ceremony reports), and section 2155.003 of the Government Code (reporting requirements applicable to the comptroller).

The Commission first adopted adjustments to reporting thresholds in 2019, which were effective on January 1, 2020. These new adjustments will be effective on January 1, 2022, to apply to contributions and expenditures that occur on or after that date. The thresholds contained in these amended rules are also duplicated in numerous statutes, as referenced above; amendments to the affected statutes are included with the amendments to Figures 1 through 4 of 1 TAC §18.31, which has been submitted concurrently with this proposal.

No public comments were received on these amended rules

The amendments are adopted under Texas Government Code §571.062, which authorizes the Commission to adopt rules to administer Title 15 of the Election Code, and Texas Government Code §571.064, which requires the Commission to annually adjust reporting thresholds in accordance with that statute.

The amended rules affect Title 15 of the Election Code.

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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CHAPTER 34. REGULATION OF LOBBYISTS
SUBCHAPTER B. REGISTRATION REQUIRED

1 TAC §34.41, §34.43

The Texas Ethics Commission (the Commission) adopts an amendment to Texas Ethics Commission rules in Chapter 34. Specifically, the Commission adopts amendments to §34.41, regarding Expenditure Threshold, and §34.43, regarding Compensation and Reimbursement Threshold. Section 34.41 is adopted without changes to the text as published in the October 22, 2021, issue of the *Texas Register* (46 TexReg 7124) and will not be republished. Section 34.43 is adopted with non-substantive changes to the text as proposed in the October 22, 2021, issue and will be republished.

Section 571.064(b) of the Government Code requires the Commission to annually adjust reporting thresholds upward to the nearest multiple of $10 in accordance with the percentage increase for the previous year in the Consumer Price Index for Urban Consumers published by the Bureau of Labor Statistics of the United States Department of Labor. The laws under the Commission's authority that include reporting thresholds are Title 15 of the Election Code (campaign finance law), Chapter 305 of the Government Code (lobby law), Chapter 572 of the Government Code (personal financial statements), Chapters 302 and 303 of the Government Code (speaker election, governor for a day, and speaker's reunion day ceremony reports), and section 2155.003 of the Government Code (reporting requirements applicable to the comptroller).

The Commission first adopted adjustments to reporting thresholds in 2019, which were effective on January 1, 2020. These new adjustments will be effective on January 1, 2022, to apply to contributions and expenditures that occur on or after that date. The thresholds contained in these amended rules are also duplicated in numerous statutes, as referenced above; amendments to the affected statutes are included with the amendments to Figures 1 through 4 of 1 TAC §18.31, which has been submitted concurrently with this proposal.

No public comments were received on these amended rules.

The amendments are adopted under Texas Government Code §571.062, which authorizes the commission to adopt rules to administer Chapter 305 of the Election Code; Texas Government Code §305.003, which authorizes the Commission to determine by rule the amount of expenditures made or compensation received over which a person is required to register as a lobbyist; and Texas Government Code §571.064, which requires the Commission to annually adjust reporting thresholds in accordance with that statute.

The amended rules affect Chapter 305 of the Government Code.

§34.43. Compensation and Reimbursement Threshold.

(a) A person must register under Government Code, §305.003(a)(2), if the person receives, or is entitled to receive under an agreement under which the person is retained or employed, more than $1,640 in a calendar quarter in compensation and reimbursement, not including reimbursement for the person's own travel, food, lodging, or membership dues, from one or more other persons to communicate directly with a member of the legislative or executive branch to influence legislation or administrative action.

(b) For purposes of Government Code, §305.003(a)(2), and this chapter, a person is not required to register if the person spends not more than 40 hours for which the person is compensated or reimbursed during a calendar quarter engaging in lobby activity, including preparatory activity as described by §34.3 of this title (relating to Compensation for Preparation Time).

(c) For purposes of Government Code, §305.003(a)(2), and this chapter, a person shall make a reasonable allocation of compensation between compensation for lobby activity and compensation for other activities.

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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PART 8. TEXAS JUDICIAL COUNCIL

CHAPTER 176. METHODS FOR THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE

1 TAC §176.2, §176.3

The Texas Judicial Council adopts new 8 TAC §176.2 and §176.3, Voluntary Certification for Remote Issuance of Marriage Licenses and Verification of Age and Identity of Applicant for a Marriage License, respectively. The rules are adopted with changes to clarify language and correct a statutory cross-reference in the proposed rules as published in the November 12, 2021, issue of the *Texas Register* (46 TexReg 7691). The rules will be republished.

The rules implement Senate Bill 907, 87th Legislature, Regular Session (2021), which requires the Council to adopt by rule a process for county clerks to become certified to issue marriage licenses through the use of remote technology.

The Council received public comment from VitalChek Network, Inc., a LexisNexis Company. The public comment recommended the Council consider identifying within the proposed rules more precise forms of authentication of the identity of marriage license applicants. The public comment noted some jurisdictions pose a series of questions to applicants to identify imposters and that California has adopted measures that comply with the National Institutes for Standards and Technology Level 2 for remote identity proofing. However, the public comment did not specify the questions or precise measures it recommends the Council to consider or adopt. Furthermore, the public comment seems to assume applicants would upload an application and proof of identity and age without being visible to the clerk. The proposed rule requires applicants to appear before the clerk via remote technology so that they are visible to the clerk in the same manner they would be if they were physically present before the clerk. The proposed rule cross-references Section 2.005 of the Family Code which lists the acceptable forms of identification necessary for issuance a marriage license to an applicant. These means of proving identity and age currently seem to effectively thwart imposters seeking marriage licenses. There is no reason to believe they will not continue to be effective for those who apply via remote technology. However, there is nothing in the proposed rules which would foreclose a clerk from using more stringent means of authenticating the age and identity of marriage license applicants if the clerk chooses to do so. The Council respectfully declines to amend the proposed rules.

Statutory Authority

The rules are adopted under Family Code §2.0091 and Government Code §71.039, which require the Council to adopt rules to implement a process for county clerks to voluntarily become certified to issue marriage licenses through remote technology. The process must include procedures for the sufficient verification of the age and identity of each applicant for a marriage license.

§176.2. Voluntary Certification for Remote Issuance of Marriage Licenses.

(a) A county clerk may apply for certification from the Office of Court Administration to use remote technology to receive applications for marriage licenses from, and to issue marriage licenses to, persons who are not in the county clerk's presence.

(b) The Office of Court Administration must certify a county clerk to issue marriage licenses remotely upon determining the county clerk:

(1) has posted in a prominent location on its website:

(A) contact information for scheduling a meeting through remote technology to apply for a marriage license;

(B) a copy of the marriage license application form required by Section 2.004 of the Family Code; and

(C) a list of the acceptable forms of proof of an applicant's identity and age as specified in Section 2.005 of the Family Code; and

(2) has access to:

(A) remote technology, such as a video teleconferencing system or other service that provides simultaneous, compressed full motion video and interactive communication of image and sound between the clerk, the applicant, any adult who appears on behalf of an absent applicant in accordance with Section 2.006 of the Family Code, and any other person necessary to process the application; and

(B) a method of electronically sending and receiving documents.

(c) A person who appears before a certified county clerk through remote technology fulfills the requirement of Section 2.002(1) of the Family Code.

§176.3. Verification of Age and Identity of Applicant for a Marriage License.

(a) A county clerk must verify the age and identity and, if applicable, proof of the removal of disability of minority of an applicant who appears before the clerk through remote technology. The county clerk may do so by:

(1) examining via remote video an acceptable form of proof of age and identity specified in Section 2.005 of the Family Code and, if applicable, the court order described in Section 2.003 of the Family Code;

(2) examining an electronically transmitted copy of an acceptable form of proof of age and identity listed in Section 2.005 of the Family Code and, if applicable, the court order described in Section 2.003 of the Family Code;

(3) witnessing an oath by a notary who is in the applicant's presence verifying the authenticity of the applicant's proof of age and identity and, if applicable, a court order described in Section 2.003 of the Family Code; or

(4) collecting an affidavit of a notary swearing to the age, identity, and, if applicable, legal capacity of the applicant.

(b) A county clerk who has a reasonable basis to question the authenticity of any documentation offered to establish an applicant's age, identity, or legal capacity may decline to issue the license through remote technology.

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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Maria Elena Ramon
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TITLE 7. BANKING AND SECURITIES

PART 4. DEPARTMENT OF SAVINGS AND MORTGAGE LENDING

CHAPTER 78. WRAP MORTGAGE LOANS

The Finance Commission of Texas (commission), on behalf of the Department of Savings and Mortgage Lending (department), adopts new rules in 7 TAC Chapter 78, Wrap Mortgage Loans, §§78.1 - 78.3, 78.100 - 78.102, 78.200, 78.201, 78.300 - 78.303, 78.400 - 78.403. The commission's proposal was published in the October 29, 2021 issue of the *Texas Register* (46 TexReg 7304). The following rule is adopted with changes to the published text and is republished to reflect such changes: §78.2. The changes regulate no new parties and affect no new subjects of regulation. As a result, the rule will not be republished as a proposed rule for comment. The remaining rules in the proposal are adopted without changes to the proposed text as published in the *Texas Register* and will not be republished.

Explanation of and Justification for the Rules

During the 87th Legislature (Regular Session), Senate Bill 43 (SB43) was enacted into law (eff. January 1, 2022) which, among other things, amended the Finance Code to create new Finance Code Chapter 159, concerning Wrap Mortgage Loan Financing (Chapter 159). A wrap mortgage loan is a loan made to finance the purchase of residential real estate that leaves a preexisting loan and lien owed by the previous owner (wrap lender) in place when the property is sold (and is therefore thought to encapsulate or "wrap around" the preexisting loan). The borrower (wrap borrower) signs a new promissory note and deed of trust to secure the purchase price of the residential real estate (less any down payments). The wrap loan is thus subordinated and becomes "junior" or "inferior" to the preexisting lien. The wrap borrower makes periodic payments to the wrap lender or its third-party servicer for the wrap lender or third-party servicer to then make payments toward and satisfy the amounts owed on the preexisting lien. The adopted rules: (i) create definitions necessary to administer Chapter 159; (ii) clarify how time periods measured in days by Chapter 159 are to be calculated; (iii) clarify and establish requirements related to the written disclosure a wrap lender is required to provide to the wrap borrower in accordance with Finance Code §159.101, including: adoption of a model disclosure form by the commission, as mandated by such section; establishing formatting requirements for the disclosure; clarifying when a wrap lender is deemed to have provided the disclosure for purposes of the statute; establishing requirements concerning the requirement that a wrap lender provide a foreign-language version of the disclosure, for negotiations with the wrap borrower conducted primarily in a language other than English; and clarifying that the disclosure may be delivered by the wrap lender and signed by the wrap borrower electronically; (iv) clarify and establish requirements related to the requirement, pursuant to Finance Code §159.105, that a wrap mortgage loan be "closed by an attorney or a title company"; (v) establish requirements related to the wrap borrower's right to make deductions from the amounts the wrap borrower is required to pay under the terms of the wrap mortgage loan for payments made to the preexisting lienholder or other obligee in connection with the preexisting loan or lien, as provided by Finance Code §159.202; (vi) clarify and establish requirements related to the fiduciary duties owed to a wrap borrower by a person who collects or receives payment from a wrap borrower, as provided by Finance Code §159.152, including: clarifying that a wrap lender may not delegate or assign its fiduciary duties to another person except as a result of selling or assigning the wrap mortgage loan; clarifying that, unless agreed to otherwise in writing by the wrap borrower and wrap lender, funds received from a wrap borrower must be placed in a trust account maintained for the benefit of the wrap borrower; and establishing requirements for the wrap lender to maintain a separate accounting for each wrap mortgage loan made by the wrap lender; (vii) clarify and establish requirements concerning the wrap lender's use of a third party to act as residential mortgage loan servicer; (viii) establish requirements concerning the books and records a wrap lender that is required to register as a residential mortgage loan servicer under Finance Code Chapter 158 (wrap lender registrant) must create and maintain, as mandated of the commission by Finance Code §159.252(d)(1); and (ix) clarify and establish requirements related to the savings and mortgage lending commissioner's authority to make inspections (examinations) of and conduct investigations on a wrap lender registrant, including: establishing what constitutes reasonable cause for an investigation, as mandated of the commission by Finance Code §159.252(d)(2); and, addressing the reimbursement of expenses for examination by the commissioner (by and through the commissioner's examiners) of records located outside of Texas, as mandated of the commission by Finance Code §159.252(g).

Summary of Public Comments

Publication of the commission's proposal for the rules recited a deadline of 30 days to receive public comments, or November 28, 2021. A public hearing in accordance with Government Code §2001.029 was not required. No comments were received.

SUBCHAPTER A. GENERAL PROVISIONS

7 TAC §§78.1 - 78.3

Statutory Authority

The rules are adopted under the authority of Finance Code §159.108 which authorizes the commission to adopt and enforce rules for the intent of or to ensure compliance with Finance Code Chapter 159.

These adopted rules affect the statutes contained in Finance Code Chapter 159, Wrap Mortgage Loan Financing.

§78.2. Definitions.

The following terms, when used in this chapter, and in the Commissioner's administration and enforcement of Finance Code Chapter 159, have the following meanings, unless the context clearly indicates otherwise:

(1) "Application" means a request, in any form, for an offer (or a response to a solicitation for an offer) of wrap mortgage loan terms, and the information about the mortgage applicant that is customary or necessary in a decision on whether to make such an offer, including, but not limited to, a mortgage applicant's name, income, social

security number to obtain a credit report, property address, an estimate of the value of the real estate, and/or the mortgage loan amount.

(2) "Attorney" has the meaning assigned by Texas Insurance Code §2501.003.

(3) "Commissioner" means the savings and mortgage lending commissioner appointed under Finance Code Chapter 13.

(4) "Department" means the Department of Savings and Mortgage Lending.

(5) "E-Sign Act" refers to the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§7001-7006.

(6) "Inspection" includes examination.

(7) "Legal holiday" means the federal legal public holidays set forth in 5 U.S.C. §6103(a).

(8) "Make a wrap mortgage loan," means when a person determines the credit decision to provide the wrap mortgage loan, or the act of funding the wrap mortgage loan or transferring money to the wrap borrower. A person whose name appears on the loan documents as the payee of the note is considered to have "made" the wrap mortgage loan.

(9) "Nationwide Mortgage Licensing System and Registry" or "NMLS" has the meaning assigned by Finance Code §180.002.

(10) "Residential mortgage loan" has the meaning assigned by Finance Code §159.001. The term does not include a loan which is secured by structure that is suitable for occupancy as a dwelling but is used for a commercial purpose such as a professional office, salon, or other non-residential use, and is not used as a residence.

(11) "Residential mortgage loan originator" has the meaning assigned by Finance Code §180.002.

(12) "Residential mortgage loan servicer" has the meaning assigned by Finance Code §158.002.

(13) "Residential real estate" has the meaning assigned by Finance Code §159.001. For purposes of Finance Code §159.002(b)(1), the term does not include "unimproved residential estate," as that term is defined by Finance Code §159.002(a).

(14) "Superior lien" refers to any lien described by Finance Code §159.001(7)(A).

(15) "Superior lienholder" means the holder of any lien described by Finance Code §159.001(7)(A).

(16) "Third-party servicer" means a person other than the wrap lender acting as residential mortgage loan servicer for a wrap mortgage loan.

(17) "Title company" means a "title insurance company" as that term is defined by Texas Insurance Code §2501.003.

(18) "UETA" refers to the Texas Uniform Electronic Transactions Act, Texas Business & Commerce Code Chapter 322.

(19) "Wrap borrower" has the meaning assigned by Finance Code §159.001.

(20) "Wrap lender" has the meaning assigned by Finance Code §159.001.

(21) "Wrap lender registrant" means a wrap lender who is required to register as a residential mortgage loan servicer under Finance Code Chapter 158.

(22) "Wrap mortgage applicant" means an applicant for a wrap mortgage loan or a person who is solicited (or contacts a wrap lender in response to a solicitation) to obtain a wrap mortgage loan, and includes a person who has not completed or started completing a formal loan application on the appropriate form (e.g., Fannie Mae's Form 1003 Uniform Residential Mortgage Loan Application), but has submitted financial information constituting an application, as provided by paragraph (1) of this section.

(23) "Wrap mortgage loan" has the meaning assigned by Finance Code §159.001.

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. LENDER REQUIREMENTS AND RESPONSIBILITIES

7 TAC §§78.100 - 78.102

Statutory Authority

The rules are adopted under the authority of Finance Code §159.108 which authorizes the commission to adopt and enforce rules for the intent of or to ensure compliance with Finance Code Chapter 159. §78.101(b) is further adopted under the authority of, and to implement, Finance Code §159.101(c).

The adopted rules affect the statutes contained in Finance Code Chapter 159, Wrap Mortgage Loan Financing.

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SUBCHAPTER C. BORROWER'S RIGHTS AND RESPONSIBILITIES

7 TAC §78.200, §78.201

Statutory Authority

The rules are adopted under the authority of Finance Code §159.108 which authorizes the commission to adopt and enforce rules for the intent of or to ensure compliance with Finance Code Chapter 159.

The adopted rules affect the statutes contained in Finance Code Chapter 159, Wrap Mortgage Loan Financing.

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SUBCHAPTER D. WRAP LENDER AND SERVICER REQUIREMENTS

7 TAC §§78.300 - 78.303

Statutory Authority

The rules are adopted under the authority of Finance Code §159.108 which authorizes the commission to adopt and enforce rules for the intent of or to ensure compliance with Finance Code Chapter 159.

The adopted rules affect the statutes contained in Finance Code Chapter 159, Wrap Mortgage Loan Financing.

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SUBCHAPTER E. COMPLIANCE AND ENFORCEMENT

7 TAC §§78.400 - 78.403

Statutory Authority

The rules are adopted under the authority of Finance Code §159.108 which authorizes the commission to adopt and enforce rules for the intent of or to ensure compliance with Finance Code Chapter 159. §§78.401 - 78.403 are further adopted under the authority of, and to implement, Finance Code §159.252(d). §78.402(g) is further adopted under the authority of, and to implement, Finance Code §159.252(g).

The adopted rules affect the statutes contained in Finance Code Chapter 159, Wrap Mortgage Loan Financing.

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PART 8. JOINT FINANCIAL REGULATORY AGENCIES

CHAPTER 153. HOME EQUITY LENDING

7 TAC §§153.1, 153.5, 153.12, 153.13, 153.17, 153.22, 153.26, 153.45, 153.51

The Finance Commission of Texas and the Texas Credit Union Commission ("commissions") adopt amendments to §153.1 (relating to Definitions), §153.5 (relating to Two Percent Fee Limitation: Section 50(a)(6)(E)), §153.12 (relating to Closing Date: Section 50(a)(6)(M)(i)), §153.13 (relating to Preclosing Disclosures: Section 50(a)(6)(M)(ii)), §153.17 (relating to Authorized Lenders: Section 50(a)(6)(P)), §153.22 (relating to Copies of Documents: Section 50(a)(6)(Q)(v)), §153.26 (relating to Acknowledgment of Fair Market Value: Section 50(a)(6)(Q)(ix)), §153.45 (relating to Refinance of an Equity Loan: Section 50(f)), and §153.51 (Consumer Disclosure: Section 50(g)) in 7 TAC, Chapter 153, concerning Home Equity Lending. The commissions adopt the amendments to §§153.5, 153.12, 153.13, 153.17, 153.22, 153.26, 153.45, and 153.51 without changes to the proposed text as published in the September 10, 2021, issue of the *Texas Register* (46 TexReg 5690). These rules will not be republished. The commissions adopt the amendments to §153.1 with changes to the proposed text as published in the September 10, 2021, issue of the *Texas Register* (46 TexReg 5690). This rule will be republished.

7 TAC Chapter 153 contains the commissions' interpretations of the home equity lending provisions of Texas Constitution, Article XVI, Section 50 ("Section 50"). In general, the purposes of the rule changes to 7 TAC Chapter 153 are: (1) to specify requirements for electronic disclosures, and (2) to describe Section 50's applicability to out-of-state financial institutions.

The interpretations in 7 TAC Chapter 153 are administered by the Joint Financial Regulatory Agencies ("agencies"), consisting of the Texas Department of Banking, Department of Savings and Mortgage Lending, Office of Consumer Credit Com-

missioner, and Texas Credit Union Department. The agencies distributed an early precomment draft of proposed changes to interested stakeholders for review, and then held an online webinar regarding the proposed changes. The agencies received one informal precomment on the rule text draft. The agencies appreciate the thoughtful input provided by stakeholders.

Amendments to §153.1 add definitions and statutory citations for the terms "E-Sign Act" (referring to the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§7001-7006) and "UETA" (referring to the Texas Uniform Electronic Transactions Act, Texas Business & Commerce Code, Chapter 322). The terms "E-Sign Act" and "UETA" provide a concise way to refer to these two statutes, and are used throughout this adoption in connection with electronic disclosures. Amendments throughout §153.1 also renumber other definitions accordingly.

Based on input from staff of the *Texas Register.* changes have been made to the definitions of "Fair market value" and "Preclosing disclosure" in §153.1(10) and (15), to conform to letter case conventions used for other defined terms.

Amendments to §153.5 revise the title to this section to conform to letter case conventions used in other rules. In addition, citations to the definition of "interest" in §153.1 will be updated to reflect the renumbering described in the previous paragraph.

Amendments to §153.12 relate to oral and electronic loan applications. Section 50(a)(6)(M)(i) provides that a home equity loan closing must occur at least 12 days after the owner "submits a loan application to the lender." New §153.12(3) explains that a loan application may be submitted electronically in accordance with state and federal law governing electronic disclosures, with references to the UETA and the E-Sign Act. These amendments respond to an informal precomment recommending amendments to §153.12 on electronic disclosures. An amendment to §153.12(2) also replaces the word "given" with "submitted," to be consistent with Section 50(a)(6)(M)(i).

An amendment to §153.13 describes requirements for providing an electronic copy of the preclosing disclosure. Section 50(a)(6)(M)(ii) of the Texas Constitution requires the lender to provide the owner with a copy of the loan application and a final itemized disclosure of amounts that will be charged at closing. The current interpretation at §153.13 refers to these items as the "preclosing disclosure." New §153.13(4) explains that the lender may provide the preclosing disclosure electronically in accordance with state and federal law governing electronic signatures and delivery of electronic documents, and includes references to the UETA and the E-Sign Act.

The amendment to §153.13 responds to a request that the commissions received in September 2020, while the commissions were conducting a rule review of Chapter 153. As a result of the rule review, the commissions amended §153.22 to specify that the lender may provide signed documents electronically in accordance with state and federal law. In an official comment, a stakeholder recommended either: (1) adopting a new section to specify that the lender may electronically deliver all notices, disclosures, and documents to the property owner, or (2) amending Chapter 153's individual sections on required disclosures to specify that the lender may electronically deliver each disclosure. Although the commissions and the agencies generally do not object to the use of electronic disclosures, the commissions received this suggestion too late in the rulemaking process to include the proposed changes in the October 2020 adoption of rule review amendments. The commissions indicated that the agencies would revisit this issue in the future. After reviewing the request, the commissions believe that it is appropriate to amend each section of Chapter 153 requiring disclosures individually. This will help ensure that Chapter 153 remains clear with respect to which constitutional provision is interpreted by each section of Chapter 153.

In addition, an informal precomment recommended that §153.13 (and other sections in this adoption) consistently refer to both electronic signatures and delivery of electronic documents, when describing requirements under state and federal law. In response to this precomment, the new text throughout this adoption refers to both of these sets of requirements.

An amendment to §153.17 describes Section 50's applicability to out-of-state financial institutions. Section 50(a)(6)(P) of the Texas Constitution lists the entities that are authorized to make home equity loans, and includes "a bank, savings and loan association, savings bank, or credit union doing business under the laws of this state or the United States." New §153.17(2) specifies that for purposes of Section 50(a)(6)(P), a "bank, savings and loan association, savings bank, or credit union doing business under the laws of this state or the United States" includes a financial institution described by Texas Finance Code, §201.101(1)(A) - (D) that is chartered under the laws of another state and does business in Texas in accordance with applicable state law, including the requirements of Texas Finance Code, §201.102. The financial institutions described by Texas Finance Code, §201.101(1)(A) - (D) are banks (including savings banks), savings and loan associations, and credit unions.

The amendment to §153.17 responds to a request that the agencies received from an out-of-state bank in March 2021. The request asks whether a bank organized under the laws of another state may make a home equity loan under the Texas Constitution. The commissions believe that new §153.17(2) appropriately answers this question by referring to provisions of the Texas Finance Code that govern out-of-state financial institutions in Texas.

In an informal precomment, a stakeholder recommended deleting the phrase "or the United States" and adding an exception for institutions doing business under the laws of the United States. The stakeholder argued that this text creates an inconsistency because institutions doing business under the laws of the United States are not chartered under the laws of a state. The commissions do not believe that the adopted amendment to §153.17 creates an inconsistency. The amendment uses the word "includes," and does not suggest that the listed state-chartered institutions are the entire population of financial institutions encompassed by Section 50(a)(6)(P). The commissions do not believe that the stakeholder's recommended change would clarify the text, and have not included it in the current adoption. However, for clarity, the adopted amendment to §153.17 includes the phrase "state-chartered" before "financial institution."

An amendment to §153.22 revises references to the UETA and the E-Sign Act, to refer to these statutes consistently with other sections in this adoption.

An amendment to §153.26 describes requirements for electronically signing the acknowledgment of fair market value. Section 50(a)(6)(Q)(ix) of the Texas Constitution requires the lender and the owner to sign a written acknowledgment of the fair market value of the homestead property. New §153.26(4) explains that the owner and lender may sign the written acknowledgment

electronically in accordance with state and federal law governing electronic signatures and delivery of electronic documents. This amendment responds to the same September 2020 stakeholder request on electronic disclosures described earlier in this adoption.

An amendment to §153.45 describes requirements for providing an electronic copy of the refinance disclosure. Section 50(f)(2)(D) of the Texas Constitution requires the lender to provide a refinance disclosure to the owner if the owner applies for a refinance of a home equity loan to a non-home-equity loan. New §153.45(4)(E) explains that the lender may provide the refinance disclosure electronically in accordance with state and federal law governing electronic signatures and delivery of electronic documents. This amendment responds to the same September 2020 stakeholder request on electronic disclosures described earlier in this adoption.

An amendment to §153.51 describes requirements for providing an electronic copy of the consumer disclosure. Section 50(g) of the Texas Constitution requires the lender to provide a consumer disclosure to the owner at least 12 days before closing a home equity loan. New §153.51(2) explains that the lender may provide the consumer disclosure electronically in accordance with state and federal law governing electronic signatures and delivery of electronic documents. This amendment responds to the same September 2020 stakeholder request on electronic disclosures described earlier in this adoption.

The commissions received no official comments on the proposal.

The rule changes are adopted under Texas Finance Code, §11.308 and §15.413, which authorize the commissions to issue interpretations of Texas Constitution, Article XVI, §50(a)(5) - (7), (e) - (p), (t), and (u), subject to Texas Government Code, Chapter 2001.

The constitutional provisions affected by the adoption are contained in Texas Constitution, Article XVI, §50. No statute is affected by this adoption.

§153.1. Definitions.

Any reference to Section 50 in this interpretation refers to Article XVI, Texas Constitution, unless otherwise noted. These words and terms have the following meanings when used in this chapter, unless the context indicates otherwise:

(1) Balloon--an installment that is more than an amount equal to twice the average of all installments scheduled before that installment.

(2) Business Day--All calendar days except Sundays and these federal legal public holidays: New Year's Day, the Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day.

(3) Closed or closing--the date when each owner and the spouse of each owner signs the equity loan agreement or the act of signing the equity loan agreement by each owner and the spouse of each owner.

(4) Consumer Disclosure--The written notice contained in Section 50(g) that must be provided to the owner at least 12 days before the date the extension of credit is made.

(5) Cross-default provision--a provision in a loan agreement that puts the borrower in default if the borrower defaults on another obligation.

(6) Date the extension of credit is made--the date on which the closing of the equity loan occurs.

(7) E-Sign Act--the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§7001-7006.

(8) Equity loan--An extension of credit as defined and authorized under the provisions of Section 50(a)(6).

(9) Equity loan agreement--the documents evidencing the agreement between the parties of an equity loan.

(10) Fair market value--the fair market value of the homestead as determined on the date that the loan is closed.

(11) Force-placed insurance--insurance purchased by the lender on the homestead when required insurance on the homestead is not maintained in accordance with the equity loan agreement.

(12) Interest--As used in Section 50(a)(6)(E), "interest" means the amount determined by multiplying the loan principal by the interest rate over a period of time.

(13) Lockout provision--a provision in a loan agreement that prohibits a borrower from paying the loan early.

(14) Owner--A person who has the right to possess, use, and convey, individually or with the joinder of another person, all or part of the homestead.

(15) Preclosing disclosure--The written itemized disclosure required by Section 50(a)(6)(M)(ii).

(16) Two percent limitation--the limitation on fees in Section 50(a)(6)(E).

(17) UETA--the Texas Uniform Electronic Transactions Act, Texas Business & Commerce Code, Chapter 322.

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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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

The Public Utility Commission of Texas (commission) adopts amendments to 16 Texas Administrative Code (TAC) §25.43, §25.471, §25.475, §25.479, and §25.498. The commission also adopts new 16 TAC §25.499, relating to Acknowledgement of

Risk Requirements for Certain Commercial Contracts. The commission adopts these rules with changes to the proposed text as published in the August 13, 2021, issue of the *Texas Register* (46 TexReg 4937). The rules will be republished. These rule amendments will implement an amendment to Public Utility Regulatory Act (PURA) §17.003(d-1)(c) and new §39.110 enacted by the 87th Texas Legislature. These rule changes also implement a number of other customer protections for retail electric customers.

Specifically, amended §25.43 simplifies the maximum Provider of Last Resort (POLR) rate formula and limits price volatility originating from ERCOT Real-Time Settlement Point Prices (RTSPPs) from adversely affecting residential, and small and medium commercial customers who are transitioned to POLR service through the addition of a 12-month RTSPP price average and year-over-year cap on price increases. Amended §25.498 restructures the maximum price cap for prepaid service to match the maximum POLR rate under amended §25.43 and removes the alternative price cap measures in the previous rule.

Amended §25.475 requires an additional notice of contract expiration and prohibits the offering of indexed and wholesale-indexed products to residential and small commercial customers. Amended §25.475 also clarifies that the price of fixed rate products does not vary with changes in ancillary service costs for residential and small commercial customers, unless the commission specifically designates a type of ancillary service charge that is beyond the REP's control.

Amended §25.479 requires electric utilities and retail electric providers to periodically provide to customers information concerning load shed, type of customers and procedure to be considered for critical care or critical load, and reducing electricity use at times when involuntary load shed events may be implemented.

New §25.499 implements SB 3's Acknowledgement of Risk (AOR) requirements for wholesale indexed products offered to large and medium commercial customers and prescribes a standard format for the AOR document. Amended §25.471 adds new §25.499 to the list of rule sections that large commercial and industrial commercials cannot waive by contract.

The commission received comments on the proposed rules from Octopus Energy, the Office of Public Utility Counsel (OPUC), Windrose Power & Gas LLC, Texas Legal Services Center and AARP Texas (TLSC), Coalition of Competitive Retail Electric Providers, Texas-New Mexico Power Company (Joint TDUs), Texas Energy Association for Marketers (TEAM), TXU Energy Retail Company LLC (TXU), Alliance for Retail Markets (ARM), Robert L. Borlick, and Joint REPs.

Question 1

Should the maximum rate for provider of last resort service that is charged by a large service provider to a residential customer in proposed §25.43(m)(2)(A)(iii) and small and medium non-residential customers in proposed §25.43(m)(2)(B)(iv) include a safety threshold to prevent the energy charge from increasing by more than a certain percentage on a year-to-year basis? If so, what is an appropriate safety threshold?

TLSC favored a safety threshold or cap, but expressed concern over determining an appropriate cap. TLSC noted that a rate cap may have the potential to become "self-fulfilling," assuming the rate will increase annually. TLSC asserted that it was the intent of the Legislature and in the best interests of consumers to have POLR service widely available at a reasonable cost, and that the POLR rate should reflect average competitive rates.

CCR opposed a safety threshold that would prevent the energy charge from increasing by more than a certain percentage on a year-to-year basis. CCR argued that POLR service is not meant to be a long-term service for customers, and instead is intended to be a safety net when a retail electric provider (REP) leaves the market unexpectedly and, as a result, a customer may not have time to select a different provider. CCR argued it is highly unlikely that residential and small non-residential customers who are transitioned to a POLR provider would pay the maximum rate under §25.43(m)(2)(A) and §25.43(m)(2)(B) because commission rules incentivize POLR providers to charge a competitive rate instead of the POLR rate. Specifically, §25.43(s) requires quarterly reports to be filed with the commission if an LSP charges the maximum POLR rate for a customer segment under §25.43(m)(2).

TEAM stated it does not object to a 20% year-over-year safety threshold provided "there is a corresponding safety relief that provides REPs an ability to recover its costs for power procured at the last minute on the real time market for new POLR customers." TEAM asserted that the proposed mechanism based on the prior year's average of real time prices, which are not necessarily reflective of costs, are nonetheless useful for regulatory certainty as they provide a known price cap for certain services such as pre-paid services. For pre-paid services to be viable, any alternative price adjustment mechanism for POLR must not be a justification for a starting POLR rate that is too low.

ARM opposed a safety threshold that would prevent the energy charge from increasing by more than a certain percentage on a year-to-year basis. ARM argued an additional safety threshold in the POLR rate is not necessary because the 12-month lookback required in assessing the "LSP energy charge" under §25.43(m)(2)(A)(iii) and §25.43(m)(2)(B)(iv) sufficiently dampens price volatility. ARM argued the POLR rate is not a long-term rate, and no residential or small non-residential customer should be on it for more than 60 days. ARM argued that for the remainder of the 2021-2022 POLR term, the risk of customers being subject to the POLR rate during any further mass transitions should be low because customers will likely be transferred to VREPs, which offer market-based month-to-month products that are not priced at the POLR rate.

OPUC favored a safety threshold or cap, and further recommended that the limitation should be the lesser of the formula outcome under the proposed rule or 20% for residential customers and 25% for non-residential customers. OPUC argued that its proposal is appropriate as the current rule already contemplates a 20% increase over average RTSPPs for residential consumers and 25% for non-residential customers. OPUC asserted that consumers paying below the average RTSPP for their area would benefit from the flat maximum cap of 20% or 25% while consumers paying over the average RTSPP will benefit from the formula approach which would yield a price below their current price.

OPUC disagreed with assertions by ARM, TEAM, and CCR that a safety threshold is not warranted. OPUC agreed with TLSC's concerns that the existence of rate cap has the potential to create a presumption that the rate will increase annually. OPUC maintained that until a better solution is put forward, a safety net is warranted basis to protect residential and small non-residential consumers from overwhelming rate shock and that such a

method still permits a reasonable return to providers of POLR service.

Joint REPs opposed OPUC's recommendations for a 20% and 25% rate cap for residential and small non-residential customers, respectively. Joint REPs argued that the POLR rate is short-term, and no customer should remain on it from year to year, decreasing the likelihood of rate shock. Joint REPs cited §25.43(j)(4) which requires LSPs (Large Service Provider) to move residential and small non-residential customers that have been dropped to POLR to a month-to-month market-based product after 60 days. Joint REPs subsequently recommended deferring changes to the POLR rate until a later rulemaking or adopt ARM's alternative proposal to maintain the current minimum and maximum POLR rate structure with modifications to bypass the direct pass-through of RTSPPs for residential and small non-residential customer classes. If the commission institutes a POLR cap, Joint REPs recommends the cap be set after considering the final POLR calculation determined by this rulemaking. Joint REPs contended that the cap must account for whether the final formula is set as only a multiplier of past rates, set to an arbitrarily low rate, or developed to lessen the long-term risk that the POLR rate does not recover costs. Joint REPs claimed such a review is necessary because a low cap with a low formula with a following year where prices rebound could risk insufficient cost recovery for POLR providers and indicated that Oncor service territories have seen yearly variances that exceed 20% in three out of five years.

Commission Response

The commission agrees with OPUC and TLSC that a safety threshold is necessary for the POLR rate. POLR service serves as an emergency back-up for customers, so it is essential that an outlier year such as 2021 not be allowed to dictate extremely high rates for the next year. Accordingly, the commission sets the "LSP energy charge" variable of the maximum POLR rate formula for residential customers at the lesser of the formula outcome under the adopted rule or 120%. For small and medium non-residential customers the "LSP energy charge" is the lesser of the formula outcome under the adopted rule or 125%.

The commission disagrees with CCR and Joint REPs that a safety threshold is unnecessary because POLR is a short-term solution that customers are unlikely to remain on for an extended period. The commission further disagrees with ARM's contention that the 12-month lookback sufficiently dampens price volatility. While dampening price volatility, the 12-month lookback would also serve to lock in a high maximum POLR rate for an entire year, making the safety threshold even more necessary. It is against the public interest to require customers shifted to POLR service to pay extraordinarily high prices associated with RTSPPs, which as shown by Winter Storm Uri, can increase dramatically enough to even increase the annual average of RTSPPs. Therefore, along with amendments setting the average RTSPPs to be over a 12-month period in the LSP energy charge variable, an additional cap is required to ensure high RTSPPs in one year do not render POLR service unaffordable in the next.

The commission also disagrees with TEAM's contention that the commission needs to include a cost recovery mechanism to ensure that REPs can recover their costs of serving POLR customers. This decision is consistent with the commission's other determinations in this rulemaking that market entities, not customers, should bear the risk of unpredictable price fluctuations beyond reasonable market expectations for electric service. The commission also notes that a POLR cost recovery mechanism has not been adequately noticed or developed to include in this rulemaking. However, if TEAM believes this proposal merits further consideration, the commission recommends that TEAM file comments in Project No. 52757, Review of Chapter 25 - Rules Applicable to Electric Service Providers.

Question 2

The first part of Question 2 states:

Do the acknowledgement of risk requirements in proposed §25.475(c)(3)(G) and §25.475(j) provide adequate customer protections for residential and small commercial customers that enroll in indexed retail electric products and retail electric products that allow for the pass-through of ancillary service charges?

TEAM, ARM, and CCR argued that the proposed AOR (Acknowledgement of Risk) requirements under §25.475(c)(3)(G) and §25.475(j) do provide adequate protections for residential and small commercial customers. CCR stated that the proposed AOR requirements ensure a customer that enrolls in an indexed product or a product that includes ancillary service charges understands the pricing volatility risk associated with such products.

TEAM and ARM asserted that proposed §25.475(c)(3)(G) and §25.475(j) adequately protect consumers and suggested that the AOR should appear in the EFL (Electricity Facts Label) with clear language indicating that the language applies only to indexed products subject to volatility. TEAM and ARM elaborated that the EFL already contains customer protections for price disclosure under §25.475(g)(2)(B) relating to disclosure of a total average price, and under §25.475(g)(2)(F) relating to contact information for current price data. ARM contended that AORs for pass-throughs of ancillary service prices are unnecessary because under current rules, such costs cannot be passed through on fixed rate products. TEAM pointed out that most competitive market commodity indices such as NYMEX do not carry the same type of volatility that was experienced in Winter Storm Uri, unlike the ERCOT (Electric Reliability Council of Texas) RTSPP that was fixed by regulatory action.

TLSC and OPUC stated that proposed §25.475(c)(3)(G) and §25.475(j) do not adequately protect residential customers from market risk. OPUC maintained that the "waiver" in the proposed rules is insufficient to protect residential and small commercial customers from the risks associated with indexed products. In TLSC's view, the AOR in §24.475(i) indicates customers may not fully understand the terms and conditions of a retail electric plan marketed to them. OPUC argued that waivers are so ubiquitous in everyday life that consumers do not read them and, if they do, the language may be difficult to understand. OPUC specifically noted that ancillary service charges also require a waiver and that ancillary service prices were higher during Winter Storm Uri than the actual price for energy which was capped at $9,000. Therefore, according to TLSC and OPUC, a prohibition of all indexed products and products that pass through ancillary service charges for residential and small commercial consumers is warranted.

The second part of Question 2 states:

If not, should these products be prohibited for residential and small commercial customers?

TLSC and OPUC supported the prohibition of all indexed retail products for residential and small commercial customers. TLSC generally opposed the proposals provided by the retail electric industry and the general proposition of residential customers taking on the risk of indexed rates and paying directly for ancillary service via pass-through of cost. TLSC maintained that "few residential consumers possess the knowledge or the resources to monitor pricing in the ERCOT market" and therefore the risk of high prices should be carried by REPs, not consumers. TLSC further argued that indexed rates and the pass-through of costly ancillary service charges are contrary to the basic market concepts codified in PURA §39.101(e) and the intent of the Legislature in passing HB (House Bill) 16. TLSC stressed that even small price increases can have profound negative consequences for low- and fixed-income families and that the prohibition of plans that expose customers to sudden price increases is the best way to protect consumers. OPUC noted that while some indices may not vary significantly, others do and that consumers should not be exposed to such price fluctuations.

TLSC argued that comments from ARM, CCR, TEAM and Robert Borlick collectively supported shifting financial risk of the wholesale market from the REP to the consumer. TLSC stated that a REP could manage its financial risk through voluntary customer programs to reduce load and costs that compensate customers for participating in such programs. Additionally, TLSC argued that customers can manage their financial risk by choosing a fixed rate product. TLSC specifically agreed with OPUC that a customer signing a waiver cannot be expected to predict or comprehend the possibility of rate increases in the future.

OPUC disagreed with Octopus Energy, TEAM and CCR that indexed plans and plans with ancillary service pass through charges should be allowed for residential and small commercial customers. OPUC concurred with TLSC that few customers understand how to monitor indexed pricing and what it could mean for their electricity bills. OPUC further agreed with TLSC that many customers have difficulty understanding ancillary services and the contents of a contract with pass-through charges.

CCR, TEAM, ARM, and Octopus Energy opposed prohibiting all indexed retail products for residential and small commercial customers.

CCR argued that PURA §39.001(c) specifically prohibits the commission from regulating competitive electric services or prices except as authorized by PURA, such as the specific customer protection for pricing and billing under PURA §39.101(a). CCR further argued that the selection of pass-through of ancillary service charges or an indexed plan is a competitive decision and that prohibiting REPs from including specific cost drivers in pricing is unnecessary.

TEAM argued that indexed products have existed for years and have performed to overall consumer satisfaction. TEAM further pointed out that the Legislature only banned "real time wholesale indexed products" in HB 16, not other indexed products. Many indexed products, according to TEAM, are not tied to the volatility of a commodity index, and benefit consumers. TEAM concluded that indexed products are "a necessary tool" for "development of customer-centric innovations." TEAM and ARM concluded that banning certain products stifles competition and forecloses customer choice. Until Winter Storm Uri, ancillary service charges were not nearly as volatile, according to TEAM and ARM. ARM proposed amendments across §25.475 to have that section conform with its recommendation to move the AOR into the EFL.

Octopus Energy argued that "competition and innovation" in the ERCOT retail electric market are key reasons against such a prohibition. Specifically, such a prohibition will undermine customer choice, reduce the development of load management incentives, and subvert efforts to improve reliability in the electric markets. Octopus Energy argued that the intent of HB 16 was to prohibit the offering or enrolling of residential and small commercial customers products that pass-through prices 100% indexed to the wholesale real-time market and that a ban on all indexed products is contrary to that intent. Octopus Energy maintained that indexed products appropriately protect customers from the highest prices, provide a significant cost reduction to residential and small-commercial customers and encourage reduced usage during peak load. Specifically, Octopus Energy encouraged voluntary caps imposed by REPs to prevent customer exposure from the highest prices associated with wholesale indexed products.

Octopus Energy agreed with TEAM in opposing the prohibition of all indexed products for residential and small commercial customers. Octopus Energy also agreed with Robert Borlick that "a broad prohibition against all indexed products would reduce the development of demand response in the residential and small commercial customer classes and reduce the reliability of the ERCOT grid." Octopus Energy opposed the recommendations of OPUC and TLSC to prohibit all indexed products for residential and small commercial customers. Octopus Energy specifically argued that contrary to the arguments of OPUC, and to a lesser extent TLSC, that customers do understand the benefits and risks of a wholesale indexed product that they sign up for.

Joint REPs opposed prohibiting all indexed retail products for residential and small commercial customers. Joint REPs categorically opposed OPUC and TLSC's proposals to prohibit wholesale indexed products and products containing ancillary service pass-through charges as unsupported by law and restricting competitive innovation.

Commission Response

The commission finds that having "indexed products" as a separate category of products is unnecessary and confusing for residential and small commercial customers and prohibits the offering of indexed products to these customer classes.

The commission disagrees with CCR that PURA prohibits the commission from banning the sale of indexed products to residential and small commercial customers. Under PURA §39.001(c), cited by CCR, the commission "may not make rules...restricting or conditioning competition except as authorized in this title." PURA clearly authorizes the commission to prohibit practices when necessary to provide adequate customer protection. Under PURA §39.101(b), a customer is entitled to "receive sufficient information to make an informed choice of service provider," and "to be protected from unfair, misleading, or deceptive practices". The commission finds that indexed products--the price of which on any future date is unknown at the start of each billing period, can fluctuate unpredictably, and are indexed to metrics that are not available to the customer as part of the enrollment process--do not provide sufficient information for a residential or small commercial customer to make an informed choice of service provider. Furthermore, the apparent stability of indexed rate plans can be misleading, because these plans have the potential to increase drastically without notice and such increases are not within the reasonable expectations for residential and small commercial customers.

The commission also disagrees with arguments made by ARM, TEAM, CCR, and Octopus Energy that prohibiting indexed products unnecessarily stifles creativity, limits competition, or reduces incentives for demand response. The only unique feature of an indexed product is that the price of an indexed product can vary within a billing cycle in a manner that is unpredictable at the time of enrollment, which is not appropriate for residential and small commercial customers. Innovative fixed or variable price products can be designed to include elements such as time-of-use, seasonal, nights and weekends, tiered rates, flat rates, credits, and others, while providing customers with the appropriately tailored protections that those product types provide, such as the price certainty of fixed rate products or the lack of early termination fees or long-term commitments of variable price products. The commission encourages REPs to continue to bring new products to market to further enrich the competitive landscape of Texas' deregulated energy market.

Replacing "shall" with "will"

The commission is implementing a general change to its rules by removing "shall" from the text of its rules and replacing it with a more specific term. Several such changes were proposed in this section.

ARM identified four instances in §25.43 in which the commission proposed replacing "shall" with "must" where ARM recommends a change to "will" or "plan to" instead.

Commission Response

The commission agrees with ARM and replaces "must" with "will" in these contexts.

§25.43 - Provider of Last Resort (POLR)

Proposed §25.43 establishes the requirements for provider of last resort ("POLR") service, which is available to any requesting retail customer and to any retail customer whose REP has exited the market.

TLSC generally opposed high POLR rates, prepaid service, and having customers bear the financial risk of the market through indexed rates and pass-through of ancillary service costs.

TLSC maintained that, consistent with PURA § 39.106, POLR should be a standard retail service package that ensures stable, reasonable rates based on average prices being paid in the competitive market to a wide range of customers.

TLSC contended that the proposals by REP commenters to increase the POLR rate places price risk on residential consumers and allows REPs to use a high POLR rate as a marketing tool to gain market share during a mass transition. TLSC asserted that POLR service should be structured to place downward pressure on electricity prices and provide more affordable firm service to prepaid customers paying prices capped at the POLR rate. TLSC argued that current commission rules incentivize POLR providers to charge an uncompetitive, high price for undesirable service. Further, they asserted, current POLR rates make the retail market less competitive by exposing consumers, rather than industry, to financial risk.

TLSC requested that the commission establish POLR service as a standard retail service package at a fixed rate for all customers and the POLR service option should be made available on the Power to Choose website maintained by the commission.

Commission Response

The commission declines to adopt TLSC's proposals to change POLR to a standard retail product for the reasons detailed in the commission's response to Question 1. Such proposals are outside the scope of this rulemaking. The adopted rule adequately addresses TLSC's concerns regarding customer protections while also providing appropriate compensation for REPs that provide POLR service.

§25.43(c)(8) - "Market-based product"

Subsection §25.43(c) contains section-specific defined words and terms. Paragraph §25.43(c)(8) is the definition for "Market-based product" which in the proposed rules is defined as "A month-to-month product that is either offered to or matches the rate of a product offered to non-POLR customers of the REP for the same TDU territory and customer class. A month-to-month contract may not contain a termination fee or penalty. For purposes of this section, a rate for residential customers that is derived by applying a positive or negative multiplier to the rate described in subsection (m)(2) of this section is not a market-based product."

Alliance for Retail Markets (ARM) proposed modifying the definition of "market-based product" in §25.43(c)(8) to allow for "consistency with other in-market products." Specifically, ARM argued that REP customer segments may not map directly to the POLR customer classes of residential, small non-residential, medium non-residential, and large non-residential defined in §25.43(c) and therefore the proposed definition of §25.43(c)(8) may be challenging for REPs. ARM further argued that offering a rate consistent with general market rates should be sufficient for the definition rather than requiring a direct match to an existing product offered by a REP. ARM reasoned that POLR service creates unique risks and demands on REPs, such as bad debt, and that a REP should be able to calculate the high costs and risks of POLR into its market-based product pricing, rather than the "formulaic POLR rate."

Commission Response

The commission declines to adopt the recommendations proposed by ARM as the definition only requires a price match to a non-POLR customer product and the current definition excepts rates derived from using the maximum POLR formula under (m)(2) as being considered a market-based product for residential customers. Furthermore, ARM's comments regarding customer segmentation and mapping are substantively incorporated into §25.43(m)(2). The historical segmentation of residential customers and small and medium commercial customers, and large commercial customers and comments do not indicate that such categories are overly burdensome for REPs and to the extent that they could be improved the commission has adopted proposals of some commenters to do so.

§25.43(f)(1) - Customer Information

Paragraph §25.43(f)(1) provides an index of hyperlinked standard terms of POLR service for each customer class defined in §25.43(c) and specifically provides the rate to be charged, as defined in §25.43(m)(2), by a Large Service Provider (LSP).

ARM and TEAM indicated that, if the POLR rate formula is changed by the commission, the terms of service linked in §25.43(f)(1) must be updated accordingly. ARM and TEAM also pointed out that in the terms of service provided in §25.43(f)(1)(D) for Large Non-Residential Service, the term "RTSPP" should be changed to "energy charge" in (1)(iv) to

be consistent with current rules: "The (RTSPP) energy charge shall have a floor of $7.25 per MWh."

Commission Response

The commission agrees with ARM and TEAM and amends the rule accordingly.

§25.43(i) - VREP List

Subsection§25.43(i) specifies the process for creating and publishing a list of Voluntary Retail Electric Providers ("VREP"). The existing rule requires REPS interested in becoming a VREP to submit a request no earlier than June 1 and no later than July 31. The proposed rule authorizes the commission's executive director to allow REPs to submit requests outside of this submission window.

TXU opposed the amendment to §25.43(i), interpreting it as allowing the executive director to designate additional VREPs (Voluntary Retail Electric Provider) at any time. TXU reasoned that the amendment should not be implemented because it would imbalance the inherent risk-reward considerations for a REP in deciding whether to be VREP. Specifically, a REP must consider the balance between a VREP competitively retaining customers assigned during a POLR event in exchange for the additional financial risk of POLR customers and the foregoing of market opportunities due to VREP obligations. TXU argued that any calculations by a VREP to retain customers after a POLR event is rendered moot if the VREP pool can be altered by executive director and may disincentivize REPs from providing POLR service or postpone volunteering to be a VREP. Pursuant to this recommendation, TXU therefore recommended "unless otherwise determined by the executive director" be removed from proposed §25.43(i).

OPUC opposed TXU's recommendation to strike language in §25.43(i) authorizing the executive director to designate additional VREPs at any time, as such discretion by the executive director in the proposed rule would incentivize competition and thus be beneficial for providing the best possible price to consumers. OPUC noted that the final provider list for 2021 lacked any VREPs for the large non-residential service areas and that granting the executive director discretion to assign additional VREPs would permit additional coverage. However, OPUC acknowledged TXU's concerns and, in conjunction with the proposed rule, proposed a priority designation with a right of first refusal for REPs that enrolled and were certified as VREPs during period specified in the rule (i.e., June 1 to July 31 of each even-numbered year), rather than through executive director designation. This approach, in OPUC's view, "appropriately balances the desire for more participating VREPs with the reward for risks taken by VREPs who choose to participate through the regular VREP certification process."

Commission Response

The commission disagrees with TXU. The rule as proposed strikes an appropriate balance between the concerns described by TXU and allowing flexibility for the executive director to act in response to unforeseen circumstances. OPUC's proposed "right of first refusal" is unnecessarily complex. Therefore, the commission adopts the language as proposed.

§25.43(l)(1)(E) - Mass transition of customers to POLR providers

Under §25.43(l)(1)(E), ERCOT is required to assign ESI (Electric Service Identifier) IDs to VREPs in proportion to the number of ESI IDs that each REP indicated it was willing to serve.

ARM argued that the allocation of customers detailed in current §25.43(l)(1)(E) is inefficient and discriminatory as a VREP could indicate it was willing to serve a very large number of customers which would dilute the proportion assignable to other VREPs. ARM reiterated that the benefit for REPs in becoming a VREP in exchange for the inherent risks is the potential to competitively retain customers assigned to it through a POLR event. ARM contended that basing the customer allocation on the ratio of a VREPs willingness-to-serve count relative to the total count for all VREPs diminishes that benefit. ARM hypothesized that a VREP could volunteer to serve a large number of customers for its willingness-to-serve maximum and therefore dilute the number of customers assigned to other VREPs. Instead, ARM proposed allocating customers shifted to POLR be equally divided between VREPs, up to the VREP's self-indicated maximum, and offered draft language in line with its recommendation:

Assign ESI IDs in numerical order to VREPs, in the order determined in subparagraph (D) of this paragraph, in accordance with the number of ESI IDs each VREP indicated a willingness to serve pursuant to subsection (i) of this section. If the number of ESI IDs is less than the total that the VREPs indicated that they are willing to serve, each VREP must be assigned (a proportionate) an equal number of ESI IDs, (as calculated by dividing) up to the number that each VREP indicated it was willing to serve (by the total that all VREPs indicated they were willing to serve, multiplying the result by the total number of ESI IDs being transferred to the VREPs, and rounding to a whole number) for a given class and POLR area.

Commission Response

The commission agrees with ARM that allocating POLR customers evenly among VREPs is a more equitable approach that reduces the risk of a REP inflating its willingness-to-serve count in order to be assigned a larger share of the available POLR customers. The commission adopts ARM's proposed language.

§25.43(m) - Rates Applicable to POLR Service

Subsection §25.43(m) details the obligations of a VREP in offering POLR service and the form and manner of such service, particularly establishing a maximum rate for POLR service charged by an LSP.

TLSC argued POLR rates should be a standardized, reasonable, and even long-term fixed rate product, reflective of competitive market rates. TLSC maintained that the POLR rate should not be punitive or designed primarily to provide temporary service in the event of financial default by a REP. TLSC expressed its preference for POLR service as a viable option for customers subject to switch-hold and customers on prepaid service. TLSC argued that a standard retail service package should be developed by all REPs and the pricing for such a package should be used for POLR customers across load zones.

Joint REPs opposed TLSC's recommendations to change POLR service into a long-term option by making it a standard retail service package based on average prices in the market. Joint REPs noted that the commission has declined to implement the same proposals in Project Number 31416, a prior rulemaking project addressing this rule. Joint REPs maintained that TLSC's recommendations were outside the scope of this rulemaking to implement the requirements of HB 16 and SB (Senate Bill) 3 and highlighted that POLR is intended to be a short-term solution to prevent service disruptions and not act as a substitute for competitively priced products. Joint REPs referred to PURA §39.001(a) which states "electric services and their prices should be deter-

mined by customer choices and the normal forces of competition" and that TLSC's proposals were contrary to the statutory mandate. Specifically, Joint REPS argued that to require the POLR rate be set at an average price as TLSC suggested would pressure the market towards convergence on the average price point, thus eradicating incentives to innovate or add value to retail electricity customers.

Commission Response

The commission declines to modify the rule in response to TLSC's comments. The commission agrees with Joint REPs that POLR is intended to function as a safety net to prevent service disruptions in certain situations, including mass transitions, and is not intended to act as a substitute for competitively priced products or pressure the market toward certain pricing outcomes or product types. The commission has also addressed this topic in response to comments on Question 1.

§25.43(m)(2) - Maximum Rate Formula

Paragraph §25.43(m)(2) establishes the maximum rate for POLR service charged by an LSP for each class of customer.

TEAM and ARM commented that a POLR rate that is too low will be contrary to the intent of POLR service as a short-term "last resort" and could interfere with the competitive market. Specifically, because PURA §39.107(g) caps the price for prepaid service at the POLR rate, TEAM and ARM argued that a low POLR rate may affect a REP's ability to offer prepaid pricing. TEAM further commented that POLR service must be offered even outside of mass transitions under PURA §39.106(c). Therefore, if POLR service rates are lower than market-based offers, VREPs may lose money on POLR service which may impact the provision of other products that incorporate POLR costs and pricing structure such as prepaid products.

TEAM emphasized that the POLR rate should be high enough to mitigate the risks taken on by the VREPs for providing POLR service. TEAM asserted that if the calculations in proposed §25.43(m)(2)(A) and §25.43(m)(2)(B) were applied to 2021, then the residential rate would be five percent lower than the result generated by the existing rule, and the small and medium non-residential rate would be the same. Conversely, if the proposed formula is applied to 2022, the POLR rates would be higher because of the outlier rates caused by Winter Storm Uri. TEAM and ARM argued that the proposed formula applied past September 2022 may produce lower POLR rates that would limit a REP's capability to offer other products, such as prepaid service.

Additionally, TEAM stated that the proposed POLR rate formula does not account for ancillary service costs, which have been significantly higher due to Winter Storm Uri. TEAM argued that, if ancillary service costs continue to be volatile in the future due to similar events, the POLR rate should include ancillary service charges as a variable.

Commission Response

The commission disagrees with TEAM that the proposed POLR rate formula does not account for ancillary service costs and declines to amend the proposed rule. Ancillary service costs are accounted for in the LSP energy charge variable for each customer class.

Medium Non-residential customers

TEAM and ARM maintained that HB 16's ban on real-time wholesale indexed products does not apply to medium non-residential customers. Therefore, medium non-residential customers should not be grouped with small non-residential customers, and the POLR rate formula for each should be structured differently. TEAM specifically proposed a separate LSP energy rate for medium non-residential customers. Under TEAM's proposal, the LSP customer charge for small non-residential customers would increase to 5¢ per kWh. The LSP customer charge for medium non-residential customers would remain at 2.5¢ per kWh.

OPUC opposed TEAM's recommendations for altering the POLR rate structure, stating that POLR service already costs more due to the inherent risk it poses. Further, OPUC argued, TEAM's proposal would increase an already high rate that likely exceeds the average market price. Finally, OPUC argued the POLR rate is generally paid by customers who, often through no fault of their own, are transitioned onto a POLR product. Therefore, OPUC requested the commission reject the proposal by TEAM to alter the POLR formula.

TLSC proposed the commission compare the results of other calculation methodologies with current or past POLR rates. TLSC referred to two alternative rate calculation methods: RTSPP Data Normalization and Weighted Average Energy Rate Charges. According to TLSC, RTSPP Data Normalization is representative of the rate year, discounts outliers and utilizes an adder to accurately reflect the retail rate. Weighted Average Energy Rate Charges, as explained by TLSC, is based on the weighted average energy rate charge in the load zone for a wholesale rate plus an adder to accurately reflect the retail rate.

Commission Response

The commission declines to implement TEAM's proposed rule language splitting small commercial customers and medium commercial customers from §25.43(m)(2)(B) into separate paragraphs. The commission has determined that the current rule adequately segments the customer categories and that only large customer categories should be exposed to hourly RTSPPs or ancillary service charges in the POLR rate formula and ancillary service charges in wholesale indexed products.

The commission declines to implement TLSC's proposals RTSPP Data Normalization and Weighted Average Energy Rate Charges as these methods would change the POLR rate to be more like a retail product, which is not its intended purpose. The commission refers to its responses under Question 1.

§25.43(m)(2)(A)(ii) and §25.43(m)(2)(B)(iii) - "LSP customer charge"

Clauses §25.43(m)(2)(A)(ii) and §25.43(m)(2)(B)(iii) contain the definition of "LSP customer charge" which is a constant of 6¢ for residential customers and 2.5¢ for small and medium non-residential customers.

TEAM and ARM made several recommendations for altering the POLR formula. Specifically, TEAM and ARM proposed increasing the "LSP customer charge" for residential customers to 9¢ from 6¢ and, for small commercial customers only, increasing the "LSP customer charge" to 5¢ from 2.5¢. ARM further argued that the increase to the LSP customer charge is necessary to ensure that LSPs can sufficiently recover costs incurred for providing POLR service to residential and small non-residential customer categories.

TLSC expressed skepticism about the LSP customer charge of 6¢ in §25.43(m)(2)(A)(ii) and stressed the basis for these calcu-

lations and assumptions should be documented and published for comment and amendment if appropriate.

TLSC opposed TEAM and ARM's proposals to increase the customer charge for residential customers from 6¢ to 9¢ per kWh in §25.43(m)(2)(A)(ii) and to set the energy charge floor at $7.25 per kWh. TLSC argued that, if TEAM and ARM's proposals were adopted, the lowest POLR rate possible would be 18.06¢ per kWh, which is unaffordable for most customers.

Commission Response

The commission declines to implement TEAM and ARM's proposals for "LSP customer charge" for residential and small commercial customers. The commission agrees with OPUC and TLSC that TEAM and ARM's recommendations would result in a maximum POLR rate for these customer segments that is unaffordable. The commission instead implements changes to these variables that protect customers from extreme rates and ensure cost recovery for REPS consistent the commission's responses to Question 1.

§25.43(m)(2)(A)(iii) and §25.43(m)(2)(B)(iv) - "LSP energy charge"

Clauses §25.43(m)(2)(A)(iii) and §25.43(m)(2)(B)(iv) define "LSP energy charge" for use as a variable in the formula calculating maximum rate for POLR service charged by an LSP for residential and small and medium commercial customer segments, respectively.

Proposed §25.43(m)(2)(A)(iii) and §25.43(m)(2)(B)(iv) changes the calculation of LSP energy charge from an hourly rate to a rate that is set annually. Within the calculation of the energy charge is a multiplier of 120 percent for residential customers and 125 percent for small and medium non-residential customers. TEAM advocated for increasing the 120% LSP energy charge multiplier for residential customers to 125% and including an additional provision applicable to residential and small commercial customers. If the average of the actual RTSPPs for the applicable load zone for the 30 days preceding the transition to a POLR rate is at least twice the historical average RTSPP, the additional provision would increase the multiplier to 175% and the base LSP energy charge would be calculated according to the historical average RTSPP multiplied by the number of kWhs the customer used. TLSC opposed TEAM's proposals to increase the multiplier from 120% to 125% for residential customers.

ARM suggested that the LSP customer charge increase be implemented with one of two proposed amendments. ARM's first proposal calculated the LSP energy charge as a rolling average of the RTSPP from the preceding 60 days with a 125% multiplier. ARM's second proposal maintained the language of the proposed rule but contained an additional trigger provision that would alter the calculation of "LSP energy charge" based on specific criteria. If the average RTSPP for the 30 days preceding the transition to POLR was twice the historical average RTSPP, then the LSP energy charge would include an additional multiplier. The multiplier would be the ratio of the preceding 30 days' average RTSPP to the historical average RTSPP.

TEAM and ARM recommended that the reference to "customer load zone" within the definition of "LSP energy charge" for residential and small commercial customers be modified to match the average charge calculation under §25.43(c)(15)(C), where the average POLR charge is determined based on the customer load zone "partially or wholly in the customer's TDU service area with highest average price." TEAM elaborated that each TDU area covers two to three load zones and that it is market standard for EFLs to be provided to customers based on the customer's TDU territory, and therefore "load zone" should be similarly specified. TEAM and ARM elaborated, arguing the current rule's method of using the highest of load zone averages is beneficial and that this change would ensure customer EFLs do not vary based on load zone within the same TDU territory and therefore be less confusing to customers as well as to REP call centers.

Commission Response

The commission agrees with TEAM and ARM that the reference to "customer load zone" within the definition of "LSP energy charge" defined in §25.43(m)(2)(A)(iii) and §25.43(m)(2)(B)(iv) be modified to "load zone partially or wholly in a service area" and adopts the recommended rule language. The commission declines to implement TEAM's and ARM's remaining proposals regarding the LSP energy charge. The commission agrees with OPUC and TLSC that TEAM's and ARM's recommendations would result in a maximum POLR rate for these customer segments that is unreasonable. The commission instead implements changes to these variables consistent with the commission's discussion of responses to Question 1.

Time period for LSP energy charge calculation

CCR suggested the commission consider having POLR price calculation based on the calendar year instead of what appears to be the state's fiscal year. CCR stated in both cases the "LSP energy charge" defined in §25.43(m)(2)(A)(iii) and §25.43(m)(2)(B)(iv) would be the average of the actual RTSPPs for the customer's load zone for the previous 12-month period ending December 31 of the preceding year multiplied by the number of kWhs the customer used during that billing period and further multiplied by 125%. CCR expressed that transitioning to a calendar year would simplify a customer's understanding of the rate calculations under §25.43(m)(2)(A) and §25.43(m)(2)(B), would harmonize with the requirements of §25.43(j), relating to the selection and service of REPs as LSPs, and ensure customers are provided he most up-to-date information. Joint REPs recommended that, if CCR's calendar year proposal is adopted, then EFL updates should be due on April 1 instead of December 31 in order to permit ERCOT to complete final settlement for December of the preceding year, which is 55 days after the operating day.

Commission Response

The commission disagrees with CCR's and Joint REP's recommendation to base the POLR price calculation on the calendar year. The timing of the current rule is to ensure the new POLR rate is available on January 1st to match the new POLR term every other year and therefore the commission declines to adopt CCR and Joint REP's proposed changes for "LSP energy charge" regarding the same.

For §25.43(m)(2)(A)(iii) only, Windrose recommended the LSP energy charge calculation use Intercontinental Exchange (ICE) data, specifically the ERCOT North 34KV Real-Time Peak Fixed Price Future contracts, as an index predictive of the short-term future market prices. The ICE-based variable recommended by Windrose would be a 30-day forward looking average. Windrose explained that when a REP receives customers switched through a mass transition to POLR then "the rational action a REP would take" is to acquire monthly short-term forward contracts to hedge the variable load created by the POLR-switched customers. Windrose asserts using an index predictive of future

prices is better than an approach using historical prices because with a "backward looking proposal there will always be the risk that market fundamentals are different, and the historical pricing will not allow a REP to cover their costs." Further, Windrose recommended the multiplier for the LSP energy charge be 200% to more fully account for other costs and peak-hour price spikes not already accounted for in the LSP energy charge calculation.

Joint REPs agreed with Windrose's recommendations that the energy charge component of the POLR rate be based on the short-term forward market on the Intercontinental Exchange by using the average price for the next 30 days for the ICE ERCOT North 345 kV Real-Time Peak Fixed Price Future contract, the multiplier of customer usage, and the 200% adder for non-energy costs such as losses, ancillary services, and other expenses. Joint REPs further stated if a POLR cap is adopted, Joint REPs recommended Windrose's proposed definition for §25.43(m)(2)(A)(iii) be considered for the maximum POLR cap and the minimum POLR cap be the calculation under the current version of §25.43(m)(2)(A)(iii).

Commission Response

The commission declines to adopt Windrose's proposal for "LSP energy charge." Windrose's recommendation offers no price certainty because it is based on forward prices. In implementing HB 16, the commission seeks to mitigate extreme variability in POLR rates. The commission also declines to accept Joint REPs' proposal to make Windrose's proposal the maximum POLR rate.

§25.43(m)(2)(A)(iv) and §25.43(m)(2)(B)(v) -- "Number of kWhs the customer used"

Clauses §25.43(m)(2)(A)(iv) and §25.43(m)(2)(B)(v) define "Number of kWhs the customer used" for use as a variable in the formula calculating maximum rate for POLR service charged by an LSP for residential and small non-residential customer segments, respectively. Proposed §25.43(m)(2)(A)(iv) and §25.43(m)(2)(B)(v) state "'Number of kWhs the customer used' is based on interval data."

ARM proposed a definition of "Number of kWhs the customer used" that would change the basis of the definition from 'interval data' for residential and small commercial customer segments to 'usage information provided by the TDU.' ARM contended that interval data is not relevant for the POLR rate formula because the POLR rate is not directly indexed to RTSPPs due to the changes imposed by the commissions proposed rule, or ARM's alternative rule. Therefore, ARM suggested that it is more accurate to state that usage information is provided by the TDU, not interval data, for residential and small commercial customer segments. TEAM recommended a virtually identical definition of "number of kWhs the customer used" and reorganization of §25.43(m)(2).

Commission Response

The commission agrees with ARM and TEAM that "interval data" may not necessarily be available from a non-standard meter. The commission amends the proposed rule to clarify that "Number of kWhs the customer used" is based on usage data provided to the POLR by the TDU.

§25.43(m)(4) - Good Cause Exception

Paragraph §25.43(m)(4) allows the LSP, for good cause, to adjust the rate applicable to a specific customer class prescribed in §25.43(m)(2) on an interim basis and after 10 business days of notice to the customer class, upon a showing by an LSP that the POLR rate as calculated is insufficient for cost recovery. Windrose recommended subsection §25.43(m)(4) be removed from the proposed rule as it prevents a future POLR rate from being truly ascertainable and effectively means that there is no known POLR rate. Windrose expanded its point with a hypothetical where the POLR rate is lower than the REP's cost to serve the customer. Specifically, Windrose stated that, to mitigate exposure to real time prices, REPs purchase forward wholesale power contracts to hedge fixed-price contracts sold to retail customers. Windrose argued that, by nature, POLR customers are "unexpected load" that a VREP has not fully accounted for. Windrose implied that the good cause exception diminishes the already limited certainty a VREP has about its allocation of POLR customers and prevents adequate risk mitigation by a VREP through the purchase of short-term forward contracts to hedge the variable load and set variable rate pricing.

Windrose also indicated that the current rule sets the POLR rate based on the wholesale price to ensure VREPs can recover such costs. Windrose expressed concern that in an event similar to Winter Storm Uri where wholesale prices spike, VREPs would argue that "load weighted real time price" is the necessary cost to recover in applying for the good cause exception in §25.43(m)(4). Windrose articulated that this would effectively turn the subsection into a "back door" to charge customers real-time costs of power, contrary to the intention of this rulemaking and therefore should be deleted.

Joint REPs opposed Windrose's recommendation to delete §25.43(m)(4) but acknowledged the concern. Joint REPs argued that deleting the good cause exception in §25.43(m)(4) effectively requires an LSP to potentially operate at a loss by taking on a variable number of customers on short notice, at rates that do not cover the prevailing costs of providing service. Joint REPs further commented that the requirement for each LSP to seek a good cause exception under §25.43(m)(4) in situations that warrant good cause would be resource intensive for LSPs and the commission, and instead could be mitigated by designing the POLR rate to account for risk. However Joint REPs contended that the "circuit breaker" provisions within §25.43(m)(4) requiring the adjusted rate to be on an interim basis and upon good cause shown to the commission, with 10 days of notice to customers are sufficient for unanticipated events.

Commission Response

The commission declines to implement Windrose's proposal to remove the good cause exception codified under §25.43(m)(4) for the reasons cited by Joint REPs.

§25.43(p)(13) and §25.43(p)(14) - REP Obligations and Prohibitions, ERCOT Rules for Identification of Customers Transferred to POLR Service

Subsection §25.43(p) details a REP's obligations in transitioning customers to POLR service. Paragraph §25.43(p)(13) prohibits a mass transition under §25.43(p) from superseding a customer-made switch request to a new REP if the request was made before the mass transition was initiated, and further requires that a customer-requested switch post-dating the mass transition be made on the next available switch date. Paragraph §25.43(p)(14) contains ERCOT-specific rules regarding identification of mass transitioned customers for a period of 60 days, termination identification based on the later of the first completed switch or end of the 60-day period, and an implementation timetable with requirements for ERCOT regarding system changes or new transactions.

ARM proposed amendments to §25.43(p)(13) on the basis that the rule addresses concerns that have since been resolved by advanced metering systems (AMS) that permit same day switching and have diminished costs related to physical meter readings. ARM argued that §25.43(p)(13) is now harmful to the customer's REP-of-choice as the rule requires customers be switched to the customer's REP-of-choice, who may be not expecting the additional customer and may not yet be financially prepared to serve that customer, rather than allowing the customer to continue to be switched to the POLR REP and then later be switched to the customer's REP-of-choice on the agreed upon date. ARM recommended that the customer's REP-of-choice be given the opportunity to proceed with the switch date as originally scheduled or advance the switch to the customer's chosen REP instead of the customer being switched to the POLR REP. ARM proposed draft language for §25.43(p)(13), replacing the language stating that "the switch must be made on the next available switch date" and replacing it with "the scheduled recipient REP shall be notified and given the opportunity to accelerate the switch date."

ARM also provided draft language for §25.43(p)(14) which struck the last sentence concerning the processing of the switch transaction as an "unprotected, out-of-cycle switch".

Commission Response

The commission agrees with ARM that AMS allows REPs the ability to offer same-day switches. However, the commission disagrees with ARM that REPs should have the option of allowing the customer to be transitioned to a VREP or POLR rather than honoring the customer's selection of REP. The commission adopts §25.43(p)(13) as proposed. The commission agrees with ARM's proposed amendment §25.43(p)(14) and amends the rule accordingly.

§25.43(t)(1) - ERCOT Customer Notice Requirements for POLR Transition

Subsection §25.43(t) prescribes the form, manner, and timing of notice to customers transitioned to POLR service and notice to the commission by ERCOT, the REP transitioning the customer, and the POLR provider. Paragraph §25.43(t)(1) prescribes the methods ERCOT must use to notify the customer of the customer's transition to POLR service and requires ERCOT to study the effectiveness of the prescribed notice methods used and report the results to the commission.

ARM recommended §25.43(t)(1) be amended to acknowledge that ERCOT may use different messaging for customers transitioned to a VREP during a POLR transition because these customers are served on a market-based month to month rate, rather than the POLR rate calculated under §25.43(m)(2).

Commission Response

The commission declines to adopt ARM's proposal for §25.43(t)(1). Whether a customer is served on a market-based month-to-month rate or the maximum POLR rate has no bearing on the form of notice. While the "language and format approved by the commission" may vary based on the rate type, the current rule language allows appropriate flexibility.

§25.43(t)(3)(B) - Pricing of POLR service

Subparagraph §25.43(t)(3)(B) requires the notice to include a description of the POLR provider's rate for service and, if the pricing of subsection §25.43(m)(2) is applicable, a statement that the price is generally higher than available competitive prices, that the price is unpredictable, and that the exact rate for each billing period must not be determined until the time the bill is prepared.

TEAM recommended removing language about the POLR rate being unpredictable and not determined until the bill is prepared or otherwise amending the language to be consistent with the final pricing formula determined in this rulemaking under §25.43(m)(2). TEAM specifically highlighted the requirement that "a statement that the price is generally higher than available competitive prices" be reviewed once the commission establishes the final pricing formula.

Commission Response

The commission agrees with TEAM that the formula in the adopted rule no longer should be described as "unpredictable" and amends the rule accordingly. The statement "a statement that the price is generally higher than available competitive prices" is an accurate description of the POLR rate and should remain in the notice.

§25.471(a) - General Provisions of Customer Protection Rules - concerning applicability

Paragraph §25.471(a)(3) applies minimum, mandatory customer protection rules to aggregators and REPs, and, where applicable, TDUs, registration agents, brokers, and power generation companies. Customers larger than 50 kW are eligible to waive a number of these rules. Proposed §25.471(a)(3) adds proposed §25.499 (relating to Acknowledgement of Risk Requirements for Certain Commercial Contracts) to the list of rules that a customer larger than 50 kW cannot agree to waive by contract.

ARM supported the proposed changes to rules applicable to customers other than residential and small commercial customers, as the changes provide certainty and will help ensure compliance.

TLSC alleged that some REPs adopt contract provisions that are contrary to PURA and commission rules. TLSC recommended amending §25.471(a)(4) to require that REPs "notify the commission of all offerings and certify that each published document is fully in compliance with statutory and regulatory requirements."

Commission Response

The commission declines to adopt TLSC's recommendation to amend §25.471(a)(4) require a REP to notify the commission of all offerings and certify that published REP documents comply with all statutory and regulatory requirements, because this would be overly burdensome for both REPs and commission staff. All products offered by a REP must already meet specific, minimum customer protection requirements detailed under Chapter 25, Subchapter B of this title as required by PURA §39.101, regardless of whether the REP has certified compliance. Further, requiring a REP to notify the commission of each new product would impose a cost on REPs without providing any additional customer protection. If, on its own initiative or in response to a complaint by a customer, commission staff desires to review a document produced by a REP, it can request that document under §25.485 (relating to Customer Access and Complaint Handling).

§25.475(a) - Applicability of Customer Protection Rules

Section §25.475 prescribes customer protection rules applicable to REPs and general requirements and information disclosures applicable to residential and small commercial customers. Specifically, §25.475 lists notice and information disclosure re-

quirements for contracts with residential and small commercial customers for fixed rate products and non-fixed rate products.

Proposed §25.475(a) details the requirements applying to REPs and aggregators in marketing and providing service to residential and small commercial customers, and further specifies that the section applies to brokers, aggregators, and TDUs only when specifically stated. Additionally, the proposed version indicates that the section is effective for contracts entered into on or after September 1, 2021, and that contracts entered into prior must comply with the version of §25.475 effective at the time of execution.

TLSC opposed the proposed changes to §25.475(a) requiring compliance for brokers and aggregators only when specified. TLSC contended that, like REPS, the §25.475 rules should universally apply to brokers and aggregators.

Commission Response

The commission declines to apply the entirety of §25.475 to brokers and aggregators as recommended by TLSC as such a sweeping change of the rule's applicability is beyond the scope of this rulemaking project. Further, the commission notes that each of these entities plays different roles in the market, requiring different customer protection rules. Brokerage service customer protection rules, for example, are codified separately under §25.486 (relating to Customer Protections for Brokerage Services).

Effective date

TEAM recommended that §25.475(a) clarify that PURA §39.112, via Section 3 of HB 16, only applies to new enrollments or re-enrollments on or after September 1, 2021, not existing customers and provided rule language consistent with its proposal. Accordingly, TEAM expressed concern that the rule will apply to pre-existing contracts and maintained that expiration dates in the proposed rule should not affect existing customer contracts. TEAM maintained that requiring REPs to craft an expiration notice system, no matter where the customer is in their existing contract, would be onerous. TEAM emphasized that any rule exceeding the scope of HB16 should only be effective on or after the effective rule date and further argued that any changes related to SB 3 should not be applied until the effective date of the rulemaking, and instead should be effective no later than December 1, 2021.

TEAM proposed language for §25.475(a) that would make the rule apply only to brokers and aggregators when specifically indicated and would be effective for new contracts beginning after the rule is effective, with a three-month window for implementation. Additionally, TEAM and ARM recommended that any contracts created prior to the effective rule date would adhere to current rule requirements. ARM specified that the applicability in wholesale indexed product ban for residential and small commercial customers under §25.475(c)(2)(F), acknowledgment of wholesale pricing risk for larger customers under §25.499, and increased contract notice expiration requirements for residential term contracts under §25.475(c)(2)(D) and (E) and §25.475(e) should track HB 16 to be effective only for contracts entered into, on or after September 1, 2021.

ARM additionally recommended that, for rule requirements under §25.475 and §25.499 beyond the scope of HB 16, be effective 120 days after this rulemaking to provide REPs time to implement. ARM's recommended language was also included in redlines provided by Joint REPs.

Commission Response

The commission agrees with Joint REPs that REPs need time to implement modifications to the rule that were adopted at the discretion of the commission that effect contract documents. However, the commission disagrees that requirements mandated by statute merit a delayed effective date. Further, the clarifications that the commission made to the definitions of fixed price products and price are effective immediately.

The commission adds language clarifying that the "requirements for an additional notice to residential customers of contract expiration is effective for contracts entered into on or after September 1, 2021. REPs must comply with the requirements set forth in §25.475(e)(2)(B)(ii), (e)(2)(C)(iii), (v), (vi), (vii), (h)(4), (h)(6)(C), and the requirements set forth under §25.475(e)(1) for contracts entered into with small commercial customers by April 1, 2022. Contracts entered into prior to the effective date of these provisions must comply with the provisions of this section in effect at the time the contracts were executed."

The commission also notes that the ban on offering wholesale indexed products to residential and small commercial customers under §25.475(c)(3)(F) was effective via statute on September 1, 2021, and the ban on offering indexed products under that subparagraph is effective on February 1, 2022. The commission, however, addresses the deadlines by adding language to §25.475(c)(3)(F).

The commission does not provide a delayed effective date for §25.475(c)(3)(G) or (j) as these provisions were removed from the rule.

§25.475(b)(1) - (2) - Contract and Contract Documents

Paragraph §25.475(b)(2) defines the term "Contract" as inclusive of the terms of service, EFL, and YRAC. Proposed §25.475(b)(2) adds the AOR to the definition. Proposed §25.475(b)(2) defines the term "Contract Documents" as the terms of service, EFL, YRAC, and, if applicable, the AOR.

ARM and TEAM opposed requiring AORs under §25.475(j) for residential and small commercial customers who purchase a product with a separate assessment of ancillary service charges and instead recommended inclusion of the AOR in the EFL. ARM and TEAM therefore requested the removal of AOR references under §25.475(b)(1) and included a proposed revision to the definition removing the AOR reference.

CCR and Joint REPs proposed inclusion of a reference to the Prepaid Disclosure Statement (PDS) in the definitions of both contract and contract documents and provided recommended language.

Commission Response

The commission removes the reference to AOR in both the definitions of contract and contract documents because the commission is prohibiting each of the products requiring an AOR under the proposed rule. The commission agrees with CCR and Joint REPs that PDS should be included in both definitions and adopts Joint Reps recommended language.

§25.475(b)(5) and (8) - Definitions of Fixed Rate Product & Price

Paragraphs §25.475(b)(5) and §25.475(b)(8) respectively provide the definitions of "fixed rate product" and "price." Under existing §25.475(b)(5), a fixed rate product is a "retail electric product...for which the price (including all recurring charges) for each billing period of the contract term is the same throughout the contract term, except that the price may vary from the disclosed amount solely to reflect actual changes in TDU charges,

changes to [ERCOT administrative fees] or changes resulting from federal, state or local laws that impose new or modified fees or costs on a REP that are beyond the REP's control." Under existing §25.475(b)(8), price is defined as the "cost for a retail electric product that includes all recurring charges [and excluding applicable taxes]." Proposed §25.475(b)(5) and (8) clarify that ancillary services are included in both the definition of price and again, in "price" as it is used in the definition of fixed rate product. The commission's proposed changes to the definitions of "price" and "fixed rate product" were intended to ensure that REPs are prohibited from passing through the cost of ancillary services to customers enrolled in fixed rate products. TEAM, ARM, CCR, Octopus Energy, and Joint REPs opposed the commission's proposed changes, but differed in whether they objected to the prohibition on the pass through of existing ancillary service charges or new or modified ancillary service charges.

Existing Ancillary Service Charges

CCR argued the existing definition of "fixed rate product" allows REPs to pass through costs "beyond the REP's control" such as ERCOT charges and that conversely, the proposed rule forces REPs to "bundle" ERCOT charges into its generation costs. CCR maintained that, if the commission requires REPs to offer a "fixed price" inclusive of ancillary service charges without permitting REPs to pass through such costs to customers, REPs will likely cease offering fixed rate products.

CCR argued that the amount of ancillary service costs a REP will be responsible for is unknown because ERCOT allocates each load serving entity a load share of the total ancillary services it procures and that only once ERCOT has procured all ancillary services, which may vary daily, can a REP have certainty about the amount and type of ancillary services ERCOT will charge the REP. As such, under the proposed rule it is difficult for a REP to design a fixed rate product that adequately accounts for a REP's ancillary service charges and therefore, a REP cannot include ancillary service charges as part of the "price" for a fixed rate product on the EFL or otherwise recoup that cost. CCR opined that the current rules allow charges that are not within the REP's control to be passed through to the customer and in contrast, the proposed rule prohibits the pass through of ancillary service charges for fixed rate products, which in turn will result in a REP absorbing as a loss any increase in costs not covered by the fixed amount prescribed on the EFL at the outset of the contract. Therefore, in CCR's view, components of an ASC that are not within a REP's control should be eligible to be passed through to customers and that conversely, the proposed rule erroneously concludes that ancillary service charges are a generation expense within the control of the REP and not part of the ERCOT fee charged to loads.

CCR suggested amending the definition of "fixed rate product" to disclose what is "fixed" depending on whether a REP discloses the total price ("bundled") or itemizes all or some of cost components of the price ("unbundled") on the EFL. If a REP offers a "bundle" then the rate is inclusive of generation charges, TDU charges, and ERCOT charges and pass-through of any increases to these costs would be prohibited. However, if an "unbundled" product is offered, the EFL will include a "fixed" generation portion, while other line item costs are eligible to be passed through to customers.

OPUC, ARM, and TEAM each filed comments reflecting a different understanding of current law than that espoused by CCR with regards to whether REPs are currently permitted to pass through changes in existing ancillary service charges to residential and small commercial customers enrolled in a fixed rate product.

OPUC expressed indifference to the proposed definition because, in OPUC's view, ancillary service charges are already not permitted to be passed through to customers, and the proposed definitional changes to "fixed rate product" and "price" will have no effect on what has already been established by the commission.

ARM and TEAM drew a distinction between variations in existing ancillary service prices, and changes to the process ERCOT uses for determining the quantity of ancillary services acquired or the creation of new ancillary service products. These commenters argue that existing ancillary services have historically been treated as recurring charges that are properly included in the price of a fixed indexed product but that changes to the quantity of ancillary services acquired or the creation of new ancillary service products qualify as regulatory actions that would permit a variation in price charged to the customer. OPUC agreed that ancillary service charges were recurring charges.

TEAM also argued that the proposed rule creates ambiguity as to what quantity or type of ancillary service charges must be carried by load service entities and REPs.

Joint REPs opposed CCR's proposed amendments for the definition of "fixed rate product" to provide for separate descriptions and pass-through criteria for "bundled" and "unbundled" plans, because it will cause confusion among customers and current rules already require disclosure by REPs as to which terms of a product can and cannot change in the EFLs.

Commission Response

The commission declines to modify the definition of fixed rate product to provide for separate descriptions and pass-through criteria for bundled and unbundled plans, as requested by CCR, as such a delineation would be superfluous. The price of a fixed rate product is not permitted to vary based on any changes in ancillary service charges, unless determined by the commission, regardless of whether they are presented in a bundled or unbundled manner. The commission also agrees with Joint REPs that this proposal would cause confusion among customers regarding which aspects of their rates were fixed.

The commission disagrees with CCR's depiction of ancillary service charges as part of an ERCOT administrative fee that can be passed through to customers. In Project Number 35768, Rulemaking Relating to Retail Electric Provider Disclosures to Customers, the commission specifically "clarifie[d] that for the fixed rate product, ERCOT fees include fees approved by the commission and charged to loads, such as the ERCOT administrative fee ... [and under] this definition, ERCOT fees would not include ancillary services...". The commission agrees with TEAM, ARM, and OPUC that ancillary service charges should be treated as recurring charges that are fixed in the context of a fixed rate product.

The commission agrees with TEAM that the proposed rule does not clearly delineate between which ancillary service charges are not permitted to cause the price of a fixed rate product to vary from the disclosed amount. To clarify that, unless determined by the commission, REPs are not permitted to pass through any variations in ancillary service charges, the commission adds language to paragraph (b)(5): "The price may not vary from the disclosed amount to reflect changes in ancillary service charges unless the Commission expressly designates a specific type of

ancillary service product as incurring charges beyond the REP's control for a customer's existing contract."

New or Modified Ancillary Service Charges

TEAM, ARM, and CCR each argued REPs should be permitted to modify the price of fixed rate products when ERCOT or the commission introduce modified or new ancillary service products. ARM noted that "there is an important distinction between variations in ancillary services prices and variations in the quantity of ancillary services obtained (or suite of ancillary services procured)." ARM elaborated, stating that "variations in the price of ancillary service charges [may not be passed through to customers], but changes to ERCOT's process for determining the quantity of ancillary services to be obtained or the creation of new ancillary service products that result in charges assessed to load serving entities (such as REPs) arguably qualify as regulatory actions that would permit a price change under to §25.475(d)(2)(B). Further, ARM characterized ERCOT's procurement of a dramatically increased quantity of ancillary services as regulatory action that should be eligible for pass-through under §25.475(d)(2)(B).

In the alternative, ARM recommended clarifying the reference to ancillary service charges in the proposed definitions to distinguish which ancillary service costs that a REP can and cannot reasonably control. ARM stated that REPs should not "unilaterally bear policy-driven risks that are beyond their control."

TEAM argued that changing the definition of "fixed rate product" will only cause confusion as the proposed rule differs from the statutory definition of "fixed rate product" under PURA §39.112(a), which was not changed by HB 16. Additionally, TEAM stated the meaning of "ancillary services" has been in flux at the commission in terms of quantity or type of ancillary service costs LSEs (Load Serving Entities) and REPs are responsible for. Specifically, TEAM argued that ancillary services were "historically designed to cover unanticipated forecast error in the amount of load on the system and short-term risk of the sudden loss of a generation unit" but recent action by ERCOT using ancillary services as a "reserve substitute" has changed the meaning of ancillary services in practice. TEAM concluded that if ERCOT creates a new cost or fee beyond REP's control, and labels it an ancillary service charge, REPs should not be prohibited from passing through that cost.

TLSC opposed ARM, TEAM, and CCR's recommendations to remove ancillary service charges from the proposed definitions of "fixed rate product" and thus permit ancillary service charges to be passed through to customers. TLSC argued that this would mean REPs would be able to charge fees additional to the "fixed" price. TLSC maintained that consumers may be misled by a rate that passes through ancillary service charges as being lower than it actually is. Accordingly, TLSC reasoned that REPs, not the consumer, should bear "financial risk in the market" by hedging wholesale prices.

Commission Response

As previously stated, the commission modifies the definition of fixed rate product to clarify that "[t]he price may not vary from the disclosed amount to reflect changes in ancillary service charges unless the commission expressly designates a specific type of ancillary service product as incurring charges beyond the REP's control for a customer's existing contract." The commission declines to adopt ARM's recommendation for distinguishing between ancillary service costs that a REP can and cannot reasonably control in the proposed definition of "fixed rate product" and "price" or to draw a distinction between existing and new or modified ancillary service charges. Such distinctions would not effectuate the commission's customer protection goal of insulating customers from hazardous price increases as whatever portion of ancillary service charges that may not be known is the portion most subject to volatility due to outlier events. The added language to the definition of "fixed rate product" specifies that the commission, in its discretion, may review whether costs outside of a REPs control incurred for ancillary service products may be passed through in the price for a fixed rate product in existing customer contracts. The commission will review costs associated with ancillary service products for pass through eligibility to balance customer protection interests and the risk concerns of REPs.

Ancillary service charges are a necessary cost that is required to maintain the safety and reliability of the electric grid, and while the commission recognizes that these costs may be challenging for REPs to predict with accuracy, REPs are in a significantly better position to do so than residential or small commercial customers and have access to a much wider array of financial tools to manage those risks. The review process implemented by the commission for ancillary service products substantially addresses the commenters' concerns by ensuring that, prior to implementation, charges associated with new ancillary service product are eligible for review by the commission on a case-by-case basis to determine if they are appropriate for pass through. The commission understands that forward-looking certainty is important for REPs to obtain financing and develop forward-looking business models. As a result, the commission has determined that such an ancillary service review process is necessary in order to determine the effect that upcoming market design changes will have on the REP community and consumers. The commission emphasizes that it will be thoughtful about the assignment of any extraordinary costs but also require the REP community to demonstrate the necessity of pass through eligibility for each ancillary service product. The commission wants to account for, on a case-by-case basis, whether pass through is warranted, and, if so, whether full or partial pass through is necessary.

The commission also disagrees with TEAM that not allowing the price of fixed rate products to vary due to changes in ancillary service costs is inconsistent with statute. The commission acknowledges that the statutory definition for fixed rate product in PURA §39.112(a) aligns with the existing definition in the commission's rules, but PURA §39.112(k) specifically states that "[n]o provision in this section shall be construed to prohibit the commission from adopting rules that would provide a greater degree of customer protection." Moreover, under PURA §39.101(a)(1) "the commission shall ensure that retail electric customers are established that entitle a customer to... safe, reliable, and reasonably priced electricity" and under PURA §39.101(b)(5) and (6) a customer is entitled "to receive sufficient information to make an informed choice of service provider" and "to be protected from unfair, misleading, or deceptive practices."

Similar to its analysis for prohibiting indexed rate products under Question 2 above, the commission finds that allowing REPs to modify the price of a fixed rate product based on changes in costs associated with ancillary service charges does not ensure that customers are entitled to reliable and reasonably priced electricity, nor - by the REPs' own admission - do customers have sufficient information to make an informed choice of provider if individual REPs may elect to pass these costs through to customers directly. Lastly, while the commission recognizes that REPs are

not misleading or deceptive in attempting to pass through ancillary service charges or modify the rate of fixed rate products in response to changes in ancillary service costs, it is fundamentally unfair for customers to bear an unexpected, unknown cost that could be exponentially higher than what is expected upon signing of a contract for a fixed rate product. Including ancillary service charges in the definitions of "fixed rate product" and "price," and thus preventing ancillary service charges from being passed through to customers, is neither a ban on REPs offering fixed rate products nor an unreasonable restraint on cost recovery by REPs. The commission finds that these proposed definitional changes and resulting effects on fixed rate products are "both practical and limited so as to impose the least impact on competition" as required by PURA § 39.001(d).

§25.475(c) - General Retail Electric Provider requirements

Subsection §25.475(c) concerns the general and specific contract requirements and general information disclosure requirements a REP must provide customers in their communications with said customers. Subsection §25.475(c) also contains website requirements for REPs, concerning specific information that must be available on REP websites.

CCR recommended simplifying language referring to documents such as terms of service, YRAC, EFL, the AOR to "contract documents" because the proposed language excludes the PDS.

Commission Response

The commission declines to simplify references to the terms of service, YRAC, EFL, and AOR to "contract documents." Additionally, distinction among the documents is necessary for specific requirements for each document within §25.475 and reference elsewhere in the rules. The commission has adopted CCR's and Joint REP's proposal to include the PDS in the definition of "Contract documents" under §25.475(b)(2). The commission adds references to PDS as appropriate throughout this subsection.

§25.475(c)(2)(A) - General Contracting Requirements

Subparagraph §25.475(c)(2)(A) concerns required contract documents and their formatting.

TEAM and ARM suggested removing references to AORs from the proposed language. ARM recommended requiring AOR within EFLs and removing references to AOR in §25.475(c)(2)(A) since they would no longer be needed with their recommendation. TEAM recommended the removal of AOR language from §25.475 entirely and alternatively also recommended modifying the proposed rule to require an AOR in the EFL.

Commission Response

The commission removes all references to AOR in 25.475, consistent with its decisions to prohibit the offering of indexed products to residential and small commercial customers and prohibit the pass through of ancillary service charges to these customers.

§25.475(c)(3)(F) and §25.475(c)(3)(G) - Specific Contracting Requirements

Proposed §25.475(c)(3)(F) concerns a REP, aggregator, or broker's ability to enroll a residential or small commercial customer in a wholesale indexed product.

Proposed §25.475(c)(3)(G) concerns a REP, aggregator, or broker's ability to enroll a customer that is not a residential or small commercial customer in a wholesale indexed product.

TLSC recommended the proposed subparagraph §25.475(c)(3)(F) prohibit all indexed products as well as all products that pass through ancillary service charges. Octopus Energy, TEAM and CCR oppose the prohibition of indexed plans and plans with ancillary service pass through charges for residential and small commercial customers. CCR, TEAM, and TLSC recommended deleting some or all of proposed §25.475(c)(3)(G) and Octopus agreed in reply. CCR and TEAM recommended striking the subparagraph in its entirety. CCR argued that the proposed subparagraph is beyond the scope of HB 16. OPUC disagreed with CCR, replying that placing restrictions or eliminating indexed products is well within the commission's authority. Octopus recommended "appropriate safeguards" for an indexed product rather than a complete ban. Robert Borlick commented "that a ban of all indexed products would reduce demand response and reliability of the ERCOT grid" and Octopus agreed in reply. TLSC commented that most customers lack the knowledge or the resources to monitor ERCOT market pricing or ancillary service charges. OPUC agreed. OPUC disagreed with CCR, TEAM and Octopus Energy's opposition to prohibition of indexed plans and plans with ancillary service pass through charges for residential and small commercial customers.

TLSC recommended the deletion of the subsection "concerning the customer's acknowledgement of risk." ARM and TEAM suggested modifying the proposed subparagraph to permit the placement of the AOR in the EFL. TEAM made this suggestion in the alternative, if the commission did not strike the language.

Commission Response

The commission agrees with TLSC's and OPUC's recommendation and adopts language consistent with a comprehensive ban on wholesale indexed products and products that pass-through ancillary service charges to residential or small non-residential customers. The commission disagrees with Octopus Energy, TEAM, and CCR and declines to adopt its proposals for the rule. The comprehensive discussion of this decision is found under the commission response to comments on Question 2.

The commission also adds language clarifying when these prohibitions take effect, as discussed under §25.475(a) above.

Proposed §25.475(e)(1) - Notice Timeline for Expiration of a Non-Fixed Rate Product

Proposed §25.475(e) encompasses contract expiration and renewal offers. The rule dictates what information a REP is required to provide a customer, under which circumstances and when such information needs to be sent to customers. Proposed §25.475(e)(1) addresses the notice a REP must provide a customer regarding the expiration of a non-fixed rate product and a REP's obligation should they fail to provide such notice.

TEAM opposed the application of fixed rate product expiration notice requirements under proposed §25.475(e)(1) to small commercial customers because doing so would be outside the scope of HB 16.

ARM and TEAM proposed clarifying proposed §25.475(e)(1) to conform to the language of HB 16. Specifically, TEAM suggested adding language to the paragraph that would allow contract expiration notices to be sent electronically as stated in proposed §25.475(e)(2)(B).

Commission Response

The commission strikes proposed paragraph (e)(1) from the adopted rule, as it is no longer necessary. All variable price products are month-to-month, and non-fixed rate term products are no longer permitted consistent with the commission's decision to eliminate indexed products for residential and small commercial customers.

Proposed §25.475(e)(2)(A); Adopted §25.475(e)(2)(A) - Notice Timeline for Fixed Rate Products

Proposed §25.475(e)(2) addresses the notice a REP must provide a customer regarding the expiration of a fixed rate product and a REP's obligation should they fail to provide such notice.

Proposed §25.475(e)(2)(A) establishes the form and manner of expiration notices to customers subscribing to fixed rate products.

TLSC supported the proposed changes to the notice timeline for fixed rate products in proposed §25.475(e)(2).

ARM opposed the application of contract expiration notice provisions to small commercial customers because it would be outside the scope of HB 16 and requested that small commercial customers not be included in the adopted rule. Alternatively, ARM suggested changing the language of subparagraph proposed §25.475(e)(2)(A) to allow REPs to send the final contract expiration notice to a small commercial customer 14 days prior to the contract expiration date.

ARM and TEAM also recommended permitting REPs to send the first contract expiration notice up to three months prior to the contract end date if the contract is for a term of 12 months or longer, as three months would encompass the last third of the contract term. Octopus Energy agreed. In the alternative, ARM suggested amending the preamble of proposed §25.475(e)(2)(A) to provide for this flexibility.

Octopus Energy recommended requiring two additional notices at two months and one month prior to the end date of the contract. If these two additional notices are required, Octopus also recommends limiting a REP's option to extend a contract to three months or less, should the REP fail to provide appropriate notice of the original contract end date.

Commission Response

The commission disagrees with ARM and TEAM that contract expiration notice provisions should not apply to small commercial customers. As detailed in commission responses to Question 1, Question 2, §25.43(m)(2), and §25.475(b)(5), the commission, in its discretion, has gone beyond the mandatory minimum requirements of H.B. 16 and S.B. 3 pursuant to its statutory authority as the agency charged with regulation of the electric market. However, the commission acknowledges the prudence expressed in commenters' recommendations and adopts ARM's proposal permitting a REP to send the final contract expiration notice to a small commercial customer 14 days prior to the contract expiration date. The commission further adopts ARM and TEAM's proposal, supported by Octopus Energy, to send the first contract expiration notice up to three months prior to the contract end date if the contract is for a term of 12 months or longer and amends §25.475(e)(1)(A) accordingly. The commission declines to adopt Octopus Energy's recommendations for two additional notice requirements for two months and one month prior to the end date of the contract as ARM and TEAM's proposal substantively addresses this concern with a 12-month threshold.

Proposed §25.475(e)(2)(C); Adopted §25.475(e)(2)(C) - Additional Means of Providing Notice

Proposed §25.475(e)(2)(C) dictates a REP's obligation if the notice timeline for expiration of a fixed rate product is not met and the customer does not select another retail electric product before the expiration of the fixed rate contract term.

ARM commented that proposed §25.475(e)(2)(C) should be deleted as it is duplicative of proposed §25.475(e)(3)(E). TEAM suggested clarifying proposed §25.475(e)(2)(C) to conform to proposed §25.475(e)(3)(E) to specify that "sufficient expiration notice' means the final (contract expiration notice) and not that all three (contract expiration notices) must first be sent" ARM also suggested this in the alternative to deleting proposed §25.475(e)(2)(C).

Octopus Energy strongly supported the changes to the notice REPs must provide customers regarding the termination of a fixed rate product. Octopus Energy proposed clarifying proposed §25.475(e)(2)(C) concerning how long a REP must continue serve to a customer under the pricing terms of a fixed rate product if a REP makes an error providing the expiration notice during the last third of the customer's fixed rate contract period.

Joint REPs opposed Octopus Energy's recommendation for contract expiration notice, arguing it may be harmful in practice. Joint REPs recommend including an explanation in the preamble to clarify that the requirement in proposed §25.475(e)(2)(C) is not intended to allow for REPs to avoid sending the contract expiration notice to a customer by continuing to serve such a customer on a fixed rate product.

Commission Response

The commission adopts ARM's and TEAM's proposal for clarifying "sufficient expiration notice" in §25.475(e)(1)(C) to specify the final contract expiration notice and not that all three contract expiration notices must first be sent in order to conform with §25.475(e)(2)(E).

The commission declines to adopt Octopus Energy's proposal for §25.475(e)(1)(C). The proposed rule appropriately balances the obligation of a REP to provide required notice to a customer with the right of a customer to select another retail electric product.

The commission agrees with Joint REPs that §25.475(e)(1)(C) is not intended to permit REPs to continue to serve a customer on a fixed rate product by failing to issue contract expiration notices to customers.

The commission agrees with Octopus Energy's recommendation limiting REPs to extend a contract by a period not exceeding three months should the REP fail to provide appropriate notice of the original contract end date and amends the rule accordingly.

Proposed §25.475(e)(3)(A) and §25.475(e)(3)(C)(vi); Adopted §25.475(e)(2)(A) and §25.475(e)(2)(C)(vi) - Contract Expiration

Paragraph §25.475(e)(3) reflects REP's responsibilities to a customer when a contract is reaching its expiration date, including notice and information requirements. Proposed §25.475(e)(3)(A) details the procedure a REP must follow if a customer takes no action in response to the final notice of contract expiration. Proposed §25.475(e)(3)(B) and its subsections prescribe the requirements and form and content of a customer's contract expiration notice.

Octopus Energy recommended clarifying proposed §25.475(e)(3)(A) to require REPs to provide monthly notice of the price applicable to a default renewal product before that product goes into effect. To do this, Octopus Energy recommended changing proposed §25.475(e)(3)(A) to require REPs to provide notice of the price a customer will pay if they default to the renewal prices no later than 24 to 72 hours before the rate is applicable unless the customer is on a daily or hourly index. In addition, Octopus Energy suggested making this price notice a requirement for "any variable price product sold to residential and small commercial customers, as well as customers who rolled onto such a product prior to the effective date of HB 16."

Joint REPs opposed Octopus Energy's recommendation for price disclosure because it is "unnecessary, impractical" and goes beyond the scope of HB 16. Joint REPs further commented that REPs have existing obligations to provide notice of price to customers under §25.475 and a product's price is not known until a customer's usage is known and the contract is towards its end.

ARM and TEAM commented that the removal of the word "visible" from proposed §25.475(e)(3)(B)(i) may have been in error. ARM suggested the appropriate word to remove from that subparagraph would have been "readily." If this was the case, ARM supported the change, and this support would also be applicable to the same change in proposed §25.475(e)(3)(B)(ii) and §25.475(e)(3)(B)(iii) as well. TEAM recommended including in proposed §25.475(e)(3)(C)(vi) language like that of proposed §25.475(e)(3)(C)(v) and proposed §25.475 (e)(3)(C)(vii) that clarifies the information required in the final notice.

Commission Response

The commission declines to adopt Octopus Energy's recommendations for §25.475(e)(2)(A) as it is beyond the scope of this rulemaking and agrees with Joint REPs regarding the same. The commission agrees with ARM and TEAM and adopts their proposed change for §25.475(e)(2)(B)(i), removing the word "readily" and replacing it with "visible" in conformity with §25.475(e)(2)(B)(ii) and §25.475(e)(2)(B)(iii).

The commission agrees with TEAM and adopts their proposed change to add "The final notice provided pursuant to subsection (e)(3) must include" to §25.475(e)(2)(C)(vi) for conformity with §25.475(e)(2)(C)(v) and §25.475(e)(2)(C)(vii).

Proposed §25.475(e)(4); Adopted §25.475(e)(3) - Affirmative Consent

Paragraph §25.475(e)(4) prescribes how a customer may be re-enrolled with the REP for service with the same product under which the customer is currently receiving service, or a different product, and what information must be sent to a customer in doing so.

ARM and TEAM recommended removing the reference to the AOR as a separate document in proposed §25.475(e)(4)(C). In the alternative TEAM suggested including the AOR in the EFL.

Commission Response

The commission removes the reference to AORs as requested, as AORs are no longer necessary in accordance with the commission's decision to prohibit the offering of indexed products to residential and small commercial customers.

§25.475(h)(4) - TDU Load Shed Procedures

§25.475(h) dictates the specificity required in the Your Rights as a Customer (YRAC) disclosure. Proposed §25.475(h)(4) requires that a TDU develop load shed procedures on or before September 1, 2021. The YRAC document detail such procedures and identifies for customers where more detailed information on the same can be found.

TLSC requested YRACs and terms of services to be reviewed for compliance with commission rules upon being posted on Power to Choose. TEAM requested the commission assist utilities in creating a standard load shedding procedure. Additionally, TEAM requested assistance with creating conformity in particular areas, even if the commission believes each region should have different standards. Joint TDUs reported having already created a template for a "concise, standardized communication discharging the TDU's obligations under §25.475(h)(4) that each TDU will provide each REP and post on the TDU's website." Joint TDUs believed they have already fulfilled their obligation to communicate the load shed procedures, along with information required by S.B. 3. Additionally, Joint TDUs believed the omission of a formal review and approval process is inherent and proper, because TDUs are required to communicate their own respective procedures on load shed. Joint TDUs requested a reasonable period to comply with the new rule and asserted a September 1, 2021, deadline was inappropriate in that it is retroactive. TEAM also requested an opportunity for REPs to review and comment on load shed procedures prior to the rule adoption. Joint TDUs acknowledged they would include this documentation on their respective websites but doing so would only be beneficial for customers who have consistent computer access.

TLSC requested the commission not assist TDUs with creating a document because it would alleviate legal liability for providing reliable power. TLSC requested transparency of the process and additional information that provides information of load shedding priorities for each address. TLSC believed this information is important for critical care and chronically conditioned customers.

TLSC listed certain types of information they would like to see included in the periodic notice of load shed procedures: notification of critical care and chronic condition customers twice yearly, how involuntary load shedding affects these individual's power supply, and safety nets created by REPs and utilities alike, along with a phone number to communicate with a knowledgeable individual in case of an unplanned outage. TLSC believed the current TDU draft plan is insufficient.

Commission Response

The commission disagrees with TLSC's recommendation for the commission to review YRACs and terms of service documents simultaneously after being posted on the Power to Choose website for similar reasons as stated under heading §25.471(a). Imposing a requirement for the commission to review the YRACs and terms of service documents upon posting to the Power to Choose website is out of scope of this rulemaking.

The commission finds that TEAM's proposal for the commission to assist utilities in creating a standard load shedding procedure is beyond the scope of this rulemaking.

The commission agrees with Joint TDUs and TEAM that a September 1, 2021, effective date for compliance with §25.475(h)(4) is inappropriate. However, the commission notes TDUs are required to comply with §17.003(d-1) to the extent possible or practicable as of September 1, 2021.

§25.479 - Issuance and Format of Bills

Section §25.479 concerns the required contents of bills and the frequency and delivery of such bills. Subparagraph §25.479(c)(1)(S) requires a bill to a residential customer list the Power to Choose website in 12-point font or larger on the first page of the bill. Proposed §25.479(d) requires a REP to provide public service notices to its customers, including load shed procedures, a list of critical customers and applications for the same, and recommendations to customers to reduce electricity use during load shed.

TLSC expressed concern for residential customers who lack internet access being able to reach the Power to Choose website as specified in §25.479(c)(1)(S). Due to this concern TLSC recommended adding the Power to Choose phone number to the §25.479 (c)(1)(S) required information for residential customers.

ARM and TEAM expressed concerns about the timeline for public service notices in §25.479 (d)(1) - (4). Because of hurricane messaging requirements in May to November, ARM and TEAM proposed changing the public service notice requirements to April and December with an allowance for electronic communication.

ARM also commented that service notice requirements in §25.479(d) are similar to the requirements that §25.479(h)(4) would add to the YRAC documents. Therefore, ARM recommended changing §25.479(d)(2) to allow REPs to direct customers to a website maintained for purposes of §25.479(h)(4).

Commission Response

The commission disagrees with TLSC's recommendation for §25.479(c)(1)(S) to change the rule language to include the Power to Choose phone number. The required language is specified in PURA §39.116.

The commission disagrees with ARM's and TEAM's recommendation to change §25.479(d)(1) - (4) to require REPs to provide information to customers in April and December as opposed to April and October. The commission's selection of April and October is intended to allow customers sufficient time in advance of the summer and winter seasons to apply for critical care status or make other necessary arrangements. This goal supersedes ARM's and TEAM's goal to make the messaging cycle more convenient for their implementation. The commission agrees with ARM that §25.479(d)(2) should reference the YRAC documents detailing critical customers under §25.479(h)(4) and amends the rule accordingly.

§25.485(c) - Regarding Complaint Handling

Subsection §25.485(c) addresses a customer's ability to make a formal or informal complaint and a REPs ability to require alternative dispute resolution in the terms of service.

TLSC expressed concerns over terms of service agreements violating §25.485(c) and that they are written in language costumers cannot comprehend. TLSC recommended that the commission needs to be more proactive in this regard as the customers most vulnerable are poor, elderly, or those with disabilities. TLSC suggested "regular compliance reviews of the documents, providing standard language for all or portions of the document, and issuing fines when violations are found" or a recurring procedure for document review that define the business relationship between a REP and customer.

Commission Response

The commission declines to adopt the recommendations of TLSC for reviewing terms of service agreements as outside the scope of this rulemaking.

§25.498 - Prepaid service

Section §25.498 governs the applicability and relevant definitions for prepaid service in addition to the requirements and obligations of a REP in offering prepaid service.

TLSC opposed general prepaid service, arguing that it is targeted to low-income customers, has subpar consumer protection standards resulting in multiple disconnections in a single month, and is high priced. TLSC suggested that instead of prepaid service, reasonably priced fixed-rate POLR service offered as a standard retail service package be available to transition prepaid customers to post-paid service. TLSC urged the commission to be proactive in monitoring for compliance with prepaid service rules and take corrective action where required.

Commission Response

The commission declines to adopt the recommendations of TLSC for banning prepaid service products as this proposal is beyond the scope of this rulemaking. The commission also declines to adopt the recommendations of TLSC to transform POLR service into a retail service product. As discussed in the commission's response to Question 1 above, the commission opts to use a year-over-year safety threshold to ensure that POLR rates remain at a reasonable level.

§25.498(c)(15) - Price Cap for Prepaid Service

Paragraph §25.498(c)(15) prohibits a REP providing prepaid service to a residential customer from charging higher than the POLR rate in the applicable TDU service territory. Specifically, the calculation under §25.475(g)(2)(A) - §25.475(g)(2)(E) for prepaid service must be equal to or lower than at least one of the tests described in subparagraph §25.498(c)(15)(A) - §25.498(c)(15)(C) which consist of the minimum, maximum, and average POLR rates. §25.498(c)(15)(D) requires the same test for a prepaid fixed rate product. Windrose offered draft language modifying §25.498(c)(15) as follows:

"A REP that provides prepaid service to a residential customer (shall) "must" not charge an amount for electric service that is higher than the price charged by the POLR in the applicable TDU service territory. The average price over a calendar month or TDU billing cycle for prepaid service to a residential customer calculated as required by §25.475(g)(2)(A) - (E) of this title must be equal to or lower than at least one of the tests described in subparagraphs (A) - (C) of this paragraph"

Windrose proposed the amendment because it interpreted the commission's intent for the rule to be to ensure the average price charged does not exceed the POLR threshold and that the average is calculated over the billing cycle or a typical billing period. Windrose noted that some REPs offer free energy and TDU charges overnight in exchange for a higher rate during peak hours and that such a REP could charge a higher rate during peak hours so long as the average rate is below the POLR threshold. In calculating the average, Windrose notes a timeframe is necessary and proposes the timeframe be "a calendar month or TDU billing cycle." ARM noted if the commission's proposed changes to §25.43(m)(2)(A) and §25.43(m)(2)(B) are implemented, amendments may be required for §25.498(c)(15) to determine whether a prepaid product is compliant with the requirement that it be priced no greater than the POLR rate. Specifically, some of the changes to the existing rule in proposed

§25.43(m)(2)(A) and §25.43(m)(2)(B) may render the tests envisioned in §25.498(c)(15) impractical and would warrant revision. However, ARM stated that if its alternative proposal for §25.43(m)(2)(A) and §25.43(m)(2)(B) is adopted, the tests in §25.498(c)(15) could likely remain as-is.

Commission Response

The commission disagrees with Windrose that §25.498(c)(15) should use the "average price" in determining if the REP is offering a rate that exceeds the POLR threshold.

The commission agrees with ARM that the final POLR rate formula under §25.43(m)(2) affects the prepaid service price cap tests under §25.498(c)(15). Accordingly, the commission modifies §25.498(c)(15) and removes references to the average POLR rate test and the minimum POLR rate test.

§25.499 - Acknowledgement of Risk Requirements for Certain Commercial Contracts

Proposed §25.499 establishes requirements related to AOR documents for wholesale indexed products or products that include a separate assessment of ancillary services costs offered to a customer other than a residential or small commercial customer.

ARM endorsed proposed new §25.499 which, in ARM's view, improved amended §25.471's enumeration of customer protection rules as §25.499 separately addresses requirements for customers other than residential or small commercial entities and thus makes the applicability of customer protection rules clearer.

TEAM argued that HB 16 does not impose an AOR requirement for any products other than wholesale indexed products and if an AOR requirement is imposed it should be included within the EFL. TEAM provided draft language removing the requirements for an AOR for products with a separate assessment of ancillary services costs located in subsections (a) and (d) of this section.

Joint REPs, which included TEAM, provided a redline of this rule in its reply that did not include TEAM's recommended language.

Commission Response

The commission declines to adopt TEAM's recommendation to not require an AOR for products containing a separate assessment of ancillary service costs. A customer that enrolls in a product with a separate assessment of ancillary service costs needs to understand the inherent risk of a large, unexpected increase in cost associated with this type of product. While not explicitly required by HB 16, the commission finds that these products present a similar risk as wholesale indexed products, and therefore, merit similar treatment under commission rules.

The commission also declines to adopt TEAM's recommendation that the AOR disclosure should be solely provided as a part of an EFL. To ensure that a customer acknowledges the risks, the commission requires affirmative action on the part of the customer.

§25.499(b) - Effective Date

Proposed §25.499(b) specifies that this section is effective for enrollments or re-enrollments entered into on or after September 1, 2021.

ARM recommended that the requirements imposed by the proposed rule that exceed the requirements of HB 16 should be effective 120 days after adoption to provide REPs time to modify systems and implement the requirements.

Commission Response

The commission agrees with ARM that REPs require time to implement the changes required by this subsection. The commission specifies that the AOR requirements for product types other than wholesale indexed products are effective for enrollments or reenrollments entered into on or after April 1, 2021.

§25.499(d) - Acknowledgement of Risk Requirements

Proposed §24.499(d) requires an aggregator, broker, or REP, prior to enrolling a customer in a wholesale indexed product or a product containing a separate assessment of ancillary service charges, to obtain an AOR signed by the customer verifying that the customer accepts the potential price risks associated with the product. Paragraph (d)(2) of this subsection contains specific language that must be included in an AOR for products that contain a separate assessment of ancillary service charges.

CCR recommended that the proposed language in §25.499(d) be modified to allow for other methods for obtaining customer consent, beyond a signature. Specifically, CCR recommended that a REP be permitted to obtain an AOR by means of one of the methods authorized in §25.474 of this title (relating to Selection of Retail Electric Provider).

Joint REPs opposed CCR's recommendations that the AOR requirement be modified to allow for alternative means of obtaining customer consent by cross-referencing an authorized method in §25.474. Joint REPs opposed this recommendation as large commercial customers can waive §25.474 via §25.471(a)(3). Additionally, Joint REPs stated that HB 16, via PURA §39.110(c), requires a customer-signed acknowledgement as a prerequisite to enrollment.

Commission Response

The commission declines to allow a REP to obtain an AOR through one of the methods for enrollment under §25.474 as requested by CCR. The commission agrees with Joint REPs that the language of HB 16 requires a signed AOR. However, the commission notes that it does not specify that the AOR must contain a physical signature, and that other forms of signatures authorized by law, such as electronic signatures, also fulfill this requirement.

CCR and TEAM argued that the commission exceeded the requirements of H.B. 16 by expanding the use of the AOR beyond wholesale indexed products to also include products containing a separate assessment of ancillary services costs. TEAM recommended removal of the reference to ancillary service costs from (d) and both commenters recommended deletion of (d)(2).

Commission Response

The commission declines to omit products containing a separate assessment of ancillary service costs from the AOR requirements under §25.499(d) for reasons discussed in its reply to comments filed on §25.499.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting this rule, the commission makes other minor modifications for the purpose of clarifying its intent.

SUBCHAPTER B. CUSTOMER SERVICE AND PROTECTION

16 TAC §25.43

Statutory Authority

This rule amendment is adopted under the following provisions of PURA: §14.001, which provides the commission the general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by PURA that is necessary and convenient to the exercise of that power and jurisdiction; §14.002, which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; §17.003, which requires electric utilities and retail electric providers to provide clear and uniform information about rates, terms, services, involuntary load shed procedures, critical designations, and procedures for applying for critical designations; §17.102, which directs the commission to adopt and enforce rules requiring that charges on an electric service provider's bill be clearly and easily identified, §39.101, which requires the commission to ensure that retail customer protections are established that entitle a customer to safe, reliable, and reasonably priced electricity, and other protections; §39.106, which requires that the commission designate providers of last resort; §39.107(g), which prohibits metered electric service being sold to residential customers on a prepaid basis at a price that is higher than the price charged by the POLR, §39.110, which prohibits the offering of wholesale indexed products to residential or small commercial customers and placed conditions on the enrollment of other customers in wholesale indexed products; §39.112, which requires a REP to provide certain information to a residential customer who has a fixed rate product.

Cross reference to statutes: Public Utility Regulatory Act §14.001, §14.002, §17.003, §17.102, §39.101, §39.106, §39.107(g), §39.110, and §39.112.

§25.43. Provider of Last Resort (POLR).

(a) Purpose. This section establishes the requirements for Provider of Last Resort (POLR) service and ensures that it is available to any requesting retail customer and any retail customer who is transferred to another retail electric provider (REP) by the Electric Reliability Council of Texas (ERCOT) because the customer's REP failed to provide service to the customer or failed to meet its obligations to the independent organization.

(b) Application. The provisions of this section relating to the selection of REPs providing POLR service apply to all REPs that are serving retail customers in transmission and distribution utility (TDU) service areas. This section does not apply when an electric cooperative or a municipally owned utility (MOU) designates a POLR provider for its certificated service area. However, this section is applicable when an electric cooperative delegates its authority to the commission in accordance with subsection (r) of this section to select a POLR provider for the electric cooperative's service area. All filings made with the commission pursuant to this section, including filings subject to a claim of confidentiality, must be filed with the commission's Filing Clerk in accordance with the commission's Procedural Rules, Chapter 22, Subchapter E, of this title (relating to Pleadings and other Documents).

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

(1) Affiliate--As defined in §25.107 of this title (relating to Certification of Retail Electric Providers (REPs).

(2) Basic firm service--Electric service that is not subject to interruption for economic reasons and that does not include value-added options offered in the competitive market. Basic firm service excludes, among other competitively offered options, emergency or back-up service, and stand-by service. For purposes of this definition, the phrase "interruption for economic reasons" does not mean disconnection for non-payment.

(3) Billing cycle--A period bounded by a start date and stop date that REPs and TDUs use to determine when a customer used electric service.

(4) Billing month--Generally a calendar accounting period (approximately 30 days) for recording revenue, which may or may not coincide with the period a customer's consumption is recorded through the customer's meter.

(5) Business day--As defined by the ERCOT Protocols.

(6) Large non-residential customer--A non-residential customer who had a peak demand in the previous 12-month period at or above one megawatt (MW).

(7) Large service provider (LSP)--A REP that is designated to provide POLR service pursuant to subsection (j) of this section.

(8) Market-based product - A month-to-month product that is either offered to or matches the rate of a product offered to non-POLR customers of the REP for the same TDU territory and customer class. A month-to-month contract may not contain a termination fee or penalty. For purposes of this section, a rate for residential customers that is derived by applying a positive or negative multiplier to the rate described in subsection (m)(2) of this section is not a market-based product.

(9) Mass transition--The transfer of customers as represented by ESI IDs from a REP to one or more POLR providers pursuant to a transaction initiated by the independent organization that carries the mass transition (TS) code or other code designated by the independent organization.

(10) Medium non-residential customer--A non-residential retail customer who had a peak demand in the previous 12-month period of 50 kilowatt (kW) or greater, but less than 1,000 kW.

(11) POLR area--The service area of a TDU in an area where customer choice is in effect.

(12) POLR provider--A volunteer retail electric provider (VREP) or LSP that may be required to provide POLR service pursuant to this section.

(13) Residential customer--A retail customer classified as residential by the applicable TDU tariff or, in the absence of classification under a tariff, a retail customer who purchases electricity for personal, family, or household purposes.

(14) Transitioned customer--A customer as represented by ESI IDs that is served by a POLR provider as a result of a mass transition under this section.

(15) Small non-residential customer--A non-residential retail customer who had a peak demand in the previous 12-month period of less than 50 kW.

(16) Voluntary retail electric provider (VREP)--A REP that has volunteered to provide POLR service pursuant to subsection (i) of this section.

(d) POLR service.

(1) There are two types of POLR providers: VREPs and LSPs.

(2) For the purpose of POLR service, there are four classes of customers: residential, small non-residential, medium non-residential, and large non-residential.

(3) A VREP or LSP may be designated to serve any or all of the four customer classes in a POLR area.

(4) A POLR provider must offer a basic, standard retail service package to customers it is designated to serve, which is limited to:

(A) Basic firm service; and

(B) Call center facilities available for customer inquiries.

(5) A POLR provider must, in accordance with §25.108 of this title (relating to Financial Standards for Retail Electric Providers Regarding the Billing and Collection of Transition Charges), fulfill billing and collection duties for REPs that have defaulted on payments to the servicer of transition bonds or to TDUs.

(6) Each LSP's customer billing for residential customers taking POLR service under a rate prescribed by subsection (m)(2) of this section must contain notice to the customer that other competitive products or services may be available from the LSP or another REP. The notice must also include contact information for the LSP, and the Power to Choose website, and must include a notice from the commission in the form of a bill insert or a bill message with the header "An Important Message from the Public Utility Commission Regarding Your Electric Service" addressing why the customer has been transitioned to an LSP, a description of the purpose and nature of POLR service, and explaining that more information on competitive markets can be found at www.powertochoose.org, or toll-free at 1-866-PWR-4-TEX (1-866-797-4839).

(e) Standards of service.

(1) An LSP designated to serve a class in a given POLR area must serve any eligible customer requesting POLR service or assigned to the LSP pursuant to a mass transition in accordance with the Standard Terms of Service in subsection (f)(1) of this section for the provider customer's class. However, in lieu of providing terms of service to a transitioned customer under subsection (f) of this section and under a rate prescribed by subsection (m)(2) of this section an LSP may at its discretion serve the customer pursuant to a market-based month-to-month product, provided it serves all transitioned customers in the same class and POLR area pursuant to the product.

(2) A POLR provider must abide by the applicable customer protection rules as provided for under Subchapter R of this chapter (relating to Customer Protection Rules for Retail Electric Service), except that if there is an inconsistency or conflict between this section and Subchapter R of this chapter, the provisions of this section apply. However, for the medium non-residential customer class, the customer protection rules as provided for under Subchapter R of this chapter do not apply, except for §25.481 of this title (relating to Unauthorized Charges), §25.485(a)-(b) of this title (relating to Customer Access and Complaint Handling), and §25.495 of this title (relating to Unauthorized Change of Retail Electric Provider).

(3) An LSP that has received commission approval to designate one of its affiliates to provide POLR service on behalf of the LSP pursuant to subsection (k) of this section must retain responsibility for the provision of POLR service by the LSP affiliate and remains liable for violations of applicable laws and commission rules and all financial obligations of the LSP affiliate associated with the provisioning of POLR service on its behalf by the LSP affiliate.

(f) Customer information.

(1) The Standard Terms of Service prescribed in subparagraphs (A) - (D) of this paragraph apply to POLR service provided by an LSP under a rate prescribed by subsection (m)(2) of this section.

(A) Standard Terms of Service, POLR Provider Residential Service:
Figure: 16 TAC §25.43(f)(1)(A) (No change.)

(B) Standard Terms of Service, POLR Provider Small Non-Residential Service:
Figure: 16 TAC §25.43(f)(1)(B) (No change.)

(C) Standard Terms of Service, POLR Provider Medium Non-Residential Service:
Figure: 16 TAC §25.43(f)(1)(C) (No change.)

(D) Standard Terms of Service, POLR Provider Large Non-Residential Service:
Figure: 16 TAC §25.43(f)(1)(D) (No change.)

(2) An LSP providing service under a rate prescribed by subsection (m)(2) of this section must provide each new customer the applicable Standard Terms of Service. Such Standard Terms of Service must be updated as required under §25.475(f) of this title (relating to General Retail Electric Provider Requirements and Information Disclosures to Residential and Small Commercial Customers).

(g) General description of POLR service provider selection process.

(1) Each REP must provide information to the commission in accordance with subsection (h)(1) of this section. Based on this information, the commission's designated representative will designate REPs that are eligible to serve as POLR providers in areas of the state in which customer choice is in effect, except that the commission will not designate POLR providers in the service areas of MOUs or electric cooperatives unless an electric cooperative has delegated to the commission its authority to designate the POLR provider, in accordance with subsection (r) of this section.

(2) POLR providers must serve two-year terms. The initial term for POLR service in areas of the state where retail choice is not in effect as of the effective date of the rule must be set at the time POLR providers are initially selected in such areas.

(h) REP eligibility to serve as a POLR provider. In each even-numbered year, the commission will determine the eligibility of certified REPs to serve as POLR providers for a term scheduled to commence in January of the next year.

(1) Each REP must provide information to the commission necessary to establish its eligibility to serve as a POLR provider for the next term. A REP must file, by July 10th of each even-numbered year, by service area, information on the classes of customers it provides service to, and for each customer class, the number of ESI IDs the REP serves and the retail sales in megawatt-hours for the annual period ending March 31 of the current year. As part of that filing, a REP may request that the commission designate one of its affiliates to provide POLR service on its behalf pursuant to subsection (k) of this section in the event that the REP is designated as an LSP. The independent organization must provide to the commission the total number of ESI ID and total MWh data for each class. Each REP must also provide information on its technical capability and financial ability to provide service to additional customers in a mass transition. The commission's determination regarding eligibility of a REP to serve as POLR provider under the provisions of this section will not be considered confidential information.

(2) Eligibility to be designated as a POLR provider is specific to each POLR area and customer class. A REP is eligible to be designated a POLR provider for a particular customer class in a POLR area, unless:

(A) A proceeding to revoke or suspend the REP's certificate is pending at the commission, the REP's certificate has been suspended or revoked by the commission, or the REP's certificate is deemed suspended pursuant to §25.107 of this title (relating to Certification of Retail Electric Providers (REPs));

(B) The sum of the numeric portion of the REP's percentage of ESI IDs served and percentage of retail sales by MWhs in the POLR area, for the particular class, is less than 1.0;

(C) The commission does not reasonably expect the REP to be able to meet the criteria set forth in subparagraph (B) of this paragraph during the entirety of the term;

(D) On the date of the commencement of the term, the REP or its predecessor will not have served customers in Texas for at least 18 months;

(E) The REP does not serve the applicable customer class, or does not have an executed delivery service agreement with the service area TDU;

(F) The REP is certificated as an Option 2 REP under §25.107 of this title;

(G) The REP's customers are limited to its own affiliates;

(H) A REP files an affidavit stating that it does not serve small or medium non-residential customers, except for the low-usage sites of the REP's large non-residential customers, or commonly owned or franchised affiliates of the REP's large non-residential customers and opts out of eligibility for either, or both of the small or medium non-residential customer classes; or

(I) The REP does not meet minimum financial, technical and managerial qualifications established by the commission under §25.107 of this title.

(3) For each term, the commission will publish the names of all REPs eligible to serve as a POLR provider under this section for each customer class in each POLR area and will provide notice to REPs determined to be eligible to serve as a POLR provider. A REP may challenge its eligibility determination within five business days of the notice of eligibility by filing with the commission additional documentation that includes the specific data, the specific calculation, and a specific explanation that clearly illustrate and prove the REP's assertion. Commission staff will verify the additional documentation and, if accurate, reassess the REP's eligibility. Commission staff will notify the REP of any change in eligibility status within 10 business days of the receipt of the additional documentation. A REP may then appeal to the commission through a contested case if the REP does not agree with the staff determination of eligibility. The contested status will not delay the designation of POLR providers.

(4) A standard form may be created by the commission for REPs to use in filing information concerning their eligibility to serve as a POLR provider.

(5) If ERCOT or a TDU has reason to believe that a REP is no longer capable of performing POLR responsibilities, ERCOT or the TDU must make a filing with the commission detailing the basis for its concerns and must provide a copy of the filing to the REP that is the subject of the filing. If the filing contains confidential information, ERCOT or the TDU must file the confidential information in accordance with §22.71 of this title (relating to Filing of Pleadings, Documents, and Other Materials). Commission staff will review the filing, and will request that the REP demonstrate that it still meets the qualifications to provide the service. The commission staff may initiate a proceeding with the commission to disqualify the REP from providing POLR service. No ESI IDs will be assigned to a POLR provider after the commission staff initiates a proceeding to disqualify the POLR provider, unless the commission by order confirms the POLR provider's designation.

(i) VREP list. Based on the information provided in accordance with this subsection and subsection (h) of this section, the commission will post the names of VREPs on its webpage, including the aggregate customer count offered by VREPs. A REP may submit a request to be a VREP no earlier than June 1, and no later than July 31, of each even-numbered year unless otherwise determined by the executive director. This filing must include a description of the REP's capabilities to serve additional customers as well as the REP's current financial condition in enough detail to demonstrate that the REP is capable of absorbing a mass transition of customers without technically or financially distressing the REP and the specific information set out in this subsection. The commission's determination regarding eligibility of a REP to serve as a VREP, under the provisions of this section, will not be considered confidential information.

(1) A VREP must provide to the commission the name of the REP, the appropriate contact person with current contact information, which customer classes the REP is willing to serve within each POLR area, and the number of ESI IDs the REP is willing to serve by customer class and POLR area in each transition event.

(2) A REP that has met the eligibility requirements of subsection (h) of this section and provided the additional information set out in this subsection is eligible for designation as a VREP.

(3) Commission staff will make an initial determination of the REPs that are to serve as a VREP for each customer class in each POLR area and publish their names. A REP may challenge its eligibility determination within five business days of the notice of eligibility by submitting to commission staff additional evidence of its capability to serve as a VREP. Commission staff will reassess the REP's eligibility and notify the REP of any change in eligibility status within 10 business days of the receipt of the additional documentation. A REP may then appeal to the commission through a contested case if the REP does not agree with the staff determination of eligibility. The contested status will not delay the designation of VREPs.

(4) A VREP may file a request at any time to be removed from the VREP list or to modify the number of ESI IDs that it is willing to serve as a VREP. If the request is to increase the number of ESI IDs, it must provide information to demonstrate that it is capable of serving the additional ESI IDs, and the commission staff will make an initial determination, which is subject to an appeal to the commission, in accordance with the timelines specified in paragraph (3) of this subsection. If the request is to decrease the number of ESI IDs, the request must be effective five calendar days after the request is filed with the commission; however, after the request becomes effective the VREP must continue to serve ESI IDs previously acquired through a mass transition event as well as ESI IDs the VREP acquires from a mass transition event that occurs during the five-day notice period. If in a mass transition a VREP is able to acquire more customers than it originally volunteered to serve, the VREP may work with commission staff and ERCOT to increase its designation. Changes approved by commission staff will be communicated to ERCOT and must be implemented for the current allocation if possible.

(5) ERCOT or a TDU may challenge a VREP's eligibility. If ERCOT or a TDU has reason to believe that a REP is no longer capable of performing VREP responsibilities, ERCOT or the TDU must make a filing with the commission detailing the basis for its concerns and must provide a copy of the filing to the REP that is the subject of the filing. If the filing contains confidential information, ERCOT or

the TDU must file it in accordance with §25.71 of this title (relating to General Procedures, Requirements and Penalties). Commission staff will review the filing of ERCOT and if commission staff concludes that the REP should no longer provide VREP service, it will request that the REP demonstrate that it still meets the qualifications to provide the service. The commission staff may initiate a proceeding with the commission to disqualify the REP from providing VREP service. No ESI IDs will be assigned to a VREP after the commission staff initiates a proceeding to disqualify the VREP, unless the commission by order confirms the VREP's designation.

(j) LSPs. This subsection governs the selection and service of REPs as LSPs.

(1) The REPs eligible to serve as LSPs must be determined based on the information provided by REPs in accordance with subsection (h) of this section. However, for new TDU service areas that are transitioned to competition, the transition to competition plan approved by the commission may govern the selection of LSPs to serve as POLR providers.

(2) In each POLR area, for each customer class, the commission will designate up to 15 LSPs. The eligible REPs that have the greatest market share based upon retail sales in megawatt-hours, by customer class and POLR area must be designated as LSPs. Commission staff will designate the LSPs by October 15th of each even-numbered year, based upon the data submitted to the commission under subsection (h) of this section. Designation as a VREP does not affect a REP's eligibility to also serve as an LSP.

(3) For the purpose of calculating the POLR rate for each customer class in each POLR area, an EFL must be completed by the LSP that has the greatest market share in accordance with paragraph (2) of this subsection. The Electricity Facts Label (EFL) must be supplied to commission staff electronically for placement on the commission webpage by January 1 of each year, and more often if there are changes to the non-bypassable charges. Where REP-specific information is required to be inserted in the EFL, the LSP supplying the EFL must note that such information is REP-specific.

(4) An LSP serving transitioned residential and small non-residential customers under a rate prescribed by subsection (m)(2) of this section must move such customers to a market-based month-to-month product, with pricing for such product to be effective no later than either the 61st day of service by the LSP or beginning with the customer's next billing cycle date following the 60th day of service by the LSP. For each transition event, all such transitioned customers in the same class and POLR area must be served pursuant to the same product terms, except for those customers specified in subparagraph (B) of this paragraph.

(A) The notice required by §25.475(d) of this title to inform the customers of the change to a market-based month-to-month product may be included with the notice required by subsection (t)(3) of this section or may be provided 14 days in advance of the change. If the §25.475(d) notice is included with the notice required by subsection (t)(3) of this section, the LSP may state that either or both the terms of service document and EFL for the market-based month-to-month product will be provided at a later time, but no later than 14 days before their effective date.

(B) The LSP is not required to transfer to a market-based product any transitioned customer who is delinquent in payment of any charges for POLR service to such LSP as of the 60th day of service. If such a customer becomes current in payments to the LSP, the LSP must move the customer to a market-based month-to-month product as described in this paragraph on the next billing cycle that occurs five business days after the customer becomes current. If the LSP does not plan to move customers who are delinquent in payment of any charges for POLR service as of the 60th day of service to a market-based month-to-month product, the LSP must inform the customer of that potential outcome in the notice provided to comply with §25.475(d) of this title.

(5) Upon a request from an LSP and a showing that the LSP will be unable to maintain its financial integrity if additional customers are transferred to it under this section, the commission may relieve an LSP from a transfer of additional customers. The LSP must continue providing continuous service until the commission issues an order relieving it of this responsibility. In the event the requesting LSP is relieved of its responsibility, the commission staff designee will, with 90 days' notice, designate the next eligible REP, if any, as an LSP, based upon the criteria in this subsection.

(k) Designation of an LSP affiliate to provide POLR service on behalf of an LSP.

(1) An LSP may request the commission designate an LSP affiliate to provide POLR service on behalf of the LSP either with the LSP's filing under subsection (h) of this section or as a separate filing in the current term project. The filing must be made at least 30 days prior to the date when the LSP affiliate is to begin providing POLR service on behalf of the LSP. To be eligible to provide POLR service on behalf of an LSP, the LSP affiliate must be certificated to provide retail electric service; have an executed delivery service agreement with the service area TDU; and meet the requirements of subsection (h)(2) of this section, with the exception of subsection (h)(2)(B), (C), (D), and (E) of this section as related to serving customers in the applicable customer class.

(2) The request must include the name and certificate number of the LSP affiliate, information demonstrating the affiliation between the LSP and the LSP affiliate, and a certified agreement from an officer of the LSP affiliate stating that the LSP affiliate agrees to provide POLR service on behalf of the LSP. The request must also include an affidavit from an officer of the LSP stating that the LSP will be responsible and indemnify any affected parties for all financial obligations of the LSP affiliate associated with the provisioning of POLR service on behalf of the LSP in the event that the LSP affiliate defaults or otherwise does not fulfill such financial obligations.

(3) Commission staff will make an initial determination of the eligibility of the LSP affiliate to provide POLR service on behalf of an LSP and publish their names. The LSP or LSP affiliate may challenge commission staff's eligibility determination within five business days of the notice of eligibility by submitting to commission staff additional evidence of its capability to provide POLR service on behalf of the LSP. Commission staff will reassess the LSP affiliate's eligibility and notify the LSP and LSP affiliate of any change in eligibility status within 10 business days of the receipt of the additional documentation. If the LSP or LSP affiliate does not agree with staff's determination of eligibility, either or both may then appeal the determination to the commission through a contested case. The LSP must provide POLR service during the pendency of the contested case.

(4) ERCOT or a TDU may challenge an LSP affiliate's eligibility to provide POLR service on behalf of an LSP. If ERCOT or a TDU has reason to believe that an LSP affiliate is not eligible or is not performing POLR responsibilities on behalf of an LSP, ERCOT or the TDU must make a filing with the commission detailing the basis for its concerns and must provide a copy of the filing to the LSP and the LSP affiliate that are the subject of the filing. If the filing contains confidential information, ERCOT or the TDU must file it in accordance with §25.71 of this title (relating to General Procedures, Requirements and Penalties). Commission staff will review the filing and if commission

staff concludes that the LSP affiliate should not be allowed to provide POLR service on behalf of the LSP, it will request that the LSP affiliate demonstrate that it has the capability. The commission staff will review the LSP affiliate's filing and may initiate a proceeding with the commission to disqualify the LSP affiliate from providing POLR service. The LSP affiliate may continue providing POLR service to ESI IDs currently receiving the service during the pendency of the proceeding; however, the LSP must immediately assume responsibility to provide service under this section to customers who request POLR service, or are transferred to POLR service through a mass transition, during the pendency of the proceeding.

(5) Designation of an affiliate to provide POLR service on behalf of an LSP must not change the number of ESI IDs served or the retail sales in megawatt-hours for the LSP for the reporting period nor does such designation relieve the LSP of its POLR service obligations in the event that the LSP affiliate fails to provide POLR service in accordance with the commission rules.

(6) The designated LSP affiliate must provide POLR service and all reports as required by the commission's rules on behalf of the LSP.

(7) The methodology used by a designated LSP affiliate to calculate POLR rates must be consistent with the methodology used to calculate LSP POLR rates in subsection (m) of this section.

(8) If an LSP affiliate designated to provide POLR service on behalf of an LSP cannot meet or fails to meet the POLR service requirements in applicable laws and Commission rules, the LSP must provide POLR service to any ESI IDs currently receiving the service from the LSP affiliate and to ESI IDs in a future mass transition or upon customer request.

(9) An LSP may elect to reassume provisioning of POLR service from the LSP affiliate by filing a reversion notice with the commission and notifying ERCOT at least 30 days in advance.

(l) Mass transition of customers to POLR providers. The transfer of customers to POLR providers must be consistent with this subsection.

(1) ERCOT must first transfer customers to VREPs, up to the number of ESI IDs that each VREP has offered to serve for each customer class in the POLR area. ERCOT must use the VREP list to assign ESI IDs to the VREPs in a non-discriminatory manner, before assigning customers to the LSPs. A VREP must not be assigned more ESI IDs than it has indicated it is willing to serve pursuant to subsection (i) of this section. To ensure non-discriminatory assignment of ESI IDs to the VREPs, ERCOT must:

(A) Sort ESI IDs by POLR area;

(B) Sort ESI IDs by customer class;

(C) Sort ESI IDs numerically;

(D) Sort VREPs numerically by randomly generated number; and

(E) Assign ESI IDs in numerical order to VREPs, in the order determined in subparagraph (D) of this paragraph, in accordance with the number of ESI IDs each VREP indicated a willingness to serve pursuant to subsection (i) of this section. If the number of ESI IDs is less than the total that the VREPs indicated that they are willing to serve, each VREP must be assigned an equal number of ESI IDs, up to the number that each VREP indicated it was willing to serve for a given class and POLR area.

(2) If the number of ESI IDs exceeds the amount the VREPs are designated to serve, ERCOT must assign remaining ESI IDs to LSPs in a non-discriminatory fashion, in accordance with their percentage of market share based upon retail sales in megawatt-hours, on a random basis within a class and POLR area, except that a VREP that is also an LSP that volunteers to serve at least 1% of its market share for a class of customers in a POLR area must be exempt from the LSP allocation up to 1% of the class and POLR area. To ensure non-discriminatory assignment of ESI IDs to the LSPs, ERCOT must:

(A) Sort the ESI IDs in excess of the allocation to VREPs, by POLR area;

(B) Sort ESI IDs in excess of the allocation to VREPs, by customer class;

(C) Sort ESI IDs in excess of the allocation to VREPs, numerically;

(D) Sort LSPs, except LSPs that volunteered to serve 1% of their market share as a VREP, numerically by MWhs served;

(E) Assign ESI IDs that represent no more than 1% of the total market for that POLR area and customer class less the ESI IDs assigned to VREPs that volunteered to serve at least 1% of their market share for each POLR area and customer class in numerical order to LSPs designated in subparagraph (D) of this paragraph, in proportion to the percentage of MWhs served by each LSP to the total MWhs served by all LSPs;

(F) Sort LSPs, including any LSPs previously excluded under subparagraph (D) of this paragraph; and

(G) Assign all remaining ESI IDs in numerical order to LSPs in proportion to the percentage of MWhs served by each LSP to the total MWhs served by all LSPs.

(3) Each mass transition must be treated as a separate event.

(m) Rates applicable to POLR service.

(1) A VREP must provide service to customers using a market-based, month-to-month product. The VREP must use the same market-based, month-to-month product for all customers in a mass transition that are in the same class and POLR area.

(2) Subparagraphs (A)-(C) of this paragraph establish the maximum rate for POLR service charged by an LSP. An LSP may charge a rate less than the maximum rate if it charges the lower rate to all customers in a mass transition that are in the same class and POLR area.

(A) Residential customers. The LSP rate for the residential customer class must be determined by the following formula: LSP rate (in $ per kWh) = (Non-bypassable charges + LSP customer charge + LSP energy charge) / kWh used where:

(i) Non-bypassable charges must be all TDU charges and credits for the appropriate customer class in the applicable service territory and other charges including ERCOT administrative charges, nodal fees or surcharges, reliability unit commitment (RUC) capacity short charges attributable to LSP load, and applicable taxes from various taxing or regulatory authorities, multiplied by the level of kWh and kW used, where appropriate.

(ii) LSP customer charge must be $0.06 per kWh.

(iii) LSP energy charge must be the average of the actual Real-Time Settlement Point Prices (RTSPPs) for the applicable load zone for the previous 12-month period ending September 1 of the preceding year (the historical average RTSPP) multiplied by the number of kWhs the customer used during that billing period and further multiplied by 120%. In no instance may the LSP energy charge exceed 120% of the previous year's LSP energy charge. The applicable load

zone will be the load zone located partially or wholly in the customer's TDU service territory with the highest average under the historical average RTSPP calculation.

(iv) "Number of kWhs the customer used" is based on usage data provided to the POLR by the TDU.

(B) Small and medium non-residential customers. The LSP rate for the small and medium non-residential customer classes must be determined by the following formula: LSP rate (in $ per kWh) = (Non-bypassable charges + LSP customer charge + LSP demand charge + LSP energy charge) / kWh used, where:

(i) Non-bypassable charges must be all TDU charges and credits for the appropriate customer class in the applicable service territory, and other charges including ERCOT administrative charges, nodal fees or surcharges, RUC capacity short charges attributable to LSP load, and applicable taxes from various taxing or regulatory authorities, multiplied by the level of kWh and kW used, where appropriate.

(ii) LSP customer charge must be $0.025 per kWh.

(iii) LSP demand charge must be $2.00 per kW, per month, for customers that have a demand meter, and $50.00 per month for customers that do not have a demand meter.

(iv) LSP energy charge must be the average of the actual RTSPPs for the applicable load zone for the previous 12-month period ending September 1 of the preceding year multiplied by the number of kWhs the customer used during that billing period and further multiplied by 125%. In no instance may the LSP energy charge exceed 125% of the previous year's LSP energy charge. The applicable load zone will be the load zone located partially or wholly in the customer's TDU service territory with the highest average under the historical average RTSPP calculation.

(v) "Number of kWhs the customer used" is based on usage data provided to the POLR by the TDU.

(C) Large non-residential customers. The LSP rate for the large non-residential customer class must be determined by the following formula: LSP rate (in $ per kWh) = (Non-bypassable charges + LSP customer charge + LSP demand charge + LSP energy charge) / kWh used, where:

(i) Non-bypassable charges must be all TDU charges and credits for the appropriate customer class in the applicable service territory, and other charges including ERCOT administrative charges, nodal fees or surcharges, RUC capacity short charges attributable to LSP load, and applicable taxes from various taxing or regulatory authorities, multiplied by the level of kWh and KW used, where appropriate.

(ii) LSP customer charge must be $2,897.00 per month.

(iii) LSP demand charge must be $6.00 per kW, per month.

(iv) LSP energy charge must be the appropriate RTSPP, determined on the basis of 15-minute intervals, for the customer multiplied by 125%, multiplied by the level of kilowatt-hours used. The energy charge must have a floor of $7.25 per MWh.

(3) If in response to a complaint or upon its own investigation, the commission determines that an LSP failed to charge the appropriate rate prescribed by paragraph (2) of this subsection, and as a result overcharged its customers, the LSP must issue refunds to the specific customers who were overcharged.

(4) On a showing of good cause, the commission may permit the LSP to adjust the rate prescribed by paragraph (2) of this subsection, if necessary to ensure that the rate is sufficient to allow the LSP to recover its costs of providing service. Notwithstanding any other commission rule to the contrary, such rates may be adjusted on an interim basis for good cause shown and after at least 10 business days' notice and an opportunity for hearing on the request for interim relief. Any adjusted rate must be applicable to all LSPs charging the rate prescribed by paragraph (2) of this subsection to the specific customer class, within the POLR area that is subject to the adjustment.

(5) For transitioned customers, the customer and demand charges associated with the rate prescribed by paragraph (3) of this subsection must be pro-rated for partial month usage if a large non-residential customer switches from the LSP to a REP of choice.

(n) Challenges to customer assignments. A POLR provider is not obligated to serve a customer within a customer class or a POLR area for which the REP is not designated as a POLR provider, after a successful challenge of the customer assignment. A POLR provider must use the ERCOT market variance resolution tool to challenge a customer class assignment with the TDU. The TDU must make the final determination based upon historical usage data and not premise type. If the customer class assignment is changed and a different POLR provider for the customer is determined appropriate, the customer must then be served by the appropriate POLR provider. Back dated transactions may be used to correct the POLR assignment.

(o) Limitation on liability. A POLR provider must make reasonable provisions to provide service under this section to any ESI IDs currently receiving the service and to ESI IDs obtained in a future mass transition or served upon customer request; however, liabilities not excused by reason of force majeure or otherwise must be limited to direct, actual damages.

(1) Neither the customer nor the POLR provider must be liable to the other for consequential, incidental, punitive, exemplary, or indirect damages. These limitations apply without regard to the cause of any liability or damage.

(2) In no event will ERCOT or a POLR provider be liable for damages to any REP, whether under tort, contract or any other theory of legal liability, for transitioning or attempting to transition a customer from such REP to the POLR provider to carry out this section, or for marketing, offering or providing competitive retail electric service to a customer taking service under this section from the POLR provider.

(p) REP obligations in a transition of customers to POLR service.

(1) A customer may initiate service with an LSP by requesting such service at the rate prescribed by subsection (m)(2) of this section with any LSP that is designated to serve the requesting customer's customer class within the requesting customer's service area. An LSP cannot refuse a customer's request to make arrangements for POLR service, except as otherwise permitted under this title.

(2) The POLR provider is responsible for obtaining resources and services needed to serve a customer once it has been notified that it is serving that customer. The customer is responsible for charges for service under this section at the rate in effect at that time.

(3) If a REP terminates service to a customer, or transitions a customer to a POLR provider, the REP is financially responsible for the resources and services used to serve the customer until it notifies the independent organization of the termination or transition of the service and the transfer to the POLR provider is complete.

(4) The POLR provider is financially responsible for all costs of providing electricity to customers from the time the transfer or initiation of service is complete until such time as the customer ceases taking service under this section.

(5) A defaulting REP whose customers are subject to a mass transition event must return the customers' deposits within seven calendar days of the initiation of the transition.

(6) ERCOT must create a single standard file format and a standard set of customer billing contact data elements that, in the event of a mass transition, must be used by the exiting REP and the POLRs to send and receive customer billing contact information. The process, as developed by ERCOT must be tested on a periodic basis. Each REP must submit timely, accurate, and complete files, as required by ERCOT in a mass transition event, as well as for periodic testing. The commission will establish a procedure for the verification of customer information submitted by REPs to ERCOT. ERCOT must notify the commission if any REP fails to comply with the reporting requirements in this subsection.

(7) When customers are to be transitioned or assigned to a POLR provider, the POLR provider may request usage and demand data, and customer contact information including email, telephone number, and address from the appropriate TDU and from ERCOT, once the transition to the POLR provider has been initiated. Customer proprietary information provided to a POLR provider in accordance with this section must be treated as confidential and must only be used for mass transition related purposes.

(8) Information from the TDU and ERCOT to the POLR providers must be provided in Texas SET format when Texas SET transactions are available. However, the TDU or ERCOT may supplement the information to the POLR providers in other formats to expedite the transition. The transfer of information in accordance with this section must not constitute a violation of the customer protection rules that address confidentiality.

(9) A POLR provider may require a deposit from a customer that has been transitioned to the POLR provider to continue to serve the customer. Despite the lack of a deposit, the POLR provider is obligated to serve the customer transitioned or assigned to it, beginning on the service initiation date of the transition or assignment, and continuing until such time as any disconnection request is effectuated by the TDU. A POLR provider may make the request for deposit before it begins serving the customer, but the POLR provider must begin providing service to the customer even if the service initiation date is before it receives the deposit - if any deposit is required. A POLR provider must not disconnect the customer until the appropriate time period to submit the deposit has elapsed. For the large non-residential customer class, a POLR provider may require a deposit to be provided in three calendar days. For the residential customer class, the POLR provider may require a deposit to be provided after 15 calendar days of service if the customer received 10 days' notice that a deposit was required. For all other customer classes, the POLR provider may require a deposit to be provided in 10 calendar days. The POLR provider may waive the deposit requirement at the customer's request if deposits are waived in a non-discriminatory fashion. If the POLR provider obtains sufficient data, it must determine whether a residential customer has satisfactory credit based on the criteria the POLR provider routinely applies to its other residential customers. If the customer has satisfactory credit, the POLR provider must not request a deposit from the residential customer.

(A) At the time of a mass transition, the executive director or staff designated by the executive director will distribute available proceeds from an irrevocable stand-by letter of credit in accordance with the priorities established in §25.107(f)(6) of this title. For a REP that has obtained a current list from the Low Income List Administrator (LILA) that identifies low-income customers, these funds must first be used to provide deposit payment assistance for that REP's transitioned low-income customers. The Executive Director or staff designee will, at the time of a transition event, determine the reasonable deposit amount up to $400 per customer ESI ID, unless good cause exists to increase the level of the reasonable deposit amount above $400. Such reasonable deposit amount may take into account factors such as typical residential usage and current retail residential prices, and, if fully funded, must satisfy in full the customers' initial deposit obligation to the VREP or LSP.

(B) For a REP that has obtained a current list from the LILA that identifies low-income customers, the Executive Director or the staff designee will distribute available proceeds pursuant to §25.107(f)(6) of this title to the VREPs proportionate to the number of customers they received in the mass transition, who at the time of the mass transition were identified as low-income customers by the current LILA list, up to the reasonable deposit amount set by the Executive Director or staff designee. If funds remain available after distribution to the VREPs, the remaining funds must be distributed to the appropriate LSPs by dividing the amount remaining by the number of low income customers as identified in the LILA list that are allocated to LSPs, up to the reasonable deposit amount set by the Executive Director or staff designee.

(C) If the funds distributed in accordance with §25.107(f)(6) of this title do not equal the reasonable deposit amount determined, the VREP and LSP may request from the customer payment of the difference between the reasonable deposit amount and the amount distributed. Such difference must be collected in accordance with §25.478(e)(3) of this title (relating to Credit Requirements and Deposits).

(D) Notwithstanding §25.478(d) of this title, 90 days after the transition date, the VREP or LSP may request payment of an amount that results in the total deposit held being equal to what the VREP or LSP would otherwise have charged a customer in the same customer class and service area in accordance with §25.478(e) of this title, at the time of the transition.

(10) On the occurrence of one or more of the following events, ERCOT must initiate a mass transition to POLR providers, of all of the customers served by a REP:

(A) Termination of the Load Serving Entity (LSE) or Qualified Scheduling Entity (QSE) Agreement for a REP with ERCOT;

(B) Issuance of a commission order recognizing that a REP is in default under the TDU Tariff for Retail Delivery Service;

(C) Issuance of a commission order de-certifying a REP;

(D) Issuance of a commission order requiring a mass transition to POLR providers;

(E) Issuance of a judicial order requiring a mass transition to POLR providers; and

(F) At the request of a REP, for the mass transition of all of that REP's customers.

(11) A REP must not use the mass transition process in this section as a means to cease providing service to some customers, while retaining other customers. A REP's improper use of the mass transition process may lead to de-certification of the REP.

(12) ERCOT may provide procedures for the mass transition process, consistent with this section.

(13) A mass transition under this section must not override or supersede a switch request made by a customer to switch an ESI ID to a new REP of choice, if the request was made before a mass transition is initiated. If a switch request has been made but is scheduled for any date after the next available switch date, the switch must be made on the next available switch date.

(14) ERCOT must identify customers who are mass transitioned for a period of 60 calendar days. The identification must terminate at the first completed switch or at the end of the 60-day period, whichever is first. If necessary, ERCOT system changes or new transactions must be implemented no later than 14 months from the effective date of this section to communicate that a customer was acquired in a mass transition and is not charged the out-of-cycle meter read pursuant to paragraph (16) of this subsection.

(15) In the event of a transition to a POLR provider or away from a POLR provider to a REP of choice, the switch notification notice detailed in §25.474(l) of this title (relating to Selection of Retail Electric Provider) is not required.

(16) In a mass transition event, the ERCOT initiated transactions must request an out-of-cycle meter read for the associated ESI IDs for a date two calendar days after the calendar date ERCOT initiates such transactions to the TDU. If an ESI ID does not have the capability to be read in a fashion other than a physical meter read, the out-of-cycle meter read may be estimated. An estimated meter read for the purpose of a mass transition to a POLR provider must not be considered a break in a series of consecutive months of estimates, but must not be considered a month in a series of consecutive estimates performed by the TDU. A TDU must create a regulatory asset for the TDU fees associated with a mass transition of customers to a POLR provider pursuant to this subsection. Upon review of reasonableness and necessity, a reasonable level of amortization of such regulatory asset must be included as a recoverable cost in the TDU's rates in its next rate case or such other rate recovery proceeding as deemed necessary. The TDU must not bill as a discretionary charge, the costs included in this regulatory asset, which must consist of the following:

(A) fees for out-of-cycle meter reads associated with the mass transition of customers to a POLR provider; and

(B) fees for the first out-of-cycle meter read provided to a customer who transfers away from a POLR provider, when the out-of-cycle meter read is performed within 60 calendar days of the date of the mass transition and the customer is identified as a transitioned customer.

(17) In the event the TDU estimates a meter read for the purpose of a mass transition, the TDU must perform a true-up evaluation of each ESI ID after an actual meter reading is obtained. Within 10 days after the actual meter reading is obtained, the TDU must calculate the actual average kWh usage per day for the time period from the most previous actual meter reading occurring prior to the estimate for the purpose of a mass transition to the most current actual meter reading occurring after the estimate for the purpose of mass transition. If the average daily estimated usage sent to the exiting REP is more than 50% greater than or less than the average actual kWh usage per day, the TDU must promptly cancel and re-bill both the exiting REP and the POLR using the average actually daily usage.

(q) Termination of POLR service provider status.

(1) The commission may revoke a REP's POLR status after notice and opportunity for hearing:

(A) If the POLR provider fails to maintain REP certification;

(B) If the POLR provider fails to provide service in a manner consistent with this section;

(C) The POLR provider fails to maintain appropriate financial qualifications; or

(D) For other good cause.

(2) If an LSP defaults or has its status revoked before the end of its term, after a review of the eligibility criteria, the commission staff designee will, as soon as practicable, designate the next eligible REP, if any, as an LSP, based on the criteria in subsection (j) of this section.

(3) At the end of the POLR service term, the outgoing LSP must continue to serve customers who have not selected another REP.

(r) Electric cooperative delegation of authority. An electric cooperative that has adopted customer choice may select to delegate to the commission its authority to select POLR providers under PURA §41.053(c) in its certificated service area in accordance with this section. After notice and opportunity for comment, the commission will, at its option, accept or reject such delegation of authority. If the commission accepts the delegation of authority, the following conditions apply:

(1) The board of directors must provide the commission with a copy of a board resolution authorizing such delegation of authority;

(2) The delegation of authority must be made at least 30 calendar days prior to the time the commission issues a publication of notice of eligibility;

(3) The delegation of authority must be for a minimum period corresponding to the period for which the solicitation must be made;

(4) The electric cooperative wishing to delegate its authority to designate a continuous provider must also provide the commission with the authority to apply the selection criteria and procedures described in this section in selecting the POLR providers within the electric cooperative's certificated service area; and

(5) If there are no competitive REPs offering service in the electric cooperative certificated area, the commission must automatically reject the delegation of authority.

(s) Reporting requirements. Each LSP that serves customers under a rate prescribed by subsection (m)(2) of this section must file the following information with the commission on a quarterly basis beginning January of each year in a project established by the commission for the receipt of such information. Each quarterly report must be filed within 30 calendar days of the end of the quarter.

(1) For each month of the reporting quarter, each LSP must report the total number of new customers acquired by the LSP under this section and the following information regarding these customers:

(A) The number of customers from whom a deposit was requested pursuant to the provisions of §25.478 of this title, and the average amount of deposit requested;

(B) The number of customers from whom a deposit was received, including those who entered into deferred payment plans for the deposit, and the average amount of the deposit;

(C) The number of customers whose service was physically disconnected pursuant to the provisions of §25.483 of this title

(relating to Disconnection of Service) for failure to pay a required deposit; and

(D) Any explanatory data or narrative necessary to account for customers that were not included in either subparagraph (B) or (C) of this paragraph.

(2) For each month of the reporting quarter each LSP must report the total number of customers to whom a disconnection notice was issued pursuant to the provisions of §25.483 of this title and the following information regarding those customers:

(A) The number of customers who entered into a deferred payment plan, as defined by §25.480(j) of this title (relating to Bill Payment and Adjustments) with the LSP;

(B) The number of customers whose service was physically disconnected pursuant to §25.483 of this title;

(C) The average amount owed to the LSP by each disconnected customer at the time of disconnection; and

(D) Any explanatory data or narrative necessary to account for customers that are not included in either subparagraph (A) or (B) of this paragraph.

(3) For the entirety of the reporting quarter, each LSP must report, for each customer that received POLR service, the TDU and customer class associated with the customer's ESI ID, the number of days the customer received POLR service, and whether the customer is currently the LSP's customer.

(t) Notice of transition to POLR service to customers. When a customer is moved to POLR service, the customer must be provided notice of the transition by ERCOT, the REP transitioning the customer, and the POLR provider. The ERCOT notice must be provided within two days of the time ERCOT and the transitioning REP know that the customer must be transitioned and customer contact information is available. If ERCOT cannot provide notice to customers within two days, it must provide notice as soon as practicable. The POLR provider must provide the notice required by paragraph (3) of this subsection to commission staff at least 48 hours before it is provided to customers, and must provide the notice to transitioning customers as soon as practicable. The POLR provider must email the notice to the commission staff members designated for receipt of the notice.

(1) ERCOT notice methods must include a post-card, containing the official commission seal with language and format approved by the commission. ERCOT must notify transitioned customers with an automated phone-call and email to the extent the information to contact the customer is available pursuant to subsection (p)(6) of this section. ERCOT must study the effectiveness of the notice methods used and report the results to the commission.

(2) Notice by the REP from which the customer is transferred must include:

(A) The reason for the transition;

(B) A contact number for the REP;

(C) A statement that the customer will receive a separate notice from the POLR provider that must disclose the date the POLR provider must begin serving the customer;

(D) Either the customer's deposit plus accrued interest, or a statement that the deposit must be returned within seven days of the transition;

(E) A statement that the customer can leave the assigned service by choosing a competitive product or service offered by the POLR provider, or another competitive REP, as well as the following statement: "If you would like to see offers from different retail electric providers, please access www.powertochoose.org, or call toll-free 1-866-PWR-4-TEX (1-866-797-4839) for a list of providers in your area;"

(F) For residential customers, notice from the commission in the form of a bill insert or a bill message with the header "An Important Message from the Public Utility Commission Regarding Your Electric Service" addressing why the customer has been transitioned to another REP, the continuity of service purpose, the option to choose a different competitive provider, and information on competitive markets to be found at www.powertochoose.org, or toll-free at 1-866-PWR-4-TEX (1-866-797-4839);

(G) If applicable, a description of the activities that the REP will use to collect any outstanding payments, including the use of consumer reporting agencies, debt collection agencies, small claims court, and other remedies allowed by law, if the customer does not pay or make acceptable payment arrangements with the REP; and

(H) Notice to the customer that after being transitioned to POLR service, the customer may accelerate a switch to another REP by requesting a special or out-of-cycle meter read.

(3) Notice by the POLR provider must include:

(A) The date the POLR provider began or will begin serving the customer and a contact number for the POLR provider;

(B) A description of the POLR provider's rate for service. In the case of a notice from an LSP that applies the pricing of subsection (m)(2) of this section, a statement that the price is generally higher than available competitive prices;

(C) The deposit requirements of the POLR provider and any applicable deposit waiver provisions and a statement that, if the customer chooses a different competitive product or service offered by the POLR provider, a REP affiliated with the POLR provider, or another competitive REP, a deposit may be required;

(D) A statement that the additional competitive products or services may be available through the POLR provider, a REP affiliated with the POLR provider, or another competitive REP, as well as the following statement: "If you would like to choose a different retail electric provider, please access www.powertochoose.org, or call toll-free 1-866-PWR-4-TEX (1-866-797-4839) for a list of providers in your area;"

(E) The applicable Terms of Service and Electricity Facts Label (EFL); and

(F) For residential customers that are served by an LSP under a rate prescribed by subsection (m)(2) of this section, a notice to the customer that after being transitioned to service from a POLR provider, the customer may accelerate a switch to another REP by requesting a special or out-of-cycle meter read.

(u) Market notice of transition to POLR service. ERCOT must notify all affected Market Participants and the Retail Market Subcommittee (RMS) email listserv of a mass transition event within the same day of an initial mass-transition call after the call has taken place. The notification must include the exiting REP's name, total number of ESI IDs, and estimated load.

(v) Disconnection by a POLR provider. The POLR provider must comply with the applicable customer protection rules as provided for under Subchapter R of this chapter, except as otherwise stated in this section. To ensure continuity of service, service under this section must begin when the customer's transition to the POLR provider is complete. A customer deposit is not a prerequisite for the initiation of service

under this section. Once service has been initiated, a customer deposit may be required to prevent disconnection. Disconnection for failure to pay a deposit may not occur until after the proper notice and after that appropriate payment period detailed in §25.478 of this title has elapsed, except where otherwise noted in this section.

(w) Deposit payment assistance.

(1) The commission staff designee will distribute the deposit payment assistance monies to the appropriate POLRs on behalf of customers as soon as practicable.

(2) The executive director or staff designee will use best efforts to provide written notice to the appropriate POLRs of the following on or before the second calendar day after the transition:

(A) a list of the ESI IDs identified by the LILA that have been or will be transitioned to the applicable POLR (if available); and

(B) the amount of deposit payment assistance that will be provided on behalf of a POLR customer identified by the LILA (if available).

(3) Amounts credited as deposit payment assistance pursuant to this section must be refunded to the customer in accordance with §25.478(j) of this title.

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 R. CUSTOMER PROTECTION RULES FOR RETAIL ELECTRIC SERVICE PROVIDERS

16 TAC §§25.471, 25.475, 25.479, 25.498, 25.499

Statutory Authority

These rule amendments and one new rule are adopted under the following provisions of PURA: §14.001, which provides the commission the general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by PURA that is necessary and convenient to the exercise of that power and jurisdiction; §14.002, which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; §17.003, which requires electric utilities and retail electric providers to provide clear and uniform information about rates, terms, services, involuntary load shed procedures, critical designations, and procedures for applying for critical designations; §17.102, which directs the commission to adopt and enforce rules requiring that charges on an electric service provider's bill be clearly and easily identified, §39.101, which requires the commission to ensure that retail customer protections are established that entitle a customer to safe, reliable, and reasonably priced electricity, and other protections; §39.106, which requires that the commission designate providers of last resort; §39.107(g), which prohibits metered electric service being sold to residential customers on a prepaid basis at a price that is higher than the price charged by the POLR, §39.110, which prohibits the offering of wholesale indexed products to residential or small commercial customers and placed conditions on the enrollment of other customers in wholesale indexed products; §39.112, which requires a REP to provide certain information to a residential customer who has a fixed rate product.

Cross reference to statutes: Public Utility Regulatory Act §14.001, §14.002, §17.003, §17.102, §39.101, §39.106, §39.107(g), §39.110, and §39.112.

§25.471. General Provisions of Customer Protection Rules.

(a) Application. This subchapter applies to aggregators and retail electric providers (REPs). In addition, where specifically stated, these rules apply to transmission and distribution utilities (TDUs), the registration agent, brokers and power generation companies. These rules specify when certain provisions are applicable only to some, but not all, of these providers.

(1) Affiliated REP customer protection rules, to the extent the rules differ from those applicable to all REPs or those that apply to the provider of last resort (POLR), do not apply to the affiliated REP when serving customers outside the geographic area served by its affiliated transmission and distribution utility. The affiliated REP customer protection rules apply until the price-to-beat obligation ends in the affiliated REPs' affiliated TDU service territory.

(2) Requirements applicable to a POLR apply to a REP only in its provision of service as a POLR.

(3) The rules in this subchapter are minimum, mandatory requirements that must be offered to or complied with for all customers unless otherwise specified. Except for the provisions of §25.495 of this title (relating to Unauthorized Change of Retail Electric Provider), §25.481 of this title (relating to Unauthorized Charges), §25.485(a) - (b) of this title (relating to Customer Access and Complaint Handling), and §25.499 (relating to Acknowledgement of Risk Requirements for Certain Commercial Contracts), a customer other than a residential or small commercial class customer, or a non-residential customer whose load is part of an aggregation in excess of 50 kilowatts, may agree to terms of service that reflect either a higher or lower level of customer protections than would otherwise apply under these rules. Any agreements containing materially different protections from those specified in these rules must be reduced to writing and provided to the customer. Additionally, copies of such agreements must be provided to the commission upon request.

(4) The rules of this subchapter control over any inconsistent provisions, terms, or conditions of a REP's terms of service or other documents describing service offerings for customers in Texas.

(5) For purposes of this subchapter, a municipally owned utility or electric cooperative is subject to the same provisions as a REP where the municipally owned utility or electric cooperative sells retail electricity service outside its certificated service area.

(b) Purpose. The purposes of this subchapter are to:

(1) provide minimum standards for customer protection. An aggregator or REP may adopt higher standards for customer protection, provided that the prohibition on discrimination set forth in subsection (c) of this section is not violated;

(2) provide customer protections and disclosures established by other state and federal laws and rules including but not limited to the Fair Credit Reporting Act (15 U.S.C. §1681, et seq.) and the Truth in Lending Act (15 U.S.C. §1601, et seq.). Such protections are applicable where appropriate, whether or not it is explicitly stated in these rules;

(3) provide customers with sufficient information to make informed decisions about electric service in a competitive market; and

(4) prohibit fraudulent, unfair, misleading, deceptive, or anticompetitive acts and practices by aggregators, REPs, and brokers in the marketing, solicitation and sale of electric service, in the administration of any terms of service for electric service and in providing advice or procurement services to, or acting on behalf of, a retail electric customer regarding the selection of a retail electric provider, or a product or service offered by a retail electric provider.

(c) Prohibition against discrimination. This subchapter prohibits REPs from unduly refusing to provide electric service or otherwise unduly discriminating in the marketing and provision of electric service to any customer because of race, creed, color, national origin, ancestry, sex, marital status, lawful source of income, level of income, disability, familial status, location of customer in an economically distressed geographic area, or qualification for low-income or energy efficiency services.

(d) Definitions. For the purposes of this subchapter the following words and terms have the following meaning, unless the context indicates otherwise:

(1) Applicant--A person who applies for electric service via a move-in or switch with a REP that is not currently the person's REP of record or applies for aggregation services with an aggregator from whom the person is not currently receiving aggregation services.

(2) Burned Veteran--A customer who is a military veteran who a medical doctor certifies has a significantly decreased ability to regulate body temperature because of severe burns received in combat.

(3) Competitive energy services--As defined in §25.341 of this title (relating to Definitions).

(4) Customer--A person who is currently receiving retail electric service from a REP in the person's own name or the name of the person's spouse, or the name of an authorized representative of a partnership, corporation, or other legal entity, including a person who is changing premises but is not changing their REP.

(5) Electric service--Combination of the transmission and distribution service provided by a transmission and distribution utility, municipally owned utility, or electric cooperative, metering service provided by a TDU or a competitive metering provider, and the generation service provided to an end-use customer by a REP. This term does not include optional competitive energy services, as defined in §25.341 of this title, that are not required for the customer to obtain service from a REP.

(6) Energy service--As defined in §25.223 of this title (relating to Unbundling of Energy Service).

(7) Enrollment--The process of obtaining authorization and verification for a request for service that is a move-in or switch in accordance with this subchapter.

(8) In writing--Written words memorialized on paper or sent electronically.

(9) Move-in--A request for service to a new premise where a customer of record is initially established or to an existing premise where the customer of record changes.

(10) Retail electric provider (REP)--Any entity as defined in §25.5 of this title (relating to Definitions). For purposes of this rule, a municipally owned utility or an electric cooperative is only considered a REP where it sells retail electric power and energy outside its certified service territory. An agent of the REP may perform all or part of the REP's responsibilities pursuant to this subchapter. For purposes of this subchapter, the REP will be responsible for the actions of the agent.

(11) Small commercial customer--A non-residential customer that has a peak demand of less than 50 kilowatts during any 12-month period, unless the customer's load is part of an aggregation program whose peak demand is in excess of 50 kilowatts during the same 12- month period.

(12) Switch--The process by which a person changes REPs without changing premises.

(13) Termination of service--The cancellation or expiration of a service agreement or contract by a REP or customer.

§25.475. General Retail Electric Provider Requirements and Information Disclosures to Residential and Small Commercial Customers.

(a) Applicability. The requirements of this section apply to retail electric providers (REPs) in connection with the provision of service and marketing to residential and small commercial customers. When specifically stated, the requirements of this section apply to brokers, aggregators, and transmission and distribution utilities (TDUs). The requirements for an additional notice to residential customers of contract expiration is effective for contracts entered into on or after September 1, 2021. REPs must comply with the requirements set forth in §25.475(e)(2)(B)(ii), (e)(2)(C)(iii), (v), (vi), (vii), (h)(4), (h)(6)(C), and the requirements set forth under §25.475(e)(1) for contracts entered into with small commercial customers by April 1, 2022. Contracts entered into prior to the effective date of these provisions must comply with the provisions of this section in effect at the time the contracts were executed.

(b) Definitions. The definitions set forth in §25.5 (relating to Definitions) and §25.471(d) (relating to General Provisions of Customer Protection Rules) of this title apply to this section. In addition, the following words and terms, when used in this section have the following meanings, unless the context indicates otherwise.

(1) Contract--The terms of service document, the Electricity Facts Label (EFL), Your Rights as a Customer document (YRAC), and the documentation of enrollment pursuant to §25.474 of this title (relating to Selection of Retail Electric Provider), and, if applicable, Prepaid Disclosure Statement (PDS).

(2) Contract documents--The terms of service, EFL, YRAC, and, if applicable, PDS.

(3) Contract expiration--The time when the initial term contract is completed. A new contract is initiated when the customer begins receiving service pursuant to the new EFL.

(4) Contract term--The time period the contract is in effect.

(5) Fixed rate product--A retail electric product with a term of at least three months for which the price (including all recurring charges and ancillary service charges) for each billing period of the contract term is the same throughout the contract term, except that the price may vary from the disclosed amount solely to reflect actual changes in TDU charges, changes to the Electric Reliability Council of Texas (ERCOT) or Texas Regional Entity, Inc. administrative fees charged to loads or changes resulting from federal, state or local laws that impose new or modified fees or costs on a REP that are beyond the REP's control. The price may not vary from the disclosed amount to reflect changes in ancillary service charges unless the commission

expressly designates a specific type of ancillary service product as incurring charges beyond the REP's control for a customer's existing contract.

(6) Indexed product--A retail electric product for which the price, including recurring charges, can vary according to a pre-defined pricing formula that is based on publicly available indices or information and is disclosed to the customer, and to reflect actual changes in TDU charges, changes to the ERCOT or Texas Regional Entity administrative fees charged to loads or changes resulting from federal, state or local laws or regulatory actions that impose new or modified fees or costs on a REP that are beyond the REPs control. An indexed product may be for a term of three months or more, or may be a month-to-month contract.

(7) Month-to-month contract--A contract with a term of 31 days or less. A month-to-month contract may not contain a termination fee or penalty.

(8) Price--The cost for a retail electric product that includes all recurring charges, including the cost of ancillary services, excluding state and local sales taxes, and reimbursement for the state miscellaneous gross receipts tax.

(9) Recurring charge--A charge for a retail electric product that is expected to appear on a customer's bill in every billing period or appear in three or more billing periods in a twelve month period. A charge is not considered recurring if it will be billed by the TDU and passed on to the customer and will either not be applied to all customers of that class within the TDU territory, or cannot be known until the customer enrolls or requests a specific service.

(10) Term contract--A contract with a term in excess of 31 days.

(11) Variable price product--A retail product for which price may vary according to a method determined by the REP, including a product for which the price, can increase no more than a defined percentage as indexed to the customer's previous billing month's price. For residential customers, a variable price product can be only a month-to-month contract.

(12) Wholesale Indexed Product--A retail electric product in which the price a customer pays for electricity includes a direct pass-through of real-time settlement point prices determined by the independent organization certified under the Public Utility Regulatory Act (PURA) §39.151 for the ERCOT power region.

(c) General Retail Electric Provider requirements.

(1) General Disclosure Requirements.

(A) All written, electronic, and oral communications, including advertising, websites, direct marketing materials, billing statements, terms of service, EFLs, YRACs, and, if applicable, PDSs distributed by a REP or aggregator must be clear and not misleading, fraudulent, unfair, deceptive, or anti-competitive. Prohibited communications include, but are not limited to:

(i) Using the term or terms "fixed" to market a product that does not meet the definition of a fixed rate product.

(ii) Suggesting, implying, or otherwise leading someone to believe that a REP or aggregator has been providing retail electric service prior to the time the REP or aggregator was certified or registered by the commission.

(iii) Suggesting, implying or otherwise leading someone to believe that receiving retail electric service from a REP will provide a customer with better quality of service from the TDU.

(iv) Falsely suggesting, implying or otherwise leading someone to believe that a person is a representative of a TDU or any REP or aggregator.

(v) Falsely suggesting, implying or otherwise leading someone to believe that a contract has benefits for a period of time longer than the initial contract term.

(B) Written and electronic communications must not refer to laws, including commission rules without providing a link or website address where the text of those rules are available. All printed advertisements, electronic advertising over the Internet, and websites, must include the REP's certified name or commission authorized business name, or the aggregator's registered name, and the number of the certification or registration.

(C) The terms of service, EFL, YRAC , and, if applicable, PDS must be provided to each customer upon enrollment. Each document must be provided to the customer whenever a change is made to the specific document and upon a customer's request, at any time free of charge.

(D) A REP must retain a copy of each version of the terms of service, EFL, YRAC, and, if applicable, PDS during the time the plan is in effect for a customer and for four years after the contract ceases to be in effect for any customer. REPs must provide such documents at the request of the commission or its staff.

(2) General contracting requirements.

(A) Each terms of service, EFL, and YRAC must be complete, be written in language that is clear, plain and easily understood, and be printed in paragraphs of no more than 250 words in a font no smaller than 10 point. References to laws including commission rules in these documents must include a link or website address to the full text of the applicable law or rule.

(B) Each contract document must be available to the commission to post on its customer education website if the REP chooses to post offers to the website.

(C) A contract is limited to service to a customer at a location specified in the contract. If the customer moves from the location, the customer is under no obligation to continue the contract at another location. The REP may require a customer to provide evidence that it is moving to another location. There must be no early termination fee assessed to the customer as a result of the customer's relocation if the customer provides a forwarding address and, if required, reasonable evidence that the customer no longer occupies the location specified in the contract.

(D) A terms of service document and EFL must disclose the type of product being described, using one of the following terms: fixed rate product or a variable price product.

(E) A REP must not use a credit score, a credit history, or utility payment data as the basis for determining the price for electric service for a product with a contract term of 12 months or less for an existing residential customer or in response to an applicant's request to become a residential customer.

(F) In any dispute between a customer and a REP concerning the terms of a contract, any vagueness, obscurity, or ambiguity in the contract will be construed in favor of the customer.

(G) For a variable price product, the REP must disclose on the REP's website and through a toll-free number the current price and, for residential customers, one year price history, or history for the life of the product, if it has been offered less than one year. A REP must not rename a product in order to avoid disclosure of price history. The

EFL of a variable price product must include a notice of how the current price and, if applicable, historical price information may be obtained by a customer.

(H) A REP must comply with its contracts.

(3) Specific contract requirements.

(A) The contract term must be conspicuously disclosed.

(B) The start and end dates of the contract must be available to the customer upon request. If the REP cannot determine the start date, the REP may estimate the start date. After the start date is known, the REP must specify the end date of the contract by:

(i) specifying a calendar date; or

(ii) reference to the first meter read on or after a specific calendar date.

(C) If a REP specifies a calendar date as the end date, the REP may bill the term contract price through the first meter read on or after the end date of the contract.

(D) Each contract for service must include the terms of the default renewal product that the customer will be automatically enrolled in if the customer does not select another retail electric product before the expiration of the contract term after the customer has received all required expiration notices.

(E) If a REP does not provide proper notice of the expiration of a fixed rate contract and the customer does not select another REP before expiration of the contract term, the REP must continue to serve the customer under the pricing terms of the fixed rate product until the REP provides notice in accordance with applicable requirements of subsection I(2)(A)(i) or (ii) or the customer selects another retail electric product.

(F) A REP, aggregator, or broker is prohibited from offering:

(i) an indexed product to a residential or small commercial customer on or after February 1, 2022; or

(ii) a wholesale indexed product to a residential or small commercial customer on or after September 1, 2021.

(4) Website requirements.

(A) Each REP that offers residential retail electric products for enrollment on its website must prominently display the EFL for any products offered without a person having to enter any personal information other than zip code and information that allows determination of the type of offer the consumer wishes to review. Person-specific information must not be required.

(B) The EFL for each product must be printable in no more than a two-page format. The EFL, terms of service, YRAC, and, if applicable, PDS for any products offered for enrollment on the website must be available for viewing or downloading.

(d) Changes in contract and price and notice of changes. A REP may make changes to the terms and conditions of a contract or to the price of a product as provided for in this section. Changes in term (length) of a contract require the customer to enter into a new contract and may not be made by providing the notice described in paragraph (3) of this subsection.

(1) Contract changes other than price.

(A) A REP may not change the price (other than as allowed by paragraph (2) of this subsection) or contract term of a term contract for a retail electric product, during its term; but may change any other provision of the contract, with notice under paragraph (3) of this subsection.

(B) A REP may not change the terms and conditions of a variable price month-to-month product unless it provides notice under paragraph (3) of this subsection.

(2) Price changes.

(A) A REP may only change the price of a fixed rate product or a variable product consistent with the definitions in this section and according to the product's EFL. Such price changes do not require notice under paragraph (3) of this subsection.

(B) For a fixed rate product, each bill must either show the price changes on one or more separate line items, or must include a conspicuous notice stating that the amount billed may include price changes allowed by law or regulatory actions.

(C) Each residential bill for a variable price product must include a statement informing the customer how to obtain information about the price that will apply on the next bill.

(3) Notice of changes to terms and conditions. A REP must provide written notice to its customers at least 14 days in advance of the date that the change in the contract will be applied to the customer's bill or take effect. Notice is not required for a change that benefits the customer.

(4) Contents of the notice to change terms and conditions. The notice must:

(A) be provided in or with the customer's bill or in a separate document;

(B) include the following statement, "Important notice regarding changes to your contract" clearly and conspicuously in the notice;

(C) identify the change and the specific contract provisions that address the change;

(D) clearly specify what actions the customer needs to take if the customer does not accept the proposed changes to the contract;

(E) state in bold lettering that if the new terms are not acceptable to the customer, the customer may terminate the contract and no termination penalty may apply for 14 days from the date that the notice is sent to the customer but may apply if action is taken after the 14 days have expired. No such statement is required if the customer would not be subject to a termination penalty under any circumstances; and

(F) state in bold lettering that establishing service with another REP may take up to seven business days.

(e) Contract expiration and renewal offers.

(1) Notice Timeline for Expiration of a Fixed Rate Product.

(A) For fixed rate products, the REP must provide the customer with at least three written notices of the date the fixed rate product will expire. The notices must be provided during the last third of the fixed rate contract period and in intervals that allow for, as practicable, even distribution of the notices throughout the last third of the fixed rate contract period. For contracts with a period of 12 months or longer, the first notice may be provided up to three months prior to the contract end date. For fixed rate contracts for a period:

(i) Of more than four months, the final notice must be provided at least 30 days before the date the fixed rate contact will expire.

(ii) Of four or fewer months, the final notice must be provided at least 15 days before the date the fixed rate contract will expire.

(iii) For a small commercial customer, the final notice must be provided at least 14 days before the fixed rate contract will expire.

(B) The notices must be provided to the customer by mail at the customer's billing address, unless the customer has opted to receive communications electronically from the REP.

(C) If a REP does not provide the required notice of the expiration of a customer's fixed rate contract and the customer does not select another retail electric product before expiration of the fixed rate contract term, the REP must continue serving the customer under the terms of the fixed rate contract until the REP provides notice in accordance with applicable requirements of subsection (e)(1)(A)(i) or (ii), or until the customer selects another retail electric product.

(2) Contract Expiration.

(A) If a customer takes no action in response to the final notice of contract expiration for the continued receipt of retail electric service upon the contract's expiration, the REP must serve the customer pursuant to a default renewal product that is a month-to-month product that the customer may cancel at any time without a fee. The month-to-month product price may vary between billing cycles based on clear terms designed to be easily understood by the average customer.

(B) Written notice of contract expiration must be provided in or with the customer's bill, or in a separate document.

(i) If notice is provided with a residential customer's bill, the notice must be printed on a separate page. A statement must be included in a manner readily visible on the outside of the envelope sent to a residential customer's billing address by mail and in the subject line on the e-mail (if the REP sends the notice by e-mail) that states, "Contract Expiration Notice. See Enclosed."

(ii) If the notice is provided in or with a small commercial customer's bill, the REP must include a statement in a manner readily visible on the outside of the billing envelope or in the subject line of an electronic bill that states, "Contract Expiration Notice" or "Contract Expiration Notice. See Enclosed."; or

(iii) For residential and small commercial customers, if notice is provided in a separate document, a statement must be included in a manner readily visible on the outside of the envelope and in the subject line of the e-mail (if customer has agreed to receive official documents by e-mail) that states, "Contract Expiration Notice. See Enclosed."

(C) A written notice of contract expiration (whether with the bill or in a separate envelope) must set out the following:

(i) The date, in boldfaced and underlined text, as provided for in subsection (c)(3)(B) of this section that the existing contract will expire.

(ii) If the REP provided a calendar date as the end date for the contract, a statement in bold lettering no smaller than 12 point font that no termination penalty must apply to residential and small commercial customers 14 days prior to the date stated as the expiration date in the notice. In addition, a description of any fees or charges associated with the early termination of a residential customer's fixed rate product that would apply before 14 days prior to the date stated as the expiration date in the notice must be provided. No such statements are required if the original contract did not contain a termination fee.

(iii) If the REP defined the contract end date by reference to the first meter read on or after a specific calendar date, a statement in bold lettering no smaller than 12 point font that no termination penalty applies to residential customers for 14 days prior to the date provided as the "on or after" date included in connection with the first meter read language referenced in the notice, or that no termination penalty applies to small commercial customers for 14 days prior to the contract end date. No such statement is required if the original contract did not contain a termination fee.

(iv) A description of any renewal offers the REP chooses to make available to the customer and the location of the terms of service and EFL for each of those products and a description of actions the customer needs to take to continue to receive service from the REP under the terms of any of the described renewal offers and the deadline by which actions must be taken.

(v) The final notice provided pursuant to subsection (e)(2) must include a copy of the EFL for the default renewal product if the customer takes no action or if the EFL is not included with the contract expiration notice, the REP must provide the EFL to the customer at least 14 days before the expiration of the contract using the same delivery method as was used for the notice. The contract expiration notice must specify how and when the EFL will be made available to the customer.

(vi) The final notice provided pursuant to subsection (e)(2) must include a statement that if the customer takes no action, service to the customer will continue pursuant to the EFL for the default renewal product that must be included as part of the notice of contract expiration. The terms of service for the default renewal product must be included as part of the notice, unless the terms of service applicable to the customer's existing service also applies to the default renewal product.

(vii) The final notice provided pursuant to subsection (e)(2) must include a statement that the default service is month-to month and may be cancelled at any time with no fee.

(3) Affirmative consent. A customer that is currently receiving service from a REP may be re-enrolled with the REP for service with the same product under which the customer is currently receiving service, or a different product, by conducting an enrollment pursuant to §25.474 of this title or by obtaining the customer's consent in a recording, electronic document, or written letter of authorization consistent with the requirements of this subsection. Affirmative consent is not required when a REP serves the customer under a default renewal product pursuant to paragraph (1) of this subsection. Each recording, electronic document, or written consent form must:

(A) Indicate the customer's name, billing address, service address (for small commercial customers, the ESI ID may be used rather than the service address);

(B) Indicate the identification number of the terms of service and EFL under which the customer will be served;

(C) Indicate if the customer has received, or when the customer will receive copies of the terms of service, EFL, YRAC, and, if applicable, PDS;

(D) Indicate the price(s) which the customer is agreeing to pay;

(E) Indicate the date or estimated date of the re-enrollment, the contract term, and the estimated start and end dates of contract term;

(F) Affirmatively inquire whether the customer has decided to enroll for service with the product, and contain the customer's affirmative response; and

(G) Be entirely in plain, easily understood language, in the language that the customer has chosen for communications.

(f) Terms of service document. The following information must be conspicuously contained in the terms of service:

(1) Identity and contact information. The REP's certified name and business name (dba) (if applicable), mailing address, e-mail and Internet address (if applicable), certification number, and a toll-free telephone number (with hours of operation and time-zone reference).

(2) Pricing and payment arrangements.

(A) Description of the amount of any routine non-recurring charges resulting from a move-in or switch that may be charged to the customer, including but not limited to an out-of-cycle meter read, and connection or reconnection fees;

(B) For small commercial customers, a description of the demand charge and how it will be applied, if applicable;

(C) An itemization, including name and cost, of any non-recurring charges for services that may be imposed on the customer for the retail electric product, including an application fee, charges for default in payment or late payment, and returned checks charges;

(D) A description of any collection fees or costs that may be assessed to the customer by the REP and that cannot be quantified in the terms of service; and

(E) A description of payment arrangements and bill payment assistance programs offered by the REP.

(3) Deposits. If the REP requires deposits from its customers:

(A) a description of the conditions that will trigger a request for a deposit;

(B) the maximum amount of the deposit or the manner in which the deposit amount will be determined;

(C) a statement that interest will be paid on the deposit at the rate approved by the commission, and the conditions under which the customer may obtain a refund of a deposit;

(D) an explanation of the conditions under which a customer may establish satisfactory credit pursuant to §25.478 of this title (relating to Credit Requirements and Deposits); and

(E) if applicable, the customer's right to post a letter of guarantee in lieu of a deposit pursuant to §25.478(i) of this title.

(4) Rescission, Termination and Disconnection.

(A) In a conspicuous and separate paragraph or box:

(i) A description of the right of a customer, for switch requests, to rescind service without fee or penalty of any kind within three federal business days after receiving the terms of service, pursuant to §25.474 of this title; and

(ii) Detailed instructions for rescinding service, including the telephone number and, if available, facsimile number or e-mail address that the customer may use to rescind service.

(B) A statement as to how service can be terminated and any penalties that may apply;

(C) A statement of the customer's ability to terminate service without penalty if the customer moves to another premises and provides evidence that it is moving, if required, and a forwarding address; and

(D) If the REP has disconnection authority, pursuant to §25.483 of this title (relating to Disconnection of Service), a statement that the REP may order disconnection of the customer for non-payment.

(5) Antidiscrimination. A statement informing the customer that the REP cannot deny service or require a prepayment or deposit for service based on a customer's race, creed, color, national origin, ancestry, sex, marital status, lawful source of income, level of income, disability, familial status, location of a customer in a economically distressed geographic area, or qualification for low income or energy efficiency services. For residential customers, a statement informing the customer that the REP cannot use a credit score, a credit history, or utility payment data as the basis for determining the price for electric service for a product with a contract term of 12 months or less.

(6) Other terms. Any other material terms and conditions, including exclusions, reservations, limitations of liability, or special equipment requirements, that are a part of the contract for the retail electric product.

(7) Contract expiration notice. For a term contract, the terms of service must contain a statement informing the customer that a contract expiration notice will be sent at least 14 days prior to the end of the initial contract term. The terms of service must also state that if the customer fails to take action to ensure the continued receipt of retail electric service upon the contract's expiration, the customer will continue to be served by the REP automatically pursuant to a default renewal product, which must be a month-to-month product.

(8) A statement describing the conditions under which the contract can change and the notice that will be provided if there is a change.

(9) Version number. A REP must assign an identification number to each version of its terms of service, and must publish the number on the terms of service document.

(g) Electricity Facts Label. The EFL must be unique for each product offered and must include the information required in this subsection. Nothing in this subsection precludes a REP from charging a price that is less than its EFL would otherwise provide.

(1) Identity and contact information. The REP's certified name and business name (dba) (if applicable), mailing address, e-mail and Internet address (if applicable), certification number, and a toll-free telephone number (with hours of operation and time-zone reference).

(2) Pricing disclosures. Pricing information must be disclosed by a REP in an EFL. The EFL must state specifically whether the product is a fixed rate or variable price product.

(A) For a fixed rate product, the EFL must provide the total average price for electric service reflecting all recurring charges, excluding state and local sales taxes, and reimbursement for the state miscellaneous gross receipts tax, to the customer.

(B) For a variable price product, the EFL must provide the total average price for electric service for the first billing cycle reflecting all recurring charges, including any TDU charges that may be passed through and excluding state and local sales taxes, and reimbursement for the state miscellaneous gross receipts tax, to the customer. Actual changes in TDU charges, changes to the ERCOT or Texas Regional Entity administrative fees charge to loads or changes resulting from federal, state or local laws or regulatory actions that im-

pose new or modified fees or costs on a REP that were not implemented prior to the issuance of the EFL and were not included in the average price calculation may be directly passed through to customers beginning with the customer's first billing cycle.

(C) The total average price for electric service must be expressed in cents per kilowatt hour, rounded to the nearest one-tenth of one cent for the following usage levels:

(i) For residential customers, 500, 1,000 and 2,000 kilowatt hours per month; and

(ii) For small commercial customers, 1,500, 2,500, and 3,500 kilowatt hours per month. If demand charges apply assume a 30 percent load factor.

(D) If a REP combines the charges for retail electric service with charges for any other product, the REP must:

(i) If the electric product is sold separately from the other products, disclose the total price for electric service separately from other products; and

(ii) If the REP does not permit a customer to purchase the electric product without purchasing the other products or services, state the total charges for all products and services as the price of the total electric service. If the product has a one-time cost up front, for the purposes of the average price calculation, the cost of the product may be figured in over a 12-month period with 1/12 of the cost being attributed to a single month.

(E) The following must be included on the EFL for specific product types:

(i) For a variable price product that increases no more than a defined percentage as indexed to the customer's previous billing month's price, a notice in bold type no smaller than 12 point font: "Except for price changes allowed by law or regulatory action, this price is the price that will be applied during your first billing cycle; this price may increase by no more than {insert percentage} percent from month-to-month." For residential customers, the following additional statement is required: "Please review the historical price of this product available at {insert specific website address and toll-free telephone number}." In the disclosure chart, the box describing whether the price can change during the contract period must include the following statement: "The price applied in the first billing cycle may be different from the price in this EFL if there are changes in TDSP charges; changes to the Electric Reliability Council of Texas or Texas Regional Entity, Inc. administrative fees charged to loads; or changes resulting from federal, state or local laws or regulatory actions that impose new or modified fees or costs that are outside our control."

(ii) For all other variable price products, a notice in bold type no smaller than 12 point font: "Except for price changes allowed by law or regulatory action, this price is the price that will be applied during your first billing cycle; this price may change in subsequent months at the sole discretion of {insert REP name}. In the disclosure chart, the box describing whether the price can change during the contract period must include the following statement: "The price applied in the first billing cycle may be different from the price in this EFL if there are changes in TDSP charges; changes to the Electric Reliability Council of Texas or Texas Regional Entity administrative fees charged to loads; or changes resulting from federal, state or local laws or regulatory actions that impose new or modified fees or costs that are outside our control." For residential customers, the following additional statement is required: "Please review the historical price of this product available at {insert specific website address and toll-free telephone number}."

(3) Fee Disclosures.

(A) If customer may be subject to a special charge for underground service or any similar charge that applies only in a part of the TDU service area, the EFL must include a statement in the electricity price section that some customers will be subject to a special charge that is not included in the total average price for electric service and must disclose how the customer can determine the price and applicability of the special charge.

(B) A listing of all fees assessed by the REP that may be charged to the customer and whether the fee is included in the recurring charges.

(4) Term Disclosure. EFL must include disclosure of the length of term, minimum service term, if any, and early termination penalties, if any.

(5) Renewable Energy Disclosures. The EFL must include the percentage of renewable energy of the electricity product and the percentage of renewable energy of the statewide average generation mix.

(6) Format of Electricity Facts Label. REPs must use the following format for the EFL with the pricing chart and disclosure chart shown. The additional language is for illustrative purposes. It does not include all reporting requirements as outlined above. Such subsections should be referred to for determination of the required reporting items on the EFL. Each EFL must be printed in type no smaller than ten points in size, unless a different size is specified in this section, and must be formatted as shown in this paragraph:
Figure: 16 TAC §25.475(g)(6)

(7) Version number. A REP must assign an identification number to each version of its EFL, and must publish the number on the EFL.

(h) Your Rights as a Customer disclosure. The information set out in this section must be included in a REP's "Your Rights as a Customer" document in plain language, to summarize the standard customer protections provided by this subchapter or additional protections provided by the REP.

(1) A YRAC document must be consistent with the terms of service for the retail product.

(2) The YRAC document must inform the customer of the REP's complaint resolution policy pursuant to §25.485 of this title (relating to Customer Access and Complaint Handling) and payment arrangements and deferred payment policies pursuant to §25.480 of this title (relating to Bill Payment and Adjustments).

(3) The YRAC document must inform the customer of the REP's procedures for reporting outages and the steps necessary to have service restored or reconnected after an involuntary suspension or disconnection.

(4) The YRAC must provide information the REP has received from the TDU pursuant to PURA §17.003(e) regarding the TDU's procedures for implementing involuntary load shedding initiated by the independent organization certified under PURA §39.151 for the ERCOT power region, and, if applicable, where any additional details regarding those procedures or relevant updates may be located. The REP may fulfill this requirement by providing a website address with the required information. Each TDU must develop such information and resources by September 1, 2021 and make the website address where such information can be viewed available to REPs. A REP may provide this information at a website address other than the website addresses made available by the TDUs. A TDU or other entity

providing a website address is required to update this information within 30 days of any material change in the information.

(5) The YRAC document must inform the customer of the customer's right to have the meter tested pursuant to §25.124 of this title (relating to Meter Testing), or in accordance with the tariffs of a transmission and distribution utility, a municipally owned utility, or an electric cooperative, as applicable, and the REP's ability in all cases to make that request on behalf of the customer by a standard electronic market transaction, and the customer's right to be instructed on how to read the meter, if applicable.

(6) The YRAC document must inform the customer of the availability of:

(A) Financial and energy assistance programs for residential customers;

(B) Any special services such as readers or notices in Braille or TTY;

(C) Special policies or programs available to residential customers designated as chronic condition or critical care under §25.497 of this title and the procedure for a customer to apply to be considered for such designations; and

(D) Any available discounts that may be offered by the REP for qualified low-income residential customers. A REP may comply with this requirement by providing the customer with instructions for how to inquire about such discounts.

(7) The YRAC document must inform the customer of the following customer rights and protections:

(A) Unauthorized switch protections applicable under §25.495 of this title (relating to Unauthorized Change of Retail Electric Provider);

(B) The customer's right to dispute unauthorized charges on the customer's bill as set forth in §25.481 of this title (relating to Unauthorized Charges);

(C) Protections relating to disconnection of service pursuant to §25.483 of this title;

(D) Non-English language requirements pursuant to §25.473 of this title (relating to Non-English Language Requirements);

(E) Availability of a Do Not Call List pursuant to §25.484 of this title (relating to Electric No-Call List) and §26.37 of this title (relating to Texas No-Call List); and

(F) Privacy rights regarding customer proprietary information as provided by §25.472 of this title (relating to Privacy of Customer Information).

(8) Identity and contact information. The REP's certified name and business name (dba), certification number, mailing address, e-mail and Internet address (if applicable), and a toll-free telephone number (with hours of operation and time-zone reference) at which the customer may obtain information concerning the product.

(i) Advertising claims. If a REP or aggregator advertises or markets the specific benefits of a particular electric product, the REP or aggregator must provide the name of the electric product offered in the advertising or marketing materials to the commission or its staff, upon request. All advertisements and marketing materials distributed by or on behalf of a REP or aggregator must comply with this section. REPs and aggregators are responsible for representations to customers and prospective customers by employees or other agents of the REP concerning retail electric service that are made through advertising, marketing or other means.

(1) Print advertisements. Print advertisements and marketing materials, including direct mail solicitations that make any claims regarding price, savings, or environmental quality for an electricity product of the REP compared to a product offered by another REP must include the EFL of the REP making the claim. In lieu of including an EFL, the following statement must be provided: "You can obtain important standardized information that will allow you to compare this product with other offers. Contact (name, telephone number, and Internet address (if available) of the REP)." If the REPs phone number or website address is included on the advertisement, such phone number or website address is not required in the disclaimer statement. Upon request, a REP must provide to the commission the contract documents relating to a product being advertised and any information used to develop or substantiate comparisons made in the advertisement.

(2) Television, radio, and internet advertisements. A REP must include the following statement in any television, Internet, or radio advertisement that makes a specific claim about price, savings, or environmental quality for an electricity product of the REP compared to a product offered by another REP: "You can obtain important standardized information that will allow you to compare this product with other offers. Contact (name, telephone number and website (if available) of the REP)." If the REPs phone number or website address is included on the advertisement, such phone number or website address is not required in the disclaimer statement. This statement is not required for general statements regarding savings or environmental quality, but must be provided if a specific price is included in the advertisement, or if a specific statement about savings or environmental quality compared to another REP is made. Upon request, a REP must provide to the commission the contract documents relating to a product being advertised and any information used to develop or substantiate comparisons made in the advertisement.

(3) Outdoor advertisements. A REP must include, in a font size and format that is legible to the intended audience, its certified name or commission authorized business name, certification number, telephone number and Internet address (if available).

(4) Renewable energy claims. A REP must authenticate its sales of renewable energy in accordance with §25.476 of this title (relating to Renewable and Green Energy Verification). If a REP relies on supply contracts to authenticate its sales of renewable energy, it must file a report with the commission, not later than March 15 of each year demonstrating its compliance with this paragraph and §25.476 of this title.

§25.479. Issuance and Format of Bills.

(a) Application. This section applies to a retail electric provider (REP) that is responsible for issuing electric service bills to retail customers, unless the REP is issuing a consolidated bill (both energy services and transmission and distribution services) on behalf of an electric cooperative or municipally owned utility. This section does not apply to a municipally owned utility or electric cooperative issuing bills to its customers in its own service territory.

(b) Frequency and delivery of bills.

(1) A REP must issue a bill monthly to each customer unless service is provided for a period of less than one month. A REP may issue a bill less frequently than monthly if both the customer and the REP agree to such an arrangement.

(2) A bill must be issued no later than 30 days after the REP receives the usage data and any related invoices for non-bypassable charges, unless validation of the usage data and invoice received from a transmission and distribution utility by the REP or other efforts to determine the accuracy of usage data or invoices delay billing by a REP past 30 days. The number of days to issue a bill must be extended

beyond 30 days to the extent necessary to support agreements between REPs and customers for less frequent billing, as provided in paragraph (1) of this subsection or for consolidated billing.

(3) A REP must issue bills to residential customers in writing and delivered via the United States Postal Service. REPs may provide bills to a customer electronically in lieu of written mailings if both the customer and the REP agree to such an arrangement. An affiliated REP or a provider of last resort must not require a customer to agree to such an arrangement as a condition of receiving electric service.

(4) A REP must not charge a customer a fee for issuing a standard bill, which is a bill delivered via U.S. mail that complies with the requirements of this section. The customer may be charged a fee or given a discount for non-standard billing in accordance with the terms of service document.

(c) Bill content.

(1) Each customer's bill must include the following information:

(A) The certified name and address of the REP and the number of the license issued to the REP by the commission;

(B) A toll-free telephone number, in bold-face type, which the customer can call during specified hours for inquiries and to make complaints to the REP about the bill;

(C) A toll-free telephone number that the customer may call 24 hours a day, seven days a week, to report power outages and concerns about the safety of the electric power system;

(D) The service address, electric service identifier (ESI), and account number of the customer;

(E) The service period for which the bill is rendered;

(F) The date on which the bill was issued;

(G) The payment due date of the bill and, if different, the date by which payment from the customer must be received by the REP to avoid a late charge or other collection action;

(H) The current charges for electric service as disclosed in the customer's terms of service document, including applicable taxes and fees labeled "current charges." If the customer is on a level or average payment plan, the level or average payment due must be clearly shown in addition to the current charges;

(I) A calculation of the average unit price for electric service for the current billing period, labeled, "The average price you paid for electric service this month." The calculation of the average price for electric service must reflect the total of all fixed and variable recurring charges, but not include state and local sales taxes, reimbursement for the state miscellaneous gross receipts tax, and any nonrecurring charges or credits, divided by the kilowatt-hour consumption, and must be expressed as a cents per kilowatt-hour amount rounded to the nearest one-tenth of one cent.

(J) The identification and itemization of charges other than for electric service as disclosed in the customer's terms of service document;

(K) The itemization and amount of any non-recurring charge, including late fees, returned check fees, restoration of service fees, or other fees disclosed in the REP's terms of service document provided to the customer;

(L) The balances from the preceding bill, payments made by the customer since the preceding bill, and the amount the customer is required to pay by the due date, labeled "amount due;"

(M) A notice that the customer has the opportunity to voluntarily donate money to the bill payment assistance program, pursuant to §25.480(g)(2) of this title (relating to Bill Payment and Adjustments);

(N) If available to the REP on a standard electronic transaction, if the bill is based on kilowatt-hour (kWh) usage, the following information:

(i) the meter reading at the beginning of the period for which the customer is being billed, labeled "previous meter read," and the meter reading at the end of the period for which the customer is being billed, labeled "current meter read," and the dates of such readings;

(ii) the kind and number of units measured, including kWh, actual kilowatts (kW), or kilovolt ampere (kVa);

(iii) if applicable, billed kW or kVa;

(iv) whether the bill was issued based on estimated usage; and

(v) any conversions from meter reading units to billing units, or any other calculations to determine billing units from recording or other devices, or any other factors used in determining the bill, unless the customer is provided conversion charts;

(O) Any amount owed under a written guarantee agreement, provided the guarantor was previously notified in writing by the REP of an obligation on a guarantee as required by §25.478 of this title (relating to Credit Requirements and Deposits);

(P) A conspicuous notice of any services or products being provided to the customer that have been added since the previous bill;

(Q) Notification of any changes in the customer's prices or charges due to the operation of a variable rate feature previously disclosed by the REP in the customer's terms of service document;

(R) The notice required by §25.481(d) of this title (relating to Unauthorized Charges); and

(S) For residential customers, on the first page of the bill in at least 12-point font the phrase, "for more information about residential electric service please visit www.powertochoose.com."

(2) If a REP separately identifies a charge defined by one of the terms in this paragraph on the customer's bill, then the term in this paragraph must be used to identify that charge, and such term and its definition must be easily located on the REP's website and available to a customer free of charge upon request. Nothing in this paragraph precludes a REP from aggregating transmission and distribution utility (TDU) or REP charges. For any TDU charge(s) listed in this paragraph, the amount billed by the REP must not exceed the amount of the TDU tariff charge(s). The label for any TDU charge(s) may also identify the TDU that issued the charge(s). A REP may use a different term than a defined term by adding or deleting a suffix, by adding the word "total" to a defined term, where appropriate, changing the use of lowercase or capital letters or punctuation, or using the acceptable abbreviation specified in this paragraph for a defined term. If an abbreviation other than the acceptable abbreviation is used for the term, then the term must also be identified on the customer's bill.

(A) Advanced metering charge--A charge assessed to recover a TDU's charges for Advanced Metering Systems, to the extent that they are not recovered in a TDU's standard metering charge. Acceptable abbreviation: Advanced Meter.

(B) Competition Transition Charge--A charge assessed to recover a TDU's charges for nonsecuritized costs associated with the transition to competition. Acceptable abbreviation: Competition Transition.

(C) Energy Efficiency Cost Recovery Factor--A charge assessed to recover a TDU's costs for energy efficiency programs, to the extent that the TDU charge is a separate charge exclusively for that purpose that is approved by the Public Utility Commission. Acceptable abbreviation: Energy Efficiency.

(D) Late Payment Penalty--A charge assessed for late payment in accordance with Public Utility Commission rules.

(E) Meter Charge--A charge assessed to recover a TDU's charges for metering a customer's consumption, to the extent that the TDU charge is a separate charge exclusively for that purpose that is approved by the Public Utility Commission.

(F) Miscellaneous Gross Receipts Tax Reimbursement--A fee assessed to recover he miscellaneous gross receipts tax imposed on retail electric providers operating in an incorporated city or town having a population of more than 1,000. Acceptable abbreviation: Gross Receipts Reimb.

(G) Nuclear Decommissioning Fee--A charge assessed to recover a TDU's charges for decommissioning of nuclear generating sites. Acceptable abbreviation: Nuclear Decommission.

(H) PUC Assessment--A fee assessed to recover the statutory fee for administering the Public Utility Regulatory Act.

(I) Sales tax--Sales tax collected by authorized taxing authorities, such as the state, cities and special purpose districts.

(J) TDU Delivery Charges--The total amounts assessed by a TDU for the delivery of electricity to a customer over poles and wires and other TDU facilities not including discretionary charges.

(K) Transmission Distribution Surcharges--One or more TDU surcharge(s) on a customer's bill in any combination. Surcharges include charges billed as tariff riders by the TDU. Acceptable abbreviation: TDU Surcharges.

(L) Transition Charge--A charge assessed to recover a TDU's charges for securitized costs associated with the transition to competition.

(3) If the REP includes any of the following terms in its bills, the term must be applied in a manner consistent with the definitions, and such term and its definition must be easily located on the REP's website and available to a customer free of charge upon request:

(A) Base Charge--A charge assessed during each billing cycle without regard to the customer's demand or energy consumption.

(B) Demand Charge--A charge based on the rate at which electric energy is delivered to or by a system at a given instant, or averaged over a designated period, during the billing cycle.

(C) Energy Charge--A charge based on the electric energy (kWh) consumed.

(4) A REP must provide an itemization of charges, including non-bypassable charges, to the customer upon the customer's request and, to the extent that the charges are consistent with the terms set out in paragraph (2), of this subsection, the terms must be used in the itemization.

(5) A customer's electric bill must not contain charges for electric service from a service provider other than the customer's designated REP.

(6) A REP must include on each residential and small commercial billing statement, in boldfaced and underlined type, the date, as provided for in §25.475(c)(3)(B) of this title (relating to General Retail Electric Provider Requirements and Information Disclosure to Residential and Small Commercial Customers) that a fixed rate product will expire.

(7) To the extent that a REP uses the concepts identified in this paragraph in a customer's bill, it must use the term set out in this paragraph, and the definitions in this paragraph must be easily located on the REP's website. A REP may not use a different term for a concept that is defined in this paragraph.

(A) kW--Kilowatt, the standard unit for measuring electricity demand, equal to 1,000 watts;

(B) kWh--Kilowatt-hour, the standard unit for measuring electricity energy consumption, equal to 1,000 watt-hours; and

(8) Notice of contract expiration may be provided in a bill in accordance with §25.475 of this title.

(d) Public service notices. A REP must, as required by the commission after reasonable notice, provide brief public service notices to its customers. The REP must provide these public service notices to its customers on its billing statements, as a separate document issued with its bill, by electronic communication, or by other acceptable mass communication methods, as approved by the commission. Additionally, in April and October of each year, or as otherwise directed by the commission, the REP must provide information to each customer along with the customer's bill about:

(1) The electric utility's procedures for implementing involuntary load shedding initiated by the independent organization certified for the ERCOT power region under PURA §39.151;

(2) The types of customers who may be considered critical care residential customers, critical load industrial customers, or critical load according to commission rules adopted under PURA §38.076;

(3) The procedure for a customer to apply to be considered a critical care customer, a critical load industrial customer, or critical load according to commission rules adopted under PURA §38.076; and

(4) Reducing electricity use at times when involuntary load shedding events may be implemented.

(e) Estimated bills. If a REP is unable to issue a bill based on actual meter reading due to the failure of the TDU, the registration agent, municipally owned utility or electric cooperative to obtain or transmit a meter reading or an invoice for non-bypassable charges to the REP on a timely basis, the REP may issue a bill based on the customer's estimated usage and inform the customer of the reason for the issuance of the estimated bill.

(f) Non-recurring charges. A REP may pass through to its customers all applicable non-recurring charges billed to the REP by a TDU, municipally owned utility, or electric cooperative as a result of establishing, switching, disconnecting, reconnecting, or maintaining service to an applicant or customer. In the event of a meter test, the TDU, municipally owned utility, electric cooperative, and REP must comply with the requirements of §25.124 of this title (relating to Meter Testing) or with the requirements of the tariffs of a TDU, municipally owned utility, or electric cooperative, as applicable. The TDU, municipally owned utility, or electric cooperative must maintain a record of all meter tests performed at the request of a REP or a REP's customers.

(g) Record retention. A REP must maintain monthly billing and payment records for each account for at least 24 months after the date the bill is mailed. The billing records must contain sufficient data

to reconstruct a customer's billing for a given period. A copy of a customer's billing records may be obtained by that customer on request, and may be obtained once per 12-month period, at no charge.

(h) Transfer of delinquent balances or credits. If the customer has an outstanding balance or credit owed to the customer's current REP that is due from a previous account in the same customer class, then the customer's current REP may transfer that balance to the customer's current account. The delinquent balance and specific account or address must be identified as such on the bill. There must be no balance transfers between REPs, other than transfer of a deposit, as specified in §25.478(j)(2) of this title.

§25.498. Prepaid Service.

(a) Applicability. This section applies to retail electric providers (REPs) that offer a payment option in which a customer pays for retail service prior to the delivery of service and to transmission and distribution utilities (TDUs) that have installed advanced meters and related systems. A REP may not offer prepaid service to residential or small commercial customers unless it complies with this section. The following provisions do not apply to prepaid service, unless otherwise expressly stated:

(1) §25.479 of this title (relating to Issuance and Format of Bills);

(2) §25.480(b), (e)(3), (h), (i), (j), and (k) of this title (relating to Bill Payment and Adjustments); and

(3) §25.483 of this title (relating to Disconnection of Service), except for §25.483(b)(2)(A) and (B), (d), and (e)(1)-(6) of this title.

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

(1) Connection balance--A current balance, not to exceed $75 for a residential customer, required to establish prepaid service or reconnect prepaid service following disconnection.

(2) Current balance--An account balance calculated consistent with subsection (c)(6) of this section.

(3) Customer prepayment device or system (CPDS)--A device or system that includes metering and communications capabilities that meet the requirements of this section, including a device or system that accesses customer consumption information from a TDU's advanced metering system (AMS). The CPDS may be owned by the REP, and installed by the TDU consistent with subsection (c)(2)-(4) of this section.

(4) Disconnection balance--An account balance, not to exceed $10 for a residential customer, below which the REP may initiate disconnection of the customer's service.

(5) Landlord--A landlord or property manager or other agent of a landlord.

(6) Postpaid service--A payment option offered by a REP for which the customer normally makes a payment for electric service after the service has been rendered.

(7) Prepaid service--A payment option offered by a REP for which the customer normally makes a payment for electric service before service is rendered.

(8) Prepaid disclosure statement (PDS)--A document described by subsection (e) of this section.

(9) Summary of usage and payment (SUP)--A document described by subsection (h) of this section.

(c) Requirements for prepaid service.

(1) A REP must file with the commission a notice of its intent to provide prepaid service prior to offering such service. The notice of intent must include a description of the type of CPDS the REP will use, and the initial Electricity Facts Label (EFL), terms of service, and PDS for the service. Except as provided in subsection (m) of this section, a REP-controlled CPDS or TDU settlement provisioned meter is required for any prepaid service.

(2) A CPDS that relies on metering equipment other than the TDU meter must conform to the requirements and standards of §25.121(e) of this title (relating to Meter Requirements), §25.122 of this title (relating to Meter Records), and section 4.7.3 of the tariff for retail electric delivery service, which is prescribed by §25.214 of this title (relating to Terms and Conditions of Retail Delivery Service Provided by Investor Owned Transmission and Distribution Utilities).

(3) A TDU may, consistent with its tariff, install CPDS equipment, including meter adapters and collars on or near the TDU's meters. Such installation does not constitute competitive energy services as this term is defined in §25.341(3) of this title (relating to Definitions).

(4) A CPDS must not cause harmful interference with the operation of a TDU's meter or equipment, or the performance of any of the TDU's services. If a CPDS interferes with the TDU's meter or equipment, or TDU's services, the CPDS must be promptly corrected or removed. A CPDS that relies on communications channels other than those established by the TDU must protect customer information in accordance with §25.472 of this title (relating to Privacy of Customer Information).

(5) A REP may choose the means by which it communicates required information to a customer, including an in-home device at the customer's premises, United States Postal Service, email, telephone, mobile phone, or other electronic communications. The means by which the REP will communicate required information to a customer must be described in the terms of service and the PDS.

(A) A REP must communicate time-sensitive notifications required by paragraph (7)(B), (D), and (E) of this subsection by telephone, mobile phone, or electronic means.

(B) A REP must, as required by the commission after reasonable notice, provide brief public service notices to its customers. The REP must provide these public service notices to its customers by electronic communication, or by other acceptable mass communication methods, as approved by the commission.

(6) A REP must calculate the customer's current balance by crediting the account for payments received and reducing the account balance by known charges and fees that have been incurred, including charges based on estimated usage as allowed in paragraph (11)(E) of this subsection.

(A) The REP may also reduce the account balance by:

(i) estimated applicable taxes; and

(ii) estimated TDU charges that have been incurred in serving the customer and that, pursuant to the terms of service, will be passed through to the customer.

(B) If the customer's balance reflects estimated charges and taxes authorized by subparagraph (A) of this paragraph, the REP must promptly reconcile the estimated charges and taxes with actual charges and taxes, and credit or debit the balance accordingly within 72 hours after actual consumption data or a statement of charges from the TDU is available.

(C) A REP may reverse a payment for which there are insufficient funds available or that is otherwise rejected by a bank, credit card company, or other payor.

(D) If usage sent by the TDU is estimated or the REP estimates consumption according to paragraph (11)(E) of this subsection, the REP must promptly reconcile the estimated consumption and associated charges with the actual consumption and associated charges within 72 hours after actual consumption data is available to the REP.

(7) A REP must:

(A) on the request of the customer, provide the customer's current balance calculated pursuant to paragraph (6) of this subsection, including the date and time the current balance was calculated and the estimated time or days of paid electricity remaining; and

(B) make the current balance available to the customer either:

(i) continuously, via the internet, phone, or an in-home device; or

(ii) within two hours of the REP's receipt of a customer's balance request, by the means specified in the Terms of Service for making such a request.

(C) communicate to the customer the current price for electric service calculated as required by §25.475(g)(2)(A)-(E) of this title (relating to General Retail Electric Provider Requirements and Information Disclosures to Residential and Small Commercial Customers);

(D) provide a warning to the customer at least one day and not more than seven days before the customer's current balance is estimated by the REP to drop to the disconnection balance;

(E) provide a confirmation code when the customer makes a payment by credit card, debit card, or electronic check. A REP is not required to provide a confirmation code or receipt for payment sent by mail or electronic bill payment system. The REP must provide a receipt showing the amount paid for payment in person. At the customer's request, the REP must confirm all payments by providing to the customer the last four digits of the customer's account number or Electric Service Identifier (ESI ID), payment amount, and the date the payment was received;

(F) ensure that a CPDS controlled by the REP does not impair a customer's ability to choose a different REP or any electric service plans offered by the REP that do not require prepayment. When the REP receives notice that a customer has chosen a new REP, the REP must take any steps necessary to facilitate the switch on a schedule that is consistent with the effective date stated on the Electric Reliability Council of Texas (ERCOT) enrollment transaction and ERCOT's rules for processing such transactions; and

(G) refund to the customer or an energy assistance agency, as applicable, any unexpended balance from the account within ten business days after the REP receives the final bill and final meter read from the TDU.

(i) In the case of unexpended funds provided by an energy assistance agency, the REP must refund the funds to the energy assistance agency and identify the applicable customer and the customer's address associated with each refund.

(ii) In the case of unexpended funds provided by the customer that are less than five dollars, the REP must communicate the unexpended balance to the customer and state that the customer may contact the REP to request a refund of the balance. Once the REP has received the request for refund from the customer, the REP must refund the balance within ten business days.

(8) Nothing in this subsection limits a customer from obtaining a SUP.

(9) The communications provided under paragraph (7)(A)-(D) of this subsection and any confirmation of payment as described in paragraph (7)(E) of this subsection, except a receipt provided when the payment is made in person at a third-party payment location, must be provided in English or Spanish, at the customer's election.

(10) A REP must cooperate with energy assistance agencies to facilitate the provision of energy assistance payments to requesting customers.

(11) A REP must not:

(A) tie the duration of an electric service contract to the duration of a tenant's lease;

(B) require, or enter into an agreement with a landlord requiring, that a tenant select the REP as a condition of a lease;

(C) require a connection balance in excess of $75 for a residential customer;

(D) require security deposits for electric service; or

(E) base charges on estimated usage, other than usage estimated by the TDU or estimated by the REP in a reasonable manner for a time period in which the TDU has not provided actual or estimated usage data on a web portal within the time prescribed by §25.130(g) of this title (relating to Advanced Metering) and in which the TDU-provided portal does not provide the REP the ability to obtain on-demand usage data.

(12) A REP providing service must not charge a customer any fee for:

(A) transitioning from a prepaid service to a postpaid service, but notwithstanding §25.478(c)(3) of this title (relating to Credit Requirements and Deposits), a REP may require the customer to pay a deposit for postpaid service consistent with §25.478(b) or (c)(1) and (2) of this title and may:

(i) require the deposit to be paid within ten days after issuance of a written disconnection notice that requests a deposit; or

(ii) bill the deposit to the customer.

(B) the removal of equipment; or

(C) the switching of a customer to another REP, or otherwise cancelling or discontinuing taking prepaid service for reasons other than nonpayment, but may charge and collect early termination fees pursuant to §25.475 of this title.

(13) If a customer owes a debt to the REP for electric service, the REP may reduce the customer's account balance by the amount of the debt. Before reducing the account balance, the REP must notify the customer of the amount of the debt and that the customer's account balance will be reduced by the amount of the debt no sooner than 10 days after the notice required by this paragraph is issued.

(14) In addition to the connection balance, a REP may require payment of applicable TDU fees, if any, prior to establishing electric service or reconnecting electric service.

(15) A REP that provides prepaid service to a residential customer must not charge an amount for electric service that is higher than the price charged by the POLR in the applicable TDU service terri-

tory. The price for prepaid service to a residential customer calculated as required by §25.475(g)(2)(A)-(E) of this title must be equal to or lower than the maximum POLR rate for the residential customer class at the 500 kilowatt-hour (kWh), 1,000 kWh, and 2,000 kWh usage levels as shown on the POLR EFL posted on the commission's website for the applicable TDU service territory. When an updated POLR EFL is posted on the commission's website, the REP, at the REP's option, may continue to reference the prior POLR EFL to ensure compliance with this paragraph for prepaid service prices charged during the first 30 days, beginning the date that the updated POLR EFL is posted. For a fixed rate product, the REP must show that the prepaid service prices calculated under §25.475(g)(2)(A), (D)-(E) of this title are equal to or lower than the test described in this paragraph at the time the REP makes the offer and provided that the customer accepts the offer within 30 days.

(d) Customer acknowledgement. As part of the enrollment process, a REP must obtain the applicant's or customer's acknowledgement of the following statement: "The continuation of electric service depends on your prepaying for service on a timely basis and if your balance falls below {insert dollar amount of disconnection balance}, your service may be disconnected with little notice. Some electric assistance agencies may not provide assistance to customers that use prepaid service." The REP must obtain this acknowledgement using any of the authorization methods specified in §25.474 of this title (relating to Selection of Retail Electric Provider).

(e) Prepaid disclosure statement (PDS). A REP must provide a PDS contemporaneously with the delivery of the contract documents to a customer pursuant to §25.474 of this title and as required by subsection (f) of this section. A REP must also provide a PDS contemporaneously with any advertisement or other marketing materials not addressed in subsection (f) of this section that include a specific price or cost for prepaid service. The commission may adopt a form for a PDS. The PDS must be a separate document and must be at a minimum written in 12-point font, and must:

(1) provide the following statement: "The continuation of electric service depends on you prepaying for service on a timely basis and if your current balance falls below the disconnection balance, your service may be disconnected with little notice.";

(2) inform the customer of the following:

(A) the connection balance that is required to initiate or reconnect electric service;

(B) the acceptable forms of payment, the hours that payment can be made, instructions on how to make payments, any requirement to verify payment and any fees associated with making a payment;

(C) when service may be disconnected and the disconnection balance;

(D) that prepaid service is not available to critical care or chronic condition residential customers as these terms are defined in §25.497 of this title (relating to Critical Load Industrial Customers, Critical Load Public Safety Customers, Critical Care Residential Customers and Chronic Condition Residential Customers);

(E) the means by which the REP will communicate required information;

(F) the availability of deferred payment plans and, if a REP reserves the right to apply a switch-hold while the customer is subject to a deferred payment plan, that a switch-hold may apply until the customer satisfies the terms of the deferred payment plan, and that a switch-hold means the customer will not be able to buy electricity from other companies while the switch-hold is in place;

(G) the availability of energy bill payment assistance, including the disclosure that some electric assistance agencies may not provide assistance to customers that use prepaid service and the statement "If you qualify for low-income status or low-income assistance, have received energy assistance in the past, or you think you will be in need of energy assistance in the future, you should contact the billing assistance program to confirm that you can qualify for energy assistance if you need it."; and

(H) an itemization of any non-recurring REP fees and charges that the customer may be charged.

(3) be prominently displayed in the property management office of any multi-tenant commercial or residential building at which the landlord is acting as an agent of the REP.

(f) Marketing of prepaid services.

(1) This paragraph applies to advertisements conveyed through print, television, radio, outdoor advertising, prerecorded telephonic messages, bill inserts, bill messages, and electronic media other than Internet websites. If the advertisement includes a specific price or cost, the advertisement must include in a manner that is clear and conspicuous to the intended audience:

(A) any non-recurring fees, and the total amount of those fees, that will be deducted from the connection balance to establish service;

(B) the following statement, if applicable: "Utility fees may also apply and may increase the total amount that you pay.";

(C) the maximum fee per payment transaction that may be imposed by the REP; and

(D) the following statement: "You can obtain important standardized information that will allow you to compare this product with other offers. Contact (name, telephone number, and Internet address (if available) of the REP)." If the REP's phone number or website address is already included on the advertisement, the REP need not repeat the phone number or website as part of this required statement. The REP must provide the PDS and EFL to a person who requests standardized information for the product.

(2) This paragraph applies to all advertisements and marketing that include a specific price or cost conveyed through Internet websites, direct mail, mass e-mails, and any other media not addressed by paragraphs (1), (3), and (4) of this subsection. In addition to meeting the requirements of §25.474(d)(7) of this title, a REP must include the PDS and EFL on Internet websites and in direct mail, mass e-mails, and any other media not addressed by paragraphs (1), (3), and (4) of this subsection. For electronic communications, the PDS and EFL may be provided through a hyperlink.

(3) This paragraph applies to outbound telephonic solicitations initiated by the REP. A REP must disclose the following:

(A) information required by paragraph (1)(A)-(C) of this subsection;

(B) when service may be disconnected, the disconnection balance, and any non-TDU disconnection fees;

(C) the means by which the REP will communicate required information; and

(D) the following statement: "You have the right to review standardized documents before you sign up for this product." The

REP must provide the PDS and EFL to a person who requests standardized information for the product.

(4) This paragraph applies to solicitations in person. In addition to meeting the requirements of §25.474(e)(8) of this title, before obtaining a signature from an applicant or customer who is being enrolled in prepaid service, a REP must provide the applicant or customer a reasonable opportunity to read the PDS.

(g) Landlord as customer of record. A REP offering prepaid service to multiple tenants at a location may designate the landlord as the customer of record for the purpose of transactions with ERCOT and the TDU.

(1) For each ESI ID for which the REP chooses to designate the landlord as the customer of record, the REP must provide to the TDU the name, service and mailing addresses, and ESI ID, and keep that information updated as required in the TDU's Tariff for Retail Delivery Service.

(2) The REP must treat each end-use consumer as a customer for purposes of this subchapter, including §25.471 of this title (relating to General Provisions of Customer Protection Rules). Nothing in this subsection affects a REP's responsibility to provide customer billing contact information to ERCOT in the format required by ERCOT.

(h) Summary of usage and payment (SUP).

(1) A REP must provide a SUP to each customer upon the customer's request within three business days of receipt of the request. The SUP must be delivered by an electronic means of communications that provides a downloadable and printable record of the SUP or, if the customer requests, by the United States Postal Service. If a customer requests a paper copy of the SUP, a REP may charge a fee for the SUP, which must be specified in the terms of service and PDS provided to the customer. For purposes of the SUP, a billing cycle must conform to a calendar month.

(2) A SUP must include the following information:

(A) the certified name and address of the REP and the number of the license issued to the REP by the commission;

(B) a toll-free telephone number, in bold-face type, that the customer can call during specified hours for questions and complaints to the REP about the SUP;

(C) the name, meter number, account number, ESI ID of the customer, and the service address of the customer;

(D) the dates and amounts of payments made during the period covered by the summary;

(E) a statement of the customer's consumption and charges by calendar month during the period covered by the summary;

(F) an itemization of non-recurring charges, including returned check fees and reconnection fees; and

(G) the average price for electric service for each calendar month included in the SUP. The average price for electric service must reflect the total of all fixed and variable recurring charges, but not including state and local sales taxes, reimbursement for the state miscellaneous gross receipts tax, and any nonrecurring charges or credits, divided by the kilowatt-hour consumption, and must be expressed as a cents per kilowatt-hour amount rounded to the nearest one-tenth of one cent.

(3) If a REP separately identifies a charge defined by one of the terms in this paragraph on the customer's SUP, then the term in this paragraph must be used to identify the charge, and such term and its definition must be easily located on the REP's website and available to a customer free of charge upon request. Nothing in the paragraph precludes a REP from aggregating TDU or REP charges. For any TDU charge(s) listed in this paragraph, the amount billed by the REP must not exceed the amount of the TDU charge(s). The label for any TDU charge(s) may also identify the TDU that issued the charge(s). A REP may use a different term than a defined term by adding or deleting a suffix, adding the word "total" to a defined term, where appropriate, changing the use of lower-case or capital letters or punctuation, or using the acceptable abbreviation specified in this paragraph for a defined term. If an abbreviation other than the acceptable abbreviation is used for the term, then the term must also be identified on the customer's SUP.

(A) Advanced metering charge--A charge assessed to recover a TDU's charges for Advanced Metering Systems, to the extent that they are not recovered in a TDU's standard metering charge. Acceptable abbreviation: Advanced Meter.

(B) Competition Transition Charge--A charge assessed to recover a TDU's charges for nonsecuritized costs associated with the transition to competition. Acceptable abbreviation: Competition Transition.

(C) Energy Efficiency Cost Recovery Factor--A charge assessed to recover a TDU's costs for energy efficiency programs, to the extent that the TDU charge is a separate charge exclusively for that purpose that is approved by the Public Utility Commission. Acceptable abbreviation: Energy Efficiency.

(D) Late Payment Penalty--A charge assessed for late payment in accordance with Public Utility Commission rules.

(E) Meter Charge--A charge assessed to recover a TDU's charges for metering a customer's consumption, to the extent that the TDU charge is a separate charge exclusively for that purpose that is approved by the Public Utility Commission.

(F) Miscellaneous Gross Receipts Tax Reimbursement--A fee assessed to recover the miscellaneous gross receipts tax imposed on retail electric providers operating in an incorporated city or town having a population of more than 1,000. Acceptable abbreviation: Gross Receipts Reimb.

(G) Nuclear Decommissioning Fee--A charge assessed to recover a TDU's charges for decommissioning of nuclear generating sites. Acceptable abbreviation: Nuclear Decommission.

(H) PUC Assessment--A fee assessed to recover the statutory fee for administering the Public Utility Regulatory Act.

(I) Sales tax--Sales tax collected by authorized taxing authorities, such as the state, cities and special purpose districts.

(J) TDU Delivery Charges--The total amounts assessed by a TDU for the delivery of electricity to a customer over poles and wires and other TDU facilities not including discretionary charges.

(K) Transmission Distribution Surcharges--One or more TDU surcharge(s) on a customer's bill in any combination. Surcharges include charges billed as tariff riders by the TDU. Acceptable abbreviation: TDU Surcharges.

(L) Transition Charge--A charge assessed to recover a TDU's charges for securitized costs associated with the transition to competition.

(4) If the REP includes any of the following terms in its SUP, the term must be applied in a manner consistent with the definitions, and such term and its definition must be easily located on the REP's website and available to a customer free of charge upon request:

(A) Base Charge--A charge assessed during each billing cycle of service without regard to the customer's demand or energy consumption.

(B) Demand Charge--A charge based on the rate at which electric energy is delivered to or by a system at a given instant, or averaged over a designated period during the billing cycle.

(C) Energy Charge--A charge based on the electric energy (kWh) consumed.

(5) Unless a shorter time period is specifically requested by the customer, information provided must be for the most recent 12 months, or the longest period available if the customer has taken prepaid service from the REP for less than 12 months.

(6) In accordance with §25.472(b)(1)(D) of this title, a REP must provide a SUP to an energy assistance agency within one business day of receipt of the agency's request, and must not charge the agency for the SUP.

(i) Deferred payment plans. A deferred payment plan for a customer taking prepaid service is an agreement between the REP and a customer that requires a customer to pay a negative current balance over time. A deferred payment plan may be established in person, by telephone, or online, but all deferred payment plans must be confirmed in writing by the REP to the customer.

(1) The REP must place a residential customer on a deferred payment plan, at the customer's request:

(A) when the customer's current balance reflects a negative balance of $50 or more during an extreme weather emergency, as defined in §25.483(j)(1) of this title, if the customer makes the request within one business day after the weather emergency has ended; or

(B) during a state of disaster declared by the governor pursuant to Texas Government Code §418.014 if the customer is in an area covered by the declaration and the commission directs that deferred payment plans be offered.

(2) The REP must offer a deferred payment plan to a residential customer who has been underbilled by $50 or more for reasons other than theft of service.

(3) The REP may offer a deferred payment plan to a customer who has expressed an inability to pay.

(4) The deferred payment plan must include both the negative current balance and the connection balance.

(5) The customer has the right to satisfy the deferred payment plan before the prescribed time.

(6) The REP may require that:

(A) no more than 50% of each transaction amount be applied towards the deferred payment plan; or

(B) an initial payment of no greater than 50% of the amount due be made, with the remainder of the deferred amount paid in installments. The REP must inform the customer of the right to pay the remaining deferred balance by reducing the deferred balance by five equal monthly installments. However, the customer can agree to fewer or more frequent installments. The installments to repay the deferred balance must be applied to the customer's account on a specified day of each month.

(7) The REP may initiate disconnection of service if the customer does not meet the terms of a deferred payment plan or if the customer's current balance falls below the disconnection balance, excluding the remaining deferred amount. However, the REP must not initiate disconnection of service unless it has provided the customer at least one day's notice that the customer has not met the terms of the plan or, pursuant to subsection (c)(7)(D) of this section, a timely notice that the customer's current balance was estimated to fall below the disconnection balance, excluding the remaining deferred amount.

(8) The REP may apply a switch-hold while the customer is on a deferred payment plan.

(9) A copy of the deferred payment plan must be provided to the customer.

(A) The plan must include a statement, in clear and conspicuous type, that states, "If you have any questions regarding the terms of this agreement, or if the agreement was made by telephone and you believe this does not reflect your understanding of that agreement, contact (insert name and contact number of REP)."

(B) If a switch-hold will apply, the plan must include a statement, in a clear and conspicuous type, that states "By entering into this agreement, you understand that {company name} will put a switch-hold on your account. A switch-hold means that you will not be able to buy electricity from other companies until you pay this past due amount. The switch-hold will be removed after your final payment on this past due amount is processed. While a switch-hold applies, if you are disconnected for not paying, you will need to pay {us or company name}, to get your electricity turned back on."

(C) If the customer and the REP's representative or agent meet in person, the representative must read to the customer the statement in subparagraph (A) of this paragraph and, if applicable, the statement in subparagraph (B) of this paragraph.

(D) The plan may include a one-time penalty in accordance with §25.480(c) of this title, but must not include a finance charge.

(E) The plan must include the terms for payment of deferred amounts, consistent with paragraph (6) of this subsection.

(F) The plan must state the total amount to be paid under the plan.

(G) The plan must state that a customer's electric service may be disconnected if the customer does not fulfill the terms of the deferred payment plan, or if the customer's current balance falls below the disconnection balance, excluding the remaining deferred amount.

(10) The REP must not charge the customer a fee for placing the customer on a deferred payment plan.

(11) The REP, through a standard market process, must submit a request to remove the switch-hold, pursuant to §25.480(m)(2) of this title if the customer pays the deferred balance owed to the REP. On the day the REP submits the request to remove the switch-hold, the REP must notify the customer that the customer has satisfied the deferred payment plan and that the switch-hold is being removed.

(j) Disconnection of service. As provided by subsection (a)(4) of this section, §25.483 (b)(2)(A) and (B), (d), (e)(1) - (6), and the definition of extreme weather in §25.483(j)(1) of this title apply to prepaid service. In addition to those provisions, this subsection applies to disconnection of a customer receiving prepaid service.

(1) Prohibition on disconnection. A REP must not initiate disconnection for a customer's failure to maintain a current balance above the disconnection balance on a weekend day or during any period during which the mechanisms used for payments specified in the customer's PDS are unavailable; or during an extreme weather emer-

gency, as this term is defined in §25.483 of this title, in the county in which the service is provided.

(2) Initiation of disconnection. A REP may initiate disconnection of service when the current balance falls below the disconnection balance, but only if the REP provided the customer a timely warning pursuant to subsection (c)(7)(D) of this section; or when a customer fails to comply with a deferred payment plan, but only if the REP provided the customer a timely warning pursuant to subsection (i)(7) of this section. A REP may initiate disconnection if the customer's current balance falls below the disconnection balance due to reversal of a payment found to have insufficient funds available or is otherwise rejected by a bank, credit card company, or other payor.

(3) Pledge from electric assistance agencies. If a REP receives a pledge, letter of intent, purchase order, or other commitment from an energy assistance agency to make a payment for a customer, the REP must immediately credit the customer's current balance with the amount of the pledge.

(A) The REP must not initiate disconnection of service if the pledge from the energy assistance agency (or energy assistance agencies) establishes a current balance above the customer's disconnection balance or, if the customer has been disconnected, must request reconnection of service if the pledge from the energy assistance agency establishes a current balance for the customer that is at or above the customer's connection balance required for reconnection.

(B) The REP may initiate disconnection of service if payment from the energy assistance agency is not received within 45 days of the REP's receipt of the commitment or if the payment is not sufficient to satisfy the customer's disconnection balance in the case of a currently energized customer, or the customer's connection balance if the customer has been disconnected for falling below the disconnection balance.

(4) Reconnection of service. Within one hour of a customer establishing a connection balance or any otherwise satisfactory correction of the reasons for disconnection, the REP must request that the TDU reconnect service or, if the REP disconnected service using its CPDS, reconnect service. The REP's payment mechanism may include a requirement that the customer verify the payment using a card, code, or other similar method in order to establish a connection balance or current balance above the disconnection balance when payment is made to a third-party processor acting as an agent of the REP.

(k) Service to Critical Care Residential Customers and Chronic Condition Residential Customers. A REP must not knowingly provide prepaid service to a customer who is a critical care residential customer or chronic condition residential customer as those terms are defined in §25.497 of this title. In addition, a REP must not enroll an applicant who states that the applicant is a critical care residential customer or chronic condition residential customer.

(1) If the REP is notified by the TDU that a customer receiving prepaid service is designated as a critical care residential customer or chronic condition residential customer, the REP must diligently work with the customer to promptly transition the customer to postpaid service or another REP in a manner that avoids a service disruption. The REP must not charge the customer a fee for the transition, including an early termination or disconnection fee.

(2) If the customer is unresponsive, the REP must transfer the customer to a competitively offered, month-to-month postpaid product at a rate no higher than the rate calculated pursuant to §25.43(l)(2)(A) of this title. The REP must provide the customer notice that the customer has been transferred to a new product and must provide the customer the new product's Terms of Service and EFL.

(l) Compliance period. No later than October 1, 2011, prepaid service offered by a REP pursuant to a new contract to a customer being served using a "settlement provisioned meter," as that term is defined in Chapter 1 of the TDU's tariff for retail delivery service, or using a REP-controlled collar or meter must comply with this section. Before October 1, 2011, prepaid service offered by a REP to a customer served using a settlement provisioned meter or REP-controlled collar or meter must comply with this section as it currently exists or as it existed in 2010, except as provided in subsection (m) of this section.

(m) Transition of Financial Prepaid Service Customers. A REP may continue to provide a financial prepaid service *(i.e.,* one that does not use a settlement provisioned meter or REP-controlled collar or meter) only to its customer that was receiving financial prepaid service at a particular location on October 1, 2011. A customer who is served by a financial prepaid service must be transitioned to a service that complies with the other subsections of this section by the later of October 1, 2011 or sixty days after the customer begins to be served using either a settlement provisioned meter or a REP-controlled collar or meter. The customer must be notified by the REP that the customer's current prepaid service will no longer be offered as of a date specified by the REP by the later of either October 1, 2011 or sixty days after the customer begins to be served using either a settlement provisioned meter or REP-controlled collar or meter, as applicable. The REP must provide the notification no sooner than 60 days and not less than 30 days prior to the termination of the customer's current prepaid service. The customer must be notified that the customer will be moved to a new prepaid service, and the REP must transmit an EFL and PDS to the customer with the notification, if the customer does not choose another service or REP.

§25.499. Acknowledgement of Risk Requirements for Certain Commercial Contracts.

(a) Purpose. This section establishes requirements for the offering of wholesale indexed products and products containing separate assessment of ancillary services costs to a customer other than a residential or small commercial customer.

(b) Application. This section applies to all retail electric providers (REPs), aggregators and brokers. The Acknowledgement of Risk (AOR) for wholesale indexed products required by this section is effective for enrollments or re-enrollments entered into on or after September 1, 2021. The AOR required for other product types required under this section are effective for enrollments or re-enrollments entered into on or after April 1, 2021. REPs are not required to modify contract documents related to contracts or enrollments entered into before this date.

(c) Definitions. The definitions set forth in §25.5 (relating to Definitions) and §25.471(d) (relating to General Provisions of Customer Protection Rules) of this title apply to this section. In addition, wholesale indexed product, when used in this section, means a retail electric product in which the price a customer pays for electricity includes a direct pass-through of real-time settlement point prices determined by the independent organization certified under the Public Utility Regulatory Act (PURA) §39.151 for the ERCOT power region.

(d) Acknowledgement of Risk (AOR). Before a customer other than a residential or small commercial customer is enrolled in a wholesale indexed product, or a product that contains a separate assessment of ancillary service charges, an aggregator, broker, or REP must obtain an AOR, signed by the customer, verifying that the customer accepts the potential price risks associated with the product.

(1) For Wholesale Indexed Products, the AOR must include the following statement in clear, boldfaced text: "I understand that the volatility and fluctuation of wholesale energy pricing may cause my energy bill to be multiple times higher in a month in which wholesale energy prices are high. I understand that I will be responsible for charges caused by fluctuations in wholesale energy prices."

(2) For products that contain a separate assessment of ancillary service charges the AOR must include the following statement in clear, boldfaced text: "I understand that my energy bill may include a separate assessment of ancillary service charges, which may cause my energy bill to be multiple times higher in a month in which ancillary services charges are high. I understand that I will be responsible for charges caused by fluctuations in ancillary service charges."

(3) An AOR may be included as an addendum to a contract.

(4) A REP, aggregator, or broker must retain a record of the AORs for each customer during the time the applicable plan is in effect and for four years after the contract ceases to be in effect for any customer. A REP must provide such documents at the request of the commission or its staff.

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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Andrea Gonzalez
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For further information, please call: (512) 936-7244

PART 9. TEXAS LOTTERY COMMISSION

CHAPTER 402. CHARITABLE BINGO OPERATIONS DIVISION

The Texas Lottery Commission (Commission) adopts amendments to 16 TAC §§402.413 (Military Service Members, Military Veterans, and Military Spouses), 402.452 (Net Proceeds), and 402.702 (Disqualifying Convictions) without changes to the proposed text as published in the November 5, 2021, issue of the *Texas Register* (46 TexReg 7490). The amended rules will not be republished. The purpose of the amendments is to conform the rules to various statutes.

The amendments to §402.413(a)(2) add the space force to the definition of "Armed forces of the United States" in accordance with Texas Occupations Code §55.001(2), which was amended by House Bill 139 of the 87th Texas Legislature.

The amendments to §402.452(b)(3) base the calculation of net proceeds for a two-year license on each 12-month period that ends on an anniversary of the date the license was issued, in accordance with Texas Occupations Code §2001.451(g)(2).

The amendments to §402.702(i) allow license and registration applicants 30 days to provide documentation of mitigating factors upon notification of the Commission's intent to deny the application, in accordance with Texas Occupations Code §53.0231(a)(2).

The Commission received no written comments on the proposed amendments during the public comment period.

SUBCHAPTER D. LICENSING REQUIREMENTS

16 TAC §402.413, §402.452

The rule amendments are adopted under Texas Occupations Code §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act; and Texas Government Code §467.102, which authorizes the Commission to adopt rules for 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.

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Bob Biard
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SUBCHAPTER G. COMPLIANCE AND ENFORCEMENT

16 TAC §402.702

The rule amendments are adopted under Texas Occupations Code §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act; and Texas Government Code §467.102, which authorizes the Commission to adopt rules for 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.

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CHAPTER 403. GENERAL ADMINISTRATION

16 TAC §403.701

The Texas Lottery Commission (Commission) adopts new 16 TAC §403.701 (Family Leave Pool) without changes to the proposed text as published in the November 5, 2021, issue of the *Texas Register* (46 TexReg 7491). The new rule will not be republished. The new rule implements House Bill (H.B.) 2063 enacted by the 87th Texas Legislature, which amended Government Code Chapter 661 by adding new Subchapter A-1 to require each state agency to create and administer an employee family leave pool. According to this new statute, the governing body of each state agency is required to adopt rules and implement procedures relating to the operation of the Commission's family leave pool.

The new rule sets forth the purpose of the family leave pool, designates a pool administrator and requires the development and implementation of operating procedures consistent with the H.B. 2063.

The Commission received no written comments on the proposed new rule during the public comment period.

The new rule is adopted under the authority of Texas Government Code §661.022, which requires the Commission to adopt rules to create and administer an employee family leave pool.

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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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 74. CURRICULUM REQUIREMENTS

SUBCHAPTER AA. COMMISSIONER'S RULES ON COLLEGE AND CAREER READINESS

19 TAC §74.1003

The Texas Education Agency (TEA) adopts an amendment to §74.1003, concerning college and career readiness. The amendment is adopted with changes to the proposed text as published in the July 16, 2021 issue of the *Texas Register* (46 TexReg 4260) and will be republished. The adopted amendment codifies the criteria used to identify the industry-based certifications (IBCs) to be used for public school accountability.

REASONED JUSTIFICATION: Section 74.1003 defines the IBCs that are recognized for the purpose of accounting for students who earn industry certifications in the public school accountability system. In subsection (a), Figure: 19 TAC §74.1003(a) includes a list of the certifications that applied to the 2017-2018 and 2018-2019 school years. Subsection (b) specifies that, beginning in the 2019-2020 school year, the list of approved IBCs affecting public school accountability is provided in the accountability manual adopted annually in 19 TAC §97.1001, Accountability Rating System.

The adopted amendment to §74.1003 adds new subsection (c) to outline the criteria IBCs must meet to be recognized for the purpose of public school accountability beginning in the 2022-2023 school year. To be included on the list, a certification must be industry recognized and valued, attainable by a high school student, portable, certified, and offered as a capstone or at the end of a program.

The following changes were made to the rule since published as proposed.

New subsection (c) was added to clarify that the list of IBCs to be used in the public school accountability system will be reviewed and updated every two years beginning in 2021. The subsequent subsections were re-lettered to accommodate the addition.

In response to public comment, a definition for "certification" was added as new subsection (d)(1), and the subsequent paragraphs were renumbered to accommodate the addition.

In response to public comment, subsection (d)(2) was amended to specify the criteria for a certification to be considered industry recognized and valued. First, the certification must be referred to TEA either by the Texas Workforce Commission (TWC) as part of the inventory of industry-recognized credentials approved by the industry-based certification advisory council authorized by Texas Labor Code, §312.002, or directly using a process identified and implemented by TEA and published on the TEA website if the certification is not referred to TEA by TWC. The certification must also be determined to be valued by a representative sample of employers, as demonstrated by meeting certain standards described in the rule. If a determination of value is not made before a referral by TWC, TEA may use a third-party organization to gather information on whether the standards for value have been met.

In response to public comment, subsection (d)(6) was amended to clarify that capstone or end-of-program means a certification assessment is taken at the culmination of a single high school course or multiple related courses within a secondary program of study and that there must be at least 50% overlap between the certification assessment standards and the essential knowledge and skills for a secondary course aligned to the career cluster associated with the certification assessment or the applicable essential knowledge and skills for a set of courses within a program of study in a secondary career and technical education program.

SUMMARY OF COMMENTS AND AGENCY RESPONSES: The public comment period on the proposal began July 16, 2021, and ended August 16, 2021. Following is a summary of the public comments received and the corresponding agency responses.

Comment: One individual stated that TEA should allow students to take certification examinations that have age restrictions at any age, then validate the certification upon the student turning 18.

Response: The agency disagrees and provides the following clarification. The agency does not determine the age at which a

person is eligible to take an industry-based certification examination. Certification entities regulate certification eligibility.

Comment: Twenty-four school personnel and parents stated that students should not be required to wait until a capstone course is completed to be eligible to take an IBC assessment.

Response: The agency agrees. In response to this and other comments, §74.1003(d)(6) has been modified at adoption to clarify that a certification assessment is taken at the culmination of a single high school course or multiple related courses within a secondary program of study and that there must be at least 50% overlap between the certification assessment standards and the essential knowledge and skills for a secondary course aligned to the career cluster associated with the certification assessment or the applicable essential knowledge and skills for a set of courses within a program of study in a secondary career and technical education program.

Comment: A teacher stated that school officials would feel pressure to enroll students in career and technical education courses in order to take an IBC assessment.

Response: This comment falls outside the scope of the proposed rulemaking for §74.1003.

Comment: Two administrators commented that districts do not have time to evaluate each IBC based on the criteria listed within §74.1003.

Response: The agency agrees and offers the following clarification. TEA is responsible for the evaluation of IBCs for inclusion on the approved list.

Comment: A counselor stated that school district personnel will feel pressure to enroll students in programs of study in order to gain points for college, career, or military readiness (CCMR).

Response: This comment falls outside the scope of the proposed rulemaking for §74.1003.

Comment: Several administrators and teachers listed specific industry-based certifications that they would like to be included on the accountability list.

Response: The agency provides the following clarification. The open window for submission of IBCs for evaluation was from December 1, 2020-January 15, 2021. An additional extended opportunity for submission was made available March 22-29, 2021. IBCs submitted during this timeframe were evaluated. In response to this and other comments, the agency has added new language to §74.1003 at adoption to explain that the list of industry-based certifications to be used in the public school accountability system will be reviewed and updated every two years beginning in 2021.

Comment: One administrator questioned whether IBCs could be offered within the course the districts deem appropriate.

Response: The agency offers the following clarification. Each approved IBC must align to the Texas Essential Knowledge and Skills for a secondary course aligned to the career cluster associated with the certification assessment or the applicable essential knowledge and skills for a set of courses within a program of study in a secondary career and technical education program.

Comment: Representative Keith Bell, Texas Association of Manufacturers, and Texas Association of Builders requested that the rulemaking for §74.1003 be withdrawn and supplanted by House Bill (HB) 3938, 87th Texas Legislature, Regular Session, 2021.

Response: The agency provides the following clarification. Texas Education Code, §39.053, requires the commissioner of education to adopt a set of indicators of the quality of learning and achievement. School districts and campuses must be evaluated based on these indicators of achievement, including students who earn industry certifications. This is a different requirement than the requirement addressed in HB 3938. However, in response to this comment, §74.1003(d)(2) was amended at adoption to clarify that certifications referred to TEA by the Texas Workforce Commission as part of the inventory of industry-recognized credentials approved by the industry-based certification advisory council authorized by Texas Labor Code, §312.002, will be considered for inclusion on the list of certifications related to public school accountability.

Comment: Texas Association of Manufacturers and Texas Association of Builders stated that the "attainable by a high school student" criterion should be removed in recognition that students may start a certification in high school and complete it within postsecondary education.

Response: The agency disagrees that the "attainable by a high school student" criterion should be removed but agrees that IBCs are part of a continuum of education and learning. In addition, the agency offers the following clarification. In recognition of Early College High School (ECHS), Pathways in Technology Early College High School (P-TECH), and Texas Science Technology Engineering and Mathematics (T-STEM) programs, the list of IBCs includes certifications that students may earn with an associate or bachelor's degree. Additionally, the portability criterion evaluates certifications for their transferability to postsecondary work, their contribution toward an apprenticeship program, and whether they are part of a coherent sequence to show progressive skills development.

Comment: Twenty-two district personnel requested that the rulemaking for §74.1003 be postponed until the 2023-2024 school year to give districts time to prepare.

Response: The agency agrees that districts need time to prepare. However, the agency disagrees that implementation should begin in the 2023-2024 school year and has maintained implementation language as proposed. Implementation of the updated list of industry-based certifications will begin with the 2022-2023 school year. To further clarify, language has been added at adoption to specify that the list of industry-based certifications to be used in the public school accountability system shall be reviewed and updated every two years beginning in 2021.

Comment: Twenty-three commenters suggested revising §74.1003(c) to read, "Beginning with industry-based certifications earned in the 2022-2023 school year, certifications recognized for the purpose of public school accountability shall meet the following criteria," to clarify whether IBCs previously earned would count toward CCMR.

Response: The agency disagrees that the implementation language should be revised and offers the following clarification. The newly adopted list of IBCs for public school accountability would be in effect for the 2022-2023 school year. Students who previously earned an IBC from the approved list would continue to count toward CCMR.

Comment: One member of a trade organization stated that the current IBC list does not align with the needs of industry.

Response: The agency disagrees and offers the following clarification. The first criterion is industry recognition and value. In response to this and other comments, the language for this criterion has been adjusted at adoption to clarify how TEA will determine whether a certification is industry recognized and valued.

Comment: Two commenters stated that requiring an organization to use a third-party certifying entity instead of developing and testing their own expectations puts an undue expense on the organization.

Response: The agency disagrees. Third-party certifying entities provide validation of knowledge, skills, and competencies using predetermined standards, thereby ensuring a standard level of quality and rigor and should not result in a new expense for an organization that provides workforce curriculum or training.

Comment: The Dallas Regional Chamber expressed support for the proposed amendment to §74.1003, stating that the addition of proposed §74.1003(c) introduces rigor and relevance to the list of IBCs for public school accountability and refines the list of certifications to include only those certifications that demonstrably provide Texas students with a direct pathway to higher education, an in-demand career, or a better wage.

Response: The agency agrees. In response to other comments, language was adjusted to further clarify the rule.

Comment: Ten individuals stated that earning an IBC should remain a full point within CCMR and the A-F accountability ratings.

Response: The comment falls outside the scope of the proposed rulemaking for §74.1003.

Comment: An individual expressed confusion about what is considered a certification.

Response: The agency agrees that there is confusion regarding certifications and added new §74.1003(d)(1) at adoption to provide a definition for certification.

STATUTORY AUTHORITY. The amendment is adopted under Texas Education Code, §39.053, which requires the commissioner to adopt a set of indicators of the quality of learning and achievement, including improving student preparedness for success in entering the workforce, the military, or postsecondary education.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code, §39.053.

§74.1003. Industry-Based Certifications for Public School Accountability.

(a) The list of certifications provided in this subsection will be recognized for the purpose of accounting for students who earn industry certifications in the public school accountability system for the 2017-2018 and 2018-2019 school years.
Figure: 19 TAC §74.1003(a) (No change.)

(b) Beginning in the 2019-2020 school year, the list of certifications provided in the annual accountability manual adopted as a figure in §97.1001 of this title (relating to Accountability Rating System) will be recognized for the purpose of accounting for students who earn industry certifications in the public school accountability system.

(c) The list of industry-based certifications to be used in the public school accountability system shall be reviewed and updated every two years beginning in 2021.

(d) Beginning in the 2022-2023 school year, certifications recognized for the purpose of public school accountability shall meet the following criteria.

(1) Certification. A certification is defined as a validation or license that indicates an individual possesses certain industry-specific skills and that meets two or more of the following criteria:

(A) the certification is related to the performance requirements of a career or occupation, measured against a set of industry-accepted standards, and not dependent upon a particular curriculum or program;

(B) the certification is earned by successfully completing an assessment that demonstrates an individual's proficiency of the prescribed standards; or

(C) the certification is a time-limited credential that must be maintained through ongoing professional training and/or testing requirements.

(2) Industry recognized and valued.

(A) A certification is industry recognized and valued if the certification is:

(i) referred to the Texas Education Agency (TEA):

(I) by the Texas Workforce Commission (TWC) as part of the inventory of industry-recognized credentials approved by the industry-based certification advisory council authorized by Texas Labor Code, §312.002; or

(II) directly using a process identified and implemented by TEA and published on the TEA website if the certification is not referred to TEA by TWC under subclause (I) of this clause; and

(ii) determined to be valued by a representative sample of employers, as demonstrated in at least one of the following ways:

(I) inclusion of the certification in job postings as required or highly recommended;

(II) use of the certification as a factor in selecting candidates for an interview or for hire; or

(III) offer of higher pay for individuals who possess the certification.

(B) If a determination of value under subparagraph (A)(ii) of this paragraph is not made prior to referral under subparagraph (A)(i)(I) of this paragraph, TEA may use a third-party organization with expertise in gathering information from employers related to the value of industry-based certifications to directly contact groups of employers and report to TEA regarding whether the standards under subparagraph (A)(ii) of this paragraph have been met.

(3) Attainable by a high school student. All eligibility requirements such as age and experience can be met and the certification awarded before or within the summer after a student's high school graduation.

(4) Portable. The certification can:

(A) be transferred seamlessly to postsecondary work through acceptance for credit or hours in core program courses at an institution of higher education;

(B) be counted toward hours in an aligned apprenticeship program;

(C) be part of a prescribed coherent sequence of industry-recognized credentials to show progressive skills development; or

(D) support employment in more than one region of the state.

(5) Certifying entity. The assessment of the knowledge and skills required to obtain the certification is provided by or determined by an independent, third-party certifying entity using predetermined standards for knowledge, skills, and competencies.

(6) Capstone or end-of-program. A certification assessment is taken at the culmination of a single high school course or multiple related courses within a secondary program of study. There must be at least 50% overlap between the certification assessment standards and:

(A) the essential knowledge and skills for a secondary course aligned to the career cluster associated with the certification assessment; or

(B) the applicable essential knowledge and skills for a set of courses within a program of study in a secondary career and technical education program.

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 December 20, 2021.

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CHAPTER 100. COMMISSIONER'S RULES CONCERNING OPEN-ENROLLMENT CHARTER SCHOOLS

SUBCHAPTER AA. COMMISSIONER'S RULES CONCERNING OPEN-ENROLLMENT CHARTER SCHOOLS

DIVISION 4. PROPERTY OF OPEN-ENROLLMENT CHARTER SCHOOLS

19 TAC §100.1067

The Texas Education Agency (TEA) adopts an amendment to §100.1067, concerning possession and control of the public property of a former charter holder. The amendment is adopted with changes to the proposed text as published in the June 18, 2021 issue of the *Texas Register* (46 TexReg 3667) and will be republished. The adopted amendment implements Senate Bill (SB) 1454, 86th Texas Legislature, 2019, which established state oversight of related-party and other transactions conducted by charter schools and described how closed charter school funds and property are to be handled.

REASONED JUSTIFICATION: Section 100.1067 describes the commissioner's authority to take control of and dispose of public property held by a former charter holder.

SB 1454, 86th Texas Legislature, 2019, amended Texas Education Code (TEC), Chapters 12 and 39A. The bill established state oversight of related-party and other transactions conducted by charter schools and provided for the management of assets of an open-enrollment charter school that ceases to operate. Prior to the enactment of SB 1454, the TEC did not expressly address provisions for property disposition of former charter holders or closed open-enrollment charter schools.

SB 1454 pertains to the control and disposition of real property purchased with public funds upon a charter holder's ceasing operations. The adopted changes outline two general actions TEA may direct the former charter holder to take: (1) retain or sell the property, or (2) transfer the property. The adopted amendment also details the procedures associated with each.

The adopted amendment to §100.1067(a) clarifies the commissioner's authority to direct disposition of the charter holder's property.

The adopted amendment to §100.1067(b) aligns the language with SB 1454 and clarifies the commissioner's authority to cure defective audits submitted by charter schools.

Adopted new §100.1067(c)(1) describes the commissioner's authority to direct the method of disposition of real property when the charter holder has purchased the property with state funds. In response to public comments, the agency has made the following changes to subsection (c)(1) at adoption.

Section 100.1067(c)(1)(A)(v) was modified to change the equation by which to calculate the amount of state reimbursement for property. The new language also allows for the charter holder to request an extension from the commissioner if an appraisal cannot be obtained in 30 calendar days.

Section 100.1067(c)(1)(A)(vi)(III) was modified to clarify that total funds means state, federal, or any other private funds.

Section 100.1067(c)(1)(A)(viii)(I) was modified to change the equation by which to calculate the amount of state reimbursement for property.

Section 100.1067(c)(1)(A)(viii)(IV) was modified to allow for the commissioner to extend the final financial audit deadline upon request of the charter holder.

Section 100.1067(c)(1)(A)(ix)(II) was modified to clarify that the property must be sold and fully closed no later than one year after the last day of instruction.

Section 100.1067(c)(1)(A)(ix)(V) was modified to change the equation by which to calculate the amount of state reimbursement for property.

Section 100.1067(c)(1)(A)(x) was modified to extend the deadline by which a charter holder shall provide an appraisal from 30 calendar days to 60 calendar days after the final order of revocation, non-renewal, surrender, or return of the charter. New language was also added to permit the charter holder to request that the commissioner grant an extension if an appraisal cannot be obtained within 60 calendar days.

Section 100.1067(c)(1)(B)(ii)(I)(-a-)-(-d-) were modified to clarify that accountability rating means academic accountability rating.

Section 100.1067(c)(1)(B)(ii)(I) was added to prohibit a school district or charter school from purchasing property unless the school district or charter school has a current passing rating in the financial accountability rating system.

Adopted new §100.1067(c)(2) describes the commissioner's authority to direct the method of distribution of personal property when the charter holder has purchased the property with state funds.

Adopted new §100.1067(c)(3) describes the commissioner's authority to direct the method of distribution of property when the charter holder has leased the property with state funds.

Adopted new §100.1067(d) describes the authority of the commissioner with regard to expenditures for maintenance of the property.

Adopted new §100.1067(e) describes the actions the charter holder shall take upon the termination of operations of the open-enrollment charter school.

Adopted new §100.1067(g) specifies that the commissioner has discretion to direct disposition of the property in the best interest of Texas students.

SUMMARY OF COMMENTS AND AGENCY RESPONSES: The public comment period on the proposal began June 18, 2021, and ended July 19, 2021. Following is a summary of the public comments received and corresponding agency responses.

Comment: The law firm Schulman, Lopez, Hoffer and Adelstein LLP (SLHA, LLP) commented that §100.1067(b)(2), providing that the commissioner may cure any defects in the annual audit reports by reviewing the reports and reclassifying the transactions, was too open-ended and that the commissioner should be required to follow audit standards.

Response: The agency disagrees. If the agency conducts a review or investigation and determines that the transaction is not properly classified, TEC, §12.1163(d), gives the agency authority to reclassify. The statute does not require any specific auditing standard. In this instance, the agency is not conducting an audit but reviewing an audit and, therefore, the auditing standards do not apply.

Comment: SLHA, LLP commented that §100.1067(c)(1)(A)(iii) is not clear about whether the commissioner will act within 30 days and recommends that notice be given to the commissioner, who may then object.

Response: The agency disagrees. A charter holder may not act unless written consent is granted. Once consent is granted, a charter holder may act.

Comment: SLHA, LLP commented that §100.1067(c)(1)(A)(iv) is unclear about whether the interest is based on the last completed audit report.

Response: The agency disagrees. No dollar amount is required. The affidavit simply requires the commissioner provide affirmative consent to transact on the property.

Comment: SLHA, LLP commented that the 30-day deadline set forth in §100.1067(c)(1)(A)(v) may be difficult to meet.

Response: The agency agrees and has revised this provision at adoption to allow for the commissioner to grant an extension if an appraisal cannot be obtained in time.

Comment: SLHA, LLP commented that the formula set forth in §100.1067(c)(1)(A)(v) fails to adequately account for any funds that are not funds under TEC, §12.106, that also may have paid for the property and that the method of calculation should be revised.

Response: The agency agrees and has revised the language at adoption to clarify the calculation. The numerator is state funds used to purchase and the denominator is state funds plus non-state funds used to purchase.

Comment: SLHA, LLP commented that §100.1067(c)(1)(A)(vi-)(III) is also missing input of any non-public funds into the audit determination.

Response: The agency agrees and has revised the language at adoption to clarify that "total funds" includes state, federal, or any other private funds.

Comment: SLHA, LLP commented that the meaning of the term "full insurance coverage as determined by the commissioner" is unclear and recommends it be changed to "commercially reasonable and customary insurance."

Response: The agency disagrees. The agency has not yet received full reimbursement of the property, and, therefore, full insurance coverage is necessary to protect the state interest.

Comment: SLHA, LLP commented that the formula set forth in §100.1067(c)(1)(A)(viii)(I) again fails to adequately account for any funds that are not funds under TEC, §12.106, that also may have paid for the property and that the method of calculation should be revised.

Response: The agency agrees and has revised the language at adoption to clarify the calculation. The numerator is state funds used to purchase and the denominator is state funds plus non-state funds used to purchase.

Comment: SLHA, LLP commented that the timeline set forth in §100.1067(c)(1)(A)(viii)(IV) will be impossible to meet.

Response: The agency disagrees. However, in response other comments, the agency has updated the language at adoption to allow for extensions if necessary.

Comment: SLHA, LLP commented that the provisions in §100.1067(c)(1)(A)(ix)(I) and (II) should be more flexible to allow for the school and state to time the sale of the property to maximize the value of the property.

Response: The agency disagrees. The requirement is that the property be sold for fair-market value on the date of the transaction.

Comment: SLHA, LLP commented that the term "sold" in §100.1067(c)(1)(A)(ix)(II) is unclear.

Response: The agency agrees and has revised the language at adoption to define "sold" as fully closed, not just under contract.

Comment: SLHA, LLP commented that the 30-day timeframe set forth in §100.1067(c)(1)(A)(x) is not a realistic timeframe to secure a commercial appraisal from start to finish and recommends a 60-to-90-day timeframe.

Response: The agency agrees and has revised the language at adoption to allow an audit up to 60 days prior to the final order and to allow the charter holder to request an extension.

Comment: SLHA, LLP commented that §100.1067(c)(1)(A)(xiv), stating that a decision by the commissioner is final and may not be appealed, should be changed to provide for an informal review to discover any issues or errors.

Response: The agency disagrees. There is no language that prevents the charter holder from requesting the commissioner to reconsider a decision, but there are no statutory rights of appeal.

Comment: SLHA, LLP commented that it is unclear if the memorandum of understanding entered into with the General Land Office (GLO) is a sufficient legal instrument through which to give TEA the legal right to hold title to real property.

Response: The agency disagrees. The agency may take title under TEC, §12.1283(a), and request that the GLO assist in the sale.

Comment: SLHA, LLP commented that it is unclear whether the references to "accountability rating" are referring to an academic or financial accountability rating.

Response: The agency agrees and has revised the language at adoption. In addition, new §100.1067(c)(1)(B)(ii)(I) was modified to state that no charter can take property if their current charter FIRST rating is lower than satisfactory.

Comment: SLHA, LLP commented that school districts should have the lowest levels of priority for property transfers.

Response: The agency disagrees. While giving a high-performing charter first priority, a lower performing charter should not have priority over a higher performing school district.

Comment: SLHA, LLP commented that the three-year timeframe in which a charter holder or school district may not sell property it received from the state is arbitrary.

Response: The agency disagrees. Three years is a reasonable time to assure that the entity did not take the property with the intent to re-sell the property for a profit.

Comment: SLHA, LLP commented that the recognition of security interest is important and appreciated.

Response: The agency agrees.

Comment: SLHA, LLP commented to inquire what factors determine the highest qualified bidder.

Response: The agency provides the following clarification. The agency will provide the requested information through the solicitation process.

Comment: SLHA, LLP commented that the commissioner should specify in §100.1067 a prioritization for nearby charter schools to receive the public property. Traditional school districts should receive it to the extent any personal property remains following the charter school distribution.

Response: The agency disagrees. Personal property is typically of low re-sell value, and the administrative burden of making these determinations outweighs the benefit.

Comment: SLHA, LLP commented to inquire whether the agency can legally hold title or whether the title needs to be with the GLO or Texas Facilities Commission.

Response: The agency provides the following clarification. TEC, §12.1283(a), allows the agency to take title.

Comment: SLHA, LLP commented to inquire whether the agency will be in the property management business under §100.1067.

Response: The agency provides the following clarification. TEA is a state agency and not a property management business.

Comment: The Texas American Federation of Teachers and an individual requested that the agency include the definition of "related party" in §100.1067.

Response: The agency disagrees. The agency is in the process of creating separate rule language that would include the definition of "related party."

Comment: The Texas Public Charter School Association (TPCSA) commented that §100.1067 should be amended to ensure that public property of the former charter holder be offered first to the other charter holders to sustain school options.

Response: The agency disagrees that all charter holders shall be offered property first and has based preference on school performance as well. While giving a high-performing charter first priority, a lower performing charter should not have priority over a higher performing school district.

Comment: TPCSA commented that §100.1067 should be amended to protect the interests of secured and unsecured creditors who are a source of funding for charter school facility development.

Response: The agency disagrees. TEC, §12.1012(7), defines payable obligation, and TEC, §12.128(e), protects a lender that has a valid security interest or lien established in compliance with the law. The agency does not have the authority to adopt rules to protect creditors who are not described by one of these two laws.

Comment: TPCSA commented that §100.1067 should be amended to acknowledge that individuals and organizations that donate and grant funds to charter schools are making restricted gifts to be utilized by charter schools for a specific purpose.

Response: The agency agrees and has revised the language at adoption to clarify the calculation. To adequately account for any funds that are not funds under TEC, §12.106, that also may have paid for the property, the numerator is state funds used to purchase and the denominator is state funds plus non-state funds used to purchase. The agency has also revised the language to clarify that "total funds" includes state, federal, or any other private funds.

Comment: TPCSA commented that §100.1067 should be amended to expand and clarify all required steps, notices to the commissioner, required documents, and timelines and allow for greater time flexibility.

Response: The agency agrees and has revised the language to allow an audit up to 60 days prior to the final order and to allow the charter holder to request an extension.

Comment: TPCSA commented that §100.1067 should be amended to clarify that charter schools are required to follow audit standards when classifying assets.

Response: The agency disagrees. Section 100.1067(c)(1)(A-)(vi) states that charter holders must submit a final audit under TEC, §44.008, which includes audit requirements and standards.

Comment: TPCSA commented that §100.1067 should be amended to allow parties to make decisions, while providing notice and the opportunity for the commissioner to intervene.

Response: The agency disagrees. A charter holder may not act unless written consent is granted. Once consent is granted, a charter holder may act.

STATUTORY AUTHORITY. The amendment is adopted under Texas Education Code (TEC), §12.106, as amended by Senate Bill (SB) 1454, 86th Texas Legislature, 2019, which describes the nature of state funding that a charter holder is entitled to

receive and details disposition of state funds after a charter school ceases to operate; TEC, §12.128, as amended by SB 1454, 86th Texas Legislature, 2019, which outlines how charter schools may use and dispose of property purchased with public funds; TEC, §12.1281, as added by SB 1454, 86th Texas Legislature, 2019, which describes how a former charter holder may dispose of its property purchased with state funds after the charter school ceases to operate; TEC, §12.1282, as added by SB 1454, 86th Texas Legislature, 2019, which details how a former charter holder may be permitted to transfer property purchased with state funds; TEC, §12.1283, as added by SB 1454, 86th Texas Legislature, 2019, which details how the agency may sell property from a former charter holder, originally purchased with state funds; TEC, §12.1284, as added by SB 1454, 86th Texas Legislature, 2019, which describes generally final disposition of funds by Texas Education Agency after closure of charter school operations; and TEC, §39A.256, as amended by SB 1454, 86th Texas Legislature, 2019, which describes generally how a board of managers may be appointed to a closing charter school by the commissioner and details the authority such a board of managers would have with regard to a school's final closure.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code, §12.106 and §12.128, as amended by Senate Bill (SB) 1454, 86th Texas Legislature, 2019; §§12.1281, 12.1282, 12.1283, and 12.1284, as added by SB 1454, 86th Texas Legislature, 2019; and 39A.256, as amended by SB 1454, 86th Texas Legislature, 2019.

§100.1067. Possession and Control of the Public Property of a Former Charter Holder.

(a) Disposition of audited property. The commissioner of education shall take possession, assume control, and supervise the disposition of the public property disclosed by the annual audit report as filed with the Texas Education Agency (TEA) or as revised pursuant to subsection (b) of this section. At any time, the commissioner may appoint a board of managers to transfer the property or may direct the governing board of the charter holder to transfer the property. The commissioner may transfer or direct the transfer of property to any public school if the commissioner determines that the transfer is in the best interest of students. For purposes of this section, references to a charter holder refers to both an organization that currently holds a charter contract and an organization that formerly held a charter contract.

(b) Disposition of property--defective audit. If the annual audit reports filed by a former charter holder are not in substantial compliance with §100.1063(f) of this title (relating to Use of Public Property by a Charter Holder), the commissioner shall use such legal process as may be available under Texas law to take possession and assume control of all property of the former charter holder and, using such legal process, supervise the disposition of such property in accordance with law. The commissioner may transfer or direct the transfer of property to any public school if the commissioner determines that the transfer is in the best interest of students.

(1) At any time, the commissioner may determine whether the annual audit reports filed by a former charter holder substantially comply with §100.1063(f) of this title.

(2) At the commissioner's sole discretion, the commissioner may cure any defects in the annual audit reports by reviewing the audit reports and reclassifying the transactions and restating the financial statements or by securing, at the former charter holder's expense, such professional services as may be required to create and/or audit the necessary exhibits to the annual audit reports.

(3) The commissioner may, at the commissioner's sole discretion, take possession, assume control, and supervise the disposition of the public property disclosed by the annual audit reports and any revisions made under this subsection.

(c) Method of disposition of property. The commissioner may take possession, assume control, and supervise the disposition of property by taking one or more of the following actions.

(1) For real property purchased with funds received under the Texas Education Code (TEC), §12.106, the commissioner shall direct the charter holder to dispose of the property through one of the following methods.

(A) The charter holder may retain or sell the property and provide reimbursement to the state. The following provisions apply to a charter holder that retains or sells the property.

(i) The charter holder must notify the commissioner more than 30 calendar days prior to the last day of instruction that the charter holder intends to reimburse the state for its interest in the property and specify whether the charter holder intends to retain or sell the real property.

(ii) The charter holder must provide the commissioner a written assurance that the charter holder will comply with the requirements of TEC, §12.1284.

(iii) The charter holder must obtain the written consent of the commissioner.

(iv) The charter holder must file an affidavit in the real property records of the county in which the real property is located disclosing the state interest in the property at least 30 calendar days prior to the last day of instruction.

(v) Not later than 30 calendar days after the charter school's last day of operation, the charter holder must deposit with the Texas Comptroller of Public Accounts an amount equal to 110% of the estimated state reimbursement for the property as directed by the commissioner, which TEA will calculate by taking the fair-market value of the property as determined by an appraisal approved by the commissioner, subtracting the principal amount of any debt described by TEC, §12.128(e), and multiplying that result by a fraction for which the numerator is the funds received under TEC, §12.106, used to purchase the property and the denominator is the funds received under TEC, §12.106, plus any non-state funds used to purchase the property. If an appraisal cannot be obtained in 30 calendar days, the charter holder may request that the commissioner grant an extension.

(vi) The charter holder must prepare and submit a final audit under TEC, §44.008. This audit must be filed by the deadline specified in TEC, §44.008, and must disclose:

(I) the total amount of funds received under TEC, §12.106, that were used to purchase each separate item of real property to be retained or sold by the charter holder;

(II) the total amount of federal funds that were used to purchase each separate item of real property to be retained or sold by the former charter holder; and

(III) the total amount of state, federal, or any other private funds that were used to purchase the property to be retained or sold by the former charter holder.

(vii) The charter holder shall timely make all required payments relating to the property, including note payments; shall maintain the premises; and shall maintain full insurance coverage as determined by the commissioner until the state has received its full reimbursement and released its claim to the property.

(viii) The following provisions apply if the charter holder elects to retain the property.

(I) After the final annual audit report is filed, TEA will calculate the final state reimbursement amount, which is calculated by taking the fair-market value of the property as determined by the commissioner less the final principal amount of any debt described by TEC, §12.128(e), that was incurred prior to the charter school's cessation of operations and multiplying that amount by a fraction for which the numerator is the funds received under TEC, §12.106, used to purchase the property and the denominator is the funds received under TEC, §12.106, plus any non-state funds used to purchase the property.

(II) If the final state reimbursement amount is greater than the deposit made with the comptroller under this section, the former charter holder must make the additional deposit to the comptroller within 30 calendar days of TEA's determination of the final state reimbursement amount or as otherwise ordered by the commissioner.

(III) Once the charter holder has filed its final audit report under TEC, §44.008, and sufficient funds are on deposit with the comptroller to pay the final reimbursement amount, the commissioner may request the comptroller to distribute the deposit as directed by TEA and release any state claim on the property. Any remaining funds on deposit with the comptroller may be returned to the former charter holder once the state has received the full final reimbursement amount.

(IV) If the charter holder fails to complete its final financial audit under TEC, §44.008, or fails to make an additional payment to the comptroller as required, the charter holder shall forfeit the amount deposited with the comptroller and shall dispose of the property as ordered by the commissioner. The commissioner may extend this deadline upon request of the charter holder.

(ix) The following provisions apply if the charter holder sells the property.

(I) The property must be sold for at least fair-market value, as determined under this section.

(II) The property must be sold and fully closed no later than one year after the last day of instruction.

(III) If the property is sold prior to the completion of the final audit report under TEC, §44.008, for an amount greater than the fair-market value used to determine the estimated state reimbursement amount, the charter holder shall deposit with the comptroller an amount equal to the difference between the estimated fair-market value and the sales price multiplied by the percentage of state funds used to purchase the property based on the most recent audit pursuant to TEC, §44.008.

(IV) After the property has been sold and the final audit report, pursuant to TEC, §44.008, has been filed, TEA shall calculate the final state reimbursement amount.

(V) The final state reimbursement amount is calculated by taking the final gross sales price of the property less the remaining principal amount of any debt described by TEC, §12.128(e), that was incurred prior to the charter school's cessation of operations and multiplying that amount by a fraction for which the numerator is the funds received under TEC, §12.106, used to purchase the property and the denominator is the funds received under TEC, §12.106, plus any non-state funds used to purchase the property.

(VI) If the final state reimbursement amount is greater than the total deposit made with the comptroller, the former charter holder must make the additional deposit to the comptroller within 30 calendar days or as otherwise ordered by the commissioner.

(VII) Once the former charter holder has filed its final audit report under TEC, §44.008, and sold the property, and once sufficient funds are on deposit with the state comptroller's office to pay the final reimbursement amount, the commissioner may request the comptroller to distribute the deposit and release any state claim on the property. Any funds on deposit with the comptroller may be returned to the former charter holder once the state has received the full final reimbursement amount.

(VIII) The release of claims may be made in a closing where an independent third party is responsible for distributing the funds necessary to supplement the escrow account with the comptroller's office. If the property is sold before the final audit has been submitted to TEA, TEA may elect to release its claim on the property based on the most recent audit report.

(IX) If the charter holder fails to complete its final financial audit under TEC, §44.008, fails to sell the property within one year after the last day of instruction, or fails to make an additional payment to the comptroller as required, the charter holder shall forfeit the amount deposited with the state comptroller and shall dispose of the property as ordered by the commissioner.

(x) For purposes of determining the fair-market value of the real property, the charter holder shall provide an appraisal from a certified appraiser approved by the commissioner not less than 60 calendar days after the final order of revocation, non-renewal, surrender, or return of the charter, or as otherwise directed by the commissioner. If the charter holder cannot provide an appraisal within 60 calendar days, the charter holder may request that the commissioner grant an extension.

(xi) The commissioner may direct the charter holder to contract with a specified, certified appraiser or require the charter holder to obtain additional appraisals and may then choose which appraisal will be used to calculate fair-market value.

(xii) Subject to the satisfaction of any security interest or lien described by TEC, §12.128(e), if the commissioner determines a former charter holder failed to comply with this section or TEC, §12.1282, on request of TEA, the attorney general shall take any appropriate legal action to compel the former charter holder to convey title to TEA or other governmental entity authorized by TEA to maintain or dispose of the property.

(xiii) All payments made by the charter holder to retain real property must be made with non-state funds. Lease payments received for state property are state property.

(xiv) A decision by the commissioner under this section is final and may not be appealed.

(B) The charter holder may transfer the property using one of the following methods.

(i) Transfer to TEA.

(I) Subject to the satisfaction of any security interest or lien, the former charter holder shall transfer the property, including a conveyance of title, to TEA no later than two weeks after the last day of instruction.

(II) The following provisions apply to the sale of public real property by TEA.

(-a-) After TEA receives title to real property described by TEC, §12.128, TEA may sell the property at any price acceptable to TEA.

(-b-) On request of TEA, the General Land Office shall enter into a memorandum of understanding to sell real property for TEA as required by TEC, §12.1283. The memorandum of understanding may allow the General Land Office to recover from the sale proceeds any cost incurred by the office or commission in the sale of the property.

(-c-) Subject to the satisfaction of any security interest or lien described by TEC, §12.128(e), proceeds from the sale of property under this section shall be deposited in the charter school liquidation fund.

(ii) Transfer to a school district or open-enrollment charter school under TEC, §12.1282.

(I) The following order of priority shall be used when transferring to a school district or open-enrollment charter school under this clause. No property may be transferred to a school district or charter school if it has a financial accountability rating of lower than satisfactory.

(-a-) A charter school with the highest or second-highest academic accountability rating with no campus rated at the lowest or second-lowest accountability rating and whose approved geographic boundary encompasses the property to be transferred.

(-b-) A school district that has the highest or second-highest academic accountability rating with no campus rated at the lowest or second-lowest accountability rating and whose geographic boundary includes the property to be transferred.

(-c-) A charter school with the third-highest academic accountability rating with no campus rated at the lowest or second-lowest accountability rating and whose approved geographic boundary encompasses the property to be transferred.

(-d-) A school district with the third-highest academic accountability rating with no campus rated at the lowest or second-lowest accountability rating and whose geographic boundary encompasses the property to be transferred.

(II) A school district or an open-enrollment charter school may receive property under this clause only if:

(-a-) the open-enrollment charter school or school district receiving the property:

(-1-) has not received notice of the expiration or revocation of the contract for charter, notice of reconstitution of its governing body, or the assignment of an accreditation rating of Not Accredited-Revoked;

(-2-) agrees to the transfer;

(-3-) agrees to identify the property as purchased wholly using state funds on the school's annual financial report filed under TEC, §44.008; and

(-4-) agrees that if the property is sold within three years, the charter holder or school district will remit the sales proceeds back to TEA to be deposited in the charter school liquidation fund;

(-b-) any creditor with a security interest in or lien on the property described by TEC, §12.128(e), agrees to the transfer; and

(-c-) the transfer of the property does not make the open-enrollment charter school or school district receiving the property insolvent.

(III) Property received by an open-enrollment charter school or school district under this clause is considered state property. TEA may require a set amount of remuneration in exchange for the property, may accept bids, or may accept bids with a minimum bid amount established. If TEA takes bids, TEA shall transfer the property to the highest qualified bidder from the highest priority category established in subclause (I) of this clause, except as provided by subsection (g) of this section.

(2) For personal property purchased with state funds, the commissioner shall direct the charter holder to dispose of the property through one of the following methods.

(A) If TEA determines that the cost of disposing of personal property described by TEC, §12.128, transferred to TEA by an open-enrollment charter school that ceases to operate exceeds the return of value from the sale of the property, TEA may distribute the personal property to open-enrollment charter schools and school districts in a manner determined by the commissioner.

(B) On request of TEA, the Texas Facilities Commission shall enter into a memorandum of understanding to sell personal property for TEA as required by TEC, §12.1283.

(i) A memorandum of understanding entered into as provided by this subparagraph may allow the Texas Facilities Commission to recover from the sale proceeds any cost incurred by the office or commission in the sale of the property.

(ii) Subject to the satisfaction of any security interest or lien described by TEC, §12.128(e), proceeds from the sale of personal property under this section shall be deposited in the charter school liquidation fund.

(3) For property leased with state funds, the commissioner may direct the charter holder to assign the charter holder's interest in the lease to TEA or may direct the charter holder to cancel the lease.

(d) Maintenance of property. TEA may approve an expenditure of remaining funds by a former charter holder for insurance or utilities for or maintenance, repairs, or improvements to property described by this section, and TEA may lease the property in its possession if TEA determines that the action is reasonably necessary to dispose of the property or preserve the property's value.

(e) Funds and assets following termination of operations. After extinguishing all payable obligations owed by the charter school that ceases to operate, and after disposing of all real and personal property owned by the charter school that ceases to operate, the former charter holder shall:

(1) remit to TEA any remaining funds as described by TEC, §12.106(h), and any state reimbursement amounts as described by TEC, §12.128, to be deposited in the charter school liquidation fund;

(2) transfer all or a portion of the remaining funds to another charter school that has all or part of the operations of the former charter school assigned to it under TEC, §12.116(d)(2), if ordered by the commissioner, only if the charter school:

(A) has not received notice of possible adverse action or sanction by the commissioner;

(B) has an academic accountability rating at the district level of A or B and no campus with a rating of D or F;

(C) has a Charter FIRST rating of Meets Standard Achievement or above;

(D) has an accreditation rating of Accredited;

(E) does not have any warrant holds by which state payments issued to payees indebted to the state, or payees with a tax delinquency, are held by the comptroller until the debt is satisfied in accordance with Texas Government Code, §403.055; and

(F) agrees to classify the property as state property; or

(3) take any combination of the actions described by paragraphs (1) and (2) of this subsection.

(f) Use of legal process. Notwithstanding subsection (c) of this section, the commissioner may use such legal process as may be available under Texas law to take possession and assume control over the public property disclosed by the annual audit reports and, using such legal process, supervise the disposition of such property in accordance with law.

(g) Commissioner authority. The commissioner has discretion to direct disposition of the property in the best interest of Texas students.

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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Texas Education Agency
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CHAPTER 109. BUDGETING, ACCOUNTING, AND AUDITING

SUBCHAPTER AA. COMMISSIONER'S RULES CONCERNING FINANCIAL ACCOUNTABILITY

19 TAC §109.1001

(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 figures in 19 TAC §109.1001 are not included in the print version of the Texas Register. The figures are available in the on-line version of the December 31, 2021, issue of the Texas Register.)

The Texas Education Agency (TEA) adopts an amendment to §109.1001, concerning financial accountability ratings. The amendment is adopted with changes to the proposed text as published in the September 3, 2021, issue of the *Texas Register* (46 TexReg 5524) and will be republished. The adopted amendment updates financial accountability rating information and rating worksheets for school districts and open-enrollment charter schools, including adjustments required under Texas Education Code (TEC), §39.087, as added by House Bill (HB) 1525, 87th Texas Legislature, Regular Session, 2021.

REASONED JUSTIFICATION: Section 109.1001 includes the financial accountability rating system and rating worksheets that explain the indicators that TEA will analyze to assign financial accountability ratings for school districts and open-enrollment charter schools. The rule also specifies the minimum financial accountability rating information that a school district or an open-enrollment charter school is to report to parents and taxpayers in the district.

The adopted amendment clarifies the financial accountability rating indicators terminology used to determine each school district's and charter school's rating for the 2020-2021 rating year and subsequent years by revising the ratings worksheet calculations in §109.1001(e)(5) and (f)(5). The adopted amendment also includes terminology clarifications to the rating worksheets in §109.1001(e)(5) and (f)(5). The worksheets, dated October 2021, differ from the current worksheets, dated April 2020, as follows.

Figure: 19 TAC §109.1001(e)(5)

A statement has been added that Indicator 5 will not be utilized for the 2020-2021 rating year.

Indicator 15 has been revised to clarify terminology that aligns with the calculation used to score the indicator when the average daily attendance of the school district is greater than the allotted range. The "Determination of Points" chart in the worksheet was revised to add the arithmetic symbol for "less than or equal to" to each of the ratios disclosed in the allotted range table of Indicator 15.

The "Determination of rating based on meeting ceiling criteria" description section was revised to remove the word "on" from the description of ceiling Indicator 5 to provide greater clarity of the indicator's description.

At adoption, Figure: 19 TAC §109.1001(e)(5) was modified to remove the duplicative term "hold" from the calculation for Indicator 15.

Figure: 19 TAC §109.1001(f)(5)

Indicator 13 was revised to remove the use of unrestricted net assets in the calculation and insert the use of total net assets in the calculation.

A statement was added that Indicator 21 will not be utilized for the 2020-2021 rating year.

In response to public comment, the following changes were made at adoption.

New subsection (e)(6) was added, including new Figure: 19 TAC §109.1001(e)(6) that clarifies terminology and calculations for School FIRST indicators for years subsequent to the 2020-2021 rating year. The worksheet states that Indicators 10 and 15 will not be utilized for the 2021-2022 rating year.

New subsection (f)(6) was added, including new Figure: 19 TAC §109.1001(f)(6) that clarifies terminology and calculations for Charter FIRST indicators for years subsequent to the 2020-2021 rating year. The worksheet states that Indicators 10, 16, and 21 will not be utilized for the 2021-2022 rating year. In addition, the data source for Indicator 10 does not include the revenue object code 57XX series in the calculation for the indicator, and references to the "Charter School AFR Data Template" as the source of data for certain data elements for Indicators 6, 7, 9, and 12 are not included because TEA will no longer use the template as a source of data for the elements.

SUMMARY OF COMMENTS AND AGENCY RESPONSES: The public comment period on the proposal began September 3, 2021, and ended October 4, 2021. Following is a summary of public comments received and agency responses.

School FIRST Indicator 7

Comment: Concerning proposed Figure: 19 TAC §109.1001(e)(5), a school district employee commented that recapture payments made by a school district should be excluded from the operating cost calculation for Indicator 7 for School FIRST. The school district employee stated that taxes flow in and flow out via recapture payments by August 15. Additionally, the school district employee stated that recapture is not an operating cost, but it is treated as such in the calculation for Indicator 7 and causes districts that have a large recapture percentage to have a much higher requirement for days of cash on hand. The school district employee further stated that this punitive aspect is unlikely to have been the legislative intent.

Response: The agency disagrees that recapture payments should be excluded from the days of cash on hand and current investments calculation for Indicator 7 (Was the number of days of cash on hand and current investments in the general fund for the school district sufficient to cover operating expenditures (excluding facilities acquisition and construction)?). The days of cash on hand and current investments calculation allows the agency to determine with a reasonable degree of certainty that a school district is maintaining sufficient cash on hand to pay its short-term expenditures. Furthermore, school districts that have local revenue in excess of entitlement are legally obligated to reduce their revenue level under TEC, Chapter 49, and one option is through making recapture payments. The agency has maintained language as proposed concerning Indicator 7 in Figure: 19 TAC §109.1001(e)(5).

School FIRST Indicators 10 and 15

Comment: Concerning proposed Figure: 19 TAC §109.1001(e)(5), a school district employee commented that neither Indicator 10 nor Indicator 15 for School FIRST will result in an accurate depiction of school districts' financial integrity because of dramatic changes to school district budgets and enrollment due to COVID-19 beginning with the 2019-2020 school year and extending through the 2020-2021 school year. The school district employee proposed that Indicator 10 be removed from the FIRST rating or that final budgeted amounts be used in the calculation for the indicator.

Regarding Indicator 10, the school district employee stated that a comparison of budgeted revenues submitted via the Public Education Information Management System (PEIMS) in October can vary significantly from actual revenues in August. The employee provided two examples for the variance from the employee's own school district: an unexpected COVID hold harmless funding that impacted the school district's ability to meet the requirements for Indicator 10 and a lawsuit from its major taxpayer lasting four years. The school district employee stated that these incidents affected the district's 2018-2019, 2019-2020, and 2020-2021 school years and could not have been predicted prior to adopting a budget. The school district employee further stated that Indicator 10 punishes school districts when unavoidable circumstances occur.

Regarding Indicator 15, the school district employee stated that Indicator 15 could result in a loss of points because of an unanticipated loss of students due to COVID. Additionally, the school district employee stated that districts were required to file attendance projections in 2018 for the 2019-2020 and 2020-2021 school years and that no school district could have known that COVID was coming and the impact that it would have on enrollment and attendance. The school district employee also stated that even though school districts were held harmless, there could still potentially be some skewed results for this indicator.

Response: The agency disagrees that Indicator 10 (Did the school district average less than a 10 percent variance (90% to 110%) when comparing budgeted revenues to actual revenues for the last 3 fiscal years?) and Indicator 15 (Was the school district's ADA within the allotted range of the district's biennial pupil projection(s) submitted to TEA? If the district did not submit pupil projections to TEA, did it certify TEA's projections?) should be removed from the School FIRST rating for years that have not been impacted by a widespread calamity and disagrees that the final budget should be used in the calculation for Indicator 10 instead of a school district's approved budget submitted through the PEIMS fall collection. Using the budget collected through PEIMS provides a uniform method of collection for the agency at a consistent time for the calculation for Indicator 10. Additionally, the agency maintains that Indicators 10 and 15 are predictive indicators for financial stability and that inaccurate pupil projections can prevent school districts from creating accurate budgets, which can lead to cash flow problems and possible financial insolvency. The agency has maintained language as proposed concerning Indicators 10 and 15 in Figure: 19 TAC §109.1001(e)(5). However, the agency has decided to not score Indicators 10 and 15 for the 2021-2022 rating year. Therefore, Figure: 19 TAC §109.1001(e)(6), which discloses indicators for the 2021-2022 rating year, was added at adoption. A note was added to Indicators 10 and 15 that states, "This indicator will not be utilized for the 2021-2022 rating year."

Comment: The Texas Public Charter Schools Association (TPCSA) requested that TEA modify and expand 19 TAC §109.1001(n) to waive or provide relief to any Charter FIRST indicator if the charter school can demonstrate that unforeseen circumstances related to the pandemic adversely impacted the indicator. TPCSA further commented that the rule will be used for subsequent years and that it is necessary to highlight an important concern that exists now and will continue beyond the pandemic.

Response: The agency agrees that adjustments should be made to the financial accountability rating system when unforeseen circumstances occur that adversely impact FIRST scores. These adjustments are allowed for under TEC, §39.087, COVID-19 Adjustment for Financial Accountability, and TEC, §39.082, Development and Implementation, which allows charter schools and school districts to submit additional information regarding FIRST indicators under subsection (g).

Charter FIRST Indicator 5

Comment: Concerning proposed Figure: 19 TAC §109.1001(f)(5), TPCSA urged the agency to consider a full waiver or other relief for Indicator 5 for Charter FIRST. TPCSA stated that the proposed rule waived this indicator for traditional school districts for the 2020-2021 School FIRST rating year and requested that a similar waiver be applied for Indicator 5 for charter schools. Schulman, Lopez, Hoffer and Adelstein, LLP also requested that the agency exclude Indicator 5 from Charter FIRST in Figure: 19 TAC §109.1001(f)(5). The law firm stated that Indicator 5 was excluded for school districts and that not waiving Indicator 5 for charter schools goes against the directive of TEC, §39.082, to create a financial accountability rating system to distinguish among school districts and open-enrollment charter schools based on level of financial performance.

Response: The agency disagrees that Indicator 5 (Was the total unrestricted net position balance (Net of the accretion of interest for capital appreciation bonds) in the governmental activities

column in the Statement of Net Position greater than zero? (If the school district's increase of students in membership over 5 years was 7 percent or more, then the school district passes this indicator.)) should be waived for charter schools. The agency agrees that Indicator 5 for School FIRST was not scored for the 2020-2021 School FIRST ratings. The agency's decision to not score Indicator 5 was based on the significant impact of the implementation of Governmental Accounting Standards Board (GASB) 68 and 75 on school districts' net position balance. Nonprofit charter schools are not subject to GASB. Additionally, 99% of charter schools met the requirements to pass Indicator 5 for the 2020-2021 Charter FIRST ratings by having a positive total net assets balance or at least a 7% growth in student membership over five years or year over year for new charter schools. The agency has maintained language as proposed concerning Indicator 5 in Figure: 19 TAC §109.1001(f)(5).

Charter FIRST Indicator 7

Comment: Concerning proposed Figure: 19 TAC §109.1001(f)(5), TPCSA urged the agency to consider a full waiver or other relief for Indicator 7 for Charter FIRST. TPCSA stated that charter schools were offered Elementary and Secondary School Emergency Relief (ESSER), Federal Emergency Management Agency (FEMA), and other state and federal funds and that much of the funding was delayed and may have been included in accounts receivable. Additionally, TPCSA stated that this could result in lower cash on hand while accounts receivable is higher. TPCSA also stated that there were unanticipated pandemic-related expenditures to establish virtual schools or acquire personal protective equipment (PPE). TPCSA commented that Indicator 7 is a ceiling indicator and can adversely impact Charter FIRST ratings.

Schulman, Lopez, Hoffer and Adelstein, LLP also requested that the agency exclude Indicator 7 from Charter FIRST in Figure: 19 TAC §109.1001(f)(5) because many charter schools were required to spend significant funds out of cash on hand to implement mitigation measures such as ensuring sufficient space for distancing, providing adequate technology for remote learning, and more. The law firm requested that the agency create an exception that would allow charter schools to submit documentary evidence of the impact of the pandemic on cash on hand and award points for Indicator 7 upon submission of sufficient evidence.

Response: The agency disagrees that Indicator 7 (Was the number of days of cash on hand and current investments for the charter school sufficient to cover operating expenses?) should be waived. Additionally, the results of the calculation for Indicator 7 yields 0, 2, 4, 6, 8, or 10 points in the Charter FIRST scoring system. While the agency agrees that charter schools may have had unanticipated pandemic-related expenditures that could cause a lower number of days of cash on hand and current investments, recording anticipated funding in accounts receivable does not impact the number of days of cash on hand calculation. Charter schools received funding based on a hold harmless amount and in many cases received additional funding. The agency has maintained language as proposed concerning Indicator 7 in Figure: 19 TAC §109.1001(f)(5). The agency agrees that adjustments should be made to the financial accountability rating system when unforeseen circumstances occur that adversely impact FIRST scores. These adjustments are allowed for under TEC, §39.087 and §39.082, which allows charter schools and school districts to submit additional information regarding FIRST indicators under subsection (g).

Charter FIRST Indicator 10

Comment: Concerning proposed Figure: 19 TAC §109.1001(f)(5), TPCSA urged the agency to consider a full waiver or other relief for Indicator 10 for Charter FIRST and suggested changing Indicator 10 to consider only budgeted state revenue (FSP, fund code 420) and not local revenue.

TPCSA stated that budgeted revenue may vary from actual revenue because of increasing or declining enrollment or attendance and virtual options, new and changing TEA hold harmless calculations and guidance, and the influx of ESSER, state, and FEMA funds; donations/gifts; grants; and other funding. TPCSA further commented that this indicator penalizes charter schools that receive unanticipated gifts or donations.

TPCSA stated that the current calculation of Indicator 10 contradicts the legislative intent of TEC, §39.082(b), to "measure the financial management performance and future financial solvency" and that the indicator penalizes not only charter schools that might not be financially solvent but also those that end up being more financially successful than they anticipated in their budget.

TPCSA added that many charter schools receive unexpected revenue in the form of donations, gifts, federal and state funding, and philanthropic competitive and non-competitive grants and that accepting these gifts can result in more than a 10% revenue variance, violating Indicator 10. TPCSA stated that Charter FIRST should not discourage charter schools from applying for or receiving revenue from these sources. Additionally, TPCSA stated that Indicator 10 inappropriately penalizes charter schools that receive restricted grants or donations because they are not counted in revenue while unrestricted gifts are counted.

Lastly, TPCSA commented that Indicator 10 appears to inappropriately treat charter schools as if they receive local tax revenue in the same manner as traditional school districts and that local revenue for school districts is generated from local property taxes, which are stable and can be estimated and budgeted in advance, while local revenue for charter schools is often unexpected and much more difficult to estimate and budget.

Schulman, Lopez, Hoffer and Adelstein, LLP also requested that the agency exclude Indicator 10 from Charter FIRST in Figure: 19 TAC §109.1001(f)(5) because the COVID-19 pandemic seriously inhibited charter schools' ability to accurately predict enrollment, average daily attendance (ADA), and revenues for the 2020-2021 school year. The law firm stated that charter schools whose ADA estimations and budgeted revenue were less accurate because of the impact of the COVID-19 pandemic will be punished for those estimations for two years into the future because the indicator considers three years of budget variances. The law firm further stated that this indicator adversely and punitively affects small and new charter schools for impacts of the pandemic outside their control. The law firm requested that the agency create an exception that would allow charter schools to submit documentary evidence of the impact of the pandemic on losses in enrollment and ADA and award points for this indicator or exclude the indicator when supported by documentation.

Response: The agency agrees that only state revenue should be included in the calculation for Indicator 10 for Charter FIRST. The agency will also exclude Indicator 10 from the 2021-2022 Charter FIRST ratings. The agency added Figure: 19 TAC §109.1001(f)(6) at adoption, which discloses indicators for the 2021-2022 rating year. The agency will not score Indicator 10 for the 2021-2022 Charter FIRST ratings and will include only

state revenue object code series 58XX in the calculation of budgeted and actual revenues for Indicator 10 for subsequent years. A note was added to Indicator 10 that states, "This indicator will not be utilized for the 2021-2022 rating year." An edit was also made to the data source for Indicator 10 to delete object code 57XX as a source of revenue in the calculation.

The agency also agrees that adjustments should be made to the financial accountability rating system when unforeseen circumstances occur that adversely impact FIRST scores. These adjustments are allowed for under TEC, §39.087 and §39.082, which allows charter schools and school districts to submit additional information regarding FIRST indicators under subsection (g).

Charter FIRST Indicator 14

Comment: Concerning proposed Figure: 19 TAC §109.1001(f)(5), TPCSA urged the agency to consider a full waiver or other relief for Indicator 14. TPCSA stated that Indicator 14 is adversely impacted by (1) increasing or declining enrollment or attendance and virtual options, since it may not be possible to rapidly reduce administrative staff or costs at the same rate as instructional costs, and (2) administration staff requirements for all of the new funding, guidelines, applications, stakeholder input, and grant management. TPSCA added that some schools must administer ESSER, TEA's Texas COVID Learning Acceleration Supports (TCLAS), Prior Purchase Reimbursement Program (PPRP), FEMA grants, and other grants.

Response: The agency disagrees that Indicator 14 (Was the charter school's administrative cost ratio equal to or less than the threshold ratio?) should be waived. The agency understands that adjustments in ADA can impact a charter school; therefore, Indicator 14 is designed so that charter schools with a lower ADA can have a higher administrative cost ratio to receive the maximum points for this indicator as compared to charter schools with a higher ADA that may have a greater chance of benefitting from economies of scale. Additionally, 65% of charter schools received the maximum points allowed for this indicator while only 5% received zero points. The agency has maintained language as proposed concerning Indicator 14 in Figure: 19 TAC §109.1001(f)(5).

Charter FIRST Indicator 16

Comment: Concerning proposed Figure: 19 TAC §109.1001(f)(5), TPCSA urged the agency to consider a full waiver or other relief for Indicator 16 for Charter FIRST. TPCSA stated that Indicator 16 is adversely impacted by increasing or declining enrollment or attendance and virtual options throughout the year, changing health guidance and parental preference, and local health policies. TPCSA also commented that ADA estimates are made in August, which is before the impacts of the pandemic in a given year can be accurately predicted.

Schulman, Lopez, Hoffer and Adelstein, LLP also requested that the agency exclude Indicator 16 from Charter FIRST in Figure: 19 TAC §109.1001(f)(5) because the COVID-19 pandemic seriously inhibited charter schools' ability to accurately predict enrollment, ADA, and revenues for the 2020-2021 school year. The law firm further stated that this indicator adversely and punitively affects small and new charter schools for impacts of the pandemic outside their control. The law firm requested that the agency create an exception that would allow charter schools to submit documentary evidence of the impact of the pandemic on losses in enrollment and ADA and award points for this indicator or exclude the indicator when supported by documentation.

Response: The agency agrees that the uncertainty of ADA caused by the pandemic may adversely impact Indicator 16 (Was the charter school's actual average daily attendance (ADA) within 10 percent of the charter school's annual estimated ADA?). Therefore, the agency will exclude Indicator 16 from the 2021-2022 Charter FIRST ratings. The agency added Figure: 19 TAC §109.1001(f)(6) at adoption, which discloses indicators for the 2021-2022 rating year. A note was added to Indicator 16 that states, "This indicator will not be utilized for the 2021-2022 rating year."

The agency also agrees that adjustments should be made to the financial accountability rating system when unforeseen circumstances occur that adversely impact FIRST scores. These adjustments are allowed for under TEC, §39.087 and §39.082, which allows charter schools and school districts to submit additional information regarding FIRST indicators under subsection (g).

STATUTORY AUTHORITY. The amendment is adopted under Texas Education Code (TEC), §12.104, as amended by Senate Bill (SB) 1365, 87th Texas Legislature, Regular Session, 2021, subjects open-enrollment charter schools to the prohibitions, restrictions, or requirements relating to public school accountability and special investigations under TEC, Chapter 39, Subchapters A, B, C, D, F, G, and J, and TEC, Chapter 39A; TEC, §39.082, which requires the commissioner to develop and implement a financial accountability rating system for public schools and establishes certain minimum requirements for the system, including an appeals process; TEC, §39.083, which requires the commissioner to include in the financial accountability system procedures for public schools to report and receive public comment on an annual financial management report; TEC, §39.085, which requires the commissioner to adopt rules to implement TEC, Chapter 39, Subchapter D, which addresses financial accountability for public schools; TEC, §39.087, as added by House Bill 1525, 87th Texas Legislature, Regular Session, 2021, which requires the commissioner to adjust the financial accountability rating system under TEC, §39.082, to account for the impact of financial practices necessary as a response to the coronavirus disease (COVID-19) pandemic, including adjustments required to account for federal funding and funding adjustments under TEC, Chapter 48, Subchapter F; and TEC, §39.151, as amended by SB 1365, 87th Texas Legislature, Regular Session, 2021, which requires the commissioner to provide a process by which a district or charter school can challenge an agency decision related to academic or financial accountability under TEC, Chapter 39, including a determination of consecutive school years of unacceptable performance ratings. This process must include a committee to make recommendations to the commissioner. These provisions collectively authorize and require the commissioner to adopt the financial accountability system rules, which implement each requirement of statute applicable to districts and open-enrollment charter schools.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code, §§12.104, as amended by Senate Bill (SB) 1365, 87th Texas Legislature, Regular Session, 2021; 39.082; 39.083; 39.085; 39.087, as added by House Bill 1525, 87th Texas Legislature, Regular Session, 2021; and 39.151, as amended by SB 1365, 87th Texas Legislature, Regular Session, 2021.

§109.1001. Financial Accountability Ratings.

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

(1) Annual Financial Report (AFR)--The audited annual report required by the Texas Education Code (TEC), §44.008, that is due to the Texas Education Agency (TEA) by no later than 150 days after the close of a school district's or an open-enrollment charter school's fiscal year.

(2) Ceiling indicator--An upper limit (the maximum score) at which a score from a standard limit of a specific indicator will result regardless of overall points.

(3) Debt--An amount of money owed to a person, bank, company, or other organization.

(4) Electronic submission--The TEA electronic data feed format required for use by school districts, open-enrollment charter schools, and regional education service centers (ESCs).

(5) Financial Integrity Rating System of Texas (FIRST)--The financial accountability rating system administered by the TEA in accordance with the TEC, §39.082 and §39.085. The system provides additional transparency to public education finance and meaningful financial oversight and improvement for school districts (School FIRST) and open-enrollment charter schools and charter schools operated by a public institution of higher education under TEC, Chapter 12, Subchapters D and E (Charter FIRST).

(6) Fiscal year--The fiscal year of a school district or an open-enrollment charter school, which begins on July 1 or September 1 of each year, as determined by the board of trustees of the district or the governing body of the charter holder in accordance with the TEC, §44.0011.

(7) Foundation School Program (FSP)--The program established under the TEC, Chapters 41, 42, and 46, or any successor program of state-appropriated funding for school districts in this state.

(8) Open-enrollment charter school--A charter school authorized by the commissioner of education under TEC, Chapter 12, Subchapter D.

(9) Public institution of higher education (IHE)--A public college or university eligible to operate a school district; an open-enrollment charter school; or a TEC, Chapter 12, Subchapter E, charter school authorized by the commissioner.

(10) Summary of Finances (SOF) report--The document of record for FSP allocations. An SOF report is produced for each school district and open-enrollment charter school by the TEA division responsible for state funding that describes the school district's or open-enrollment charter school's funding elements and FSP state aid.

(11) Texas Student Data System Public Education Information Management System (TSDS PEIMS)--The system that school districts and open-enrollment charter schools use to load, validate, and submit their data to the TEA.

(12) Warrant hold--The process by which state payments issued to payees indebted to the state, or payees with a tax delinquency, are held by the Texas Comptroller of Public Accounts until the debt is satisfied in accordance with the Texas Government Code, §403.055.

(b) The TEA will assign a financial accountability rating to each school district, open-enrollment charter school, and charter school operated by a public IHE under TEC, Chapter 12, Subchapters D and E, as required by the TEC, §39.082.

(c) The commissioner will evaluate the rating system every three years as required by the TEC, §39.082, and may modify the system in order to improve the effectiveness of the rating system. If the rating system has been modified, the TEA will communicate changes to ratings criteria and their effective dates to school districts, open-enrollment charter schools, and charter schools operated by public IHEs.

(d) The TEA will use the following sources of data in calculating the financial accountability indicators for school districts, open-enrollment charter schools, and charter schools operated by public IHEs:

(1) AFR. For each school district, open-enrollment charter school, and charter school operated by a public IHE, the TEA will use audited financial data in the district's or charter's AFR. The AFR, submitted as an electronic submission through the TEA website, must include data required in the Financial Accountability System Resource Guide (FASRG) adopted under §109.41 of this title (relating to Financial Accountability System Resource Guide);

(2) TSDS PEIMS. The TEA will use TSDS PEIMS data submitted by the school district, open-enrollment charter school, or charter school operated by a public IHE in the calculation of the financial accountability indicators.

(3) Warrant holds. The TEA will use warrant holds as reported by the Texas Comptroller of Public Accounts in the calculation of the financial accountability indicators.

(4) FSP. The TEA will use the average daily attendance (ADA) information used for FSP funding purposes for the school district, open-enrollment charter school, or charter school operated by a public IHE in the calculation of the financial accountability indicators.

(e) The TEA will base the financial accountability rating of a school district on its overall performance on the financial measurements, ratios, and other indicators established by the commissioner, as shown in the figures provided in this subsection. Financial accountability ratings for a rating year are based on the data from the immediate prior fiscal year.

(1) The financial accountability rating indicators for rating year 2014-2015 are based on fiscal year 2014 financial data and are provided in the figure in this paragraph entitled "School FIRST - Rating Worksheet Dated August 2015 for rating year 2014-2015."
Figure: 19 TAC §109.1001(e)(1) (No change.)

(2) The financial accountability rating indicators for rating year 2015-2016 are based on fiscal year 2015 financial data and are provided in the figure in this paragraph entitled "School FIRST - Rating Worksheet Dated August 2015 for rating year 2015-2016."
Figure: 19 TAC §109.1001(e)(2) (No change.)

(3) The financial accountability rating indicators for rating year 2016-2017 are based on fiscal year 2016 financial data and are provided in the figure in this paragraph entitled "School FIRST - Rating Worksheet Dated December 2016 for rating year 2016-2017."
Figure: 19 TAC §109.1001(e)(3) (No change.)

(4) The financial accountability rating indicators for rating years 2017-2018, 2018-2019, and 2019-2020 are based on financial data from fiscal years 2017, 2018, and 2019, respectively, and are provided in the figure in this paragraph entitled "School FIRST - Rating Worksheet Dated April 2020 for rating years 2017-2018 through 2019-2020." The financial accountability rating indicators for rating years 2017-2018, 2018-2019, and 2019-2020 will use the same calculations and scoring method provided in the figure in this paragraph.
Figure: 19 TAC §109.1001(e)(4) (No change.)

(5) The financial accountability rating indicators for rating year 2020-2021 are based on fiscal year 2020 financial data and are pro-

vided in the figure in this paragraph entitled "School FIRST - Rating Worksheet Dated October 2021 for rating year 2020-2021." The financial accountability rating indicators for rating years after 2020-2021 will use the same calculations and scoring method provided in the figure in this paragraph.
Figure: 19 TAC §109.1001(e)(5)

(6) The financial accountability rating indicators for rating year 2021-2022 are based on fiscal year 2021 financial data and are provided in the figure in this paragraph entitled "School FIRST - Rating Worksheet Dated October 2021 for rating year 2021-2022." The financial accountability rating indicators for rating years after 2021-2022 will use the same calculations and scoring method provided in the figure in this paragraph.
Figure: 19 TAC §109.1001(e)(6)

(7) The specific calculations and scoring methods used in the financial accountability rating worksheets for school districts for rating years prior to 2014-2015 remain in effect for all purposes with respect to those rating years.

(f) The TEA will base the financial accountability rating of an open-enrollment charter school on its overall performance on the financial measurements, ratios, and other indicators established by the commissioner, as shown in the figures provided in this subsection. Financial accountability ratings for a rating year are based on the data from the immediate prior fiscal year.

(1) The financial accountability rating indicators for rating year 2014-2015 are based on fiscal year 2014 financial data and are provided in the figure in this paragraph entitled "Charter FIRST - Rating Worksheet Dated August 2015 for rating year 2014-2015."
Figure: 19 TAC §109.1001(f)(1) (No change.)

(2) The financial accountability rating indicators for rating year 2015-2016 are based on fiscal year 2015 financial data and are provided in the figure in this paragraph entitled "Charter FIRST - Rating Worksheet Dated August 2015 for rating year 2015-2016."
Figure: 19 TAC §109.1001(f)(2) (No change.)

(3) The financial accountability rating indicators for rating year 2016-2017 are based on fiscal year 2016 financial data and are provided in the figure in this paragraph entitled "Charter FIRST - Rating Worksheet Dated August 2015 for rating year 2016-2017."
Figure: 19 TAC §109.1001(f)(3) (No change.)

(4) The financial accountability rating indicators for rating years 2017-2018, 2018-2019, and 2019-2020 are based on financial data from fiscal years 2017, 2018, and 2019, respectively, and are provided in the figure in this paragraph entitled "Charter FIRST - Rating Worksheet Dated April 2020 for rating year 2017-2018." The financial accountability rating indicators for rating years 2017-2018, 2018-2019, and 2019-2020 will use the same calculations and scoring method provided in the figure in this paragraph.
Figure: 19 TAC §109.1001(f)(4) (No change.)

(5) The financial accountability rating indicators for rating year 2020-2021 are based on fiscal year 2020 financial data and are provided in the figure in this paragraph entitled "Charter FIRST - Rating Worksheet Dated October 2021 for rating year 2020-2021." The financial accountability rating indicators for rating years after 2020-2021 will use the same calculations and scoring method provided in the figure in this paragraph.
Figure: 19 TAC §109.1001(f)(5)

(6) The financial accountability rating indicators for rating year 2021-2022 are based on fiscal year 2021 financial data and are provided in the figure in this paragraph entitled "Charter FIRST - Rating Worksheet Dated October 2021 for rating year 2021-2022." The financial accountability rating indicators for rating years after 2021-2022 will use the same calculations and scoring method provided in the figure in this paragraph.
Figure: 19 TAC §109.1001(f)(6)

(7) The specific calculations and scoring methods used in the financial accountability rating worksheets for open-enrollment charter schools for rating years prior to 2014-2015 remain in effect for all purposes with respect to those rating years.

(g) The TEA will base the financial accountability rating of a charter school operated by a public IHE on its overall performance on the financial measurements, ratios, and other indicators established by the commissioner, as shown in the figures provided in this subsection. Financial accountability ratings for a rating year are based on the data from the immediate prior fiscal year.

(1) The financial accountability rating indicators for rating year 2016-2017 are based on fiscal year 2016 financial data and are provided in the figure in this paragraph entitled "IHE Charter FIRST - Rating Worksheet Dated June 2019 for rating years 2016-2017 through 2019-2020." The financial accountability rating indicators for rating years 2016-2017 through 2019-2020 will use the same calculations and scoring method provided in the figure in this paragraph.
Figure: 19 TAC §109.1001(g)(1) (No change.)

(2) The financial accountability rating indicators for rating year 2020-2021 are based on fiscal year 2020 financial data and are provided in the figure in this paragraph entitled "IHE Charter FIRST - Rating Worksheet Dated June 2019 for rating year 2020-2021." The financial accountability rating indicators for rating years after 2020-2021 will use the same calculations and scoring method provided in the figure in this paragraph.
Figure: 19 TAC §109.1001(g)(2) (No change.)

(h) The types of financial accountability ratings that school districts or open-enrollment charter schools may receive for the rating year 2014-2015 are as follows.

(1) P for pass. This rating applies only to the financial accountability rating for rating year 2014-2015 based on fiscal year 2014 financial data. In accordance with the procedures established in this section, a school district or an open-enrollment charter school will receive a P rating if it scores within the applicable range established by the commissioner for a P rating.

(2) F for substandard achievement. This rating applies to the financial accountability rating for rating year 2014-2015 based on fiscal year 2014 financial data. In accordance with the procedures established in this section, a school district or an open-enrollment charter school will receive an F rating if it scores within the applicable range established by the commissioner for an F rating.

(i) The types of financial accountability ratings that school districts or open-enrollment charter schools may receive for the rating year 2015-2016 and all subsequent rating years are as follows.

(1) A for superior achievement. Beginning with the financial accountability rating for rating year 2015-2016 and all subsequent rating years, in accordance with the procedures established in this section, a school district or an open-enrollment charter school will receive an A rating if it scores within the applicable range established by the commissioner for an A rating.

(2) B for above standard achievement. Beginning with the financial accountability rating for rating year 2015-2016 and all subsequent rating years, in accordance with the procedures established in this section, a school district or an open-enrollment charter school will

receive a B rating if it scores within the applicable range established by the commissioner for a B rating.

(3) C for standard achievement. Beginning with the financial accountability rating for rating year 2015-2016 and all subsequent rating years, in accordance with the procedures established in this section, a school district or an open-enrollment charter school will receive a C rating if it scores within the applicable range established by the commissioner for a C rating.

(4) F for substandard achievement. Beginning with the financial accountability rating for rating year 2015-2016 and all subsequent rating years, in accordance with the procedures established in this section, a school district or an open-enrollment charter school will receive an F rating if it scores within the applicable range established by the commissioner for an F rating.

(5) No Rating. Beginning with the financial accountability rating for rating year 2016-2017 and all subsequent rating years, in accordance with the procedures established in this section, a school district receiving territory due to an annexation order by the commissioner under the TEC, §13.054, or consolidation under the TEC, Chapter 49, Subchapter H, will not receive a rating for two consecutive rating years beginning with the rating year that is based on financial data from the fiscal year in which the order of annexation becomes effective. After the second rating year, the receiving district will be subject to the financial accountability rating system established by the commissioner in this section.

(j) The types of financial accountability ratings that charter schools operated by public IHEs may receive for the rating year 2016-2017 and all subsequent rating years are as follows.

(1) P for pass. Beginning with the financial accountability rating for rating year 2016-2017 and all subsequent rating years, in accordance with the procedures established in this section, a charter school operated by a public IHE will receive a P rating if it scores within the applicable range established by the commissioner for a P rating.

(2) F for substandard achievement. Beginning with the financial accountability rating for rating year 2016-2017 and all subsequent rating years, in accordance with the procedures established in this section, a charter school operated by a public IHE will receive an F rating if it scores within the applicable range established by the commissioner for an F rating.

(k) The commissioner may lower a financial accountability rating based on the findings of an action conducted under the TEC, Chapter 39 or 39A, or change a financial accountability rating in cases of disaster, flood, extreme weather conditions, fuel curtailment, or another calamity.

(l) A financial accountability rating remains in effect until replaced by a subsequent financial accountability rating.

(m) The TEA will issue a preliminary financial accountability rating to a school district, an open-enrollment charter school, or a charter school operated by a public IHE on or before August 8 of each year. The TEA will base the financial accountability rating for a rating year on the data from the fiscal year preceding the rating year.

(1) The TEA will not delay the issuance of the preliminary or final rating if a school district, an open-enrollment charter school, or a charter school operated by a public IHE fails to meet the statutory deadline under the TEC, §44.008, for submitting the AFR. Instead, the school district, open-enrollment charter school, or charter school operated by a public IHE will receive an F rating for substandard achievement.

(2) If the TEA receives an appeal of a preliminary rating, described by subsection (n) of this section, the TEA will issue a final rating to the school district, open-enrollment charter school, or charter school operated by a public IHE no later than 60 days after the deadline for submitting appeals.

(3) If the TEA does not receive an appeal of a preliminary rating, described by subsection (n) of this section, the preliminary rating automatically becomes a final rating 31 days after issuance of the preliminary rating.

(n) A school district, an open-enrollment charter school, or a charter school operated by a public IHE may appeal its preliminary financial accountability rating through the following appeals process.

(1) The TEA division responsible for financial accountability must receive a written appeal no later than 30 days after the TEA's release of the preliminary rating. The appeal must include adequate evidence and additional information that supports the position of the school district, open-enrollment charter school, or charter school operated by a public IHE. Appeals received 31 days or more after TEA issues a preliminary rating will not be considered.

(2) A data error attributable to the TEA is a basis for an appeal. If a preliminary rating contains a data error attributable to the TEA, a school district or an open-enrollment charter school may submit a written appeal requesting a review of the preliminary rating.

(3) A school district, an open-enrollment charter school, or a charter school operated by a public IHE may appeal any other adverse issue it identifies in the preliminary rating.

(4) The TEA will only consider appeals that would result in a change of the preliminary rating.

(5) The TEA division responsible for financial accountability will select an external review panel to independently oversee the appeals process.

(6) The TEA division responsible for financial accountability will submit the information provided by the school district, open-enrollment charter school, or charter school operated by a public IHE to the external review panel members for review.

(7) Each external review panel member will examine the appeal and supporting documentation and will submit his or her recommendation to the TEA division responsible for financial accountability.

(8) The TEA division responsible for financial accountability will compile the recommendations and forward them to the commissioner.

(9) The commissioner will make a final ratings decision.

(o) A final rating issued by the TEA under this section may not be appealed under the TEC, §7.057, or any other law or rule.

(p) A financial accountability rating by a voluntary association is a local option of the school district, open-enrollment charter school, or charter school operated by a public IHE, but it does not substitute for a financial accountability rating by the TEA.

(q) Each school district, open-enrollment charter school, and charter school operated by a public IHE is required to report information and financial accountability ratings to parents, taxpayers, and other stakeholders by implementing the following reporting procedures.

(1) Each school district, open-enrollment charter school, and charter school operated by a public IHE must prepare and distribute an annual financial management report in accordance with this subsection.

(2) Each school district, open-enrollment charter school, and charter school operated by a public IHE must provide the public with an opportunity to comment on the report at a public hearing.

(3) The annual financial management report for a school district, an open-enrollment charter school, or a charter school operated by a public IHE must include:

(A) a description of its financial management performance based on a comparison, provided by the TEA, of its performance on the indicators established by the commissioner and reflected in this section. The report will contain information that discloses:

(i) state-established standards; and

(ii) the financial management performance of the school district, open-enrollment charter school, or charter school operated by a public IHE under each indicator for the current and previous year's financial accountability ratings;

(B) any descriptive information required by the commissioner, including:

(i) a copy of the superintendent's current employment contract or other written documentation of employment if no contract exists. This must disclose all compensation and benefits paid to the superintendent. The school district, open-enrollment charter school, or charter school operated by a public IHE may publish the superintendent's employment contract on its website instead of publishing it in the annual financial management report;

(ii) a summary schedule for the fiscal year (12-month period) of expenditures paid on behalf of the superintendent and each board member and total reimbursements received by the superintendent and each board member. This includes transactions on the credit card(s), debit card(s), stored-value card(s), and any other similar instrument(s) of the school district, open-enrollment charter school, or charter school operated by a public IHE to cover expenses incurred by the superintendent and each board member. The summary schedule must separately report reimbursements for meals, lodging, transportation, motor fuel, and other items. The summary schedule of total reimbursements should not include reimbursements for supplies and materials that were purchased for the operation of the school district, open-enrollment charter school, or charter school operated by a public IHE;

(iii) a summary schedule for the fiscal year of the dollar amount of compensation and fees received by the superintendent from an outside school district, open-enrollment charter school, charter school operated by a public IHE, or any other outside entity in exchange for professional consulting or other personal services. The schedule must separately report the amount received from each entity;

(iv) a summary schedule for the fiscal year of the total dollar amount of gifts that had a total economic value of $250 or more received by the executive officers and board members. This reporting requirement applies only to gifts received by the executive officers and board members (and their immediate family as described by Government Code, Chapter 573, Subchapter B, Relationships by Consanguinity or by Affinity) of the school district, open-enrollment charter school (or charter holder), or charter school operated by a public IHE (or charter holder) from an outside entity that received payments from the school district, open-enrollment charter school (or charter holder), or charter school operated by a public IHE (or charter holder) in the prior fiscal year and to gifts from competing vendors that were not awarded contracts in the prior fiscal year. This reporting requirement does not apply to reimbursement by an outside entity for travel-related expenses when the purpose of the travel was to investigate matters directly related to an executive officer's or board member's duties or to investigate matters related to attendance at education-related conferences and seminars with the primary purpose of providing continuing education (this exclusion does not apply to trips for entertainment purposes or pleasure trips). This reporting requirement excludes an individual gift or a series of gifts from a single outside entity that had a total economic value of less than $250 per executive officer or board member; and

(v) a summary schedule for the fiscal year of the dollar amount received by board members for the total amount of business transactions with the school district, open-enrollment charter school (or charter holder), or charter school operated by a public IHE (or charter holder). This reporting requirement is not to duplicate the items disclosed in the summary schedule of reimbursements received by board members; and

(C) any other information the board of trustees of the school district, open-enrollment charter school, or charter school operated by a public IHE determines to be useful.

(4) The board of trustees of each school district, open-enrollment charter school, or charter school operated by a public IHE must hold a public hearing on the annual financial management report within two months after receiving a final financial accountability rating. The public hearing must be held at a location in the facilities of the school district, open-enrollment charter school, or charter school operated by a public IHE. The board must give notice of the hearing to owners of real estate property in the geographic boundaries of the school district, open-enrollment charter school, or charter school operated by a public IHE and to parents of school district, open-enrollment charter school, or charter school operated by a public IHE students. In addition to other notice required by law, the board must provide notice of the hearing:

(A) to a newspaper of general circulation in the geographic boundaries of the school district, each campus of an open-enrollment charter school, or each campus of a charter school operated by a public IHE in one posting prior to holding the public meeting, providing the time and place of the hearing. The notice in the newspaper may not be earlier than 30 days or later than 10 days before the date of the hearing. If no newspaper is published in the county in which the district's central administration office is located or within the geographic boundaries of an open-enrollment charter school's campus or campus of a charter school operated by a public IHE, then the board must publish the notice in the county nearest to the county seat of the county in which the district's central administration office is located or in which the campus of the open-enrollment charter school or the campus of a charter school operated by a public IHE is located; and

(B) through electronic mail to the mass communication media serving the school district, open-enrollment charter school, or charter school operated by a public IHE, including, but not limited to, radio and television.

(5) At the hearing, the school district, open-enrollment charter school, or charter school operated by a public IHE must provide the annual financial management report to the attending parents and taxpayers.

(6) The school district, open-enrollment charter school, or charter school operated by a public IHE must retain the annual financial management report for at least three years after the public hearing and make it available to parents and taxpayers upon request.

(7) Each school district, open-enrollment charter school, or charter school operated by a public IHE that received an F rating must file a corrective action plan with the TEA, prepared in accordance with instructions from the commissioner, within one month after the pub-

lic hearing of the school district, open-enrollment charter school, or charter school operated by a public IHE. The commissioner may require certain information in the corrective action plan to address the factor(s) that may have contributed to the F rating for a school district, open-enrollment charter school, or charter school operated by a public IHE.

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 December 16, 2021.

TRD-202105100
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Effective date: January 5, 2022
Proposal publication date: September 3, 2021
For further information, please call: (512) 475-1497

TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 117. END STAGE RENAL DISEASE FACILITIES

SUBCHAPTER D. MINIMUM STANDARDS FOR PATIENT CARE AND TREATMENT

25 TAC §117.49

The Texas Health and Human Services Commission (HHSC) adopts new §117.49, concerning Miscellaneous Policies and Protocols.

New §117.49 is adopted without changes to the proposed text as published in the October 8, 2021, issue of the *Texas Register* (46 TexReg 6766). This rule will not be republished.

BACKGROUND AND JUSTIFICATION

The new section is necessary to comply with House Bill (H.B.) 119, 87th Legislature, Regular Session, 2021, which requires HHSC to adopt rules prohibiting health care facilities and providers from discriminating against an organ transplant recipient based on a patient's or client's disability.

COMMENTS

The 31-day comment period ended November 8, 2021. During this period, HHSC received comments regarding the proposed rules from the Texas Council for Developmental Disabilities (TCDD). A summary of comments relating to the rule and HHSC's responses follows.

Comment: TCDD stated the provisions of H.B. 119 apply to health care facilities based on the definition of "health care facility" added at Texas Health and Safety Code (HSC) §161.471(3) and noted the proposed rules in the October 8, 2021, issue of the *Texas Register* applied to the following facilities: end stage renal disease facilities, hospitals, ambulatory surgical centers, birthing centers, abortion facilities, and narcotic treatment programs. TCDD stated the proposed rules do not include several facility types specifically referenced in the definition of "health care facility" at HSC §161.471(3), including nursing facilities, laboratories, intermediate care facilities, mental health facilities, and any facility for individuals with intellectual or developmental disabilities.

Response: HHSC declines to revise the rule in response to this comment. This rule update is intended to apply only to licensed acute health care facilities and providers that HHSC regulates. Other facilities, including nursing facilities, intermediate care facilities, and facilities for individuals with intellectual or developmental disabilities, are outside the scope of this rule update.

Comment: TCDD stated it is questionable whether H.B. 119 applies to some facilities with proposed rules in this rule update, including abortion facilities and narcotic treatment programs.

Response: HHSC declines to revise the rule in response to this comment. This rule update is applicable to these facility types because HSC §161.471(3) defines a health care facility as "a facility licensed, certified, or otherwise authorized to provide health care in the ordinary course of business, including a hospital, nursing facility, laboratory, intermediate care facility, mental health facility, transplant center, and any other facility for individuals with intellectual or developmental disabilities."

Comment: TCDD noted the provisions of H.B. 119 apply to health care providers based on the definition of "health care provider" added at HSC §161.471(4) and stated it was unclear why rules governing licensed chemical dependency counselors (LCDCs) are included in this rule update.

Response: HHSC declines to revise the rule in response to this comment. LCDCs and counselor interns (CIs) must comply with HSC Chapter 161, Subchapter S, because LCDCs and CIs meet the definition of "health care provider" at HSC §161.471(4). LCDCs must be licensed under Occupations Code §504.151 and CIs must be registered under Occupations Code §504.1515.

Comment: TCDD stated it is unclear why physician assistants, advanced nurse practitioners, registered nurses, and numerous other types of licensed, certified, or otherwise authorized health care professionals are not included in this rule update in addition to LCDCs.

Response: HHSC declines to revise the rule in response to this comment. HHSC may only adopt rules for health care professionals under HHSC's statutory authority and other state agencies (e.g. the Texas Medical Board, the Texas Nursing Board, and the Behavioral Health Executive Council) have statutory authority for the health care providers the commenter mentioned.

STATUTORY AUTHORITY

The new section is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies; Texas Health and Safety Code §251.003, which authorizes the Executive Commissioner of HHSC to adopt rules governing ESRD facilities; and Texas Health and Safety Code §251.014, which requires these rules to include minimum standards to protect the health and safety of a patient of an ESRD facility.

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 December 17, 2021.

TRD-202105148
Karen Ray
Chief Counsel
Department of State Health Services
Effective date: January 6, 2022
Proposal publication date: October 8, 2021
For further information, please call: (512) 834-4591

CHAPTER 133. HOSPITAL LICENSING
SUBCHAPTER C. OPERATIONAL REQUIREMENTS

25 TAC §133.45

The Texas Health and Human Services Commission (HHSC) adopts amendments to §133.45, concerning Miscellaneous Policies and Protocols.

Amended §133.45 is adopted without changes to the proposed text as published in the October 8, 2021, issue of the *Texas Register* (46 TexReg 6767). This rule will not be republished.

BACKGROUND AND JUSTIFICATION

The amendments are necessary to comply with House Bill (H.B.) 3721, 87th Legislature, Regular Session, 2021, which requires HHSC to adopt rules requiring abortion facilities and hospitals to comply with the human trafficking signage requirements required by Texas Health and Safety Code §245.025.

The amendments are also necessary to comply with House Bill (H.B.) 119, 87th Legislature, Regular Session, 2021, which requires HHSC to adopt rules prohibiting health care facilities and providers from discriminating against an organ transplant recipient based on a patient's or client's disability.

COMMENTS

The 31-day comment period ended November 8, 2021. During this period, HHSC received comments regarding the proposed rules from the Texas Council for Developmental Disabilities (TCDD). A summary of comments relating to the rule and HHSC's responses follows.

Comment: TCDD stated the provisions of H.B. 119 apply to health care facilities based on the definition of "health care facility" added at Texas Health and Safety Code (HSC) §161.471(3) and noted the proposed rules in the October 8, 2021, issue of the *Texas Register* applied to the following facilities: end stage renal disease facilities, hospitals, ambulatory surgical centers, birthing centers, abortion facilities, and narcotic treatment programs. TCDD stated the proposed rules do not include several facility types specifically referenced in the definition of "health care facility" at HSC §161.471(3), including nursing facilities, laboratories, intermediate care facilities, mental health facilities, and any facility for individuals with intellectual or developmental disabilities.

Response: HHSC declines to revise the rule in response to this comment. This rule update is intended to apply only to licensed acute health care facilities and providers that HHSC regulates. Other facilities, including nursing facilities, intermediate care facilities, and facilities for individuals with intellectual or developmental disabilities, are outside the scope of this rule update.

Comment: TCDD stated it is questionable whether H.B. 119 applies to some facilities with proposed rules in this rule update, including abortion facilities and narcotic treatment programs.

Response: HHSC declines to revise the rule in response to this comment. This rule update is applicable to these facility types because HSC §161.471(3) defines a health care facility as "a facility licensed, certified, or otherwise authorized to provide health care in the ordinary course of business, including a hospital, nursing facility, laboratory, intermediate care facility, mental health facility, transplant center, and any other facility for individuals with intellectual or developmental disabilities."

Comment: TCDD noted the provisions of HB 119 apply to health care providers based on the definition of "health care provider" added at HSC §161.471(4) and stated it was unclear why rules governing licensed chemical dependency counselors (LCDCs) are included in this rule update.

Response: HHSC declines to revise the rule in response to this comment. LCDCs and counselor interns (CIs) must comply with HSC Chapter 161, Subchapter S, because LCDCs and CIs meet the definition of "health care provider" at HSC §161.471(4). LCDCs must be licensed under Occupations Code §504.151 and CIs must be registered under Occupations Code §504.1515.

Comment: TCDD stated it is unclear why physician assistants, advanced nurse practitioners, registered nurses, and numerous other types of licensed, certified, or otherwise authorized health care professionals are not included in this rule update in addition to LCDCs.

Response: HHSC declines to revise the rule in response to this comment. HHSC may only adopt rules for health care professionals under HHSC's statutory authority and other state agencies (e.g. the Texas Medical Board, the Texas Nursing Board, and the Behavioral Health Executive Council) have statutory authority for the health care providers the commenter mentioned.

STATUTORY AUTHORITY

The amended section is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies; Texas Health and Safety Code §241.026, which authorizes the Executive Commissioner of HHSC to adopt rules governing development, establishment, and enforcement standards for the construction, maintenance, and operation of licensed hospitals.

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 December 17, 2021.

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Karen Ray
Chief Counsel
Department of State Health Services
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Proposal publication date: October 8, 2021
For further information, please call: (512) 834-4591

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CHAPTER 135. AMBULATORY SURGICAL CENTERS

SUBCHAPTER A. OPERATING REQUIREMENTS FOR AMBULATORY SURGICAL CENTERS

25 TAC §135.30

The Texas Health and Human Services Commission (HHSC) adopts new §135.30, concerning Miscellaneous Policies and Protocols.

New §135.30 is adopted without changes to the proposed text as published in the October 8, 2021, issue of the *Texas Register* (46 TexReg 6771). This rule will not be republished.

BACKGROUND AND JUSTIFICATION

The new section is necessary to comply with House Bill (H.B.) 119, 87th Legislature, Regular Session, 2021, which requires HHSC to adopt rules prohibiting health care facilities and providers from discriminating against an organ transplant recipient based on a patient's or client's disability.

COMMENTS

The 31-day comment period ended November 8, 2021. During this period, HHSC received comments regarding the proposed rules from the Texas Council for Developmental Disabilities (TCDD). A summary of comments relating to the rule and HHSC's responses follows.

Comment: TCDD stated the provisions of H.B. 119 apply to health care facilities based on the definition of "health care facility" added at Texas Health and Safety Code (HSC) §161.471(3) and noted the proposed rules in the October 8, 2021, issue of the *Texas Register* applied to the following facilities: end stage renal disease facilities, hospitals, ambulatory surgical centers, birthing centers, abortion facilities, and narcotic treatment programs. TCDD stated the proposed rules do not include several facility types specifically referenced in the definition of "health care facility" at HSC §161.471(3), including nursing facilities, laboratories, intermediate care facilities, mental health facilities, and any facility for individuals with intellectual or developmental disabilities.

Response: HHSC declines to revise the rule in response to this comment. This rule update is intended to apply only to licensed acute health care facilities and providers that HHSC regulates. Other facilities, including nursing facilities, intermediate care facilities, and facilities for individuals with intellectual or developmental disabilities, are outside the scope of this rule update.

Comment: TCDD stated it is questionable whether H.B. 119 applies to some facilities with proposed rules in this rule update, including abortion facilities and narcotic treatment programs.

Response: HHSC declines to revise the rule in response to this comment. This rule update is applicable to these facility types because HSC §161.471(3) defines a health care facility as "a facility licensed, certified, or otherwise authorized to provide health care in the ordinary course of business, including a hospital, nursing facility, laboratory, intermediate care facility, mental health facility, transplant center, and any other facility for individuals with intellectual or developmental disabilities."

Comment: TCDD noted the provisions of H.B. 119 apply to health care providers based on the definition of "health care provider" added at HSC §161.471(4) and stated it was unclear why rules governing licensed chemical dependency counselors (LCDCs) are included in this rule update.

Response: HHSC declines to revise the rule in response to this comment. LCDCs and counselor interns (CIs) must comply with HSC Chapter 161, Subchapter S, because LCDCs and CIs meet the definition of "health care provider" at HSC §161.471(4). LCDCs must be licensed under Occupations Code §504.151 and CIs must be registered under Occupations Code §504.1515.

Comment: TCDD stated it is unclear why physician assistants, advanced nurse practitioners, registered nurses, and numerous other types of licensed, certified, or otherwise authorized health care professionals are not included in this rule update in addition to LCDCs.

Response: HHSC declines to revise the rule in response to this comment. HHSC may only adopt rules for health care professionals under HHSC's statutory authority and other state agencies (e.g. the Texas Medical Board, the Texas Nursing Board, and the Behavioral Health Executive Council) have statutory authority for the health care providers the commenter mentioned.

STATUTORY AUTHORITY

The new section is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies; Texas Health and Safety Code §243.009, which requires HHSC to adopt rules for licensing of ASCs, and Texas Health and Safety Code §243.010, which requires those rules to include minimum standards applicable to ASCs.

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 December 17, 2021.

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Karen Ray
Chief Counsel
Department of State Health Services
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For further information, please call: (512) 834-4591

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CHAPTER 137. BIRTHING CENTERS

SUBCHAPTER D. OPERATIONAL AND CLINICAL STANDARDS FOR THE PROVISION AND COORDINATION OF TREATMENT AND SERVICES

25 TAC §137.55

The Texas Health and Human Services Commission (HHSC) adopts an amendment to §137.55, concerning Other State and Federal Compliance Requirements.

Amended §137.55 is adopted without changes to the proposed text as published in the October 8, 2021, issue of the *Texas Register* (46 TexReg 6772). This rule will not be republished.

BACKGROUND AND JUSTIFICATION

The amendment is necessary to comply with House Bill (H.B.) 119, 87th Legislature, Regular Session, 2021, which requires HHSC to adopt rules prohibiting health care facilities and providers from discriminating against an organ transplant recipient based on a patient's or client's disability.

COMMENTS

The 31-day comment period ended November 8, 2021. During this period, HHSC received comments regarding the proposed rules from the Texas Council for Developmental Disabilities (TCDD). A summary of comments relating to the rule and HHSC's responses follows.

Comment: TCDD stated the provisions of H.B. 119 apply to health care facilities based on the definition of "health care facility" added at Texas Health and Safety Code (HSC) §161.471(3) and noted the proposed rules in the October 8, 2021, issue of the *Texas Register* applied to the following facilities: end stage renal disease facilities, hospitals, ambulatory surgical centers, birthing centers, abortion facilities, and narcotic treatment programs. TCDD stated the proposed rules do not include several facility types specifically referenced in the definition of "health care facility" at HSC §161.471(3), including nursing facilities, laboratories, intermediate care facilities, mental health facilities, and any facility for individuals with intellectual or developmental disabilities.

Response: HHSC declines to revise the rule in response to this comment. This rule update is intended to apply only to licensed acute health care facilities and providers that HHSC regulates. Other facilities, including nursing facilities, intermediate care facilities, and facilities for individuals with intellectual or developmental disabilities, are outside the scope of this rule update.

Comment: TCDD stated it is questionable whether HB 119 applies to some facilities with proposed rules in this rule update, including abortion facilities and narcotic treatment programs.

Response: HHSC declines to revise the rule in response to this comment. This rule update is applicable to these facility types because HSC §161.471(3) defines a health care facility as "a facility licensed, certified, or otherwise authorized to provide health care in the ordinary course of business, including a hospital, nursing facility, laboratory, intermediate care facility, mental health facility, transplant center, and any other facility for individuals with intellectual or developmental disabilities."

Comment: TCDD noted the provisions of H.B. 119 apply to health care providers based on the definition of "health care provider" added at HSC §161.471(4) and stated it was unclear why rules governing licensed chemical dependency counselors (LCDCs) are included in this rule update.

Response: HHSC declines to revise the rule in response to this comment. LCDCs and counselor interns (CIs) must comply with HSC Chapter 161, Subchapter S, because LCDCs and CIs meet the definition of "health care provider" at HSC §161.471(4). LCDCs must be licensed under Occupations Code §504.151 and CIs must be registered under Occupations Code §504.1515.

Comment: TCDD stated it is unclear why physician assistants, advanced nurse practitioners, registered nurses, and numerous other types of licensed, certified, or otherwise authorized health care professionals are not included in this rule update in addition to LCDCs.

Response: HHSC declines to revise the rule in response to this comment. HHSC may only adopt rules for health care professionals under HHSC's statutory authority and other state agencies (e.g. the Texas Medical Board, the Texas Nursing Board, and the Behavioral Health Executive Council) have statutory authority for the health care providers the commenter mentioned.

STATUTORY AUTHORITY

The amended section is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies; Texas Health and Safety Code §244.009, which requires HHSC to adopt rules for licensing of birthing centers; and Texas Health and Safety Code §244.010, which requires those rules to include minimum standards applicable to birthing centers.

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 December 17, 2021.

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Karen Ray
Chief Counsel
Department of State Health Services
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For further information, please call: (512) 834-4591

CHAPTER 139. ABORTION FACILITY REPORTING AND LICENSING

SUBCHAPTER D. MINIMUM STANDARDS FOR LICENSED ABORTION FACILITIES

25 TAC §139.60

The Texas Health and Human Services Commission (HHSC) adopts amendments to §139.60, concerning Other State and Federal Compliance Requirements.

Amended §139.60 is adopted without changes to the proposed text as published in the October 8, 2021, issue of the *Texas Register* (46 TexReg 6774). This rule will not be republished.

BACKGROUND AND JUSTIFICATION

The amendments are necessary to comply with House Bill (H.B.) 3721, 87th Legislature, Regular Session, 2021, which requires HHSC to adopt rules requiring abortion facilities and hospitals to comply with the human trafficking signage requirements required by Texas Health and Safety Code §245.025.

The amendments are also necessary to comply with H.B. 119, 87th Legislature, Regular Session, 2021, which requires HHSC to adopt rules prohibiting health care facilities and providers from discriminating against an organ transplant recipient based on a patient's or client's disability.

COMMENTS

The 31-day comment period ended November 8, 2021. During this period, HHSC received comments regarding the proposed rules from the Texas Council for Developmental Disabilities (TCDD). A summary of comments relating to the rule and HHSC's responses follows.

Comment: TCDD stated the provisions of H.B. 119 apply to health care facilities based on the definition of "health care facility" added at Texas Health and Safety Code (HSC) §161.471(3) and noted the proposed rules in the October 8, 2021, issue of the *Texas Register* applied to the following facilities: end stage renal disease facilities, hospitals, ambulatory surgical centers, birthing centers, abortion facilities, and narcotic treatment programs. TCDD stated the proposed rules do not include several facility types specifically referenced in the definition of "health care facility" at HSC §161.471(3), including nursing facilities, laboratories, intermediate care facilities, mental health facilities, and any facility for individuals with intellectual or developmental disabilities.

Response: HHSC declines to revise the rule in response to this comment. This rule update is intended to apply only to licensed acute health care facilities and providers that HHSC regulates. Other facilities, including nursing facilities, intermediate care facilities, and facilities for individuals with intellectual or developmental disabilities, are outside the scope of this rule update.

Comment: TCDD stated it is questionable whether H.B. 119 applies to some facilities with proposed rules in this rule update, including abortion facilities and narcotic treatment programs.

Response: HHSC declines to revise the rule in response to this comment. This rule update is applicable to these facility types because HSC §161.471(3) defines a health care facility as "a facility licensed, certified, or otherwise authorized to provide health care in the ordinary course of business, including a hospital, nursing facility, laboratory, intermediate care facility, mental health facility, transplant center, and any other facility for individuals with intellectual or developmental disabilities."

Comment: TCDD noted the provisions of H.B. 119 apply to health care providers based on the definition of "health care provider" added at HSC §161.471(4) and stated it was unclear why rules governing licensed chemical dependency counselors (LCDCs) are included in this rule update.

Response: HHSC declines to revise the rule in response to this comment. LCDCs and counselor interns (CIs) must comply with HSC Chapter 161, Subchapter S, because LCDCs and CIs meet the definition of "health care provider" at HSC §161.471(4). LCDCs must be licensed under Occupations Code §504.151 and CIs must be registered under Occupations Code §504.1515.

Comment: TCDD stated it is unclear why physician assistants, advanced nurse practitioners, registered nurses, and numerous other types of licensed, certified, or otherwise authorized health care professionals are not included in this rule update in addition to LCDCs.

Response: HHSC declines to revise the rule in response to this comment. HHSC may only adopt rules for health care professionals under HHSC's statutory authority and other state agencies (e.g. the Texas Medical Board, the Texas Nursing Board, and the Behavioral Health Executive Council) have statutory authority for the health care providers the commenter mentioned.

STATUTORY AUTHORITY

The amended section is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies; Texas Health and Safety Code §245.009, which requires HHSC to adopt rules for licensing of abortion facilities; and Texas Health and Safety Code §245.010, which requires those rules to include minimum standards to protect the health and safety of a patient of an abortion facility and comply with Texas Health and Safety Code Chapter 171.

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 December 17, 2021.

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Karen Ray
Chief Counsel
Department of State Health Services
Effective date: January 6, 2022
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For further information, please call: (512) 834-4591

CHAPTER 140. HEALTH PROFESSIONS REGULATION

SUBCHAPTER I. LICENSED CHEMICAL DEPENDENCY COUNSELORS

25 TAC §140.435

The Texas Health and Human Services Commission (HHSC) adopts new §140.435, concerning Miscellaneous Policies and Protocols.

New §140.435 is adopted without changes to the proposed text as published in the October 8, 2021, issue of the *Texas Register* (46 TexReg 6776). This rule will not be republished.

BACKGROUND AND JUSTIFICATION

The new section is necessary to comply with House Bill (H.B.) 119, 87th Legislature, Regular Session, 2021, which requires HHSC to adopt rules prohibiting health care facilities and providers from discriminating against an organ transplant recipient based on a patient's or client's disability.

COMMENTS

The 31-day comment period ended November 8, 2021. During this period, HHSC received comments regarding the proposed rules from the Texas Council for Developmental Disabilities (TCDD). A summary of comments relating to the rule and HHSC's responses follows.

Comment: TCDD stated the provisions of H.B. 119 apply to health care facilities based on the definition of "health care facility" added at Texas Health and Safety Code (HSC) §161.471(3) and noted the proposed rules in the October 8, 2021, issue of the *Texas Register* applied to the following facilities: end stage renal disease facilities, hospitals, ambulatory surgical centers, birthing centers, abortion facilities, and narcotic treatment pro-

grams. TCDD stated the proposed rules do not include several facility types specifically referenced in the definition of "health care facility" at HSC §161.471(3), including nursing facilities, laboratories, intermediate care facilities, mental health facilities, and any facility for individuals with intellectual or developmental disabilities.

Response: HHSC declines to revise the rule in response to this comment. This rule update is intended to apply only to licensed acute health care facilities and providers that HHSC regulates. Other facilities, including nursing facilities, intermediate care facilities, and facilities for individuals with intellectual or developmental disabilities, are outside the scope of this rule update.

Comment: TCDD stated it is questionable whether H.B. 119 applies to some facilities with proposed rules in this rule update, including abortion facilities and narcotic treatment programs.

Response: HHSC declines to revise the rule in response to this comment. This rule update is applicable to these facility types because HSC §161.471(3) defines a health care facility as "a facility licensed, certified, or otherwise authorized to provide health care in the ordinary course of business, including a hospital, nursing facility, laboratory, intermediate care facility, mental health facility, transplant center, and any other facility for individuals with intellectual or developmental disabilities."

Comment: TCDD noted the provisions of HB 119 apply to health care providers based on the definition of "health care provider" added at HSC §161.471(4) and stated it was unclear why rules governing licensed chemical dependency counselors (LCDCs) are included in this rule update.

Response: HHSC declines to revise the rule in response to this comment. LCDCs and counselor interns (CIs) must comply with HSC Chapter 161, Subchapter S, because LCDCs and CIs meet the definition of "health care provider" at HSC §161.471(4). LCDCs must be licensed under Occupations Code §504.151 and CIs must be registered under Occupations Code §504.1515.

Comment: TCDD stated it is unclear why physician assistants, advanced nurse practitioners, registered nurses, and numerous other types of licensed, certified, or otherwise authorized health care professionals are not included in this rule update in addition to LCDCs.

Response: HHSC declines to revise the rule in response to this comment. HHSC may only adopt rules for health care professionals under HHSC's statutory authority and other state agencies (e.g. the Texas Medical Board, the Texas Nursing Board, and the Behavioral Health Executive Council) have statutory authority for the health care providers the commenter mentioned.

STATUTORY AUTHORITY

The new section is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Occupations Code §504.051, which authorizes the Executive Commissioner to adopt rules as necessary to establish standards of conduct and ethics for LCDCs.

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 December 17, 2022.

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Karen Ray
Chief Counsel
Department of State Health Services
Effective date: January 6, 2022
Proposal publication date: October 8, 2021
For further information, please call: (512) 834-4591

CHAPTER 229. FOOD AND DRUG

SUBCHAPTER J. MINIMUM STANDARDS FOR NARCOTIC TREATMENT PROGRAMS

25 TAC §229.144

The Texas Health and Human Services Commission (HHSC) adopts an amendment to §229.144, concerning State and Federal Statutes and Regulations.

Amended §229.144 is adopted without changes to the proposed text as published in the October 8, 2021, issue of the *Texas Register* (46 TexReg 6777). This rule will not be republished.

BACKGROUND AND JUSTIFICATION

The amendment is necessary to comply with House Bill (H.B.) 119, 87th Legislature, Regular Session, 2021, which requires HHSC to adopt rules prohibiting health care facilities and providers from discriminating against an organ transplant recipient based on a patient's or client's disability.

COMMENTS

The 31-day comment period ended November 8, 2021. During this period, HHSC received comments regarding the proposed rules from the Texas Council for Developmental Disabilities (TCDD). A summary of comments relating to the rule and HHSC's responses follows.

Comment: TCDD stated the provisions of H.B. 119 apply to health care facilities based on the definition of "health care facility" added at Texas Health and Safety Code (HSC) §161.471(3) and noted the proposed rules in the October 8, 2021, issue of the *Texas Register* applied to the following facilities: end stage renal disease facilities, hospitals, ambulatory surgical centers, birthing centers, abortion facilities, and narcotic treatment programs. TCDD stated the proposed rules do not include several facility types specifically referenced in the definition of "health care facility" at HSC §161.471(3), including nursing facilities, laboratories, intermediate care facilities, mental health facilities, and any facility for individuals with intellectual or developmental disabilities.

Response: HHSC declines to revise the rule in response to this comment. This rule update is intended to apply only to licensed acute health care facilities and providers that HHSC regulates. Other facilities, including nursing facilities, intermediate care facilities, and facilities for individuals with intellectual or developmental disabilities, are outside the scope of this rule update.

Comment: TCDD stated it is questionable whether H.B. 119 applies to some facilities with proposed rules in this rule update, including abortion facilities and narcotic treatment programs.

Response: HHSC declines to revise the rule in response to this comment. This rule update is applicable to these facility types because HSC §161.471(3) defines a health care facility as "a facility licensed, certified, or otherwise authorized to provide health care in the ordinary course of business, including a hospital, nursing facility, laboratory, intermediate care facility, mental health facility, transplant center, and any other facility for individuals with intellectual or developmental disabilities."

Comment: TCDD noted the provisions of HB 119 apply to health care providers based on the definition of "health care provider" added at HSC §161.471(4) and stated it was unclear why rules governing licensed chemical dependency counselors (LCDCs) are included in this rule update.

Response: HHSC declines to revise the rule in response to this comment. LCDCs and counselor interns (CIs) must comply with HSC Chapter 161, Subchapter S, because LCDCs and CIs meet the definition of "health care provider" at HSC §161.471(4). LCDCs must be licensed under Occupations Code §504.151 and CIs must be registered under Occupations Code §504.1515.

Comment: TCDD stated it is unclear why physician assistants, advanced nurse practitioners, registered nurses, and numerous other types of licensed, certified, or otherwise authorized health care professionals are not included in this rule update in addition to LCDCs.

Response: HHSC declines to revise the rule in response to this comment. HHSC may only adopt rules for health care professionals under HHSC's statutory authority and other state agencies (e.g. the Texas Medical Board, the Texas Nursing Board, and the Behavioral Health Executive Council) have statutory authority for the health care providers the commenter mentioned.

STATUTORY AUTHORITY

The amended section is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code §466.004, which authorizes HHSC to adopt rules for the issuance of permits to operate narcotic treatment programs, including rules for applications, criteria for issuance of permits, and criteria for the suspension and revocation of permits.

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 December 17, 2021.

TRD-202105154
Karen Ray
Chief Counsel
Department of State Health Services
Effective date: January 6, 2022
Proposal publication date: October 8, 2021
For further information, please call: (512) 834-4591

CHAPTER 289. RADIATION CONTROL
SUBCHAPTER F. LICENSE REGULATIONS

25 TAC §§289.252, 289.256, 289.257

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC), on behalf of the Department of State Health Services (DSHS), adopts amendments to §289.252, concerning Licensing of Radioactive Material; §289.256, concerning Medical and Veterinary Use of Radioactive Material; and §289.257, concerning Packaging and Transportation of Radioactive Material. Sections 289.252, 289.256, and 289.257 are adopted with changes to the proposed text as published in the October 8, 2021, issue of the *Texas Register* (46 TexReg 6779) and will be republished.

BACKGROUND AND JUSTIFICATION

The amendments to §§289.252, 289.256, and 289.257 are necessary to comply with compatibility requirements of the United States Nuclear Regulatory Commission (NRC), to which Texas is subject as an Agreement State. The amendments update NRC information and are the result of the NRC's adoption of rules related to the reporting and notification requirements for a medical event for permanent implant brachytherapy. The amendments update the training for radiation safety officers, associate radiation safety officers, authorized medical physicists, authorized nuclear pharmacists, teletherapy or medical physicists, authorized users, and nuclear pharmacists. The amendments allow associate radiation safety officers to be named on a medical license and several clarifying amendments; and exempt certain board-certified individuals from certain training and experience requirements (i.e., "grandfather" these individuals).

Other amendments to §§289.252, 289.256, and 289.257 clarify terms and conditions of licenses for medical use of radioactive material, establish new definitions, update license application processes, and update facility radiation protection programs. The amendments also include changes to update, correct, improve, or clarify rule citation references, terminology, language and format consistency, grammar, and minor typographical and formatting errors.

COMMENTS

The 31-day comment period ended November 8, 2021.

During this period, DSHS did not receive any public comments regarding the proposed rules. However, DSHS and Texas Radiation Advisory Board found three grammatical errors and one rule reference error.

The word "a" was corrected to "an" in §289.252(h)(2)(C)(i) for clarity.

The word "to" was removed from §289.256(ww)(1) and §289.257(r)(1) for clarity.

A rule reference is corrected from "§289.256(g)(5)" to "§289.256(g)(7)" in row 9 in Figure 25 TAC §289.256(xxx).

The value 4x103 was corrected to $4x10^3$ in §289.257(d)(44)(A)(ii).

STATUTORY AUTHORITY

The amendments are adopted under the Texas Health and Safety Code, Chapter 401 (the Texas Radiation Control Act), which provides for DSHS radiation control rules and regulatory program to be compatible with federal standards and regulation; §401.051, which provides the required authority to adopt rules and guidelines relating to the control of sources of radiation; §401.052, which provides authority for rules that provide for transportation and routing of radioactive material and waste

in Texas; §401.103, which provides authority for licensing and registration for transportation of sources of radiation; §401.104, which provides for rulemaking authority for general or specific licensing of radioactive material and devices or equipment using radioactive material; §401.224, which provides rulemaking authority relating to the packaging of radioactive waste; Chapter 401, Subchapter J, which authorizes enforcement of the Act; 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 for the operation and provision of health and human services by DSHS and for the administration of Texas Health and Safety Code, Chapter 1001.

§289.252. Licensing of Radioactive Material.

(a) Purpose. The intent of this section is as follows.

(1) This section provides for the specific licensing of radioactive material.

(2) Unless otherwise exempted, no person shall manufacture, produce, receive, possess, use, transfer, own, or acquire radioactive material except as authorized by the following:

(A) a specific license issued in accordance with this section and any of the following sections:

(i) §289.253 of this title (relating to Radiation Safety Requirements for Well Logging Service Operations and Tracer Studies);

(ii) §289.255 of this title (relating to Radiation Safety Requirements and Licensing and Registration Procedures for Industrial Radiography);

(iii) §289.256 of this title (relating to Medical and Veterinary Use of Radioactive Material);

(iv) §289.258 of this title (relating to Licensing and Radiation Safety Requirements for Irradiators); or

(v) §289.259 of this title (relating to Licensing of Naturally Occurring Radioactive Material (NORM)); or

(B) a general license or general license acknowledgment issued in accordance with §289.251 of this title (relating to Exemptions, General Licenses, and General License Acknowledgements).

(3) A person who manufactures, produces, receives, possesses, uses, transfers, owns, or acquires radioactive materials before receiving a license is subject to the requirements of this chapter.

(b) Scope. In addition to the requirements of this section, the following additional requirements are applicable.

(1) All licensees, unless otherwise specified, are subject to the requirements in the following sections:

(A) §289.201 of this title (relating to General Provisions for Radioactive Material);

(B) §289.202 of this title (relating to Standards for Protection Against Radiation from Radioactive Materials);

(C) §289.203 of this title (relating to Notices, Instructions, and Reports to Workers; Inspections);

(D) §289.204 of this title (relating to Fees for Certificates of Registration, Radioactive Material Licenses, Emergency Planning and Implementation, and Other Regulatory Services);

(E) §289.205 of this title (relating to Hearing and Enforcement Procedures); and

(F) §289.257 of this title (relating to Packaging and Transportation of Radioactive Material).

(2) Licensees engaged in well logging service operations and tracer studies are subject to the requirements of §289.253 of this title.

(3) Licensees engaged in industrial radiographic operations are subject to the requirements of §289.255 of this title.

(4) Licensees using radioactive material for medical or veterinary use are subject to the requirements of §289.256 of this title.

(5) Licensees using sealed sources in irradiators are subject to the requirements of §289.258 of this title.

(6) Licensees possessing or using naturally occurring radioactive material are subject to the requirements of §289.259 of this title.

(c) Types of licenses. Licenses for radioactive materials are of two types: general and specific.

(1) General licenses provided in §289.251 and §289.259 of this title are effective without the filing of applications with the department or the issuance of licensing documents to the particular persons, although the filing of an application for acknowledgement with the department may be required for a particular general license. The general licensee is subject to any other applicable portions of this chapter and any conditions or limitations of the general license.

(2) Specific licenses require the submission of an application to the department and the issuance of a licensing document by the department. The licensee is subject to all applicable portions of this chapter as well as any conditions or limitations specified in the licensing document.

(d) Filing application for specific licenses. The department may, at any time after the filing of the original application, require further statements in order to enable the department to determine whether the application should be denied or the license should be issued.

(1) Applications for specific licenses shall be filed in a manner prescribed by the department.

(2) Each application shall be signed by the chief executive officer or other individual delegated the authority to manage, direct, or administer the licensee's activities.

(3) An application for a license may include a request for a license authorizing one or more activities. The department may require the issuance of separate specific licenses for those activities.

(4) An application for a license may include a request for more than one location of use on the license. The department may require the issuance of a separate license for additional locations that are more than 30 miles from the main site specified on a license.

(5) Each application for a specific license, other than a license exempted from §289.204 of this title, shall be accompanied by the fee prescribed in §289.204 of this title.

(6) Each application shall be accompanied by a completed RC Form 252-1 (Business Information Form).

(7) Each applicant shall demonstrate to the department that the applicant is financially qualified to conduct the activity requested for licensure, including any required decontamination, decommissioning, reclamation, and disposal before the department issues a license. Each licensee shall demonstrate to the department that it remains fi-

nancially qualified to conduct the licensed activity before a license is renewed. Methods for demonstrating financial qualifications are specified in subsection (jj)(8) of this section. The requirement for demonstration of financial qualification is separate from the requirement specified in subsection (gg) of this section for certain applicants or licensees to provide financial assurance.

(8) If facility drawings submitted in conjunction with the application for a license are prepared by a professional engineer or engineering firm, those drawings shall be final and shall be signed, sealed and dated in accordance with the requirements of the Texas Board of Professional Engineers and Land Surveyors, Title 22, Part 6, Texas Administrative Code (TAC), Chapter 137.

(9) Applications for licenses shall be processed in accordance with the following time periods.

(A) The first period is the time from receipt of an application by the department to the date of issuance or denial of the license or a written notice outlining why the application is incomplete or unacceptable. This time period is 60 days.

(B) The second period is the time from receipt of the last item necessary to complete the application to the date of issuance or denial of the license. This time period is 30 days.

(C) These time periods are exclusive of any time period incident to hearings and post-hearing activities required by the Texas Government Code, Chapter 2001.

(10) Except as provided in this paragraph, an application for a specific license to use radioactive material in the form of a sealed source or in a device that contains the sealed source shall:

(A) identify the source or device by manufacturer and model number as registered in accordance with subsection (v) of this section or with equivalent regulations of the United States Nuclear Regulatory Commission (NRC) or any agreement state, or for a source or a device containing radium-226 or accelerator-produced radioactive material registered in accordance with subsection (v) of this section; or

(B) contain the information specified in subsection (v)(3) - (4) of this section.

(11) For sources or devices manufactured before October 23, 2012, that are not registered in accordance with subsection (v) of this section or with equivalent regulations of the NRC or any agreement state, and for which the applicant is unable to provide all categories of information specified in subsection (v)(3) - (4) of this section, the application shall include:

(A) all available information identified in subsection (v)(3) - (4) of this section concerning the source, and, if applicable, the device; and

(B) sufficient additional information to demonstrate that there is reasonable assurance that the radiation safety properties of the source or device are adequate to protect health and minimize danger to life and property. Such information shall include:

(i) a description of the source or device;

(ii) a description of radiation safety features;

(iii) the intended use and associated operating experience; and

(iv) the results of a recent leak test.

(12) For sealed sources and devices allowed to be distributed without registration of safety information in accordance with subsection (v)(8)(A) of this section, the applicant shall supply only the manufacturer, model number, and radionuclide and quantity.

(13) If it is not feasible to identify each sealed source and device individually, the applicant shall propose constraints on the number and type of sealed sources and devices to be used and the conditions under which they will be used, in lieu of identifying each sealed source and device.

(14) Notwithstanding the provisions of §289.204(d)(1) of this title, reimbursement of application fees may be granted in the following manner.

(A) In the event the application is not processed in the time periods as stated in paragraph (9) of this subsection, the applicant has the right to request of the director of the Radiation Control Program full reimbursement of all application fees paid in that particular application process. If the director does not agree that the established periods have been violated or finds that good cause existed for exceeding the established periods, the request will be denied.

(B) Good cause for exceeding the period established is considered to exist if:

(i) the number of applications for licenses to be processed exceeds by 15 percent or more the number processed in the same calendar quarter the preceding year;

(ii) another public or private entity utilized in the application process caused the delay; or

(iii) other conditions existed giving good cause for exceeding the established periods.

(C) If the request for full reimbursement authorized by subparagraph (A) of this paragraph is denied, the applicant may then request a hearing by appeal to the Commissioner of Health for a resolution of the dispute. The appeal will be processed in accordance with Title 1, TAC, Chapter 155, and the Formal Hearing Procedures, §§1.21, 1.23, 1.25, and 1.27 of this title.

(15) Applications for licenses may be denied for the following reasons:

(A) any materially false statement in the application or any statement of fact required under provisions of the Texas Radiation Control Act (Act);

(B) conditions revealed by the application or statement of fact or any report, record, or inspection, or other means that would warrant the department to refuse to grant a license on an application; or

(C) failure to clearly demonstrate how the requirements in this chapter have been addressed.

(16) Action on a specific license application will be considered abandoned if the applicant does not respond within 30 days from the date of a request for any information by the department. Abandonment of such actions does not provide an opportunity for a hearing; however, the applicant retains the right to resubmit the application in accordance with paragraphs (1) - (8) of this subsection.

(e) General requirements for the issuance of specific licenses. A license application will be approved if the department determines that:

(1) the applicant and all personnel who will be handling the radioactive material are qualified by reason of training and experience to use the material in question for the purpose requested in accordance with this chapter in such a manner as to minimize danger to occupational and public health and safety, life, property, and the environment;

(2) the applicant's proposed equipment, facilities, and procedures are adequate to minimize danger to occupational and public health and safety, life, property, and the environment;

(3) the issuance of the license will not be inimical to the health and safety of the public;

(4) the applicant satisfied any applicable special requirement in this section and other sections as specified in subsection (a)(2)(A) of this section;

(5) the radiation safety information submitted for requested sealed source(s) or device(s) containing radioactive material is in accordance with subsection (v) of this section;

(6) qualifications of the designated radiation safety officer (RSO) as specified in subsection (f) of this section are adequate for the purpose requested in the application;

(7) the applicant submitted adequate operating, safety, and emergency procedures;

(8) the applicant's permanent facility is located in Texas (if the applicant's permanent facility is not located in Texas, reciprocal recognition shall be sought as required by subsection (ee) of this section);

(9) the owner of the property is aware that radioactive material is stored or used on the property, if the proposed facility is not owned by the applicant. The applicant shall provide a written statement from the owner, or from the owner's agent, indicating such. This paragraph does not apply to property owned or held by a government entity or to property on which radioactive material is used under an authorization for temporary job site use;

(10) there is no reason to deny the license as specified in subsections (d)(15) or (x)(9) of this section; and

(11) the applicant shall have a current registration with the Secretary of State to conduct business in the state, unless the applicant is exempt. All applicants using an assumed name in their application shall file an assumed name certificate as required under the Texas Business and Commerce Code, Chapter 71.

(f) RSO.

(1) An RSO shall be designated for every license issued by the department. A single individual may be designated as RSO for more than one license if authorized by the department.

(2) The RSO's documented qualifications shall include as a minimum:

(A) possession of a high school diploma or a certificate of high school equivalency based on the GED test;

(B) completion of the training and testing requirements specified in this chapter for the activities for which the license application is submitted; and

(C) training and experience necessary to supervise the radiation safety aspects of the licensed activity.

(3) Every licensee shall establish in writing the authority, duties, and responsibilities of the RSO and ensure that the RSO is provided sufficient authority, organizational freedom, time, resources, and management prerogative to perform the specific duties of the RSO which include the following:

(A) to establish and oversee operating, safety, emergency, and as low as reasonably achievable (ALARA) procedures, and to review them at least annually to ensure that the procedures are current and conform with this chapter;

(B) to oversee and approve all phases of the training program for operations and personnel so that appropriate and effective radiation protection practices are taught;

(C) to ensure that required radiation surveys and leak tests are performed and documented in accordance with this chapter, including any corrective measures when levels of radiation exceed established limits;

(D) to ensure that individual monitoring devices are used properly by occupationally-exposed personnel, that records are kept of the monitoring results, and that timely notifications are made in accordance with §289.203 of this title;

(E) to investigate and cause a report to be submitted to the department for each known or suspected case of radiation exposure to an individual or radiation level detected in excess of limits established by this chapter and each theft or loss of source(s) of radiation, to determine the cause(s), and to take steps to prevent a recurrence;

(F) to investigate and cause a report to be submitted to the department for each known or suspected case of release of radioactive material to the environment in excess of limits established by this chapter;

(G) to have a thorough knowledge of management policies and administrative procedures of the licensee;

(H) to assume control and have the authority to institute corrective actions, including shutdown of operations when necessary in emergency situations or unsafe conditions;

(I) to ensure that records are maintained as required by this chapter;

(J) to ensure the proper storing, labeling, transport, use and disposal of sources of radiation, storage, and transport containers;

(K) to ensure that inventories are performed in accordance with the activities for which the license application is submitted;

(L) to perform a physical inventory of the radioactive sealed sources authorized for use on the license every 6 months and make, maintain, and retain records of the inventory of the radioactive sealed sources authorized for use on the license every six months, to include the following:

(i) isotope(s);

(ii) quantity(ies);

(iii) activity(ies);

(iv) date inventory is performed;

(v) location;

(vi) unique identifying number or serial number; and

(vii) signature of person performing the inventory;

(M) to ensure that personnel are complying with this chapter, the conditions of the license, and the operating, safety, and emergency procedures of the licensee;

(N) to serve as the primary contact with the department; and

(O) to have knowledge of and ensure compliance with federal and state security measures for radioactive material.

(4) The RSO shall ensure that the duties listed in paragraph (3)(A) - (O) of this subsection are performed.

(5) The RSO shall be on site periodically, commensurate with the scope of licensed activities, to satisfy the requirements of paragraphs (3) and (4) of this subsection.

(6) The RSO, or a Site RSO designated on the license, shall be capable of physically arriving at the licensee's authorized use site(s) within a reasonable time of being notified of an emergency situation or unsafe condition. A Site RSO shall meet the qualifications in paragraph (2) of this subsection.

(7) Requirements for RSOs for specific licenses for broad scope authorization for research and development. In addition to the requirements in paragraphs (1) and (3) - (6) of this subsection, the RSO's qualifications for specific licenses for broad scope authorization for research and development shall include evidence of the following:

(A) a bachelor's degree in health physics, radiological health, physical science or a biological science with a physical science minor and 4 years of applied health physics experience in a program with radiation safety issues similar to those in the program to be managed;

(B) a master's degree in health physics or radiological health and 3 years of applied health physics experience in a program with radiation safety issues similar to those in the program to be managed;

(C) 2 years of applied health physics experience in a program with radiation safety issues similar to those in the program to be managed and one of the following:

(i) doctorate degree in health physics or radiological health;

(ii) comprehensive certification by the American Board of Health Physics;

(iii) certification by the American Board of Radiology in Nuclear Medical Physics;

(iv) certification by the American Board of Science in Nuclear Medicine in Radiation Protection; or

(v) certification by the American Board of Medical Physics in Medical Health Physics; or

(D) equivalent qualifications as approved by the department.

(8) The qualifications in paragraph (7)(A) - (D) do not apply to individuals who have been adequately trained and designated as RSOs on licenses issued before October 1, 2000.

(g) Duties and responsibilities of the Radiation Safety Committee (RSC). The duties and responsibilities of the RSC include the following:

(1) meeting as often as necessary to conduct business but no less than three times a year;

(2) reviewing summaries of the following information presented by the RSO:

(A) over-exposures;

(B) significant incidents, including spills, contamination, or medical events; and

(C) items of non-compliance following an inspection;

(3) reviewing the program for maintaining doses ALARA, and providing any necessary recommendations to ensure doses are ALARA;

(4) reviewing the overall compliance status for authorized users;

(5) sharing responsibility with the RSO to conduct periodic audits of the radiation safety program;

(6) reviewing the audit of the radiation safety program and acting upon the findings;

(7) developing criteria to evaluate training and experience of new authorized user applicants;

(8) evaluating and approving authorized user applicants who request authorization to use radioactive material at the facility;

(9) evaluating new uses of radioactive material;

(10) reviewing and approving permitted program and procedural changes before implementation; and

(11) having knowledge of and ensuring compliance with federal and state security measures for radioactive material.

(h) Specific licenses of broad scope.

(1) Types of specific licenses of broad scope.

(A) A "Type A specific license of broad scope" is a specific license authorizing receipt, acquisition, ownership, possession, use, and transfer of any chemical or physical form of the radioactive material specified in the license, but not exceeding quantities specified in the license. The quantities specified are usually in the multicurie range.

(B) A "Type B specific license of broad scope" is a specific license authorizing receipt, acquisition, ownership, possession, use, and transfer of any chemical or physical form of radioactive material specified in subsection (jj)(10) of this section. The possession limit for a Type B specific license of broad scope, if only one radionuclide is possessed thereunder, is the quantity specified for that radionuclide in subsection (jj)(10) of this section. If two or more radionuclides are possessed thereunder, the possession limit for each is determined as follows: For each radionuclide, determine the ratio of the quantity possessed to the applicable quantity specified in subsection (jj)(10) of this section, for that radionuclide. The sum of the ratios for all radionuclides possessed under the license shall not exceed unity.

(C) A "Type C specific license of broad scope" is a specific license authorizing receipt, acquisition, ownership, possession, use, and transfer of any chemical or physical form of radioactive material specified in subsection (jj)(10) of this section. The possession limit for a Type C specific license of broad scope, if only one radionuclide is possessed thereunder, is the quantity specified for that radionuclide in subsection (jj)(10) of this section. If two or more radionuclides are possessed thereunder, the possession limit is determined for each as follows: For each radionuclide determine the ratio of the quantity possessed to the applicable quantity specified in subsection (jj)(10) of this section, for that radionuclide. The sum of the ratios for all radionuclides possessed under the license shall not exceed unity.

(2) An application for a Type A specific license of broad scope will be approved if:

(A) the applicant satisfies the general requirements specified in subsection (e) of this section;

(B) the applicant has engaged in a reasonable number of activities involving the use of radioactive material; and

(C) the applicant has established administrative controls and provisions relating to organization and management, procedures, record keeping, material control, and accounting and

management review that are necessary to assure safe operations, including:

(i) the establishment of an RSC composed of such persons as an RSO, a representative of management, and persons trained and experienced in the safe use of radioactive materials management to fulfill the duties and responsibilities specified in subsection (g) of this section;

(ii) the appointment of a full-time RSO meeting the requirements of subsection (f)(7) or (8) of this section who is qualified by training and experience in radiation protection, and who is available for advice and assistance on radiation safety matters; and

(iii) the establishment of appropriate administrative procedures to ensure:

(I) control of procurement and use of radioactive material;

(II) completion of safety evaluations of proposed uses of radioactive material which take into consideration such matters as the adequacy of facilities and equipment, training and experience of the user, and the operating or handling procedures; and

(III) review, approval, and recording by the RSC of safety evaluations of proposed uses prepared in accordance with subclause (II) of this clause before use of the radioactive material.

(3) An application for a Type B specific license of broad scope will be approved if:

(A) the applicant satisfies the general requirements specified in subsection (e) of this section; and

(B) the applicant has established administrative controls and provisions relating to organization and management, procedures, record keeping, material control and accounting, and management review that are necessary to assure safe operations, including:

(i) the appointment of an RSO who is qualified by training and experience in radiation protection, and who is available for advice and assistance on safety matters; and

(ii) the establishment of appropriate administrative procedures to ensure:

(I) control of procurement and use of radioactive material;

(II) completion of safety evaluations of proposed uses of radioactive material which take into consideration such matters as the adequacy of facilities and equipment, training and experience of the user, and the operating or handling procedures; and

(III) review, approval, and recording by the RSO of safety evaluations of proposed uses prepared in accordance with subclause (II) of this clause before use of the radioactive material.

(4) An application for a Type C specific license of broad scope will be approved if:

(A) the applicant satisfies the general requirements specified in subsection (e) of this section;

(B) the applicant submits a statement that radioactive material will be used only by, or under the direct supervision of, individuals who have received:

(i) a college degree at the bachelor level, or equivalent training and experience, in the physical or biological sciences or in engineering; and

(ii) at least 40 hours of training and experience in the safe handling of radioactive materials, and in the characteristics of ionizing radiation, units of radiation dose and quantities, radiation detection instrumentation, and biological hazards of exposure to radiation appropriate to the type and forms of radioactive material to be used; and

(C) the applicant has established administrative controls and provisions relating to procurement of radioactive material, procedures, record keeping, material control and accounting, and management review necessary to assure safe operations.

(5) An application filed pursuant to subsection (e) of this section for a specific license other than one of broad scope will be considered by the department as an application for a specific license of broad scope under this subsection if the applicable requirements of this subsection are satisfied.

(6) The following conditions apply to specific licenses of broad scope.

(A) Unless specifically authorized in accordance with a separate license, persons licensed under this subsection shall not:

(i) conduct tracer studies in the environment involving direct release of radioactive material;

(ii) receive, acquire, own, possess, use, transfer, or import devices containing 100,000 curies or more of radioactive material in sealed sources used for irradiation of materials;

(iii) conduct activities for which a specific license issued by the department in accordance with subsections (i) - (u) of this section and §289.255, §289.256, and §289.259 of this title as required;

(iv) add or cause the addition of radioactive material to any food, beverage, cosmetic, drug, or other product designed for ingestion or inhalation by, or application to, a human being; or

(v) commercially distribute radioactive materials.

(B) Each Type A specific license of broad scope issued under this subsection shall be subject to the condition that radioactive material possessed under the license may only be used by, or under the direct supervision of, individuals approved by the licensee's RSC.

(C) Each Type B specific license of broad scope issued under this subsection shall be subject to the condition that radioactive material possessed under the license may only be used by, or under the direct supervision of, individuals approved by the licensee's RSO.

(D) Each Type C specific license of broad scope issued under this subsection shall be subject to the condition that radioactive material possessed under the license may only be used by, or under the direct supervision of, individuals who satisfy the requirements of paragraph (4) of this subsection.

(i) Specific licenses for introduction of radioactive material into products in exempt concentrations. No person may introduce radioactive material into a product or material knowing or having reason to believe that it will be transferred to persons exempt in accordance with §289.251 of this title except as specified with a license issued by the NRC.

(j) Specific licenses for commercial distribution of radioactive material in exempt quantities.

(1) Authority to transfer possession or control by the manufacturer, processor, or producer of any equipment, device, commodity, or other product containing source material, byproduct material, or naturally occurring and accelerator-produced radioactive material (NARM) whose subsequent possession, use, transfer, and disposal by all other persons are exempted from regulatory requirements may be

obtained only from the United States Nuclear Regulatory Commission (NRC), Washington, DC 20555 in accordance with Title 10, Code of Federal Regulations (CFR), §32.18.

(2) Licenses issued in accordance with this subsection do not authorize the following:

(A) combining of exempt quantities of radioactive material in a single device;

(B) any program advising persons to combine exempt quantity sources and providing devices for them to do so; and

(C) the possession and use of combined exempt sources, in a single unregistered device, by persons exempt from licensing in accordance with §289.251(e)(2) of this title.

(k) Specific licenses for incorporation of byproduct material or NARM into gas and aerosol detectors. A specific license authorizing the incorporation of byproduct material or NARM into gas and aerosol detectors to be distributed to persons exempt from this chapter shall be issued only by the NRC in accordance with Title 10, CFR, §32.26.

(l) Specific licenses for the manufacture and commercial distribution of devices to persons generally licensed in accordance with §289.251(f)(4)(H) of this title.

(1) In addition to the requirements in subsection (e) of this section, a specific license to manufacture or commercially distribute devices containing radioactive material to persons generally licensed in accordance with §289.251(f)(4)(H) of this title or equivalent requirements of the NRC or any agreement state will be issued if the department approves the following information submitted by the applicant:

(A) the design, manufacture, prototype testing, quality control, labels, proposed uses, installation, servicing, leak testing, operating and safety instructions, and potential hazards of the device to provide reasonable assurance that:

(i) the device can be safely operated by persons not having training in radiological protection;

(ii) under ordinary conditions of handling, storage, and use of the device, the radioactive material contained in the device will not be released or inadvertently removed from the device, and it is unlikely that any person will receive in any period of one year a dose in excess of ten percent of the limits specified in §289.202(f) of this title; and

(iii) under accident conditions (such as fire and explosion) associated with handling, storage, and use of the device, it is unlikely that any person would receive an external radiation dose or dose commitment in excess of the following organ doses:

(I) 15 rems to the whole body; head and trunk; active blood-forming organs; gonads; or lens of eye;

(II) 200 rems to the hands and forearms; feet and ankles; localized areas of skin averaged over areas no larger than 1 square centimeter (cm^2); or

(III) 50 rems to other organs;

(B) procedures for disposition of unused or unwanted radioactive material;

(C) each device bears a durable, legible, clearly visible label or labels approved by the department that contain the following in a clearly identified and separate statement:

(i) instructions and precautions necessary to assure safe installation, operation, and servicing of the device (documents such as operating and service manuals may be identified in the label and used to provide this information);

(ii) the requirement, or lack of requirement, for leak testing, or for testing any "on-off" mechanism and indicator, including the maximum time interval for such testing, and the identification of radioactive material by isotope, quantity of radioactivity, and date of determination of the quantity; and

(iii) the information called for in one of the following statements, as appropriate, in the same or substantially similar form:

(I) For radioactive materials other than NARM, the following statement is appropriate:
Figure: 25 TAC §289.252(l)(1)(C)(iii)(I) (No change.)

(II) For NARM, the following statement is appropriate:
Figure: 25 TAC §289.252(l)(1)(C)(iii)(II) (No change.)

(III) The model and serial number and name of manufacturer or distributor may be omitted from this label provided they are elsewhere stated in labeling affixed to the device.

(D) Each device having a separable source housing that provides the primary shielding for the source also bears, on the source housing, a durable label containing the device model number and serial numbers, the isotope and quantity, the words, "Caution-Radioactive Material," the radiation symbol described in §289.202(z) of this title, and the name of the manufacturer or initial distributor.

(E) Each device meeting the criteria of §289.251(g)(1) of this title, bears a permanent (for example, embossed, etched, stamped, or engraved) label affixed to the source housing if separable, or the device if the source housing is not separable, that includes the words, "Caution-Radioactive Material," and, if practicable, the radiation symbol described in §289.202(z) of this title.

(F) The device has been registered in the Sealed Source and Device Registry.

(2) In the event the applicant desires that the device be required to be tested at intervals longer than 6 months, either for proper operation of the "on-off" mechanism and indicator, if any, or for leakage of radioactive material, or for both, the applicant shall include in the application sufficient information to demonstrate that the longer interval is justified by performance characteristics of the device or similar devices and by design features that have a significant bearing on the probability or consequences of radioactive material leakage from the device or failure of the "on-off" mechanism and indicator. In determining the acceptable interval for the test for radioactive material leakage, the department will consider information that includes the following:

(A) primary containment (sealed source capsule);

(B) protection of primary containment;

(C) method of sealing containment;

(D) containment construction materials;

(E) form of contained radioactive material;

(F) maximum temperature withstood during prototype tests;

(G) maximum pressure withstood during prototype tests;

(H) maximum quantity of contained radioactive material;

(I) radiotoxicity of contained radioactive material; and

(J) operating experience with identical devices or similarly designed and constructed devices.

(3) In the event the applicant desires that the general licensee in accordance with §289.251(f)(4)(H) of this title or in accordance with equivalent regulations of the NRC or any agreement state, be authorized to mount the device, collect the sample to be analyzed by a specific licensee for radioactive material leakage, perform maintenance of the device consisting of replacement of labels, rust and corrosion prevention, and for fixed gauges, repair and maintenance of sealed source holder mounting brackets, test the "on-off" mechanism and indicator, or remove the device from installation, the applicant shall include in the application written instructions to be followed by the general licensee, estimated annual doses associated with such activity or activities, and bases for such estimates. The submitted information shall demonstrate that performance of such activity or activities by an individual untrained in radiological protection, in addition to other handling, storage, and use of devices in accordance with the general license, is unlikely to cause that individual to receive an annual dose in excess of ten percent of the limits specified in §289.202(f) of this title.

(4) Before the device may be transferred, each person licensed in accordance with this subsection to commercially distribute devices to generally licensed persons shall furnish:

(A) a copy of the general license in §289.251(f)(4)(H) of this title to each person to whom the licensee directly commercially distributes radioactive material in a device for use in accordance with the general license in §289.251(f)(4)(H) of this title;

(B) a copy of the general license in the NRC's or any agreement state's regulation equivalent to §289.251(f)(4)(H) of this title, or alternatively, a copy of the general license in §289.251(f)(4)(H) of this title to each person to whom the licensee directly commercially distributes radioactive material in a device for use in accordance with the general license of the NRC or any agreement state. If certain requirements of the regulations do not apply to the particular device, those requirements may be omitted. If a copy of the general license in §289.251(f)(4)(H) of this title is furnished to such a person, it shall be accompanied by an explanation that the use of the device is regulated by the NRC or any agreement state in accordance with requirements substantially the same as those in §289.251(f)(4)(H) of this title;

(C) a copy of §289.251(g) of this title;

(D) a list of the services that can only be performed by a specific licensee;

(E) information on acceptable disposal options including estimated costs of disposal;

(F) the name or position, address, and phone number of a contact person at the department, the NRC, or any agreement state, from which additional information may be obtained; and

(G) an indication that it is the NRC's policy to issue high civil penalties for improper disposal if the device is commercially distributed to a general licensee of the NRC.

(5) An alternative approach to informing customers may be submitted by the licensee for approval by the department.

(6) In the case of a transfer through an intermediate person, each licensee who commercially distributes radioactive material in a device for use in accordance with the general license in §289.251(f)(4)(H) of this title, shall furnish the information in paragraph (4) of this subsection to the intended user before the initial transfer to the intermediate person.

(7) Each person licensed in accordance with this subsection to commercially distribute devices to generally licensed persons shall:

(A) report to the department all commercial distributions of devices to persons for use in accordance with the general license in §289.251(f)(4)(H) of this title and all receipts of devices from general licensees licensed in accordance with §289.251(f)(4)(H) of this title.

(i) The report shall:

(I) cover each calendar quarter;

(II) be filed within 30 days thereafter;

(III) be submitted on a form prescribed by the department or in a clear and legible report containing all of the data required by the form;

(IV) clearly indicate the period covered by the report;

(V) clearly identify the specific licensee submitting the report and include the license number of the specific licensee;

(VI) identify each general licensee by name and mailing address for the location of use; if there is no mailing address for the location of use, an alternate address for the general licensee shall be submitted along with information on the actual location of use;

(VII) identify an individual by name, title, and phone number who has knowledge of and authority to take required actions to ensure compliance with the appropriate regulations and requirements;

(VIII) identify the type, model and serial number of device, and serial number of sealed source commercially distributed;

(IX) identify the quantity and type of radioactive material contained in the device; and

(X) include the date of transfer.

(ii) If one or more intermediate persons will temporarily possess the device at the intended place of use before its possession by the user, the report shall also include the information in accordance with paragraph (7)(A)(i) of this subsection for both the intended user and each intermediate person and clearly designate the intermediate person(s).

(iii) If no commercial distributions have been made to persons generally licensed in accordance with §289.251(f)(4)(H) of this title during the reporting period, the report shall so indicate.

(iv) For devices received from a general licensee, the report shall include the identity of the general licensee by name and address, the type, model number, and serial number of the device received, the date of receipt, and, in the case of devices not initially transferred by the reporting licensee, the name of the manufacturer or initial transferor.

(B) report the following to the NRC to include covering each calendar quarter to be filed within 30 days thereafter, clearly indicating the period covered by the report, the identity of the specific licensee submitting the report, and the license number of the specific licensee:

(i) all commercial distributions of such devices to persons for use in accordance with the NRC general license in Title 10, CFR, §31.5 and all receipts of devices from general licensees in areas under NRC jurisdiction including the following:

(I) identity of each general licensee by name and address;

(II) the type, model and serial number of device, and serial number of sealed source commercially distributed;

(III) the quantity and type of radioactive material contained in the device;

(IV) the date of transfer; or

(ii) if the licensee makes changes to a device possessed in accordance with the general license in §289.251(f)(4)(H) of this title, such that the label must be changed to update required information, the report shall identify the licensee, the device, and the changes to information on the device label;

(iii) in the case of devices not initially transferred by the reporting licensee, the name of the manufacturer or initial transferor;

(iv) if no commercial distributions have been made to the NRC licensees during the reporting period; the report shall so indicate;

(C) report to the department or any agreement state all transfers of devices manufactured and commercially distributed in accordance with this subsection for use in accordance with a general license in that state's requirements equivalent to §289.251(f)(4)(H) of this title and all receipts of devices from general licensees.

(i) The report shall:

(I) be submitted within 30 days after the end of each calendar quarter in which such a device is commercially distributed to the generally licensed person;

(II) clearly indicate the period covered by the report;

(III) clearly identify the specific licensee submitting the report and include the license number of the specific licensee;

(IV) identify each general licensee by name and mailing address for the location of use; if there is no mailing address for the location of use an alternate address for the licensee shall be submitted along with the information on the actual location of use;

(V) identify an individual by name, position, and phone number who has knowledge of and authority to take required actions to ensure compliance with the appropriate regulations and requirements;

(VI) include the type, model and serial number of the device, and serial number of sealed source commercially distributed;

(VII) include the quantity and type of radioactive material contained in the device; and

(VIII) include the date of receipt.

(ii) If one or more intermediate persons will temporarily possess the device at the intended place of use before its possession by the user, the report shall also include the same information for both the intended user and each intermediate person, and clearly designate the intermediate person(s).

(iii) If no commercial distributions have been made to persons in the agreement state during the reporting period, the report shall so indicate.

(iv) For devices received from a general licensee, the report shall include the identity of the general licensee by name and address, the type, model number, and serial number of the device received, the date of receipt, and, in the case of devices not initially transferred by the reporting licensee, the name of the manufacturer or initial transferor; and

(D) make, maintain, and retain records required by this paragraph for inspection by the department in accordance with subsection (mm) of this section, including the name, address, and the point of contact for each general licensee to whom the licensee directly or through an intermediate person commercially distributes radioactive material in devices for use in accordance with the general license provided in §289.251(f)(4)(H) of this title, or equivalent requirements of the NRC or any agreement state.

(i) The records shall include the following:

(I) the date of each commercial distribution;

(II) the isotope and the quantity of radioactivity in each device commercially distributed;

(III) the identity of any intermediate person; and

(IV) compliance with the reporting requirements of this subsection.

(ii) If no commercial distributions have been made to persons generally licensed in accordance with §289.251(f)(4)(H) of this title during the reporting period, the records shall so indicate.

(8) If a notification of bankruptcy has been made in accordance with subsection (x)(6) of this section or the license is to be terminated, each person licensed in accordance with this subsection shall provide, upon request to the NRC and to any appropriate agreement state, records of final disposition required in accordance with subsection (y)(16)(A) of this section.

(9) Each device that is transferred after February 19, 2002, shall meet the labeling requirements in accordance with paragraph (1)(C) - (E) of this subsection.

(m) Specific licenses for the manufacture, assembly, repair, or initial transfer of luminous safety devices containing tritium or promethium-147 for use in aircraft for distribution to persons generally licensed in accordance with §289.251(f)(4)(B) of this title. In addition to the requirements in subsection (e) of this section, a specific license to manufacture, assemble, repair, or initially transfer luminous safety devices containing tritium or promethium-147 for use in aircraft, for distribution to persons generally licensed in accordance with §289.251(f)(4)(B) of this title, will be issued if the department approves the information submitted by the applicant. The information shall satisfy the requirements of Title 10, CFR, §§32.53, 32.54, 32.55, and 32.56, or their equivalent.

(n) Specific licenses for the manufacture or initial transfer of calibration sources containing americium-241 or radium-226 for commercial distribution to persons generally licensed in accordance with §289.251(f)(4)(D) of this title.

(1) In addition to the requirements in subsection (e) of this section, a specific license to manufacture or initially transfer calibration sources containing americium-241, or radium-226 to persons generally licensed in accordance with §289.251(f)(4)(D) of this title will be issued if the department approves the information submitted by the applicant. The information shall satisfy the requirements of Title 10, CFR, §§32.57, 32.58, 32.59, and §70.39 or their equivalent.

(2) Each person licensed in accordance with this subsection shall perform a dry wipe test on each source containing more than 0.1 μCi (3.7 kilobecquerels (kBq)) of americium-241 or radium-226 before transferring the source to a general licensee in accordance with

§289.251(f)(4)(D) of this title or equivalent regulations of the NRC or any agreement state. This test shall be performed by wiping the entire radioactive surface of the source with a filter paper with the application of moderate finger pressure. The radioactivity on the filter paper shall be measured by using radiation detection instrumentation capable of detecting 0.005 μCi (0.185 kBq) of americium-241 or radium-226. If a source has been shown to be leaking or losing more than 0.005 μCi (0.185 kBq) of americium-241 or radium-226 by methods described in this paragraph, the source shall be rejected and shall not be transferred to a general licensee in accordance with §289.251(f)(4)(D) of this title or equivalent regulations of the NRC or any agreement state.

(o) Specific licenses for the manufacture and commercial distribution of sealed sources or devices containing radioactive material for medical use. In addition to the requirements in subsection (e) of this section, a specific license to manufacture and commercially distribute sealed sources and devices containing radioactive material to persons licensed in accordance with §289.256 of this title for use as a calibration, transmission, or reference source or for use of sealed sources listed in §289.256(q), (rr), (bbb), and (ddd) of this title will be issued if the department approves the following information submitted by the applicant:

(1) an evaluation of the radiation safety of each type of sealed source or device including the following:

(A) the radioactive material contained, its chemical and physical form, and amount;

(B) details of design and construction of the sealed source or device;

(C) procedures for, and results of, prototype tests to demonstrate that the sealed source or device will maintain its integrity under stresses likely to be encountered in normal use and accidents;

(D) for devices containing radioactive material, the radiation profile of a prototype device;

(E) details of quality control procedures to assure that production sources and devices meet the standards of the design and prototype tests;

(F) procedures and standards for calibrating sealed sources and devices;

(G) instructions for handling and storing the sealed source or device from the radiation safety standpoint. These instructions are to be included on a durable label attached to the sealed source or device or attached to a permanent storage container for the sealed source or device, provided that instructions that are too lengthy for the label may be summarized on the label and printed in detail on a brochure that is referenced on the label; and

(H) a legend and methods for labeling sources and devices as to their radioactive content;

(2) documentation that the label affixed to the sealed source or device, or to the permanent storage container for the sealed source or device, contains information on the radionuclide, quantity, and date of assay, and a statement that the name of the sealed source or device is licensed by the department for commercial distribution to persons licensed for use of sealed sources in the healing arts or by equivalent licenses of the NRC or any agreement state;

(3) documentation that in the event the applicant desires that the sealed source or device be required to be tested for radioactive material leakage at intervals longer than 6 months, the applicant shall include in the application sufficient information to demonstrate that the longer interval is justified by performance characteristics of the sealed source or device or similar sources or devices and by design features that have a significant bearing on the probability or consequences of radioactive material leakage from the sealed source;

(4) documentation that in determining the acceptable interval for testing radioactive material leakage, information will be considered that includes the following:

(A) primary containment (sealed source capsule);

(B) protection of primary containment;

(C) method of sealing containment;

(D) containment construction materials;

(E) form of contained radioactive material;

(F) maximum temperature withstood during prototype tests;

(G) maximum pressure withstood during prototype tests;

(H) maximum quantity of contained radioactive material;

(I) radiotoxicity of contained radioactive material; and

(J) operating experience with identical sealed sources or devices or similarly designed and constructed sealed sources or devices; and

(5) the source or device has been registered in the Sealed Source and Device Registry.

(p) Specific licenses for the manufacture and commercial distribution of radioactive material for certain *in vitro* clinical or laboratory testing in accordance with the general license. In addition to the requirements in subsection (e) of this section, a specific license to manufacture or commercially distribute radioactive material for use in accordance with the general license in §289.251(f)(4)(G) of this title will be issued if the department approves the following information submitted by the applicant:

(1) documentation that the radioactive material will be prepared for distribution in prepackaged units of:

(A) iodine-125 in units not exceeding 10 μCi (0.37 megabecquerel (MBq)) each;

(B) iodine-131 in units not exceeding 10 μCi (0.37 MBq) each;

(C) carbon-14 in units not exceeding 10 μCi (0.37 MBq) each;

(D) hydrogen-3 (tritium) in units not exceeding 50 μCi (1.85 MBq) each;

(E) iron-59 in units not exceeding 20 μCi (0.74 MBq) each;

(F) cobalt-57 in units not exceeding 10 μCi (0.37 MBq) each;

(G) selenium-75 in units not exceeding 10 μCi (0.37 MBq) each; or

(H) mock iodine-125 in units not exceeding 0.05 μCi (1.85 kBq) of iodine-129 and 0.005 μCi (0.185 kBq) of americium-241 each;

(2) evidence that each prepackaged unit will bear a durable, clearly visible label:

(A) identifying the radioactive contents as to chemical form and radionuclide, and indicating that the amount of radioactivity does not exceed 10 µCi (0.37 MBq) of iodine-125, iodine-131, carbon-14, cobalt-57, or selenium-75; 50 µCi (1.85 MBq) of hydrogen-3 (tritium); 20 µCi (0.74 MBq) of iron-59; or mock iodine-125 in units not exceeding 0.05 µCi (1.85 kBq) of iodine-129 and 0.005 µCi (0.185 kBq) of americium-241; and

(B) displaying the radiation caution symbol in accordance with §289.202(z) of this title and the words, "CAUTION, RADIOACTIVE MATERIAL," and "Not for Internal or External Use in Humans or Animals";

(3) that one of the following statements, as appropriate, or a substantially similar statement appears on a label affixed to each prepackaged unit or appears in a leaflet or brochure that accompanies the package:

(A) option 1:
Figure: 25 TAC §289.252(p)(3)(A) (No change.)

(B) option 2:
Figure: 25 TAC §289.252(p)(3)(B) (No change.)

(4) that the label affixed to the unit, or the leaflet or brochure that accompanies the package, contains adequate information as to the precautions to be observed in handling and storing the radioactive material. In the case of a mock iodine-125 reference or calibration source, the information accompanying the source shall also contain directions to the licensee regarding the waste disposal requirements of §289.202(ff) of this title.

(q) Specific licenses for the manufacture and commercial distribution of ice detection devices. In addition to the requirements of subsection (e) of this section, a specific license to manufacture and commercially distribute ice detection devices to persons generally licensed in accordance with §289.251(f)(4)(E) of this title will be issued if the department approves the information submitted by the applicant. This information shall satisfy the requirements of Title 10, CFR, §§32.61 and 32.62.

(r) Specific licenses for the manufacture, preparation, or transfer for commercial distribution of radioactive drugs containing radioactive materials for medical use under §289.256 of this title.

(1) In addition to the requirements in subsection (e) of this section, a specific license to manufacture, prepare, or transfer for commercial distribution, radioactive drugs containing radioactive material for use by persons authorized in accordance with §289.256 of this title will be issued if the department approves the following information submitted by the applicant:

(A) evidence that the applicant is at least one of the following:

(i) registered with the United States Food and Drug Administration (FDA) as the owner or operator of a drug establishment that engages in the manufacture, preparation, propagation, compounding, or processing of a drug in accordance with Title 21, CFR, §207.17;

(ii) registered or licensed with a state agency as a drug manufacturer;

(iii) licensed as a pharmacy by the Texas State Board of Pharmacy;

(iv) operating as a nuclear pharmacy within a federal medical institution; or

(v) a positron emission tomography (PET) drug production facility registered with a state agency;

(B) radionuclide data relating to the following:

(i) chemical and physical form;

(ii) maximum activity per vial, syringe, generator, or other container of the radioactive drug; and

(iii) shielding provided by the packaging to show it is appropriate for the safe handling and storage of the radioactive drugs by medical use licensees;

(C) labeling requirements including the following:

(i) that each transport radiation shield, whether it is constructed of lead, glass, plastic, or other material, of a radioactive drug to be transferred for commercial distribution shall include the following:

(I) the radiation symbol and the words "CAUTION, RADIOACTIVE MATERIAL" or "DANGER, RADIOACTIVE MATERIAL;"

(II) the name of the radioactive drug or its abbreviation; and

(III) the quantity of radioactivity at a specified date and time (the time may be omitted for radioactive drugs with a half-life greater than 100 days); and

(ii) that each syringe, vial, or other container used to hold a radioactive drug to be transferred for commercial distribution shall include the following:

(I) radiation symbol and the words, "CAUTION, RADIOACTIVE MATERIAL" or "DANGER, RADIOACTIVE MATERIAL;" and

(II) an identifier that ensures that the syringe, vial, or other container can be correlated with the information on the transport radiation shield.

(2) A licensee shall possess and use instrumentation to measure the radioactivity of radioactive drugs and shall have procedures for the use of the instrumentation. The licensee shall measure, by direct measurement or by a combination of measurements and calculations, the amount of radioactivity in dosages of alpha, beta, or photon-emitting radioactive drugs before transfer for commercial distribution. In addition, the licensee shall:

(A) perform tests before initial use, periodically, and following repair, on each instrument for accuracy, linearity, and geometry dependence, as appropriate for the use of the instrument; and make adjustments when necessary;

(B) check each instrument for constancy and proper operation at the beginning of each day of use; and

(C) make, maintain, and retain records of the tests and checks required in this paragraph for inspection by the department in accordance with subsection (mm) of this section.

(3) A licensee described in paragraph (1)(A)(iii) or (iv) of this subsection shall prepare radioactive drugs for medical use as defined in §289.256 of this title with the following provisions.

(A) Radioactive drugs shall be prepared by either an authorized nuclear pharmacist, as specified in subparagraphs (B) and (D) of this paragraph, or an individual under the supervision of an authorized nuclear pharmacist as specified in §289.256(s) of this title.

(B) A pharmacist shall be allowed to work as an authorized nuclear pharmacist if:

(i) the individual qualifies as an authorized nuclear pharmacist as defined in §289.256 of this title;

(ii) the individual meets the requirements specified in §289.256(k)(2) and (m) of this title, and the licensee has received from the department, an approved license amendment identifying this individual as an authorized nuclear pharmacist; or

(iii) the individual is designated as an authorized nuclear pharmacist in accordance with subparagraph (D) of this paragraph.

(C) The actions authorized in subparagraphs (A) and (B) of this paragraph are permitted in spite of more restrictive language in license conditions.

(D) A licensee may designate a pharmacist, as defined in §289.256 of this title, as an authorized nuclear pharmacist if:

(i) the individual was a nuclear pharmacist preparing only radioactive drugs containing accelerator-produced radioactive material; and

(ii) the individual practiced at a pharmacy at a government agency or federally recognized Indian Tribe or at all other pharmacies before the effective date of this rule as noticed by the NRC or the department.

(E) The licensee shall provide the following to the department:

(i) a copy of each individual's certification by a specialty board whose certification process has been recognized by the NRC, the department, or an agreement state as specified in §289.256(k)(1) of this title; or

(ii) the department, NRC, or another agreement state license; or

(iii) the permit issued by a broad scope licensee or the authorization from a commercial nuclear pharmacy authorized to list its own authorized nuclear pharmacist; or

(iv) documentation that only accelerator-produced radioactive materials were used in the practice of nuclear pharmacy at a government agency or federally recognized Indian Tribe or at all other locations of use before the effective date of this rule as noticed by the NRC or the department; and

(v) a copy of the Texas State Board of Pharmacy licensure or registration, no later than 30 days after the date that the licensee allows, in accordance with subparagraph (B)(i) and (iii) of this paragraph, the individual to work as an authorized nuclear pharmacist.

(F) The radiopharmaceuticals for human use shall be processed and prepared according to instructions that are furnished by the manufacturer on the label attached to or in the FDA-accepted instructions in the leaflet or brochure that accompanies the generator or reagent kit.

(G) If the authorized nuclear pharmacist elutes generators or processes radioactive material with the reagent kit in a manner that deviates from instructions furnished by the manufacturer on the label attached to or in the leaflet or brochure that accompanies the generator or reagent kit or in the accompanying leaflet or brochure, a complete description of the deviation shall be made and maintained for inspection by the department in accordance with subsection (mm) of this section.

(4) A licensee shall satisfy the labeling requirements in subsection (r)(1)(C) of this section.

(5) Nothing in this subsection relieves the licensee from complying with applicable FDA, or other federal and state requirements governing radioactive drugs.

(s) Specific licenses for the manufacture and commercial distribution of products containing depleted uranium for mass-volume applications.

(1) In addition to the requirements in subsection (e) of this section, a specific license to manufacture products and devices containing depleted uranium for use in accordance with §289.251(f)(3)(D) of this title or equivalent regulations of the NRC or an agreement state, will be issued if the department approves the following information submitted by the applicant:

(A) the design, manufacture, prototype testing, quality control procedures, labeling or marking, proposed uses, and potential hazards of the product or device to provide reasonable assurance that possession, use, or commercial distribution of the depleted uranium in the product or device is not likely to cause any individual to receive in any period of one year a radiation dose in excess of ten percent of the limits specified in §289.202(f) of this title; and

(B) reasonable assurance is provided that unique benefits will accrue to the public because of the usefulness of the product or device.

(2) In the case of a product or device whose unique benefits are questionable, the department will issue a specific license in accordance with paragraph (1) of this subsection only if the product or device is found to combine a high degree of utility and low probability of uncontrolled disposal and dispersal of significant quantities of depleted uranium into the environment.

(3) The department may deny any application for a specific license in accordance with this subsection if the end use(s) of the product or device cannot be reasonably foreseen.

(4) Each person licensed in accordance with paragraph (1) of this subsection shall:

(A) maintain the level of quality control required by the license in the manufacture of the product or device, and in the installation of the depleted uranium into the product or device;

(B) label or mark each unit to:

(i) identify the manufacturer of the product or device and the number of the license under which the product or device was manufactured, the fact that the product or device contains depleted uranium, and the quantity of depleted uranium in each product or device; and

(ii) state that the receipt, possession, use, and commercial distribution of the product or device are subject to a general license or the equivalent and the requirements of the NRC or of an agreement state;

(C) assure that before being installed in each product or device, the depleted uranium has been impressed with the following legend clearly legible through any plating or other covering: "Depleted Uranium";

(D) furnish a copy of the following:

(i) the general license in §289.251(f)(3)(D) of this title to each person to whom the licensee commercially distributes depleted uranium in a product or device for use in accordance with the general license in §289.251(f)(3)(D) of this title;

(ii) the NRC's or agreement state's requirements equivalent to the general license in §289.251(f)(3)(D) of this title and a copy of the NRC's or agreement state's certificate; or

(iii) alternately, a copy of the general license in §289.251(f)(3)(D) of this title to each person to whom the licensee commercially distributes depleted uranium in a product or device for use in accordance with the general license of the NRC or an agreement state;

(E) report to the department all commercial distributions of products or devices to persons for use in accordance with the general license in §289.251(f)(3)(D) of this title.

(i) The report shall be submitted within 30 days after the end of each calendar quarter in which such a product or device is commercially distributed to the generally licensed person and shall include the following:

(I) identity of each general licensee by name and address;

(II) identity of an individual by name and position who may constitute a point of contact between the department and the general licensee;

(III) the type and model number of devices commercially distributed; and

(IV) the quantity of depleted uranium contained in the product or device.

(ii) If no commercial distributions have been made to persons generally licensed in accordance with §289.251(f)(3)(D) of this title during the reporting period, the report shall so indicate;

(F) report to the NRC and each responsible agreement state agency all commercial distributions of industrial products or devices to persons for use in accordance with the general license in the NRC's or agreement state's equivalent requirements to §289.251(f)(3)(D) of this title. The report shall meet the provisions of subparagraph (E)(i) and (ii) of this paragraph; and

(G) make, maintain, and retain records including the name, address, and point of contact for each general licensee to whom the licensee commercially distributes depleted uranium in products or devices for use in accordance with the general license provided in §289.251(f)(3)(D) of this title or equivalent requirements of the NRC or any agreement state. The records shall be maintained for inspection by the department in accordance with subsection (mm) of this section and shall include the date of each commercial distribution, the quantity of depleted uranium in each product or device commercially distributed, and compliance with the report requirements of this section.

(t) Specific licenses for the processing of loose radioactive material for manufacture and commercial distribution. In addition to the requirements in subsection (e) of this section, a license to process loose radioactive material for manufacture and commercial distribution of radioactive material to persons authorized to possess such radioactive material in accordance with this chapter will be issued if the department approves the following information submitted by the applicant:

(1) radionuclides to be used, including the chemical and physical form and the maximum activity of each radionuclide;

(2) intended use of each radionuclide and the sealed sources or other products to be manufactured that includes:

(A) receipt of radioactive material;

(B) chemical or physical preparations;

(C) sealed source construction;

(D) final assembly or processing;

(E) quality assurance testing;

(F) quality control program;

(G) leak testing;

(H) American National Standards Institute (ANSI) testing procedures;

(I) transportation containers;

(J) shipping procedures; and

(K) disposition of unwanted or unused radioactive material;

(3) scaled drawings of the facility to include:

(A) air filtration;

(B) ventilation system;

(C) plumbing; and

(D) radioactive material handling systems and, when applicable, remote handling hot cells;

(4) details of the environmental monitoring program; and

(5) documentation of training as specified in subsection (jj)(1) of this section for all personnel who will be handling radioactive materials.

(u) Specific licenses for other manufacture and commercial distribution of radioactive material. In addition to the requirements in subsection (e) of this section, a license to manufacture and commercially distribute radioactive material to persons authorized to possess such radioactive material in accordance with these requirements will be issued if the department approves the following information submitted by the applicant:

(1) the radionuclides to be used, including the chemical and physical form and the maximum activity of each radionuclide;

(2) the intended use of each radionuclide and the sealed sources or other products to be manufactured that includes:

(A) receipt of radioactive material;

(B) chemical or physical preparations;

(C) sealed source construction;

(D) final assembly or processing;

(E) quality assurance testing;

(F) quality control program;

(G) leak testing;

(H) ANSI testing procedures;

(I) transportation containers;

(J) shipping procedures; and

(K) disposition of unwanted or unused radioactive material;

(3) scaled drawings of radioactive material handling systems; and

(4) documentation of training as specified in subsection (jj)(1) of this section for all personnel who will be handling radioactive material.

(v) Sealed source or device evaluation.

(1) Any manufacturer or initial distributor of a sealed source or device containing a sealed source may submit a request to the department for evaluation of radiation safety information about its product and for its registration.

(2) The request for review shall be sent to the department in accordance with §289.201(k) of this title and shall be submitted in duplicate accompanied by the appropriate fee specified in §289.204 of this title.

(3) In order to provide reasonable assurance that the radiation safety properties of the source or device are adequate to protect health and minimize danger to life and property, the request for evaluation of a sealed source or device shall include sufficient information about the:

(A) design;

(B) manufacture;

(C) prototype testing;

(D) quality control program;

(E) labeling;

(F) proposed uses; and

(G) leak testing.

(4) The request for evaluation of a device shall also include sufficient information about:

(A) installation;

(B) service and maintenance;

(C) operating and safety instructions; and

(D) its potential hazards.

(5) The department normally evaluates a sealed source or a device using radiation safety criteria in accepted industry standards. If these standards and criteria do not readily apply to a particular case, the department formulates reasonable standards and criteria with the help of the manufacturer or distributor. The department shall use criteria and standards sufficient to ensure that the radiation safety properties of the device or sealed source are adequate to protect health and minimize danger to life and property. Section 289.251(e)(1) - (3) of this title includes specific criteria that apply to certain exempt products and §289.251(f) of this title includes specific criteria applicable to certain generally licensed devices. This section includes specific provisions that apply to certain specifically licensed items.

(6) After completion of the evaluation, the department issues a sealed source and device (SS & D) certificate of registration to the person making the request. The SS & D certificate of registration acknowledges the availability of the submitted information for inclusion in an application for a specific license proposing use of the product, or concerning use under an exemption from licensing or general license as applicable for the category of SS & D certificate of registration.

(7) The person submitting the request for evaluation and SS & D certificate of registration of safety information about the product shall manufacture and distribute the product in accordance with:

(A) the statements and representations, including quality control program, contained in the request; and

(B) the provisions of the SS & D certificate of registration.

(8) Authority to manufacture or initially distribute a sealed source or device to specific licensees shall be provided in the license without the issuance of a SS & D certificate of registration in the following cases:

(A) calibration and reference sources shall contain no more than:

(i) 1 mCi (37 MBq) for beta and/or gamma emitting radionuclides; or

(ii) 10 µCi (0.37 MBq) for alpha emitting radionuclides; or

(B) the intended recipients are qualified by training and experience and have sufficient facilities and equipment to safely use and handle the requested quantity of radioactive material in any form in the case of unregistered sources or, for registered sealed sources contained in unregistered devices, are qualified by training and experience and have sufficient facilities and equipment to safely use and handle the requested quantity of radioactive material in unshielded form, as specified in their licenses; and

(i) the intended recipients are licensed in accordance with subsection (h) of this section, §289.256(o) of this title, or equivalent regulations of the NRC or any agreement state; or

(ii) the recipients are authorized for research and development; or

(iii) the sources and devices are to be built to the unique specifications of the particular recipient and contain no more than 20 Ci (740 GBq) of tritium or 200 mCi (7.4 GBq) of any other radionuclide.

(9) After the SS & D certificate of registration is issued, the department may conduct an additional review as it determines is necessary to ensure compliance with current regulatory standards. In conducting its review, the department will complete its evaluation in accordance with criteria specified in this section. The department may request such additional information as it considers necessary to conduct its review and the SS & D certificate of registration holder shall provide the information as requested.

(10) Inactivation of SS & D certificate(s) of registration.

(A) An SS & D certificate of registration holder who no longer manufactures or initially transfers any of the sealed source(s) or device(s) covered by a particular SS & D certificate of registration issued by the department shall request inactivation of the SS & D certificate of registration. Such a request shall be made to the department by an appropriate method in accordance with §289.201(k) of this title and shall normally be made no later than 2 years after initial distribution of all of the source(s) or device(s) covered by the SS & D certificate of registration has ceased. However, if the SS & D certificate of registration holder determines that an initial transfer was in fact the last initial transfer more than 2 years after that transfer, the SS & D certificate of registration holder shall request inactivation of the SS & D certificate of registration within 90 days of this determination and briefly describe the circumstances of the delay.

(B) If a distribution license is to be terminated in accordance with subsection (y) of this section, the licensee shall request inactivation of its SS & D certificate of registration(s) associated with that distribution license before the department will terminate the license. Such a request for inactivation of the SS & D certificate(s) of registration shall indicate that the license is being terminated and include the associated specific license number.

(C) A specific license to manufacture or initially transfer a source or device covered only by an inactivated SS & D certificate of registration no longer authorizes the licensee to initially transfer such sources or devices for use. Servicing of devices shall be in accordance with any conditions in the SS & D certificate of registration, including in the case of an inactive SS & D certificate of registration.

(w) Issuance of specific licenses.

(1) When the department determines that an application meets the requirements of the Act and the rules of the department, the department will issue a specific license authorizing the proposed activity in such form and containing the conditions and limitations as the department deems appropriate or necessary.

(2) The department may incorporate in any license at the time of issuance, or thereafter by amendment, additional requirements and conditions with respect to the licensee's receipt, possession, use, and transfer of radioactive material subject to this section as the department deems appropriate or necessary in order to:

(A) minimize danger to occupational and public health and safety and the environment;

(B) require reports and the keeping of records, and to provide for inspections of activities in accordance with the license as may be appropriate or necessary; and

(C) prevent loss or theft of radioactive material subject to this chapter.

(3) The department may request, and the licensee shall provide, additional information after the license has been issued to enable the department to determine whether the license should be modified in accordance with subsection (dd) of this section.

(x) Specific terms and conditions of licenses.

(1) Each license issued in accordance with this section shall be subject to the applicable provisions of the Act and to applicable rules, now or hereafter in effect, and orders of the department.

(2) No license issued or granted in accordance with this section and no right to possess or utilize radioactive material granted by any license issued in accordance with this section shall be transferred, assigned, or in any manner disposed of, either voluntarily or involuntarily, directly or indirectly, through transfer of control of any license to any person unless the department shall, after securing full information, find that the transfer is in accordance with the provisions of the Act and to applicable rules, now or hereafter in effect, and orders of the department, and shall give its consent in writing.

(3) An application for transfer of license shall include:

(A) the identity, technical and financial qualifications of the proposed transferee; and

(B) financial assurance for decommissioning information required by subsection (gg) of this section.

(4) Each person licensed by the department in accordance with this section shall confine use and possession of the radioactive material licensed to the locations and purposes authorized in the license. Radioactive material shall not be used or stored in residential locations unless specifically authorized by the department.

(5) The licensee shall notify the department, in writing within 15 calendar days, of any of the following changes:

(A) name;

(B) mailing address; or

(C) RSO.

(6) Each licensee shall notify the department, in writing, immediately following the filing of a voluntary or involuntary petition for bankruptcy by the licensee or its parent company, if the parent company is involved in the bankruptcy.

(7) The notification in paragraph (6) of this subsection shall include:

(A) the bankruptcy court in which the petition for bankruptcy was filed; and

(B) the date of the filing of the petition.

(8) A copy of the petition for bankruptcy shall be submitted to the department along with the written notification.

(9) In making a determination whether to grant, deny, amend, renew, revoke, suspend, or restrict a license, the department may consider the technical competence and compliance history of an applicant or holder of a license. After an opportunity for a hearing, the department may deny an application for a license, an amendment to a license, or renewal of a license if the applicant's compliance history reveals that three or more department actions have been issued against the applicant, within the previous six years, that assess administrative or civil penalties against the applicant, or that revoke or suspend the license.

(10) Each licensee preparing technetium-99m radiopharmaceuticals from molybdenum-99/technetium-99m generators or rubidium-82 from strontium-82/rubidium-82 generators shall test the generator eluates for molybdenum-99 breakthrough or strontium-82 and strontium-85 contamination, respectively, in accordance with §289.256 of this title.

(A) The licensee shall make, maintain, and retain a record of the results of each test for inspection by the department in accordance with subsection (mm) of this section.

(B) The licensee shall report the results of any test that exceeds the permissible concentration listed in §289.256(ii) of this title at the time of generator elution, in accordance with §289.256(xxx) of this title.

(11) Licensees shall not hold radioactive waste, sources, or devices not authorized for disposal by decay in storage, and that are not in use for longer than 24 months following the last principal activity use. Sources and devices kept in standby for future use may be excluded from the 24-month time limit if the department approves a plan for future use. A plan for an alternative disposal timeframe may be submitted by the licensee if the 24-month time limit cannot be met. Licensees shall submit plans to the department at least 30 days before the end of the 24 months of nonuse.

(y) Expiration and termination of licenses and decommissioning of sites and separate buildings or outdoor areas.

(1) Except as provided in paragraph (2) of this subsection and subsection (z)(2) of this section, each specific license expires at the end of the day, in the month and year stated in the license.

(2) Expiration of the specific license does not relieve the licensee of the requirements of this chapter.

(3) All license provisions continue in effect beyond the expiration date, with respect to possession of radioactive material until the department notifies the former licensee in writing that the provisions of the license are no longer binding. During this time, the former licensee shall:

(A) be limited to actions involving radioactive material that are related to decommissioning; and

(B) continue to control entry to restricted areas until the location(s) is suitable for release for unrestricted use in accordance with the requirements in §289.202(ddd) of this title.

(4) Within 60 days of the occurrence of any of the following, each licensee shall provide notification to the department in writing and either begin decommissioning a site, or any separate building or outdoor area that contains residual radioactivity, so that the building and outdoor area is suitable for release in accordance with §289.202(eee) of this title, or submit within 12 months of notification a decommissioning plan, if required by paragraph (7) of this subsection, and begin decommissioning upon approval of that plan if:

(A) the license has expired or has been revoked in accordance with this subsection or subsection (dd) of this section;

(B) the licensee has decided to permanently cease principal activities, as defined in §289.201(b) of this title, at the entire site or in any separate building or outdoor area that contains residual radioactivity such that the building or outdoor area is unsuitable for release in accordance with department requirements;

(C) no principal activities at an entire site as specified in the license have been conducted for a period of 24 months; or

(D) no principal activities have been conducted for a period of 24 months in any separate building or outdoor area that contains residual radioactivity such that the building or outdoor area is unsuitable for release in accordance with §289.202(eee) of this title.

(5) Coincident with the notification required by paragraph (4) of this subsection, the licensee shall maintain in effect all decommissioning financial assurances established by the licensee in accordance with subsection (gg) of this section in conjunction with a license issuance or renewal or as required by this section. The amount of the financial assurance shall be increased, or may be decreased, as appropriate, with department approval, to cover the detailed cost estimate for decommissioning established in accordance with paragraph (10)(E) of this subsection.

(A) Any licensee who has not provided financial assurance to cover the detailed cost estimate submitted with the decommissioning plan shall do so in accordance with subsection (gg) of this section.

(B) Following approval of the decommissioning plan, a licensee may reduce the amount of the financial assurance as decommissioning proceeds and radiological contamination is reduced at the site, with the approval of the department.

(6) The department may grant a request to delay or postpone initiation of the decommissioning process if the department determines that such relief is not detrimental to the occupational and public health and safety and is otherwise in the public interest. The request shall be submitted no later than 30 days before notification in accordance with paragraph (4) of this subsection. The schedule for decommissioning set forth in paragraph (4) of this subsection may not commence until the department has made a determination on the request.

(7) A decommissioning plan shall be submitted if required by license condition or if the procedures and activities necessary to carry out decommissioning of the site or separate building or outdoor area have not been previously approved by the department and these procedures could increase potential health and safety impacts to workers or to the public, such as in any of the following cases:

(A) procedures would involve techniques not applied routinely during cleanup or maintenance operations;

(B) workers would be entering areas not normally occupied where surface contamination and radiation levels are significantly higher than routinely encountered during operation;

(C) procedures could result in significantly greater airborne concentrations of radioactive materials than are present during operation; or

(D) procedures could result in significantly greater releases of radioactive material to the environment than those associated with operation.

(8) The department may approve an alternate schedule for submittal of a decommissioning plan required in accordance with paragraph (4) of this subsection if the department determines that the alternative schedule is necessary to the effective conduct of decommissioning operations and presents no undue risk from radiation to the occupational and public health and safety and is otherwise in the public interest.

(9) The procedures listed in paragraph (7) of this subsection may not be carried out before approval of the decommissioning plan.

(10) The proposed decommissioning plan for the site or separate building or outdoor area shall include the following:

(A) a description of the conditions of the site or separate building or outdoor area sufficient to evaluate the acceptability of the plan;

(B) a description of planned decommissioning activities;

(C) a description of methods used to ensure protection of workers and the environment against radiation hazards during decommissioning;

(D) a description of the planned final radiation survey;

(E) an updated detailed cost estimate for decommissioning, comparison of that estimate with present funds set aside for decommissioning, and a plan for assuring the availability of adequate funds for completion of decommissioning; and

(F) for decommissioning plans calling for completion of decommissioning later than 24 months after plan approval, a justification for the delay based on the criteria in paragraph (15) of this subsection.

(11) The proposed decommissioning plan will be approved by the department if the information in the plan demonstrates that the decommissioning will be completed as soon as practicable and that the health and safety of workers and the public will be adequately protected.

(12) Except as provided in paragraph (14) of this subsection, licensees shall complete decommissioning of the site or separate building or outdoor areas as soon as practicable but no later than 24 months following the initiation of decommissioning.

(13) Except as provided in paragraph (14) of this subsection, when decommissioning involves the entire site, the licensee shall request license termination as soon as practicable but no later than 24 months following the initiation of decommissioning.

(14) The department may approve a request for an alternate schedule for completion of decommissioning of the site or separate building or outdoor area, and license termination if appropriate, if

the department determines that the alternative is warranted by consideration of the following:

(A) whether it is technically feasible to complete decommissioning within the allotted 24-month period;

(B) whether sufficient waste disposal capacity is available to allow completion of decommissioning within the allotted 24-month period;

(C) whether a significant volume reduction in wastes requiring disposal will be achieved by allowing short-lived radionuclides to decay;

(D) whether a significant reduction in radiation exposure to workers can be achieved by allowing short-lived radionuclides to decay; and

(E) other site-specific factors that the department may consider appropriate on a case-by-case basis, such as the regulatory requirements of other government agencies, lawsuits, groundwater treatment activities, monitored natural ground-water restoration, actions that could result in more environmental harm than deferred cleanup, and other factors beyond the control of the licensee.

(15) As the final step in decommissioning, the licensee shall do the following:

(A) certify the disposition of all licensed material, including accumulated wastes; and

(B) conduct a radiation survey of the premises where the licensed activities were carried out and submit a report of the results of this survey unless the licensee demonstrates that the premises are suitable for release in accordance with the radiological requirements for license termination specified in §289.202(ddd) of this title. The licensee shall do the following, as appropriate:

(i) report the following levels:

(I) gamma radiation in units of microroentgen per hour (μR/hr) (millisieverts per hour (mSv/hr)) at 1 meter (m) from surfaces;

(II) radioactivity, including alpha and beta, in units of disintegrations per minute (dpm) or microcuries (μCi) (megabecquerels (MBq)) per 100 square centimeters (cm^2) for surfaces;

(III) μCi (MBq) per milliliter for water; and

(IV) picocuries (pCi) (becquerels (Bq)) per gram (g) for solids such as soils or concrete; and

(ii) specify the manufacturer's name and model and serial number of survey instrument(s) used and certify that each instrument is properly calibrated in accordance with §289.202(p) of this title and tested.

(16) The department will provide written notification to specific licensees, including former licensees with provisions continued in effect beyond the expiration date in accordance with paragraph (3) of this subsection, that the provisions of the license are no longer binding. The department will provide such notification when the department determines that:

(A) radioactive material has been properly disposed;

(B) reasonable effort has been made to eliminate residual radioactive contamination, if present;

(C) a radiation survey has been performed that demonstrates that the premises are suitable for release in accordance with the radiological requirements for license termination specified in §289.202(ddd) of this title, or other information submitted by the licensee is sufficient to demonstrate that the premises are suitable for release in accordance with the radiological requirements for license termination specified in §289.202(ddd) of this title; and

(D) any outstanding fees in accordance with §289.204 of this title are paid and any outstanding notices of violations of this chapter or of license conditions are resolved.

(17) Each licensee shall submit to the department all records required by §289.202(nn)(3) of this title before the license is terminated.

(z) Renewal of licenses.

(1) Requests for renewal of specific licenses shall be filed in accordance with subsection (d)(1) - (4) and (6) - (8) of this section. In any application for renewal, the applicant may incorporate drawings by clear and specific reference (for example, title, date and unique number of drawing), if no modifications have been made since previously submitted.

(2) In any case in which a licensee, not less than 30 days before expiration of an existing license, has filed a request in proper form for renewal or for a new license authorizing the same activities, such existing license shall not expire until the request has been finally determined by the department. In any case in which a licensee, not more than 90 days after the expiration of an existing license, has filed a request in proper form for renewal or for a new license authorizing the same activities, the department may reinstate the license and extend the expiration until the request has been finally determined by the department. The requirements in this subsection are subject to the provisions of Texas Government Code, §2001.054.

(3) An application for technical renewal of a license will be approved if the department determines that the requirements of subsection (e) of this section have been satisfied.

(aa) Amendment of licenses at request of licensee.

(1) Requests for amendment of a license shall be filed in accordance with subsection (d)(1) - (4) of this section shall be signed by management or the RSO, and shall specify the respects in which the licensee desires a license to be amended and the grounds for the amendment.

(2) Requests for amendments to delete a subsite from a license shall be filed in accordance with subsections (d)(1) and (2) and (y)(13) and (15) of this section.

(bb) Department action on requests to renew or amend. In considering a request by a licensee to renew or amend a license, the department will apply the criteria in subsection (e) of this section as applicable.

(cc) Transfer of material.

(1) No licensee shall transfer radioactive material except as authorized in accordance with this chapter. This subsection does not include transfer for commercial distribution.

(2) Except as otherwise provided in a license and subject to the provisions of paragraphs (3) and (4) of this subsection, any licensee may transfer radioactive material:

(A) to the department (A licensee may transfer material to the department only after receiving prior approval from the department);

(B) to the United States Department of Energy (DOE);

(C) to any person exempt from this section to the extent permitted in accordance with such exemption;

(D) to any person authorized to receive such material in accordance with the terms of a general license or its equivalent, or a specific license or equivalent licensing document, issued by the department, the NRC, or any agreement state, or to any person otherwise authorized to receive such material by the federal government or any agency of the federal government, the department, or any agreement state; or

(E) as otherwise authorized by the department in writing.

(3) Before transferring radioactive material to a specific licensee of the department, the NRC, or any agreement state, or to a general licensee who is required to register with the department, the NRC, or any agreement state before receipt of the radioactive material, the licensee transferring the material shall verify that the transferee's license authorizes the receipt of the type, form, and quantity of radioactive material to be transferred.

(4) The following methods for the verification required by paragraph (3) of this subsection are acceptable.

(A) The transferor may possess and have read a current copy of the transferee's specific license.

(B) When a current copy of the transferee's specific license described in subparagraph (A) of this paragraph is not readily available or when a transferor desires to verify that information received is correct or up-to-date, the transferor may obtain and record confirmation from the department, the NRC, or any agreement state that the transferee is licensed to receive the radioactive material.

(5) Preparation for shipment and transport of radioactive material shall be in accordance with the provisions of subsection (ff) of this section.

(6) Requirements for transfer of small quantities of source material.

(A) An application for a specific license to initially transfer source material for use in accordance with §289.251(f)(3) of this title; Title 10, CFR, §40.22; or equivalent regulations of any agreement state, will be approved if:

(i) the applicant satisfies the general requirements specified in subsection (e) of this section; and

(ii) the applicant submits adequate information on, and the department approves the methods to be used for quality control, labeling, and providing safety instructions to recipients.

(B) Quality control, labeling, safety instructions, and records and reports. Each person licensed under subparagraph (A) of this paragraph shall:

(i) label the immediate container of each quantity of source material with the type of source material and quantity of material and the words, "radioactive material."

(ii) ensure that the quantities and concentrations of source material are as labeled and indicated in any transfer records.

(iii) provide the information specified in this clause to each person to whom source material is transferred for use under §289.251(f)(3) of this title; Title 10, CFR, §40.22; or equivalent regulations of any agreement state. This information must be transferred before the source material is transferred for the first time in each calendar year to the particular recipient. The required information includes:

(I) a copy, as applicable, of §289.251(f)(3) of this title; Title 10, CFR, §40.22; or the equivalent agreement state regulation that applies; and of this subsection; Title 10, CFR, §40.51; or the equivalent agreement state regulations that apply; and

(II) appropriate radiation safety precautions and instructions relating to handling, use, storage, and disposal of the material.

(iv) report transfers as follows:

(I) File a report with the department and the Director, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555. The report shall include the following information:

(-a-) the name, address, and license number of the person who transferred the source material;

(-b-) for each general licensee under §289.251(f)(3) of this title; Title 10, CFR, §40.22; or equivalent regulations of any agreement state to whom greater than 50 grams (0.11 lb) of source material has been transferred in a single calendar quarter, the name and address of the general licensee to whom source material is distributed; a responsible agent, by name and/or position and phone number, of the general licensee to whom the material was sent; and the type, physical form, and quantity of source material transferred; and

(-c-) the total quantity of each type and physical form of source material transferred in the reporting period to all such generally licensed recipients.

(II) File a report with each responsible agreement state agency that identifies all persons, operating under §289.251(f)(3) of this title; Title 10, CFR, §40.22, or equivalent regulations of any agreement state to whom greater than 50 grams (0.11 lb) of source material has been transferred within a single calendar quarter. The report shall include the following information specific to those transfers made to the agreement state being reported to:

(-a-) the name, address, and license number of the person who transferred the source material; and

(-b-) the name and address of the general licensee to whom source material was distributed; a responsible agent, by name and/or position and phone number, of the general licensee to whom the material was sent; and the type, physical form, and quantity of source material transferred; and

(-c-) the total quantity of each type and physical form of source material transferred in the reporting period to all such generally licensed recipients within the agreement state.

(III) The following are to be submitted to the department by January 31 of each year:

(-a-) each report required by subclauses (I) and (II) of this clause covering all transfers for the previous calendar year;

(-b-) if no transfers were made during the current period to persons generally licensed in accordance with §289.251(f)(3) of this title; Title 10, CFR, §40.22; or equivalent regulations of any agreement state, a report to the department indicating so; and

(-c-) if no transfers have been made to general licensees in a particular agreement state during the reporting period, this information shall be reported to the responsible agreement state upon request of that agency.

(C) Records.

(i) The licensee shall maintain all information that supports the reports required by this paragraph concerning each transfer to a general licensee for inspection by the department in accordance with subsection (mm) of this section.

(ii) The licensee who transferred the material shall retain each record of transfer of radioactive material until the department terminates each license that authorizes the activity that is subject to the recordkeeping requirement.

(dd) Modification, suspension, and revocation of licenses.

(1) The terms and conditions of all licenses shall be subject to revision or modification. A license may be modified, suspended or revoked by reason of amendments to the Act, by reason of rules in this chapter, or orders issued by the department.

(2) Any license may be revoked, suspended, or modified, in whole or in part, for any of the following:

(A) any material false statement in the application or any statement of fact required under provisions of the Act;

(B) conditions revealed by such application or statement of fact or any report, record, or inspection, or other means that would warrant the department to refuse to grant a license on an original application;

(C) violation of, or failure to observe any of the terms and conditions of the Act, this chapter, the license, or order of the department; or

(D) existing conditions that constitute a substantial threat to the public health or safety or the environment.

(3) Each specific license revoked by the department ends at the end of the day on the date of the department's final determination to revoke the license, or on the revocation date stated in the determination, or as otherwise provided by the department order.

(4) Except in cases in which the occupational and public health or safety requires otherwise, no license shall be suspended or revoked unless, before the institution of proceedings therefore, facts or conduct that may warrant such action shall have been called to the attention of the licensee in writing and the licensee shall have been afforded an opportunity to demonstrate compliance with all lawful requirements.

(ee) Reciprocal recognition of licenses.

(1) Subject to this section, any person who holds a specific license from the NRC or any agreement state, and issued by the agency having jurisdiction where the licensee maintains an office for directing the licensed activity and at which radiation safety records are normally maintained, is granted a general license to conduct the activities authorized in such licensing document within the State of Texas provided that:

(A) the licensing document does not limit the activity authorized by such document to specified installations or locations;

(B) the out-of-state licensee notifies the department in writing at least three working days before engaging in such activity. If, for a specific case, the three-working-day period would impose an undue hardship on the out-of-state licensee, the licensee may, upon application to the department, obtain permission to proceed sooner. The department may waive the requirement for filing additional written notifications during the remainder of the calendar year following the receipt of the initial notification from a person engaging in activities in accordance with the general license provided in this subsection. Such notification shall include:

(i) the exact location, start date, duration, and type of activity to be conducted;

(ii) the identification of the radioactive material to be used;

(iii) the name(s) and in-state address(es) of the individual(s) performing the activity;

(iv) a copy of the applicant's pertinent license;

(v) a copy of the licensee's operating, safety, and emergency procedures;

(vi) a fee as specified in §289.204 of this title; and

(vii) a copy of the completed RC Form 252-1 (Business Information Form);

(C) the out-of-state licensee complies with all applicable rules of the department and with all the terms and conditions of the licensee's licensing document, except any such terms and conditions that may be inconsistent with applicable rules of the department;

(D) the out-of-state licensee supplies such other information as the department may request;

(E) the out-of-state licensee shall not transfer or dispose of radioactive material possessed or used in accordance with the general license provided in this subsection except by transfer to a person:

(i) specifically licensed by the department, the NRC, or any agreement state to receive such material, or

(ii) exempt from the requirements for a license for such material in accordance with §289.251(e)(1) of this title; and

(F) the out-of-state licensee shall have the following documents in their possession at all times when conducting work in Texas, and make them available for department review upon request:

(i) a copy of the department letter granting the licensee reciprocal recognition of their out-of-state license;

(ii) a copy of the licensee's operating and emergency procedures;

(iii) a copy of the licensee's radioactive material license;

(iv) a copy of all applicable sections of 25 TAC, Chapter 289; and

(v) a copy of the completed RC Form 252-3 notifying the department of the licensee's intent to work in Texas.

(2) In addition to the provisions of paragraph (1) of this subsection, any person who holds a specific license issued by the NRC or any agreement state authorizing the holder to manufacture, transfer, install, or service the device described in §289.251(f)(4)(H) of this title or in Title 10, CFR, §150.20, within areas subject to the jurisdiction of the licensing body, is granted a general license to install, transfer, demonstrate, or service the device in the State of Texas provided that:

(A) the person files a report with the department within 30 days after the end of each calendar quarter in which any device is transferred to or installed in the State of Texas. Each report shall identify by name and address, each general licensee to whom the device is transferred, the type of device transferred by manufacturer's name, model and serial number of the device, and serial number of the sealed source, and the quantity and type of radioactive material contained in the device;

(B) the device has been manufactured, labeled, installed, and serviced in accordance with applicable provisions of the specific license issued to the person by the NRC or any agreement state;

(C) the person assures that any labels required to be affixed to the device in accordance with requirements of the authority that

licensed manufacture of the device bear a statement that "Removal of this label is prohibited"; and

(D) the holder of the specific license furnishes to each general licensee to whom the holder of the specific license transfers the device, or on whose premises the holder of the specific license installs the device, a copy of the general license contained in §289.251(f)(4)(H) of this title.

(3) The department may withdraw, limit, or qualify its acceptance of any specific license or equivalent licensing document issued by another agency, or any product distributed in accordance with the licensing document, upon determining that the action is necessary in order to prevent undue hazard to occupational and public health and safety and the environment.

(ff) Preparation of radioactive material for transport. Requirements for the preparation of radioactive material for transport are specified in §289.257 of this title.

(gg) Financial assurance and record keeping for decommissioning.

(1) The applicant for a specific license or renewal of a specific license, or holder of a specific license, authorizing the possession and use of radioactive material shall submit and receive written authorization for a decommissioning funding plan as described in paragraph (4) of this subsection in an amount sufficient to allow the department to engage a third party to decommission the site(s) specified on the license for the following situations:

(A) when unsealed radioactive material requested or authorized on the license, with a half-life greater than 120 days, is in quantities exceeding 10^5 times the applicable quantities set forth in subsection (jj)(2) of this section;

(B) when a combination of the unsealed radionuclides requested or authorized on the license, with a half-life greater than 120 days, results in the R of the radionuclides divided by 10^5 being greater than 1 (unity rule), where R is defined as the sum of the ratios of the quantity of each radionuclide to the applicable value in subsection (jj)(2) of this section;

(C) when sealed sources or plated foils requested or authorized on the license, with a half-life greater than 120 days and in quantities exceeding 10^{12} times the applicable quantities set forth in subsection (jj)(2) of this section (or when a combination of isotopes is involved if R, as defined in this subsection, divided by 10^{12} is greater than 1), shall submit a decommissioning funding plan as described in paragraph (4) of this subsection; or

(D) when radioactive material requested or authorized on the license is in quantities more than 100 mCi (3.7 gigabecquerels (GBq)) of source material in a readily dispersible form.

(2) The applicant for a specific license or renewal of a specific license or the holder of a specific license authorizing possession and use of radioactive material as specified in paragraph (3) of this subsection shall either:

(A) submit a decommissioning funding plan as described in paragraph (4) of this subsection in an amount sufficient to allow the department to engage a third party to decommission the site(s) specified on the license; or

(B) submit financial assurance for decommissioning in the amount in accordance with paragraph (3) of this subsection using one of the methods described in paragraph (6) of this subsection in an amount sufficient to allow the department to engage a third party to decommission the site(s) specified on the license.

(3) The required amount of financial assurance for decommissioning is determined by the quantity of material authorized by the license and is determined as follows:

(A) $1,125,000 for quantities of material greater than 10^4 but less than or equal to 10^5 times the applicable quantities in subsection (jj)(2) of this section in unsealed form. (For a combination of radionuclides, if R, as defined in paragraph (1) of this subsection, divided by 10^4 is greater than 1 but R divided by 10^5 is less than or equal to 1);

(B) $225,000 for quantities of material greater than 10^3 but less than or equal to 10^4 times the applicable quantities in subsection (jj)(2) of this section in unsealed form. (For a combination of radionuclides, if R, as defined in paragraph (1) of this subsection, divided by 10^3 is greater than 1 but R divided by 10^4 if less than or equal to 1);

(C) $113,000 for quantities of material greater than 10^{10} but less than or equal to 10^{12} times the applicable quantities in subsection (jj)(2) of this section in sealed sources or plated foils. (For a combination of radionuclides, if R, as defined in paragraph (1) of this subsection, divided by 10^{10} is greater than 1, but R divided by 10^{12} is less than or equal to 1); or

(D) $225,000 for quantities of source material greater than 10 mCi (0.37 GBq) but less than or equal to 100 mCi (3.7 GBq) in a readily dispersible form.

(4) Each decommissioning funding plan shall:

(A) be submitted for review and approval and shall contain the following:

(i) a detailed cost estimate for decommissioning in an amount reflecting:

(I) the cost of an independent contractor to perform all decommissioning activities;

(II) the cost of meeting the criteria of §289.202(ddd)(2) of this title for unrestricted use, provided that, if the applicant or licensee can demonstrate its ability to meet the provisions of §289.202(ddd)(3) of this title, the cost estimate may be based on meeting the criteria of §289.202(ddd)(3) of this title;

(III) the volume of onsite subsurface material containing residual radioactivity that will require remediation to meet the criteria for license termination; and

(IV) an adequate contingency factor.

(ii) identification of and justification for using the key assumptions contained in the detailed cost estimate;

(iii) a description of the method of assuring funds for decommissioning from paragraph (6) of this subsection, including means for adjusting cost estimates and associated funding levels periodically over the life of the facility;

(iv) a certification by the licensee that financial assurance for decommissioning has been provided in the amount of the cost estimate for decommissioning; and

(v) a signed original of the financial instrument obtained to satisfy the requirements of paragraph (6) of this subsection (unless a previously submitted and accepted financial instrument continues to cover the cost estimate for decommissioning); and

(B) at the time of license renewal and at intervals not to exceed three years, the decommissioning funding plan, be resubmitted with adjustments as necessary to account for changes in costs and the extent of contamination. If the amount of financial assurance will be

adjusted downward, this cannot be done until the updated decommissioning funding plan is approved. The decommissioning funding plan shall update the information submitted with the original or prior approved plan, and shall specifically consider the effect of the following events on decommissioning costs:

(i) spills of radioactive material producing additional residual radioactivity in onsite subsurface material;

(ii) waste inventory increasing above the amount previously estimated;

(iii) waste disposal costs increasing above the amount previously estimated;

(iv) facility modifications;

(v) changes in authorized possession limits;

(vi) actual remediation costs that exceed the previous cost estimate;

(vii) onsite disposal; and

(viii) use of a settling pond.

(5) Financial assurance in conjunction with a decommissioning funding plan shall be submitted as follows:

(A) for an applicant for a specific license, financial assurance as described in paragraph (6) of this subsection, may be obtained after the application has been approved and the license issued by the department, but shall be submitted to the department before receipt of licensed material; or

(B) for an applicant for renewal of a specific license, or a holder of a specific license, a signed original of the financial instrument obtained to satisfy the requirements of paragraph (6) of this subsection shall be submitted with the decommissioning funding plan.

(6) Financial assurance for decommissioning shall be provided by one or more of the following methods. The financial instrument obtained shall be continuous for the term of the license in a form prescribed by the department. The applicant or licensee shall obtain written approval of the financial instrument or any amendment to it from the department.

(A) Prepayment. Prepayment is the deposit into an account segregated from licensee assets and outside the licensee's administrative control of cash or liquid assets such that the amount of funds would be sufficient to pay decommissioning costs. Prepayment may be in the form of a trust, escrow account, government fund, certificate of deposit, or deposit of government securities.

(B) A surety method, insurance, or other guarantee method. These methods guarantee that decommissioning costs will be paid. A surety method may be in the form of a surety bond, letter of credit, or line of credit. A parent company guarantee of funds for decommissioning costs based on a financial test may be used if the guarantee and test are as contained in subsection (jj)(3) of this section. A parent company guarantee may not be used in combination with other financial methods to satisfy the requirements of this section. For commercial corporations that issue bonds, a guarantee of funds by the applicant or licensee for decommissioning costs based on a financial test may be used if the guarantee and test are as contained in subsection (jj)(4) of this section. For commercial companies that do not issue bonds, a guarantee of funds by the applicant or licensee for decommissioning costs may be used if the guarantee and test are as contained in subsection (jj)(5) of this section. For nonprofit entities, such as colleges, universities, and nonprofit hospitals, a guarantee of funds by the applicant or licensee may be used if the guarantee and test are as contained in subsection (jj)(6) of this section. A guarantee by the applicant or licensee may not be used in combination with any other financial methods to satisfy the requirements of this section or in any situation where the applicant or licensee has a parent company holding majority control of the voting stock of the company. Any surety method or insurance used to provide financial assurance for decommissioning shall contain the following conditions.

(i) The surety method or insurance shall be open-ended or, if written for a specified term, such as five years, shall be renewed automatically unless 90 days or more before the renewal date, the issuer notifies the department, the beneficiary, and the licensee of its intention not to renew. The surety method or insurance shall also provide that the full face amount be paid to the beneficiary automatically before the expiration without proof of forfeiture if the licensee fails to provide a replacement acceptable to the department within 30 days after receipt of notification of cancellation.

(ii) The surety method or insurance shall be payable in the State of Texas to the Radiation and Perpetual Care Account.

(iii) The surety method or insurance shall remain in effect until the department has terminated the license.

(C) An external sinking fund in which deposits are made at least annually, coupled with a surety method or insurance, the value of which may decrease by the amount being accumulated in the sinking fund. An external sinking fund is a fund established and maintained by setting aside funds periodically in an account segregated from licensee assets and outside the licensee's administrative control in which the total amount of funds would be sufficient to pay decommissioning costs at the time termination of operation is expected. An external sinking fund may be in the form of a trust, escrow account, government fund, certificate of deposit, or deposit of government securities. The surety or insurance provisions shall be in accordance with subparagraph (B) of this paragraph.

(D) In the case of federal, state, or local government licensees, a statement of intent containing a cost estimate for decommissioning or an amount in accordance with paragraph (3) of this subsection, and indicating that funds for decommissioning will be obtained when necessary.

(E) When a governmental entity is assuming custody and ownership of a site, there shall be an arrangement that is deemed acceptable by such governmental entity.

(7) Each person licensed in accordance with this section shall make, maintain, and retain records of information important to the safe and effective decommissioning of the facility in an identified location for inspection by the department in accordance with subsection (mm) of this section. If records of relevant information are kept for other purposes, reference to these records and their locations may be used. Information the department considers important to decommissioning consists of the following:

(A) records of spills or other unusual occurrences involving the spread of contamination in and around the facility, equipment, or site. These records may be limited to instances when contamination remains after any cleanup procedures or when there is reasonable likelihood that contaminants may have spread to inaccessible areas, as in the case of possible seepage into porous materials such as concrete. These records shall include any known information on identification of involved nuclides, quantities, forms, and concentrations;

(B) as-built drawings and modifications of structures and equipment in restricted areas where radioactive materials are used or stored, and of locations of possible inaccessible contamination such as buried pipes that may be subject to contamination. If required draw-

ings are referenced, each relevant document need not be indexed individually. If drawings are not available, the licensee shall substitute appropriate records of available information concerning these areas and locations;

(C) except for areas containing only sealed sources (provided the sealed sources have not leaked or no contamination remains after any leak) or byproduct materials having only half-lives of less than 65 days, a list contained in a single document and updated every two years, of the following:

(i) all areas designated and formerly designated as restricted areas as defined in §289.201(b) of this title;

(ii) all areas outside of restricted areas that require documentation under subparagraph (A) of this paragraph;

(iii) all areas outside of restricted areas that contain material such that, if the license expired, the licensee would be required to either decontaminate the area to meet the criteria for decommissioning in §289.202(ddd) of this title, or meet the requirements for approval of disposal under §289.202(ff) - (kk) of this title; and

(D) records of the cost estimate performed for the decommissioning funding plan or of the amount certified for decommissioning, and records of the funding method used for assuring funds.

(8) Any licensee who has submitted an application before January 1, 1995, for renewal of license in accordance with this section shall provide financial assurance for decommissioning in accordance with paragraphs (1) and (2) of this subsection.

(hh) Emergency plan for responding to a release.

(1) A new or renewal application for each specific license to possess radioactive materials in unsealed form, on foils or plated sources, or sealed in glass in excess of the quantities in subsection (jj)(7) of this section shall contain either:

(A) an evaluation showing that the maximum dose to a person offsite due to a release of radioactive material would not exceed 1 rem effective dose equivalent or 5 rems to the thyroid; or

(B) an emergency plan for responding to a release of radioactive material.

(2) One or more of the following factors may be used to support an evaluation submitted in accordance with paragraph (1)(A) of this subsection:

(A) the radioactive material is physically separated so that only a portion could be involved in an accident;

(B) all or part of the radioactive material is not subject to release during an accident because of the way it is stored or packaged;

(C) the release fraction in the respirable size range would be lower than the release fraction in subsection (jj)(7) of this section due to the chemical or physical form of the material;

(D) the solubility of the radioactive material would reduce the dose received;

(E) facility design or engineered safety features in the facility would cause the release fraction to be lower than that in subsection (jj)(7) of this section;

(F) operating restrictions or procedures would prevent a release fraction as large as that in subsection (jj)(7) of this section; or

(G) other factors appropriate for the specific facility.

(3) An emergency plan for responding to a release of radioactive material submitted in accordance with paragraph (1)(B) of this subsection shall include the following information.

(A) Facility description. A brief description of the licensee's facility and area near the site.

(B) Types of accidents. An identification of each type of radioactive materials accident for which protective actions may be needed.

(C) Classification of accidents. A classification system for classifying accidents as alerts or site area emergencies.

(D) Detection of accidents. Identification of the means of detecting each type of accident in a timely manner.

(E) Mitigation of consequences. A brief description of the means and equipment for mitigating the consequences of each type of accident, including those provided to protect workers onsite, and a description of the program for maintaining the equipment.

(F) Assessment of releases. A brief description of the methods and equipment to assess releases of radioactive materials.

(G) Responsibilities. A brief description of the responsibilities of licensee personnel should an accident occur, including identification of personnel responsible for promptly notifying offsite response organizations and the department; also, responsibilities for developing, maintaining, and updating the plan.

(H) Notification and coordination. A commitment to and a brief description of the means to promptly notify offsite response organizations and request offsite assistance, including medical assistance for the treatment of contaminated injured onsite workers when appropriate. A control point shall be established. The notification and coordination shall be planned so that unavailability of some personnel, parts of the facility, and some equipment will not prevent the notification and coordination. The licensee shall also commit to notify the department immediately after notification of the appropriate offsite response organizations and not later than one hour after the licensee declares an emergency. These reporting requirements do not supersede or release licensees from complying with the requirements in accordance with the Emergency Planning and Community Right-to-Know-Act of 1986, Title III, Publication L. 99-499 or other state or federal reporting requirements.

(I) Information to be communicated. A brief description of the types of information on facility status, radioactive releases, and recommended protective actions, if necessary, to be given to offsite response organizations and to the department.

(J) Training. A brief description of the frequency, performance objectives, and plans for the training that the licensee will provide workers on how to respond to an emergency, including any special instructions and orientation tours the licensee would offer to fire, police, medical, and other emergency personnel. The training shall familiarize personnel with site-specific emergency procedures. Also, the training shall thoroughly prepare site personnel for their responsibilities in the event of accident scenarios postulated as most probable for the specific site, including the use of team training for such scenarios.

(K) Safe shutdown. A brief description of the means of restoring the facility to a safe condition after an accident.

(L) Exercises. Provisions for conducting quarterly communications checks with offsite response organizations at intervals not to exceed three months and biennial onsite exercises to test response to simulated emergencies. Communications checks with offsite response organizations shall include the check and update of

all necessary telephone numbers. The licensee shall invite offsite response organizations to participate in the biennial exercises. Participation of offsite response organizations in biennial exercises, although recommended, is not required. Exercises shall use accident scenarios postulated as most probable for the specific site and the scenarios shall not be known to most exercise participants. The licensee shall critique each exercise using individuals not having direct implementation responsibility for the plan. Critiques of exercises shall evaluate the appropriateness of the plan, emergency procedures, facilities, equipment, training of personnel, and overall effectiveness of the response. Deficiencies found by the critiques shall be corrected.

(M) Hazardous chemicals. A certification that the applicant has met its responsibilities in accordance with the Emergency Planning and Community Right-to-Know Act of 1986, Title III, Publication L. 99-499, if applicable to the applicant's activities at the proposed place of use of the radioactive material.

(4) The licensee shall allow the offsite response organizations expected to respond in case of an accident 60 days to comment on the licensee's emergency plan before submitting it to the department. The licensee shall provide any comments received within the 60 days to the department with the emergency plan.

(ii) Physical protection of category 1 and category 2 quantities of radioactive material.

(1) Specific exemptions. A licensee that possesses radioactive waste that contains category 1 or category 2 quantities of radioactive material is exempt from the requirements of paragraphs (2) - (23) of this subsection, except that any radioactive waste that contains discrete sources, ion-exchange resins, or activated material that weighs less than 2,000 kilograms (4,409 pounds) is not exempt from the requirements of this subsection. The licensee shall implement the following requirements to secure the radioactive waste:

(A) use continuous physical barriers that allow access to the radioactive waste only through established access control points;

(B) use a locked door or gate with monitored alarm at the access control point;

(C) assess and respond to each actual or attempted unauthorized access to determine whether an actual or attempted theft, sabotage, or diversion occurred; and

(D) immediately notify the local law enforcement agency (LLEA) and request an armed response from the LLEA upon determination that there was an actual or attempted theft, sabotage, or diversion of the radioactive waste that contains category 1 or category 2 quantities of radioactive material.

(2) Personnel access authorization requirements for category 1 or category 2 quantities of radioactive material.

(A) General.

(i) Each licensee that possesses an aggregated quantity of radioactive material at or above the category 2 threshold shall establish, implement, and maintain its access authorization program in accordance with the requirements of this paragraph and paragraphs (3) - (8) of this subsection.

(ii) An applicant for a new license and each licensee that would become subject to the requirements of this paragraph and paragraphs (3) - (8) of this subsection upon application for modification of its license shall implement the requirements of this paragraph and paragraphs (3) - (8) of this subsection, as appropriate, before taking possession of an aggregated category 1 or category 2 quantity of radioactive material.

(iii) Any licensee that has not previously implemented the security orders or been subject to this paragraph and paragraphs (3) - (8) of this subsection shall implement the provisions of these paragraphs before aggregating radioactive material to a quantity that equals or exceeds the category 2 threshold.

(B) General performance objective. The licensee's access authorization program must ensure that the individuals specified in subparagraph (C)(i) of this paragraph are trustworthy and reliable.

(C) Applicability.

(i) Licensees shall subject the following individuals to an access authorization program:

(I) any individual whose assigned duties require unescorted access to category 1 or category 2 quantities of radioactive material or to any device that contains the radioactive material; and

(II) reviewing officials.

(ii) Licensees need not subject the categories of individuals listed in paragraph (6)(A)(i) - (xiii) of this subsection to the investigation elements of the access authorization program.

(iii) Licensees shall approve for unescorted access to category 1 or category 2 quantities of radioactive material only those individuals with job duties that require unescorted access to category 1 or category 2 quantities of radioactive material.

(iv) Licensees may include individuals needing access to safeguards information-modified handling in accordance with Title 10, CFR, Part 73, in the access authorization program under this paragraph and paragraphs (3) - (8) of this subsection.

(3) Access authorization program requirements.

(A) Granting unescorted access authorization.

(i) Licensees shall implement the requirements of paragraph (2), this paragraph, and paragraphs (4) - (8) of this subsection for granting initial or reinstated unescorted access authorization.

(ii) Individuals who have been determined to be trustworthy and reliable shall also complete the security training required by paragraph (10)(C) of this subsection before being allowed unescorted access to category 1 or category 2 quantities of radioactive material.)

(B) Reviewing officials.

(i) Reviewing officials are the only individuals who may make trustworthiness and reliability determinations that allow individuals to have unescorted access to category 1 or category 2 quantities of radioactive materials possessed by the licensee.

(ii) Each licensee shall name one or more individuals to be reviewing officials. After completing the background investigation on the reviewing official, the licensee shall provide to the department under oath or affirmation, a certification that the reviewing official is deemed trustworthy and reliable by the licensee. The fingerprints of the named reviewing official must be taken by a law enforcement agency, federal or state agencies that provide fingerprinting services to the public, or commercial fingerprinting services authorized by a state to take fingerprints. The licensee shall recertify that the reviewing official is deemed trustworthy and reliable every 10 years in accordance with paragraph (4)(C) of this subsection.

(iii) Reviewing officials must be permitted to have unescorted access to category 1 or category 2 quantities of radioactive materials or access to safeguards information or safeguards informa-

tion-modified handling, if the licensee possesses safeguards information or safeguards information-modified handling.

(iv) Reviewing officials cannot approve other individuals to act as reviewing officials.

(v) A reviewing official does not need to undergo a new background investigation before being named by the licensee as the reviewing official if:

(I) the individual has undergone a background investigation that included fingerprinting and a Federal Bureau of Investigation (FBI) criminal history records check and has been determined to be trustworthy and reliable by the licensee; or

(II) the individual is subject to a category listed in paragraph (6)(A) of this subsection.

(C) Informed consent.

(i) Licensees may not initiate a background investigation without the informed and signed consent of the subject individual. This consent must include authorization to share personal information with other individuals or organizations as necessary to complete the background investigation. Before a final adverse determination, the licensee shall provide the individual with an opportunity to correct any inaccurate or incomplete information that is developed during the background investigation. Licensees do not need to obtain signed consent from those individuals that meet the requirements of paragraph (4)(B) of this subsection. A signed consent must be obtained before any reinvestigation.

(ii) The subject individual may withdraw his or her consent at any time. Licensees shall inform the individual that:

(I) if an individual withdraws his or her consent, the licensee may not initiate any elements of the background investigation that were not in progress at the time the individual withdrew his or her consent; and

(II) the withdrawal of consent for the background investigation is sufficient cause for denial or termination of unescorted access authorization.

(D) Personal history disclosure. Any individual who is applying for unescorted access authorization shall disclose the personal history information that is required by the licensee's access authorization program for the reviewing official to make a determination of the individual's trustworthiness and reliability. Refusal to provide, or the falsification of, any personal history information required by paragraph (2), this paragraph, and paragraphs (4) - (8) of this subsection is sufficient cause for denial or termination of unescorted access.

(E) Determination basis.

(i) The reviewing official shall determine whether to permit, deny, unfavorably terminate, maintain, or administratively withdraw an individual's unescorted access authorization based on an evaluation of all of the information collected to meet the requirements of paragraph (2), this paragraph, and paragraphs (4) - (8) of this subsection.

(ii) The reviewing official may not permit any individual to have unescorted access until the reviewing official has evaluated all of the information collected to meet the requirements of paragraph (2), this paragraph, and paragraphs (4) - (8) of this subsection and determined that the individual is trustworthy and reliable. The reviewing official may deny unescorted access to any individual based on information obtained at any time during the background investigation.

(iii) The licensee shall document the basis for concluding whether or not there is reasonable assurance that an individual is trustworthy and reliable.

(iv) The reviewing official may terminate or administratively withdraw an individual's unescorted access authorization based on information obtained after the background investigation has been completed and the individual granted unescorted access authorization.

(v) Licensees shall maintain a list of persons currently approved for unescorted access authorization. When a licensee determines that a person no longer requires unescorted access or meets the access authorization requirement, the licensee shall:

(I) remove the person from the approved list as soon as possible, but no later than 7 working days; and

(II) take prompt measures to ensure that the individual is unable to have unescorted access to the material.

(F) Procedures. Licensees shall develop, implement, and maintain written procedures for implementing the access authorization program. The procedures must:

(i) include provisions for the notification of individuals who are denied unescorted access;

(ii) include provisions for the review, at the request of the affected individual, of a denial or termination of unescorted access authorization; and

(iii) contain a provision to ensure that the individual is informed of the grounds for the denial or termination of unescorted access authorization and allow the individual an opportunity to provide additional relevant information.

(G) Right to correct and complete information.

(i) Before any final adverse determination, licensees shall provide each individual subject to paragraph (2), this paragraph, and paragraphs (4) - (8) of this subsection with the right to complete, correct, and explain information obtained as a result of the licensee's background investigation. Confirmation of receipt by the individual of this notification must be maintained by the licensee for inspection by the department in accordance with subsection (mm) of this section.

(ii) If, after reviewing his or her criminal history record, an individual believes that it is incorrect or incomplete in any respect and wishes to change, correct, update, or explain anything in the record, the individual may initiate challenge procedures. These procedures include direct application by the individual challenging the record to the law enforcement agency that contributed the questioned information or a direct challenge as to the accuracy or completeness of any entry on the criminal history record to the Federal Bureau of Investigation, Criminal Justice Information Services (CJIS) Division, ATTN: SCU, Mod. D-2, 1000 Custer Hollow Road, Clarksburg, WV 26306 as set forth in Title 28, CFR, §§16.30 - 16.34. In the latter case, the FBI will forward the challenge to the agency that submitted the data, and will request that the agency verify or correct the challenged entry. Upon receipt of an official communication directly from the agency that contributed the original information, the FBI Identification Division makes any changes necessary in accordance with the information supplied by that agency. Licensees shall provide at least 10 days for an individual to initiate action to challenge the results of an FBI criminal history records check after the record being made available for his or her review. The licensee may make a final adverse determination based upon the criminal history records only after receipt of the FBI's confirmation or correction of the record.

(H) Records. The licensee shall make, maintain, and retain the following records/documents for inspection by the department in accordance with subsection (mm) of this section. The licensee shall maintain superseded versions or portions of the following records/documents for inspection by the department in accordance with subsection (mm) of this section:

(i) documentation regarding the trustworthiness and reliability of individual employees;

(ii) a copy of the current access authorization program procedures; and

(iii) the current list of persons approved for unescorted access authorization.

(4) Background investigations.

(A) Initial investigation. Before allowing an individual unescorted access to category 1 or category 2 quantities of radioactive material or to the devices that contain the material, licensees shall complete a background investigation of the individual seeking unescorted access authorization. The scope of the investigation must encompass at least the seven years preceding the date of the background investigation or since the individual's eighteenth birthday, whichever is shorter. The background investigation must include at a minimum:

(i) fingerprinting and an FBI identification and criminal history records check in accordance with paragraph (5) of this subsection;

(ii) verification of true identity. Licensees shall:

(I) verify the true identity of the individual who is applying for unescorted access authorization to ensure that the applicant is who he or she claims to be;

(II) review official identification documents (e.g., driver's license; passport; government identification; certificate of birth issued by the state, province, or country of birth) and compare the documents to personal information data provided by the individual to identify any discrepancy in the information;

(III) document the type, expiration, and identification number of the identification document, or maintain a photocopy of identifying documents on file in accordance with paragraph (7) of this subsection;

(IV) certify in writing that the identification was properly reviewed; and

(V) maintain the certification and all related documents for inspection by the department in accordance with subsection (mm) of this section;

(iii) employment history verification. Licensees shall:

(I) complete an employment history verification, including military history; and

(II) verify the individual's employment with each previous employer for the most recent 7 years before the date of application;

(iv) verification of education. Licensees shall verify that the individual participated in the education process during the claimed period;

(v) character and reputation determination. Licensees shall complete reference checks to determine the character and reputation of the individual who has applied for unescorted access authorization. Unless other references are not available, reference checks may not be conducted with any person who is known to be a close member of the individual's family, including the individual's spouse, parents, siblings, or children, or any individual who resides in the individual's permanent household. Reference checks as specified in paragraphs (2) and (3), this paragraph, and paragraphs (5) - (8) of this subsection must be limited to whether the individual has been and continues to be trustworthy and reliable;

(vi) the licensee shall also, to the extent possible, obtain independent information to corroborate that provided by the individual (e.g., seek references not supplied by the individual); and

(vii) if a previous employer, educational institution, or any other entity with which the individual claims to have been engaged fails to provide information or indicates an inability or unwillingness to provide information within a time frame deemed appropriate by the licensee but at least after 10 business days of the request or if the licensee is unable to reach the entity, the licensee shall document the refusal, unwillingness, or inability in the record of investigation; and attempt to obtain the information from an alternate source.

(B) Grandfathering.

(i) Individuals who have been determined to be trustworthy and reliable for unescorted access to category 1 or category 2 quantities of radioactive material as specified in the fingerprint orders may continue to have unescorted access to category 1 and category 2 quantities of radioactive material without further investigation. These individuals shall be subject to the reinvestigation requirement.

(ii) Individuals who have been determined to be trustworthy and reliable in accordance with Title 10, CFR, Part 73, or the security orders for access to safeguards information, safeguards information-modified handling, or risk-significant material may have unescorted access to category 1 and category 2 quantities of radioactive material without further investigation. The licensee shall document that the individual was determined to be trustworthy and reliable under Title 10, CFR, Part 73, or a security order. Security order, in this context, refers to any order that was issued by the NRC that required fingerprints and an FBI criminal history records check for access to safeguards information, safeguards information-modified handling, or risk significant material such as special nuclear material or large quantities of uranium hexafluoride. These individuals shall be subject to the reinvestigation requirement.

(C) Reinvestigations. Licensees shall conduct a reinvestigation every 10 years for any individual with unescorted access to category 1 or category 2 quantities of radioactive material. The reinvestigation shall consist of fingerprinting and an FBI identification and criminal history records check in accordance with paragraph (5) of this subsection. The reinvestigations must be completed within 10 years of the date on which these elements were last completed.

(5) Requirements for criminal history records checks of individuals granted unescorted access to category 1 or category 2 quantities of radioactive material.

(A) General performance objective and requirements.

(i) Except for those individuals listed in paragraph (6) of this subsection and those individuals grandfathered under paragraph (4)(B) of this subsection, each licensee subject to the requirements of paragraphs (2) - (4), this paragraph, and paragraphs (6) - (8) of this subsection shall:

(I) fingerprint each individual who is to be permitted unescorted access to category 1 or category 2 quantities of radioactive material;

(II) transmit all collected fingerprints to the NRC for transmission to the FBI; and

(III) use the information received from the FBI as part of the required background investigation to determine whether to grant or deny further unescorted access to category 1 or category 2 quantities of radioactive materials for that individual.

(ii) The licensee shall notify each affected individual that his or her fingerprints will be used to secure a review of his or her criminal history record, and shall inform him or her of the procedures for revising the record or adding explanations to the record.

(iii) Fingerprinting is not required if a licensee is reinstating an individual's unescorted access authorization to category 1 or category 2 quantities of radioactive materials if:

(I) the individual returns to the same facility that granted unescorted access authorization within 365 days of the termination of his or her unescorted access authorization; and

(II) the previous access was terminated under favorable conditions.

(iv) Fingerprints do not need to be taken if an individual who is an employee of a licensee, contractor, manufacturer, or supplier has been granted unescorted access to category 1 or category 2 quantities of radioactive material, access to safeguards information, or safeguards information-modified handling by another licensee, based upon a background investigation conducted in accordance with paragraphs (2) - (4), this paragraph, and paragraphs (6) - (8) of this subsection, the fingerprint orders, or Title 10, CFR, Part 73. An existing criminal history records check file may be transferred to the licensee asked to grant unescorted access in accordance with the requirements of paragraph (7)(C) of this subsection.

(v) Licensees shall use the information obtained as part of a criminal history records check solely for the purpose of determining an individual's suitability for unescorted access authorization to category 1 or category 2 quantities of radioactive materials, access to safeguards information, or safeguards information-modified handling.

(B) Prohibitions.

(i) Licensees may not base a final determination to deny an individual unescorted access authorization to category 1 or category 2 quantities of radioactive material solely on the basis of information received from the FBI involving:

(I) an arrest more than one year old for which there is no information of the disposition of the case; or

(II) an arrest that resulted in dismissal of the charge or an acquittal.

(ii) Licensees may not use information received from a criminal history records check obtained under paragraphs (2) - (4), this paragraph, and paragraphs (6) - (8) of this subsection in a manner that would infringe upon the rights of any individual under the First Amendment to the Constitution of the United States, nor shall licensees use the information in any way that would discriminate among individuals on the basis of race, religion, national origin, gender, or age.

(C) Procedures for processing of fingerprint checks.

(i) For the purpose of complying with paragraphs (2) - (4), this paragraph, and paragraphs (6) - (8) of this subsection, licensees shall use an appropriate method listed in Title 10, CFR, §37.7, to submit to the U.S. Nuclear Regulatory Commission, Director, Division of Physical and Cyber Security Policy, 11545 Rockville Pike, ATTN: Criminal History Program/Mail Stop T-07D04M, 11545 Rockville Pike, Rockville, Maryland 20852, one completed, legible standard fingerprint card (Form FD-258, ORIMDNRCOOOZ), electronic fingerprint scan or, where practicable, other fingerprint record for each individual requiring unescorted access to category 1 or category 2 quantities of radioactive material. Copies of these forms may be obtained by emailing *MAILSVS.Resource@nrc.gov.*Guidance on submitting electronic fingerprints can be found at *https://www.nrc.gov/security/chp.html.*

(ii) Fees for the processing of fingerprint checks are due upon application. Licensees shall submit payment with the application for the processing of fingerprints through corporate check, certified check, cashier's check, money order, or electronic payment, made payable to "U.S. NRC." (For guidance on making electronic payments, contact the Division of Physical and Cyber Security Policy by emailing *Crimhist.Resource@nrc.gov.)* Combined payment for multiple applications is acceptable. The NRC publishes the amount of the fingerprint check application fee on the NRC's public website. (To find the current fee amount, go to the Licensee Criminal History Records Checks & Firearms Background Check information page at *https://www.nrc.gov/security/chp.html* and see the link for How do I determine how much to pay for the request?).

(iii) The NRC will forward to the submitting licensee all data received from the FBI as a result of the licensee's application(s) for criminal history records checks.

(6) Relief from fingerprinting, identification, and criminal history records checks and other elements of background investigations for designated categories of individuals permitted unescorted access to certain radioactive materials.

(A) Fingerprinting, and the identification and criminal history records checks required by Section 149 of the Atomic Energy Act of 1954, as amended, and other elements of the background investigation are not required for the following individuals before granting unescorted access to category 1 or category 2 quantities of radioactive materials:

(i) an employee of the NRC or of the Executive Branch of the U.S. Government who has undergone fingerprinting for a prior U.S. Government criminal history records check;

(ii) a member of Congress;

(iii) an employee of a member of Congress or Congressional committee who has undergone fingerprinting for a prior U.S. Government criminal history records check;

(iv) the governor of a state or his or her designated state employee representative;

(v) federal, state, or local law enforcement personnel;

(vi) state radiation control program directors and state homeland security advisors or their designated state employee representatives;

(vii) agreement state employees conducting security inspections on behalf of the NRC under an agreement executed as specified in §274.1 of the Atomic Energy Act;

(viii) representatives of the International Atomic Energy Agency (IAEA) engaged in activities associated with the U.S./IAEA Safeguards Agreement who have been certified by the NRC;

(ix) emergency response personnel who are responding to an emergency;

(x) commercial vehicle drivers for road shipments of category 1 and category 2 quantities of radioactive material;

(xi) package handlers at transportation facilities such as freight terminals and railroad yards;

(xii) any individual who has an active federal security clearance, provided that he or she makes available the appropriate documentation. Written confirmation from the agency/employer that granted the federal security clearance or reviewed the criminal history records check must be provided to the licensee. The licensee shall maintain this documentation for inspection by the department in accordance with subsection (mm) of this section; and

(xiii) any individual employed by a service provider licensee for which the service provider licensee has conducted the background investigation for the individual and approved the individual for unescorted access to category 1 or category 2 quantities of radioactive material. Written verification from the service provider must be provided to the licensee. The licensee shall maintain and retain the documentation for inspection by the department in accordance with subsection (mm) of this section.

(B) Fingerprinting, and the identification and criminal history records checks required by Section 149 of the Atomic Energy Act of 1954, as amended, are not required for an individual who has had a favorably adjudicated U.S. Government criminal history records check within the last 5 years, under a comparable U.S. Government program involving fingerprinting and an FBI identification and criminal history records check provided that he or she makes available the appropriate documentation. Written confirmation from the agency/employer that reviewed the criminal history records check must be provided to the licensee. The licensee shall maintain this documentation for inspection by the department in accordance with subsection (mm) of this section. These programs include:

(i) National Agency Check;

(ii) Transportation Worker Identification Credentials (TWIC) under Title 49, CFR, Part 1572;

(iii) Bureau of Alcohol, Tobacco, Firearms, and Explosives background check and clearances under Title 27, CFR, Part 555;

(iv) Health and Human Services security risk assessments for possession and use of select agents and toxins under Title 42, CFR, Part 73;

(v) Hazardous Material security threat assessment for hazardous material endorsement to commercial driver's license under Title 49, CFR, Part 1572; and

(vi) Customs and Border Protection's Free and Secure Trade (FAST) Program.

(7) Protection of information.

(A) Each licensee who obtains background information on an individual under paragraphs (2) - (6), this paragraph, or paragraph (8) of this subsection shall establish and maintain a system of files and written procedures for protection of the record and the personal information from unauthorized disclosure.

(B) The licensee may not disclose the record or personal information collected and maintained to persons other than the subject individual, his or her representative, or to those who have a need to have access to the information in performing assigned duties in the process of granting or denying unescorted access to category 1 or category 2 quantities of radioactive material, safeguards information, or safeguards information-modified handling. No individual authorized to have access to the information may disseminate the information to any other individual who does not have a need to know.

(C) The personal information obtained on an individual from a background investigation may be provided to another licensee:

(i) upon the individual's written request to the licensee holding the data to disseminate the information contained in his or her file; and

(ii) the recipient licensee verifies information such as name, date of birth, social security number, gender, and other applicable physical characteristics.

(D) The licensee shall make background investigation records obtained under paragraphs (2) - (6), this paragraph, and paragraph (8) of this subsection available for examination by an authorized representative of the department to determine compliance with the regulations and laws.

(E) The licensee shall maintain all fingerprint and criminal history records on an individual (including data indicating no record) received from the FBI, or a copy of these records if the individual's file has been transferred, for inspection by the department in accordance with subsection (mm) of this section.

(8) Access authorization program review.

(A) Each licensee shall be responsible for the continuing effectiveness of the access authorization program. Each licensee shall ensure that access authorization programs are reviewed to confirm compliance with the requirements of paragraphs (2) - (7) and this paragraph of this subsection and that comprehensive actions are taken to correct any noncompliance that is identified. The review program shall evaluate all program performance objectives and requirements. Each licensee shall review the access program content and implementation at least every 12 months.

(B) The results of the reviews, along with any recommendations, must be documented. Each review report must identify conditions that are adverse to the proper performance of the access authorization program, the cause of the condition(s), and, when appropriate, recommend corrective actions, and corrective actions taken. The licensee shall review the findings and take any additional corrective actions necessary to preclude repetition of the condition, including reassessment of the deficient areas where indicated.

(C) Review records must be maintained for inspection by the department in accordance with subsection (mm) of this section.

(9) Security program.

(A) Applicability.

(i) Each licensee that possesses an aggregated category 1 or category 2 quantity of radioactive material shall establish, implement, and maintain a security program in accordance with the requirements of this paragraph and paragraphs (10) - (17) of this subsection.

(ii) An applicant for a new license and each licensee that would become newly subject to the requirements of this paragraph and paragraphs (10) - (17) of this subsection upon application for modification of its license shall implement the requirements of this paragraph and paragraphs (10) - (17) of this subsection, as appropriate, before taking possession of an aggregated category 1 or category 2 quantity of radioactive material.

(iii) Any licensee that has not previously implemented the security orders or been subject to the provisions of this paragraph and paragraphs (10) - (17) of this subsection shall provide

written notification to the department at least 90 days before aggregating radioactive material to a quantity that equals or exceeds the category 2 threshold.

(B) General performance objective. Each licensee shall establish, implement, and maintain a security program that is designed to monitor and, without delay, detect, assess, and respond to an actual or attempted unauthorized access to category 1 or category 2 quantities of radioactive material.

(C) Program features. Each licensee's security program must include the program features, as appropriate, described in paragraphs (10) - (16) of this subsection.

(10) General security program requirements.

(A) Security plan.

(i) Each licensee identified in paragraph (9)(A) of this subsection shall develop a written security plan specific to its facilities and operations. The purpose of the security plan is to establish the licensee's overall security strategy to ensure the integrated and effective functioning of the security program required by paragraph (9), this paragraph, and paragraphs (11) - (17) of this subsection. The security plan must, at a minimum:

(I) describe the measures and strategies used to implement the requirements of paragraph (9), this paragraph, and paragraphs (11) - (17) of this subsection; and

(II) identify the security resources, equipment, and technology used to satisfy the requirements of paragraph (9), this paragraph, and paragraphs (11) - (17) of this subsection.

(ii) The security plan must be reviewed and approved by the individual with overall responsibility for the security program.

(iii) A licensee shall revise its security plan as necessary to ensure the effective implementation of department and NRC requirements. The licensee shall ensure that:

(I) the revision has been reviewed and approved by the individual with overall responsibility for the security program; and

(II) the affected individuals are instructed on the revised plan before the changes are implemented.

(iv) The licensee shall maintain a copy of the current security plan as a record for inspection by the department in accordance with subsection (mm) of this section. If any portion of the plan is superseded, the licensee shall maintain the superseded material for inspection by the department in accordance with subsection (mm) of this section.

(B) Implementing procedures.

(i) The licensee shall develop and maintain written procedures that document how the requirements of paragraph (9), this paragraph, and paragraphs (11) - (17) of this subsection and the security plan will be met.

(ii) The implementing procedures and revisions to these procedures must be approved in writing by the individual with overall responsibility for the security program.

(iii) The licensee shall maintain a copy of the current procedure as a record for inspection by the department in accordance with subsection (mm) of this section. Superseded portions of the procedure shall be maintained for inspection by the department in accordance with subsection (mm) of this section.

(C) Training.

(i) Each licensee shall conduct training to ensure that those individuals implementing the security program possess and maintain the knowledge, skills, and abilities to carry out their assigned duties and responsibilities effectively. The training must include instruction in:

(I) the licensee's security program and procedures to secure category 1 or category 2 quantities of radioactive material, and in the purposes and functions of the security measures employed;

(II) the responsibility to report promptly to the licensee any condition that causes or may cause a violation of the requirements of the department;

(III) the responsibility of the licensee to report promptly to the local law enforcement agency and licensee any actual or attempted theft, sabotage, or diversion of category 1 or category 2 quantities of radioactive material; and

(IV) the appropriate response to security alarms.

(ii) In determining those individuals who shall be trained on the security program, the licensee shall consider each individual's assigned activities during authorized use and response to potential situations involving actual or attempted theft, diversion, or sabotage of category 1 or category 2 quantities of radioactive material. The extent of the training must be commensurate with the individual's potential involvement in the security of category 1 or category 2 quantities of radioactive material.

(iii) Refresher training must be provided at a frequency not to exceed 12 months and when significant changes have been made to the security program. This training must include:

(I) review of the training requirements of this subparagraph of this paragraph and any changes made to the security program since the last training;

(II) reports on any relevant security issues, problems, and lessons learned;

(III) relevant results of inspections by the department; and

(IV) relevant results of the licensee's program review and testing and maintenance.

(iv) The licensee shall maintain records of the initial and refresher training for inspection by the department in accordance with subsection (mm) of this section. The training records shall include:

(I) the dates of the training;

(II) the topics covered;

(III) a list of licensee personnel in attendance; and

(IV) any related information.

(D) Protection of information.

(i) Licensees authorized to possess category 1 or category 2 quantities of radioactive material shall limit access to and unauthorized disclosure of their security plan, implementing procedures, and the list of individuals that have been approved for unescorted access.

(ii) Efforts to limit access shall include the development, implementation, and maintenance of written policies and pro-

cedures for controlling access to, and for proper handling and protection against unauthorized disclosure of, the security plan, implementing procedures, and the list of individuals that have been approved for unescorted access.

(iii) Before granting an individual access to the security plan, implementing procedures, or the list of individuals that have been approved for unescorted access, licensees shall:

(I) evaluate an individual's need to know the security plan, implementing procedures, or the list of individuals that have been approved for unescorted access; and

(II) if the individual has not been authorized for unescorted access to category 1 or category 2 quantities of radioactive material, safeguards information, or safeguards information-modified handling, the licensee must complete a background investigation to determine the individual's trustworthiness and reliability. A trustworthiness and reliability determination shall be conducted by the reviewing official and shall include the background investigation elements contained in paragraph (4)(A)(ii) - (vii) of this subsection.

(iv) Licensees need not subject the following individuals to the background investigation elements for protection of information:

(I) the categories of individuals listed in paragraph (6)(A)(i) - (xiii) of this subsection; or

(II) security service provider employees, provided written verification that the employee has been determined to be trustworthy and reliable, by the required background investigation in paragraph (4)(A)(ii) - (vii) of this subsection, has been provided by the security service provider.

(v) The licensee shall document the basis for concluding that an individual is trustworthy and reliable and should be granted access to the security plan, implementing procedures, or the list of individuals that have been approved for unescorted access.

(vi) Licensees shall maintain a list of persons currently approved for access to the security plan, implementing procedures, or the list of individuals that have been approved for unescorted access. When a licensee determines that a person no longer needs access to the security plan, implementing procedures, and the list of individuals that have been approved for unescorted access, or no longer meets the access authorization requirements for access to the information, the licensee shall:

(I) remove the person from the approved list as soon as possible, but no later than 7 working days; and

(II) take prompt measures to ensure that the individual is unable to obtain the security plan, implementing procedures, or the list of individuals that have been approved for unescorted access.

(vii) When not in use, the licensee shall store its security plan, implementing procedures, and the list of individuals that have been approved for unescorted access in a manner to prevent unauthorized access. Information stored in nonremovable electronic form shall be password protected.

(viii) The licensee shall make, maintain, and retain as a record for inspection by the department in accordance with subsection (mm) of this section:

(I) a copy of the information protection procedures; and

(II) the list of individuals approved for access to the security plan, implementing procedures, or the list of individuals that have been approved for unescorted access.

(11) LLEA coordination.

(A) A licensee subject to paragraphs (9) and (10), this paragraph, and paragraphs (12) - (17) of this subsection shall coordinate, to the extent practicable, with an LLEA for responding to threats to the licensee's facility, including any necessary armed response. The information provided to the LLEA must include:

(i) a description of the facilities and the category 1 and category 2 quantities of radioactive materials along with a description of the licensee's security measures that have been implemented to comply with paragraphs (9) and (10), this paragraph, and paragraphs (12) - (17) of this subsection; and

(ii) a notification that the licensee will request a timely armed response by the LLEA to any actual or attempted theft, sabotage, or diversion of category 1 or category 2 quantities of material.

(B) The licensee shall notify the department within three business days if:

(i) the LLEA has not responded to the request for coordination within 60 days of the coordination request; or

(ii) the LLEA notifies the licensee that the LLEA does not plan to participate in coordination activities.

(C) The licensee shall document its efforts to coordinate with the LLEA. The documentation must be kept for inspection by the department in accordance with subsection (mm) of this section.

(D) The licensee shall coordinate with the LLEA at least every 12 months, or when changes to the facility design or operation adversely affect the potential vulnerability of the licensee's material to theft, sabotage, or diversion.

(12) Security zones.

(A) Licensees shall ensure that all aggregated category 1 and category 2 quantities of radioactive material are used or stored within licensee established security zones. Security zones may be permanent or temporary.

(B) Temporary security zones shall be established as necessary to meet the licensee's transitory or intermittent business activities, such as periods of maintenance, source delivery, and source replacement.

(C) Security zones must, at a minimum, allow unescorted access only to approved individuals through:

(i) isolation of category 1 and category 2 quantities of radioactive materials by the use of continuous physical barriers that allow access to the security zone only through established access control points. A physical barrier is a natural or man-made structure or formation sufficient for the isolation of the category 1 or category 2 quantities of radioactive material within a security zone; or

(ii) direct control of the security zone by approved individuals at all times; or

(iii) a combination of continuous physical barriers and direct control.

(D) For category 1 quantities of radioactive material during periods of maintenance, source receipt, preparation for shipment, installation, or source removal or exchange, the licensee shall, at a minimum, provide sufficient individuals approved for unescorted

access to maintain continuous surveillance of sources in temporary security zones and in any security zone in which physical barriers or intrusion detection systems have been disabled to allow such activities.

(E) Individuals not approved for unescorted access to category 1 or category 2 quantities of radioactive material must be escorted by an approved individual when in a security zone.

(13) Monitoring, detection and assessment.

(A) Monitoring and detection.

(i) Licensees shall:

(I) establish and maintain the capability to continuously monitor and detect without delay all unauthorized entries into its security zones;

(II) provide the means to maintain continuous monitoring and detection capability in the event of a loss of the primary power source; or

(III) provide for an alarm and response in the event of a loss of this capability to continuously monitor and detect unauthorized entries.

(ii) Monitoring and detection must be performed by:

(I) a monitored intrusion detection system that is linked to an onsite or offsite central monitoring facility;

(II) electronic devices for intrusion detection alarms that will alert nearby facility personnel;

(III) a monitored video surveillance system;

(IV) direct visual surveillance by approved individuals located within the security zone; or

(V) direct visual surveillance by a licensee designated individual located outside the security zone.

(iii) A licensee subject to paragraphs (9) - (12), this paragraph, and paragraphs (14) - (17) of this subsection shall also have a means to detect unauthorized removal of the radioactive material from the security zone. This detection capability must provide:

(I) for category 1 quantities of radioactive material, immediate detection of any attempted unauthorized removal of the radioactive material from the security zone. Such immediate detection capability must be provided by:

(-a-) electronic sensors linked to an alarm;

(-b-) continuous monitored video surveillance; or

(-c-) direct visual surveillance; and

(II) for category 2 quantities of radioactive material, weekly verification through physical checks, tamper indicating devices, use, or other means to ensure that the radioactive material is present.

(B) Assessment. Licensees shall immediately assess each actual or attempted unauthorized entry into the security zone to determine whether the unauthorized access was an actual or attempted theft, sabotage, or diversion.

(C) Personnel communications and data transmission. For personnel and automated or electronic systems supporting the licensee's monitoring, detection, and assessment systems, licensees shall:

(i) maintain continuous capability for personnel communication and electronic data transmission and processing among site security systems; and

(ii) provide an alternative communication capability for personnel, and an alternative data transmission and processing capability, in the event of a loss of the primary means of communication or data transmission and processing. Alternative communications and data transmission systems may not be subject to the same failure modes as the primary systems.

(D) Response. Licensees shall immediately respond to any actual or attempted unauthorized access to the security zones, or actual or attempted theft, sabotage, or diversion of category 1 or category 2 quantities of radioactive material at licensee facilities or temporary job sites. For any unauthorized access involving an actual or attempted theft, sabotage, or diversion of category 1 or category 2 quantities of radioactive material, the licensee's response shall include requesting, without delay, an armed response from the LLEA.

(14) Maintenance and testing.

(A) Each licensee subject to paragraphs (9) - (13), this paragraph, and paragraphs (15) - (17) of this subsection shall implement a maintenance and testing program to ensure that intrusion alarms, associated communication systems, and other physical components of the systems used to secure or detect unauthorized access to radioactive material are maintained in operable condition and are capable of performing their intended function when needed. The equipment relied on to meet the security requirements of this subsection must be inspected and tested for operability and performance at the manufacturer's suggested frequency. If there is no suggested manufacturer's suggested frequency, the testing must be performed at least annually, not to exceed 12 months.

(B) The licensee shall maintain records on the maintenance and testing activities for inspection by the department in accordance with subsection (mm) of this section.

(15) Requirements for mobile devices. Each licensee that possesses mobile devices containing category 1 or category 2 quantities of radioactive material shall:

(A) have two independent physical controls that form tangible barriers to secure the material from unauthorized removal when the device is not under direct control and constant surveillance by the licensee; and

(B) for devices in or on a vehicle or trailer, unless the health and safety requirements for a site prohibit the disabling of the vehicle, the licensee shall utilize a method to disable the vehicle or trailer when not under direct control and constant surveillance by the licensee. Licensees shall not rely on the removal of an ignition key to meet this requirement.

(16) Security program review.

(A) Each licensee shall be responsible for the continuing effectiveness of the security program. Each licensee shall ensure that the security program is reviewed to confirm compliance with the requirements of paragraphs (9) - (15), this paragraph, and paragraph (17) of this subsection, and that comprehensive actions are taken to correct any noncompliance that is identified. The review shall include the radioactive material security program content and implementation. Each licensee shall review the security program content and implementation at least every 12 months.

(B) The results of the review, along with any recommendations, must be documented.

(i) Each review report must

(I) identify conditions that are adverse to the proper performance of the security program;

(II) identify the cause of the condition(s); and

(III) when applicable, recommend corrective actions, and identify and document any corrective actions taken.

(ii) The licensee shall review the findings and take any additional corrective actions necessary to preclude repetition of the condition, including reassessment of the deficient areas where indicated.

(C) The licensee shall make, maintain, and retain the documentation of the review required under subparagraph (B) of this paragraph for inspection by the department in accordance with subsection (mm) of this section.

(17) Reporting of events.

(A) The licensee shall immediately notify the LLEA after determining that an unauthorized entry resulted in an actual or attempted theft, sabotage, or diversion of a category 1 or category 2 quantity of radioactive material. As soon as possible after initiating a response, but not at the expense of causing delay or interfering with the LLEA response to the event, the licensee shall notify the department at (512) 458-7460. In no case shall the notification to the department be later than four hours after the discovery of any attempted or actual theft, sabotage, or diversion.

(B) The licensee shall assess any suspicious activity related to possible theft, sabotage, or diversion of category 1 or category 2 quantities of radioactive material and notify the LLEA as appropriate. As soon as possible but not later than 4 hours after notifying the LLEA, the licensee shall notify the department at (512) 458-7460.

(C) Each initial telephonic notification required by subparagraphs (A) and (B) of this paragraph must be followed within a period of 30 days by a written report submitted to the department. The report must include sufficient information for department analysis and evaluation, including identification of any necessary corrective actions to prevent future instances.

(18) Additional requirements for transfer of category 1 and category 2 quantities of radioactive material. A licensee transferring a category 1 or category 2 quantity of radioactive material to a licensee of the department, the NRC, or any agreement state shall meet the license verification requirements listed below instead of those listed in subsection (cc)(4) of this section.

(A) Any licensee transferring category 1 quantities of radioactive material to a licensee of the department, the NRC, or any agreement state, before conducting such transfer, shall verify with the NRC's license verification system or the license issuing authority that the transferee's license authorizes the receipt of the type, form, and quantity of radioactive material to be transferred and that the licensee is authorized to receive radioactive material at the location requested for delivery. If the verification is conducted by contacting the license issuing authority, the transferor shall document the verification. For transfers within the same organization, the licensee does not need to verify the transfer.

(B) Any licensee transferring category 2 quantities of radioactive material to a licensee of the department, the NRC, or any agreement state, before conducting such transfer, shall verify with the NRC's license verification system or the license issuing authority that the transferee's license authorizes the receipt of the type, form, and quantity of radioactive material to be transferred. If the verification is conducted by contacting the license issuing authority, the transferor shall document the verification. For transfers within the same organization, the licensee does not need to verify the transfer.

(C) In an emergency where the licensee cannot reach the license issuing authority and the license verification system is nonfunctional, the licensee may accept a written certification by the transferee that it is authorized by license to receive the type, form, and quantity of radioactive material to be transferred.

(i) The certification must include:

(I) the license number;

(II) the current revision number;

(III) the issuing authority;

(IV) the expiration date; and

(V) for a category 1 shipment, the authorized address.

(ii) The licensee shall keep a copy of the certification.

(iii) The certification must be confirmed by use of the NRC's license verification system or by contacting the license issuing authority by the end of the next business day.

(D) The transferor shall keep a copy of the verification documentation required under this paragraph as a record for inspection by the department in accordance with subsection (mm) of this section.

(19) Applicability of physical protection of category 1 and category 2 quantities of radioactive material during transit. The shipping licensee shall be responsible for meeting the requirements of paragraph (18), this paragraph, and paragraphs (20) - (23) of this subsection unless the receiving licensee has agreed in writing to arrange for the in-transit physical protection required under this paragraph, and paragraphs (20) - (23) of this subsection.

(20) Preplanning and coordination of shipment of category 1 and category 2 quantities of radioactive material.

(A) Each licensee that plans to transport, or deliver to a carrier for transport, licensed material that is a category 1 quantity of radioactive material outside the confines of the licensee's facility or other place of use or storage shall:

(i) preplan and coordinate shipment arrival and departure times with the receiving licensee;

(ii) preplan and coordinate shipment information with the governor or the governor's designee of any state through which the shipment will pass to:

(I) discuss the state's intention to provide law enforcement escorts; and

(II) identify safe havens; and

(iii) document the preplanning and coordination activities.

(B) Each licensee that plans to transport, or deliver to a carrier for transport, licensed material that is a category 2 quantity of radioactive material outside the confines of the licensee's facility or other place of use or storage shall coordinate the shipment no-later-than arrival time and the expected shipment arrival with the receiving licensee. The licensee shall document the coordination activities.

(C) Each licensee who receives a shipment of a category 2 quantity of radioactive material shall confirm receipt of the shipment with the originator. If the shipment has not arrived by the no-later-than arrival time, the receiving licensee shall notify the originator.

(D) Each licensee, who transports or plans to transport a shipment of a category 2 quantity of radioactive material, and determines that the shipment will arrive after the no-later-than arrival time provided pursuant to subparagraph (B) of this paragraph, shall promptly notify the receiving licensee of the new no-later-than arrival time.

(E) The licensee shall make, maintain, and retain a copy of the documentation for preplanning and coordination and any revision thereof, as a record for inspection by the department in accordance with subsection (mm) of this section.

(21) Advance notification of shipment of category 1 quantities of radioactive material. As specified in subparagraphs (A) and (B) of this paragraph, for shipments initially made by an agreement state licensee, each licensee shall provide advance notification to the Texas Department of Public Safety and the governor of the State of Texas, or the governor's designee, of the shipment of licensed material in a category 1 quantity, through or across the boundary of the state, before the transport, or delivery to a carrier for transport of the licensed material outside the confines of the licensee's facility or other place of use or storage.

(A) Procedures for submitting advance notification.

(i) The notification must be made to the Texas Department of Public Safety and to the office of each appropriate governor or governor's designee.

(I) The contact information, including telephone and mailing addresses, of governors and governors' designees, is available on the NRC's Web site at https://scp.nrc.gov/special/designee.pdf. A list of agreement state advance notification contact information is also available upon request from the Director, Division of Materials Safety, Security, State, and Tribal Programs, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.

(II) Notifications to the Texas Department of Public Safety must be to the Director, Texas Department of Public Safety, Office of Homeland Security, P.O. Box 4087, Austin, Texas 78773 or by fax to (512) 424-5708.

(ii) A notification delivered by mail must be postmarked at least seven days before transport of the shipment commences at the shipping facility.

(iii) A notification delivered by any means other than mail must reach the Texas Department of Public Safety at least four days before the transport of the shipment commences; and

(iv) A notification delivered by any means other than mail must reach the office of the governor or the governor's designee at least four days before transport of a shipment within or through the state.

(B) Information to be furnished in advance notification of shipment. Each advance notification of shipment of category 1 quantities of radioactive material must contain the following information, if available at the time of notification:

(i) the name, address, and telephone number of the shipper, carrier, and receiver of the category 1 radioactive material;

(ii) the license numbers of the shipper and receiver;

(iii) a description of the radioactive material contained in the shipment, including the radionuclides and quantity;

(iv) the point of origin of the shipment and the estimated time and date that shipment will commence;

(v) the estimated time and date that the shipment is expected to enter each state along the route;

(vi) the estimated time and date of arrival of the shipment at the destination; and

(vii) a point of contact, with a telephone number, for current shipment information.

(C) Revision notice.

(i) The licensee shall provide any information not previously available at the time of the initial notification, as soon as the information becomes available but not later than commencement of the shipment, to the governor of the state or the governor's designee and to the Director, Texas Department of Public Safety, Office of Homeland Security, P.O. Box 4087, Austin, Texas 78773 or by fax to (512) 424-5708.

(ii) A licensee shall provide notice as follows of any changes to the information provided in accordance with subparagraphs (B) and (C)(i) of this paragraph.

(I) Promptly notify the governor of the state or the governor's designee.

(II) Immediately notify the Director, Texas Department of Public Safety, Office of Homeland Security, P.O. Box 4087, Austin, Texas 78773 or by fax to (512) 424-5708.

(D) Cancellation notice.

(i) Each licensee who cancels a shipment for which advance notification has been sent shall send a cancellation notice to:

(I) the governor of each state or to the governor's designee previously notified; and

(II) the Director, Texas Department of Public Safety, Office of Homeland Security, P.O. Box 4087, Austin, Texas 78773 or by fax to (512) 424-5708.

(ii) The licensee shall send the cancellation notice before the shipment would have commenced or as soon thereafter as possible.

(iii) The licensee shall state in the notice that it is a cancellation and identify the advance notification that is being cancelled.

(E) Records. The licensee shall make, maintain, and retain a copy of the advance notification and any revision and cancellation notices as a record for inspection by the department in accordance with subsection (mm) of this section.

(F) Protection of information. State officials, state employees, and other individuals, whether or not licensees of the department, the NRC, or any agreement state, who receive schedule information of the kind specified in subparagraph (B) of this paragraph shall protect that information against unauthorized disclosure as specified in paragraph (10)(D) of this subsection.

(22) Requirements for physical protection of category 1 or category 2 quantities of radioactive material during shipment.

(A) Shipments by road.

(i) Each licensee who transports, or delivers to a carrier for transport, in a single shipment, a category 1 quantity of radioactive material shall:

(I) ensure that movement control centers are established that maintain position information from a remote location. These control centers shall monitor shipments 24 hours a day, 7 days

a week, and have the ability to communicate immediately, in an emergency, with the appropriate law enforcement agencies;

(II) ensure that redundant communications are established that allow the transport to contact the escort vehicle (when used) and movement control center at all times. Redundant communications may not be subject to the same interference factors as the primary communication;

(III) ensure that shipments are continuously and actively monitored by a telemetric position monitoring system or an alternative tracking system reporting to a movement control center. A movement control center shall provide positive confirmation of the location, status, and control over the shipment. The movement control center must be prepared to promptly implement preplanned procedures in response to deviations from the authorized route or a notification of actual, attempted, or suspicious activities related to the theft, loss, or diversion of a shipment. These procedures will include the identification of and contact information for the appropriate LLEA along the shipment route;

(IV) provide an individual to accompany the driver for those highway shipments with a driving time period greater than the maximum number of allowable hours of service in a 24-hour duty day as established by the Department of Transportation Federal Motor Carrier Safety Administration. The accompanying individual may be another driver; and

(V) develop written normal and contingency procedures to address:

(-a-) notifications to the communication center and law enforcement agencies;

(-b-) communication protocols, which must include a strategy for the use of authentication codes and duress codes and provisions for refueling or other stops, detours, and locations where communication is expected to be temporarily lost;

(-c-) loss of communications; and

(-d-) responses to an actual or attempted theft or diversion of a shipment.

(ii) Each licensee who makes arrangements for the shipment of category 1 quantities of radioactive material shall ensure that drivers, accompanying personnel, and movement control center personnel have access to the normal and contingency procedures.

(iii) Each licensee that transports category 2 quantities of radioactive material shall maintain constant control and/or surveillance during transit and have the capability for immediate communication to summon appropriate response or assistance.

(iv) Each licensee who delivers to a carrier for transport, in a single shipment, a category 2 quantity of radioactive material shall:

(I) use carriers that have established package tracking systems. An established package tracking system is a documented, proven, and reliable system routinely used to transport objects of value. In order for a package tracking system to maintain constant control and/or surveillance, the package tracking system must allow the shipper or transporter to identify when and where the package was last and when it should arrive at the next point of control;

(II) use carriers that maintain constant control and/or surveillance during transit and have the capability for immediate communication to summon appropriate response or assistance; and

(III) use carriers that have established tracking systems that require an authorized signature before releasing the package for delivery or return.

(B) Shipments by rail.

(i) Each licensee who transports, or delivers to a carrier for transport, in a single shipment, a category 1 quantity of radioactive material shall:

(I) ensure that rail shipments are monitored by a telemetric position monitoring system or an alternative tracking system reporting to the licensee, third-party, or railroad communications center. The communications center shall provide positive confirmation of the location of the shipment and its status. The communications center shall implement preplanned procedures in response to deviations from the authorized route or to a notification of actual, attempted, or suspicious activities related to the theft or diversion of a shipment. These procedures will include the identification of and contact information for the appropriate LLEA along the shipment route; and

(II) ensure that periodic reports to the communications center are made at preset intervals.

(ii) Each licensee who transports, or delivers to a carrier for transport, in a single shipment, a category 2 quantity of radioactive material shall:

(I) use carriers that have established package tracking systems. An established package tracking system is a documented, proven, and reliable system routinely used to transport objects of value. In order for a package tracking system to maintain constant control and/or surveillance, the package tracking system must allow the shipper or transporter to identify when and where the package was last and when it should arrive at the next point of control;

(II) use carriers that maintain constant control and/or surveillance during transit and have the capability for immediate communication to summon appropriate response or assistance; and

(III) use carriers that have established tracking systems that require an authorized signature before releasing the package for delivery or return.

(C) Investigations.

(i) Each licensee who makes arrangements for the shipment of category 1 quantities of radioactive material shall immediately conduct an investigation upon the discovery that a category 1 shipment is lost or missing.

(ii) Each licensee who makes arrangements for the shipment of category 2 quantities of radioactive material shall immediately conduct an investigation, in coordination with the receiving licensee, of any shipment that has not arrived by the designated no-later-than arrival time.

(23) Reporting of events during shipment.

(A) The shipping licensee shall notify the appropriate LLEA and shall notify the department at (512) 458-7460 within one hour of its determination that a shipment of category 1 quantities of radioactive material is lost or missing. The appropriate LLEA would be the law enforcement agency in the area of the shipment's last confirmed location. During the investigation required by paragraph (22)(C) of this subsection, the shipping licensee will provide agreed upon updates to the department on the status of the investigation.

(B) The shipping licensee shall notify the department at (512) 458-7460 within four hours of its determination that a shipment of category 2 quantities of radioactive material is lost or missing. If, after 24 hours of its determination that the shipment is lost or missing, the radioactive material has not been located and secured, the licensee shall immediately notify the department.

(C) The shipping licensee shall notify the designated LLEA along the shipment route as soon as possible upon discovery of any actual or attempted theft or diversion of a shipment or suspicious activities related to the theft or diversion of a shipment of a category 1 quantity of radioactive material. As soon as possible after notifying the LLEA, the licensee shall notify the department at (512) 458-7460 upon discovery of any actual or attempted theft or diversion of a shipment, or any suspicious activity related to the shipment of category 1 radioactive material.

(D) The shipping licensee shall notify the department at (512) 458-7460 as soon as possible upon discovery of any actual or attempted theft or diversion of a shipment, or any suspicious activity related to the shipment, of a category 2 quantity of radioactive material.

(E) The shipping licensee shall notify the department at (512) 458-7460 and the LLEA as soon as possible upon recovery of any lost or missing category 1 quantities of radioactive material.

(F) The shipping licensee shall notify the department at (512) 458-7460 as soon as possible upon recovery of any lost or missing category 2 quantities of radioactive material.

(G) The initial telephonic notification required by subparagraphs (A) - (D) of this paragraph must be followed within a period of 30 days by a written report submitted to the department. A written report is not required for notifications on suspicious activities required by subparagraphs (C) and (D) of this paragraph. The report must set forth the following information:

(i) a description of the licensed material involved, including kind, quantity, and chemical and physical form;

(ii) a description of the circumstances under which the loss or theft occurred;

(iii) a statement of disposition, or probable disposition, of the licensed material involved;

(iv) actions that have been taken, or will be taken, to recover the material; and

(v) procedures or measures that have been, or will be, adopted to ensure against a recurrence of the loss or theft of licensed material.

(H) Subsequent to filing the written report, the licensee shall also report any additional substantive information on the loss or theft within 30 days after the licensee learns of such information.

(24) Form of records. Each record required by this subsection shall be legible throughout the retention period specified in the department's rules. The record may be the original or a reproduced copy or a microform, provided that the copy or microform is authenticated by authorized personnel and that the microform is capable of producing a clear copy throughout the required retention period. The record may also be stored in electronic media with the capability for producing legible, accurate, and complete records during the required retention period. Records such as letters, drawings, and specifications, must include all pertinent information such as stamps, initials, and signatures. The licensee shall maintain adequate safeguards against tampering with and loss of records.

(25) Record retention. All records/documents referenced in this subsection shall be made and maintained by the licensee for inspection by the department in accordance with subsection (mm) of this section. If a retention period is not otherwise specified, these records must be retained until the department terminates the facility's license. All records related to this subsection may be destroyed upon department termination of the facility license.

(jj) Appendices.

(1) Subjects to be included in training courses:

(A) fundamentals of radiation safety:

(i) characteristics of radiation;

(ii) units of radiation dose (rem) and activity of radioactivity (curie);

(iii) significance of radiation dose;

(I) radiation protection standards; and

(II) biological effects of radiation;

(iv) levels of radiation from sources of radiation;

(v) methods of controlling radiation dose;

(I) time;

(II) distance; and

(III) shielding;

(vi) radiation safety practices, including prevention of contamination and methods of decontamination; and

(vii) discussion of internal exposure pathways;

(B) radiation detection instrumentation to be used:

(i) radiation survey instruments:

(I) operation;

(II) calibration; and

(III) limitations;

(ii) survey techniques; and

(iii) individual monitoring devices;

(C) equipment to be used:

(i) handling equipment and remote handling tools;

(ii) sources of radiation;

(iii) storage, control, disposal, and transport of equipment and sources of radiation;

(iv) operation and control of equipment; and

(v) maintenance of equipment;

(D) the requirements of pertinent federal and state regulations;

(E) the licensee's written operating, safety, and emergency procedures; and

(F) the licensee's record keeping procedures.

(2) Isotope quantities (for use in subsection (gg) of this section).

Figure: 25 TAC §289.252(jj)(2)

(3) Criteria relating to use of financial tests and parent company guarantees for providing reasonable assurance of funds for decommissioning.

(A) Introduction. An applicant or licensee may provide reasonable assurance of the availability of funds for decommissioning based on obtaining a parent company guarantee that funds will be available for decommissioning costs and on a demonstration that the parent company passes a financial test. This paragraph establishes criteria for

passing the financial test and for obtaining the parent company guarantee.

(B) Financial test.

(i) To pass the financial test, the parent company shall meet the criteria of either subclause (I) or (II) of this clause.

(I) The parent company shall have:

(-a-) two of the following three ratios:

(-1-) a ratio of total liabilities to net worth less than 2.0;

(-2-) a ratio of the sum of net income plus depreciation, depletion, and amortization to total liabilities greater than 0.1; and

(-3-) a ratio of current assets to current liabilities greater than 1.5;

(-b-) net working capital and tangible net worth each at least six times the current decommissioning cost estimates for the total of all facilities or parts thereof (or prescribed amount if a certification is used);

(-c-) tangible net worth of at least $10 million; and

(-d-) assets located in the United States amounting to at least 90 percent of total assets or at least six times the current decommissioning cost estimates for the total of all facilities or parts thereof (or prescribed amount if a certification is used.)

(II) The parent company shall have:

(-a-) a current rating for its most recent bond issuance of AAA, AA, A, or BBB as issued by Standard and Poor's or Aaa, Aa, A, or Baa as issued by Moody's;

(-b-) tangible net worth each at least six times the current decommissioning cost estimate for the total of all facilities or parts thereof (or prescribed amount if a certification is used);

(-c-) tangible net worth of at least $10 million; and

(-d-) assets located in the United States amounting to at least 90 percent of total assets or at least six times the current decommissioning cost estimates for the total of all facilities or parts thereof (or prescribed amount if certification is used).

(ii) The parent company's independent certified public accountant shall have compared the data used by the parent company in the financial test, which is derived from the independently audited, year-end financial statements for the latest fiscal year, with the amounts in such financial statement. In connection with that procedure, the licensee shall inform the department within 90 days of any matters coming to the auditor's attention that cause the auditor to believe that the data specified in the financial test should be adjusted and that the company no longer passes the test.

(iii) After the initial financial test, the parent company shall repeat the passage of the test within 90 days after the close of each succeeding fiscal year.

(iv) If the parent company no longer meets the requirements of clause (i) of this subparagraph, the licensee shall send notice to the department of intent to establish alternate financial assurance as specified in the department's regulations. The notice shall be sent by certified mail within 90 days after the end of the fiscal year for which the year-end financial data show that the parent company no longer meets the financial test requirements. The licensee shall provide alternate financial assurance within 120 days after the end of such fiscal year.

(C) Parent company guarantee. The terms of a parent company guarantee that an applicant or licensee obtains shall provide that:

(i) the parent company guarantee will remain in force unless the guarantor sends notice of cancellation by certified mail to the licensee and the department. Cancellation may not occur, however, during the 120 days beginning on the date of receipt of the notice of cancellation by both the licensee and the department, as evidenced by the return receipts;

(ii) if the licensee fails to provide alternate financial assurance as specified in the department's rules within 90 days after receipt by the licensee and the department of a notice of cancellation of the parent company guarantee from the guarantor, the guarantor will provide such alternative financial assurance in the name of the licensee;

(iii) the parent company guarantee and financial test provisions shall remain in effect until the department has terminated the license; and

(iv) if a trust is established for decommissioning costs, the trustee and trust shall be acceptable to the department. An acceptable trustee includes an appropriate state or federal government agency or an entity that has the authority to act as a trustee and whose trust operations are regulated and examined by a federal or state agency.

(4) Criteria relating to use of financial tests and self-guarantees for providing reasonable assurance of funds for decommissioning.

(A) Introduction. An applicant or licensee may provide reasonable assurance of the availability of funds for decommissioning based on furnishing its own guarantee that funds will be available for decommissioning costs and on a demonstration that the company passes a financial test of subparagraph (B) of this paragraph. Subparagraph (B) of this paragraph establishes criteria for passing the financial test for the self-guarantee and establishes the terms for a self-guarantee.

(B) Financial test.

(i) To pass the financial test, a company shall meet all of the following criteria:

(I) tangible net worth at least 10 times the total current decommissioning cost estimate for the total of all facilities or parts thereof (or the current amount required if certification is used for all decommissioning activities for which the company is responsible as self-guaranteeing licensee and as parent-guarantor);

(II) assets located in the United States amounting to at least 90 percent of total assets or at least 10 times the total current decommissioning cost estimate (or the current amount required if certification is used for all decommissioning activities for which the company is responsible as self-guaranteeing licensee and as parent-guarantor); and

(III) a current rating for its most recent bond issuance of AAA, AA, A as issued by Standard and Poor's, or Aaa, Aa, A as issued by Moody's.

(ii) To pass the financial test, a company shall meet all of the following additional criteria:

(I) the company shall have at least one class of equity securities registered under the Securities Exchange Act of 1934;

(II) the company's independent certified public accountant shall have compared the data used by the company in the

financial test that is derived from the independently audited year-end financial statements, based on United States generally accepted accounting practices, for the latest fiscal year, with the amounts in such financial statement. In connection with that procedure, the licensee shall inform the department within 90 days of any matters coming to the auditor's attention that cause the auditor to believe that the data specified in the financial test should be adjusted and that the company no longer passes the test; and

(III) after the initial financial test, the company shall repeat the passage of the test within 90 days after the close of each succeeding fiscal year.

(iii) If the licensee no longer meets the criteria of clause (i) of this subparagraph, the licensee shall send immediate notice to the department of its intent to establish alternate financial assurance as specified in the department's rules within 120 days of such notice.

(C) Company self-guarantee. The terms of a self-guarantee that an applicant or licensee furnishes shall provide that:

(i) the company guarantee will remain in force unless the licensee sends notice of cancellation by certified mail to the department. Cancellation may not occur, however, during the 120 days beginning on the date of receipt of the notice of cancellation by the department, as evidenced by the return receipt.

(ii) the licensee shall provide alternate financial assurance as specified in the department's rules within 90 days following receipt by the department of a notice of cancellation of the guarantee;

(iii) the guarantee and financial test provisions shall remain in effect until the department has terminated the license or until another financial assurance method acceptable to the department has been put in effect by the licensee;

(iv) the licensee will promptly forward to the department and the licensee's independent auditor all reports covering the latest fiscal year filed by the licensee with the Securities and Exchange Commission in accordance with the requirements of the Securities and Exchange Act of 1934, §13;

(v) if, at any time, the licensee's most recent bond issuance ceases to be rated in any category of "A" or above by either Standard and Poor's or Moody's, the licensee will provide notice in writing of such fact to the department within 20 days after publication of the change by the rating service. If the licensee's most recent bond issuance ceases to be rated in any category of A or above by both Standard and Poor's and Moody's, the licensee no longer meets the criteria of subparagraph (B)(i) of this paragraph; and

(vi) the applicant or licensee shall provide to the department a written guarantee (a written commitment by a corporate officer) that states that the licensee will fund and carry out the required decommissioning activities or, upon issuance of an order by the department, the licensee will set up and fund a trust in the amount of the current cost estimates for decommissioning.

(5) Criteria relating to use of financial tests and self-guarantees for providing reasonable assurance of funds for decommissioning by commercial companies that have no outstanding rated bonds.

(A) Introduction. An applicant or licensee may provide reasonable assurance of the availability of funds for decommissioning based on furnishing its own guarantee that funds will be available for decommissioning costs and on a demonstration that the company passes the financial test of subparagraph (B) of this paragraph. The terms of the self-guarantee are in subparagraph (C) of this paragraph. This paragraph establishes criteria for passing the financial test for the self-guarantee and establishes the terms for a self-guarantee.

(B) Financial test.

(i) To pass the financial test a company shall meet the following criteria:

(I) tangible net worth greater than $10 million, or at least 10 times the total current decommissioning cost estimate (or the current amount required if certification is used), whichever is greater, for all decommissioning activities for which the company is responsible as self-guaranteeing licensee and as parent-guarantor;

(II) assets located in the United States amounting to at least 90 percent of total assets or at least 10 times the total current decommissioning cost estimate (or the current amount required if certification is used) for all decommissioning activities for which the company is responsible as self-guaranteeing licensee and as parent-guarantor; and

(III) a ratio of cash flow divided by total liabilities greater than 0.15 and a ratio of total liabilities divided by net worth less than 1.5.

(ii) In addition, to pass the financial test, a company shall meet all of the following requirements:

(I) the company's independent certified public accountant shall have compared the data used by the company in the financial test, that is required to be derived from the independently audited year-end financial statement based on United States generally accepted accounting practices for the latest fiscal year, with the amounts in the financial statement. In connection with that procedure, the licensee shall inform the department within 90 days of any matters that may cause the auditor to believe that the data specified in the financial test should be adjusted and that the company no longer passes the test;

(II) after the initial financial test, the company shall repeat passage of the test within 90 days after the close of each succeeding fiscal year; and

(III) if the licensee no longer meets the requirements of subparagraph (B)(i) of this paragraph, the licensee shall send notice to the department of its intent to establish alternative financial assurance as specified in the department's rules. The notice shall be sent by certified mail, return receipt requested, within 90 days after the end of the fiscal year for which the year-end financial data show that the licensee no longer meets the financial test requirements. The licensee shall provide alternative financial assurance within 120 days after the end of such fiscal year.

(C) Company self-guarantee. The terms of a self-guarantee that an applicant or licensee furnishes shall provide the following.

(i) The guarantee shall remain in force unless the licensee sends notice of cancellation by certified mail, return receipt requested, to the department. Cancellation may not occur until an alternative financial assurance mechanism is in place.

(ii) The licensee shall provide alternative financial assurance as specified in the department's rules within 90 days following receipt by the department of a notice of cancellation of the guarantee.

(iii) The guarantee and financial test provisions shall remain in effect until the department has terminated the license or until another financial assurance method acceptable to the department has been put in effect by the licensee.

(iv) The applicant or licensee shall provide to the department a written guarantee (a written commitment by a corporate officer) that states that the licensee will fund and carry out the required

decommissioning activities or, upon issuance of an order by the department, the licensee will set up and fund a trust in the amount of the current cost estimates for decommissioning.

(6) Criteria relating to use of financial tests and self-guarantees for providing reasonable assurance of funds for decommissioning by nonprofit entities, such as colleges, universities, and nonprofit hospitals.

(A) Introduction. An applicant or licensee may provide reasonable assurance of the availability of funds for decommissioning based on furnishing its own guarantee that funds will be available for decommissioning costs and on a demonstration that the applicant or licensee passes the financial test of subparagraph (B) of this paragraph. The terms of the self-guarantee are in subparagraph (C) of this paragraph. This paragraph establishes criteria for passing the financial test for the self-guarantee and establishes the terms for a self-guarantee.

(B) Financial test.

(i) To pass the financial test, a college or university shall meet the criteria of subclause (I) or (II) of this clause. The college or university shall meet one of the following:

(I) for applicants or licensees that issue bonds, a current rating for its most recent uninsured, uncollateralized, and unencumbered bond issuance of AAA, AA, or A as issued by Standard and Poor's or Aaa, Aa, or A as issued by Moody's; or

(II) for applicants or licensees that do not issue bonds, unrestricted endowment consisting of assets located in the United States of at least $50 million, or at least 30 times the total current decommissioning cost estimate (or the current amount required if certification is used), whichever is greater, for all decommissioning activities for which the college or university is responsible as a self-guaranteeing licensee.

(ii) To pass the financial test, a hospital shall meet the criteria in subclause (I) or (II) of this clause. The hospital shall meet one of the following:

(I) for applicants or licensees that issue bonds, a current rating for its most recent uninsured, uncollateralized, and unencumbered bond issuance of AAA, AA, or A as issued by Standard and Poor's or Aaa, Aa, or A as issued by Moody's; or

(II) for applicants or licensees that do not issue bonds, all the following tests shall be met:

(-a-) (total revenues less total expenditures) divided by total revenues shall be equal to or greater than 0.04;

(-b-) long term debt divided by net fixed assets shall be less than or equal to 0.67;

(-c-) (current assets and depreciation fund) divided by current liabilities shall be greater than or equal to 2.55; and

(-d-) operating revenues shall be at least 100 times the total current decommissioning cost estimate (or the current amount required if certification is used) for all decommissioning activities for which the hospital is responsible as a self-guaranteeing licensee.

(iii) In addition, to pass the financial test, a licensee shall meet all the following requirements:

(I) the licensee's independent certified public accountant shall have compared the data used by the licensee in the financial test that is required to be derived from the independently audited year-end financial statements, based on United States generally accepted accounting practices, for the latest fiscal year, with the amounts in the financial statement. In connection with that procedure, the licensee shall inform the department within 90 days of any matters coming to the attention of the auditor that cause the auditor to believe that the data specified in the financial test should be adjusted and that the licensee no longer passes the test; and

(II) after the initial financial test, the licensee shall repeat passage of the test within 90 days after the close of each succeeding fiscal year;

(III) if the licensee no longer meets the requirements of subparagraph (A) of this paragraph, the licensee shall send notice to the department of its intent to establish alternative financial assurance as specified in the department's rules. The notice shall be sent by certified mail, return receipt requested, within 90 days after the end of the fiscal year for which the year-end financial data show that the licensee no longer meets the financial test requirements. The licensee shall provide alternate financial assurance within 120 days after the end of such fiscal year.

(C) Self-guarantee. The terms of a self-guarantee that an applicant or licensee furnishes shall provide the following:

(i) The guarantee shall remain in force unless the licensee sends notice of cancellation by certified mail, return receipt requested, to the department. Cancellation may not occur unless an alternative financial assurance mechanism is in place.

(ii) The licensee shall provide alternative financial assurance as specified in the department's regulations within 90 days following receipt by the department of a notice of cancellation of the guarantee.

(iii) The guarantee and financial test provisions shall remain in effect until the department has terminated the license or until another financial assurance method acceptable to the department has been put in effect by the licensee.

(iv) The applicant or licensee shall provide to the department a written guarantee (a written commitment by a corporate officer or officer of the institution) that states that the licensee will fund and carry out the required decommissioning activities or, upon issuance of an order by the department, the licensee will set up and fund a trust in the amount of the current cost estimates for decommissioning.

(v) If, at any time, the licensee's most recent bond issuance ceases to be rated in any category of "A" or above by either Standard and Poor's or Moody's, the licensee shall provide notice in writing of the fact to the department within 20 days after publication of the change by the rating service.

(7) Quantities of radioactive materials requiring consideration of the need for an emergency plan for responding to a release. The following table contains quantities of radioactive materials requiring consideration of the need for an emergency plan for responding to a release.

Figure: 25 TAC §289.252(jj)(7) (No change.)

(8) Requirements for demonstrating financial qualifications.

(A) If an applicant or licensee is not required to submit financial assurance in accordance with subsection (gg) of this section, that applicant or licensee shall demonstrate financial qualification by submitting attestation that the applicant or licensee is financially qualified to conduct the activity requested for licensure, including any required decontamination, decommissioning, reclamation, and disposal before the department issues a license.

(B) If an applicant or licensee is required to submit financial assurance in accordance with subsection (gg) of this section, that applicant or licensee shall:

(i) submit one of the following:

(I) the bonding company report or equivalent (from which information can be obtained to calculate a ratio in clause (ii) of this subparagraph) that was used to obtain the financial assurance instrument used to meet the financial assurance requirement specified in subsection (gg) of this section. However, if the applicant or licensee posted collateral to obtain the financial instrument used to meet the requirement for financial assurance specified in subsection (gg) of this section, the applicant or licensee shall demonstrate financial qualification by one of the methods specified in subclause (II) or (III) of this clause;

(II) Securities and Exchange Commission documentation (from which information can be obtained to calculate a ratio as described in clause (ii) of this subparagraph, if the applicant or licensee is a publicly-held company); or

(III) a self-test (for example, an annual audit report certifying a company's assets and liabilities and resulting ratio as described in clause (ii) of this subparagraph or, in the case of a new company, a business plan specifying expected expenses versus capitalization and anticipated revenues); and

(ii) declare its Standard Industry Classification (SIC) code. Several companies publish lists, on an annual basis, of acceptable assets-to liabilities (assets divided by liabilities) ratio ranges for each type of SIC code. If an applicant or licensee submits documentation of its current assets and current liabilities or, in the case of a new company, a business plan specifying expected expenses versus capitalization and anticipated revenues, and the resulting ratio falls within an acceptable range as published by generally recognized companies (for example, Almanac of Business and Industrial Financial Ratios, Industry NORM and Key Business Ratios, Dun & Bradstreet Industry publications, and Manufacturing USA: Industry Analyses, Statistics, and Leading Companies), the department will consider that applicant or licensee financially qualified to conduct the requested or licensed activity.

(C) If the applicant or licensee is a state or local government entity, a statement of such will suffice as demonstration that the government entity is financially qualified to conduct the requested or licensed activities.

(D) The department will consider other types of documentation if that documentation provides an equivalent measure of assurance of the applicant's or licensee's financial qualifications as found in subparagraphs (A) and (B) of this paragraph.

(9) Category 1 and category 2 radioactive materials. Licensees shall use Figure: 25 TAC §289.252(jj)(9) to determine whether a quantity of radioactive material constitutes a Category 1 or Category 2 quantity of radioactive material.
Figure: 25 TAC §289.252(jj)(9) (No change.)

(10) Broad scope license limits (for use in subsection (h) of this section).
Figure: 25 TAC §289.252(jj)(10)

(kk) Requirements for the issuance of specific licenses for a medical facility or educational institution to produce Positron Emission Tomography (PET) radioactive drugs for noncommercial transfer to licensees in its consortium.

(1) A license application will be approved if the department determines that an application from a medical facility or educational institution to produce PET radioactive drugs for noncommercial transfer to licensees in its consortium authorized for medical use in accordance with §289.256 of this title includes:

(A) a request for authorization for the production of PET radionuclides or evidence of an existing license issued in accordance with this section, the NRC, or another agreement states requirements for a PET radionuclide production facility within its consortium from which it receives PET radionuclides;

(B) evidence that the applicant is qualified to produce radioactive drugs for medical use by meeting one of the criteria in subsection (r)(1)(A) of this section;

(C) identification of individual(s) authorized to prepare the PET radioactive drugs if the applicant is a pharmacy, and documentation that each individual meets the requirements of an authorized nuclear pharmacist as specified in subsection (r)(3)(B) of this section; and

(D) information identified in subsection (r)(1)(B) of this section on the PET drugs to be noncommercially transferred to members of its consortium.

(2) Authorization in accordance with paragraph (1) of this subsection to produce PET radioactive drugs for noncommercial transfer to medical use licensees in its consortium does not relieve the licensee from complying with applicable FDA, other federal, and state requirements governing radioactive drugs.

(3) Each licensee authorized in accordance with paragraph (1) of this subsection to produce PET radioactive drugs for noncommercial transfer to medical use licensees in its consortium shall:

(A) satisfy the labeling requirements in subsection (r)(1)(C) of this section for each PET radioactive drug transport radiation shield and each syringe, vial, or other container used to hold a PET radioactive drug intended for noncommercial distribution to members of its consortium; and

(B) possess and use instrumentation meeting the requirements of §289.202(p)(3)(D) of this title to measure the radioactivity of the PET radioactive drugs intended for noncommercial distribution to members of its consortium and meet the procedural, radioactivity measurement, instrument test, instrument check, and instrument adjustment requirements in subsection (r)(2) of this section.

(4) A licensee that is a pharmacy authorized in accordance with paragraph (1) of this subsection to produce PET radioactive drugs for noncommercial transfer to medical use licensees in its consortium shall require that any individual that prepares PET radioactive drugs shall be:

(A) an authorized nuclear pharmacist that meets the requirements in subsection (r)(3)(B) of this section; or

(B) an individual under the supervision of an authorized nuclear pharmacist as specified in §289.256(s) of this title.

(5) A pharmacy, authorized in accordance with paragraph (1) of this subsection to produce PET radioactive drugs for noncommercial transfer to medical use licensees in its consortium that allows an individual to work as an authorized nuclear pharmacist, shall meet the requirements of subsection (r)(3)(E) of this section.

(ll) Specific licenses for installation, repair, or maintenance of devices containing sealed sources of radioactive material.

(1) In addition to the requirements in subsection (e) of this section, a specific license authorizing persons to perform installation, repair, or maintenance of devices containing sealed source(s) including source exchanges will be issued if the department approves the information submitted by the applicant.

(2) Each installation, repair, or maintenance activity shall be documented and a record maintained for inspection by the depart-

ment in accordance with subsection (mm) of this section. The record shall include the date, description of the service, initial survey results, and name(s) of the individual(s) who performed the work.

(3) Installation, repair, maintenance, or source exchange activities shall be performed by a specifically licensed person unless otherwise authorized in accordance with subsection (v) of this section.

(mm) Records/documents retention. Each licensee shall make, maintain, and retain at each authorized use site and for the time period set forth in the table, the records/documents described in the following table and in the referenced rule provision, and shall make them available to the department for inspection, upon reasonable notice.

Figure: 25 TAC §289.252(mm)

§289.256. Medical and Veterinary Use of Radioactive Material.

(a) Purpose.

(1) This section establishes requirements for the medical and veterinary use of radioactive material and for the issuance of specific licenses authorizing the medical and veterinary use of radioactive material. Unless otherwise exempted, no person shall manufacture, produce, receive, possess, use, transfer, own, or acquire radioactive material for medical or veterinary use except as authorized in a license issued in accordance with this section.

(2) A person who manufactures, produces, receives, possesses, uses, transfers, owns, or acquires radioactive material prior to receiving a license is subject to the requirements of this chapter.

(3) A specific license is not needed for a person who:

(A) receives, possesses, uses, or transfers radioactive material in accordance with the regulations in this chapter under the supervision of an authorized user as provided in subsection (s) of this section, unless prohibited by license condition; or

(B) prepares unsealed radioactive material for medical use in accordance with the regulations in this chapter under the supervision of an authorized nuclear pharmacist or authorized user as provided in subsection (s) of this section, unless prohibited by license condition.

(b) Scope.

(1) In addition to the requirements of this section, all licensees, unless otherwise specified, are subject to the requirements of §289.201 of this title (relating to General Provisions for Radioactive Material), §289.202 of this title (relating to Standards for Protection Against Radiation from Radioactive Materials), §289.203 of this title (relating to Notices, Instructions, and Reports to Workers; Inspections), §289.204 of this title (relating to Fees for Certificates of Registration, Radioactive Material Licenses, Emergency Planning and Implementation, and Other Regulatory Services), §289.205 of this title (relating to Hearing and Enforcement Procedures), §289.252 of this title (relating to Licensing of Radioactive Material), and §289.257 of this title (relating to Packaging and Transportation of Radioactive Material).

(2) Veterinarians who receive, possess, use, transfer, own, or acquire radioactive material in the practice of veterinary medicine shall comply with the requirements of this section except for subsections (d), (dd) and (uuu) of this section.

(3) An entity that is a "covered entity" as that term is defined in HIPAA (the Health Insurance Portability and Accountability Act of 1996, Title 45, Code of Federal Regulations (CFR), Parts 160 and 164) may be subject to privacy standards governing how information that identifies a patient can be used and disclosed. Failure to follow HIPAA requirements may result in the department making a referral of a potential violation to the United States Department of Health and Human Services.

(4) In accordance with the requirements of the Texas Medical Board, Title 22, Texas Administrative Code (TAC), Chapter 160, medical licensees must use the services of a licensed medical physicist for activities falling within the medical physicist scope of practice as identified in 22 TAC §160.17 unless exempted under 22 TAC §160.5.

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

(1) Address of use--The building or buildings that are identified on the license and where radioactive material may be prepared, received, used, or stored.

(2) Area of use--A portion of an address of use that has been set aside for the purpose of preparing, receiving, using, or storing radioactive material.

(3) Associate radiation safety officer (ARSO)--An individual who:

(A) meets the requirements in subsections (h) and (m) of this section; and

(B) is currently identified as an ARSO for the types of use of radioactive material for which the individual has been assigned duties and tasks by the radiation safety officer (RSO) on:

(i) a specific medical use license issued by the department, the United States Nuclear Regulatory Commission (NRC), or an agreement state; or

(ii) a medical use permit issued by an NRC master material licensee.

(4) Authorized medical physicist--An individual who meets the following:

(A) the requirements in subsections (j) and (m) of this section; or

(B) is identified as an authorized medical physicist or teletherapy physicist on one of the following:

(i) a specific medical use license issued by the department, the NRC, or an agreement state;

(ii) a medical use permit issued by an NRC master material licensee;

(iii) a permit issued by an NRC, or agreement state broad scope medical use licensee; or

(iv) a permit issued by an NRC master material license broad scope medical use permittee; and

(C) holds a current Texas license under the Medical Physics Practice Act, Texas Occupations Code, Chapter 602, in therapeutic radiological physics for uses in subsections (rr) and (ddd) of this section.

(5) Authorized nuclear pharmacist--A pharmacist who meets the following:

(A) the requirements in subsections (k) and (m) of this section; or

(B) is identified as an authorized nuclear pharmacist on one of the following:

(i) a specific license issued by the department, the NRC, or an agreement state that authorizes medical use or the practice of nuclear pharmacy;

(ii) a permit issued by an NRC master material licensee that authorizes medical use or the practice of nuclear pharmacy;

(iii) a permit issued by the department, the NRC, or an agreement state licensee of broad scope that authorizes medical use or the practice of nuclear pharmacy; or

(iv) a permit issued by an NRC master material license broad scope medical use permittee that authorizes medical use or the practice of nuclear pharmacy; or

(C) is identified as an authorized nuclear pharmacist by a commercial nuclear pharmacy that has been authorized to identify authorized nuclear pharmacists; or

(D) is designated as an authorized nuclear pharmacist in accordance with §289.252(r) of this title; and

(E) holds a current Texas license under the Texas Pharmacy Act, Texas Occupations Code, Chapters 551 - 566, 568, and 569, as amended, and who is certified as an authorized nuclear pharmacist by the Texas State Board of Pharmacy.

(6) Authorized user--An authorized user is defined as follows:

(A) for human use, a physician licensed by the Texas Medical Board; or a dentist licensed by the Texas State Board of Dental Examiners; or a podiatrist licensed by the Texas State Board of Podiatric Medicine who:

(i) meets the requirements in subsection (m) and subsections (gg), (jj), (nn) - (qq), (zz), (aaa), (ccc) or (ttt) of this section; or

(ii) is identified as an authorized user on any of the following:

(I) an agency, NRC, or agreement state license that authorizes the medical use of radioactive material;

(II) a permit issued by an NRC master material licensee that is authorized to permit the medical use of radioactive material;

(III) a permit issued by a specific licensee of broad scope issued by the department, the NRC, or an agreement state authorizing the medical use of radioactive material; or

(IV) a permit issued by an NRC master material licensee of broad scope that is authorized to permit the medical use of radioactive material.

(B) for veterinary use, an individual who is, a veterinarian licensed by the Texas State Board of Veterinary Medical Examiners; and

(i) is certified by the American College of Veterinary Radiology for the use of radioactive materials in veterinary medicine; or

(ii) has received training in accordance with subsections (gg), (jj), (nn) - (qq), (zz), (aaa), (ccc), and (ttt) of this section as applicable; or

(iii) is identified as an authorized user on any of the following:

(I) an agency, NRC, or agreement state license that authorizes the veterinary use of radioactive material;

(II) a permit issued by an NRC master material licensee that is authorized to permit the medical use of radioactive material;

(III) a permit issued by a specific licensee of broad scope issued by the department, the NRC, or an agreement state authorizing the medical or veterinary use of radioactive material; or

(IV) a permit issued by an NRC master material licensee of broad scope that authorizes the medical use of radioactive material.

(7) Brachytherapy--A method of radiation therapy in which plated, embedded, activated, or sealed sources are utilized to deliver a radiation dose at a distance of up to a few centimeters, by surface, intracavitary, intraluminal, or interstitial application.

(8) Brachytherapy sealed source--A sealed source or a manufacturer-assembled source train, or a combination of these sources that is designed to deliver a therapeutic dose within a distance of a few centimeters.

(9) High dose-rate remote afterloader--A device that remotely delivers a dose rate in excess of 1200 rads (12 gray (Gy)) per hour at the point or surface where the dose is prescribed.

(10) Institutional Review Board (IRB)--Any board, committee, or other group formally designated by an institution and approved by the United States Food and Drug Administration (FDA) to review, approve the initiation of, and conduct periodic review of biomedical research involving human subjects.

(11) Low dose-rate remote afterloader--A device that remotely delivers a dose rate of less than or equal to 200 rads (2 Gy) per hour at the point or surface where the dose is prescribed.

(12) Management--The chief executive officer or other individual delegated the authority to manage, direct, or administer the licensee's activities.

(13) Manual brachytherapy--A type of brachytherapy in which the sealed sources, for example, seeds and ribbons, are manually inserted either into the body cavities that are in close proximity to a treatment site or directly in the tissue volume.

(14) Medical event--An event that meets the criteria in subsection (uuu)(1) of this section.

(15) Medical institution--An organization in which several medical disciplines are practiced.

(16) Medical use--The intentional internal or external administration of radioactive material, or the radiation from radioactive material, to patients or human research subjects under the supervision of an authorized user.

(17) Medium dose-rate afterloader--A device that remotely delivers a dose rate greater than 200 rads (2 Gy) and less than or equal to 1200 rads (12 Gy) per hour at the point or surface where the dose is prescribed.

(18) Mobile nuclear medicine service--A licensed service authorized to transport radioactive material to, and medical use of the material at, the client's address. Services transporting calibration sources only are not considered mobile nuclear medicine licensees.

(19) Ophthalmic physicist--An individual who:

(A) meets the requirements in subsections (m) and (xx)(1)(B) of this section; and

(B) is identified as an ophthalmic physicist on:

(i) a specific medical use license issued by the department, the NRC, or an agreement state;

(ii) a permit issued by an agency, NRC, or agreement state broad scope medical use licensee;

(iii) a medical use permit issued by an NRC master material licensee; or

(iv) a permit issued by an NRC master material licensee broad scope medical use permittee.

(20) Output--The exposure rate, dose rate, or a quantity related in a known manner to these rates from a teletherapy unit, a brachytherapy source, a remote afterloader unit, or a gamma stereotactic radiosurgery unit, for a specified set of exposure conditions.

(21) Patient--A human or animal under medical care and treatment.

(22) Patient intervention--Actions by the patient or human research subject, whether intentional or unintentional, such as dislodging or removing treatment devices or prematurely terminating the administration.

(23) Permanent facility--A building or buildings that are identified on the license within the State of Texas and where radioactive material may be prepared, received, used, or stored. This may also include an area or areas where administrative activities related to the license are performed.

(24) Preceptor--An individual who provides, directs, or verifies the training and experience required for an individual to become an authorized user, an authorized medical physicist, an authorized nuclear pharmacist, an RSO, or an ARSO.

(25) Prescribed dosage--The specified activity or range of activity of unsealed radioactive material as documented in a written directive or in accordance with the directions of the authorized user for procedures in subsections (ff) and (hh) of this section.

(26) Prescribed dose--Prescribed dose means one of the following:

(A) for gamma stereotactic radiosurgery, the total dose as documented in the written directive;

(B) for teletherapy, the total dose and dose per fraction as documented in the written directive;

(C) for brachytherapy, either the total sealed source strength and exposure time, or the total dose, as documented in the written directive; or

(D) for remote afterloaders, the total dose and dose per fraction as documented in the written directive.

(27) Pulsed dose-rate remote afterloader--A special type of remote afterloading device that uses a single sealed source capable of delivering dose rates greater than 1200 rads (12 Gy) per hour, but is approximately one-tenth of the activity of typical high dose-rate remote afterloader sealed sources and is used to simulate the radiobiology of a low dose rate remote afterloader treatment by inserting the sealed source for a given fraction of each hour.

(28) Radiation safety officer (RSO)--For purposes of this section, an individual who:

(A) meets the requirements in subsections (h) and (m) of this section; or

(B) is identified as an RSO on one of the following:

(i) a specific license issued by the department, the NRC, or an agreement state that authorizes the medical or veterinary use of radioactive material; or

(ii) a permit issued by an NRC master material licensee that authorizes the medical or veterinary use of radioactive material.

(29) Sealed source and device registry--The national registry that contains all the registration certificates, generated by both the NRC and the agreement states, that summarize the radiation safety information for sealed sources and devices and describe the licensing and use conditions approved for the product.

(30) Stereotactic radiosurgery--The use of external radiation in conjunction with a guidance device to very precisely deliver a dose to a tissue volume by the use of three-dimensional coordinates.

(31) Technologist--A person (nuclear medicine technologist) skilled in the performance of nuclear medicine procedures under the supervision of a physician.

(32) Teletherapy--Therapeutic irradiation in which the sealed source is at a distance from the patient or human or animal research subject.

(33) Therapeutic dosage--The specified activity or range of activity of radioactive material that is intended to deliver a radiation dose to a patient or human or animal research subject for palliative or curative treatment.

(34) Therapeutic dose--A radiation dose delivered from a sealed source containing radioactive material to a patient or human or animal research subject for palliative or curative treatment.

(35) Treatment site--The anatomical description of the tissue intended to receive a radiation dose, as described in a written directive.

(36) Type of use--Use of radioactive material as specified under the following subsections:

(A) uptake, dilution, and excretion studies in subsection (ff) of this section;

(B) imaging and localization studies in subsection (hh) of this section;

(C) therapy with unsealed radioactive material in subsection (kk) of this section;

(D) manual brachytherapy with sealed sources in subsection (rr) of this section;

(E) sealed sources for diagnosis in subsection (bbb) of this section;

(F) sealed source in a remote afterloader unit, teletherapy unit, or gamma stereotactic radiosurgery unit in subsection (ddd) of this section; or

(G) other medical or veterinary uses of radioactive material or a radiation source approved for medical or veterinary use in subsection (q) of this section.

(37) Unit dosage--A dosage prepared for medical use for administration as a single dosage to a patient or human or animal research subject without any further modification of the dosage after it is initially prepared.

(38) Veterinary use--The intentional internal or external administration of radioactive material, or the radiation from radioactive material, to patients under the supervision of an authorized user.

(39) Written directive--An authorized user's written order for the administration of radioactive material or radiation from radioactive material to a specific patient or human research subject, as specified in subsection (t) of this section.

(d) Provisions for research involving human subjects.

(1) A licensee may conduct research involving human subjects only if it uses the radioactive materials specified on its license for the uses authorized on the license.

(2) The licensee may conduct research specified in paragraph (1) of this subsection provided that:

(A) the research is conducted, funded, supported, or regulated by a federal agency that has implemented the Federal Policy for the Protection of Human Subjects as required by Title 10, CFR, §35.6 (Federal Policy); or

(B) the licensee has applied for and received approval of a specific amendment to its license before conducting the research.

(3) Before conducting research as specified in paragraph (1) of this subsection, the licensee shall obtain the following:

(A) "informed consent," as defined and described in the Federal Policy, from the human research subjects; and

(B) review and approval of the research from an IRB as required by Title 45, CFR, Part 46, and Title 21, CFR, Part 56, and in accordance with the Federal Policy.

(4) Nothing in this subsection relieves licensees from complying with the other requirements of this chapter.

(e) Implementation.

(1) If a license condition exempted a licensee from a provision of this section or §289.252 of this title on the effective date of this rule, then the license condition continues to exempt the licensee from the requirements in the corresponding provision until there is a license amendment or license renewal that modifies or removes the license condition.

(2) When a requirement in this section differs from the requirement in an existing license condition, the requirement in this section shall govern.

(3) Licensees shall continue to comply with any license condition that requires implementation of procedures required by subsections (ggg) and (mmm) - (ooo) of this section until there is a license amendment or renewal that modifies the license condition.

(f) Specific requirements for the issuance of licenses. In addition to the requirements in §289.252(e) of this title and subsections (n) - (q) of this section, as applicable, a license will be issued if the department determines that:

(1) the applicant satisfies any applicable special requirement in this section;

(2) qualifications of the designated RSO as specified in subsection (h) of this section are adequate for the purpose requested in the application; and

(3) the following information submitted by the applicant is approved:

(A) an operating, safety, and emergency procedures manual to include specific information on the following:

(i) radiation safety precautions and instructions;

(ii) methodology for measurement of dosages or doses to be administered to patients or human or animal research subjects;

(iii) calibration, maintenance, and repair of instruments and equipment necessary for radiation safety; and

(iv) waste disposal procedures; and

(B) any additional information required by this chapter that is requested by the department to assist in its review of the application; and

(C) qualifications of the following:

(i) RSO in accordance with subsection (c)(28) of this section;

(ii) authorized user(s) in accordance with subsection (c)(6) of this section as applicable to the use(s) being requested;

(iii) authorized medical physicist in accordance with subsection (c)(4) of this section, if applicable;

(iv) authorized nuclear pharmacist in accordance with subsection (c)(5) of this section, if applicable;

(v) ophthalmic physicist in accordance with subsection (c)(19), if applicable;

(vi) Radiation Safety Committee (RSC), in accordance with subsection (i) of this section, if applicable; and

(vii) ARSO in accordance with subsection (c)(3) of this section, if applicable; and

(4) the applicant's permanent facility is located in Texas.

(g) Authority and responsibilities for the radiation protection program.

(1) In addition to the radiation protection program requirements of §289.202(e) of this title, a licensee's management shall approve in writing:

(A) requests for a license application, renewal, or amendment before submittal to the department; and

(B) any individual before allowing that individual to work as an authorized user, authorized nuclear pharmacist, or authorized medical physicist.

(2) A licensee's management shall appoint an RSO who agrees, in writing, to be responsible for implementing the radiation protection program. The licensee, through the RSO, shall ensure that radiation safety activities are being performed in accordance with licensee-approved procedures and regulatory requirements. A licensee's management may appoint, in writing, one or more ARSO to support the RSO. The RSO, with written agreement of the licensee's management, must assign the specific duties and tasks to each ARSO. These duties and tasks are restricted to the types of use for which the ARSO is listed on a license. The RSO may delegate duties and tasks to the ARSO but shall not delegate the authority or responsibilities for implementing the radiation protection program.

(3) Every licensee shall establish in writing the authority, duties, and responsibilities of the RSO and ensure that the RSO is provided sufficient authority, organizational freedom, time, resources, and management prerogative to perform the following duties:

(A) establish and oversee operating, safety, emergency, and as low as reasonably achievable (ALARA) procedures, and to review them at least annually to ensure that the procedures are current and conform with this chapter;

(B) ensure that required radiation surveys and leak tests are performed and documented in accordance with this chapter, including any corrective measures when levels of radiation exceed established limits;

(C) ensure that individual monitoring devices are used properly by occupationally-exposed personnel, that records are kept of the monitoring results, and that timely notifications are made in accordance with §289.203 of this title;

(D) investigate and cause a report to be submitted to the department for each known or suspected case of radiation exposure to an individual or radiation level detected in excess of limits established by this chapter and each theft or loss of source(s) of radiation, to determine the cause(s), and to take steps to prevent a recurrence;

(E) investigate and cause a report to be submitted to the department for each known or suspected case of release of radioactive material to the environment in excess of limits established by this chapter;

(F) have a thorough knowledge of management policies and administrative procedures of the licensee;

(G) identify radiation safety problems;

(H) assume control and initiate, recommend, or provide corrective actions, including shutdown of operations when necessary, in emergency situations or unsafe conditions;

(I) verify implementation of corrective actions;

(J) ensure that records are maintained as required by this chapter;

(K) ensure the proper storing, labeling, transport, use, and disposal of sources of radiation, storage, and/or transport containers;

(L) ensure that inventories are performed in accordance with the activities for which the license application is submitted;

(M) ensure that personnel are complying with this chapter, the conditions of the license, and the operating, safety, and emergency procedures of the licensee; and

(N) serve as the primary contact with the department.

(4) The RSO shall ensure that the duties listed in paragraph (3)(A) - (N) of this subsection are performed.

(5) The RSO shall be on site periodically commensurate with the scope of licensed activities to satisfy the requirements of paragraphs (3) and (4) of this subsection.

(6) The RSO, or staff designated by the RSO, shall be capable of physically arriving at the licensee's authorized use site(s) within a reasonable time of being notified of an emergency situation or unsafe condition.

(7) For up to 60 days each calendar year, a licensee may permit an authorized user or an individual qualified to be an RSO, under subsections (h) and (m) of this section, to function as a temporary RSO and to perform the duties of an RSO in accordance with paragraph (3) of this subsection, provided the licensee takes the actions required in paragraphs (2), (3), and (9) of this subsection, and notifies the department in accordance with subsection (r)(5) of this section. Records of qualifications and dates of service shall be maintained in accordance with subsection (xxx) of this section for inspection by the department.

(8) A licensee may simultaneously appoint more than one temporary RSO in accordance with paragraph (7) of this subsection, if needed to ensure that the licensee has a temporary RSO that satisfies the requirements to be an RSO for each of the different types of uses of radioactive material permitted by the license.

(9) The licensee shall maintain records, in accordance with subsection (xxx) of this section, as follows.

(A) A licensee shall retain a record of actions taken by the licensee's management in accordance with paragraph (1) of this subsection. The record must include a summary of the actions taken and a signature of licensee management.

(B) The authority, duties, and responsibilities of the RSO as required by paragraph (3) of this subsection, and a signed copy of each RSO's agreement to be responsible for implementing the radiation safety program, as required by paragraph (2) of this subsection. The records must include the signature of the RSO and licensee management.

(C) A copy of the written document appointing the ARSO, for each ARSO appointed under paragraph (2) of this subsection. The record must include the signature of licensee management.

(h) Training for an RSO and ARSO. Except as provided in subsection (l) of this section, the licensee shall require the individual fulfilling the responsibilities of an RSO or an individual assigned duties and tasks as an ARSO in accordance with subsection (g) of this section for licenses for medical or veterinary use of radioactive material to be an individual who:

(1) is certified by a specialty board whose certification process has been recognized by the department, the NRC, or an agreement state and who meets the requirements in paragraph (4) of this subsection. The names of board certifications that have been recognized by the department, the NRC, or an agreement state are posted on the NRC's Medical Uses Licensee Toolkit web page:

(A) to have its certification process recognized, a specialty board shall require all candidates for certification to:

(i) hold a bachelor's or graduate degree from an accredited college or university in physical science or engineering or biological science with a minimum of 20 college credits in physical science;

(ii) have five or more years of professional experience in health physics (graduate training may be substituted for no more than two years of the required experience) including at least three years in applied health physics; and

(iii) pass an examination, administered by diplomates of the specialty board, which evaluates knowledge and competence in radiation physics and instrumentation, radiation protection, mathematics pertaining to the use and measurement of radioactivity, radiation biology and radiation dosimetry; or

(B) to have its certification process recognized, a specialty board shall require all candidates for certification to:

(i) hold a master's or doctor's degree in physics, medical physics, other physical science, engineering, or applied mathematics from an accredited college or university;

(ii) have two years of full-time practical training and/or supervised experience in medical physics as follows:

(I) under the supervision of a medical physicist who is certified in medical physics by a specialty board recognized by the department, the NRC, or an agreement state; or

(II) in clinical nuclear medicine facilities providing diagnostic and/or therapeutic services under the direction of physi-

cians who meet the requirements for authorized users in subsections (l), (jj), or (nn) of this section; and

(iii) pass an examination, administered by diplomates of the specialty board, that assesses knowledge and competence in clinical diagnostic radiological or nuclear medicine physics and in radiation safety; or

(2) has completed all of the following:

(A) a structured educational program consisting of both:

(i) 200 hours of classroom and laboratory training in the following areas:

(I) radiation physics and instrumentation;

(II) radiation protection;

(III) mathematics pertaining to the use and measurement of radioactivity;

(IV) radiation biology; and

(V) radiation dosimetry; and

(ii) one year of full-time radiation safety experience under the supervision of the individual identified as the RSO on an agency, NRC, or agreement state license or on a permit issued by an NRC master material licensee that authorizes similar type(s) of use(s) of radioactive material. An ARSO may provide supervision for those areas for which the ARSO is authorized on an agency, NRC, or an agreement state license or a permit issued by an NRC master material licensee. The full-time radiation safety experience must involve the following:

(I) shipping, receiving, and performing related radiation surveys;

(II) using and performing checks for proper operation of instruments used to determine the activity of dosages, survey meters, and instrument used to measure radionuclides;

(III) securing and controlling radioactive material;

(IV) using administrative controls to avoid mistakes in the administration of radioactive material;

(V) using procedures to prevent or minimize radioactive contamination and using proper decontamination procedures;

(VI) using emergency procedures to control radioactive material; and

(VII) disposing of radioactive material; and

(B) has obtained written attestation, signed by a preceptor RSO or ARSO who has experience with the radiation safety aspects of similar types of use of radioactive material for which the individual is seeking approval as an RSO or an ARSO, and the written attestation must state that the individual has satisfactorily completed the requirements in paragraphs (2)(A) and (4) of this subsection, and is able to independently fulfill the radiation safety-related duties as an RSO or as an ARSO for a medical use license; or

(3) meets one of the following:

(A) is a medical physicist who has been certified by a specialty board whose certification process has been recognized by the department, the NRC, or an agreement state in accordance with subsection (j)(1) of this section and has experience with the radiation safety aspects of similar types of use of radioactive material for which the licensee is seeking the approval of the individual as RSO or an ARSO and who meets the requirements in paragraph (4) of this subsection;

(B) is an authorized user, authorized medical physicist, or authorized nuclear pharmacist identified on an agency, NRC, or another agreement state's license, a permit issued by a NRC master material licensee, a permit issued by the department, the NRC, or another agreement state licensee of broad scope, or a permit issued by a NRC master material license broad scope permittee, has experience with the radiation safety aspects of similar types of use of radioactive material for which the licensee is seeking the approval of the individual as the RSO or ARSO, and who meets the requirements in paragraph (4) of this subsection; or

(C) has experience with the radiation safety aspects of the types of use of radioactive material for which the individual is seeking simultaneous approval both as the RSO and the authorized user on the same new medical use license or new medical use permit issued by a NRC master material license. The individual must also meet the requirements in paragraph (4) of this subsection; and

(4) has training in the radiation safety, regulatory issues, and emergency procedures for the types of use for which a licensee seeks approval, and this training requirement may be satisfied by completing training that is supervised by an RSO, an ARSO, authorized medical physicist, authorized nuclear pharmacist, or authorized user, as appropriate, who is authorized for the type(s) of use for which the licensee is seeking approval.

(i) Radiation safety committee (RSC). Licensees of broad scope and licensees who are authorized for two or more different types of uses of radioactive material in accordance with subsections (kk), (rr), and (ddd) of this section, or two or more types of units under subsection (ddd) of this section shall establish an RSC to oversee all uses of radioactive material permitted by the license.

(1) The RSC for licenses for medical use with broad scope authorization shall be composed of the following individuals as approved by the department:

(A) authorized users from each type of use of radioactive material authorized on the license;

(B) the RSO;

(C) a representative of nursing service;

(D) a representative of management who is neither an authorized user nor the RSO; and

(E) may include other members as the licensee deems appropriate.

(2) The RSC for licenses for medical and veterinary use authorized for two or more different types of uses of radioactive material in accordance with subsections (kk), (rr), and (ddd) of this section, or two or more types of units in accordance with subsection (ddd) of this section shall be composed of the following individuals as approved by the department:

(A) an authorized user of each type of use permitted by the license;

(B) the RSO;

(C) a representative of nursing service, if applicable;

(D) a representative of management who is neither an authorized user nor the RSO; and

(E) may include other members as the licensee deems appropriate.

(3) Duties and responsibilities of the RSC.

(A) For licensees without broad scope authorization, the duties and responsibilities of the RSC include the following:

(i) meeting as often as necessary to conduct business but no less than three times a year;

(ii) reviewing summaries of the following information presented by the RSO:

(I) over-exposures;

(II) significant incidents, including spills, contamination, or medical events; and

(III) items of non-compliance following an inspection;

(iii) reviewing the program for maintaining doses ALARA, and providing any necessary recommendations to ensure doses are ALARA; and

(iv) reviewing the audit of the radiation safety program and acting upon the findings.

(B) For licensees of broad scope, the duties and responsibilities of the RSC include the items in subparagraph (A) of this paragraph and the following:

(i) reviewing the overall compliance status for authorized users;

(ii) sharing responsibility with the RSO to conduct periodic audits of the radiation safety program;

(iii) developing criteria to evaluate training and experience of new authorized user applicants;

(iv) evaluating and approving authorized user applicants who request authorization to use radioactive material at the facility; and

(v) reviewing and approving permitted program and procedural changes before implementation.

(4) Records documenting the RSC meetings shall be made and maintained for inspection by the department in accordance with subsection (xxx) of this section. The record shall include the date, names of individuals in attendance, minutes of the meeting, and any actions taken.

(j) Training for an authorized medical physicist. Except as provided in subsection (l) of this section, the licensee shall require the authorized medical physicist to be:

(1) an individual who is certified by a specialty board whose certification process has been recognized by the department, the NRC, or an agreement state and who meets the requirements in paragraph (3) of this subsection. The names of board certifications that have been recognized by the department, the NRC, or an agreement state are posted on the NRC's Medical Uses Licensee Toolkit web page. To have its certification process recognized, a specialty board shall require all candidates for certification to meet the following:

(A) hold a master's or doctor's degree in physics, medical physics, other physical science, engineering, or applied mathematics from an accredited college or university;

(B) complete two years of full-time practical training and/or supervised experience in medical physics as follows:

(i) under the supervision of a medical physicist who is certified in medical physics by a specialty board whose certification process has been recognized by the department, the NRC, or an agreement state; or

(ii) in clinical radiation facilities providing high-energy, external beam therapy (photons and electrons with energies greater than or equal to 1 million electron volts) and brachytherapy services under the direction of physicians who meet the requirements for authorized users in subsections (l), (zz) or (ttt) of this section; and

(C) pass an examination administered by diplomates of the specialty board that assesses knowledge and competence in clinical radiation therapy, radiation safety, calibration, quality assurance, and treatment planning for external beam therapy, brachytherapy, and stereotactic radiosurgery; or

(2) an individual who:

(A) holds a post graduate degree and experience to include:

(i) a master's or doctor's degree in physics, medical physics, other physical science, engineering, or applied mathematics from an accredited college or university; and

(ii) completion of one year of full-time training in medical physics and an additional year of full-time work experience under the supervision of an individual who meets the requirements for an authorized medical physicist for the type(s) of use for which the individual is seeking authorization, and this training and work experience shall be conducted in clinical radiation facilities that provide high-energy, external beam therapy (photons and electrons with energies greater than or equal to 1 million electron volts) and brachytherapy services and shall include:

(I) performing sealed source leak tests and inventories;

(II) performing decay corrections;

(III) performing full calibration and periodic spot checks of external beam treatment units, stereotactic radiosurgery units, and remote afterloading units as applicable; and

(IV) conducting radiation surveys around external beam treatment units, stereotactic radiosurgery units, and remote afterloading units as applicable; and

(B) has obtained written attestation that the individual has satisfactorily completed the requirements in paragraphs (2)(A) and (3) of this subsection, and is able to independently fulfill the radiation safety-related duties as an authorized medical physicist for each type of therapeutic medical unit for which the individual is requesting authorized medical physicist status, and the written attestation shall be signed by a preceptor authorized medical physicist who meets the requirements in subsection (l) of this section, this subsection, or equivalent NRC or agreement state requirements for an authorized medical physicist for each type of therapeutic medical unit for which the individual is requesting authorized medical physicist status; and

(3) an individual who has training for the type(s) of use for which authorization is sought that includes hands-on device operation, safety procedures, clinical use, and the operation of a treatment planning system. This training requirement may be satisfied by satisfactorily completing either a training program provided by the vendor or by training supervised by an authorized medical physicist authorized for the type(s) of use for which the individual is seeking authorization.

(k) Training for an authorized nuclear pharmacist. Except as provided in subsection (l) of this section, the licensee shall require the authorized nuclear pharmacist to be a pharmacist who:

(1) is certified by a specialty board whose certification process has been recognized by the department, the NRC or an agreement state. The names of board certifications that have been recognized by the department, the NRC, or an agreement state are posted on the NRC's Medical Uses Licensee Toolkit web page. To have its certification process recognized, a specialty board shall require all candidates for certification to:

(A) have graduated from a pharmacy program accredited by the Accreditation Council for Pharmacy Education (ACPE) or have passed the Foreign Pharmacy Graduate Examination Committee (FPGEC) examination;

(B) hold a current, active license to practice pharmacy in the State of Texas;

(C) provide evidence of having acquired at least 4000 hours of training/experience in nuclear pharmacy practice. Academic training may be substituted for no more than 2000 hours of the required training and experience; and

(D) pass an examination in nuclear pharmacy administered by diplomates of the specialty board, that assesses knowledge and competency in procurement, compounding, quality assurance, dispensing, distribution, health and safety, radiation safety, provision of information and consultation, monitoring patient outcomes, research and development; or

(2) has completed:

(A) a 700-hour structured educational program, including both:

(i) 200 hours of classroom and laboratory training in the following areas:

(I) radiation physics and instrumentation;

(II) radiation protection;

(III) mathematics pertaining to the use and measurement of radioactivity;

(IV) chemistry of radioactive material for medical use; and

(V) radiation biology; and

(ii) supervised practical experience in a nuclear pharmacy involving the following:

(I) shipping, receiving, and performing related radiation surveys;

(II) using and performing checks for proper operation of instruments used to determine the activity of dosages, survey meters, and, if appropriate, instruments used to measure alpha- or beta-emitting radionuclides;

(III) calculating, assaying, and safely preparing dosages for patients or human research subjects;

(IV) using administrative controls to avoid medical events in the administration of radioactive material; and

(V) using procedures to prevent or minimize radioactive contamination and using proper decontamination procedures; and

(B) has obtained written attestation, signed by a preceptor authorized nuclear pharmacist, that the individual has satisfactorily completed the requirements in paragraph (2)(A) of this subsection and is able to independently fulfill the radiation safety-related duties as an authorized nuclear pharmacist.

(l) Training for experienced RSO, teletherapy or medical physicist, authorized medical physicist, authorized user, nuclear pharmacist, and authorized nuclear pharmacist.

(1) An individual identified on an agency, NRC, or an agreement state license or a permit issued by the department, the NRC, or an agreement state broad scope licensee or master material license permit or by a master material license permittee of broad scope as an RSO, a teletherapy or medical physicist, an authorized medical physicist, a nuclear pharmacist or an authorized nuclear pharmacist on or before January 14, 2019, need not comply with the training requirements of subsections (h), (j), and (k) of this section, respectively, except the RSO and authorized medical physicists identified in this paragraph must meet the training requirements in subsections (h)(4) or (j)(3) of this section, as appropriate, for any material or uses for which they were not authorized before this date.

(2) Any individual certified by the American Board of Health Physics in Comprehensive Health Physics; American Board of Radiology; American Board of Nuclear Medicine; American Board of Science in Nuclear Medicine; Board of Pharmaceutical Specialties in Nuclear Pharmacy; American Board of Medical Physics in radiation oncology physics; Royal College of Physicians and Surgeons of Canada in nuclear medicine; American Osteopathic Board of Radiology; or American Osteopathic Board of Nuclear Medicine on or before October 24, 2005, need not comply with the training requirements of subsection (h) of this section to be identified as an RSO or as an ARSO on an agency, NRC, or agreement state license or NRC master material license permit for those materials and uses that these individuals performed on or before October 24, 2005.

(3) Any individual certified by the American Board of Radiology in therapeutic radiological physics, Roentgen ray and gamma ray physics, xray and radium physics, or radiological physics, or certified by the American Board of Medical Physics in radiation oncology physics, on or before October 24, 2005, need not comply with the training requirements for an authorized medical physicist described in subsection (j) of this section, for those materials and uses that these individuals performed on or before October 24, 2005.

(4) An RSO, a medical physicist, or a nuclear pharmacist, who used only accelerator-produced radioactive materials, discrete sources of radium-226, or both, for medical uses or in the practice of nuclear pharmacy at a government agency or federally recognized Indian Tribe before November 30, 2007, or at all other locations of use before August 8, 2009, or an earlier date as noticed by the NRC, need not comply with the training requirements of subsections (h), (j) or (k) of this section, respectively, when performing the same uses. A nuclear pharmacist, who prepared only radioactive drugs containing accelerator-produced radioactive materials, or a medical physicist, who used only accelerator-produced radioactive materials, at the locations and during the time period identified in this paragraph, qualifies as an authorized nuclear pharmacist or an authorized medical physicist, respectively, for those materials and uses performed before these dates, for the purposes of this chapter.

(5) An individual identified as a physician, dentist, podiatrist or veterinarian authorized for the medical or veterinary use of radioactive material.

(A) Physicians, dentists, or podiatrists identified as authorized users for the medical use of radioactive material on a license issued by the department, the NRC, or an agreement state, a permit issued by an NRC master material licensee, a permit issued by the department, the NRC, or an agreement state broad scope licensee, or a permit issued by an NRC master material license broad scope permittee on or before January 14, 2019, who perform only those medical

uses for which they were authorized on or before that date need not comply with the training requirements of subsections (gg) through (ttt) of this section.

(B) Physicians, dentists, or podiatrists not identified as authorized users for the medical use of radioactive material on a license issued by the department, the NRC, or an agreement state, a permit issued by an NRC master material licensee, a permit issued by the department, the NRC, or an agreement state broad scope licensee, or a permit issued by an NRC master material license of broad scope on or before October 24, 2005, need not comply with the training requirements of subsections (gg) through (ttt) of this section for those materials and uses that these individuals performed on or before October 24, 2005, as follows:

(i) For uses authorized under subsections (ff) or (hh) of this section, or oral administration of sodium iodide I-131 requiring a written directive for imaging and localization purposes, a physician who was certified on or before October 24, 2005, in nuclear medicine by the American Board of Nuclear Medicine; diagnostic radiology by the American Board of Radiology; diagnostic radiology or radiology by the American Osteopathic Board of Radiology; nuclear medicine by the Royal College of Physicians and Surgeons of Canada; or American Osteopathic Board of Nuclear Medicine in nuclear medicine;

(ii) For uses authorized under subsection (kk) of this section, a physician who was certified on or before October 24, 2005, by the American Board of Nuclear Medicine; the American Board of Radiology in radiology, therapeutic radiology, or radiation oncology; nuclear medicine by the Royal College of Physicians and Surgeons of Canada; or the American Osteopathic Board of Radiology after 1984;

(iii) For uses authorized under subsections (rr) or (ddd) of this section, a physician who was certified on or before October 24, 2005, in radiology, therapeutic radiology or radiation oncology by the American Board of Radiology; radiation oncology by the American Osteopathic Board of Radiology; radiology, with specialization in radiotherapy, as a British "Fellow of the Faculty of Radiology" or "Fellow of the Royal College of Radiology"; or therapeutic radiology by the Canadian Royal College of Physicians and Surgeons; and

(iv) For uses authorized under subsection (bbb) of this section, a physician who was certified on or before October 24, 2005, in radiology, diagnostic radiology, therapeutic radiology, or radiation oncology by the American Board of Radiology; nuclear medicine by the American Board of Nuclear Medicine; diagnostic radiology or radiology by the American Osteopathic Board of Radiology; or nuclear medicine by the Royal College of Physicians and Surgeons of Canada.

(C) Physicians, dentists, or podiatrists who used only accelerator-produced radioactive materials, discrete sources of radium-226, or both, for medical uses performed at a government agency or federally recognized Indian Tribe before November 30, 2007, or at all other locations of use before August 8, 2009, or an earlier date as noticed by the NRC, need not comply with the training requirements of subsections (gg) through (ttt) of this section when performing the same medical uses. A physician, dentist, or podiatrist, who used only accelerator-produced radioactive materials, discrete sources of radium-226, or both, for medical uses at the locations and time period identified in this paragraph, qualifies as an authorized user for those materials and uses performed before these dates, for the purposes of this chapter.

(6) Individuals who need not comply with training requirements in this subsection may serve as preceptors for, and supervisors of, applicants seeking authorization on an agency, NRC, or agreement state license for the same uses for which these individuals are authorized.

(m) Recentness of training. The training and experience specified in subsections (h), (j), and (gg) - (ttt) of this section for medical and veterinary use shall have been obtained within the seven years preceding the date of application or the individual shall have had related continuing education and experience since the required training and experience was completed.

(n) Licenses for medical and veterinarian uses of radioactive material without broad scope authorization. In addition to the requirements of subsection (f) of this section, a license for medical and veterinarian use of radioactive material as described in the applicable subsections (ff), (hh), (kk), (rr), (bbb) and (ddd) of this section will be issued if the department approves the following documentation submitted by the applicant:

(1) that the physician(s) or veterinarian(s) designated on the application as the authorized user(s) is qualified in accordance with subsections (gg), (jj), (nn) - (qq), (zz), (aaa), (ccc) and (ttt) of this section, as applicable;

(2) that the radiation detection and measuring instrumentation is appropriate for performing surveys and procedures for the uses involved;

(3) that the radiation safety operating procedures are adequate for the handling and disposal of the radioactive material involved in the uses; and

(4) that an RSC has been established in accordance with subsection (i)(2) of this section, if applicable.

(o) License for medical and veterinary uses of radioactive material with broad scope authorization. In addition to the requirements of subsection (f) of this section, a license for medical use of radioactive material with broad scope authorization will be issued if the department approves the following documentation submitted by the applicant:

(1) that the review of authorized user qualifications by the RSC is in accordance with subsections (gg), (jj), (nn) - (qq), (zz), (aaa), (ccc) and (ttt) of this section, as applicable;

(2) that the application is for a license authorizing unspecified forms and/or multiple types of radioactive material for medical research, diagnosis, and therapy;

(3) that the radiation detection and measuring instrumentation is appropriate for performing surveys and procedures for the uses involved;

(4) that the radiation safety operating procedures are adequate for the handling and disposal of the radioactive material involved in the uses;

(5) that staff has substantial experience in the use of a variety of radioactive material for a variety of human and animal uses;

(6) that the full-time RSO meets the requirements of subsection (h) of this section; and

(7) that an RSC has been established in accordance with subsection (i)(1) of this section.

(p) License for the use of remote afterloader units, teletherapy units, or gamma stereotactic radiosurgery units. In addition to the requirements of subsection (f) of this section, a license for the use of remote afterloader units, teletherapy units, or gamma stereotactic radiosurgery units will be issued if the department approves the following documentation submitted by the applicant:

(1) that the physician(s) designated on the application as the authorized user(s) is qualified in accordance with subsection (ttt) of this section;

(2) that the radiation detection and measuring instrumentation is appropriate for performing surveys and procedures for the uses involved;

(3) that the radiation safety operating procedures are adequate for the handling and disposal of the radioactive material involved in the uses;

(4) of the radioactive isotopes to be possessed;

(5) of the sealed source manufacturer(s) name(s) and the model number(s) of the sealed source(s) to be installed;

(6) of the maximum number of sealed sources of each isotope to be possessed, including the activity of each sealed source;

(7) of the manufacturer and model name and/or number of the following units, as applicable:

(A) remote afterloader unit;

(B) teletherapy unit; or

(C) gamma stereotactic radiosurgery unit;

(8) that the authorized medical physicist designated on the application is qualified in accordance with subsection (j) of this section;

(9) of the safety procedures and instructions as required by subsection (ggg) of this section;

(10) of the spot check procedures as required by subsections (mmm) - (ooo) of this section, as applicable; and

(11) that an RSC has been established in accordance with subsection (i)(1) or (2) of this section if applicable.

(q) License for other medical or veterinary uses of radioactive material or a radiation source approved for medical or veterinary use that is not specifically addressed in this section. In addition to the requirements of subsection (f) of this section, a licensee may use radioactive material or a radiation source approved for medical use which is not specifically addressed in this section if:

(1) the department approves the following documentation submitted by the applicant:

(A) any additional aspects of the medical use of the material that are applicable to radiation safety that are not addressed in, or differ from, requirements in this section;

(B) identification of and commitment to follow the applicable radiation safety program requirements in this section that are appropriate for the specific medical use;

(C) any additional specific information on:

(i) radiation safety precautions and instructions;

(ii) methodology for measurement of dosages or doses to be administered to patients or human research subjects; and

(iii) calibration, maintenance, and repair of instruments and equipment necessary for radiation safety; and

(D) any other information requested by the department in its review of the application; and

(2) the applicant or licensee has received written approval from the department in a license or license amendment and the licensee uses the material in accordance with the regulations and specific conditions the department considers necessary for the medical use of the material.

(r) License amendments and notifications.

(1) Requests for amendment of a license or deletion of an authorized use site shall be filed in accordance with §289.252(aa) of this title.

(2) A licensee shall apply for and shall receive a license amendment before the following:

(A) receiving or using radioactive material for a type of use that is authorized in accordance with this section, but is not authorized on their current license issued in accordance with this section;

(B) permitting anyone to work as an authorized user, authorized nuclear pharmacist, authorized medical physicist, or ophthalmic physicist, under the license except an individual who is identified as an authorized user, an authorized nuclear pharmacist, authorized medical physicist, or an ophthalmic physicist:

(i) on an agency, NRC or agreement state license or other equivalent permit or license recognized by the department that authorizes the use of radioactive material in medical use or in the practice of nuclear pharmacy;

(ii) on a permit issued by an agency, NRC or agreement state specific license of broad scope that is authorized to permit the use of radioactive material in medical use or in the practice of nuclear pharmacy;

(iii) on a permit issued by an NRC master material licensee that is authorized to permit the use of radioactive material in medical use or in the practice of nuclear pharmacy; or

(iv) by a commercial nuclear pharmacy that has been authorized to identify authorized nuclear pharmacists.

(C) changing RSOs, except as provided in subsection (g)(7) of this section;

(D) receiving radioactive material in excess of the amount or in a different form, or receiving a different radionuclide than is authorized on the license;

(E) adding or changing the areas in which radioactive material is used or stored and are identified in the application or on the license, including areas used in accordance with subsection (ff) or (hh) of this section if the change includes addition or relocation of either an area where positron emission tomography (PET) radionuclides are produced or a PET radioactive drug delivery line from the PET radionuclide/PET radioactive drug production area, and other areas of use where radioactive material is used only in accordance with either subsection (ff) or (hh) of this section are exempt;

(F) changing the address(es) of use identified in the application or on the license;

(G) changing operating, safety, and emergency procedures;

(H) before permitting anyone to work as an ARSO, or before the RSO assigns duties and tasks to an ARSO that differ from those for which this individual is authorized on the license; and

(I) before receiving a sealed source from a different manufacturer or of a different model number than authorized by its license unless the sealed source is used for manual brachytherapy, is listed in the Sealed Source and Device Registry, and is in a quantity and for an isotope authorized by the license.

(3) A licensee possessing a Type A specific license of broad scope for medical use, issued under §289.252(h)(2) of this title, is exempt from:

(A) the provisions of subsection (q)(1) of this section regarding the need to file an amendment to the license for medical use of radioactive material;

(B) the provisions of paragraph (2)(B) of this subsection;

(C) the provisions of paragraph (2)(E) of this subsection regarding additions to or changes in the areas of use at the addresses identified in the application or on the license;

(D) the provisions of paragraph (4) of this subsection;

(E) the provisions of paragraph (5)(A) of this subsection for an authorized user, an authorized nuclear pharmacist, an authorized medical physicist, or an ophthalmic physicist;

(F) the provisions of paragraph (5)(C) of this subsection; and

(G) the provisions of subsection (u)(1) of this section.

(4) A licensee shall notify the department in the form of a license amendment request, no later than 30 days after the date that the licensee permits an individual to work under the provisions of §289.256(r) as an authorized user, authorized medical physicist, ophthalmic physicist, or authorized nuclear pharmacist providing that the individual is authorized on a license for the same use. A licensee includes with the notification documentation:

(A) a copy of the department, NRC, or agreement state license;

(B) the permit issued by an NRC master material licensee;

(C) the permit issued by the department, the NRC, or an agreement state licensee of broad scope; or

(D) the permit issued by an NRC master material license broad scope permittee.

(5) A licensee shall notify the department in the form of a license amendment request no later than 30 days after:

(A) an authorized user, an authorized nuclear pharmacist, an RSO, an ARSO, an authorized medical physicist, or ophthalmic physicist permanently discontinues performance of duties under the license or has a name change;

(B) the licensee permits an individual qualified to be an RSO under subsections (h) and (m) of this section to function as a temporary RSO and to perform the functions of an RSO in accordance with subsection (g)(6) of this section;

(C) the licensee has added to or changed the areas of use identified in the application or on the license where byproduct material is used in accordance with either subsection (ff) or (hh) of this section, if the change does not include addition or relocation of either an area where PET radionuclides are produced or a PET radioactive drug delivery line from the PET radionuclide/PET radioactive drug production area; or

(D) the licensee obtains a sealed source for use in manual brachytherapy from a different manufacturer or with a different model number than authorized by its license for which it did not require a license amendment as provided in paragraph (1) of this subsection. The notification must include the manufacturer and model number of the sealed source, the isotope, and the quantity per sealed source.

(s) Supervision. A licensee may permit the receipt, possession, use, or transfer of radioactive material by an individual under the supervision of an authorized user, unless prohibited by license condition.

(1) A licensee who permits the receipt, possession, use, or transfer of radioactive material by an individual under the supervision of an authorized user shall do the following:

(A) instruct the supervised individual in the licensee's written operating, safety, and emergency procedures, written directive procedures, requirements of this chapter, and license conditions with respect to the use of radioactive material; and

(B) require the supervised individual to follow the instructions of the supervising authorized user for medical uses of radioactive material, written operating, safety, and emergency procedures established by the licensee, written directive procedures, requirements of this chapter, and license conditions with respect to the medical use of radioactive material.

(2) A licensee who permits the preparation of radioactive material for medical use by an individual under the supervision of an authorized nuclear pharmacist or authorized user, shall do the following:

(A) instruct the supervised individual in the preparation of radioactive material for medical use, as appropriate to that individual's involvement with radioactive material; and

(B) require the supervised individual to follow the instructions of the supervising authorized user or authorized nuclear pharmacist regarding the preparation of radioactive material for medical use, the written operating, safety, and emergency procedures established by the licensee, the requirements of this chapter, and license conditions.

(3) A licensee who permits supervised activities in accordance with paragraphs (1) and (2) of this subsection is responsible for the acts and omissions of the supervised individual.

(4) Only an authorized user may authorize the medical use of radioactive material.

(t) Written directives.

(1) A written directive shall be dated and signed by an authorized user before any administration of sodium iodide I-131 greater than 30 microcuries (μCi) (1.11 megabequerels (MBq)), administration of any therapeutic dosage of unsealed radioactive material, or administration of any therapeutic dose of radiation from radioactive material. If, because of the emergent nature of the patient's condition, a delay in order to provide a written directive would jeopardize the patient's health, an oral directive is acceptable. The information contained in the oral directive shall be documented in writing as soon as possible in the patient's record. A written directive shall be prepared and signed by the authorized user within 48 hours of the oral directive.

(2) The written directive shall contain the patient or human research subject's name and the following information for each application.

(A) For any administration of quantities greater than 30 μCi (1.11 MBq) of sodium iodide I-131: the dosage.

(B) For an administration of a therapeutic dosage of a radiopharmaceutical other than sodium iodide I-131: the radiopharmaceutical, the dosage, and the route of administration.

(C) For gamma stereotactic radiosurgery: the total dose, the treatment site, and the values for the target coordinate settings per treatment for each anatomically distinct treatment site.

(D) For teletherapy: the total dose, the dose per fraction, the number of fractions, and the treatment site.

(E) For high-dose rate remote afterloading brachytherapy: the radionuclide, the treatment site, the dose per fraction, the number of fractions, and the total dose.

(F) For permanent implant brachytherapy:

(i) before implantation: the treatment site, the radionuclide, and the total source strength; and

(ii) after implantation but before the patient leaves the post-treatment recovery area: the treatment site, the number of sources implanted, the total source strength implanted, and the date.

(G) For all other brachytherapy, including low, medium, and pulsed rate afterloaders:

(i) before implantation: the treatment site, the radionuclide, and the dose;

(ii) after implantation but before completion of the procedure: the radionuclide, the treatment site, the number of sealed sources, the total sealed source strength, exposure time (or the total dose), and the date.

(3) A written revision to an existing written directive.

(A) A written revision to an existing written directive may be made if the revision is dated and signed by an authorized user before the administration of the dosage of unsealed radioactive material, the brachytherapy dose, the gamma stereotactic radiosurgery dose, the teletherapy dose, or the next fractional dose.

(B) If, because of the patient's condition, a delay in order to provide a written revision to an existing written directive would jeopardize the patient's health, an oral revision to an existing written directive is acceptable. The oral revision must be documented as soon as possible in the patient's record. A revised written directive must be signed by the authorized user within 48 hours of the oral revision.

(4) The licensee shall retain the written directive in accordance with subsection (xxx) of this section for inspection by the department.

(5) Procedures for administrations requiring a written directive.

(A) For any administration requiring a written directive, the licensee shall develop, implement, and maintain written procedures to provide high confidence that:

(i) the patient's or human research subject's identity is verified before each administration; and

(ii) each administration is in accordance with the written directive.

(B) The procedures required by subparagraph (A) of this paragraph shall, at a minimum, address the following items that are applicable for the licensee's use of radioactive material:

(i) verifying the identity of the patient or human research subject;

(ii) verifying that the administration is in accordance with the treatment plan, if applicable, and the written directive;

(iii) checking both manual and computer-generated dose calculations; and

(iv) verifying that any computer-generated dose calculations are correctly transferred into the consoles of therapeutic medical units authorized by subsections (q) and (ddd) of this section;

(v) determining if a medical event, as defined in subsection (uuu) of this section, has occurred; and

(vi) determining, for permanent implant brachytherapy, within 60 calendar days from the date the implant was performed, the total source strength administered outside of the treatment site compared to the total source strength documented in the post-implantation portion of the written directive, unless a written justification of patient unavailability is documented.

(C) A licensee shall maintain a copy of the procedures required by subparagraph (A) of this paragraph in accordance with subsection (xxx) of this section.

(u) Suppliers for sealed sources or devices for medical use. A licensee may only use the following for medical use:

(1) sealed sources or devices manufactured, labeled, packaged, and distributed in accordance with a license issued under §289.252(o) of this title or equivalent requirements of the NRC or an agreement state;

(2) sealed sources or devices non-commercially transferred from an NRC or agreement state medical use licensee; or

(3) teletherapy sources manufactured and distributed in accordance with a license issued by the department, the NRC, or an agreement state.

(v) Possession, use, and calibration of dose calibrators to measure the activity of unsealed radioactive material.

(1) For direct measurements performed in accordance with subsection (x) of this section, the licensee shall possess and use instrumentation to measure the activity of unsealed radioactive material before it is administered to each patient or human research subject.

(2) The licensee shall calibrate the instrumentation specified in paragraph (1) of this subsection in accordance with nationally recognized standards or the manufacturer's instructions.

(3) The calibration required by paragraph (2) of this subsection shall include tests for constancy, accuracy, linearity, and geometry dependence, as appropriate to demonstrate proper operation of the instrument. The tests for constancy, accuracy, linearity, and geometry dependence shall be conducted at the following intervals:

(A) constancy at least once each day before assay of patient dosages;

(B) linearity at installation, repair, relocation, and at least quarterly thereafter;

(C) geometry dependence at installation; and

(D) accuracy at installation and at least annually thereafter.

(4) The licensee shall maintain a record of each instrument calibration in accordance with subsection (xxx) of this section. The record shall include the following:

(A) model and serial number of the instrument and calibration sources;

(B) complete date of the calibration including the month, day and year;

(C) results of the calibration; and

(D) name of the individual who performed the calibration.

(w) Calibration of survey instruments. A licensee shall calibrate the survey instruments used to show compliance with this subsection and with §289.202 of this title before first use, annually, and following a repair that affects the calibration. A licensee shall:

(1) calibrate all scales with readings up to 10 millisieverts (mSv) (1000 millirem (mrem)) per hour with a radiation source;

(2) calibrate two separated readings on each scale or decade that will be used to show compliance;

(3) conspicuously note on the instrument the complete date of the calibration including the month, day, and year;

(4) not use survey instruments if the difference between the indicated exposure rate and the calculated exposure rate is more than 20 percent; and

(5) maintain a record of each survey instrument calibration in accordance with subsection (xxx) of this section.

(x) Determination of dosages of unsealed radioactive material for medical use.

(1) Before medical use, the licensee shall determine and record the activity of each dosage.

(2) For a unit dosage, this determination shall be made by:

(A) direct measurement of radioactivity; or

(B) a decay correction, based on the activity or activity concentration determined by the following:

(i) a manufacturer or preparer licensed in accordance with §289.252(r) of this title, or under an equivalent NRC or agreement state license;

(ii) an NRC or agreement state licensee for use in research in accordance with a Radioactive Drug Research Committee-approved protocol or an Investigational New Drug (IND) protocol accepted by the FDA; or

(iii) a PET radioactive drug producer licensed in accordance with §289.252(kk) of this title or equivalent NRC or agreement state requirements.

(3) For other than unit dosages, this determination shall be made by:

(A) direct measurement of radioactivity;

(B) combination of measurement of radioactivity and mathematical calculations; or

(C) combination of volumetric measurements and mathematical calculations, based on the measurement made by:

(i) a manufacturer or preparer licensed in accordance with §289.252(r) of this title, or under an equivalent NRC or agreement state license; or

(ii) a PET radioactive drug producer licensed in accordance with §289.252(kk) of this title or equivalent NRC or agreement state requirements.

(4) Unless otherwise directed by the authorized user, a licensee shall not use a dosage if the dosage does not fall within the prescribed dosage range or if the dosage differs from the prescribed dosage by more than 20 percent.

(5) A licensee restricted to only unit doses prepared in accordance with §289.252(r) of this title need not comply with paragraph (2) of this subsection, unless the administration time of the unit dose deviates from the nuclear pharmacy's pre-calibrated time by 15 minutes or more.

(6) A licensee shall maintain a record of the dosage determination required by this subsection in accordance with subsection (xxx) of this section for inspection by the department. The record shall contain the following:

(A) the radiopharmaceutical;

(B) patient's or human research subject's name or identification number if one has been assigned;

(C) prescribed dosage;

(D) determined dosage or a notation that the total activity is less than 30 μCi (1.1 MBq);

(E) the date and time of the dosage determination; and

(F) the name of the individual who determined the dosage.

(y) Authorization for calibration, transmission, and reference sources.

(1) Any licensee authorized by subsections (n), (o), (p) or (q) of this section for medical use of radioactive material may receive, possess, and use any of the following radioactive material for check, calibration, transmission, and reference use:

(A) sealed sources, not exceeding 30 millicuries (mCi) (1.11 gigabecquerel (GBq)) each, manufactured and distributed by a person licensed under §289.252(o) of this title or equivalent NRC or agreement state regulations;

(B) sealed sources, not exceeding 30 millicuries (mCi) (1.11 gigabecquerel (GBq)) each, redistributed by a licensee authorized to redistribute the sealed sources manufactured and distributed by a person licensed under §289.252(o) of this title or equivalent NRC or agreement state regulations, provided the redistributed sealed sources are in the original packaging and shielding and are accompanied by the manufacturer's approved instructions;

(C) any radioactive material with a half-life not longer than 120 days in individual amounts not to exceed 15 mCi (0.56 GBq);

(D) any radioactive material with a half-life longer than 120 days in individual amounts not to exceed the smaller of 200 μCi (7.4 MBq) or 1000 times the quantities in §289.202(ggg)(3) of this title; and

(E) technetium-99m in amounts as needed.

(2) Radioactive material in sealed sources authorized by this subsection shall not be:

(A) used for medical use as defined in subsection (c) of this section except in accordance with the requirements in subsection (bbb) of this section; or

(B) combined (i.e., bundled or aggregated) to create an activity greater than the maximum activity of any single sealed source authorized under this section.

(3) A licensee using calibration, transmission, and reference sources in accordance with the requirements in paragraph (1) or (2) of this subsection need not list these sources on a specific medical use license.

(z) Requirements for possession of sealed sources and brachytherapy sealed sources. A licensee in possession of any sealed source or brachytherapy source shall:

(1) follow the radiation safety and handling instructions supplied by the manufacturer and the leakage test requirements in accordance with §289.201(g) of this title and reporting requirements in §289.202(bbb) of this title; and

(2) conduct a physical inventory at intervals not to exceed six months to account for all sealed sources in its possession. Records of the inventory shall be made and maintained for inspection by the department in accordance with subsection (xxx) of this section and shall include the following:

(A) model number of each source and serial number if one has been assigned;

(B) identity of each source and its nominal activity;

(C) location of each source;

(D) date of the inventory; and

(E) identification of the individual who performed the inventory.

(aa) Labeling of vials and syringes. Each syringe and vial that contains a radiopharmaceutical shall be labeled to identify the radioactive drug. Each syringe shield and vial shield shall also be labeled unless the label on the syringe or vial is visible when shielded.

(bb) Surveys for ambient radiation exposure rate.

(1) In addition to the requirements of §289.202(p) of this title and except as provided in paragraph (2) of this subsection, a licensee shall survey with a radiation detection survey instrument at the end of each day of use all areas where radioactive material requiring a written directive was prepared for use or administered.

(2) A licensee does not need to perform the surveys required by paragraph (1) of this subsection in an area(s) where patients or human research subjects are confined when they cannot be released in accordance with subsection (cc) of this section or an animal that is confined. Once the patient or human or animal research subject is released from confinement, the licensee shall survey with a radiation survey instrument, the area in which the patient or human or animal research subject was confined.

(3) A record of each survey shall be retained in accordance with subsection (xxx) of this section for inspection by the department. The record shall include the following:

(A) date of the survey;

(B) results of the survey;

(C) manufacturer's name, model, and serial number of the instrument used to make the survey; and

(D) name of the individual who performed the survey.

(cc) Release of individuals containing radioactive drugs or implants containing radioactive material.

(1) The licensee may authorize the release from its control any individual who has been administered radioactive drugs or implants containing radioactive material if the total effective dose equivalent (TEDE) to any other individual from exposure to the released individual is not likely to exceed 0.5 rem (5 mSv). Patients treated with temporary eye plaques may be released from the hospital provided that the procedures ensure that the exposure rate from the patient is less than 5 mrem (0.05 mSv) per hour at a distance of 1 meter from the eye plaque location.

(2) The licensee shall provide the released individual, or the individual's parent or guardian, with written instructions on actions recommended to maintain doses to other individuals ALARA if the TEDE to any other individual is likely to exceed 0.1 rem (1 mSv). If the TEDE to a nursing infant or child could exceed 0.1 rem (1 mSv), assuming there was no interruption of breast-feeding, the instructions shall also include the following:

(A) guidance on the interruption or discontinuation of breast-feeding; and

(B) information on the potential consequences, if any, of failure to follow the guidance.

(3) The licensee shall maintain for inspection by the department, a record in accordance with subsection (xxx) of this section of each patient released in accordance with paragraph (1) of this subsection. The record shall include the following:

(A) the basis for authorizing the release of an individual; and

(B) the instructions provided to a breast-feeding woman. if the radiation dose to the infant or child from continued breast-feeding could result in a TEDE exceeding 0.5 rem (5 mSv).

(dd) Mobile nuclear medicine service. A license for a mobile nuclear medicine service for medical or veterinary use of radioactive material will be issued if the department approves the documentation submitted by the applicant in accordance with the requirements of subsections (f) and (n) of this section. The clients of the mobile nuclear medicine service shall be licensed if the client receives or possesses radioactive material to be used by the mobile nuclear medicine service.

(1) A licensee providing mobile nuclear medicine service shall:

(A) obtain a letter signed by the management of each client for which services are rendered that permits the use of radioactive material at the client's address and clearly delineates the authority and responsibility of the licensee and the client;

(B) check instruments used to measure the activity of unsealed radioactive material for proper function before medical or veterinary use at each client's address or on each day of use, whichever is more frequent. At a minimum, the check for proper function required by this subparagraph shall include a constancy check;

(C) have at least one fixed facility where records may be maintained and radioactive material may be delivered by manufacturers or distributors each day before the mobile nuclear medicine licensee dispatching its vans to client sites;

(D) agree to have an authorized physician user directly supervise each technologist at a reasonable frequency;

(E) check survey instruments for proper operation with a dedicated check source before use at each client's address; and

(F) before leaving a client's address, survey all areas of use to ensure compliance with the requirements of §289.202 of this title.

(2) A mobile nuclear medicine service shall not have radioactive material delivered from the manufacturer or the distributor to the client unless the client has a license allowing possession of the radioactive material. Radioactive material delivered to the client shall be received and handled in conformance with the client's license.

(3) A licensee providing mobile nuclear medicine services shall maintain records, for inspection by the department, in accordance with subsection (xxx) of this section including the letter required in paragraph (1)(A) of this subsection and the record of each survey required in paragraph (1)(F) of this subsection.

(ee) Decay-in-storage.

(1) The licensee may hold radioactive material with a physical half-life of less than or equal to 120 days for decay-in-storage and dispose of it without regard to its radioactivity if the licensee does the following:

(A) monitors radioactive material at the surface before disposal and determines that its radioactivity cannot be distinguished from the background radiation level with an appropriate radiation detection survey meter set on its most sensitive scale and with no interposed shielding; and

(B) removes or obliterates all radiation labels, except for radiation labels on materials that are within containers and that will be handled as biomedical waste after it has been released from the licensee.

(2) The licensee shall retain a record of each disposal as required by paragraph (1) of this subsection in accordance with subsection (xxx) of this section for inspection by the department. The record shall include the following:

(A) date of the disposal;

(B) manufacturer's name, model number and serial number of the survey instrument used;

(C) background radiation level;

(D) radiation level measured at the surface of each waste container; and

(E) name of the individual who performed the survey.

(ff) Use of unsealed radioactive material for uptake, dilution, and excretion studies that do not require a written directive. Except for quantities that require a written directive in accordance with subsection (t) of this section, a licensee may use any unsealed radioactive material prepared for medical or veterinary use for uptake, dilution, or excretion studies that meets the following:

(1) is obtained from:

(A) a manufacturer or preparer licensed in accordance with §289.252(r) of this title or equivalent NRC or agreement state requirements; or

(B) a PET radioactive drug producer licensed in accordance with §289.252(kk) of this title or equivalent NRC or agreement state requirements; or

(2) excluding production of PET radionuclides, prepared by:

(A) an authorized nuclear pharmacist; or

(B) a physician who is an authorized user and who meets the requirements specified in subsections (jj) or (nn) and (jj)(3)(A)(ii)(VII) of this section; or

(C) an individual under the supervision, as specified in subsection (s) of this section, of the authorized nuclear pharmacist in subparagraph (A) of this paragraph, or the physician who is an authorized user in subparagraph (B) of this paragraph; or

(3) is obtained from and prepared by an NRC or agreement state licensee for use in research in accordance with a Radioactive Drug Research Committee-approved protocol or an IND protocol accepted by the FDA; or

(4) is prepared by the licensee for use in research in accordance with a Radioactive Drug Research Committee-approved application or an IND protocol accepted by the FDA.

(gg) Training for uptake, dilution, and excretion studies. Except as provided in subsection (l) of this section, the licensee shall require an authorized user of unsealed radioactive material for the uses authorized in subsection (ff) of this section to be a physician who:

(1) is certified by a medical specialty board whose certification process has been recognized by the department, the NRC or an agreement state. The names of board certifications that have been recognized by the department, the NRC, or an agreement state are posted on the NRC's Medical Uses Licensee Toolkit web page. To have its certification recognized, a specialty board shall require all candidates for certification to:

(A) complete 60 hours of training and experience in basic radionuclide handling techniques and radiation safety applicable to the medical use of unsealed radioactive material for uptake, dilution, and excretion studies as described in paragraph (3)(A) of this subsection; and

(B) pass an examination, administered by diplomates of the specialty board, that assesses knowledge and competence in radiation safety, radionuclide handling, and quality control; or

(2) is an authorized user in accordance with subsections (jj) or (nn) of this section or equivalent NRC or agreement state requirements; or

(3) has completed 60 hours of training and experience, including a minimum of eight hours of classroom and laboratory training, in basic radionuclide handling techniques applicable to the medical use of unsealed radioactive material for uptake, dilution, and excretion studies.

(A) The training and experience shall include the following:

(i) classroom and laboratory training in the following areas:

(I) radiation physics and instrumentation;

(II) radiation protection;

(III) mathematics pertaining to the use and measurement of radioactivity;

(IV) chemistry of radioactive material for medical use; and

(V) radiation biology; and

(ii) work experience, under the supervision of an authorized user who meets the requirements of this subsection, subsections (l), (jj), or (nn) of this section, or equivalent NRC or agreement state requirements involving the following:

(I) ordering, receiving, and unpacking radioactive materials safely and performing the related radiation surveys;

(II) performing quality control procedures on instruments used to determine the activity of dosages and performing checks for proper operation of survey meters;

(III) calculating, measuring, and safely preparing patient or human research subject dosages;

(IV) using administrative controls to prevent a medical event involving the use of unsealed radioactive material;

(V) using procedures to contain spilled radioactive material safely and using proper decontamination procedures; and

(VI) administering dosages of radioactive drugs to patients or human research subjects; and

(B) has obtained written attestation that the individual has satisfactorily completed the requirements in subparagraph (A) of this paragraph and is able to independently fulfill the radiation safety-related duties as an authorized user for the medical uses authorized under subsection (ff) of this section. The attestation must be obtained from either:

(i) a preceptor authorized user who meets the requirements of subsection (l) of this section, this subsection, or subsections (jj) or (nn) of this section, or equivalent NRC or agreement state requirements; or

(ii) a residency program director who affirms in writing that the attestation represents the consensus of the residency program faculty where at least one faculty member is an authorized user who meets the requirements in subsections (l), (gg), (jj), or (nn) of this section, or equivalent NRC or agreement state requirements, and concurs with the attestation provided by the residency program director. The residency training program must be approved by the Residency Review Committee of the Accreditation Council for Graduate Medical Education or the Royal College of Physicians and Surgeons of Canada or the Council on Postdoctoral Training of the American Osteopathic Association and must include training and experience specified in subparagraph (A) of this paragraph.

(hh) Use of unsealed radioactive material for imaging and localization studies that do not require a written directive. Except for quantities that require a written directive in accordance with subsection (t) of this section, a licensee may use any unsealed radioactive material prepared for medical or veterinary use for imaging and localization studies that meets the following:

(1) is obtained from:

(A) a manufacturer or preparer licensed in accordance with §289.252(r) of this title or equivalent NRC or agreement state requirements; or

(B) a PET radioactive drug producer licensed in accordance with §289.252(kk) of this title or equivalent NRC or agreement state requirements; or

(2) excluding production of PET radionuclides, prepared by:

(A) an authorized nuclear pharmacist; or

(B) a physician who is an authorized user and who meets the requirements specified in subsections (jj) or (nn) and (jj)(3)(A)(ii)(VII) of this section; or

(C) an individual under the supervision, as specified in subsection (s) of this section, of the authorized nuclear pharmacist in subparagraph (A) of this paragraph, or the physician who is an authorized user in subparagraph (B) of this paragraph; or

(3) is obtained from and prepared by an NRC or agreement state licensee for use in research in accordance with a Radioactive Drug Research Committee-approved protocol or an IND protocol accepted by the FDA; or

(4) is prepared by the licensee for use in research in accordance with a Radioactive Drug Research Committee-approved application or an IND protocol accepted by the FDA.

(ii) Permissible molybdenum-99, strontium-82, and strontium-85 concentrations.

(1) The licensee may not administer to humans a radiopharmaceutical that contains:

(A) more than 0.15 µCi of molybdenum-99 per mCi of technetium-99m (0.15 kilobecquerel (kBq) of molybdenum-99 per MBq of technetium-99m); or

(B) more than 0.02 µCi of strontium-82 per mCi of rubidium-82 chloride (0.02 kBq of strontium-82 per MBq of rubidium-82 chloride) injection; or

(C) more than 0.2 µCi of strontium-85 per mCi of rubidium-82 (0.2 kBq of strontium-85 per MBq of rubidium-82 chloride) injection.

(2) The licensee who uses molybdenum-99/technetium-99m generators for preparing a technetium-99m radiopharmaceutical shall measure the molybdenum-99 concentration in each eluate from a generator to demonstrate compliance with paragraph (1) of this subsection.

(3) The licensee who uses a strontium-82/rubidium-82 generator for preparing a rubidium-82 radiopharmaceutical shall, before the first patient use of the day, measure the concentration of radionuclides strontium-82 and strontium-85 to demonstrate compliance with paragraph (1) of this subsection.

(4) If the licensee is required to measure the molybdenum-99 or strontium-82 and strontium-85 concentrations, the licensee shall retain a record of each measurement in accordance with subsection (www) of this section for inspection by the department. The record shall include the following:

(A) for each measured elution of technetium-99m:

(i) the ratio of the measures expressed as µCi of molybdenum-99 per mCi of technetium-99m (kBq of molybdenum-99 per MBq of technetium-99m);

(ii) time and date of the measurement; and

(iii) name of the individual who made the measurement.

(B) for each measured elution of rubidium-82:

(i) the ratio of the measures expressed as µCi of strontium-82 per mCi of rubidium (kBq of strontium-82 per MBq of rubidium-82);

(ii) the ratio of the measures expressed as µCi of strontium-85 per mCi of rubidium (kBq of strontium-85 per MBq of rubidium-82);

(iii) time and date of the measurement; and

(iv) name of the individual who made the measurement.

(5) The licensee shall report any measurement that exceeds the limits in paragraph (1) of this subsection at the time of generator elution, in accordance with subsection (xxx) of this section.

(jj) Training for imaging and localization studies. Except as provided in subsection (l) of this section, the licensee shall require an authorized user of unsealed radioactive material for the uses authorized in subsection (hh) of this section to be a physician who:

(1) is certified by a medical specialty board whose certification process has been recognized by the department, the NRC or an agreement state. The names of board certifications that have been recognized by the department, the NRC, or an agreement state are posted on the NRC's Medical Uses Licensee Toolkit web page. To have its certification process recognized, a specialty board shall require all candidates for certification to:

(A) complete 700 hours of training and experience in basic radionuclide handling techniques and radiation safety applicable to the medical use of unsealed radioactive material for imaging and localization studies as described in paragraph (3) of this subsection; and

(B) pass an examination, administered by diplomates of the specialty board, that assesses knowledge and competence in radiation safety, radionuclide handling, and quality control; or

(2) is an authorized user in accordance with subsection (nn) of this section and meets the requirements of paragraph (3)(A)(ii)(VII) of this subsection or equivalent NRC or agreement state requirements; or

(3) has completed 700 hours of training and experience, including a minimum of 80 hours of classroom and laboratory training, in basic radionuclide handling techniques applicable to the medical use of unsealed radioactive material for imaging and localization studies.

(A) The training and experience shall include the following:

(i) classroom and laboratory training in the following areas:

(I) radiation physics and instrumentation;

(II) radiation protection;

(III) mathematics pertaining to the use and measurement of radioactivity;

(IV) chemistry of radioactive material for medical use; and

(V) radiation biology; and

(ii) work experience under the supervision of an authorized user who meets the requirements in subsection (l) of this section, this subsection, or paragraph (3)(A)(ii)(VII) of this section, and subsection (nn) of this section, or equivalent NRC or agreement state requirements. An authorized nuclear pharmacist who meets the requirements in subsections (k) or (l) of this section may provide the supervised work experience for subclause (VII) of this clause. Work experience must involve the following:

(I) ordering, receiving, and unpacking radioactive materials safely and performing the related radiation surveys;

(II) performing quality control procedures on instruments used to determine the activity of dosages and performing checks for proper operation of survey meters;

(III) calculating, measuring, and safely preparing patient or human research subject dosages;

(IV) using administrative controls to prevent a medical event involving the use of unsealed radioactive material;

(V) using procedures to contain spilled radioactive material safely and using proper decontamination procedures;

(VI) administering dosages of radioactive drugs to patients or human research subjects; and

(VII) eluting generator systems appropriate for preparation of radioactive drugs for imaging and localization studies, measuring and testing the eluate for radionuclide purity, and processing the eluate with reagent kits to prepare labeled radioactive drugs; and

(B) has obtained written attestation that the individual has satisfactorily completed the requirements in this paragraph and is able to independently fulfill the radiation safety-related duties as an authorized user for the medical uses authorized under subsections (ff) and (hh) of this section. The attestation must be obtained from either:

(i) a preceptor authorized user who meets the requirements of subsection (l) of this section, this subsection or paragraph (3)(A)(ii)(VII) of this subsection and subsection (nn) of this section or equivalent NRC or agreement state requirements; or

(ii) a residency program director who affirms in writing that the attestation represents the consensus of the residency program faculty where at least one faculty member is an authorized user who meets the requirements in subsections (l), or (jj), or (nn) of this section and paragraph (3)(A)(ii)(VII) of this subsection, or equivalent NRC or agreement state requirements, and concurs with the attestation provided by the residency program director. The residency training program must be approved by the Residency Review Committee of the Accreditation Council for Graduate Medical Education or the Royal College of Physicians and Surgeons of Canada or the Council on Postdoctoral Training of the American Osteopathic Association and must include training and experience specified in this paragraph.

(kk) Use of unsealed radioactive material that requires a written directive. A licensee may use any unsealed radioactive material identified in subsection (nn)(2)(A)(ii)(VI) of this section prepared for medical use that requires a written directive that meets the following:

(1) is obtained from:

(A) a manufacturer or preparer licensed in accordance with §289.252(r) of this title or equivalent NRC or agreement state requirements;

(B) a PET radioactive drug producer licensed in accordance with §289.252(kk) of this title or equivalent NRC or agreement state requirements; or

(2) excluding production of PET radionuclides, prepared by:

(A) an authorized nuclear pharmacist; or

(B) a physician who is an authorized user and who meets the requirements specified in subsections (jj) or (nn) of this section; or

(C) an individual under the supervision, as specified in subsection (s) of this section, of the authorized nuclear pharmacist in subparagraph (A) of this paragraph, or the physician who is an authorized user in subparagraph (B) of this paragraph; or

(3) is obtained from and prepared by an NRC or agreement state licensee for use in research in accordance with an IND protocol accepted by the FDA; or

(4) is prepared by the licensee for use in research in accordance with an IND protocol accepted by the FDA.

(ll) Safety instruction to personnel.

(1) The licensee shall provide radiation safety instruction, initially and at least annually, to personnel caring for patients or human or animal research subjects who cannot be released in accordance with subsection (cc) of this section. The instruction shall be appropriate to the personnel's assigned duties and include the following:

(A) patient or human or animal research subject control; and

(B) visitor control to include the following:

(i) routine visitation to hospitalized individuals or animals in accordance with §289.202(n) of this title;

(ii) contamination control;

(iii) waste control; and

(iv) notification of the RSO, or his or her designee, and an authorized user if the patient or the human or animal research subject has a medical emergency or dies.

(2) The licensee shall maintain a record for inspection by the department, in accordance with subsection (xxx) of this section, of individuals receiving instruction. The record shall include the following:

(A) list of the topics covered;

(B) date of the instruction or training;

(C) name(s) of the attendee(s); and

(D) name(s) of the individual(s) who provided the instruction.

(mm) Safety precautions. For each human patient or human research subject who cannot be released in accordance with subsection (cc) of this section, the licensee shall do the following:

(1) provide a private room with a private sanitary facility; or

(2) provide a room with a private sanitary facility with another individual who also has received therapy with an unsealed radioactive material and who also cannot be released in accordance with subsection (cc) of this section;

(3) post the patient's or the research subject's room with a "Radioactive Materials" sign and note on the door and in the patient's or research subject's chart where and how long visitors may stay in the patient's or the research subject's room; and

(4) either monitor material and items removed from the patient's or the research subject's room to determine that their radioactivity cannot be distinguished from the natural background radiation level with a radiation detection survey instrument set on its most sensitive scale and with no interposed shielding, or handle such material and items as radioactive waste; and

(5) notify the RSO, or his or her designee, and the authorized user immediately if the patient or research subject has a medical emergency or dies.

(nn) Training for use of unsealed radioactive material that requires a written directive. Except as provided in subsection (l) of this section, the licensee shall require an authorized user of unsealed radioactive material for the uses authorized in subsection (kk) of this section to be a physician who:

(1) is certified by a medical specialty board whose certification process has been recognized by the department, the NRC, or an agreement state and who meets the requirements in paragraph (2)(A)(ii)(VI) of this subsection. The names of board certifications that have been recognized by the department, the NRC, or an agreement state are posted on the NRC's Medical Uses Licensee Toolkit web page. To be recognized, a specialty board shall require all candidates for certification to:

(A) successfully complete residency training in a radiation therapy or nuclear medicine training program or a program in a related medical specialty. These residency training programs shall include 700 hours of training and experience as described in paragraph (2)(A)(i) - (2)(A)(ii)(V) of this subsection. Eligible training programs shall be approved by the Residency Review Committee of the Accreditation Council for Graduate Medical Education, the Royal College of Physicians and Surgeons of Canada, or the Committee on Post-Graduate Training of the American Osteopathic Association; and

(B) pass an examination, administered by diplomates of the specialty board, which tests knowledge and competence in radiation safety, radionuclide handling, quality assurance, and clinical use of unsealed radioactive material for which a written directive is required; or

(2) has completed 700 hours of training and experience, including a minimum of 200 hours of classroom and laboratory training, in basic radionuclide handling techniques applicable to the medical use of unsealed radioactive material requiring a written directive.

(A) The training and experience shall include the following.

(i) classroom and laboratory training in the following areas:

(I) radiation physics and instrumentation;

(II) radiation protection;

(III) mathematics pertaining to the use and measurement of radioactivity;

(IV) chemistry of radioactive material for medical use; and

(V) radiation biology; and

(ii) work experience, under the supervision of an authorized user who meets the requirements of subsection (l) of this section, this subsection or equivalent NRC or agreement state requirements. A supervising authorized user, who meets the requirements of this paragraph shall also have experience in administering dosages in the same dosage category or categories (i.e. subclause (VI) of this clause) as the individual requesting authorized user status. The work experience shall involve the following:

(I) ordering, receiving, and unpacking radioactive materials safely and performing the related radiation surveys;

(II) performing quality control procedures on instruments used to determine the activity of dosages and performing checks for proper operation of survey meters;

(III) calculating, measuring, and safely preparing patient or human research subject dosages;

(IV) using administrative controls to prevent a medical event involving the use of unsealed radioactive material;

(V) using procedures to contain spilled radioactive material safely and using proper decontamination procedures; and

(VI) administering dosages of radioactive drugs to patients or human research subjects from the three categories in the following items. Radioactive drugs containing radionuclides in categories not included in this paragraph are regulated under subsection (q) of this section. This work experience must involve a minimum of three cases in each of the following categories for which the individual is requesting authorized user status:

(-a-) oral administration of less than or equal to 33 mCi (1.22 GBq) of sodium iodide I-131, for which a written directive is required;

(-b-) oral administration of greater than 33 mCi (1.22 GBq) of sodium iodide I-131 (experience with at least three cases in this item also satisfies the requirement of item (-a-) of this subclause; and

(-c-) parenteral administration of any radioactive drug that contains a radionuclide that is primarily used for its electron emission, beta radiation characteristics, alpha radiation characteristics, or photon energy of less than 150 kiloelectron volts (keV) for which a written directive is required; and

(B) has obtained written attestation that the individual has satisfactorily completed the requirements of paragraph (2)(A) of this subsection, and is able to independently fulfill the radiation safety-related duties as an authorized user for the medical uses authorized under subsection (kk) of this section for which the individual is requesting authorized user status. The attestation must be obtained from either:

(i) a preceptor authorized user who meets the requirements of subsection (l) of this section, this subsection or equivalent NRC or agreement state requirements and has experience in administering dosages in the same dosage category or categories as the individual requesting authorized user status; or

(ii) A residency program director who affirms in writing that the attestation represents the consensus of the residency program faculty where at least one faculty member is an authorized user who meets the requirements in subsections (l) or (nn) of this section, or equivalent NRC or agreement state requirements, has experience in administering dosages in the same dosage category or categories as the individual requesting authorized user status, and concurs with the attestation provided by the residency program director. The residency training program must be approved by the Residency Review Committee of the Accreditation Council for Graduate Medical Education or the Royal College of Physicians and Surgeons of Canada or the Council on Postdoctoral Training of the American Osteopathic Association and must include training and experience specified in this paragraph.

(oo) Training for the oral administration of sodium iodide I-131 requiring a written directive in quantities less than or equal to 33 mCi (1.22 GBq). Except as provided in subsection (l) of this section, the licensee shall require an authorized user for the oral administration of sodium iodide I-131 requiring a written directive in quantities less than or equal to 33 mCi (1.22 GBq) to be a physician who:

(1) is certified by a medical specialty board whose certification process includes all of the requirements of paragraph (3)(A) of this subsection and whose certification has been recognized by the department, the NRC, or an agreement state. The names of board certifications that have been recognized by the department, the NRC, or an agreement state are posted on the NRC's Medical Uses Licensee Toolkit web page; or

(2) is an authorized user in accordance with subsection (nn) of this section for uses listed in subsection (nn)(2)(A)(ii)(VI)(-a-) or (-b-) of this section, or subsection (pp) of this section, or equivalent NRC or agreement state requirements; or

(3) has successfully completed 80 hours of classroom and laboratory training and work experience applicable to the medical use of sodium iodide I-131 for procedures requiring a written directive.

(A) The training and experience shall include the following.

(i) classroom and laboratory training shall include the following:

(I) radiation physics and instrumentation;

(II) radiation protection;

(III) mathematics pertaining to the use and measurement of radioactivity;

(IV) chemistry of radioactive material for medical use; and

(V) radiation biology; and

(ii) work experience, under the supervision of an authorized user who meets the requirements of subsection (l) of this section, this subsection, subsection (nn) or subsection (pp) of this section, or equivalent NRC or agreement state requirements. A supervising authorized user who meets the requirements in subsection (nn)(2) of this section, shall also have experience in administering dosages as specified in subsection (nn)(2)(A)(ii)(VI)(-a-) or (-b-) of this section. The work experience shall involve the following:

(I) ordering, receiving, and unpacking radioactive materials safely and performing the related radiation surveys;

(II) performing quality control procedures on instruments used to determine the activity of dosages and performing checks for proper operation of survey meters;

(III) calculating, measuring, and safely preparing patient or human research subject dosages;

(IV) using administrative controls to prevent a medical event involving the use of unsealed radioactive material;

(V) using procedures to contain spilled radioactive material safely and using proper decontamination procedures; and

(VI) administering dosages of radioactive drugs to patients or human research subjects that includes at least three cases involving the oral administration of less than or equal to 33mCi (1.22 GBq) of sodium iodide I-131; and

(B) has obtained written attestation that the individual has satisfactorily completed the requirements of paragraph (3)(A) of this subsection, and is able to independently fulfill the radiation safety-related duties as an authorized user for oral administration of less than or equal to 33 mCi (1.22 GBq) of sodium iodide I-131 for medical uses authorized under subsection (kk) of this section. The attestation must be obtained from either:

(i) a preceptor authorized user who meets the requirements of subsection (l) of this section, this subsection, subsection (nn) or subsection (pp) of this section or equivalent NRC or agreement state requirements and has experience in administering dosages as specified in subsection (nn)(2)(A)(ii)(VI)(-a-) or (-b-) of this section; or

(ii) a residency program director who affirms in writing that the attestation represents the consensus of the residency program faculty where at least one faculty member is an authorized user who meets the requirements in subsections (l), (nn), (oo) or (pp) of this section, or equivalent NRC or agreement state requirements, has experience in administering dosages as specified in subsection (nn)(2)(A)(ii)(VI)(-a-) or (-b-), and concurs with the attestation provided by the residency program director. The residency training program must be approved by the Residency Review Committee of the Accreditation Council for Graduate Medical Education or the Royal College of Physicians and Surgeons of Canada or the Council

on Postdoctoral Training of the American Osteopathic Association and must include training and experience specified in this paragraph.

(pp) Training for the oral administration of sodium iodide I-131 requiring a written directive in quantities greater than 33 mCi (1.22 GBq). Except as provided in subsection (l) of this section, the licensee shall require an authorized user for the oral administration of sodium iodide I-131 requiring a written directive in quantities greater than 33 mCi (1.22 GBq) to be a physician who:

(1) is certified by a medical specialty board whose certification process includes all of the requirements in paragraph (3)(A) of this subsection and whose certification has been recognized by the department, the NRC, or an agreement state. The names of board certifications that have been recognized by the department, the NRC, or an agreement state are posted on the NRC's Medical Uses Licensee Toolkit web page; or

(2) is an authorized user in accordance with subsection (nn) of this section or equivalent NRC or agreement state requirements for uses listed in subsection (nn)(2)(A)(ii)(VI)(-b-) of this section; or

(3) has training and experience including, successful completion of 80 hours of classroom and laboratory training applicable to the medical use of sodium iodide I-131 for procedures requiring a written directive.

(A) The training and experience shall include the following.

(i) classroom and laboratory training shall include the following:

(I) radiation physics and instrumentation;

(II) radiation protection;

(III) mathematics pertaining to the use and measurement of radioactivity;

(IV) chemistry of radioactive material for medical use; and

(V) radiation biology; and

(ii) work experience, under the supervision of an authorized user who meets the requirements of subsection (l) of this section, subsections (nn) or (pp) of this section or equivalent NRC or agreement state requirements. A supervising authorized user who meets the requirements of subsection (nn)(2) of this section, shall also have experience in administering dosages as specified in subsection (nn)(2)(A)(ii)(VI)(-b-) of this section. The work experience shall involve the following:

(I) ordering, receiving, and unpacking radioactive materials safely and performing the related radiation surveys;

(II) performing quality control procedures on instruments used to determine the activity of dosages and performing checks for proper operation of survey meters;

(III) calculating, measuring, and safely preparing patient or human research subject dosages;

(IV) using administrative controls to prevent a medical event involving the use of unsealed radioactive material;

(V) using procedures to contain spilled radioactive material safely and using proper decontamination procedures; and

(VI) administering dosages of radioactive drugs to patients or human research subjects that includes at least three cases involving the oral administration of greater than 33 mCi (1.22 GBq) of sodium iodide I-131; and

(B) has obtained written attestation that the individual has satisfactorily completed the requirements of paragraph (3)(A) of this subsection, and is able to independently fulfill the radiation safety-related duties as an authorized user for oral administration of greater than 33 mCi (1.22 GBq) of sodium iodide I-131 for medical uses authorized under subsection (kk) of this section. The attestation must be obtained from either:

(i) a preceptor authorized user who meets the requirements in subsections (l) or (nn) of this section, this subsection, or equivalent NRC or agreement state requirements, and has experience in administering dosages as specified in subsection (nn)(2)(A)(ii)(VI)(-b-) of this section; or

(ii) a residency program director who affirms in writing that the attestation represents the consensus of the residency program faculty where at least one faculty member is an authorized user who meets the requirements in subsections (l), (nn), or (pp) of this section, or equivalent NRC, or agreement state requirements, has experience in administering dosages as specified in subsection (nn)(2)(A)(ii)(VI)(-b-) of this section, and concurs with the attestation provided by the residency program director. The residency training program must be approved by the Residency Review Committee of the Accreditation Council for Graduate Medical Education or the Royal College of Physicians and Surgeons of Canada or the Council on Postdoctoral Training of the American Osteopathic Association and must include training and experience specified in this paragraph.

(qq) Training for the parenteral administration of unsealed radioactive material requiring a written directive.

(1) Except as provided in subsection (l) of this section, the licensee shall require an authorized user for the parenteral administration of unsealed radioactive materials requiring a written directive to be a physician who:

(A) is an authorized user in accordance with subsection (nn) of this section for uses listed in subsection (nn)(2)(A)(ii)(VI)(-c-) of this section or equivalent NRC or agreement state requirements; or

(B) is an authorized user under subsections (zz) or (ttt) of this section or equivalent NRC or agreement state requirements and who meets the requirements of paragraph (2) of this subsection; or

(C) is certified by a medical specialty board whose certification process has been recognized by the department, the NRC, or an agreement state in accordance with subsections (zz) or (ttt) of this section, and who meets the requirements of paragraph (2) of this subsection.

(2) The physician must also meet the following requirements:

(A) has successfully completed 80 hours of classroom and laboratory training applicable to parenteral administrations listed in subsection (nn)(2)(A)(ii)(VI)(-c-) of this section.

(B) has the training and experience that shall include the following:

(i) classroom and laboratory training shall include the following:

(I) radiation physics and instrumentation;

(II) radiation protection;

(III) mathematics pertaining to the use and measurement of radioactivity;

(IV) chemistry of radioactive material for medical use; and

(V) radiation biology; and

(ii) work experience, under the supervision of an authorized user who meets the requirements of subsection (l) of this section, this subsection or subsection (nn) of this section or equivalent NRC or agreement state requirements in the parenteral administration listed in subsection (nn)(2)(A)(ii)(VI)(-c-) of this section. A supervising authorized user who meets the requirements of subsection (nn) of this section, this subsection, or equivalent NRC or agreement state requirements shall have experience in administering dosages in the same category or categories as the individual requesting authorized user status. The work experience shall involve the following:

(I) ordering, receiving, and unpacking radioactive materials safely and performing the related radiation surveys;

(II) performing quality control procedures on instruments used to determine the activity of dosages and performing checks for proper operation of survey meters;

(III) calculating, measuring, and safely preparing patient or human research subject dosages;

(IV) using administrative controls to prevent a medical event involving the use of unsealed radioactive material;

(V) using procedures to contain spilled radioactive material safely and using proper decontamination procedures; and

(VI) administering dosages to patients or human research subjects that include at least three cases involving the parenteral administration specified in subsection (nn)(2)(A)(ii)(VI)(-c-) of this section; and

(C) has obtained written attestation that the individual has satisfactorily completed the requirements of paragraph (2)(A) and (B) of this subsection, and is able to independently fulfill the radiation safety-related duties as an authorized user for the parenteral administration of unsealed radioactive material requiring a written directive. The attestation must be obtained from either:

(i) a preceptor authorized user who meets the requirements of subsection (l) of this section, subsection (nn) of this section, or this subsection, or equivalent NRC or agreement state requirements. A preceptor authorized user who meets the requirements in subsection (nn) of this section, this section, or equivalent Agreement State requirements, must have experience in administering dosages in the same category or categories as the individual requesting authorized user status; or, and shall have experience in administering dosages in the same category or categories as the individual requesting authorized user status; or

(ii) A residency program director who affirms in writing that the attestation represents the consensus of the residency program faculty where at least one faculty member is an authorized user who meets the requirements in subsections (l), (nn) or (qq) of this section, or equivalent NRC or agreement state requirements, has experience in administering dosages in the same dosage category or categories as the individual requesting authorized user status, and concurs with the attestation provided by the residency program director. The residency training program must be approved by the Residency Review Committee of the Accreditation Council for Graduate Medical Education or the Royal College of Physicians and Surgeons of Canada or the Council on Postdoctoral Training of the American Osteopathic Association and must include training and experience specified in this paragraph.

(rr) Use of sealed sources for manual brachytherapy. The licensee shall use only brachytherapy sources as follows:

(1) as approved in the Sealed Source and Device Registry for manual brachytherapy medical use. The manual brachytherapy sources may be used for manual brachytherapy uses that are not explicitly listed in the Sealed Source and Device Registry, but must be used in accordance with the radiation safety conditions and limitations described in the Sealed Source and Device Registry; or

(2) in research to deliver therapeutic doses for medical use in accordance with an active Investigational Device Exemption application accepted by the FDA provided the requirements of subsection (u)(1) of this section are met.

(ss) Surveys after sealed source implants and removal.

(1) Immediately after implanting sealed sources in a patient or a human or animal research subject, the licensee shall perform a survey to locate and account for all sealed sources that have not been implanted.

(2) Immediately after removing the last temporary implant sealed source from a patient or a human or animal research subject, the licensee shall perform a survey of the patient or the human or animal research subject with a radiation detection survey instrument to confirm that all sealed sources have been removed.

(3) A record of each survey shall be retained, for inspection by the department, in accordance with subsection (xxx) of this section. The record shall include the following:

(A) date of the survey;

(B) results of the survey;

(C) manufacturer's name and model and serial number of the instrument used to make the survey; and

(D) name of the individual who performed the survey.

(tt) Brachytherapy sealed sources accountability.

(1) The licensee shall maintain accountability at all times for all brachytherapy sealed sources in storage or use.

(2) Promptly after removing sealed sources from a patient or a human or animal research subject, the licensee shall return brachytherapy sealed sources to a secure storage area.

(3) The licensee shall maintain a record of the brachytherapy sealed source accountability in accordance with subsection (xxx) of this section for inspection by the department.

(A) When removing temporary implants from storage, the licensee shall record the number and activity of sources, time and date the sources were removed, the name of the individual who removed the sources, and the location of use. When temporary implants are returned to storage, record the number and activity of sources, the time and date, and the name of the individual who returned them.

(B) When removing permanent implants from storage, the licensee shall record the number and activity of sources, date, the name of the individual who removed the sources, and the number and activity of sources permanently implanted in the patient or human research subject. Record the number and activity of sources not implanted and returned to storage, the date, and the name of the individual who returned them to storage.

(uu) Safety instruction to personnel. The licensee shall provide radiation safety instruction, initially and at least annually, to personnel caring for patients or human or animal research subjects who

are receiving brachytherapy and who cannot be released in accordance with subsection (cc) of this section or animals that are confined.

(1) The instruction shall be appropriate to the personnel's assigned duties and include the following:

(A) size and appearance of brachytherapy sources;

(B) safe handling and shielding instructions;

(C) patient or human research subject control;

(D) visitor control to include visitation to hospitalized individuals in accordance with §289.202(n) of this title; and

(E) notification of the RSO, or his or her designee, and an authorized user if the patient or the human or animal research subject has a medical emergency or dies.

(2) A licensee shall maintain a record, for inspection by the department, in accordance with subsection (xxx) of this section, of individuals receiving instruction. The record shall include the following:

(A) list of the topics covered;

(B) date of the instruction or training;

(C) name(s) of the attendee(s); and

(D) name(s) of the individual(s) who provided the instruction.

(vv) Safety precautions for the use of brachytherapy.

(1) For each patient or human research subject who is receiving brachytherapy and cannot be released in accordance with subsection (cc) of this section the licensee shall:

(A) provide a private room with a private sanitary facility;

(B) post the patient's or the research subject's room with a "Radioactive Materials" sign and note on the door or in the patient's or research subject's chart where and how long visitors may stay in the patient's or the research subject's room; and

(C) have available near each treatment room applicable emergency response equipment to respond to a sealed source that is inadvertently dislodged from the patient or inadvertently lodged within the patient following removal of the sealed source applicators.

(2) The RSO, or his or her designee, and the authorized user shall be notified if the patient or research subject has a medical emergency and, immediately, if the patient dies.

(ww) Calibration measurements of brachytherapy sealed sources.

(1) Before the first medical use of a brachytherapy sealed source on or after October 1, 2000, the licensee shall do the following:

(A) determine the sealed source output or activity using a dosimetry system that meets the requirements of subsection (iii)(1) of this section;

(B) determine sealed source positioning accuracy within applicators; and

(C) use published protocols accepted by nationally recognized bodies to meet the requirements of subparagraphs (A) and (B) of this paragraph.

(2) Instead of the licensee making its own measurements as required in paragraph (1) of this subsection, the licensee may use measurements provided by the source manufacturer or by a calibration laboratory accredited by the American Association of Physicists in Medicine that are made in accordance with paragraph (1) of this subsection.

(3) The licensee shall mathematically correct the outputs or activities determined in paragraph (1) of this subsection for physical decay at intervals consistent with one percent physical decay.

(4) The licensee shall retain a record of each calibration in accordance with subsection (xxx) of this section for inspection by the department. The record shall include the following:

(A) complete date of the calibration including the month, day, and year;

(B) manufacturer's name and model and serial number for the sealed source and instruments used to calibrate the sealed source;

(C) sealed source output or activity;

(D) sealed source positioning accuracy within applicators; and

(E) name of the individual, the source manufacturer, or the calibration laboratory that performed the calibration.

(xx) Strontium-90 sources for ophthalmic treatments.

(1) A licensee who uses strontium-90 for ophthalmic treatments must ensure that certain activities as specified in paragraph (2) of this subsection are performed by either:

(A) an authorized medical physicist; or

(B) an individual who:

(i) is identified as an ophthalmic physicist on a specific medical use license issued by the department, the NRC, or an agreement state; permit issued by the department, the NRC, or an agreement state broad scope medical use licensee; medical use permit issued by an NRC master material licensee; or permit issued by an NRC master material licensee broad scope medical use permittee; and

(ii) holds a master's or doctor's degree in physics, medical physics, other physical sciences, engineering, or applied mathematics from an accredited college or university; and

(iii) has successfully completed one year of full-time training in medical physics and an additional year of full-time work experience under the supervision of a medical physicist; and

(iv) has documented training in:

(I) the creation, modification, and completion of written directives;

(II) procedures for administrations requiring a written directive; and

(III) performing the calibration measurements of brachytherapy sources as detailed in subsection (ww) of this section.

(2) The individual who is identified in paragraph (1) of this subsection must:

(A) calculate the activity of each strontium-90 source that is used to determine the treatment times for ophthalmic treatments, and the decay must be based on the activity determined under subsection (ww) of this section; and

(B) assist the licensee in developing, implementing, and maintaining written procedures to provide high confidence that the administration is in accordance with the written directive. These procedures must include the frequencies that the individual meeting the requirements in paragraph (1) of this subsection will observe

treatments, review the treatment methodology, calculate treatment time for the prescribed dose, and review records to verify that the administrations were in accordance with the written directives.

(3) A licensee shall maintain a record of the activity of a strontium-90 source in accordance with subsection (xxx) of this section for inspection by the department. The record shall include the following:

(A) date and initial activity of the source as determined under subsection (ww) of this section; and

(B) for each decay calculation, the date and the source activity as determined under this subsection.

(yy) Therapy-related computer systems for manual brachytherapy. The licensee shall perform acceptance testing on the treatment planning system of therapy-related computer systems in accordance with published protocols accepted by nationally recognized bodies. At a minimum, the acceptance testing shall include, as applicable, verification of the following:

(1) the sealed source-specific input parameters required by the dose calculation algorithm;

(2) the accuracy of dose, dwell time, and treatment time calculations at representative points;

(3) the accuracy of isodose plots and graphic displays; and

(4) the accuracy of the software used to determine radioactive sealed source positions from radiographic images.

(zz) Training for use of manual brachytherapy sealed sources. Except as provided in subsection (l) of this section, the licensee shall require an authorized user of a manual brachytherapy source for the uses authorized in subsection (rr) of this section to be a physician who:

(1) is certified by a medical specialty board whose certification process has been recognized by the department, the NRC or an agreement state. The names of board certifications that have been recognized by the department, the NRC, or an agreement state are posted on the NRC's Medical Uses Licensee Toolkit web page. To have its certification recognized, a specialty board shall require all candidates for certification to:

(A) successfully complete a minimum of three years of residency training in a radiation oncology program approved by the Residency Review Committee of the Accreditation Council for Graduate Medical Education, the Royal College of Physicians and Surgeons of Canada, or the Committee on Post-Graduate Training of the American Osteopathic Association; and

(B) pass an examination, administered by diplomates of the specialty board, that assesses knowledge and competence in radiation safety, radionuclide handling, treatment planning, quality assurance, and clinical use of manual brachytherapy; or

(2) has completed:

(A) a structured educational program in basic radionuclide handling techniques applicable to the use of manual brachytherapy sources including the following:

(i) 200 hours of classroom and laboratory training in the following areas:

(I) radiation physics and instrumentation;

(II) radiation protection;

(III) mathematics pertaining to the use and measurement of radioactivity; and

(IV) radiation biology; and

(ii) 500 hours of work experience, under the supervision of an authorized user who meets the requirements of subsection (l) of this section, this subsection, or equivalent NRC or agreement state requirements at a medical facility authorized to use radioactive material under subsection (rr) of this section, involving the following:

(I) ordering, receiving, and unpacking radioactive materials safely and performing the related radiation surveys;

(II) checking survey meters for proper operation;

(III) preparing, implanting, and removing brachytherapy sources;

(IV) maintaining running inventories of material on hand;

(V) using administrative controls to prevent a medical event involving the use of radioactive material; and

(VI) using emergency procedures to control radioactive material; and

(B) three years of supervised clinical experience in radiation oncology, under an authorized user who meets the requirements of subsection (l) of this section, this subsection, or equivalent NRC or agreement state requirements, as part of a formal training program approved by the Residency Review Committee for Radiation Oncology of the Accreditation Council for Graduate Medical Education, the Royal College of Physicians and Surgeons of Canada, or the Committee on Postdoctoral Training of the American Osteopathic Association. This experience may be obtained concurrently with the supervised work experience required by subparagraph (A)(ii) of this paragraph; and

(3) has obtained written attestation that the individual has satisfactorily completed the requirements in paragraph (2) of this subsection and is able to independently fulfill the radiation safety-related duties as an authorized user of manual brachytherapy sources for the medical uses authorized under subsection (rr) of this section. The attestation must be obtained from either:

(A) a preceptor authorized user who meets the requirements of subsection (l) of this section, this subsection, or equivalent NRC or agreement state requirements; or

(B) a residency program director who affirms in writing that the attestation represents the consensus of the residency program faculty where at least one faculty member is an authorized user who meets the requirements in subsection (l) of this section, this subsection, or equivalent NRC or agreement state requirements, and concurs with the attestation provided by the residency program director. The residency training program must be approved by the Residency Review Committee of the Accreditation Council for Graduate Medical Education or the Royal College of Physicians and Surgeons of Canada or the Council on Postdoctoral Training of the American Osteopathic Association and must include training and experience specified in paragraph (2) of this subsection.

(aaa) Training for ophthalmic use of strontium-90. Except as provided in subsection (l) of this section, the licensee shall require an authorized user of strontium-90 for ophthalmic radiotherapy to be a physician who:

(1) is an authorized user under subsection (zz) of this section or equivalent NRC or agreement state requirements; or

(2) has completed 24 hours of classroom and laboratory training applicable to the medical use of strontium-90 for ophthalmic radiotherapy.

(A) The training shall include the following.

(i) classroom training shall include the following:

(I) radiation physics and instrumentation;

(II) radiation protection;

(III) mathematics pertaining to the use and measurement of radioactivity; and

(IV) radiation biology; and

(ii) supervised clinical training in ophthalmic radiotherapy under the supervision of an authorized user at a medical institution, clinic, or private practice that includes the use of strontium-90 for the ophthalmic treatment of five individuals. This supervised clinical training shall involve:

(I) examination of each individual to be treated;

(II) calculation of the dose to be administered;

(III) administration of the dose; and

(IV) follow-up and review of each individual's case history; and

(3) has obtained written attestation, signed by a preceptor authorized user who meets the requirements of subsection (l) of this section, subsection (zz) of this section or this subsection, or equivalent NRC or agreement state requirements, that the individual has satisfactorily completed the requirements of paragraph (2)(A) of this subsection and is able to independently fulfill the radiation safety-related duties as an authorized user of strontium-90 for ophthalmic use.

(bbb) Use of sealed sources and medical devices for diagnosis.

(1) The licensee shall use only sealed sources that are not in medical devices for diagnostic medical uses if the sealed sources are approved in the Sealed Source and Device Registry for diagnostic medicine. The sealed sources may be used for diagnostic medical uses that are not explicitly listed in the Sealed Source and Device Registry but must be used in accordance with the radiation safety conditions and limitations described in the Sealed Source and Device Registry.

(2) The licensee must only use medical devices containing sealed sources for diagnostic medical uses if both the sealed sources and medical devices are approved in the Sealed Source and Device Registry for diagnostic medical uses. The diagnostic medical devices may be used for diagnostic medical uses that are not explicitly listed in the Sealed Source and Device Registry but must be used in accordance with the radiation safety conditions and limitations described in the Sealed Source and Device Registry.

(3) Sealed sources and devices for diagnostic medical uses may be used in research in accordance with an active Investigational Device Exemption (IDE) application accepted by the FDA provided the requirements of subsection (u)(1) of this section are met.

(4) The licensee shall ensure that installation or exchange of sealed source(s) in medical imaging equipment is performed only by the manufacturer or persons specifically authorized to perform these services by the department, the NRC, or another agreement state. The licensee shall maintain a record for each installation or exchange for inspection by the department in accordance with subsection (xxx) of this section. The record shall include the date, the installer's radioactive material license number, and the regulatory agency that issued the license to the installer.

(ccc) Training for use of sealed sources for diagnosis. Except as provided in subsection (l) of this section, the licensee shall require the authorized user of a diagnostic sealed source or a device authorized in accordance with subsection (bbb) of this section to be a physician, dentist, or podiatrist who:

(1) is certified by a specialty board whose certification process includes all of the requirements of paragraphs (3) and (4) of this subsection and whose certification has been recognized by the department, the NRC, or an agreement state. The names of board certifications that have been recognized by the department, the NRC, or an agreement state are posted on the NRC's Medical Uses Licensee Toolkit web page; or

(2) is an authorized user for uses listed in subsection (hh) of this section or equivalent NRC or agreement state requirements; or

(3) has completed eight hours of classroom and laboratory training in basic radionuclide handling techniques specifically applicable to the use of the device. The training shall include:

(A) radiation physics and instrumentation;

(B) radiation protection;

(C) mathematics pertaining to the use and measurement of radioactivity; and

(D) radiation biology; and

(4) has completed training in the use of the device for the uses requested.

(ddd) Use of a sealed source in a remote afterloader unit, teletherapy unit, or gamma stereotactic radiosurgery unit.

(1) The licensee shall only use sealed sources:

(A) as approved and as provided for in the Sealed Source and Device Registry in photon-emitting remote afterloader units, teletherapy units, or gamma stereotactic radiosurgery units to deliver therapeutic doses for medical uses; or

(B) in research involving photon-emitting remote afterloader units, teletherapy units, or gamma stereotactic radiosurgery units in accordance with an active IDE application accepted by the FDA provided the requirements of subsection (u)(1) of this section are met.

(2) A licensee shall use photon-emitting remote afterloader units, teletherapy units, or gamma stereotactic radiosurgery units:

(A) approved in the Sealed Source and Device Registry to deliver a therapeutic dose for medical use. These devices may be used for therapeutic medical treatments that are not explicitly provided for in the Sealed Source and Device Registry, but must be used in accordance with radiation safety conditions and limitations described in the Sealed Source and Device Registry; or

(B) in research in accordance with an active IDE application accepted by the FDA provided the requirements of subsection (u)(1) of this section are met.

(eee) Surveys of patients and human research subjects treated with a remote afterloader unit.

(1) Before releasing a patient or a human research subject from licensee control, the licensee shall perform a survey of the patient or the human research subject and the remote afterloader unit with a portable radiation detection survey instrument to confirm that the sealed source(s) has been removed from the patient or human research subject and returned to the safe shielded position.

(2) The licensee shall maintain a record of the surveys in accordance with subsection (xxx) of this section for inspection by the department. The record shall include the following:

(A) date of the survey;

(B) results of the survey;

(C) manufacturer's name, model, and serial number of the survey instrument used; and

(D) name of the individual who made the survey.

(fff) Installation, maintenance, adjustment, and repair.

(1) Only a person specifically licensed by the department, the NRC, or an agreement state shall install, maintain, adjust, or repair a remote afterloader unit, teletherapy unit, or gamma stereotactic radiosurgery unit that involves work on the sealed source(s) shielding, the sealed source(s) driving unit, or other electronic or mechanical component that could expose the sealed source(s), reduce the shielding around the sealed source(s), or compromise the radiation safety of the unit or the sealed source(s).

(2) Except for low dose-rate remote afterloader units, only a person specifically licensed by the department, the NRC, or an agreement state shall install, replace, relocate, or remove a sealed source or sealed source contained in other remote afterloader units, teletherapy units, or gamma stereotactic units.

(3) For a low dose-rate remote afterloader unit, only a person specifically licensed by the department, the NRC, an agreement state, or an authorized medical physicist shall install, replace, relocate, or remove a sealed source(s) contained in the unit.

(4) The licensee shall maintain a record of the installation, maintenance, adjustment and repair done on remote afterloader units, teletherapy units, and gamma stereotactic radiosurgery units in accordance with subsection (xxx) of this section for inspection by the department. For each installation, maintenance, adjustment and repair, the record shall include the date, description of the service, and name(s) of the individual(s) who performed the work.

(ggg) Safety procedures and instructions for remote afterloader units, teletherapy units, and gamma stereotactic radiosurgery units.

(1) A licensee shall do the following:

(A) secure the unit, the console, the console keys, and the treatment room when not in use or unattended;

(B) permit only individuals approved by the authorized user, RSO, or authorized medical physicist to be present in the treatment room during treatment with the sealed source(s);

(C) prevent dual operation of more than one radiation producing device in a treatment room if applicable; and

(D) develop, implement, and maintain written procedures for responding to an abnormal situation when the operator is unable to place the sealed source(s) in the shielded position, or remove the patient or human research subject from the radiation field with controls from outside the treatment room. The procedures shall include the following:

(i) instructions for responding to equipment failures and the names of the individuals responsible for implementing corrective actions;

(ii) the process for restricting access to and posting of the treatment area to minimize the risk of inadvertent exposure; and

(iii) the names and telephone numbers of the authorized users, the authorized medical physicist, and the RSO to be contacted if the unit or console operates abnormally;

(2) A copy of the procedures required by paragraph (1)(D) of this subsection must be physically located at the unit console.

(3) The licensee shall post instructions at the unit console to inform the operator of the following:

(A) the location of the procedures required by paragraph (1)(D) of this subsection; and

(B) the names and telephone numbers of the authorized users, the authorized medical physicist, and the RSO to be contacted if the unit or console operates abnormally.

(4) Before the first use for patient treatment of a new unit or an existing unit with a manufacturer upgrade that affects the operation and safety of the unit:

(A) a licensee shall ensure that vendor operational and safety training is provided to all individuals who will operate the unit. The vendor operational and safety training must be provided by the device manufacturer or by an individual certified by the device manufacturer to provide the operational and safety training.

(B) a licensee shall provide operational and safety instructions initially and at least annually, to all individuals who operate the unit at the facility, as appropriate to the individual's assigned duties, to include:

(i) procedures identified in paragraph (1)(D) of this subsection; and

(ii) operating procedures for the unit.

(5) A licensee shall ensure that operators, authorized medical physicists, and authorized users participate in drills of the emergency procedures, initially and at least annually; and

(6) A licensee shall maintain records of the procedures required by paragraphs (1)(D) and (4)(B)(ii) of this subsection in accordance with subsection (xxx) of this section for inspection by the department.

(7) A licensee shall maintain records of individuals receiving instruction and participating in drills required by paragraphs (4) and (5) of this subsection in accordance with subsection (xxx) of this section for inspection by the department. The record shall include the following:

(A) a list of the topics covered;

(B) date of the instruction or drill;

(C) name(s) of the attendee(s); and

(D) name(s) of the individual(s) who provided the instruction.

(hhh) Safety precautions for remote afterloader units, teletherapy units, and gamma stereotactic radiosurgery units. The licensee shall do the following:

(1) control access to the treatment room by a door at each entrance;

(2) equip each entrance to the treatment room with an electrical interlock system that will do the following:

(A) prevent the operator from initiating the treatment cycle unless each treatment room entrance door is closed;

(B) cause the sealed source(s) to be shielded promptly when an entrance door is opened; and

(C) prevent the sealed source(s) from being exposed following an interlock interruption until all treatment room entrance doors are closed and the sealed source(s) "on-off" control is reset at the console;

(3) require any individual entering the treatment room to assure, through the use of appropriate radiation monitors, that radiation levels have returned to ambient levels;

(4) except for low-dose remote afterloader units, construct or equip each treatment room with viewing and intercom systems to permit continuous observation of the patient or the human research subject from the treatment console during irradiation;

(5) for licensed activities where sealed sources are placed within the patient's or human research subject's body, only conduct treatments that allow for expeditious removal of a decoupled or jammed sealed source;

(6) in addition to the requirements specified in paragraphs (1) - (5) of this subsection, require the following:

(A) for low dose-rate, medium dose-rate, and pulsed dose-rate remote afterloader units:

(i) an authorized medical physicist, and either an authorized user or a physician, under the supervision of an authorized user, who has been trained in the operation and emergency response for the unit, be physically present during the initiation of all patient treatments involving the unit; and

(ii) an authorized medical physicist, and either an authorized user or an individual, under the supervision of an authorized user, who has been trained to remove the sealed source applicator(s) in the event of an emergency involving the unit, be immediately available during continuation of all patient treatments involving the unit;

(B) for high dose-rate remote afterloader units:

(i) an authorized user and an authorized medical physicist be physically present during the initiation of all patient treatments involving the unit; and

(ii) an authorized medical physicist, and either an authorized user or a physician, under the supervision of an authorized user, who has been trained in the operation and emergency response for the unit, be physically present during continuation of all patient treatments involving the unit;

(C) for gamma stereotactic radiosurgery units and teletherapy units, require that an authorized user and an authorized medical physicist be physically present throughout all patient treatments involving gamma stereotactic radiosurgery units and teletherapy units; and

(D) notify the RSO, or his or her designee, and an authorized user as soon as possible, if the patient or human research subject has a medical emergency or dies; and

(7) have applicable emergency response equipment available near each treatment room to respond to a sealed source that remains in the unshielded position or lodges within the patient following completion of the treatment.

(iii) Dosimetry equipment.

(1) Except for low dose-rate remote afterloader sealed sources where the sealed source output or activity is determined by the manufacturer, the licensee shall have a calibrated dosimetry system available for use. To satisfy this requirement, one of the following two conditions shall be met:

(A) the system shall have been calibrated using a system or sealed source traceable to the National Institute of Standards and Technology (NIST) and published protocols accepted by nationally recognized bodies; or by a calibration laboratory accredited by the American Association of Physicists in Medicine (AAPM). The calibration shall have been performed within the previous two years and after any servicing that may have affected system calibration; or

(B) the system shall have been calibrated within the previous four years. Eighteen to 30 months after that calibration, the system shall have been intercompared with another dosimetry system that was calibrated within the past 24 months by NIST or by a calibration laboratory accredited by the AAPM. The results of the intercomparison shall have indicated that the calibration factor of the licensee's system had not changed by more than two percent. The licensee may not use the intercomparison result to change the calibration factor. When intercomparing dosimetry systems to be used for calibrating sealed sources for therapeutic unit, the licensee shall use a comparable unit with beam attenuators or collimators, as applicable, and sealed sources of the same radionuclide as the sealed source used at the licensee's facility.

(2) The licensee shall have available for use a dosimetry system for spot check output measurements, if such measurements are required by this section. To satisfy this requirement, the system may be compared with a system that has been calibrated in accordance with paragraph (1) of this subsection. This comparison shall have been performed within the previous year and after each servicing that may have affected system calibration. The spot check system may be the same system used to meet the requirements of paragraph (1) of this subsection.

(3) The licensee shall retain a record of each calibration, intercomparison, and comparison of dosimetry equipment in accordance with subsection (xxx) of this section for inspection by the department. The record shall include the following:

(A) complete date of the calibration including the month, day, and year;

(B) manufacturer's model and serial numbers of the instruments that were calibrated, intercompared, or compared;

(C) the correction factor that was determined from the calibration or comparison or the apparent correction factor that was determined from an intercomparison; and

(D) the names of the individuals who performed the calibration, intercomparison, or comparison.

(jjj) Full calibration measurements on teletherapy units.

(1) A licensee authorized to use a teletherapy unit for medical use shall perform full calibration measurements on each teletherapy unit as follows:

(A) before the first medical use of the unit; and

(B) before medical use under any of the following conditions:

(i) whenever spot check measurements indicate that the output differs by more than five percent from the output obtained at the last full calibration corrected mathematically for radioactive decay;

(ii) following replacement of the sealed source or following reinstallation of the teletherapy unit in a new location;

(iii) following any repair of the teletherapy unit that includes removal of the sealed source or major repair of the components associated with the sealed source exposure assembly; and

(C) at intervals not to exceed one year.

(2) Full calibration measurements shall include determination of the following:

(A) the output within plus or minus three percent for the range of field sizes and for the distance or range of distances used for medical use;

(B) the coincidence of the radiation field and the field indicated by the light beam localizing device;

(C) uniformity of the radiation field and its dependence on the orientation of the useful beam;

(D) timer accuracy and linearity over the range of use;

(E) "on-off" error; and

(F) the accuracy of all distance measuring and localization devices in medical use.

(3) The licensee shall use the dosimetry system described in subsection (iii)(1) of this section to measure the output for one set of exposure conditions. The remaining radiation measurements required in paragraph (2)(A) of this subsection may be made using a dosimetry system that indicates relative dose rates.

(4) The licensee shall make full calibration measurements required by paragraph (1) of this subsection in accordance with published protocols accepted by nationally recognized bodies.

(5) The licensee shall mathematically correct the outputs determined in paragraph (2)(A) of this subsection for physical decay at intervals not to exceed one month for cobalt-60, six months for cesium-137, or at intervals consistent with one percent decay for all other nuclides.

(6) Full calibration measurements required by paragraph (1) of this subsection and physical decay corrections required by paragraph (5) of this subsection shall be performed by an authorized medical physicist.

(7) The licensee shall retain a record of each calibration in accordance with subsection (xxx) of this section for inspection by the department. The record shall include the following:

(A) complete date of the calibration including the month, day, and year;

(B) manufacturer's name, model number and serial number of the teletherapy unit's sealed source and the instruments used to calibrate the unit;

(C) results and an assessment of the full calibrations; and

(D) signature of the authorized medical physicist who performed the full calibration.

(kkk) Full calibration measurements on remote afterloader units.

(1) A licensee authorized to use a remote afterloader for medical use shall perform full calibration measurements on each unit as follows:

(A) before the first medical use of the unit;

(B) before medical use under any of the following conditions:

(i) following replacement of the sealed source;

(ii) following reinstallation of the unit in a new location outside the facility; and

(iii) following any repair of the unit that includes removal of the sealed source or major repair of the components associated with the sealed source exposure assembly;

(C) at intervals not to exceed three months for high dose-rate, medium dose-rate, and pulsed dose-rate remote afterloader units with sealed sources whose half-life exceeds 75 days; and

(D) at intervals not to exceed one year for low dose-rate afterloader units.

(2) Full calibration measurements shall include, as applicable, determination of the following:

(A) the output within plus or minus five percent;

(B) sealed source positioning accuracy to within plus or minus 1 millimeter (mm);

(C) sealed source retraction with backup battery upon power failure;

(D) length of the sealed source transfer tubes;

(E) timer accuracy and linearity over the typical range of use;

(F) length of the applicators; and

(G) function of the sealed source transfer tubes, applicators, and transfer tube-applicator interfaces.

(3) A licensee shall use the dosimetry system described in subsection (iii)(1) of this section to measure the output.

(4) A licensee shall make full calibration measurements required by paragraph (1) of this subsection in accordance with published protocols accepted by nationally recognized bodies.

(5) In addition to the requirements for full calibrations for low dose-rate remote afterloader units in paragraph (2) of this subsection, a licensee shall perform an autoradiograph of the sealed source(s) to verify inventory and sealed source(s) arrangement at intervals not to exceed three months.

(6) For low dose-rate remote afterloader units, a licensee may use measurements provided by the sealed source manufacturer that are made in accordance with paragraphs (1) - (5) of this subsection.

(7) The licensee shall mathematically correct the outputs determined in paragraph (2)(A) of this subsection for physical decay at intervals consistent with one percent physical decay.

(8) Full calibration measurements required by paragraph (1) of this subsection and physical decay corrections required by paragraph (7) of this subsection shall be performed by an authorized medical physicist.

(9) The licensee shall retain a record of each calibration in accordance with subsection (xxx) of this section for inspection by the department. The record shall include the following:

(A) complete date of the calibration including the month, day, and year;

(B) manufacturer's name, model number and serial number of the remote afterloader unit's sealed source, and the instruments used to calibrate the unit;

(C) results and an assessment of the full calibrations;

(D) signature of the authorized medical physicist of this section; and

(E) results of the autoradiograph required for low dose-rate remote afterloader unit.

(lll) Full calibration measurements on gamma stereotactic radiosurgery units.

(1) A licensee authorized to use a gamma stereotactic radiosurgery unit for medical use shall perform full calibration measurements on each gamma stereotactic radiosurgery unit as follows:

(A) before the first medical use of the unit;

(B) before medical use under the following conditions:

(i) whenever spot check measurements indicate that the output differs by more than five percent from the output obtained at the last full calibration corrected mathematically for radioactive decay;

(ii) following replacement of the sealed sources or following reinstallation of the gamma stereotactic radiosurgery unit in a new location; and

(iii) following any repair of the gamma stereotactic radiosurgery unit that includes removal of the sealed sources or major repair of the components associated with the sealed source exposure assembly; and

(C) at intervals not to exceed one year, with the exception that relative helmet factors need only be determined before the first medical use of a helmet and following any damage to a helmet.

(2) Full calibration measurements shall include determination of the following:

(A) the output within plus or minus three percent;

(B) relative helmet factors;

(C) isocenter coincidence;

(D) timer accuracy and linearity over the range of use;

(E) "on-off" error;

(F) trunnion centricity;

(G) treatment table retraction mechanism, using backup battery power or hydraulic backups with the unit "off";

(H) helmet microswitches;

(I) emergency timing circuits; and

(J) stereotactic frames and localizing devices (trunnions).

(3) The licensee shall use the dosimetry system described in subsection (iii)(1) of this section to measure the output for one set of exposure conditions. The remaining radiation measurements required in paragraph (2)(A) of this subsection may be made using a dosimetry system that indicates relative dose rates.

(4) The licensee shall make full calibration measurements required by paragraph (1) of this subsection in accordance with published protocols accepted by nationally recognized bodies.

(5) The licensee shall mathematically correct the outputs determined in paragraph (2)(A) of this subsection at intervals not to exceed one month for cobalt-60 and at intervals consistent with one percent physical decay for all other radionuclides.

(6) Full calibration measurements required by paragraph (1) of this subsection and physical decay corrections required by paragraph (5) of this subsection shall be performed by an authorized medical physicist.

(7) The licensee shall retain a record of each calibration in accordance with subsection (xxx) of this section for inspection by the department. The record shall include the following:

(A) complete date of the calibration including the month, day and year;

(B) manufacturer's name, model number, and serial number for the unit and the unit's sealed source and the instruments used to calibrate the unit;

(C) results and an assessment of the full calibration; and

(D) signature of the authorized medical physicist who performed the full calibration.

(mmm) Periodic spot checks for teletherapy units.

(1) A licensee authorized to use teletherapy units for medical use shall perform output spot checks on each teletherapy unit once in each calendar month that include determination of the following:

(A) timer constancy and linearity over the range of use;

(B) "on-off" error;

(C) the coincidence of the radiation field and the field indicated by the light beam localizing device;

(D) the accuracy of all distance measuring and localization devices used for medical use;

(E) the output for one typical set of operating conditions measured with the dosimetry system described in subsection (iii)(2) of this section; and

(F) the difference between the measurement made in subparagraph (E) of this paragraph and the anticipated output, expressed as a percentage of the anticipated output, the value obtained at last full calibration corrected mathematically for physical decay.

(2) The licensee shall perform measurements required by paragraph (1) of this subsection in accordance with written procedures established by an authorized medical physicist. That authorized medical physicist need not actually perform the spot check measurements. The licensee shall maintain a copy of the written procedures in accordance with subsection (xxx) of this section for inspection by the department.

(3) The licensee authorized to use a teletherapy unit for medical use shall perform safety spot checks of each teletherapy facility once in each calendar month and after each sealed source installation to assure proper operation of the following:

(A) electrical interlocks at each teletherapy room entrance;

(B) electrical or mechanical stops installed for the purpose of limiting use of the primary beam of radiation (restriction of sealed source housing angulation or elevation, carriage or stand travel and operation of the beam "on-off" mechanism);

(C) sealed source exposure indicator lights on the teletherapy unit, on the control console, and in the facility;

(D) viewing and intercom systems;

(E) treatment room doors from inside and outside the treatment room; and

(F) electrically assisted treatment room doors with the teletherapy unit electrical power turned "off".

(4) The licensee shall have an authorized medical physicist review the results of each spot check and submit a written report to the licensee within 15 days of the spot check.

(5) If the results of the checks required in paragraph (3) of this subsection indicate the malfunction of any system, the licensee shall lock the control console in the "off" position and not use the unit

except as may be necessary to repair, replace, or check the malfunctioning system.

(6) The licensee shall retain a record of each spot check required by paragraphs (1) and (3) of this subsection, in accordance with subsection (xxx) of this section for inspection by the department. The record shall include the following:

(A) date of the spot-check;

(B) manufacturer's name and model and serial number for the teletherapy unit, and sealed source and instrument used to measure the output of the teletherapy unit;

(C) assessment of timer linearity and constancy;

(D) calculated "on-off" error;

(E) determination of the coincidence of the radiation field and the field indicated by the light beam localizing device;

(F) the determined accuracy of each distance measuring and localization device;

(G) the difference between the anticipated output and the measured output;

(H) notations indicating the operability of each entrance door electrical interlock, each electrical or mechanical stop, each sealed source exposure indicator light, and the viewing and intercom system and doors;

(I) name of the individual who performed the periodic spot-check; and

(J) the signature of the authorized medical physicist who reviewed the record of the spot check.

(nnn) Periodic spot checks for remote afterloader units.

(1) A licensee authorized to use a remote afterloader unit for medical use shall perform spot checks of each remote afterloader facility and on each unit as follows:

(A) before the first use each day of use of a high dose-rate, medium dose-rate, or pulsed dose-rate remote afterloader unit;

(B) before each patient treatment with a low dose-rate remote afterloader unit; and

(C) after each sealed source installation.

(2) The licensee shall perform the measurements required by paragraph (1) of this subsection in accordance with written procedures established by an authorized medical physicist. That individual need not actually perform the spot check measurements. The licensee shall maintain a copy of the written procedures in accordance with subsection (xxx) of this section for inspection by the department.

(3) The licensee shall have an authorized medical physicist review the results of each spot check and submit a written report to the licensee within 15 days of the spot check.

(4) To satisfy the requirements of paragraph (1) of this subsection, spot checks shall, at a minimum, assure proper operation of the following:

(A) electrical interlocks at each remote afterloader unit room entrance;

(B) sealed source exposure indicator lights on the remote afterloader unit, on the control console, and in the facility;

(C) viewing and intercom systems in each high dose-rate, medium dose-rate, and pulsed dose-rate remote afterloader facility;

(D) emergency response equipment;

(E) radiation monitors used to indicate the sealed source position;

(F) timer accuracy;

(G) clock (date and time) in the unit's computer; and

(H) decayed sealed source(s) activity in the unit's computer.

(5) If the results of the checks required in paragraph (4) of this subsection indicate the malfunction of any system, the licensee shall lock the control console in the "off" position and not use the unit except as may be necessary to repair, replace, or check the malfunctioning system.

(6) The licensee shall maintain a record, in accordance with subsection (xxx) of this section for inspection by the department, of each check required by paragraph (4) of this subsection. The record shall include the following, as applicable:

(A) date of the spot-check;

(B) manufacturer's name and model and serial number for the remote afterloader unit and sealed source;

(C) an assessment of timer accuracy;

(D) notations indicating the operability of each entrance door electrical interlock, radiation monitors, sealed source exposure indicator lights, viewing and intercom systems, clock, and decayed sealed source activity in the unit's computer;

(E) name of the individual who performed the periodic spot-check; and

(F) the signature of an authorized medical physicist who reviewed the record of the spot-check.

(ooo) Periodic spot checks for gamma stereotactic radiosurgery units.

(1) A licensee authorized to use a gamma stereotactic radiosurgery unit for medical use shall perform spot checks of each gamma stereotactic radiosurgery facility and on each unit as follows:

(A) monthly;

(B) before the first use of the unit on each day of use; and

(C) after each source installation.

(2) The licensee shall perform the measurements required by paragraph (1) of this subsection in accordance with written procedures established by an authorized medical physicist with a specialty in therapeutic radiological physics. That individual need not actually perform the spot check measurements. The licensee shall maintain a copy of the written procedures in accordance with subsection (xxx) of this section for inspection by the department.

(3) The licensee shall have an authorized medical physicist review the results of each spot check and submit a written report to the licensee within 15 days of the spot check.

(4) To satisfy the requirements of paragraph (1)(A) of this subsection, spot checks shall, at a minimum, achieve the following by:

(A) assurance of proper operation of these items:

(i) treatment table retraction mechanism, using backup battery power or hydraulic backups with the unit "off;"

(ii) helmet microswitches;

(iii) emergency timing circuits; and

(iv) stereotactic frames and localizing devices (trunnions); and

(B) determination of the following:

(i) the output for one typical set of operating conditions measured with the dosimetry system described in subsection (iii)(2) of this section;

(ii) the difference between the measurement made in clause (i) of this subparagraph and the anticipated output, expressed as a percentage of the anticipated output, (i.e., the value obtained at last full calibration corrected mathematically for physical decay);

(iii) sealed source output against computer calculation;

(iv) timer accuracy and linearity over the range of use;

(v) "on-off" error; and

(vi) trunnion centricity.

(5) To satisfy the requirements of paragraph (1)(B) and (C) of this subsection, spot checks shall assure proper operation of the following:

(A) electrical interlocks at each gamma stereotactic radiosurgery room entrance;

(B) sealed source exposure indicator lights on the gamma stereotactic radiosurgery unit, on the control console, and in the facility;

(C) viewing and intercom systems;

(D) timer termination;

(E) radiation monitors used to indicate room exposures; and

(F) emergency "off" buttons.

(6) The licensee shall arrange for prompt repair of any system identified in paragraph (4) of this subsection that is not operating properly.

(7) If the results of the checks required in paragraph (5) of this subsection indicate the malfunction of any system, the licensee shall lock the control console in the "off" position and not use the unit except as may be necessary to repair, replace, or check the malfunctioning system.

(8) The licensee shall retain a record of each check required by paragraphs (4) and (5) of this subsection in accordance with subsection (xxx) of this section for inspection by the department. The record shall include the following:

(A) date of the spot check;

(B) manufacturer's name, and model and serial number for the gamma stereotactic radiosurgery unit and the instrument used to measure the output of the unit;

(C) an assessment of timer linearity and accuracy;

(D) the calculated "on-off" error;

(E) a determination of trunnion centricity;

(F) the difference between the anticipated output and the measured output;

(G) an assessment of sealed source output against computer calculations;

(H) notations indicating the operability of radiation monitors, helmet microswitches, emergency timing circuits, emergency "off" buttons, electrical interlocks, sealed source exposure indicator lights, viewing and intercom systems, timer termination, treatment table retraction mechanism, and stereotactic frames and localizing devices (trunnions);

(I) the name of the individual who performed the periodic spot check; and

(J) the signature of an authorized medical physicist who reviewed the record of the spot check.

(ppp) Additional technical requirements for mobile remote afterloader units.

(1) A licensee providing mobile remote afterloader service shall do the following:

(A) check survey instruments before medical use at each address of use or on each day of use, whichever is more frequent; and

(B) account for all sealed sources before departure from a client's address of use.

(2) In addition to the periodic spot checks required by subsection (nnn) of this section, a licensee authorized to use remote afterloaders for medical use shall perform checks on each remote afterloader unit before use at each address of use. At a minimum, checks shall be made to verify the operation of the following:

(A) electrical interlocks on treatment area access points;

(B) sealed source exposure indicator lights on the remote afterloader unit, on the control console, and in the facility;

(C) viewing and intercom systems;

(D) applicators, sealed source transfer tubes, and transfer tube-applicator interfaces;

(E) radiation monitors used to indicate room exposures;

(F) sealed source positioning (accuracy); and

(G) radiation monitors used to indicate whether the sealed source has returned to a safe shielded position.

(3) In addition to the requirements for checks in paragraph (2) of this subsection, the licensee shall ensure overall proper operation of the remote afterloader unit by conducting a simulated cycle of treatment before use at each address of use.

(4) If the results of the checks required in paragraph (2) of this subsection indicate the malfunction of any system, the licensee shall lock the control console in the "off" position and not use the unit except as may be necessary to repair, replace, or check the malfunctioning system.

(5) The licensee shall maintain a record for inspection by the department, in accordance with subsection (xxx) of this section, of each check required by paragraph (2) of this subsection. The record shall include the following:

(A) date of the check;

(B) manufacturer's name, model number and serial number of the remote afterloader unit;

(C) notations accounting for all sealed sources before the licensee departs from a facility;

(D) notations indicating the operability of each entrance door electrical interlock, radiation monitors, sealed source exposure indicator lights, viewing and intercom system, applicators and sealed source transfer tubes, and sealed source positioning accuracy; and

(E) the signature of the individual who performed the check.

(qqq) Radiation surveys.

(1) In addition to the survey requirements of §289.202(p) of this title, a person licensed to use sealed sources in this section shall make surveys to ensure that the maximum radiation levels and average radiation levels, from the surface of the main sealed source safe with the sealed source(s) in the shielded position, do not exceed the levels stated in the Sealed Source and Device Registry.

(2) The licensee shall make the survey required by paragraph (1) of this subsection at installation of a new sealed source and following repairs to the sealed source(s) shielding, the sealed source(s) driving unit, or other electronic or mechanical component that could expose the sealed source, reduce the shielding around the sealed source(s), or compromise the radiation safety of the unit or the sealed source(s).

(3) The licensee shall maintain a record for inspection by the department, in accordance with subsection (xxx) of this section, of the radiation surveys required by paragraph (1) of this subsection. The record shall include:

(A) date of the measurements;

(B) manufacturer's name, model number and serial number of the treatment unit, sealed source, and instrument used to measure radiation levels;

(C) each dose rate measured around the sealed source while the unit is in the "off" position and the average of all measurements; and

(D) the signature of the individual who performed the test.

(rrr) Full-inspection servicing for teletherapy and gamma stereotactic radiosurgery units.

(1) The licensee shall have each teletherapy unit and gamma stereotactic radiosurgery unit fully inspected and serviced during each sealed source replacement to ensure proper functioning of the sealed source exposure mechanism and other safety components. The interval between each full-inspection servicing shall not exceed five years for each teletherapy unit and shall not exceed seven years for each gamma stereotactic radiosurgery unit.

(2) This inspection and servicing may only be performed by persons specifically licensed to do so by the department, the NRC, or an agreement state.

(3) The licensee shall maintain a record of the inspection and servicing in accordance with subsection (xxx) of this section for inspection by the department. The record shall include the following:

(A) date of inspection;

(B) manufacturer's name and model and serial number of both the treatment unit and the sealed source;

(C) a list of components inspected and serviced, and the type of service;

(D) the inspector's radioactive material license number; and

(E) the signature of the inspector.

(sss) Therapy-related computer systems for photon-emitting remote afterloader units, teletherapy units, and gamma stereotactic radiosurgery units. The licensee shall perform acceptance testing on the treatment planning system of therapy-related computer systems in accordance with published protocols accepted by nationally recognized bodies. At a minimum, the acceptance testing shall include, as applicable, verification of the following:

(1) the sealed source-specific input parameters required by the dose calculation algorithm;

(2) the accuracy of dose, dwell time, and treatment time calculations at representative points;

(3) the accuracy of isodose plots and graphic displays;

(4) the accuracy of the software used to determine sealed source positions from radiographic images; and

(5) the accuracy of electronic transfer of the treatment delivery parameters to the treatment delivery unit from the treatment planning system.

(ttt) Training for use of remote afterloader units, teletherapy units, and gamma stereotactic radiosurgery units. Except as provided in subsection (l) of this section, the licensee shall require an authorized user of a sealed source for a use authorized in subsection (ddd) of this section for:

(1) a physician who is certified by a medical specialty board whose certification process has been recognized by the department, the NRC, or an agreement state and who meets the requirements of paragraph (3) of this subsection. The names of board certifications that have been recognized by the department, the NRC, or an agreement state are posted on the NRC's Medical Uses Licensee Toolkit web page. To have its certification recognized, a specialty board shall require all candidates for certification to:

(A) successfully complete a minimum of three years of residency training in a radiation therapy program approved by the Residency Review Committee of the Accreditation Council for Graduate Medical Education, the Royal College of Physicians and Surgeons of Canada, or the Committee on Post-Graduate Training of the American Osteopathic Association; and

(B) pass an examination, administered by diplomates of the specialty board, that assesses knowledge and competence in radiation safety, radionuclide handling, treatment planning, quality assurance, and clinical use of stereotactic radiosurgery, remote afterloaders and external beam therapy; or

(2) the physician must meet the following requirements:

(A) has completed a structured educational program in basic radionuclide handling techniques applicable to the use of a sealed source in a therapeutic medical unit including the following:

(i) 200 hours of classroom and laboratory training in the following areas:

(I) radiation physics and instrumentation;

(II) radiation protection;

(III) mathematics pertaining to the use and measurement of radioactivity; and

(IV) radiation biology; and

(ii) 500 hours of work experience, under the supervision of an authorized user who meets the requirements of subsection (l) of this section, this subsection, or equivalent NRC or agreement state requirements at a medical facility that is authorized to use radioactive material in subsection (ddd) of this section involving the following:

(I) reviewing full calibration measurements and periodic spot checks;

(II) preparing treatment plans and calculating treatment times;

(III) using administrative controls to prevent a medical event involving the use of radioactive material;

(IV) implementing emergency procedures to be followed in the event of the abnormal operation of a medical unit or console;

(V) checking and using survey meters; and

(VI) selecting the proper dose and how it is to be administered; and

(iii) completion of three years of supervised clinical experience in radiation therapy, under an authorized user who meets the requirements of subsection (l) of this section, this subsection, or equivalent NRC or agreement state requirements, as part of a formal training program approved by the Residency Review Committee for Radiation Oncology of the Accreditation Council for Graduate Medical Education, the Royal College of Physicians and Surgeons of Canada, or the Committee on Postdoctoral Training of the American Osteopathic Association. This experience may be obtained concurrently with the supervised work experience required by clause (ii) of this subparagraph; and

(B) has obtained written attestation that the individual has satisfactorily completed the requirements of paragraphs (2)(A) and (3) of this subsection, and is able to independently fulfill the radiation safety-related duties as an authorized user of each type of therapeutic medical unit for which the individual is requesting authorized user status. The attestation must be obtained from either:

(i) a preceptor authorized user who meets the requirements in subsection (l) of this section, this subsection, or equivalent NRC or agreement state requirements for the type(s) of therapeutic medical unit for which the individual is requesting authorized user status; or

(ii) a residency program director who affirms in writing that the attestation represents the consensus of the residency program faculty where at least one faculty member is an authorized user who meets the requirements in subsection (l) of this section, this subsection, or equivalent NRC or agreement state requirements, for the type(s) of therapeutic medical unit for which the individual is requesting authorized user status, and concurs with the attestation provided by the residency program director. The residency training program must be approved by the Residency Review Committee of the Accreditation Council for Graduate Medical Education or the Royal College of Physicians and Surgeons of Canada or the Council on Postdoctoral Training of the American Osteopathic Association and must include training and experience specified in subparagraph (A) of this paragraph; and

(3) the physician has received training in device operation, safety procedures, and clinical use for the type(s) of use for which authorization is sought. This training requirement may be satisfied by satisfactory completion of a training program provided by the vendor for new users or by receiving training supervised by an authorized user or authorized medical physicist, as appropriate, who is authorized for the type(s) of use for which the individual is seeking authorization.

(uuu) Report and notification of a medical event.

(1) The licensee shall report any event as a medical event, except for an event that results from patient intervention, in which the administration of radioactive material, or radiation from radioactive material, except permanent implant brachytherapy, results in the following:

(A) a dose that differs from the prescribed dose or dose that would have resulted from the prescribed dosage by more than 5 rem (0.05 Sievert (Sv)) effective dose equivalent, 50 rem (0.5 Sv) to an organ or tissue, or 50 rem (0.5 Sv) shallow dose equivalent to the skin; and

(i) the total dose delivered differs from the prescribed dose by 20 percent or more;

(ii) the total dosage delivered differs from the prescribed dosage by 20 percent or more or falls outside the prescribed dosage range; or

(iii) the fractionated dose delivered differs from the prescribed dose, for a single fraction, by 50 percent or more;

(B) a dose that exceeds 5 rem (0.05 Sv) effective dose equivalent, 50 rem (0.5 Sv) to an organ or tissue, or 50 rem (0.5 Sv) shallow dose equivalent to the skin from any of the following:

(i) an administration of a wrong radioactive drug containing radioactive material or the wrong radionuclide for a brachytherapy procedure;

(ii) an administration of a radioactive drug containing radioactive material by the wrong route of administration;

(iii) an administration of a dose or dosage to the wrong individual or human research subject;

(iv) an administration of a dose or dosage delivered by the wrong mode of treatment; or

(v) a leaking sealed source; or

(C) a dose to the skin or an organ or tissue other than the treatment site that exceeds by

(i) 50 rem (0.5 Sv) or more the expected dose to that site from the procedure if the administration had been given in accordance with the written directive prepared or revised before administration; and

(ii) 50 percent or more of the expected dose to that site from the procedure if the administration had been given in accordance with the written directive prepared or revised before administration.

(2) For permanent implant brachytherapy, the licensee shall report the administration of radioactive material or radiation from radioactive material (excluding sources that were implanted in the correct site but migrated outside the treatment site) that results in:

(A) the total source strength administered differing by 20 percent or more from the total source strength documented in the post-implantation portion of the written directive;

(B) the total source strength administered outside of the treatment site exceeding 20 percent of the total source strength documented in the post-implantation portion of the written directive; or

(C) an administration that includes any of the following:

(i) the wrong radionuclide;

(ii) the wrong individual or human research subject;

(iii) sealed source(s) implanted directly into a location discontiguous from the treatment site, as documented in the post-implantation portion of the written directive; or

(iv) a leaking sealed source resulting in a dose that exceeds 50 rem (0.5 Sv) to an organ or tissue.

(3) The licensee shall report any event resulting from patient intervention in which the administration of radioactive material, or radiation from radioactive material, results or will result in an unintended permanent functional damage to an organ or a physiological system, as determined by a physician.

(4) The licensee shall notify the department by telephone no later than the next calendar day after discovery of the medical event.

(5) The licensee shall submit a written report to the department within 15 calendar days after discovery of the medical event. The written report shall include the following, excluding the individual's name or any other information that could lead to identification of the individual:

(A) the licensee's name and radioactive material license number;

(B) a description of the licensed source of radiation involved, including, for radioactive material, the kind, quantity, chemical and physical form, source and device manufacturer, model number, and serial number, if applicable;

(C) the name of the prescribing physician;

(D) a brief description of the medical event;

(E) why the event occurred;

(F) the effect, if any, on the individual(s) who received the administration;

(G) actions, if any, that have been taken, or are planned, to prevent recurrence; and

(H) certification that the licensee notified the individual (or the individual's responsible relative or guardian), and if not, why not.

(6) The licensee shall notify the referring physician and also notify the individual who is the subject of the medical event no later than 24 hours after its discovery, unless the referring physician personally informs the licensee either that he or she will inform the individual or that, based on medical judgment, telling the individual would be harmful. The licensee is not required to notify the individual without first consulting the referring physician. If the referring physician or the affected individual cannot be reached within 24 hours, the licensee shall notify the individual as soon as possible thereafter. The licensee shall not delay any appropriate medical care for the individual, including any necessary remedial care as a result of the medical event, because of any delay in notification. To meet the requirements of this subsection, the notification of the individual who is the subject of the medical event may be made instead to that individual's responsible relative or guardian. If a verbal notification is made, the licensee shall inform the individual or appropriate responsible relative or guardian, that a written description of the event can be obtained from the licensee upon request. The licensee shall provide the written description if requested.

(7) Aside from the notification requirement, nothing in this section affects any rights or duties of licensees and physicians in relation to each other, to individuals affected by the medical event, or to that individual's responsible relatives or guardians.

(8) The licensee shall annotate a copy of the report provided to the department with the following information:

(A) the name of the individual who is the subject of the event; and

(B) an identification number or if no other identification number is available, the social security number of the individual who is the subject of the event.

(9) The licensee shall provide a copy of the annotated report to the referring physician, if other than the licensee, no later than 15 calendar days after the discovery of the event.

(10) The licensee shall retain a copy of the annotated report of the medical event in accordance with subsection (xxx) of this section for inspection by the department.

(vvv) Report and notification of a dose to an embryo/fetus or nursing child.

(1) The licensee shall report any dose to an embryo/fetus that is greater than 5 rem (50 mSv) dose equivalent that is a result of an administration of radioactive material or radiation from radioactive material to a pregnant individual, unless the dose to the embryo/fetus was specifically approved, in advance, by the authorized user.

(2) The licensee shall report any dose to a nursing child that is a result of an administration of radioactive material to a breastfeeding individual that:

(A) is greater than 5 rem (50 mSv) TEDE; or

(B) has resulted in unintended permanent functional damage to an organ or a physiological system, as determined by a physician.

(3) The licensee shall notify the department by telephone no later than the next calendar day after discovery of a dose to the embryo/fetus or nursing child that requires a report in accordance with paragraphs (1) or (2) of this subsection.

(4) The licensee shall submit a written report to the department no later than 15 calendar days after discovery of a dose to the embryo/fetus or nursing child that requires a report in accordance with paragraphs (1) or (2) of this subsection. The written report shall include the following, excluding the individual's or child's name or any other information that could lead to identification of the individual or child:

(A) the licensee's name and radioactive material license number;

(B) a description of the licensed source of radiation involved, including, for radioactive material, the kind, quantity, chemical and physical form, source and/or device manufacturer, model number, and serial number, if applicable;

(C) the name of the prescribing physician;

(D) a brief description of the event;

(E) why the event occurred;

(F) the effect, if any, on the embryo/fetus or the nursing child;

(G) actions, if any, that have been taken, or are planned, to prevent recurrence; and

(H) certification that the licensee notified the pregnant individual or mother (or the mother's or child's responsible relative or guardian), and if not, why not.

(5) The licensee shall notify the referring physician and also notify the pregnant individual or mother, both hereafter referred to as the mother, no later than 24 hours after discovery of an event that would require reporting in accordance with paragraphs (1) or (2) of this subsection, unless the referring physician personally informs the licensee either that he or she will inform the mother or that, based on medical judgment, telling the mother would be harmful. The licensee is not required to notify the mother without first consulting with the referring physician. If the referring physician or mother cannot be reached within 24 hours, the licensee shall make the appropriate notifications as soon as possible thereafter. The licensee may not delay any appropriate medical care for the embryo/fetus or for the nursing child, including any necessary remedial care as a result of the event, because of any delay in notification. To meet the requirements of this subsection, the notification may be made to the mother's or child's responsible relative or guardian instead of the mother, when appropriate. If a verbal notification is made, the licensee shall inform the mother, or the mother's or child's responsible relative or guardian, that a written description of the event can be obtained from the licensee upon request. The licensee shall provide such a written description if requested.

(6) The licensee shall annotate a copy of the report provided to the department with the following information:

(A) the name of the individual or the nursing child who is the subject of the event; and

(B) an identification number or if no other identification number is available, the social security number of the individual who is the subject of the event.

(7) The licensee shall provide a copy of the annotated report as described in paragraph (6) of this subsection to the referring physician, if other than the licensee, no later than 15 days after the discovery of the event.

(8) The licensee shall retain a copy of the annotated report as described in paragraph (6) of this subsection of a dose to an embryo/fetus or a nursing child in accordance with subsection (xxx) of this section for inspection by the department.

(www) Report and notification for an eluate exceeding permissible molybdenum-99, strontium-82, and strontium-85 concentrations.

(1) The licensee shall notify by telephone the department at (512) 458-7460 and the distributor of the generator within seven calendar days after discovery that an eluate exceeded the permissible concentration listed in subsection (ii) of this section at the time of generator elution. The telephone report to the department must include the manufacturer, model number, and serial number (or lot number) of the generator; the results of the measurement; the date of the measurement; whether dosages were administered to patients or human research subjects, when the distributor was notified, and the action taken.

(2) The licensee shall submit a written report to the department within 30 calendar days after discovery of an eluate exceeding the permissible concentration at the time of generator elution. The written report must include the action taken by the licensee; the patient dose assessment; the methodology used to make this dose assessment if the eluate was administered to patients or human research subjects; and the probable cause and an assessment of failure in the licensee's equipment, procedures or training that contributed to the excessive readings if an error occurred in the licensee's breakthrough determination; and the information in the telephone report as required by paragraph (1) of this subsection.

(xxx) Records/documents for department inspection. Each licensee shall maintain copies of the following records/documents at each authorized use site and make them available to the department for inspection, upon reasonable notice.

Figure: 25 TAC §289.256(xxx)

§289.257. Packaging and Transportation of Radioactive Material.

(a) Purpose.

(1) This section establishes requirements for packaging, preparation for shipment, and transportation of radioactive material including radioactive waste.

(2) The packaging and transport of radioactive material are also subject to the requirements of §289.201 of this title (relating to General Provisions for Radioactive Material), §289.202 of this title (relating to Standards for Protection Against Radiation from Radioactive Materials), §289.203 of this title (relating to Notices, Instructions, and Reports to Workers; Inspections), §289.204 of this title (relating to Fees for Certificates of Registration, Radioactive Material Licenses, Emergency Planning and Implementation, and Other Regulatory Services), §289.205 of this title (relating to Hearing and Enforcement Procedures), §289.251 of this title (relating to Exemptions, General Licenses, and General License Acknowledgements), §289.252 of this title (relating to Licensing of Radioactive Material), and §289.256 of this title (relating to Medical and Veterinary Use of Radioactive Material) and to the regulations of other agencies (e.g., the United States Department of Transportation (DOT) and the United States Postal Service) having jurisdiction over means of transport. The requirements of this section are in addition to, and not in substitution for, other requirements.

(b) Scope.

(1) The requirements of this section apply to any licensee authorized by a specific or general license issued by the department to receive, possess, use, or transfer radioactive material, if the licensee delivers that material to a carrier for transport, transports the material outside the site of usage as specified in the department license, or transports that material on public highways. No provision of this section authorizes possession of radioactive material.

(2) Exemptions from the requirements for a license in subsection (c) of this section are specified in subsection (f) of this section. The general license in subsection (i)(2), (3), and (4) of this section requires that a United States Nuclear Regulatory Commission (NRC) certificate of compliance or other package approval be issued for the package to be used in accordance with the general license. A licensee transporting radioactive material, or delivering radioactive material to a carrier for transport, shall comply with the operating control requirements of subsections (l) - (q) of this section; the quality assurance requirements of subsections (s) - (u) and (w) - (bb) of this section; and the general provisions of subsections (a) - (e) of this section, including DOT regulations referenced in subsection (e) of this section.

(c) Requirement for license. Except as authorized in a general or specific license issued by the department, or as exempted in accordance with this section, no licensee may transport radioactive material or deliver radioactive material to a carrier for transport.

(d) Definitions. The following words and terms when used in this section shall have the following meaning, unless the context clearly indicates otherwise. To ensure compatibility with international trans-

portation standards, all limits in this section are given in terms of dual units: The International System of Units (SI) followed or preceded by United States (U.S.) standard or customary units. The U.S. customary units are not exact equivalents, but are rounded to a convenient value, providing a functionally equivalent unit. For the purpose of this section, SI units shall be used.

(1) A_1--The maximum activity of special form radioactive material permitted in a Type A package. This value is either listed in Table 257-3 of subsection (ee)(6) of this section, or may be derived in accordance with the procedure prescribed in subsection (ee) of this section.

(2) A_2--The maximum activity of radioactive material, other than special form, low specific activity (LSA) and surface contaminated object (SCO) material, permitted in a Type A package. This value is either listed in Table 257-3 of subsection (ee)(6) of this section, or may be derived in accordance with the procedure prescribed in subsection (ee) of this section.

(3) Carrier--A person engaged in the transportation of passengers or property by land or water as a common, contract, or private carrier, or by civil aircraft.

(4) Certificate holder--A person who has been issued a certificate of compliance or other package approval by the department.

(5) Certificate of compliance--The certificate issued by the NRC that approves the design of a package for the transportation of radioactive materials.

(6) Chelating agent--Amine polycarboxylic acids (e.g., EDTA, DTPA), hydroxy-carboxylic acids, and polycarboxylic acids (e.g., citric acid, carbolic acid, and glucinic acid).

(7) Chemical description--A description of the principal chemical characteristics of low-level radioactive waste (LLRW).

(8) Consignee--The designated receiver of the shipment of low-level radioactive waste.

(9) Consignment--Each shipment of a package or groups of packages or load of radioactive material offered by a shipper for transport.

(10) Containment system--The assembly of components of the packaging intended to retain the radioactive material during transport.

(11) Contamination--The presence of a radioactive substance on a surface in quantities in excess of 0.4 becquerel per square centimeter (Bq/cm^2) (10^{-5} microcurie per square centimeter ($\mu Ci/cm^2$)) for beta and gamma emitters and low toxicity alpha emitters, or 0.04 Bq/cm^2 (10^{-6} $\mu Ci/cm^2$) for all other alpha emitters.

(A) Fixed contamination means contamination that cannot be removed from a surface during normal conditions of transport.

(B) Non-fixed contamination means contamination that can be removed from a surface during normal conditions of transport.

(12) Conveyance--For transport on:

(A) public highway or rail by transport vehicle or large freight container;

(B) water by vessel, or any hold, compartment, or defined deck area of a vessel including any transport vehicle on board the vessel; and

(C) aircraft.

(13) Criticality Safety Index (CSI)--The dimensionless number (rounded up to the next tenth) assigned to and placed on the label of a fissile material package, to designate the degree of control of accumulation of packages, overpacks or freight containers containing fissile material during transportation. Determination of the criticality safety index is described in subsection (i) of this section and Title 10, Code of Federal Regulations (CFR), §71.22, §71.23, and §71.59. The criticality safety index for an overpack, freight container, consignment or conveyance containing fissile material packages is the arithmetic sum of the criticality safety indices of all the fissile material packages contained within the overpack, freight container, consignment or conveyance.

(14) Decontamination facility--A facility operating in accordance with an NRC, agreement state, or department license whose principal purpose is decontamination of equipment or materials to accomplish recycle, reuse, or other waste management objectives, and, for purposes of this section, is not considered to be a consignee for LLRW shipments.

(15) Deuterium--For the purposes of this section, this means deuterium and any deuterium compound, including heavy water, in which the ratio of deuterium atoms to hydrogen atoms exceeds 1:5000.

(16) Disposal container--A transport container principally used to confine LLRW during disposal operations at a land disposal facility (also see definition for high integrity container). Note that for some shipments, the disposal container may be the transport package.

(17) Environmental Protection Agency (EPA) identification number--The number received by a transporter following application to the administrator of EPA as required by Title 40, CFR, Part 263.

(18) Exclusive use--The sole use by a single consignor of a conveyance for which all initial, intermediate, and final loading and unloading are carried out in accordance with the direction of the consignor or consignee. The consignor and the carrier shall ensure that any loading or unloading is performed by personnel having radiological training and resources appropriate for safe handling of the consignment. The consignor shall issue specific instructions, in writing, for maintenance of exclusive use shipment controls, and include them with the shipping paper information provided to the carrier by the consignor.

(19) Fissile material--The radionuclides plutonium-239, plutonium-241, uranium-233, uranium-235, or any combination of these radionuclides. Fissile material means the fissile nuclides themselves, not material containing fissile nuclides. Unirradiated natural uranium and depleted uranium, and natural uranium or depleted uranium that has been irradiated in thermal reactors only are not included in this definition. Agency jurisdiction extends only to special nuclear material in quantities not sufficient to form a "critical mass" as defined in §289.201(b) of this title. Certain exclusions from fissile material controls are provided in subsection (h) of this section.

(20) Freight forwarder--A person or entity which holds itself out to the general public to provide transportation of property for compensation and in the ordinary course of its business:

(A) assembles and consolidates, or provides for assembling and consolidating, shipments and performs break-bulk and distribution operations of the shipments;

(B) assumes responsibility for the transportation from the place of receipt to the place of destination; and

(C) uses for any part of the transportation a rail, motor or water carrier subject to the jurisdiction of either the Federal Motor Carrier Safety Administration or the Surface Transportation Board.

(21) Generator--A licensee operating in accordance with an agency, NRC, or agreement state license who:

(A) is a waste generator as defined in this section; or

(B) is the licensee to whom waste can be attributed within the context of the Low-Level Radioactive Waste Policy Amendments Act of 1985 (e.g., waste generated as a result of decontamination or recycle activities).

(22) Graphite--For the purposes of this section, this means graphite with a boron equivalent content of less than 5 parts per million and density greater than 1.5 grams per cubic centimeter.

(23) High integrity container (HIC)--A container commonly designed to meet the structural stability requirements of Title 10, CFR, §61.56, and to meet DOT requirements for a Type A package.

(24) Indian Tribe --An Indian or Alaska Native Tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian Tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. §479a.

(25) Low-level radioactive waste (LLRW)--Radioactive material that meets the following criteria:

(A) LLRW is radioactive material that is:

(i) discarded or unwanted and is not exempt by rule adopted in accordance with the Texas Radiation Control Act (Act), Health and Safety Code, §401.106;

(ii) waste, as that term is defined in Title 10, CFR, §61.2; and

(iii) subject to:

(I) concentration limits established in Title 10, CFR, §61.55, or compatible rules adopted by the department or the Texas Commission on Environmental Quality (TCEQ), as applicable; and

(II) disposal criteria established in Title 10, CFR, or established by the department or TCEQ, as applicable.

(B) LLRW does not include:

(i) high-level radioactive waste as defined in Title 10, CFR, §60.2;

(ii) spent nuclear fuel as defined in Title 10, CFR, §72.3;

(iii) byproduct material defined in the Act, Health and Safety Code, §401.003(3)(B);

(iv) naturally occurring radioactive material (NORM) waste that is not oil and gas NORM waste;

(v) oil and gas NORM waste; or

(vi) transuranics greater than 100 nanocuries (3.7 kilobecquerels) per gram (g).

(26) Low specific activity (LSA) material--Radioactive material with limited specific activity which is nonfissile or is excepted in accordance with subsection (h) of this section, and which satisfies the following descriptions and limits set forth in this section. Shielding materials surrounding the LSA material may not be considered in determining the estimated average specific activity of the package contents. LSA material shall be in one of the following three groups:

(A) LSA-I.

(i) Uranium and thorium ores, concentrates of uranium and thorium ores, and other ores containing naturally occurring radionuclides that are intended to be processed for the use of these radionuclides; or

(ii) Natural uranium, depleted uranium, natural thorium or their compounds or mixtures, provided they are unirradiated and in solid or liquid form; or

(iii) Radioactive material other than fissile material for which the A_2 value is unlimited; or

(iv) Other radioactive material (e.g.: mill tailings, contaminated earth, concrete, rubble, other debris, and activated material) in which the radioactivity is distributed throughout, and the estimated average specific activity does not exceed 30 times the value for exempt material activity concentration determined in accordance with subsection (ee) of this section.

(B) LSA-II.

(i) Water with tritium concentration up to 0.8 terabecquerel per liter (TBq/l) (20.0 curies per liter (Ci/l)); or

(ii) Other material in which the radioactivity is distributed throughout, and the average specific activity does not exceed 10^{-4} A_2/g for solids and gases, and 10^{-5} A_2/g for liquids.

(C) LSA-III. Solids (e.g., consolidated wastes, activated materials), excluding powders, that satisfy the requirements of Title 10, CFR, §71.77 in which:

(i) the radioactive material is distributed throughout a solid or a collection of solid objects, or is essentially uniformly distributed in a solid compact binding agent (such as concrete, bitumen, ceramic, etc.); and

(ii) the radioactive material is relatively insoluble, or it is intrinsically contained in a relatively insoluble material, so that, even with a loss of packaging, the loss of radioactive material per package by leaching, when placed in water for 7 days, will not exceed 0.1 A_2; and

(iii) the estimated average specific activity of the solid, excluding any shielding material, does not exceed 2 x 10^{-3} A_2/g.

(27) Low toxicity alpha emitters--Natural uranium, depleted uranium, natural thorium; uranium-235, uranium-238, thorium-232, thorium-228 or thorium-230 when contained in ores or physical or chemical concentrates or tailings; or alpha emitters with a half-life of less than 10 days.

(28) Maximum normal operating pressure--The maximum gauge pressure that would develop in the containment system in a period of 1 year under the heat condition specified in Title 10, CFR, §71.71(c)(1), in the absence of venting, external cooling by an ancillary system, or operational controls during transport.

(29) Natural thorium--Thorium with the naturally occurring distribution of thorium isotopes (essentially 100 weight percent thorium-232).

(30) Normal form radioactive material--Radioactive material that has not been demonstrated to qualify as special form radioactive material.

(31) NRC Forms 540, 540A, 541, 541A, 542, and 542A--Official NRC forms referenced in subsection (ff) of this section which includes the information required by DOT in Title 49, CFR, Part 172. Licensees need not use originals of these forms as long as any substi-

tute forms contain the equivalent information. Licensees may include additional information deemed relevant to the licensee's shipment of low-level radioactive waste. Upon agreement between the shipper and consignee, NRC Forms 541 (and 541A) and NRC Forms 542 (and 542A) or equivalent documents may be completed, transmitted, and stored in electronic media. The electronic media shall have the capability for producing legible, accurate, and complete records in the format of the uniform manifest.

(32) Package--The packaging together with its radioactive contents as presented for transport.

(A) Fissile material package, Type AF package, Type BF package, Type B(U)F package, or Type B(M)F package--A fissile material packaging together with its fissile material contents.

(B) Type A package--A Type A packaging together with its radioactive contents. A Type A package is defined and shall comply with the DOT regulations in Title 49, CFR, Part 173.

(C) Type B package--A Type B packaging together with its radioactive contents. On approval by the NRC, a Type B package design is designated by NRC as B(U) unless the package has a maximum normal operating pressure of more than 700 kilopascals (kPa) (100 pounds per square inch (lb/ in^2)) gauge or a pressure relief device that would allow the release of radioactive material to the environment under the tests specified in Title 10, CFR, §71.73 (hypothetical accident conditions), in which case it will receive a designation B(M). B(U) refers to the need for unilateral approval of international shipments; B(M) refers to the need for multilateral approval of international shipments. There is no distinction made in how packages with these designations may be used in domestic transportation. To determine their distinction for international transportation, see DOT regulations in Title 49, CFR, Part 173. A Type B package approved before September 6, 1983, was designated only as Type B. Limitations on its use are specified in Title 10, CFR, §71.19.

(33) Packaging--The assembly of components necessary to ensure compliance with the packaging requirements of this section. It may consist of one or more receptacles, absorbent materials, spacing structures, thermal insulation, radiation shielding, and devices for cooling or absorbing mechanical shocks. The vehicle, tie-down system, and auxiliary equipment may be designated as part of the packaging.

(34) Physical description--The items called for on NRC Form 541 to describe a LLRW.

(35) Registered freight forwarder--A freight forwarder that has an emergency plan approved in accordance with subsection (r) of this section and has been issued a registration letter.

(36) Registered shipper--A shipper that has an emergency plan approved in accordance with subsection (r) of this section, and shipping containers approved in accordance with subsection(cc)(8) of this section and been issued a registration letter.

(37) Registered transporter--A transporter that has an emergency plan approved in accordance with subsection (r) of this section, and proof of financial responsibility submitted and approved in accordance with subsection(e)(4) of this section and has been issued a registration letter.

(38) Residual waste--LLRW resulting from processing or decontamination activities that cannot be easily separated into distinct batches attributable to specific waste generators. This waste is attributable to the processor or decontamination facility, as applicable.

(39) Shipper--The licensed entity (i.e., the waste generator, waste collector, or waste processor) who offers LLRW for transportation, typically consigning this type of waste to a licensed waste collector, waste processor, or land disposal facility operator. This definition applies only to shipments of LLRW shipped to a Texas LLRW disposal facility.

(40) Site of usage--The licensee's facility, including all buildings and structures between which radioactive material is transported and all roadways that are not within the public domain on which radioactive material can be transported.

(41) Special form radioactive material--Radioactive material that satisfies the following conditions:

(A) it is either a single solid piece or is contained in a sealed capsule that can be opened only by destroying the capsule;

(B) the piece or capsule has at least one dimension not less than five millimeters (0.2 in); and

(C) it satisfies the requirements of Title 10, CFR, §71.75. A special form encapsulation designed in accordance with the requirements of this subsection in effect on or after June 30, 1983 (see Title 10, CFR, Part 71, revised as of January 1, 1983), and constructed before July 1, 1985; a special form encapsulation designed in accordance with the requirements of this subsection in effect on or after March 31, 1996 (see Title 10, CFR, Part 71, revised as of January 1, 1996), and constructed before April 1, 1998; and

(D) special form material that was successfully tested before September 10, 2015, in accordance with the requirements of Title 10, CFR, §71.75(d) in effect before September 10, 2015 may continue to be used. Any other special form encapsulation must meet the specifications of this definition.

(42) Specific activity of a radionuclide--The radioactivity of the radionuclide per unit mass of that nuclide. The specific activity of a material in which the radionuclide is essentially uniformly distributed is the radioactivity per unit mass of the material.

(43) Spent nuclear fuel or spent fuel--Fuel that has been withdrawn from a nuclear reactor following irradiation, has undergone at least one year's decay since being used as a source of energy in a power reactor, and has not been chemically separated into its constituent elements by reprocessing. Spent fuel includes the special nuclear material, byproduct material, source material, and other radioactive materials associated with fuel assemblies.

(44) Surface contaminated object (SCO)--A solid object that is not itself classed as radioactive material, but which has radioactive material distributed on any of its surfaces. A SCO shall be in one of the following two groups with surface activity not exceeding the following limits:

(A) SCO-I--A solid object on which:

(i) the non-fixed contamination on the accessible surface averaged over 300 square centimeters (cm^2) (or the area of the surface if less than 300 cm^2) does not exceed 4 becquerels per square centimeter (Bq/cm^2) (10^{-4} microcurie per square centimeter ($\mu Ci/cm^2$)) for beta and gamma and low toxicity alpha emitters, or 4 x 10^{-1} Bq/cm2 (10^{-5} $\mu Ci/cm^2$) for all other alpha emitters;

(ii) the fixed contamination on the accessible surface averaged over 300 cm^2 (or the area of the surface if less than 300 cm^2) does not exceed 4 x 10^4 Bq/cm^2 (1 $\mu Ci/cm^2$) for beta and gamma and low toxicity alpha emitters, or 4 x 10^3 Bq/cm^2 (10^{-1} $\mu Ci/cm^2$) for all other alpha emitters; and

(iii) the non-fixed contamination plus the fixed contamination on the inaccessible surface averaged over 300 cm^2 (or the area of the surface if less than 300 cm^2) does not exceed 4 x 10^4 Bq/cm^2

(1 μCi/cm^2) for beta and gamma and low toxicity alpha emitters, or 4 x 10^3 Bq/cm^2 (10^{-1} μCi/cm^2) for all other alpha emitters.

(B) SCO-II--A solid object on which the limits for SCO-I are exceeded and on which the following limits are not exceeded:

(i) the non-fixed contamination on the accessible surface averaged over 300 cm^2 (or the area of the surface if less than 300 cm^2) does not exceed 400 Bq/cm^2 (10^{-2} μCi/cm^2) for beta and gamma and low toxicity alpha emitters or 40 Bq/cm^2 (10^{-3} μCi/cm^2) for all other alpha emitters;

(ii) the fixed contamination on the accessible surface averaged over 300 cm^2 (or the area of the surface if less than 300 cm^2) does not exceed 8 x 10^5 Bq/cm^2 (20 μCi/cm^2) for beta and gamma and low toxicity alpha emitters, or 8 x 10^4 Bq/cm^2 (2 μCi/cm^2) for all other alpha emitters; and

(iii) the non-fixed contamination plus the fixed contamination on the inaccessible surface averaged over 300 cm^2 (or the area of the surface if less than 300 cm^2) does not exceed 8 x 10^5 Bq/cm^2 (20 μCi/cm^2) for beta and gamma and low toxicity alpha emitters, or 8 x 10^4 Bq/cm^2 (2 μCi/cm^2) for all other alpha emitters.

(45) Transporter--A carrier who transports radioactive material.

(46) Tribal official--The highest ranking individual that represents Tribal leadership, such as the Chief, President, or Tribal Council leadership.

(47) Uniform Low-Level Radioactive Waste Manifest or uniform manifest--The combination of NRC Forms 540, 541, and, if necessary, 542, and their respective continuation sheets as needed, or equivalent.

(48) Unirradiated uranium--Uranium containing not more than 2 x 10^3 Bq (0.054 μCi) of plutonium per gram of uranium-235, not more than 9 x 10^6 Bq (243 μCi) of fission products per gram of uranium-235, and not more than 5 x 10^{-3} g of uranium-236 per gram of uranium-235.

(49) Uranium--Natural, depleted, enriched:

(A) Natural uranium--Uranium (which may be chemically separated) with the naturally occurring distribution of uranium isotopes (approximately 0.711 weight percent uranium-235, and the remainder by weight essentially uranium-238).

(B) Depleted uranium--Uranium containing less uranium-235 than the naturally occurring distribution of uranium isotopes.

(C) Enriched uranium--Uranium containing more uranium-235 than the naturally occurring distribution of uranium isotopes.

(50) Waste collector--An entity, operating in accordance with an agency, NRC, or agreement state license, whose principal purpose is to collect and consolidate waste generated by others, and to transfer this waste, without processing or repackaging the collected waste, to another licensed waste collector, licensed waste processor, or licensed land disposal facility.

(51) Waste description--The physical, chemical and radiological description of a LLRW as called for on NRC Form 541.

(52) Waste generator--An entity, operating in accordance with an agency, NRC, or agreement state license, who:

(A) possesses any material or component that contains radioactivity or is radioactively contaminated for which the licensee foresees no further use; and

(B) transfers this material or component to a licensed land disposal facility or to a licensed waste collector or processor for handling or treatment before disposal. A licensee performing processing or decontamination services may be a waste generator if the transfer of LLRW from its facility is defined as residual waste.

(53) Waste processor--An entity, operating in accordance with an NRC or agreement state license, whose principal purpose is to process, repackage, or otherwise treat LLRW or waste generated by others before eventual transfer of waste to a licensed LLRW land disposal facility.

(54) Waste type--A waste within a disposal container having a unique physical description (i.e., a specific waste descriptor code or description; or a waste sorbed on or solidified in a specifically-defined media).

(e) Transportation of radioactive material.

(1) Each licensee who transports radioactive material outside the site of usage as specified in the department license, transports on public highways, or delivers radioactive material to a carrier for transport, shall comply with the applicable requirements of the DOT regulations in Title 49, CFR, Part 107, Parts 171 - 180 and 390 - 397 appropriate to the mode of transport. The licensee shall particularly note DOT regulations in the following areas:

(A) Packaging - Title 49, CFR, Part 173: Subparts A, B, and I.

(B) Marking and labeling - Title 49, CFR, Part 172: Subpart D, and §§172.400 - 172.407 and §§172.436 - 172.441 of Subpart E.

(C) Placarding - Title 49, CFR, Part 172: Subpart F, especially §§172.500 - 172.519 and §172.556, and Appendices B and C.

(D) Accident reporting - Title 49, CFR, Part 171: §171.15 and §171.16.

(E) Shipping papers and emergency information - Title 49, CFR, Part 172: Subparts C and G.

(F) Hazardous material employee training - Title 49, CFR, Part 172: Subpart H.

(G) Hazardous material shipper/carrier registration - Title 49, CFR, Part 107: Subpart G.

(H) Security Plans - Title 49, CFR, Part 172: Subpart I.

(2) The licensee shall also note DOT regulations pertaining to the following modes of transportation:

(A) Rail: Title 49, CFR Part 174: Subparts A through D and K.

(B) Air: Title 49, CFR Part 175.

(C) Vessel: Title 49, CFR Part 176: Subparts A through F and M.

(D) Public Highway: Title 49, CFR Part 177 and Parts 390 through 397.

(3) If DOT regulations are not applicable to a shipment of radioactive material (i.e. DOT does not have jurisdiction), the licensee shall conform to DOT standards and requirements specified in paragraph (1) of this subsection to the same extent as if the shipment or transportation were subject to DOT regulations. A request for modification, waiver, or exemption from those requirements shall be filed

and approved by the department. Any notification referred to in those requirements, shall be submitted to the department.

(4) Transporter proof of financial responsibility.

(A) Transporters of low-level radioactive waste to a Texas low-level radioactive waste disposal site shall submit proof of financial responsibility required by Title 49, CFR, §387.7 and §387.9, to the department and receive a registration letter from the department before initial shipment.

(B) The transporter registration expires on the expiration date of the proof of financial responsibility or in 10 years, if the proof of financial responsibility does not have an expiration date.

(C) To renew a transporter's registration, the transporter shall submit to the department new proof of financial responsibility.

(D) The transporter shall submit to the department new proof of financial responsibility any time the amount of liability coverage is reduced or a new policy is purchased.

(5) The department shall review and determine alternate routes for the transportation and routing of radioactive material in accordance with 49 CFR, §397.103.

(f) Exemption for low-level radioactive materials.

(1) A licensee is exempt from all requirements of this section with respect to shipment or carriage of the following low-level materials:

(A) Natural material and ores containing naturally occurring radionuclides that are either in their natural state, or have only been processed for purposes other than for the extraction of the radionuclides, and which are not intended to be processed for use of these radionuclides, provided the activity concentration of the material does not exceed 10 times the applicable radionuclide activity concentration values specified in subsection (ee), (ee)(7), and (ee)(8) of this section.

(B) Materials for which the activity concentration is not greater than the activity concentration values specified in subsection (ee), (ee)(7), and (ee)(8) of this section, or for which the consignment activity is not greater than the limit for an exempt consignment found in subsection (ee), (ee)(7), and (ee)(8) of this section.

(C) Non-radioactive solid objects with radioactive substances present on any surfaces in quantities not in excess of the levels cited in the definition of contamination in subsection (d) of this section.

(2) Common and contract carriers, freight forwarders, warehousemen, and the United States Postal Service are exempt from the regulations in this subchapter to the extent that they transport or store radioactive material in the regular course of their carriage for another or storage incident thereto.

(3) Persons who discard licensed material in accordance with §289.202(fff) of this title are exempt from all requirements of this section.

(g) Exemption of physicians. Any physician licensed by a State to dispense drugs in the practice of medicine is exempt from subsection (e) of this section with respect to transport by the physician of licensed material for use in the practice of medicine. However, any physician operating under this exemption shall be licensed in accordance with §289.256 of this title or the equivalent NRC or agreement state regulations.

(h) Exemption from classification as fissile material. Fissile materials meeting the requirements of at least one of the paragraphs (1) through (6) of this subsection are exempt from classification as fissile material and from the fissile material package standards of Title 10, CFR §71.55 and §71.59, but are subject to all other requirements of this section, except as noted.

(1) An individual package containing 2 grams or less fissile material.

(2) Individual or bulk packaging containing 15 grams or less of fissile material provided the package has at least 200 grams of solid nonfissile material for every gram of fissile material. Lead, beryllium, graphite, and hydrogenous material enriched in deuterium may be present in the package but shall not be included in determining the required mass for solid nonfissile material.

(3) Solid fissile material commingled with solid non-fissile material.

(A) Low concentrations of solid fissile material commingled with solid nonfissile material provided:

(i) that there is at least 2000 grams of solid nonfissile material for every gram of fissile material; and

(ii) there is no more than 180 grams of fissile material distributed within 360 kg of contiguous non-fissile material.

(B) Lead, beryllium, graphite, and hydrogenous material enriched in deuterium may be present in the package but shall not be included in determining the required mass of solid nonfissile material.

(4) Uranium enriched in uranium-235 to a maximum of one percent by weight, and with total plutonium and uranium-233 content of up to one percent of the mass of uranium-235, provided that the mass of any beryllium, graphite, and hydrogenous material enriched in deuterium constitutes less than five percent of the uranium mass, and that the fissile material is distributed homogeneously and does not form a lattice arrangement within the package.

(5) Liquid solutions of uranyl nitrate enriched in uranium-235 to a maximum of two percent by mass, with a total plutonium and uranium-233 content not exceeding 0.002 percent of the mass of uranium, and with a minimum nitrogen to uranium atomic ratio (N/U) of 2. The material shall be contained in at least a DOT Type A package.

(6) Packages containing, individually, a total plutonium mass of not more than 1000 grams, of which not more than 20 percent by mass may consist of plutonium-239, plutonium-241, or any combination of these radionuclides.

(i) General license.

(1) NRC-approved package.

(A) A general license is issued to any licensee of the department to transport, or to deliver to a carrier for transport, radioactive material in a package for which a license, certificate of compliance (CoC), or other approval has been issued by the NRC.

(B) This general license applies only to a licensee who has a quality assurance program approved by the NRC as satisfying the provisions of Title 10, CFR, Part 71, Subpart H.

(C) This general license applies only to a licensee who meets the following requirements:

(i) has a copy of the CoC or other approval by the NRC of the package, and has the drawings and other documents referenced in the approval relating to the use and maintenance of the packaging and to the actions to be taken before shipment; and

(ii) complies with the terms and conditions of the specific license, certificate, or other approval by the NRC, as applica-

ble, and the applicable requirements of Title 10, CFR, Part 71, Subparts A, G, and H; and

(iii) before the licensee's first use of the package, submits in writing to: ATTN: Document Control Desk, Director, Division of Fuel Management, Office of Nuclear Material Safety and Safeguards, using an appropriate method listed in Title 10, CFR, Part 71, the licensee's name and license number and the package identification number specified in the package approval.

(D) This general license applies only when the package approval authorizes use of the package in accordance with this general license.

(E) For a Type B or fissile material package, the design of which was approved by NRC before April 1, 1996, the general license is subject to the additional restrictions of paragraph (2) of this subsection.

(F) For radiography containers, a program for transport container inspection and maintenance limited to radiographic exposure devices, source changers, or packages transporting these devices and meeting the requirements of §289.255(m)(2)(B) of this title (relating to Radiation Safety Requirements and Licensing and Registration Procedures for Industrial Radiography), is deemed to satisfy the requirements of subparagraph (B) of this paragraph.

(2) Use of foreign approved package.

(A) A general license is issued to any licensee to transport, or to deliver to a carrier for transport, licensed material in a package the design of which has been approved in a foreign national competent authority certificate that has been revalidated by the DOT as meeting the applicable requirements of Title 49, CFR, §171.23.

(B) Except as otherwise provided by this section, the general license applies only to a licensee who has a quality assurance program approved by the department as satisfying the applicable provisions of subsection (s) - (u) and (w) - (bb) of this section.

(C) This general license applies only to shipments made to or from locations outside the United States.

(D) Each licensee issued a general license under subparagraph (A) of this paragraph shall:

(i) maintain a copy of the applicable certificate, the revalidation, and the drawings and other documents referenced in the certificate relating to the use and maintenance of the packaging and to the actions to be taken before shipment; and

(ii) comply with the terms and conditions of the certificate and revalidation, and with the applicable requirements of §289.205(j) and (k) of this title and subsections (a) - (e), (j) - (q), (s) - (u) and (w) - (bb) of this section.

(3) Fissile material.

(A) A general license is issued to any licensee to transport fissile material, or to deliver fissile material to a carrier for transport, if the material is shipped in accordance with this section. The fissile material need not be contained in a package that meets the standards of this section; however, the material shall be contained in a Type A package. The Type A package shall also meet the DOT requirements of Title 49, CFR, §173.417(a).

(B) The general license applies only to a licensee who has a quality assurance program approved by the NRC as satisfying the provisions of Title 10, CFR, Part 71.

(C) The general license applies only when a package's contents:

(i) contain no more than a Type A quantity of radioactive material; and

(ii) contain less than 500 total grams of beryllium, graphite, or hydrogenous material enriched in deuterium.

(D) The general license applies only to packages containing fissile material that are labeled with a CSI that:

(i) has been determined in accordance with paragraph (E) of this subsection;

(ii) has a value less than or equal to 10.0; and

(iii) for a shipment of multiple packages containing fissile material, the sum of the CSIs shall be less than or equal to 50.0 (for shipment on a nonexclusive use conveyance) and less than or equal to 100.0 (for shipment on an exclusive use conveyance).

(E) The CSI shall be as follows:

(i) the value for the CSI shall be greater than or equal to the number calculated by the following equation:
Figure: 25 TAC §289.257(i)(3)(E)(i)

(ii) the calculated CSI shall be rounded up to the first decimal place;

(iii) the values of X, Y, and Z used in the CSI equation shall be taken from Tables 257-1 or 257-2 of this clause, as appropriate;
Figure: 25 TAC §289.257(i)(3)(E)(iii)

(iv) if Table 257-2 of clause (iii) of this subparagraph is used to obtain the value of X, then the values for the terms in the equation for uranium-233 and plutonium shall be assumed to be zero; and

(v) Table 257-1 values of clause (iii) of this subparagraph for X, Y, and Z shall be used to determine the CSI if:

(I) uranium-233 is present in the package;

(II) the mass of plutonium exceeds one percent of the mass of uranium-235;

(III) the uranium is of unknown uranium-235 enrichment, or greater than 24 weight percent enrichment; or

(IV) substances having a moderating effectiveness (i.e. an average hydrogen density greater than H_2O) (e.g. certain hydrocarbon oils or plastics) are present in any form, except as polyethylene used for packing or wrapping.

(4) Plutonium-beryllium special form material.

(A) A general license is issued to any licensee to transport fissile material in the form of plutonium-beryllium (Pu-Be) special form sealed sources, or to deliver Pu-Be sealed sources to a carrier for transport, if the material is shipped in accordance with this section. This material need not be contained in a package that meets the standards of Title 10, CFR, Part 71, however, the material shall be contained in a Type A package. The Type A package shall also meet the DOT requirements of Title 49, CFR, §173.417(a).

(B) The general license applies only to a licensee who has a quality assurance program approved by the NRC as satisfying the provisions of Title 10, CFR, Part 71.

(C) The general license applies only when a package's contents:

(i) contain no more than a Type A quantity of material; and

(ii) contain less than 1000g of plutonium, provided that plutonium-239, plutonium-241, or any combination of these radionuclides, constitutes less than 240 g of the total quantity of plutonium in the package.

(D) The general license applies only to packages labeled with a CSI that:

(i) has been determined in accordance with subparagraph (E) of this paragraph;

(ii) has a value less than or equal to 100.0; and

(iii) for a shipment of multiple packages containing Pu-Be sealed sources, the sum of the CSIs shall be less than or equal to 50.0 (for shipment on a nonexclusive use conveyance) and less than or equal to 100.0 (for shipment on or exclusive use conveyance).

(E) The value for the CSI shall be as follows:

(i) the CSI shall be greater than or equal to the number calculated by the following equation:
Figure: 25 TAC §289.257(i)(4)(E)(i)

(ii) the calculated CSI shall be rounded up to the first decimal place.

(j) Assumptions as to unknown properties. When the isotopic abundance, mass, concentration, degree of irradiation, degree of moderation, or other pertinent property of fissile material in any package is not known, the licensee shall package the fissile material as if the unknown properties have credible values that will cause the maximum neutron multiplication.

(k) Preliminary determinations. Before the first use of any packaging for the shipment of licensed material the licensee shall ascertain that the determinations have been made in accordance with Title 10, CFR, §71.85.

(l) Routine determinations. Before each shipment of radioactive material, the licensee shall ensure that the package with its contents satisfies the applicable requirements of this section and of the license. The licensee shall determine that:

(1) the package is proper for the contents to be shipped;

(2) the package is in unimpaired physical condition except for superficial defects such as marks or dents;

(3) each closure device of the packaging, including any required gasket, is properly installed, secured, and free of defects;

(4) any system for containing liquid is adequately sealed and has adequate space or other specified provision for expansion of the liquid;

(5) any pressure relief device is operable and set in accordance with written procedures;

(6) the package has been loaded and closed in accordance with written procedures;

(7) for fissile material, any moderator or neutron absorber, if required, is present and in proper condition;

(8) any structural part of the package that could be used to lift or tie down the package during transport is rendered inoperable for that purpose, unless it satisfies the design requirements of Title 10, CFR, §71.45;

(9) the level of non-fixed (removable) radioactive contamination on the external surfaces of each package offered for shipment is as low as reasonably achievable (ALARA), and within the limits specified in DOT regulations in Title 49, CFR, §173.443;

(10) external radiation levels around the package and around the vehicle, if applicable, will not exceed the following limits at any time during transportation:

(A) Except as provided in subparagraph (B) of this paragraph, each package of radioactive materials offered for transportation shall be designed and prepared for shipment so that under conditions normally incident to transportation the radiation level does not exceed 2 mSv/hr (200 mrem/hr) at any point on the external surface of the package, and the transport index does not exceed 10.

(B) A package that exceeds the radiation level limits specified in subparagraph (A) of this paragraph shall be transported by exclusive use shipment only, and the radiation levels for such shipment shall not exceed the following during transportation:

(i) 2 mSv/hr (200 mrem/hr) on the external surface of the package, unless the following conditions are met, in which case the limit is 10 mSv/hr (1,000 mrem/hr):

(I) the shipment is made in a closed transport vehicle;

(II) the package is secured within the vehicle so that its position remains fixed during transportation; and

(III) there are no loading or unloading operations between the beginning and end of the transportation;

(ii) 2 mSv/hr (200 mrem/hr) at any point on the outer surface of the vehicle, including the top and underside of the vehicle; or in the case of a flat-bed style vehicle, at any point on the vertical planes projected from the outer edges of the vehicle, on the upper surface of the load or enclosure, if used, and on the lower external surface of the vehicle; and

(iii) 0.1 mSv/hr (10 mrem/hr) at any point 2 meters (m) (6.6 feet (ft)) from the outer lateral surfaces of the vehicle (excluding the top and underside of the vehicle); or in the case of a flat-bed style vehicle, at any point 2 m (6.6 ft) from the vertical planes projected by the outer edges of the vehicle (excluding the top and underside of the vehicle); and

(iv) 0.02 mSv/hr (2 mrem/hr) in any normally occupied space, except that this provision does not apply to private carriers, if exposed personnel under their control wear radiation dosimetry devices in conformance with §289.202(q) of this title.

(C) For shipments made in accordance with the provisions of subparagraph (B) of this paragraph, the shipper shall provide specific written instructions to the carrier for maintenance of the exclusive use shipment controls. The instructions shall be included with the shipping paper information.

(D) The written instructions required for exclusive use shipments shall be sufficient so that, when followed, they will cause the carrier to avoid actions that will unnecessarily delay delivery or unnecessarily result in increased radiation levels or radiation exposures to transport workers or members of the general public.

(m) Air transport of plutonium.

(1) Notwithstanding the provisions of any general licenses and notwithstanding any exemptions stated directly in this section or included indirectly by citation of Title 49, CFR, Chapter I, as may be applicable, the licensee shall assure that plutonium in any form, whether for import, export, or domestic shipment, is not transported by air or delivered to a carrier for air transport unless:

(A) the plutonium is contained in a medical device designed for individual human application; or

(B) the plutonium is contained in a material in which the specific activity is less than or equal to the activity concentration values for plutonium specified in Table 257-4 of subsection (ee)(7) of this section, and in which the radioactivity is essentially uniformly distributed; or

(C) the plutonium is shipped in a single package containing no more than an A_2 quantity of plutonium in any isotope or form, and is shipped in accordance with subsection (e) of this section; or

(D) the plutonium is shipped in a package specifically authorized for the shipment of plutonium by air in the Certificate of Compliance for that package issued by the NRC.

(2) Nothing in paragraph (1) of this subsection is to be interpreted as removing or diminishing the requirements of Title 10, CFR, §73.24.

(3) For a shipment of plutonium by air which is subject to paragraph (1) of this subsection, the licensee shall, through special arrangement with the carrier, require compliance with Title 49, CFR, §175.704, DOT regulations applicable to the air transport of plutonium.

(n) Opening instructions. Before delivery of a package to a carrier for transport, the licensee shall ensure that any special instructions needed to safely open the package have been sent to, or otherwise made available to, the consignee for the consignee's use in accordance with §289.202(ee)(5) of this title.

(o) Records.

(1) For a period of three years after shipment, each licensee shall maintain, for inspection by the department, a record of each shipment of radioactive material not exempt under subsection (f) of this section, including the following where applicable:

(A) identification of the packaging by model number and serial number;

(B) verification that there are no significant defects in the packaging, as shipped;

(C) volume and identification of coolant;

(D) type and quantity of radioactive material in each package, and the total quantity of each shipment;

(E) for each item of irradiated fissile material:

(i) identification by model number and serial number;

(ii) irradiation and decay history to the extent appropriate to demonstrate that its nuclear and thermal characteristics comply with license conditions; and

(iii) any abnormal or unusual condition relevant to radiation safety;

(F) date of the shipment;

(G) for fissile packages and for Type B packages, any special controls exercised;

(H) name and address of the transferee;

(I) address to which the shipment was made; and

(J) results of the determinations required by subsection (l) of this section and by the conditions of the package approval.

(2) The licensee, certificate holder, and an applicant for a CoC, shall make available to the department for inspection, upon reasonable notice, all records required by this section. Records are only valid if stamped, initialed, or signed and dated by authorized personnel, or otherwise authenticated.

(3) The licensee, certificate holder, and an applicant for a CoC shall maintain sufficient written records to furnish evidence of the quality of packaging.

(A) The records to be maintained include:

(i) results of the determinations required by subsection (k) of this section;

(ii) design, fabrication, and assembly records;

(iii) results of reviews, inspections, tests, and audits;

(iv) results of monitoring work performance and materials analyses; and

(v) results of maintenance, modification, and repair activities.

(B) Inspection, test, and audit records must identify the:

(i) inspector or data recorder;

(ii) type of observation;

(iii) results;

(iv) acceptability; and

(v) action taken in connection with any deficiencies noted.

(C) These records must be retained for three years after the life of the packaging to which they apply.

(p) Reports. The transporter and shipper shall immediately report by telephone all radioactive waste transportation accidents to the department, at (512) 458-7460, and the local emergency management officials in the county where the radioactive waste accident occurs. All other accidents involving radioactive material shall be reported in accordance with §289.202(xx) and (yy) of this title.

(q) Advance notification of transport of irradiated reactor fuel and certain radioactive waste.

(1) As specified in paragraphs (3) - (5) of this subsection, each licensee shall provide advance notification to the governor of a state, or the governor's designee, of the shipment of radioactive waste, within or across the boundary of the state, before the transport, or delivery to a carrier, for transport, of radioactive waste outside the confines of the licensee's facility or other place of use or storage.

(2) As specified in paragraphs (3) - (5) of this subsection, after June 11, 2013, each licensee shall provide advance notification to the Tribal official of participating Tribes referenced in paragraph (4)(C)(iii) of this subsection, or the official's designee, of the shipment of radioactive waste, within or across the boundary of the Tribe's reservation, before the transport, or delivery to a carrier, for transport, of radioactive waste outside the confines of the licensee's facility or other place of use or storage.

(3) Advanced notification is also required under this subsection for the shipment of licensed radioactive material, other than irradiated fuel, meeting the following three conditions:

(A) the radioactive waste is required by this section to be in Type B packaging for transportation;

(B) the radioactive waste is being transported to or across a state boundary en route to a disposal facility or to a collection point for transport to a disposal facility; and

(C) the quantity of radioactive waste in a single package exceeds the least of the following:

(i) 3,000 times the A_1 value of the radionuclides as specified in subsection (ee) of this section for special form radioactive material;

(ii) 3,000 times the A_2 value of the radionuclides as specified in subsection (ee) of this section for normal form radioactive material; or

(iii) 1,000 terabecquerels (TBq) (27,000 curies (Ci)).

(4) The following are procedures for submitting advance notification:

(A) The notification shall be made in writing to:

(i) the office of each appropriate governor or governor's designee and to the department;

(ii) the office of each appropriate Tribal official or Tribal official's designee; and

(iii) the Director, Office of Nuclear Security and Incident Response.

(B) A notification delivered by mail shall be postmarked at least seven days before the beginning of the seven-day period during which departure of the shipment is estimated to occur.

(C) A notification delivered by any other means than mail shall reach the office of the governor or of the governor's designee or the Tribal official or Tribal official's designee at least four days before the beginning of the seven-day period during which departure of the shipment is estimated to occur.

(i) A list of the names and mailing addresses of the governors' designees receiving advance notification of transportation of radioactive waste was published in the Federal Register on June 30, 1995 (60 FR 34306).

(ii) Contact information for each state, including telephone and mailing addresses of governors and governors' designees, and participating Tribes, including telephone and mailing addresses of Tribal officials and Tribal official's designees, is available on the NRC website at: https://scp.nrc.gov/special/designee.pdf.

(iii) A list of the names and mailing addresses of the governors' designees and Tribal officials' designees of participating Tribes is available on request from the Director, Division of Materials Safety, Security, State, and Tribal Programs, Office of Nuclear Material Safety and Safeguards, United States Nuclear Regulatory Commission, Washington, DC 20555-0001.

(D) The licensee shall retain a copy of the notification for inspection by the department as a record for three years.

(5) Each advance notification of shipment of irradiated reactor fuel or radioactive waste shall contain the following information:

(A) the name, address, and telephone number of the shipper, carrier, and receiver of the irradiated reactor fuel or radioactive waste shipment;

(B) a description of the irradiated reactor fuel or radioactive waste contained in the shipment, as specified in the regulations of DOT in Title 49, CFR, §172.202 and §172.203(d);

(C) the point of origin of the shipment and the seven-day period during which departure of the shipment is estimated to occur;

(D) the seven-day period during which arrival of the shipment at state boundaries or Tribal reservation is estimated to occur;

(E) the destination of the shipment, and the seven-day period during which arrival of the shipment is estimated to occur; and

(F) a point of contact, with a telephone number, for current shipment information.

(6) A licensee who finds that schedule information previously furnished to a governor or governor's designee or a Tribal official or Tribal official's designee, in accordance with this section, will not be met, shall telephone a responsible individual in the office of the governor of the state or of the governor's designee or the Tribal official or the Tribal official's designee and inform that individual of the extent of the delay beyond the schedule originally reported. The licensee shall maintain a record of the name of the individual contacted for three years.

(7) The following are procedures for a cancellation notice.

(A) Each licensee who cancels an irradiated reactor fuel or radioactive waste shipment for which advance notification has been sent shall send a cancellation notice to the governor of each state or to the governor's designee previously notified, each Tribal official or to the Tribal official's designee previously notified, and to the Director, Office of Nuclear Security and Incident Response, and to the department.

(B) The licensee shall state in the notice that it is a cancellation and identify the advance notification that is being canceled. The licensee shall retain a copy of the notice as a record for three years.

(r) Emergency plan registration requirements.

(1) Each shipper and transporter of radioactive waste shall submit an emergency plan to the department and receive a registration letter from the department before initial shipment.

(2) A freight forwarder must submit an emergency plan in order to become a registered freight forwarder.

(3) Each shipper, transporter or freight forwarder applying for registration shall submit a Business Information Form (RC 252-1).

(4) Shipper and freight forwarder registrations expire 10 years from the date of issuance. New documentation to renew the registration must be submitted at least 30 days before the expiration date.

(s) Quality assurance requirements.

(1) Purpose. This subsection describes quality assurance requirements applying to design, purchase, fabrication, handling, shipping, storing, cleaning, assembly, inspection, testing, operation, maintenance, repair, and modification of components of packaging that are important to safety.

(A) Quality Assurance comprises all those planned and systematic actions necessary to provide adequate confidence that a system or component will perform satisfactorily in service.

(B) Quality assurance includes quality control, which comprises those quality assurance actions related to control of the physical characteristics and quality of the material or component to predetermined requirements.

(C) The licensee, certificate holder, and applicant for a CoC are responsible for the following:

(i) the quality assurance requirements as they apply to design, fabrication, testing, and modification of packaging; and

(*ii*) the quality assurance provision applicable to its use of a packaging for the shipment of licensed material under subsections (s) - (bb) and (ee) of this section.

(2) Establishment of program. Each licensee, certificate holder, and applicant for a CoC shall:

(A) Establish, maintain, and execute a quality assurance program satisfying each of the applicable criteria of this subsection, subsections (s) and (t) of this section and Title 10, CFR, §§71.101 through 71.137 and satisfying any specific provisions that are applicable to the licensee's activities including procurement of packaging; and

(B) Execute the applicable criteria in a graded approach to an extent that is commensurate with the quality assurance requirement's importance to safety.

(3) Approval of program. Before the use of any package for the shipment of licensed material subject to this subsection, each licensee shall:

(A) obtain department approval of its quality assurance program; and

(B) file a description of its quality assurance program, including a discussion of which requirements of this subsection and subsections (t) and (u) are applicable and how they will be satisfied.

(4) Radiography containers. A program for transport container inspection and maintenance limited to radiographic exposure devices, source changers, or packages transporting these devices and meeting the requirements of §289.255(m) of this title, is deemed to satisfy the requirements of subsection (i)(1)(B) of this section and paragraph (2) of this subsection.

(t) Quality assurance organization. The licensee, certificate holder, and applicant for a CoC shall (while the term "licensee" is used in these criteria, the requirements are applicable to whatever design, fabricating, assembly, and testing of the package is accomplished with respect to a package before the time a package approval is issued):

(1) be responsible for the establishment and execution of the quality assurance program. The licensee, certificate holder, and applicant for a CoC may delegate to others, such as contractors, agents, or consultants, the work of establishing and executing the quality assurance program, or any part of the quality assurance program, but shall retain responsibility for the program; and

(2) clearly establish and delineate, in writing, the authority and duties of persons and organizations performing activities affecting the functions of structures, systems, and components that are important to safety. These activities include performing the functions associated with attaining quality objectives and the quality assurance functions.

(3) establish quality assurance functions as follows:

(A) assuring that an appropriate quality assurance program is established and effectively executed; and

(B) verifying, by procedures such as checking, auditing, and inspection, that activities affecting the functions that are important to safety have been correctly performed.

(4) assure that persons and organizations performing quality assurance functions have sufficient authority and organizational freedom to:

(A) identify quality problems;

(B) initiate, recommend, or provide solutions; and

(C) verify implementation of solutions.

(u) Quality assurance program. A quality assurance program shall be maintained as follows:

(1) The licensee, certificate holder, and applicant for a CoC shall:

(A) establish, at the earliest practicable time consistent with the schedule for accomplishing the activities, a quality assurance program that complies with the requirements of this section and Title 10, CFR, §§71.101 through 71.137;

(B) document the quality assurance program by written procedures or instructions and shall carry out the program in accordance with those procedures throughout the period during which the packaging is used; and

(C) identify the material and components to be covered by the quality assurance program, the major organizations participating in the program, and the designated functions of these organizations.

(2) The licensee, certificate holder, and applicant for a CoC, through its quality assurance program, shall:

(A) provide control over activities affecting the quality of the identified materials and components to an extent consistent with their importance to safety, and as necessary to assure conformance to the approved design of each individual package used for the shipment of radioactive material;

(B) assure that activities affecting quality are accomplished under suitable controlled conditions which include:

(*i*) the use of appropriate equipment;

(*ii*) suitable environmental conditions for accomplishing the activity, such as adequate cleanliness; and

(*iii*) all prerequisites for the given activity have been satisfied; and

(C) take into account the need for special controls, processes, test equipment, tools, and skills to attain the required quality, and the need for verification of quality by inspection and test.

(3) The licensee, certificate holder, and applicant for a CoC shall base the requirements and procedures of its quality assurance program on the following considerations concerning the complexity and proposed use of the package and its components.

(A) The impact of malfunction or failure of the item to safety;

(B) The design and fabrication complexity or uniqueness of the item;

(C) The need for special controls and surveillance over processes and equipment;

(D) The degree to which functional compliance can be demonstrated by inspection or test; and

(E) The quality history and degree of standardization of the item.

(4) The licensee, certificate holder, and applicant for a CoC shall provide for indoctrination and training of personnel performing activities affecting quality, as necessary to assure that suitable proficiency is achieved and maintained.

(5) The licensee, certificate holder, and applicant for a CoC shall review the status and adequacy of the quality assurance program at established intervals. Management of other organizations participating in the quality assurance program shall review regularly the status

and adequacy of that part of the quality assurance program they are executing.

(6) Changes to quality assurance program.

(A) Each quality assurance program approval holder shall submit, in accordance with §289.201(k) of this title, a description of a proposed change to its agency-approved quality assurance program that will reduce commitments in the program description as approved by the department. The quality assurance program approval holder shall not implement the change before receiving agency approval. The description of a proposed change to the agency-approved quality assurance program must identify the change, the reason for the change, and the basis for concluding that the revised program incorporating the change continues to satisfy the applicable requirements of subsections (s) - (bb) of this section.

(B) Each quality assurance program approval holder may change a previously approved quality assurance program without prior agency approval, if the change does not reduce the commitments in the quality assurance program previously approved by the department. Changes to the quality assurance program that do not reduce the commitments shall be submitted to the department every 24 months in accordance with §289.201(k) of this title. In addition to quality assurance program changes involving administrative improvements and clarifications, spelling corrections, and non-substantive changes to punctuation or editorial items, the following changes are not considered reductions in commitment:

(i) the use of a quality assurance standard approved by the department that is more recent than the quality assurance standard in the certificate holder's or applicant's current quality assurance program at the time of the change;

(ii) the use of generic organizational position titles that clearly denote the position function, supplemented as necessary by descriptive text, rather than specific titles, provided that there is no substantive change to either the functions of the position or reporting responsibilities;

(iii) the use of generic organizational charts to indicate functional relationships, authorities, and responsibilities, or alternatively, the use of descriptive text, provided that there is no substantive change to the functional relationships, authorities, or responsibilities;

(iv) the elimination of quality assurance program information that duplicates language in quality assurance regulatory guides and quality assurance standards to which the quality assurance program approval holder has committed to on record; and

(v) organizational revisions that ensure that persons and organizations performing quality assurance functions continue to have the requisite authority and organizational freedom, including sufficient independence from cost and schedule when opposed to safety considerations.

(C) Each quality assurance program approval holder shall maintain records of quality assurance program changes.

(v) Quality control program. Each shipper shall adopt a quality control program to include verification of the following to ensure that shipping containers are suitable for shipments to a licensed disposal facility:

(1) identification of appropriate container(s);

(2) container testing documentation is adequate;

(3) appropriate container used;

(4) container packaged appropriately;

(5) container labeled appropriately;

(6) manifest filled out appropriately; and

(7) documentation maintained of each step.

(w) Handling, storage, and shipping control. The licensee, certificate holder, and applicant for a CoC shall establish measures to control, in accordance with instructions, the handling, storage, shipping, cleaning, and preservation of materials and equipment to be used in packaging to prevent damage or deterioration. When necessary for particular products, special protective environments, such as inert gas atmosphere, and specific moisture content and temperature levels shall be specified and provided.

(x) Inspection, test, and operating status. Measures to track inspection, test and operating status shall be established as follows.

(1) The licensee, certificate holder, and applicant for a CoC shall establish measures to indicate, by the use of markings such as stamps, tags, labels, routing cards, or other suitable means, the status of inspections and tests performed upon individual items of the packaging. These measures shall provide for the identification of items that have satisfactorily passed required inspections and tests, where necessary to preclude inadvertent bypassing of the inspections and tests; and

(2) The licensee, shall establish measures to identify the operating status of components of the packaging, such as tagging valves and switches, to prevent inadvertent operation.

(y) Nonconforming materials, parts, or components. The licensee, certificate holder, and applicant for a CoC shall establish measures to control materials, parts, or components that do not conform to the licensee's requirements to prevent their inadvertent use or installation. These measures shall include the following, as appropriate:

(1) procedures for identification, documentation, segregation, disposition, and notification to affected organizations; and

(2) nonconforming items shall be reviewed and accepted, rejected, repaired, or reworked in accordance with documented procedures.

(z) Corrective action. The licensee, certificate holder, and applicant for a CoC shall establish measures to assure that conditions adverse to quality, such as deficiencies, deviations, defective material and equipment, and nonconformances, are promptly identified and corrected.

(1) In the case of a significant condition adverse to quality, the measures shall assure that the cause of the condition is determined and corrective action taken to preclude repetition.

(2) The identification of the significant condition adverse to quality, the cause of the condition, and the corrective action taken shall be documented and reported to appropriate levels of management.

(aa) Quality assurance records. The licensee, certificate holder, and applicant for a CoC shall maintain written records sufficient to describe the activities affecting quality for inspection by the department for three years beyond the date when the licensee, certificate holder, and applicant for a CoC last engage in the activity for which the quality assurance program was developed. If any portion of the written procedures or instructions is superseded, the licensee, certificate holder, and applicant for a CoC shall retain the superseded material for three years after it is superseded. The records must include the following:

(1) instructions, procedures, and drawings to prescribe quality assurance activities, and closely related specifications such as required qualifications of personnel, procedures, and equipment;

(2) instructions or procedures which establish a records retention program that is consistent with applicable regulations and designates factors such as duration, location, and assigned responsibility; and

(3) changes to the quality assurance program as required by subsection (u)(6) of this section.

(bb) Audits. The licensee, certificate holder, and applicant for a CoC shall carry out a comprehensive system of planned and periodic audits, to verify compliance with all aspects of the quality assurance program, and to determine the effectiveness of the program. The audit program shall include:

(1) performance in accordance with written procedures or checklists by appropriately trained personnel not having direct responsibilities in the area being audited;

(2) documented results that are reviewed by management having responsibility in the area audited; and

(3) follow-up action, including reaudit of deficient areas, shall be taken where indicated.

(cc) Transfer for disposal and manifests.

(1) The requirements of this section and subsection (ff) of this section are designed to:

(A) control transfers of LLRW by any waste generator, waste collector, or waste processor licensee, as defined in this section, who ships LLRW either directly, or indirectly through a waste collector or waste processor, to a licensed LLRW land disposal facility, as defined in §289.201(b) of this title;

(B) establish a manifest tracking system; and

(C) supplement existing requirements concerning transfers and recordkeeping for those wastes.

(2) Beginning March 1, 1998, all affected licensees shall use subsection (ff) of this section.

(3) Each shipment of LLRW intended for disposal at a licensed land disposal facility shall be accompanied by a shipment manifest in accordance with subsection (ff)(1) of this section.

(4) Any licensee shipping LLRW intended for ultimate disposal at a licensed land disposal facility shall document the information required on the uniform manifest and transfer this recorded manifest information to the intended consignee in accordance with subsection (ff) of this section.

(5) Each shipment manifest shall include a certification by the waste generator as specified in subsection (ff)(10) of this section, as appropriate.

(6) Each person involved in the transfer for disposal and disposal of LLRW, including the waste generator, waste collector, waste processor, and disposal facility operator, shall comply with the requirements specified in subsection (ff) of this section, as appropriate.

(7) Any licensee shipping LLRW to a licensed Texas LLRW disposal facility shall comply with the waste acceptance criteria in Title 30, Texas Administrative Code, Part 1, Chapter 336.

(8) Each shipper shall submit a list for approval by the department of shipping containers that they intend to use to ship LLRW to the Texas LLRW site. If the shipper is licensed in Texas and is the holder of a CoC, the shipper shall also submit written documentation of its program for quality assurance and control and handling, shipping and control measures that comply with the requirements of subsections (s), (t), and (v) - (bb) of this section.

(dd) Fees.

(1) Each shipper shall be assessed a fee for shipments of LLRW originating in Texas or originating out-of-state being shipped to a licensed Texas LLRW disposal facility and these fees shall:

(A) be $10 per cubic foot of shipped LLRW;

(B) be collected by the department and deposited to the credit of the department's Radiation and Perpetual Care Account;

(C) be used by the department for emergency planning for and response to transportation accidents involving LLRW, including first responder training in counties through which transportation routes are designated in accordance with this section; and

(D) not be collected on waste disposed of at a federal waste disposal facility.

(2) Fee assessments are suspended from imposition against a party state compact waste generator when the amount in the department's Radiation and Perpetual Care Account attributable to those fees reaches $500,000. If the amount in that account attributable to those fees is reduced to $350,000 or less, the fee is reinstated until the amount reaches $500,000.

(3) Money expended from the department's Radiation and Perpetual Care Account to respond to accidents involving LLRW shall be reimbursed to the department's Radiation and Perpetual Care Account by the responsible shipper or transporter according to this section.

(4) For purposes of this subsection, "shipper" means a person who generates low-level radioactive waste and ships or arranges with others to ship the waste to a disposal site.

(5) This subsection does not relieve a generator from liability for a transportation accident involving LLRW.

(ee) Appendices for determination of A_1 and A_2.

(1) Values of A_1 and A_2. Values of A_1 and A_2 for individual radionuclides, which are the bases for many activity limits elsewhere in these rules are given in Table 257-3 of paragraph (6) of this subsection. The curie (Ci) values specified are obtained by converting from the terabecquerel (TBq) value. The TBq values are the regulatory standard. The curie values are for information only and are not intended to be the regulatory standard. Where values of A_1 or A_2 are unlimited, it is for radiation control purposes only. For nuclear criticality safety, some materials are subject to controls placed on fissile material.

(2) Values of radionuclides not listed.

(A) For individual radionuclides whose identities are known, but are not listed in Table 257-3 of paragraph (6) of this subsection, the A_1 and A_2 values contained in Table 257-5 of paragraph (8) of this subsection may be used. Otherwise, the licensee shall obtain prior department or NRC approval of the A_1 and A_2 values for radionuclides not listed in Table 257-3 of paragraph (6) of this subsection, before shipping the material.

(B) For individual radionuclides whose identities are known, but that are not listed in Table 257-4 of paragraph (7) of this subsection, the exempt material activity concentration and exempt consignment activity values contained in Table 257-5 of paragraph (8) of this subsection may be used. Otherwise, the licensee shall obtain prior department or NRC approval of the exempt material activity concentration and exempt consignment activity values, for radionuclides not listed in Table 257-4 of paragraph (7) of this subsection, before shipping the material.

(C) The licensee shall submit requests for prior approval, described in subparagraphs (A) and (B) of this paragraph to the department or the NRC.

(3) Calculations of A_1 and A_2 for a radionuclide not in Table 257-3 of paragraph (6) of this subsection. In the calculations of A_1 and A_2 for a radionuclide not in Table 257-3 of paragraph (6) of this subsection, a single radioactive decay chain, in which radionuclides are present in their naturally occurring proportions, and in which no daughter radionuclide has a half-life either longer than 10 days, or longer than that of the parent radionuclide, shall be considered as a single radionuclide, and the activity to be taken into account and the A_1 and A_2 value to be applied shall be those corresponding to the parent radionuclide of that chain. In the case of radioactive decay chains in which any daughter radionuclide has a half-life either longer than 10 days, or greater than that of the parent radionuclide, the parent and those daughter radionuclides shall be considered as mixtures of different radionuclides.

(4) Determination for mixtures of radionuclides whose identities and respective activities are known. For mixtures of radionuclides whose identities and respective activities are known, the following conditions apply.

(A) For special form radioactive material, the maximum quantity transported in a Type A package is as follows:
Figure: 25 TAC §289.257(ee)(4)(A) (No change.)

(B) For normal form radioactive material, the maximum quantity transported in a Type A package is as follows:
Figure: 25 TAC §289.257(ee)(4)(B) (No change.)

(C) If the package contains both special and normal form radioactive material, the activity that may be transported in a Type A package is as follows:
Figure: 25 TAC §289.257(ee)(4)(C) (No change.)

(D) Alternatively, an A_1 value for mixtures of special form material may be determined as follows:
Figure: 25 TAC §289.257(ee)(4)(D) (No change.)

(E) Alternatively, an A_2 value for mixtures of normal form material may be determined as follows:
Figure: 25 TAC §289.257(ee)(4)(E) (No change.)

(F) The exempt activity concentration for mixtures of nuclides may be determined as follows:
Figure: 25 TAC §289.257(ee)(4)(F) (No change.)

(G) The activity limit for an exempt consignment for mixtures of radionuclides may be determined as follows:
Figure: 25 TAC §289.257(ee)(4)(G) (No change.)

(5) Determination when individual activities of some of the radionuclides are not known.

(A) When the identity of each radionuclide is known, but the individual activities of some of the radionuclides are not known, the radionuclides may be grouped and the lowest A_1 or A_2 value, as appropriate, for the radionuclides in each group may be used in applying the formulas in paragraph (4) of this subsection. Groups may be based on the total alpha activity and the total beta/gamma activity when these are known, using the lowest A_1 or A_2 values for the alpha emitters and beta/gamma emitters.

(B) When the identity of each radionuclide is known but the individual activities of some of the radionuclides are not known, the radionuclides may be grouped and the lowest [A] (activity concentration for exempt material) or A (activity limit for exempt consignment) value, as appropriate, for the radionuclides in each group may be used in applying the formulas in paragraph (4) of this subsection. Groups may be based on the total alpha activity and the total beta/gamma activity when these are known, using the lowest [A] or A values for the alpha emitters and beta/gamma emitters, respectively.

(6) A_1 and A_2 values for radionuclides. The following Table 257-3 contains A_1 and A_2 values for radionuclides.
Figure: 25 TAC §289.257(ee)(6) (No change.)

(7) Exempt material activity concentrations and exempt consignment activity limits for radionuclides. The following Table 257-4 contains exempt material activity concentrations and exempt consignment activity limits for radionuclides:
Figure: 25 TAC §289.257(ee)(7) (No change.)

(8) General values for A_1 and A_2. The following Table 257-5 contains general values for A_1 and A_2:
Figure: 25 TAC §289.257(ee)(8) (No change.)

(9) Activity-mass relationships for uranium. The following Table 257-6 contains activity-mass relationships for uranium:
Figure: 25 TAC §289.257(ee)(9) (No change.)

(ff) Appendices for the requirements for transfers of LLRW intended for disposal at licensed land disposal facilities and manifests.

(1) Manifest. A waste generator, collector, or processor who transports, or offers for transportation, LLRW intended for ultimate disposal at a licensed LLRW land disposal facility shall prepare a manifest reflecting information requested on applicable NRC Forms 540 (Uniform Low-Level Radioactive Waste Manifest (Shipping Paper)) and 541 (Uniform Low-Level Radioactive Waste Manifest (Container and Waste Description)) and, if necessary, on an applicable NRC Form 542 (Uniform Low-Level Radioactive Waste Manifest (Manifest Index and Regional Compact Tabulation)) or their equivalent. NRC Forms 540 and 540A shall be completed and shall physically accompany the pertinent LLRW shipment. Upon agreement between shipper and consignee, NRC Forms 541, 541A, and 542 and 542A may be completed, transmitted, and stored in electronic media with the capability for producing legible, accurate, and complete records on the respective forms. Licensees are not required by the department to comply with the manifesting requirements of this section when they ship:

(A) LLRW for processing and expect its return (i.e., for storage in accordance with their license) before disposal at a licensed land disposal facility;

(B) LLRW that is being returned to the licensee who is the waste generator or generator, as defined in this section; or

(C) radioactively contaminated material to a waste processor that becomes the processor's residual waste.

(2) Form instructions. For guidance in completing these forms, refer to the instructions that accompany the forms. Copies of manifests required by this subsection may be legible carbon copies, photocopies, or computer printouts that reproduce the data in the format of the uniform manifest.

(3) Forms. NRC Forms 540, 540A, 541, 541A, 542 and 542A, and the accompanying instructions, in hard copy, may be obtained by writing or calling the Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; telephone (301) 415-5877; or by visiting the NRC's Web site at http://www.nrc.gov and selecting forms from the index found on the NRC home page or at www.nrc.gov/reading-rm/doc-collections/forms/#NRC.

(4) Information requirements of the DOT. This subsection includes information requirements of the DOT, as codified in Title 49, CFR, Part 172. Information on hazardous, medical, or other waste,

required to meet EPA regulations, as codified in Title 40, CFR, Parts 259 and 261 or elsewhere, is not addressed in this section, and shall be provided on the required EPA forms. However, the required EPA forms shall accompany the uniform manifest required by this section.

(5) General information. The shipper of the LLRW, shall provide the following information on the uniform manifest:

(A) the name, facility address, and telephone number of the licensee shipping the waste;

(B) an explicit declaration indicating whether the shipper is acting as a waste generator, collector, processor, or a combination of these identifiers for purposes of the manifested shipment; and

(C) the name, address, and telephone number, or the name and EPA identification number for the carrier transporting the waste.

(6) Shipment information. The shipper of the LLRW shall provide the following information regarding the waste shipment on the uniform manifest:

(A) the date of the waste shipment;

(B) the total number of packages/disposal containers;

(C) the total disposal volume and disposal weight in the shipment;

(D) the total radionuclide activity in the shipment;

(E) the activity of each of the radionuclides hydrogen-3, carbon-14, technetium-99, and iodine-129 contained in the shipment; and

(F) the total masses of uranium-233, uranium-235, and plutonium in special nuclear material, and the total mass of uranium and thorium in source material.

(7) Disposal container and waste information. The shipper of the LLRW shall provide the following information on the uniform manifest regarding the waste and each disposal container of waste in the shipment:

(A) an alphabetic or numeric identification that uniquely identifies each disposal container in the shipment;

(B) a physical description of the disposal container, including the manufacturer and model of any high integrity container;

(C) the volume displaced by the disposal container;

(D) the gross weight of the disposal container, including the waste;

(E) for waste consigned to a disposal facility, the maximum radiation level at the surface of each disposal container;

(F) a physical and chemical description of the waste;

(G) the total weight percentage of chelating agent for any waste containing more than 0.1 percent chelating agent by weight, plus the identity of the principal chelating agent;

(H) the approximate volume of waste within a container;

(I) the sorbing or solidification media, if any, and the identity of the solidification media vendor and brand name;

(J) the identities and activities of individual radionuclides contained in each container, the masses of uranium-233, uranium-235, and plutonium in special nuclear material, and the masses of uranium and thorium in source material. For discrete waste types (i.e., activated materials, contaminated equipment, mechanical filters, sealed source/devices, and wastes in solidification/stabilization media), the identities and activities of individual radionuclides associated with or contained on these waste types within a disposal container shall be reported;

(K) the total radioactivity within each container; and

(L) for wastes consigned to a disposal facility, the classification of the waste in accordance with §289.202(ggg)(4)(A) of this title. Waste not meeting the structural stability requirements of §289.202(ggg)(4)(B)(ii) of this title shall be identified.

(8) Uncontainerized waste information. The shipper of the LLRW shall provide the following information on the uniform manifest regarding a waste shipment delivered without a disposal container:

(A) the approximate volume and weight of the waste;

(B) a physical and chemical description of the waste;

(C) the total weight percentage of chelating agent if the chelating agent exceeds 0.1 percent by weight, plus the identity of the principal chelating agent;

(D) for waste consigned to a disposal facility, the classification of the waste in accordance with §289.202(ggg)(4)(A) of this title. Waste not meeting the structural stability requirements of §289.202(ggg)(4)(B)(ii) of this title shall be identified;

(E) the identities and activities of individual radionuclides contained in the waste, the masses of uranium-233, uranium-235, and plutonium in special nuclear material, and the masses of uranium and thorium in source material; and

(F) for wastes consigned to a disposal facility, the maximum radiation levels at the surface of the waste.

(9) Multi-generator disposal container information. This paragraph applies to disposal containers enclosing mixtures of waste originating from different generators. (Note: The origin of the LLRW resulting from a processor's activities may be attributable to one or more generators (including waste generators) as defined in this section). It also applies to mixtures of wastes shipped in an uncontainerized form, for which portions of the mixture within the shipment originate from different generators.

(A) For homogeneous mixtures of waste, such as incinerator ash, provide the waste description applicable to the mixture and the volume of the waste attributed to each generator.

(B) For heterogeneous mixtures of waste, such as the combined products from a large compactor, identify each generator contributing waste to the disposal container, and, for discrete waste types (i.e., activated materials, contaminated equipment, mechanical filters, sealed source/devices, and wastes in solidification/stabilization media), the identities and activities of individual radionuclides contained on these waste types within the disposal container. For each generator, provide the following:

(i) the volume of waste within the disposal container;

(ii) a physical and chemical description of the waste, including the solidification agent, if any;

(iii) the total weight percentage of chelating agents for any disposal container containing more than 0.1 percent chelating agent by weight, plus the identity of the principal chelating agent;

(iv) the sorbing or solidification media, if any, and the identity of the solidification media vendor and brand

name if the media is claimed to meet stability requirements in §289.202(ggg)(4)(B)(ii) of this title; and

(v) radionuclide identities and activities contained in the waste, the masses of uranium-233, uranium-235, and plutonium in special nuclear material, and the masses of uranium and thorium in source material if contained in the waste.

(10) Certification. An authorized representative of the waste generator, processor, or collector shall certify by signing and dating the shipment manifest that the transported materials are properly classified, described, packaged, marked, and labeled and are in proper condition for transportation according to the applicable regulations of the DOT and the department. A collector in signing the certification is certifying that nothing has been done to the collected waste that would invalidate the waste generator's certification.

(11) Control and tracking.

(A) Any licensee who transfers LLRW to a land disposal facility or a licensed waste collector shall comply with the requirements in clauses (i) - (ix) of this subparagraph. Any licensee who transfers waste to a licensed waste processor for waste treatment or repackaging shall comply with the requirements of clauses (iv) - (ix) of this subparagraph. A licensee shall:

(i) prepare all wastes so that the waste is classified according to §289.202(ggg)(4)(A) of this title and meets the waste characteristic requirements in §289.202(ggg)(4)(B) of this title;

(ii) label each disposal container (or transport package if potential radiation hazards preclude labeling of the individual disposal container) of waste to identify whether it is Class A waste, Class B waste, Class C waste, or greater than Class C waste, in accordance with §289.202(ggg)(4)(A) of this title;

(iii) conduct a quality assurance program to assure compliance with §289.202(ggg)(4)(A) and (B) of this title;

(iv) prepare the uniform manifest as required by this subsection;

(v) forward a copy or electronically transfer the uniform manifest to the intended consignee so that either:

(I) receipt of the manifest precedes the LLRW shipment; and

(II) the manifest is delivered to the consignee with the waste at the time the waste is transferred to the consignee. Using both subclauses (I) and (II) of this clause are also acceptable;

(vi) include the uniform manifest with the shipment regardless of the option chosen in clause (v) of this subparagraph;

(vii) receive acknowledgement of the receipt of the shipment in the form of a signed copy of the uniform manifest;

(viii) retain a copy of or electronically store the uniform manifest and documentation of acknowledgement of receipt as the record of transfer of radioactive material as required by §289.251 of this title and §289.252 of this title; and

(ix) for any shipments or any part of a shipment for which acknowledgement of receipt has not been received within the times set forth in this subsection, conduct an investigation in accordance with subparagraph (D) of this paragraph.

(B) Any waste collector licensee who handles only prepackaged waste shall:

(i) acknowledge receipt of the waste from the shipper within one week of receipt by returning a signed copy of the uniform manifest;

(ii) prepare a new uniform manifest to reflect consolidated shipments that meet the requirements of this subsection. The waste collector shall ensure that, for each container of waste in the shipment, the uniform manifest identifies the generator of that container of waste;

(iii) forward a copy or electronically transfer the uniform manifest to the intended consignee so that either:

(I) receipt of the uniform manifest precedes the LLRW shipment; or

(II) the uniform manifest is delivered to the consignee with the waste at the time the waste is transferred to the consignee. Using both subclauses (I) and (II) of this clause are also acceptable;

(iv) include the uniform manifest with the shipment regardless of the option chosen in clause (iii) of this subparagraph;

(v) receive acknowledgement of the receipt of the shipment in the form of a signed copy of the uniform manifest;

(vi) retain a copy of or electronically store the uniform manifest and documentation of acknowledgement of receipt as the record of transfer of radioactive material as required by §289.251 of this title and §289.252 of this title;

(vii) for any shipments or any part of a shipment for which acknowledgement of receipt has not been received within the times set forth in accordance with this clause, conduct an investigation in accordance with subparagraph (D) of this paragraph; and

(viii) notify the shipper and the department when any shipment, or part of a shipment, has not arrived within 60 days after receipt of an advance uniform manifest, unless notified by the shipper that the shipment has been cancelled.

(C) Any licensed waste processor who treats or repackages waste shall:

(i) acknowledge receipt of the waste from the shipper within one week of receipt by returning a signed copy of the uniform manifest;

(ii) prepare a new uniform manifest that meets the requirements of this subsection. Preparation of the new uniform manifest reflects that the processor is responsible for meeting these requirements. For each container of waste in the shipment, the manifest shall identify the waste generators, the preprocessed waste volume, and the other information as required in clause (i) of this subparagraph;

(iii) prepare all wastes so that the waste is classified according to §289.202(ggg)(4)(A) of this title and meets the waste characteristics requirements in §289.202(ggg)(4)(B) of this title;

(iv) label each package of waste to identify whether it is Class A waste, Class B waste, or Class C waste, in accordance with §289.202(ggg)(4)(A) and (C) of this title;

(v) conduct a quality assurance program to assure compliance with §289.202(ggg)(4)(A) and (B) of this title;

(vi) forward a copy or electronically transfer the uniform manifest to the intended consignee so that either:

(I) receipt of the uniform manifest precedes the LLRW shipment; or

(II) the uniform manifest is delivered to the consignee with the waste at the time the waste is transferred to the consignee. Using both subclause (I) of this clause and this subclause is also acceptable;

(vii) include the uniform manifest with the shipment regardless of the option chosen in clause (vi) of this subparagraph;

(viii) receive acknowledgement of the receipt of the shipment in the form of a signed copy of the uniform manifest;

(ix) retain a copy of or electronically store the uniform manifest and documentation of acknowledgement of receipt as the record of transfer of radioactive material as required by §289.251 of this title and §289.252 of this title;

(x) for any shipment or any part of a shipment for which acknowledgement of receipt has not been received within the times set forth in accordance with this clause, conduct an investigation in accordance with clause (v) of this subparagraph; and

(xi) notify the shipper and the department when any shipment, or part of a shipment, has not arrived within 60 days after receipt of an advance uniform manifest, unless notified by the shipper that the shipment has been cancelled.

(D) Any shipment or part of a shipment for which acknowledgement is not received within the times set forth in accordance with this section shall undergo the following:

(i) be investigated by the shipper if the shipper has not received notification or receipt within 20 days after transfer; and

(ii) be traced and reported. The investigation shall include tracing the shipment and filing a report with the department. Each licensee who conducts a trace investigation shall file a written report with the department within two weeks of completion of the investigation.

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 December 16, 2021.

TRD-202105096
Cynthia Hernandez
General Counsel
Department of State Health Services
Effective date: January 5, 2022
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For further information, please call: (512) 834-6655

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

25 TAC §412.272

The Texas Health and Human Services Commission (HHSC) adopts the repeal of §412.272, concerning Transfer of an Individual from a State MR Facility to a State MH Facility. The repeal of §412.272 is adopted without changes to the proposed text as published in the September 10, 2021, issue of the *Texas Register* (46 TexReg 5736). This rule will not be republished.

BACKGROUND AND JUSTIFICATION

The repeal reflects the move of the state hospitals from the Department of State Health Services to HHSC by moving an HHSC rule from Texas Administrative Code (TAC) Title 25, Chapter 412, Subchapter F to 26 TAC Chapter 902 to consolidate HHSC rules. The new rule is adopted simultaneously elsewhere in this issue of the *Texas Register.*

COMMENTS

The 31-day comment period ended on October 11, 2021.

During this period, HHSC did not receive any comments regarding the proposed repeal.

STATUTORY AUTHORITY

The repeal is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code §591.004 which provides that the Executive Commissioner of HHSC shall adopt rules to ensure the implementation of Title 7, Subtitle D, Texas Health and Safety Code.

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 December 16, 2021.

TRD-202105093
Karen Ray
Chief Counsel
Department of State Health Services
Effective date: January 5, 2022
Proposal publication date: September 10, 2021
For further information, please call: (512) 438-3049

CHAPTER 448. STANDARD OF CARE
SUBCHAPTER I. TREATMENT PROGRAM SERVICES

25 TAC §448.912

The Texas Health and Human Services Commission (HHSC) adopts new §448.912, concerning Miscellaneous Policies and Protocols.

New §448.912 is adopted without changes to the proposed text as published in the October 8, 2021, issue of the *Texas Register* (46 TexReg 6879). This rule will not be republished.

BACKGROUND AND JUSTIFICATION

The new section is necessary to comply with House Bill (H.B.) 119, 87th Legislature, Regular Session, 2021, which requires HHSC to adopt rules prohibiting health care facilities and providers from discriminating against an organ transplant recipient based on a patient's or client's disability.

COMMENTS

The 31-day comment period ended November 8, 2021. During this period, HHSC received comments regarding the proposed rules from the Texas Council for Developmental Disabilities (TCDD). A summary of comments relating to the rule and HHSC's responses follows.

Comment: TCDD stated the provisions of H.B. 119 apply to health care facilities based on the definition of "health care facility" added at Texas Health and Safety Code (HSC) §161.471(3) and noted the proposed rules in the October 8, 2021, issue of the *Texas Register* applied to the following facilities: end stage renal disease facilities, hospitals, ambulatory surgical centers, birthing centers, abortion facilities, and narcotic treatment programs. TCDD stated the proposed rules do not include several facility types specifically referenced in the definition of "health care facility" at HSC §161.471(3), including nursing facilities, laboratories, intermediate care facilities, mental health facilities, and any facility for individuals with intellectual or developmental disabilities.

Response: HHSC declines to revise the rule in response to this comment. This rule update is intended to apply only to licensed acute health care facilities and providers that HHSC regulates. Other facilities, including nursing facilities, intermediate care facilities, and facilities for individuals with intellectual or developmental disabilities, are outside the scope of this rule update.

Comment: TCDD stated it is questionable whether H.B. 119 applies to some facilities with proposed rules in this rule update, including abortion facilities and narcotic treatment programs.

Response: HHSC declines to revise the rule in response to this comment. This rule update is applicable to these facility types because HSC §161.471(3) defines a health care facility as "a facility licensed, certified, or otherwise authorized to provide health care in the ordinary course of business, including a hospital, nursing facility, laboratory, intermediate care facility, mental health facility, transplant center, and any other facility for individuals with intellectual or developmental disabilities."

Comment: TCDD noted the provisions of H.B. 119 apply to health care providers based on the definition of "health care provider" added at HSC §161.471(4) and stated it was unclear why rules governing licensed chemical dependency counselors (LCDCs) are included in this rule update.

Response: HHSC declines to revise the rule in response to this comment. LCDCs and counselor interns (CIs) must comply with HSC Chapter 161, Subchapter S, because LCDCs and CIs meet the definition of "health care provider" at HSC §161.471(4). LCDCs must be licensed under Occupations Code §504.151 and CIs must be registered under Occupations Code §504.1515.

Comment: TCDD stated it is unclear why physician assistants, advanced nurse practitioners, registered nurses, and numerous other types of licensed, certified, or otherwise authorized health care professionals are not included in this rule update in addition to LCDCs.

Response: HHSC declines to revise the rule in response to this comment. HHSC may only adopt rules for health care professionals under HHSC's statutory authority and other state agencies (e.g. the Texas Medical Board, the Texas Nursing Board, and the Behavioral Health Executive Council) have statutory authority for the health care providers the commenter mentioned.

STATUTORY AUTHORITY

The new section is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code §464.009, which authorizes the Executive Commissioner to adopt rules governing organization and structure, policies and procedures, staffing requirements, services, client rights, records, physical plant requirements, and standards for licensed CDTFs.

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 December 17, 2021.

TRD-202105155
Karen Ray
Chief Counsel
Department of State Health Services
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Proposal publication date: October 8, 2021
For further information, please call: (512) 834-4591

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TITLE 26. HEALTH AND HUMAN SERVICES

PART 1. HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 306. BEHAVIORAL HEALTH DELIVERY SYSTEM

SUBCHAPTER D. MENTAL HEALTH SERVICES--ADMISSION, CONTINUITY, AND DISCHARGE

DIVISION 4. TRANSFERS AND CHANGING LOCAL MENTAL HEALTH AUTHORITIES OR LOCAL BEHAVIORAL HEALTH AUTHORITIES

26 TAC §306.192

The Texas Health and Human Services Commission (HHSC) adopts an amendment to §306.192, concerning Transfers Between a State Mental Health Facility and a State Supported Living Center. The amendment of §306.192 is adopted without changes to the proposed text as published in the September 10, 2021, issue of the *Texas Register* (46 TexReg 5737). This rule will not be republished.

BACKGROUND AND JUSTIFICATION

The amendment to §306.192 removes references to 25 TAC §412.272 and adds a reference to 26 TAC §902.1, relating to Transfer of an Individual from a State Supported Living Center to a State Hospital. Other edits are made for clarity and consistency.

COMMENTS

The 31-day comment period ended on October 11, 2021.

During this period, HHSC did not receive any comments regarding the proposed rule amendment.

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code §571.006 which provides that the Executive Commissioner of HHSC may adopt rules as necessary for the proper and efficient treatment of persons with mental illness, and Texas Health and Safety Code §594.001 which provides that the Executive Commissioner of HHSC shall adopt rules to ensure the implementation of Title 7, Subtitle D, Texas Health and Safety Code.

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
Health and Human Services Commission
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For further information, please call: (512) 438-3049

CHAPTER 506. SPECIAL CARE FACILITIES
SUBCHAPTER C. OPERATIONAL REQUIREMENTS
26 TAC §506.38

The Texas Health and Human Services Commission (HHSC) adopts new §506.38, concerning Miscellaneous Policies and Protocols.

New §506.38 is adopted without changes to the proposed text as published in the October 8, 2021, issue of the *Texas Register* (46 TexReg 6880). This rule will not be republished.

BACKGROUND AND JUSTIFICATION

The new section is necessary to comply with House Bill (H.B.) 119, 87th Legislature, Regular Session, 2021, which requires HHSC to adopt rules prohibiting health care facilities and providers from discriminating against an organ transplant recipient based on a patient's or client's disability.

COMMENTS

The 31-day comment period ended November 8, 2021. During this period, HHSC received comments regarding the proposed rules from the Texas Council for Developmental Disabilities (TCDD). A summary of comments relating to the rule and HHSC's responses follows.

Comment: TCDD stated the provisions of H.B. 119 apply to health care facilities based on the definition of "health care facility" added at Texas Health and Safety Code (HSC) §161.471(3) and noted the proposed rules in the October 8, 2021, issue of the *Texas Register* applied to the following facilities: end stage renal disease facilities, hospitals, ambulatory surgical centers, birthing centers, abortion facilities, and narcotic treatment programs. TCDD stated the proposed rules do not include several facility types specifically referenced in the definition of "health care facility" at HSC §161.471(3), including nursing facilities, laboratories, intermediate care facilities, mental health facilities, and any facility for individuals with intellectual or developmental disabilities.

Response: HHSC declines to revise the rule in response to this comment. This rule update is intended to apply only to licensed acute health care facilities and providers that HHSC regulates. Other facilities, including nursing facilities, intermediate care facilities, and facilities for individuals with intellectual or developmental disabilities, are outside the scope of this rule update.

Comment: TCDD stated it is questionable whether H.B. 119 applies to some facilities with proposed rules in this rule update, including abortion facilities and narcotic treatment programs.

Response: HHSC declines to revise the rule in response to this comment. This rule update is applicable to these facility types because HSC §161.471(3) defines a health care facility as "a facility licensed, certified, or otherwise authorized to provide health care in the ordinary course of business, including a hospital, nursing facility, laboratory, intermediate care facility, mental health facility, transplant center, and any other facility for individuals with intellectual or developmental disabilities."

Comment: TCDD noted the provisions of H.B. 119 apply to health care providers based on the definition of "health care provider" added at HSC §161.471(4) and stated it was unclear why rules governing licensed chemical dependency counselors (LCDCs) are included in this rule update.

Response: HHSC declines to revise the rule in response to this comment. LCDCs and counselor interns (CIs) must comply with HSC Chapter 161, Subchapter S, because LCDCs and CIs meet the definition of "health care provider" at HSC §161.471(4). LCDCs must be licensed under Occupations Code §504.151 and CIs must be registered under Occupations Code §504.1515.

Comment: TCDD stated it is unclear why physician assistants, advanced nurse practitioners, registered nurses, and numerous other types of licensed, certified, or otherwise authorized health care professionals are not included in this rule update in addition to LCDCs.

Response: HHSC declines to revise the rule in response to this comment. HHSC may only adopt rules for health care professionals under HHSC's statutory authority and other state agencies (e.g. the Texas Medical Board, the Texas Nursing Board, and the Behavioral Health Executive Council) have statutory authority for the health care providers the commenter mentioned.

STATUTORY AUTHORITY

The new section is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code §248.026, which requires HHSC to adopt rules establishing minimum standards for special care facilities.

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
Health and Human Services Commission
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For further information, please call: (512) 834-4591

CHAPTER 509. FREESTANDING EMERGENCY MEDICAL CARE FACILITIES
SUBCHAPTER C. OPERATIONAL REQUIREMENTS

26 TAC §509.68

The Texas Health and Human Services Commission (HHSC) adopts new §509.68, concerning Miscellaneous Policies and Protocols.

New §509.68 is adopted without changes to the proposed text as published in the October 8, 2021, issue of the *Texas Register* (46 TexReg 6882). This rule will not be republished.

BACKGROUND AND JUSTIFICATION

The new section is necessary to comply with House Bill (H.B.) 119, 87th Legislature, Regular Session, 2021, which requires HHSC to adopt rules prohibiting health care facilities and providers from discriminating against an organ transplant recipient based on a patient's or client's disability.

COMMENTS

The 31-day comment period ended November 8, 2021. During this period, HHSC received comments regarding the proposed rules from the Texas Council for Developmental Disabilities (TCDD). A summary of comments relating to the rule and HHSC's responses follows.

Comment: TCDD stated the provisions of H.B. 119 apply to health care facilities based on the definition of "health care facility" added at Texas Health and Safety Code (HSC) §161.471(3) and noted the proposed rules in the October 8, 2021, issue of the *Texas Register* applied to the following facilities: end stage renal disease facilities, hospitals, ambulatory surgical centers, birthing centers, abortion facilities, and narcotic treatment programs. TCDD stated the proposed rules do not include several facility types specifically referenced in the definition of "health care facility" at HSC §161.471(3), including nursing facilities, laboratories, intermediate care facilities, mental health facilities, and any facility for individuals with intellectual or developmental disabilities.

Response: HHSC declines to revise the rule in response to this comment This rule update is intended to apply only to licensed acute health care facilities and providers that HHSC regulates. Other facilities, including nursing facilities, intermediate care facilities, and facilities for individuals with intellectual or developmental disabilities, are outside the scope of this rule update.

Comment: TCDD stated it is questionable whether H.B. 119 applies to some facilities with proposed rules in this rule update, including abortion facilities and narcotic treatment programs.

Response: HHSC declines to revise the rule in response to this comment. This rule update is applicable to these facility types because HSC §161.471(3) defines a health care facility as "a facility licensed, certified, or otherwise authorized to provide health care in the ordinary course of business, including a hospital, nursing facility, laboratory, intermediate care facility, mental health facility, transplant center, and any other facility for individuals with intellectual or developmental disabilities."

Comment: TCDD noted the provisions of H.B. 119 apply to health care providers based on the definition of "health care provider" added at HSC §161.471(4) and stated it was unclear why rules governing licensed chemical dependency counselors (LCDCs) are included in this rule update.

Response: HHSC declines to revise the rule in response to this comment. LCDCs and counselor interns (CIs) must comply with HSC Chapter 161, Subchapter S, because LCDCs and CIs meet the definition of "health care provider" at HSC §161.471(4). LCDCs must be licensed under Occupations Code §504.151 and CIs must be registered under Occupations Code §504.1515.

Comment: TCDD stated it is unclear why physician assistants, advanced nurse practitioners, registered nurses, and numerous other types of licensed, certified, or otherwise authorized health care professionals are not included in this rule update in addition to LCDCs.

Response: HHSC declines to revise the rule in response to this comment. HHSC may only adopt rules for health care professionals under HHSC's statutory authority and other state agencies (e.g. the Texas Medical Board, the Texas Nursing Board, and the Behavioral Health Executive Council) have statutory authority for the health care providers the commenter mentioned.

STATUTORY AUTHORITY

The new section is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code §254.101, which authorizes HHSC to adopt rules regarding freestanding emergency medical care facilities.

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
Health and Human Services Commission
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CHAPTER 510. PRIVATE PSYCHIATRIC HOSPITALS AND CRISIS STABILIZATION UNITS

SUBCHAPTER C. OPERATIONAL REQUIREMENTS

26 TAC §510.44

The Texas Health and Human Services Commission (HHSC) adopts an amendment to §510.44, concerning Miscellaneous Policies and Protocols.

Amended §510.44 is adopted without changes to the proposed text as published in the October 8, 2021, issue of the *Texas Register* (46 TexReg 6883). This rule will not be republished.

BACKGROUND AND JUSTIFICATION

The amendment is necessary to comply with House Bill (H.B.) 119, 87th Legislature, Regular Session, 2021, which requires HHSC to adopt rules prohibiting health care facilities and providers from discriminating against an organ transplant recipient based on a patient's or client's disability.

COMMENTS

The 31-day comment period ended November 8, 2021. During this period, HHSC received comments regarding the proposed rules from the Texas Council for Developmental Disabilities (TCDD). A summary of comments relating to the rule and HHSC's responses follows.

Comment: TCDD stated the provisions of H.B. 119 apply to health care facilities based on the definition of "health care facility" added at Texas Health and Safety Code (HSC) §161.471(3) and noted the proposed rules in the October 8, 2021, issue of the *Texas Register* applied to the following facilities: end stage renal disease facilities, hospitals, ambulatory surgical centers, birthing centers, abortion facilities, and narcotic treatment programs. TCDD stated the proposed rules do not include several facility types specifically referenced in the definition of "health care facility' at HSC §161.471(3), including nursing facilities, laboratories, intermediate care facilities, mental health facilities, and any facility for individuals with intellectual or developmental disabilities.

Response: HHSC declines to revise the rule in response to this comment. This rule update is intended to apply only to licensed acute health care facilities and providers that HHSC regulates. Other facilities, including nursing facilities, intermediate care facilities, and facilities for individuals with intellectual or developmental disabilities, are outside the scope of this rule update.

Comment: TCDD stated it is questionable whether H.B. 119 applies to some facilities with proposed rules in this rule update, including abortion facilities and narcotic treatment programs.

Response: HHSC declines to revise the rule in response to this comment. This rule update is applicable to these facility types because HSC §161.471(3) defines a health care facility as "a facility licensed, certified, or otherwise authorized to provide health care in the ordinary course of business, including a hospital, nursing facility, laboratory, intermediate care facility, mental health facility, transplant center, and any other facility for individuals with intellectual or developmental disabilities."

Comment: TCDD noted the provisions of HB 119 apply to health care providers based on the definition of "health care provider" added at HSC §161.471(4) and stated it was unclear why rules governing licensed chemical dependency counselors (LCDCs) are included in this rule update.

Response: HHSC declines to revise the rule in response to this comment. LCDCs and counselor interns (CIs) must comply with HSC Chapter 161, Subchapter S, because LCDCs and CIs meet the definition of "health care provider" at HSC §161.471(4). LCDCs must be licensed under Occupations Code §504.151 and CIs must be registered under Occupations Code §504.1515.

Comment: TCDD stated it is unclear why physician assistants, advanced nurse practitioners, registered nurses, and numerous other types of licensed, certified, or otherwise authorized health care professionals are not included in this rule update in addition to LCDCs.

Response: HHSC declines to revise the rule in response to this comment. HHSC may only adopt rules for health care professionals under HHSC's statutory authority and other state agencies (e.g. the Texas Medical Board, the Texas Nursing Board, and the Behavioral Health Executive Council) have statutory authority for the health care providers the commenter mentioned.

STATUTORY AUTHORITY

The amended section is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code §577.010, which requires HHSC to adopt rules and standards necessary and appropriate to ensure the proper care and treatment of patients in a private mental hospital or mental health facility.

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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TRD-202105158
Karen Ray
Chief Counsel
Health and Human Services Commission
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For further information, please call: (512) 834-4591

CHAPTER 902. CONTINUITY OF SERVICES--TRANSFERRING INDIVIDUALS FROM STATE SUPPORTED CENTERS TO STATE HOSPITALS

26 TAC §902.1

The Texas Health and Human Services Commission (HHSC) adopts new §902.1, concerning Transfer of an Individual from a State Supported Living Center to a State Hospital. The new §902.1 is adopted without changes to the proposed text as published in the September 10, 2021, issue of the *Texas Register* (46 TexReg 5759). This rule will not be republished.

BACKGROUND AND PURPOSE

The new rule reflects the move of the state hospitals from the Department of State Health Services to HHSC by moving an HHSC

rule from Texas Administrative Code (TAC) Title 25, Chapter 412, Subchapter F to 26 TAC Chapter 902 to consolidate HHSC rules. The repeal of 25 TAC Chapter 412, Subchapter F is adopted simultaneously elsewhere in this issue of the *Texas Register.*

COMMENTS

The 31-day comment period ended on October 11, 2021.

During this period, HHSC did not receive any comments regarding the proposed new rule.

STATUTORY AUTHORITY

The new section is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code §591.004 which provides that the Executive Commissioner of HHSC shall adopt rules to ensure the implementation of Title 7, Subtitle D, Texas Health and Safety Code.

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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TRD-202105095
Karen Ray
Chief Counsel
Health and Human Services Commission
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Proposal publication date: September 10, 2021
For further information, please call: (512) 438-3049

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) adopts new §§311.101 - 311.103. New §§311.101 - 311.103 are adopted *with changes* to the proposal as published in the June 25, 2021, issue of the *Texas Register* (46 TexReg 3846) and, therefore, will be republished.

Background and Summary of the Factual Basis for the Adopted 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 will 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 adopted 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 adopted 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 develop a Mine Plan prior to commencing or continuing regulated activities; 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; 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; a compliance period of 180 days for operators registered as an APO with the commission on the effective date of this rule to comply with §§311.103(a) - (e), (g), and (h)(1).

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 rulemaking adoption 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, adopted 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

Adopted new §311.101 will 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 Texas Administrative Code (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 (USGS) 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

Adopted 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.

Adopted 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

Adopted 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 phases.

Subsection (d) requires that if an operator determines a BMP is infeasible, the operator must use an alternative BMP and maintain onsite detailed, supporting documentation demonstrating why the BMP is infeasible, that the alternative BMP is more appropriate for the site, and that the alternative BMP provides equivalent or improved water quality protection. A BMP may be determined to be infeasible following criteria included in paragraphs (1) - (11).

Subsection (e) specifies that the operator's BMPs must be properly installed.

Subsection (f) indicates that the operator must modify or replace controls in a timely manner, but no later than the next anticipated storm event, or when an inspection by the operator or the ED reveals the controls are not installed correctly or are not adequate.

Subsection (g) requires the operator to obtain certification of BMPs by a licensed Texas professional engineer or a licensed Texas professional geoscientist.

Subsection (h)(1) requires that operators develop and maintain onsite a Mine Plan prior to commencing or continuing regulated activities. Subparagraphs (A) - (C) outline the requirements for the Mine Plan, including: developing the Mine Plan as outlined in the guidance document of BMPs, keeping the Mine Plan current and updating it as necessary to reflect changing conditions at the site, and having the Mine Plan certified by a licensed Texas professional engineer or a licensed Texas professional geoscientist. The Mine Plan may be consolidated with the BMPs into a single, certified document. Subsection (h)(2) requires operators to develop a Final Stabilization Report prior to operations terminating at the site or portion(s) of the site. Subparagraph (A) outlines 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 licensed Texas professional geoscientist, submittal to the ED for review and approval prior to terminating operations at the site or portion(s) of the site, and ED approval prior to implementation. Subparagraph (B) requires implementation of the Final Stabilization Report prior to operations terminating at portion(s) of the site or terminating any permit or authorization required by Chapter 205 or 305 of this title because of operations terminating at the site.

Subsection (i) allows for the ED to conduct an investigation of a sand mining facility prior to approval of the final stabilization report.

Subsection (j) requires operators to maintain documentation related to compliance with the adopted 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 (TWC), Chapter 26 or the adopted subchapter.

Subsection (k) establishes a compliance period of 180 days for operators registered as an APO with the commission on the effective date of this rule to comply with certain portions of the subchapter. Subsection (k)(1) allows existing operators 180 days to comply with §§311.103(a) - (e) and (g). All future updates or changes to BMPs must be certified in accordance with this subchapter.

Subsection (k)(2) allows existing operators 180 days to comply with §311.103(h)(1). All future updates or changes to the Mine Plan must be completed and certified in accordance with this subchapter.

This compliance period does not waive an operator's responsibility to implement existing BMPs as required by the Multi-Sector General Permit (TXR050000) or other discharge permits.

Final Regulatory Impact Determination

The TCEQ reviewed the adopted 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 will 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 rulemaking adoption will 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 rulemaking adoption is to add a new Subchapter J for the San Jacinto Watershed within the TCEQ's existing rules. The adopted 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 Mine Plan and 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 adopted rulemaking will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs; nor will the adopted 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 adopted 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 adopted under the TCEQ's general rulemaking authority. This rulemaking is being adopted under existing state law found at TWC, §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 the adopted rulemaking 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 invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. No comments were received on the Draft Regulatory Impact Analysis Determination.

Takings Impact Assessment

The TCEQ evaluated the rulemaking adoption 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 will 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 adopted 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 adopted rules will 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 adopted rules because these rules will not impact private real property in a manner that will require compensation to private real property owners under the United States Constitution or the Texas Constitution. Specifically, the adopted 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 adopted rulemaking is reasonably taken to fulfill requirements of state law. Therefore, the adopted rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the adopted rules and found that they are neither identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(a)(6). Therefore, the adopted rules are not subject to the Texas Coastal Management Program (CMP).

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received regarding the CMP.

Public Comment

The commission held a public hearing on July 22, 2021. The comment period closed on July 27, 2021. The commission received comments from Bayou Land Conservancy, Kings Point Community Association, FPI, San Jacinto River Authority (SJRA), TACA, and 98 individuals.

One individual indicated their position as against the proposed rule. Each commenter suggested changes to the proposed rule.

Response to Comments

Miscellaneous

Comment 1

TACA commented that the Best Management Practices (BMP) Guidance Document should not be subject to commission approval. TACA requested clarification on whether the BMP document is subject to formal adoption by the commission. Addition-

ally, TACA expressed concern that making the BMP guidance document subject to commission approval would unnecessarily delay improvements and innovation.

Response 1

The commission agrees with the comment. The BMP Guidance Document being developed by the executive director to accompany this proposed rulemaking is being developed through a separate agency publication process which does not require commission approval. The BMP Guidance Document will be updated on a frequency determined by the executive director to allow for technological advancements and improved industry practices. Future updates to the guidance document will not be subject to commission approval. No change was made as a result of these comments.

Comment 2

One individual commented on the need for rulemaking documents. The individual added that it is a necessary and sufficient condition for developers, contractors, and mining companies to document and codify the disposition of sand, and other excavation products.

Response 2

The commission notes that §311.103(i) of the proposed rulemaking requires sand mining facility operators to maintain documentation related to compliance with this subchapter. Additionally, operators are required to implement BMPs from the ED's BMP Guidance Document to address the discharge of sand from their facility or site and to protect water quality. In response to this comment, and other similar comments, new language was added to §311.103(g) of the proposed rule to require sand mining operators to prepare and maintain a Mine Plan which will address the overall process of mining at the site including the susceptibility of the site to erosion.

As part of the requirement that sand mining facilities document their BMPs and prepare a mine plan as noted above, the commission acknowledges that existing sand mining facility operators will need time to adequately implement those portions of the rule which require certification by a licensed Texas professional engineer or licensed Texas professional geoscientist prior to continuing operations, such as the BMPs and the additional requirement to develop a Mine Plan. As a result, new subsection (k) has been added to §311.103 of the rule to establish a compliance period of 180 days for existing sand mining facility operators.

Comment 3

One individual requested strict BMPs for sand mines along the San Jacinto River, upstream from Kingwood.

Response 3

The commission notes that the proposed rulemaking requires operators in the San Jacinto River Watershed to develop and implement BMPs from the ED's BMP Guidance Document. BMPs included in the ED's BMP Guidance Document must be developed and implemented to minimize water pollution from sand mining facilities and be based on technically supported information that is generally relied upon by professionals within the appropriate environmental area or discipline. No change was made in response to this comment.

Comment 4

One individual commented that sand mining operations, along the San Jacinto waterway, need to abide by stricter regulations to prevent sand from filling up the waterways during rain events. The individual added that TCEQ needs to make sand mining operators follow BMP's.

Response 4

The proposed rule requires sand mining facility operators in the San Jacinto River Watershed to develop and implement BMPs from the ED's BMP Guidance Document. The BMPs included in the ED's BMP Guidance Document will minimize water pollution from sand mining facilities, including pollution from sediment, and are required to be developed and implemented based on technically supported information that is generally relied upon by professionals within the appropriate environmental area or discipline. Additionally, operators are required to implement final stabilization reports to protect water quality after operations at the site or portion(s) of the site have terminated. If an inspection by the executive director finds that a regulated facility is out of compliance with the rule, the facility may be subject to violations and enforcement. No change was made in response to this comment.

Comment 5

One individual commented that there should be no exceptions to BMPs.

Response 5

The commission disagrees with this comment. The commission recognizes that each sand mining facility differs in available area, site topography, site soils, and other similar technological considerations. Additionally, local codes or ordinances may prevent some operators from implementing all BMPs in the ED's BMP Guidance Document. Because of these differences among sand mining facility operators, variance in the appropriate BMPs is to be expected. No change was made in response to this comment.

Comment 6

One individual commented that strict rules are necessary.

Response 6

The commission notes that the proposed rules, when adopted, will be enforceable. If an inspection by the executive director finds that a regulated facility is out of compliance with the rule, the facility may be subject to violations and enforcement. No change was made in response to this comment.

Comment 7

One individual commented that BMP's should apply to all Texas rivers and waterways.

Response 7

The commission disagrees with this comment. The proposed rulemaking is limited to the San Jacinto River Watershed as described in the original petitions for the rulemaking as approved by the commission. Application of this rule to all Texas rivers and waterways would go beyond the scope of this rulemaking. No change was made in response to this comment.

Comment 8

One individual expressed concern about mining operations being a source of sand in the San Jacinto River due to recent flooding events. The individual requested that the expenses of re-

moving sand be covered by standards and fines on sand mining operators. Lastly, the individual expressed concern that current fines are not sufficient to protect the San Jacinto River.

Response 8

The proposed rulemaking requires sand mining facility operators to develop and implement BMPs to protect water quality. The implementation of BMPs will minimize the discharge of sand in quantities that may adversely impact water quality. Sand mining facility operators within the San Jacinto River Watershed which fail to comply with the rule will be subject to violations and enforcement. The commission notes that this rulemaking concerns Chapter 311, the Watershed Protection Rules, which is not the appropriate rule to address fines enforced by this agency. The addition or increase of fines, and the use of funds from fines assessed to operators is outside of the scope of this rulemaking. No change was made in response to this comment.

Comment 9

BLC commented that because of the adverse impacts from aggregate mining operations in the river basin, the national organization American Rivers placed the San Jacinto on its "Most Endangered Rivers" list in 2006. BLC also commented that they do not seek to end the practice of mining in the watershed but express concern that without comprehensive, evidence-based best management practices (BMPs) that include reclamation and restoration of closed mines, the industry will harm nearby and downstream communities.

Response 9

The commission agrees that discharges from sand mining facilities in the San Jacinto River Watershed have the potential to adversely impact water quality without the implementation of proper BMPs. See Response 3 related to the requirement for operators to implement BMPs. No change was made in response to these comments.

Comment 10

One individual suggested that sand mines should not be allowed at all.

Response 10

Although sand mining facilities have the potential to adversely impact water quality, with the existing regulatory scheme and proper BMPs, sand mining facilities can be protective of water quality in the San Jacinto River Watershed and still operate. Therefore, the commission disagrees with this comment. No change was made in response to this comment.

Comment 11

One individual expressed concern for air quality and dust particulates produced by sand mining operations.

Response 11

The commission notes that this rulemaking is limited to addressing water quality concerns and the implementation of BMPs to protect water quality. Although sand mining facility operations have the potential to impact air quality, air quality goes beyond the scope of this rulemaking. No change was made in response to this comment.

Comment 12

One individual commented that they are pleased with progress of these proposed rules and guidelines.

Response 12

The commission acknowledges this comment.

Comment 13

SJRA noted that there are inconsistencies between "Licensed Texas" and "Texas Licensed" throughout the proposed rule.

Response 13

The commission agrees with the comment and language in §311.103(g) of the proposed rule has been revised for consistency to read as follows, "licensed Texas professional engineer or geoscientist."

Comment 14

One individual commented that the state of Texas and the legislature do not want to stop flooding. As a result, that will prevent people from moving to the state and start an exodus.

Response 14

The commission does not have the jurisdiction to regulate flooding as part of a rulemaking and is limited to controlling the discharge of pollutants into water in the state. This rulemaking addresses water quality protection from activities that occur at sand mining facilities in the San Jacinto River Watershed. For any flooding concerns, members of the public may wish to contact their local floodplain administrator. No change was made in response to this comment.

Comment 15

One individual commented that the costs of remediation to remove sediment deposits after flooding has been substantial for individuals and the region. The individual also expressed concerns over health impacts related to the release of chemicals used by mining operations.

The individual commented that the agency should review its mission statement and determine what part of the statement is most important.

Response 15

The commission notes that the proposed rule requires operators to develop and implement BMPs to protect water quality. See Responses 2 and 4 related to the discharge of sediment. The commission disagrees with the representation that the agency's mission is not being implemented fairly. The commission protects water quality through decisions based on the law, common sense, sound science, and fiscal responsibility. In addition, the commission strives to promote flexibility in achieving environmental goals. No change was made in response to this comment.

Comment 16

One individual commented that the current rule, as written, does not prohibit the miners from doing anything they want.

Response 16

The commission disagrees with the comment. The proposed rule establishes clear requirements for sand mining facility operators to implement BMPs to protect water quality, develop, update, and maintain a current Mine Plan, and to perform final stabilization prior to terminating operations at the site or portion(s) of the site. No change was made in response to this comment.

Comment 17

One individual complimented TCEQ's efforts. The individual also expressed concern over the best practices and stated that the rules will make it easy for operators to choose not to follow them. The commenter stated that it will result in millions of dollars in costs to taxpayers and public officials.

Response 17

The commission disagrees with the comment. See Response 16 related to established requirements for sand mining facility operators. The proposed rule establishes clear requirements for operators and once effective, the final rule will be enforced by the commission. Operators that fail to comply with the requirements of the proposed rule will be subject to violations and enforcement. No change was made in response to this comment.

Comment 18

One individual expressed concern over a sand mine operator potentially selling their facility. The individual is uncertain whether the new buyer will use the land for development or continue to use it for sand mining. The individual requests TCEQ's help communicating with the buyers/sellers, regarding reclamation.

Response 18

The obligation for operators to comply with the proposed rule is not affected by the sale or transfer of sand mining facilities. Any sand mining facility operator located within the San Jacinto River Watershed must comply with the rule. No change was made in response to this comment.

Comment 19

One individual commented that there should be more protection for the forested ecosystems along the San Jacinto River. The individual suggested there should be less sand mining and that BMPs should be required. The individual also commented that the Sand Mining Best Management Practices Guidance document should include a summary in the introduction, emphasizing the importance of forested ecosystems.

Response 19

The proposed rulemaking requires sand mining facilities to develop and implement BMPs to protect water quality. The implementation of this rule in the San Jacinto River Watershed will lead to protection of water quality throughout the watershed including in forested ecosystems within the watershed. The commission notes that the sand mining BMP Guidance Document is being developed in conjunction with the rule with stakeholder involvement but separately from this rulemaking. No change was made in response to this comment.

§311.101. Definitions.

Comment 20

SJRA requested clarification on whether the Lake Conroe watershed would be exempt from the provision, and if so, requested the reasoning behind that. SJRA also requested clarification if Luce Bayou should be included in the listed of watersheds and tributaries as both Lake Conroe and Luce Bayou are encompassed in the figure.

Response 20

The definition for San Jacinto River Watershed in §311.101(7) of the proposed rule, as written, encompasses Lake Conroe and Luce Bayou. Lake Conroe and Luce Bayou are encompassed in the definition because they are within the watershed of the listed waterbodies and its tributaries. No change was made in response to this comment.

Comment 21

SJRA requested that the watershed definition be revised to read as follows: "San Jacinto River Watershed - Those portions of the San Jacinto River Watershed that includes the watersheds of the following and their tributaries," instead of "San Jacinto River Watershed - Those portions of the San Jacinto River Watershed that includes the watersheds of the following and its tributaries."

Response 21

The commission declines to make the requested change to the definition of San Jacinto River Watershed. The terminology used in the definition for San Jacinto River Watershed in §311.101(7) of the proposed rule is consistent with the definitions included in other sections of Chapter 311 Watershed Protection Rules. No change was made in response to this comment.

Comment 22

One individual commented that there is a conflict between the geographic scope described in the written definition and that shown in the graphic. The individual suggested defining the watershed as "everything flowing into Lake Houston."

Response 22

The commission disagrees with this comment and declines to make the suggested change. The graphic was developed using the USGS National Watershed Boundary Dataset. The watershed boundaries included in the graphic are the USGS Hydrologic Unit Code eight-digit watershed boundaries encompassing the waterbodies and tributaries described in the written definition. No change was made in response to this comment.

§311.103. General Requirements.

Comment 23

TACA commented that as proposed §311.103(a), (b), and (c) require operators to develop and implement "all" best management practices (BMPs) identified in the guidance document even if one is not appropriate. TACA stated that the intent behind their petition was to provide operators with a menu of options to select suitable BMPs from for their specific site. TACA requests that the term "all" be removed from these subsections and replace with the term "technically appropriate" or a similar term.

Response 23

The commission agrees with the comment. See Response 5 related to BMP flexibility for sand mining facilities. The commission declines to make the suggested change, however, in response to this comment, §311.103(c) and (d) have been amended to expand the use of alternative equivalent BMPs where certain BMPs are infeasible for vegetative controls, structural controls, and pre-mining, mining, and post mining controls. This change also includes a requirement to maintain documentation onsite for all infeasibility claims. Additionally, the infeasibility criteria list in §311.103(d) has been revised to include the following: human health and safety concerns, local restrictions or codes, cost effectiveness, site soils, slope, available area, precipitation patterns, site vegetation, infiltration capacity, depth and distance to water in the state, and other similar technological considerations.

Comment 24

TACA commented that it is possible an operator could identify an engineering or other approach to protect water quality that is not

listed in the BMP guidance document. TACA commented that the rule should allow the operator an opportunity to work with the executive director to implement these BMPs as an alternative which could later be incorporated into the guidance document. TACA commented that TCEQ has a well-established track record of allowing for alternative means of compliance, most recently in the newly adopted Multi-Sector General Permit and that §311.103 should be revised to provide the executive director authority to approve BMPs that are not listed in the guidance document on a case-by-case basis.

Response 24

The commission agrees with the comment in part. The commission recognizes that advances in technology will occur and that the ED's BMP Guidance Document must be updated to accommodate these advances. At any time, operators or stakeholders may submit suggested changes or additions to the ED's BMP Guidance Document in writing to the ED. The ED will evaluate any suggested changes or additions to determine if updates to the ED's BMP Guidance Document are necessary. The commission disagrees that §311.103 of the proposed rule needs to include an option for case-by-case approval of BMPs. Operators must implement BMPs from the ED's BMP Guidance Document unless they are infeasible. See also Response 1 related to updates to the guidance document of BMPs developed by the ED. No change was made in response to this comment.

Comment 25

FPI commented that the list of infeasibility considerations in §311.103(c) are counterproductive and would allow operators to declare a BMP infeasible for almost any reason. FPI also expressed concern that the infeasibility declaration does not require TCEQ approval.

Response 25

The commission disagrees with the comment. See Response 5 related to BMP flexibility. The commission revised the language at §311.103(c) of the proposed rule, see Response 23. The amended rule language retains a revised list of infeasibility criteria. This list of criteria is necessary to guide operators in making accurate determinations of infeasibility and establishing the appropriate documentation to demonstrate any infeasibility determination and alternative equivalent BMP selection. Operators will be required to maintain this documentation onsite. The requirement for operators to maintain compliance documentation onsite is consistent with the existing regulatory scheme for stormwater discharge permits and other agency programs. In addition, compliance documentation may be subject to a records review during an investigation.

Comment 26

Seventy-four individuals and the Kings Point Community Association commented that the list of infeasibility considerations in §311.103(c) gives sand mine operators free license to ignore BMPs for a virtually infinite number of reasons. The individuals and the Kings Point Community Association also commented requesting that the rule language be revised to require BMP approval by TCEQ. One individual added that the list of considerations provides so much latitude to operators that the rule is useless.

Response 26

The commission disagrees with the comment. The list of infeasibility considerations included in the proposed rule was developed based on those included in the TPDES Construction General Permit and Municipal Separate Storm Sewer System General Permit. These infeasibility considerations are used by TPDES permittees to implement alternative or modified stormwater controls where the controls required by the permit are infeasible for their site-specific conditions. The commission intends for operators subject to this rule to use these considerations in the same way. Operators may have site-specific conditions that make it infeasible for them to implement a BMP from the ED's BMP Guidance Document, considering best industry practices *(see definition of infeasibility in the proposed rule).* It is necessary for the commission to allow for some flexibility to meet the requirements of the rule in these cases. See also Responses 5, 23, and 25.

Comment 27

One individual commented that the wording in §311.103(c) invites operators to take one of the twelve or more excuses for exemptions with no repercussions. The individual commented that to make the rule effective, any exemptions for infeasibility should have to be reviewed and approved by TCEQ.

Response 27

The commission disagrees with the comment. See Responses 23 and 25.

Comment 28

One individual commented in opposition of the rule because the individual believes the proposed rule includes no real regulation for mine operators. The individual also commented that any and all variances from BMP standards must be approved in advance by TCEQ.

Response 28

The commission disagrees with the comments. See Responses 16, 23, and 25.

Comment 29

One individual expressed concern that the wording of the proposed rule would allow sand mine operators to continue releasing sand to the San Jacinto River. The individual commented that any variation to the rules should be approved by TCEQ and subject to a public hearing.

Response 29

The commission disagrees with the comment. See Responses 4, 23, and 25.

Comment 30

One individual commented that the exemptions for operators in §311.103(c) would be ineffective and allow operators to bypass consequences by drafting and maintaining a document onsite.

Response 30

The commission disagrees with the comment. See Responses 23 and 25.

Comment 31

One individual commented that the considerations listed in §311.103(c) completely negate the purpose of the proposed rule. The individual stated that the negligent practice of mining operations contributed to the loss of millions of dollars, as well as the loss of life. Lastly, the individual commented that the rule does not require mandatory compliance.

Response 31

The commission disagrees with this comment. The commission notes that the proposed rule requires operators to implement and maintain BMPs to protect water quality and that compliance with the rule is enforceable. See also Responses 16, 23, and 25.

Comment 32

One individual commented that the requirement in §311.103(g) for selected BMPs to be independently certified as appropriate is hardly a mandate for oversight and gives leeway and incentive to not implement important parts of the guidance document as infeasible. The individual commented that the same amount of oversight applied to final stabilization reports in the rule should be given to the approval of BMPs.

Response 32

The commission disagrees with the comments. The commission notes that the proposed rule requires operators to implement and maintain BMPs to protect water quality and that compliance with the rule is enforceable. See Responses 16, 23, and 25.

Comment 33

SJRA commented that §311.103(e) should be rewritten from:

"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."

to instead read:

"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 to determine that such measures have been used inappropriately, or incorrectly, or are not adequate."

Response 33

The commission has modified the text at §311.103(e) of the proposed rule as follows:

"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 which determine that such measures have been used inappropriately, or incorrectly, or are not adequate."

Comment 34

Two individuals commented that the rule should not allow variance or deviation in BMPs without TCEQ review and approval.

Response 34

The commission disagrees with this comment. See Responses 23 and 25 related to alternative equivalent BMPs.

Comment 35

One individual expressed concern that the rule does not include public notification of proposed BMPs. The individual commented that notification would go a long ways towards increasing transparency of proposed activities.

Response 35

See Response 25.

Comment 36

FPI commented that the final stabilization report is like a blueprint for restoration and reclamation at the site. FPI also commented that leaving all restoration and reclamation until the very end is not in the best interests of all concerned.

FPI commented that having a comprehensive plan for restoration at the beginning of operations would ensure that operators will take steps in the beginning to streamline and coordinate their operations and BMPs so that partial reclamation is done at every stage. FPI commented that the stabilization report should be submitted to TCEQ for review with the original application and updated annually to reflect areas already mined and restored.

Response 36

The commission notes that a final stabilization report is required to ensure that operators leave the site in a stabilized condition before terminating operations at the site or portion(s) of the site to reduce discharge of sediments from the site or portion(s) of the site after the operator has terminated operations.

The commission agrees that operators should have a plan prepared at the beginning of operations to address the details of the site and how operators will perform the regulated activity at the site. This plan, developed from the beginning of operations, will then be used by operators in developing the final stabilization plan prior to termination at the site or portion(s) of the site. Revisions were made to §311.103(g) of the proposed rule language to require a Mine Plan as described in Response 2.

Statutory Authority

The new rules are adopted 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 adopted 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 require-

ments, 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 operational 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 operator 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.

(d) Infeasibility. Certain BMPs for sections (a), (b), and (c) above may be infeasible for some sand mining facility operations based on site-specific factors. An infeasibility determination is required when BMPs may be infeasible, as defined in §311.101(3). Detailed, supporting documentation shall be maintained onsite demonstrating why the BMP is infeasible, that the alternative BMP is more appropriate for the site, and that the alternative BMP provides equivalent or improved water quality protection. The operator shall implement the documented alternative, equivalent BMP at the site. The following criteria shall be used when documenting and determining the infeasibility of a BMP and that an alternative, equivalent BMP is more appropriate for the site:

(1) human health and safety concerns;

(2) local restrictions or codes;

(3) cost effectiveness;

(4) site soils;

(5) slope;

(6) available area;

(7) precipitation patterns;

(8) site vegetation;

(9) infiltration capacity;

(10) depth and distance to water in the state; and

(11) other similar technological considerations.

(e) Installation and Maintenance. The operator shall install and maintain all control measures in accordance with the manufacturer's specifications and good engineering practices.

(f) 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 which determine that such measures have been used inappropriately, or incorrectly, or are not adequate.

(g) 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.

(h) Mine Plan and Final Stabilization Report.

(1) The operator shall develop a Mine Plan prior to commencing or continuing regulated activities at the site. The Mine Plan shall:

(A) be developed and maintained onsite in accordance with the guidance document of BMPs developed by the executive director;

(B) be kept current and updated as necessary to address changing conditions at the site;

(C) be signed and certified by a licensed Texas professional engineer or a licensed Texas professional geoscientist.

(2) Using the Mine Plan referenced in §311.103(h)(1), the operator shall develop a Final Stabilization Report prior to operations terminating at the site or portion(s) of the site.

(A) The Final Stabilization Report shall:

(i) be developed in accordance with the guidance document of BMPs developed by the executive director;

(ii) be signed and certified by a licensed Texas professional engineer or a licensed Texas professional geoscientist;

(iii) be submitted to the executive director for review and approval prior to operations terminating at the site or portion(s) of the site;

(iv) receive executive director approval prior to implementation.

(B) 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.

(i) 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.

(j) 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.

(k) Existing Sand Mining Facilities.

(1) Sand mining facility operators registered as an APO with the commission on the effective date of this rule must comply with §§311.103(a) - (e) and (g) of this title within 180 days following the effective date of this subchapter. All future updates or changes to BMPs must be certified in accordance with §311.103(g).

(2) Sand mining facility operators registered as an APO with the commission on the effective date of this rule must comply with §311.103(h)(1) of this title within 180 days following the effective date of this subchapter. All future updates or changes to the Mine Plan must be made in accordance with §311.103(h)(1).

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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Deputy Director, Environmental Law Division
Texas Commission on Environmental Quality
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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION

SUBCHAPTER O. STATE AND LOCAL SALES AND USE TAXES

34 TAC §3.302

The Comptroller of Public Accounts adopts amendments to §3.302, concerning accounting methods, credit sales, bad debt deductions, repossessions, interest on sales tax, and trade-ins, with changes to the proposed text as published in the September 24, 2021, issue of the *Texas Register* (46 TexReg 6381). The rule will be republished. The comptroller amends the section to incorporate longstanding agency guidance on bad debts, to revise agency requirements with respect to taking credits on sales and use tax reports and requesting refunds, and to define key terms used in the Tax Code and this section that are undefined.

Comments were received from Peter O. Larsen of Akerman LLP and John Christian of Ryan LLC.

Throughout the section, the comptroller inserts the phrase "sales and use" before the term "tax;" replaces the term "section" with the term "subsection," where appropriate; and replaces the term "customer" with the term "purchaser" for consistency within the section and with other sections of this title.

The comptroller adds new subsection (a), titled "definitions," to define key terms used but not defined within the section. The proposed amendments also relocate terms defined within the current section to new subsection (a). Subsequent subsections are relettered accordingly.

New paragraph (1) defines the term "affiliate" based on the meaning assigned by Tax Code, §151.426(j) (Credits and Refunds for Bad Debts, Returned Merchandise, and Repossessions), and current subsection (d)(8).

New paragraph (2) defines the term "assignee" as the person who acquires the right to claim a credit or refund related to a bad debt through a written assignment executed by the retailer who made the sale or the private label credit provider.

New paragraph (3) defines the term "bad debt" based on its use in Tax Code, §151.426(a), and its definition in current subsection (d)(1), with minor revisions to provide clarity.

New paragraph (4) defines the term "credit sale" based on the term's definition in current subsection (b)(1), which is being deleted.

New paragraphs (5) and (6) define the terms "private label credit agreement" and "private label credit provider," respectively. The

terms appear in the current section but are undefined. The comptroller bases the new definitions on their common industry usage and on definitions of similar terms from other states that permit tax credits or refunds for bad debts.

Mr. Christian commented that the definition of "private label credit agreement" in proposed subsection (a)(5) and the definition of "private label credit provider" in proposed subsection (a)(6) uses language from Illinois and Wisconsin statutes that only reference credit cards. Mr. Christian acknowledged that proposed subsection (a)(5) does contain additional language that provides for additional credit instruments; however, he proposed that we instead use definitions with language from Pennsylvania and Michigan statutes. The comptroller deletes the references to the specific statutes of Wisconsin and Illinois because the definitions proposed in this section include both credit cards and other credit instruments. The comptroller declines to make additional changes based on other states' definitions, as suggested by Mr. Christian, because the proposed definitions in this section include other credit instruments.

New paragraph (7) defines the term "trade-in" based on its definition in current subsection (g) of this section and on Tax Code, §151.007(c)(5) ("Sales Price" or "Receipts").

The comptroller reletters current subsection (a), regarding accounting methods, as subsection (b). The comptroller amends paragraph (1) by giving it the heading "Reporting sales and use tax," and by replacing the term "correctly" in the first sentence with the term "accurately" to adhere more closely to the language in Tax Code, §151.408 (Accounting Basis for Reports). The amendment also replaces the term "should" in the second sentence with the term "must." A retailer must obtain prior written approval from the comptroller before the retailer can report its sales and use tax using an accounting system that is not a generally recognized accounting system. *See* Comptroller's Decision No. 26,487 (1990). In addition, the comptroller amends the second sentence to replace the phrase "commonly recognized accounting system" with the phrase "generally recognized accounting method" to more closely track the language of Tax Code, §151.408.

The comptroller amends paragraph (2) by giving it the heading "Reporting sales and use tax on rentals and leases," and correcting the reference to §3.294 of this title (relating to Rental and Lease of Tangible Personal Property).

The comptroller reletters current subsection (b), regarding credit sales, as subsection (c). The comptroller deletes current paragraph (1), defining the term "credit sale," because the definition now appears in new subsection (a)(5). The comptroller renumbers subsequent paragraphs accordingly.

The comptroller amends renumbered paragraph (1) by giving it the heading, "Service charges." The comptroller also makes nonsubstantive changes to improve readability.

The comptroller amends renumbered paragraph (2) by giving it the heading, "Accounting methods." The comptroller also adds the phrase "for its regular books and records" at the end of the paragraph to adhere more closely to the language in Tax Code, §151.408.

The comptroller amends subparagraph (A) by giving it the heading, "Accrual basis," and subparagraph (B) by giving it the heading, "Cash basis." The comptroller further amends subparagraph (B) by inserting the terms "insurance" and "interest" in the second sentence to be consistent with the language in relettered subsection (c)(1). The comptroller makes other nonsubstantive changes to subparagraphs (A) and (B) to improve readability and consistency within this section.

The comptroller amends subparagraph (C) by giving it the heading, "Modified basis." The comptroller further amends the subparagraph to add a sentence requiring a retailer to obtain written approval from the comptroller before using any accounting method other than a generally recognized accounting method to be consistent with relettered subsection (b)(1).

The comptroller adds new subparagraph (D), giving it the heading, "Cash basis reporting option." The new subparagraph informs retailers whose regular books are kept on an accrual basis of accounting that they can elect to use the cash basis of accounting for sales and use tax reporting purposes. This amendment reflects long-standing agency policy. *See, e.g.,* Comptroller's Decision No. 38,886 (2002) ("{T}he method used to report sales tax is not controlled by whether {the retailer's} books are generally maintained on an accrual or cash basis...").

The comptroller redesignates current subsection (c), titled "Transfer or sale of sales contracts and accounts receivable," as paragraph (3). The comptroller makes nonsubstantive changes to improve readability and consistency with other subsections of this section.

The comptroller amends subsection (d) to revise and reorganize the existing information on bad debts and to add the content from current subsection (e) on repossessions. The comptroller amends the heading of subsection (d) to read, "Bad debts and repossessions."

The comptroller deletes paragraph (1), defining bad debt, because the term is now defined in new subsection (a).

The comptroller redesignates subparagraph (A) as paragraph (1) and gives it the heading, "Bad debts during a reporting period." The comptroller further amends renumbered paragraph (1) by adding language clarifying that the retailer must report on its federal income tax return the amount entered in the retailer's books as a bad debt. Finally, the comptroller deletes subparagraphs (B) and (C).

The comptroller deletes the content of paragraph (2), regarding the amount of a bad debt, because the information now appears in new subparagraphs (3)(A) and (3)(B). The comptroller further amends paragraph (2) by giving it the heading, "Persons who may claim a credit or refund. "

The comptroller adds new subparagraph (A) based on the language of deleted paragraph (1)(C) and subsection (e)(1). The new subparagraph explains that only a retailer, private label credit provider, or an assignee or affiliate of either are entitled to a credit or refund for bad debts or repossessed items under Tax Code, §151.426.

The comptroller adds new subparagraph (B), which explains that only one person is entitled to a credit or refund for each bad debt or repossession.

The comptroller deletes the content of paragraph (3), regarding expenses to collect a bad debt, because the information now appears in new paragraph (3)(D). The comptroller further amends paragraph (3) by giving it the heading, "Determining the amount of a bad debt or the unpaid portion of the sales price of a taxable item repossessed under a conditional sales contract."

The comptroller adds new subparagraph (A), which states that the amount of a bad debt or unpaid portion of the sales price of

a taxable item repossessed under a conditional sales contract is the sales price of the taxable item less all payments and recoveries, including payments applied to interest, fees, and other expenses relating to the sales price of the taxable item under the credit agreement and proceeds from the sale of an account to a third party. This subparagraph is based on language from deleted subsection (d)(2) and subsection (e)(1).

The comptroller adds new subparagraph (B), which explains that the sales price of a taxable item does not include nontaxable separately stated charges such as finance and carrying charges or charges for interest or insurance. The comptroller derives the language of the new subparagraph from deleted subsection (d)(2) and subsection (e)(1).

The comptroller adds new subparagraph (C), which provides guidance on how payments should be applied to determine the amount of a bad debt in accordance with Tax Code, §151.426(e)(2), and Comptroller's Decision No. 101,531 (2010). The comptroller clarifies that payments on an account are applied to the charges occurring first in time and are prorated between taxable and nontaxable charges.

The comptroller adds new subparagraph (D), which addresses expenses to collect a bad debt or repossess an item. The comptroller derives this language from the content deleted from current subsection (d)(3) and (e)(2) and reorganizes it into new clauses (i) through (iii) to improve readability.

The comptroller adds new subparagraph (E) to explain the requirement that the claimant must account for all payments and recoveries of a debt. If the claimant does not provide the actual payment or recovery amounts, the comptroller will estimate this amount. For claims that include accounts sold to a third party, the comptroller will use, as a safe harbor, an industry average for post-sale collections, which is 2.5 times the amount paid to acquire the account. *See* Federal Trade Commission, The Structure and Practices of the Debt Buying Industry, 23 n.99 (January 2013), available at https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf (internal citations omitted).

Mr. Larsen commented that the word "credit" should be added to clarify that a person may be claiming "the refund or credit" in proposed subsection (d)(3)(E). The comptroller has revised references to a refund in subsection (d)(3)(E) to now include a "refund or credit." Mr. Larsen also suggests adding language that would allow for statistical, historical, or industry information to calculate a reasonable estimate of post-sale collections in addition to the actual collection information. The comptroller declines to make additional changes that would permit claimants to provide their own "estimate of post-sale collections". If the claimant cannot provide the actual collection amount, they can use the safe harbor estimate. This safe harbor estimate is based on an industry average of post-sale collections.

Mr. Christian requested deletion of the words "accounts sold to a third party" in subsection (d)(3)(E). However, Tax Code, §151.426(e) requires claimants to prorate all payments on an account, whether the account was sold to a third party or not. Therefore, the comptroller declines to make the requested deletion. Mr. Christian also commented that he believed language in proposed subsection (d)(3)(E) regarding the safe harbor estimate of post-sale collections exceeded the authority provided by the statute and suggested eliminating the safe harbor estimate. The safe harbor estimate in subsection (d)(3)(E) provides an alternative to the requirement that claimants must account for all payments and other recoveries on an account. Without this safe harbor, a claimant who is not able to provide the actual collection information, such as collections made by a third party to whom the account was sold, will not be able to account for all payments on the account, and the refund or credit will be denied. The amendments are within the comptroller's rule-making authority, and the comptroller declines to make the changes requested by Mr. Christian.

The comptroller deletes the content of paragraph (4) regarding required records, because the information is now in amended paragraph (7). The comptroller also amends the paragraph to address local sales and use tax. The comptroller derives the language from subsection (d)(7) and Tax Code, §151.426(i). This amendment also clarifies that only the retailer that made the sale is entitled to a refund of tax paid on a bad debt or the unpaid portion of the sales price of a taxable item repossessed under a conditional sales contract. A person who is not the retailer who made the sale is entitled to a credit or refund under this subsection only for state sales and use tax, unless the retailer expressly assigned its rights to a credit or refund.

The comptroller deletes the content of paragraph (5), regarding alternative reporting and recordkeeping methods, because the information is now in amended paragraph (8). The comptroller further amends paragraph (5) and gives it the heading, "Statute of limitations." The comptroller adds language addressing the statute of limitations based, in part, on the content deleted from subsection (d)(1)(B) and on STAR Accession No. 200203888L (March 22, 2002) (explaining that the assignee of a bad debt deduction is limited to the assignor's time period for claiming a refund). Because there are different reporting timeframes for sales and use tax and federal income taxes, the comptroller clarifies that a claim for a bad debt refund must be made within four years from the date the account was claimed as a bad debt for federal income tax purposes.

The comptroller deletes the content of paragraph (6), regarding revocation of an alternative reporting or recordkeeping method, because the information is now in amended paragraph (8). The comptroller further amends the paragraph and gives it the heading, "Post refund collection on a bad debt or sale of a repossessed item." The comptroller amends the paragraph to address the taxability of collections on an account after a credit has been taken or a refund has been issued by the comptroller. The comptroller derives this language from current paragraph (9) and Tax Code, §151.426(h).

Mr. Larsen commented on proposed subsection (d)(6) and suggested that the comptroller add the words "total taxable percentage of the principal portion" to the amount collected. The comptroller declines to make this requested change. When a person collects payment on an account for which the comptroller has previously allowed a credit or issued a refund, the total amount collected, not a taxable percentage, must be reported as a taxable sale because the refund issued represents a refund of the tax paid on a bad debt--i.e., the portion of the sales price of a taxable item that is worthless and has been charged off for federal income tax purposes.

Mr. Christian commented that proposed subsection (d)(6), when read in conjunction with proposed subsection (d)(3)(E), can potentially allow the State of Texas to double dip when accounts are sold to third parties. The comptroller revises subsection (d)(6) by adding language to explain that the post-refund reporting requirement does not apply when the claimant uses the safe harbor estimate in subsection (d)(3)(E).

The comptroller deletes the content of paragraph (7), regarding local taxes, because the information now appears in amended subsection (d)(4). The comptroller further amends paragraph (7) by giving it the title, "Claiming a credit or refund," and providing information on how a person may seek a credit or refund for bad debts and repossessions.

The comptroller adds new subparagraph (A), labeled "Permitted persons," which provides that a person who holds, or held at the time of the sale, a valid Texas sales and use tax permit can take a credit on the person's sales tax report for taxes paid on a sale determined to be a bad debt only if the person files the report electronically. A person who does not file electronically may request a refund of tax paid on a sale determined to be a bad debt by submitting a written refund request. The comptroller derives this language based, in part, on the content deleted from subsection (d)(1)(B) and (C); Tax Code, §§151.426(c) and (e), 111.0626 (Electronic Filing of Certain Reports), 111.104(b) (Refunds); and §3.325 of this title (relating to Refunds and Payments Under Protest).

The comptroller adds new subparagraph (B), labeled "Nonpermitted persons," which provides that a person who does not hold a valid Texas sales and use tax permit may not take a credit on a future sales tax report. Instead, the person may only file a written request for a refund of taxes paid on a sale later determined to be a bad debt or an item repossessed under a conditional sales contract.

The comptroller adds new subparagraph (C), labeled "Records required," which explains that a person claiming a credit or refund under this subsection must provide specific information regarding the claim. The comptroller derives this language from Tax Code, §151.426(e), the content deleted from subsection (d)(4), and current subsection (e)(3).

The comptroller adds new subparagraph (D), labeled "Records required for bad debts acquired by assignment or purchase," which provides that a claimant must maintain and make available to the comptroller additional records when a claim includes tax paid on bad debt accounts acquired from a third party. To provide clarification for auditors and others processing the refund, the comptroller requires an express assignment of the right to a refund of tax paid on a bad debt from the retailer or private label credit provider who transferred the bad debt accounts to the claimant. An assignee who acquires a bad debt account from a third party without an express assignment of the third party's right to a refund is not entitled to a refund under this subsection. New subparagraph (D) also implements the updated Webfile requirements for returns that include credits for tax paid on a bad debt.

The comptroller deletes the content of paragraph (8), defining the term "affiliate," because the definition now appears in new subsection (a). The comptroller amends paragraph (8), by giving it the title "Alternative recordkeeping and tax calculation methods." This paragraph explains how to request comptroller approval to use an alternative method of maintaining necessary records or calculating the amount of a bad debt credit or refund. The comptroller derives the content of amended paragraph (8) from language deleted from subsection (d)(5) and (6). The comptroller also amends the paragraph by adding new subparagraphs (A) through (G) to improve readability, and by correcting internal cross references.

New subparagraph (A) addresses alternative recordkeeping methods, formerly addressed in subsection (d)(5)(A).

New subparagraph (B) addresses alternative methods of reporting sales and use tax responsibilities, formerly addressed in subsection (d)(5)(B).

New subparagraph (C) explains that the comptroller may revoke an approved alternative method. The comptroller derives this language from the content deleted from subsection (d)(6).

New subparagraph (D) provides that if there is a change in the circumstances on which an approved alternative method was based, or if the alternative method used differs from the alternative method that was approved in writing, the person may submit a new written request.

New subparagraph (E) provides that the comptroller's approval of a request for an alternative method is prospective only. *See* Tax Code, §151.022 (Retroactive Effect of Rules), which gives the comptroller the authority to prescribe the extent to which a rule shall be applied without retroactive effect.

New subparagraphs (F) and (G) provide that the comptroller's approval of an alternative method does not apply to any other person or any other types of records required to be maintained for any other purpose.

The comptroller deletes paragraph (9), regarding amounts collected on a bad debt after a credit or refund has been issued, because this information now appears in subsection (d)(6).

The comptroller deletes paragraph (10). The principle expressed in the current paragraph remains true that credit or installment sales may not be labeled as bad debts merely for the purpose of delaying the payment of the tax due, but the comptroller has determined that it is not necessary to include this statement in light of the additional guidance provided on bad debts by the other proposed amendments to this section.

The comptroller deletes subsection (e), regarding repossessions, because the amendments to subsection (d) incorporate the information on repossessions. Those amendments are intended to consolidate existing provisions regarding repossessions with the bad debt provisions in subsection (d).

The comptroller reletters subsection (f), regarding interest on sales and use tax, as subsection (e). The comptroller deletes the first sentence of the subsection regarding "interest" and "time price differential" because "time price differential" is not used in this section. The comptroller deletes the statement that the term "credit" includes all deferred payment agreements because new subsection (a)(5) defines the term "credit sale" to include deferred payment agreements. The comptroller makes other nonsubstantive changes for consistency within this section.

The comptroller amends paragraph (1) by giving it the heading, "Cash basis of accounting." The comptroller replaces the phrase "on credit" with the phrase "by means of a credit sale" to use the defined term in new subsection (a)(5).

The comptroller redesignates current paragraphs (2) and (3) as new subparagraphs (A) and (B) without substantive change. The comptroller amends the format of the listed percentages for consistency with other sections of this title. The comptroller renumbers the remaining paragraphs accordingly.

The comptroller amends renumbered paragraph (2) by giving it the heading, "Determining the amount of interest."

The comptroller amends renumbered paragraph (3) by giving it the heading, "Penalty and interest." The comptroller further amends the paragraph to delete the word "Texas" and to add

titles of the cited statutes to maintain consistency with citations throughout this title.

The comptroller reletters subsection (g), regarding trade-ins, as subsection (f). The comptroller deletes the definition of the term "trade-in" because the definition now appears in new subsection (a).

The comptroller amends paragraphs (1), (2), and (3) of this subsection to add headings to make the subsection easier to navigate. The comptroller further amends paragraph (1) by adding the term "seller's" before the phrase "regular course of business" for consistency with existing comptroller guidance. *See* Comptroller's Decision No. 104,720 (2013). The comptroller makes a similar change to paragraph (2). The comptroller amends paragraph (3) to incorporate a reference to §3.336 (Currency, Certain Coins, and Gold, Silver, and Platinum Bullion) of this title.

The comptroller deletes paragraph (4), referring taxpayers to §3.336 of this title for information on bartering for taxable items, because the information now appears in paragraph (3).

The comptroller reletters subsection (h), regarding interest on tax paid in error, as subsection (g). The comptroller amends relettered subsection (g) by adding a statement that tax paid on a bad debt is not tax paid in error and does not accrue interest.

The comptroller deletes paragraph (1), regarding interest on refunds of tax paid on a bad debt, because the information now appears in relettered subsection (g).

The comptroller deletes paragraph (2), regarding interest on bad debt refunds for periods before January 1, 2000, because it is obsolete.

This amendment is adopted under Tax Code, §111.002 (Comptroller's Rules; Compliance; Forfeiture), which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendments implement Tax Code, §§111.0041 (Records; Burden To Produce and Substantiate Claims), 111.104 (Refunds), 111.1042 (Tax Refund: Informal Review), 111.107 (When Refund Or Credit Is Permitted), 151.007 ("Sales Price" or "Receipts"), 151.408 (Accounting Basis for Reports), 151.426 (Credits and Refunds for Bad Debts, Returned Merchandise, and Repossessions), and 151.428 (Interest Charged by Retailer on Amounts of Taxes).

§3.302. Accounting Methods, Credit Sales, Bad Debt Deductions, Repossessions, Interest on Sales Tax, and Trade-Ins.

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

(1) Affiliate--Any entity that would be classified as a member of an affiliated group under 26 U.S.C., §1504 (Definitions).

(2) Assignee--A person to whom either a retailer who made the sale or a private label credit provider transfers the right to claim a credit or refund of Texas sales or use tax paid on a bad debt via a written assignment with specific language transferring the right to claim a credit or refund under this section.

(3) Bad debt--Any portion of the sales price of a taxable item that a retailer or private label credit provider cannot collect, and that has been determined to be worthless and actually charged off for federal income tax purposes, provided that the bad debt amount for calculation of the refund or credit is limited to bad debts related to sales that were made by the retailer with whom the person that extended credit entered into the private label credit agreement.

(4) Credit sale--Any sale in which the terms of the sale provide for deferred payment of the sales price. Credit sales include installment sales, sales under conditional sales contracts and revolving credit accounts, and sales for which another person extends credit to the purchaser under a private label credit agreement.

(5) Private label credit agreement--An agreement by which a person agrees to extend credit to purchasers for credit sales with a retailer or the retailer's affiliates, or franchisees, often using a credit card or other instrument bearing the name or logo of the retailer or the retailer's affiliates or franchisees.

(6) Private label credit provider--A person who extends credit to a purchaser under a private label credit agreement.

(7) Trade-in--Tangible personal property taken by a seller as all or a part of the consideration for the sale of a taxable item when the property is of a type normally sold by the seller in the regular course of business, and the seller separately states the value of the property to the purchaser by means of an invoice, billing, sales slip, ticket, or contract.

(b) Accounting methods.

(1) Reporting sales and use tax. For sales and use tax purposes, retailers may use a cash basis, an accrual basis, or any generally recognized accounting basis that accurately reflects the operation of their business. A retailer who wants to use an accounting method to report tax that is not on a pure cash or accrual basis or that is not a generally recognized accounting method must obtain prior written approval from the comptroller.

(2) Reporting sales and use tax on rentals and leases. Paragraph (1) of this subsection does not apply to the reporting of sales and use tax on rentals and leases of tangible personal property. See §3.294 of this title (relating to Rental and Lease of Tangible Personal Property) for the accounting of rentals and leases.

(c) Credit sales.

(1) Service charges. Sales and use tax is due on insurance, interest, finance and carrying charges, and all other service charges incurred as a part of a credit sale unless these charges are stated separately to the purchaser by such means as an invoice, billing, sales slip or ticket, or contract.

(2) Accounting methods. Except as provided by paragraph (D), sales and use tax must be reported on a credit sale based upon the accounting method that the retailer uses for its regular books and records.

(A) Accrual basis. If a retailer uses an accrual basis of accounting for sales and use tax purposes, the entire amount of sales and use tax is due and must be reported in the reporting period in which the sale occurs.

(B) Cash basis. If a retailer uses a cash basis of accounting for sales and use tax purposes, the payment received from the purchaser includes a proportionate amount of sales and use tax, sales price, and may include finance charges. Sales and use tax is due and must be reported in the reporting period in which the payment is received based upon the cash collected, excluding separately stated insurance, interest, or finance and carrying charges.

(C) Modified basis. If a retailer uses an accounting method that is not a pure cash or accrual basis, sales and use tax must be reported in a consistent manner that accurately reflects the realization of income from the credit sales on the retailer's books and records.

The retailer must obtain prior written approval from the comptroller to use an accounting method that is not a generally recognized method.

(D) Cash basis reporting option. A retailer who uses the accrual basis of accounting for its books and records may elect to use the cash basis of accounting for sales and use tax reporting purposes as long as the retailer reports the tax in a manner that accurately reflects the realization of income from cash and credit sales on the retailer's books and records. A change from the accrual basis to the cash basis for reporting sales and use tax is prospective only, and the retailer must establish a procedure to accurately account for sales and use tax received from purchasers during the transition period.

(3) Transfer or sale of sales contracts and accounts receivable. At the time a retailer sells, factors, or assigns to a third party the retailer's right to receive all payments due under a credit sale, the unpaid sales and use tax on all remaining payments becomes due immediately. The retailer is responsible for reporting all remaining sales and use tax due on a credit sale to the comptroller in the reporting period in which the contract or receivable is sold, factored, or assigned. No reduction in the amount of sales and use tax to be reported and paid by the retailer is allowed if the transfer to the third party is for a discounted amount. This paragraph does not apply to a retailer's assignment or pledge of contracts or accounts receivable to a third party as loan collateral.

(d) Bad debts and repossessions.

(1) Bad debts during a reporting period. A retailer is not required to report sales and use tax on any amount that has been entered in the retailer's books as a bad debt during the same reporting period in which the sale occurred, and that will be taken as a deduction for federal income tax purposes on the retailer's federal income tax return during the same or subsequent reporting period.

(2) Persons who may claim a credit or refund.

(A) Only a retailer, private label credit provider, or assignee or affiliate of either may claim a credit or refund for sales and use tax paid on the bad debt or the unpaid portion of the sales price of a taxable item repossessed under a conditional sales contract.

(B) Only one person is entitled to a credit or refund for sales and use tax paid to the comptroller on each bad debt or repossession.

(3) Determining the amount of a bad debt or the unpaid portion of the sales price of a taxable item repossessed under a conditional sales contract.

(A) The amount is the sales price of the taxable item less all payments and recoveries, including payments applied to interest, fees, and other expenses relating to the sales price of the taxable item under the credit agreement and the proceeds from the sale of an account to a third party.

(B) The sales price does not include nontaxable separately stated charges such as finance, carrying, insurance or service charges; or interest from credit extended on sales of taxable items under a conditional sales contract or other contract providing for the deferred payment of the sales price.

(C) For a worthless account that includes charges for taxable and nontaxable items, payments on the account are applied to the charges occurring first in time and prorated between taxable and nontaxable charges occurring at the same time.

(D) Expenses to collect a bad debt or repossess an item. A person claiming a credit or refund under this subsection cannot add to the credit or refund amount:

(i) the expense of collecting a bad debt;

(ii) the expense of repossessing or selling a repossessed item; or

(iii) the amount that a third party has retained or which has been paid to a third party for the service of collecting a bad debt or the service of repossessing or selling a repossessed item.

(E) Any person claiming a bad debt refund or credit must also account for all recoveries on an account. If the retailer or private label credit provider claims a refund or credit that includes accounts sold to a third party, the retailer or private label credit provider must provide the detailed collection amounts for sold accounts. If the person claiming the refund or credit does not have the actual collection information, the comptroller will estimate the post-sale collections in calculating the amount eligible for a refund or credit. The comptroller will estimate the post-sale collections at a rate of 2.5 times the proceeds from the sale of the account.

(4) Local sales and use tax. Only the retailer who made the sale, or an affiliate or assignee of the retailer, is entitled to a credit or refund for local sales and use tax paid on a bad debt or the unpaid portion of the sales price of a taxable item repossessed under a conditional sales contract. A person who is not the retailer who made the sale is entitled to a credit or refund under this subsection only for state sales and use tax imposed by Tax Code, §151.051 (Sales Tax Imposed), or §151.101 (Use Tax Imposed), unless the retailer who made the sale expressly assigned its rights to a credit or refund under this subsection.

(5) Statute of limitations. A claim for a credit or a refund under this subsection must be submitted within four years from the date a bad debt is actually charged off for federal income tax purposes or the date the taxable item is repossessed, whichever is applicable.

(6) Post refund collection on a bad debt or sale of a repossessed item. A person who later collects any payment on a bad debt or sells a repossessed item for which a credit or refund was claimed must report the total amount collected or received from the sale as a taxable sale in the reporting period in which the collection or sale occurs, except when the previous credit or refund amount was calculated by estimating post-sale collections for sold accounts in accordance with subsection (d)(3)(E) of this section.

(7) Claiming a credit or refund.

(A) Permitted persons. A person who holds, or held at the time of the sale, a valid Texas sales and use tax permit and who is otherwise entitled to claim a credit or refund authorized under this subsection may:

(i) claim a credit on the person's sales and use tax report for tax paid on a bad debt only if the person files the tax report electronically and claims the credit in the reporting period in which the person's books reflect the bad debt or subsequent reporting periods; or

(ii) request a refund in writing from the comptroller for sales and use tax paid on a bad debt.

(B) Non-permitted persons. A person who does not hold a valid Texas sales and use tax permit but is otherwise entitled to a credit or refund under this subsection can only request a refund in writing from the comptroller for sales and use tax paid to the comptroller on the bad debt or the unpaid portion of the sales price of a taxable item repossessed.

(C) Records required. A person claiming a credit or requesting a refund for sales and use taxes paid on a bad debt or the unpaid portion of the sales price of a taxable item repossessed must maintain and make available to the comptroller:

(i) date of original credit sale and name and Texas sales and use tax permit number of the retailer who collected and remitted the sales and use tax to the comptroller;

(ii) amount that the purchaser contracted to pay;

(iii) taxable and nontaxable charges;

(iv) all other payments or other credits applied to the account of the purchaser;

(v) evidence that the uncollected amount has been designated as a bad debt in the books and records of the person who claims the bad debt deduction, and that the amount has been claimed as a bad debt deduction for federal income tax purposes;

(vi) identification of each city, county, transit authority, or special purpose district to which local taxes were reported if the claimant is claiming a refund or credit of local taxes;

(vii) the sales and use tax collected and remitted to the comptroller; and

(viii) any additional records requested by the comptroller to verify a credit or refund claim.

(D) Records required for bad debts acquired by assignment or purchase. In addition to the requirements in subparagraph (C) of this paragraph, an assignee claiming a credit or requesting a refund for sales and use tax paid on a bad debt must maintain and make available to the comptroller the following additional information:

(i) amount of bad debt acquired;

(ii) name and taxpayer number of the original retailer who collected and remitted the sales or use tax;

(iii) name and taxpayer number of the person from whom the assignee acquired the bad debt; and

(iv) a written assignment with specific language transferring the right to a credit or refund of Texas sales or use tax paid on a bad debt executed by the person from whom the assignee acquired the bad debt.

(8) Alternative recordkeeping and tax calculation methods. A person who is otherwise qualified to claim a credit or request a refund under this subsection, and whose volume and character of uncollectible accounts warrants an alternative method of substantiating the refund or credit, may request approval from the comptroller to use an alternative method of maintaining records, or an alternative method of calculating a credit or refund, by submitting a written request to the Audit Division, P.O. Box 13528, Austin, Texas 78711-3528.

(A) The comptroller may approve a request to maintain records other than the records specified in paragraph (7)(C) and (D) of this subsection if the records fairly and equitably apportion taxable and nontaxable elements of an uncollectible account or conditional sales contract, and substantiate the amount of Texas sales tax imposed and remitted to the comptroller with respect to the bad debt or unpaid sales price of a taxable item under a conditional sales contract.

(B) The comptroller may approve a request to implement a system to report future sales and use tax responsibilities based on a historical percentage calculated from a sample of transactions if the system utilizes records provided by the person claiming the credit or refund and the person who reported and remitted such tax to the comptroller.

(C) The comptroller may revoke the authorization to report under paragraph (8)(A) or (B) of this subsection if the comptroller determines that the percentage being used is not representative of the taxpayer's business operations or because of a change in law, including a change in the interpretation of an existing law or rule.

(D) A person may submit a new request meeting the requirements of this paragraph after a revocation. The new request should use a method that differs from the alternative method that the comptroller revoked.

(E) Approval of an alternative method is prospective only and may not be used to satisfy the requirements of paragraph (7)(C) and (D) of this subsection, concerning records required, for periods prior to the date specified in the written approval.

(F) The approval of an alternative method applies to only the person who submitted the written request. The approval does not extend to any other person, regardless of whether the requesting person and the other person are affiliates or file a consolidated federal income tax return.

(G) Approval of an alternative recordkeeping method does not apply to any other recordkeeping requirements for any other purpose.

(e) Interest on sales and use tax.

(1) Cash basis of accounting. Sellers who use a cash basis of accounting and who sell taxable items by means of a credit sale and charge interest on the amount of credit extended, including sales and use tax, are required to remit to the comptroller a portion of the interest that has been collected on the state and local sales and use taxes.

(A) If the amount of interest charged on the sales and use tax is 18% or less, the seller must remit to the comptroller one-half of the interest charged on the sales and use tax.

(B) If the amount of interest charged on the sales and use tax is greater than 18%, the seller must remit the amount of interest charged less 9.0%. For example, 21% charged less 9.0% deduction equals 12% interest remitted. A seller will not be allowed the 9.0% deduction if the interest rate charged on sales and use tax differs from the interest rate charged on the sales price of the taxable item.

(2) Determining the amount of interest. In determining the amount of interest to be remitted to the comptroller, a seller does not need to calculate the interest on each individual account. A formula for the calculation may be used if the formula correctly reflects the amount of interest collected. The formula is subject to verification upon audit of the seller's records.

(3) Penalty and interest. Except for the provisions of Tax Code, §151.423 (Reimbursement to Taxpayer for Tax Collections) and §151.424 (Discount for Prepayments), all reporting, collection, refund, and penalty provisions of Tax Code, Chapter 151, including assessment of penalty and interest, apply to interest due.

(f) Trade-ins.

(1) Acceptable trade-in. The sales price of a taxable item does not include the value of a trade-in that a seller takes as all or part of the consideration for a sale of a taxable item of the same type that is normally sold in the seller's regular course of business. For example, sales and use tax will be due only on the difference between the amount allowed on an old piano taken in trade and the sales price of a new piano.

(2) Unacceptable trade-in. The sales price of a taxable item does include the value of a trade-in that a seller takes as all or part of the consideration for the sale of a taxable item, if the trade-in is a different type from the type normally sold by the seller in the regular course of business. For example, a seller who sells only pianos who takes a desk in trade as part of the sales price of a piano collects sales and use tax on

the retail sales price of the piano without any deduction for the value of the desk. In this situation, the seller and buyer are considered to be bartering. However, if the seller of pianos is also a seller of desks, the value of the desk is allowed as a trade-in.

(3) Tax free items traded-in. Sellers who remove items from a tax-free inventory for use as a trade-in owe sales and use tax on their purchase price of the items. If both parties to a transaction remove items from a tax-free inventory to trade for other items that each party will use, the transaction is regarded as bartering by both parties. Each party to the barter is required to collect sales and use tax on the retail sales price of the item being transferred. For example, a seller of drill pipe trades pipe to a seller of appliances in exchange for a refrigerator. Both sellers are trading the respective items for use, not resale. The pipe seller must collect sales tax on the retail sales price of the pipe. The appliance seller must collect sales tax on the retail sales price of the refrigerator. See §3.336 of this title (relating to Currency, Certain Coins, and Gold, Silver, and Platinum Bullion) for information on persons who barter for taxable items with gold, silver, diamonds, or precious metals.

(g) Tax Code, §111.064, provides that interest will be paid on tax amounts found to be erroneously paid and claimed on a request for refund or in an audit. See also §3.325 of this title. Tax paid on an account that is later determined to be uncollectible and written off as a bad debt for federal tax purposes is not tax paid in error and does not accrue interest.

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 December 17, 2021.

TRD-202105147
William Hamner
Special Counsel for Tax Administration
Comptroller of Public Accounts
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For further information, please call: (512) 475-2220

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 19. DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES

CHAPTER 707. CHILD PROTECTIVE INVESTIGATIONS

SUBCHAPTER C. CHILD CARE INVESTIGATIONS

The Department of Family and Protective Services (DFPS) adopts amendments to §§707.745, 707.765, 707.825, and 707.857 in Chapter 707, concerning Child Protective Investigations. Section 707.745 is adopted without changes to the proposed text as published in the September 24, 2021, issue of the *Texas Register* (46 TexReg 6388) and will not be re-published. Sections 707.765, 707.825, and 707.857 are published with non-substantive changes to the text as published and will be re-published.

BACKGROUND AND JUSTIFICATION

The justification of the rule changes is to reflect notification requirements of investigation findings to a residential child care operation after the completion of a child abuse, neglect, or exploitation investigation involving the operation's staff.

The amendments were originally published for public comment in the October 16, 2020, issue of the *Texas Register* (45 TexReg 7404) but were not adopted until June 10, 2021. However, Texas Government Code §2001.027 requires that rule changes be adopted or withdrawn within six months of the date of publication of notice of the proposed rules in the *Texas Register.* As the rules were not adopted within six months of publication of the notice of proposed rule, DFPS requested the rule amendments be withdrawn and re-published.

DFPS re-submitted these rules for proposal without any changes from the rules that were originally submitted for adoption. See the June 4, 2021, issue of the *Texas Register* (46 TexReg 3549).

COMMENTS

The 30-day comment period ended October 24, 2021. During this period, DFPS received comments from Disability Rights Texas. A summary of the comments and DFPS's response follows:

Comment: DRTx noted, on the rules that were initially published then subsequently withdrawn, they had submitted a comment requesting the addition of language to the rules requiring DFPS to make available case records (which includes investigative reports and the supporting evidence including videotapes, audiotapes, and photographs) to the protection and advocacy system if the system represents the victim or alleged victim or is authorized by law to represent the victim or alleged victim. In the current comment, DRTx acknowledges that these rule amendments include the state protection and advocacy system in the list of entities who may obtain confidential investigation information under §707.765. They believe having that language in the regulation helps to clarify their role and can positively impact the timeframes when DRTx requests investigative reports as part of their representation of children or youth who allege abuse, neglect, or exploitation.

Response: DFPS appreciates receiving feedback from DRTx. No changes are necessary based on this comment.

DIVISION 3. NOTIFICATION

40 TAC §707.745

STATUTORY AUTHORITY

The amended sections implement the Child Abuse Prevention and Treatment Act and Texas Human Resources Code §40.006.

The amended sections are adopted under Human Resources Code (HRC) §40.027, which provides that the DFPS commissioner shall adopt rules for the operation and provision of services by the department.

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

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 December 14, 2021.

TRD-202105062
Vicki Kozikoujekian
General Counsel
Department of Family and Protective Services
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Proposal publication date: September 24, 2021
For further information, please call: (512) 929-6824

DIVISION 4. CONFIDENTIALITY

40 TAC §707.765

The amended section implements the Child Abuse Prevention and Treatment Act and Texas Human Resources Code §40.006.

The amended section is adopted under Human Resources Code (HRC) §40.027, which provides that the DFPS commissioner shall adopt rules for the operation and provision of services by the department.

§707.765. Who may obtain confidential abuse, neglect, and exploitation investigation information from the Child Care Investigation's file made confidential under the federal Child Abuse Prevention and Treatment Act and Texas Human Resources Code (HRC) §§40.005 and 42.004?

(a) The following may obtain confidential abuse, neglect, and exploitation investigation information from us subject to the limitations described in §707.767 (relating to Are there any portions of the abuse, neglect, or exploitation investigation records that may not be released to anyone?) and §707.769 (relating to Who can review or have a copy of a photograph or an audio or visual recording, depiction, or documentation of a child that is in the abuse, neglect, or exploitation investigation records maintained by us?) in this division:

(1) Texas Department of Family and Protective Services (DFPS) staff, including volunteers, as necessary to perform their assigned duties;

(2) Child Care Licensing (CCL) pursuant to HRC §40.042(f), in order to carry out its regulatory functions under HRC Chapter 42;

(3) The parent of the child who is the subject of the investigation;

(4) An attorney ad litem, guardian ad litem, or court appointed special advocate of an alleged victim of child abuse, neglect, or exploitation;

(5) The alleged perpetrator, or the parent of an alleged perpetrator that is a minor;

(6) Law enforcement;

(7) A member of the state legislature when necessary to carry out that member's official duties;

(8) A residential child care operation;

(9) A child day care operation cited for a deficiency by CCL as a result of the investigation;

(10) A single-source continuum contractor (SSCC) for community-based care when:

(A) The SSCC subcontracts with the child care operation where the investigation occurred;

(B) The operation has signed a release of information; and

(C) CCL cited the operation for a deficiency as a result of the investigation;

(11) An administrative law judge who conducts a due process hearing related to a finding of abuse, neglect, or exploitation or related to an enforcement action taken by CCL or another state agency as a result of the finding. See Division 7 of this subchapter (relating to Due Process Hearings);

(12) A judge of a court of competent jurisdiction in a criminal or civil case arising out of an investigation of child abuse, neglect, or exploitation, if the judge:

(A) provides notice to DFPS and any other interested parties;

(B) after reviewing the information, including audio and/or videotapes, determines that the disclosure is essential to the administration of justice and will not endanger the life or safety of any individual; and

(C) includes in the disclosure order any safeguards that the court finds appropriate to protect the interest of the child involved in the investigation;

(13) According to Texas Family Code (TFC) §162.0062, a prospective adoptive parent of a child who is the subject of the investigation or who is the alleged or designated perpetrator in the investigation;

(14) A child care licensing agency or child welfare agency from another state that requests information on the alleged perpetrator as part of a background check or to assist in its own child abuse, neglect, or exploitation investigation;

(15) A state protection and advocacy system, such as Disability Rights Texas, that is representing or is authorized by state or federal law to represent a child that is the subject of the investigation; and

(16) Any other person authorized by state or federal law to have a copy.

(b) Notwithstanding any other provision of this section, the parent of a child who is not the subject of the investigation or the alleged or designated perpetrator in the investigation but was a collateral witness during the investigation is entitled to the portion of the investigation record related to their child.

(c) A social study evaluator may obtain a complete, non-redacted copy of any investigative report regarding abuse, neglect, or exploitation that relates to any person residing in the residence subject to the child custody evaluation, as provided by TFC §107.111.

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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For further information, please call: (512) 929-6824

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DIVISION 6. ADMINISTRATIVE REVIEWS

40 TAC §707.825

The amended section implements the Child Abuse Prevention and Treatment Act and Texas Human Resources Code §40.006.

The amended section is adopted under Human Resources Code (HRC) §40.027, which provides that the DFPS commissioner shall adopt rules for the operation and provision of services by the department.

§707.825. What actions regarding an abuse, neglect, or exploitation finding may we take at the conclusion of the administrative review?

(a) Regardless of whether we conducted a telephone conference or meeting, the Child Care Investigations' division administrator or designee will uphold, reverse, or alter the abuse, neglect, or exploitation finding. If we proceed with the administrative review without conducting the telephone conference or meeting based on one of the reasons outlined in §707.823(c) of this division (relating to How is the administrative review conducted?), the decision to uphold, reverse, or alter the finding will be based on your written request and any supporting documentation submitted with your request.

(b) If the finding is reversed or altered, we will:

(1) update our records to reflect the change; and

(2) inform any operation previously notified of the investigation findings under §707.745(a)(4) of Division 2 (relating to Whom will we inform of the abuse, neglect, or exploitation investigation results?) of the reversal or change within five calendar days.

(c) If the finding is reversed, we will also remove your name from the Texas Department of Family and Protective Services Central Registry.

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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Vicki Kozikoujekian
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For further information, please call: (512) 929-6824

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DIVISION 7. DUE PROCESS HEARINGS

40 TAC §707.857

The amended section implements the Child Abuse Prevention and Treatment Act and Texas Human Resources Code §40.006.

The amended section is adopted under Human Resources Code (HRC) §40.027, which provides that the DFPS commissioner shall adopt rules for the operation and provision of services by the department.

§707.857. What actions must we take in response to an administrative law judge's action regarding an abuse, neglect, or exploitation finding?

(a) If the administrative law judge (ALJ) alters or reverses the finding, we will:

(1) update our records to reflect the change; and

(2) inform any operation previously notified of investigation findings under §707.745(a)(4) of Division 2 (relating to Whom will we inform of the abuse, neglect, or exploitation investigation results?) of the reversal or change within five calendar days.

(b) If the ALJ reverses the finding, we will also remove your name from the Texas Department of Family and Protective Services (DFPS) Central Registry.

(c) If the ALJ upholds the finding, we will:

(1) change your designation from a "designated perpetrator" to a "sustained perpetrator" in the DFPS Central Registry; and

(2) notify any operation previously notified of investigation findings under §707.745(a)(4) of Division 2 (relating to Whom will we inform of the abuse, neglect, or exploitation investigation results?) of the sustained finding after an appeal has occurred or the timeframe for filing an appeal has expired.

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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Vicki Kozikoujekian
General Counsel
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For further information, please call: (512) 929-6824

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Texas

TRANSFERRED RULES

The Government Code, §2002.058, authorizes the Secretary of State to remove or transfer rules within the Texas Administrative Code when the agency that promulgated the rules is abolished. The Secretary of State will publish notice of rule transfer or removal in this section of the *Texas Register*. The effective date of a rule transfer is the date set by the legislature, not the date of publication of notice. Proposed or emergency rules are not subject to administrative transfer.

Department of State Health Services

Rule Transfer

During the 84th Legislative Session, the Texas Legislature passed Senate Bill 200, addressing the reorganization of health and human services delivery in Texas. As a result, certain functions previously performed by the Department of State Health Services (DSHS), including client services, certain regulatory functions, and the operation of state hospitals, transferred to the Texas Health and Human Services Commission (HHSC) in accordance with Texas Government Code, §531.0201 and §531.02011. The DSHS rules in Texas Administrative Code, Title 25, Part 1, Chapter 61, Chronic Diseases, Subchapter A, Kidney Health Care, that are related to these transferred functions, are being transferred to HHSC under Texas Administrative Code, Title 26, Part 1, Chapter 365, Kidney Health Care.

The rules will be transferred in the Texas Administrative Code effective January 15, 2022.

The following table outlines the rule transfer:

Figure: 25 TAC Chapter 61, Subchapter A

TRD-202105179

Health and Human Services Commission

Rule Transfer

During the 84th Legislative Session, the Texas Legislature passed Senate Bill 200, addressing the reorganization of health and human services delivery in Texas. As a result, certain functions previously performed by the Department of State Health Services (DSHS), including client services, certain regulatory functions, and the operation of state hospitals, transferred to the Texas Health and Human Services Commission (HHSC) in accordance with Texas Government Code, §531.0201 and §531.02011. The DSHS rules in Texas Administrative Code, Title 25, Part 1, Chapter 61, Chronic Diseases, Subchapter A, Kidney Health Care, that are related to these transferred functions, are being transferred to HHSC under Texas Administrative Code, Title 26, Part 1, Chapter 365, Kidney Health Care.

The rules will be transferred in the Texas Administrative Code effective January 15, 2022.

The following table outlines the rule transfer:

Figure: 25 TAC Chapter 61, Subchapter A

TRD-202105180

Figure: 25 TAC Chapter 61, Subchapter A

Current Rules **Title 25. Health Services** **Part 1. Department of State Health Services** **Chapter 61. Chronic Diseases** **Subchapter A. Kidney Health Care**	**Move to** **Title 26. Health and Human Services** **Part 1. Texas Health and Human Services Commission** **Chapter 365. Kidney Health Care**
§61.1. General.	§365.1. General.
§61.2. Definitions.	§365.2. Definitions.
§61.3. Client Eligibility Requirements.	§365.3. Client Eligibility Requirements.
§61.4. Applications.	§365.4. Applications.
§61.5. Benefits and Limitations.	§365.5. Benefits and Limitations.
§61.7. Claims Submission and Payment Rates.	§365.7. Claims Submission and Payment Rates.
§61.8.Claim Filing Deadlines.	§365.8. Claim Filing Deadlines.
§61.9. Rights and Responsibilities.	§365.9. Rights and Responsibilities.
§61.10. Modifications, Suspensions, Denials, and Terminations.	§365.10. Modifications, Suspensions, Denials, and Terminations.
§61.11. Rights of Appeal.	§365.11. Rights of Appeal.

Department of Assistive and Rehabilitative Services

Rule Transfer

During the 84th Legislative Session, the Texas Legislature passed Senate Bill 200, addressing the reorganization of health and human services delivery in Texas. As a result, some agencies were abolished, and their functions transferred to the Texas Health and Human Services Commission (HHSC). Texas Government Code, §531.0202(a), specified the Department of Assistive and Rehabilitative Services (DARS) be abolished September 1, 2017, after all its functions were transferred to HHSC or the Department of Family and Protective Services in accordance with Texas Government Code, §531.0201. The former DARS rules in Texas Administrative Code (TAC), Title 40, Part 2, Chapter 107, Division for Rehabilitation Services, Subchapter D, Comprehensive Rehabilitation Services are being transferred to 26 TAC Part 1, Chapter 352, Comprehensive Rehabilitation Services.

The rules will be transferred in the Texas Administrative Code effective January 15, 2022.

The following table outlines the rule transfer:

Figure: 40 TAC Chapter 107, Subchapter D

TRD-202105181

Health and Human Services Commission

Rule Transfer

During the 84th Legislative Session, the Texas Legislature passed Senate Bill 200, addressing the reorganization of health and human services delivery in Texas. As a result, some agencies were abolished, and their functions transferred to the Texas Health and Human Services Commission (HHSC). Texas Government Code, §531.0202(a), specified the Department of Assistive and Rehabilitative Services (DARS) be abolished September 1, 2017, after all its functions were transferred to HHSC or the Department of Family and Protective Services in accordance with Texas Government Code, §531.0201. The former DARS rules in Texas Administrative Code (TAC), Title 40, Part 2, Chapter 107, Division for Rehabilitation Services, Subchapter D, Comprehensive Rehabilitation Services are being transferred to 26 TAC Part 1, Chapter 352, Comprehensive Rehabilitation Services.

The rules will be transferred in the Texas Administrative Code effective January 15, 2022.

The following table outlines the rule transfer:

Figure: 40 TAC Chapter 107, Subchapter D

TRD-202105182

Figure: 40 TAC Chapter 107, Subchapter D

Current Rules **Title 40. Social Services and Assistance** **Part 2. Department of Assistive and Rehabilitative Services** **Chapter 107. Division for Rehabilitation Services** **Subchapter D. Comprehensive Rehabilitation Services**	**Move to** **Title 26. Health and Human Services** **Part 1. Texas Health and Human Services Commission** **Chapter 352. Comprehensive Rehabilitation Services**
§107.701. Purpose.	§352.1. Purpose.
§107.703. Legal Authority.	§352.3. Legal Authority.
§107.705. Definitions.	§352.5. Definitions.
§107.707. Basic Requirements for Eligibility.	§352.7. Basic Requirements for Eligibility.
§107.709. Service Arrays.	§352.9. Service Arrays.
§107.711. Service Types.	§352.11. Service Types.
§107.713. Limitations of Services.	§352.13. Limitations of Services.
§107.714. Consumer (Client) Participation.	§352.14. Consumer (Client) Participation.
§107.715. Complaint Resolution Process.	§352.15. Complaint Resolution Process.

Review Of Agency Rules

This section contains notices of state agency rule review as directed by the Texas Government Code, §2001.039. Included here are proposed rule review notices, which invite public comment to specified rules under review; and adopted rule review notices, which summarize public comment received as part of the review. The complete text of an agency's rule being reviewed is available in the *Texas Administrative Code* on the Texas Secretary of State's website.

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the website and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

State Board for Educator Certification

Title 19, Part 7

The State Board for Educator Certification (SBEC) proposes the review of Title 19, Texas Administrative Code (TAC), Chapter 229, Accountability System for Educator Preparation Programs, pursuant to the Texas Government Code (TGC), §2001.039.

As required by the TGC, §2001.039, the SBEC will accept comments as to whether the reasons for adopting 19 TAC Chapter 229 continue to exist.

The comment period on the review of 19 TAC Chapter 229 begins December 31, 2021, and ends January 31, 2022. A form for submitting public comments on the proposed rule review is available on the TEA website at *https://tea.texas.gov/About_TEA/Laws_and_Rules/SBEC_Rules_(TAC)/State_Board_for_Educator_Certification_Rule_Review/*. The SBEC will take registered oral and written comments on the review of 19 TAC Chapter 229 at the February 11, 2022 meeting in accordance with the SBEC board operating policies and procedures.

TRD-202105172
Cristina De La Fuente-Valadez
Director, Rulemaking
State Board for Educator Certification
Filed: December 20, 2021

The State Board for Educator Certification (SBEC) proposes the review of Title 19, Texas Administrative Code (TAC), Chapter 247, Educators' Code of Ethics, pursuant to the Texas Government Code (TGC), §2001.039.

As required by the TGC, §2001.039, the SBEC will accept comments as to whether the reasons for adopting 19 TAC Chapter 247 continue to exist.

The comment period on the review of 19 TAC Chapter 247 begins December 31, 2021, and ends January 31, 2022. A form for submitting public comments on the proposed rule review is available on the TEA website at *https://tea.texas.gov/About_TEA/Laws_and_Rules/SBEC_Rules_(TAC)/State_Board_for_Educator_Certification_Rule_Review/*. The SBEC will take registered oral and written comments on the review of 19 TAC Chapter 247 at the February 11, 2022 meeting in accordance with the SBEC board operating policies and procedures.

TRD-202105173
Cristina De La Fuente-Valadez
Director, Rulemaking
State Board for Educator Certification
Filed: December 20, 2021

The State Board for Educator Certification (SBEC) proposes the review of Title 19, Texas Administrative Code (TAC), Chapter 250, Administration, pursuant to the Texas Government Code (TGC), §2001.039.

As required by the TGC, §2001.039, the SBEC will accept comments as to whether the reasons for adopting 19 TAC Chapter 250 continue to exist.

The comment period on the review of 19 TAC Chapter 250 begins December 31, 2021, and ends January 31, 2022. A form for submitting public comments on the proposed rule review is available on the TEA website at *https://tea.texas.gov/About_TEA/Laws_and_Rules/SBEC_Rules_(TAC)/State_Board_for_Educator_Certification_Rule_Review/*. The SBEC will take registered oral and written comments on the review of 19 TAC Chapter 250 at the February 11, 2022 meeting in accordance with the SBEC board operating policies and procedures.

TRD-202105174
Cristina De La Fuente-Valadez
Director, Rulemaking
State Board for Educator Certification
Filed: December 20, 2021

Texas Health and Human Services Commission

Title 26, Part 1

The Texas Health and Human Services Commission (HHSC) proposes to review and consider for readoption, revision, or repeal the chapter listed below, in its entirety, contained in Title 26, Part 1, of the Texas Administrative Code:

Chapter 272, Transition Assistance Services

Subchapter A Introduction

Subchapter B TAS Provider Requirements

Subchapter C Staff Requirements

Subchapter D Service Delivery Requirements

Subchapter E Claim Payments And Documentation

This review is conducted in accordance with the requirements of Texas Government Code §2001.039, which requires state agencies, every four years, to assess whether the initial reasons for adopting a rule con-

tinue to exist. After reviewing its rules, the agency will readopt, readopt with amendments, or repeal its rules.

Comments on the review of Chapter 272, Transition Assistance Services, may be submitted to HHSC Rules Coordination Office, Mail Code 4102, P.O. Box 13247, Austin, Texas 78711-3247, or by email to HHSRulesCoordinationOffice@hhs.texas.gov. The deadline for comments is on or before 5:00 p.m. central time on the 31st day after the date this notice is published in the *Texas Register*.

The text of the rule sections being reviewed will not be published, but may be found in Title 26, Part 1, of the Texas Administrative Code or on the Secretary of State's website at

https://texreg.sos.state.tx.us/public/readtac$ext.ViewTAC?tac_view=4&ti=26&pt=1&ch=272.

TRD-202105194
Mahan Farman-Farmaian
Director
Texas Health and Human Services Commission
Filed: December 21, 2021

Adopted Rule Reviews

Office of Consumer Credit Commissioner

Title 7, Part 5

The Finance Commission of Texas (commission) has completed the rule review of Texas Administrative Code, Title 7, Part 5, Chapter 88, concerning Consumer Debt Management Services, in its entirety. The rule review was conducted under Texas Government Code, §2001.039.

Notice of the review of 7 TAC Chapter 88 was published in the October 1, 2021, issue of the *Texas Register* (46 TexReg 6547). The commission received no comments in response to that notice. The commission believes that the reasons for initially adopting the rules contained in this chapter continue to exist.

As a result of internal review by the Office of Consumer Credit Commissioner, the commission has determined that certain revisions are appropriate and necessary. Those proposed changes are published elsewhere in this issue of the *Texas Register*.

As a result of the rule review, the commission finds that the reasons for initially adopting the rules in 7 TAC Chapter 88 continue to exist, and readopts this chapter in accordance with the requirements of Texas Government Code, §2001.039.

TRD-202105130
Matthew Nance
Deputy General Counsel
Office of Consumer Credit Commissioner
Filed: December 17, 2021

TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure 1: 1 TAC §18.31(a)

Campaign Finance Reports: Section of Election Code	Threshold Description	Original Threshold Amount	Adjusted Amount
253.031(b)	PAC: Amount of contributions or expenditures permitted before TA is required	$500	$920
253.031(d)(2)	CEC: Amount of contributions or expenditures permitted before TA is required	$25,000	$34,220
253.032(a)	Contribution by Out-of-state PAC: Threshold above which certain paperwork is required	$500	$940
253.032(a)(1)	Contribution to Out-of-state PAC: Threshold above which certain contribution information is required	$100	$190
253.032(e)	Contribution by Out-of-state PAC: Threshold at or below which certain information is required	$500	$940
254.031(a)(1)	Contributions: Threshold over which more information is required	$50	$90
254.031(a)(2)	Loans: Threshold over which more information is required	$50	$90
254.031(a)(3)	Expenditures: Threshold over which more information is required	$100	$190
254.031(a)(5)	Contributions: Threshold at or below which more information is not required	$50	$90
254.031(a)(5)	Expenditures: Threshold at or below which more information is not required	$100	$190
254.031(a)(9)	Interest, credits, refunds: Threshold over which more information is required	$100	$120
254.031(a)(10)	Sale of political assets: Threshold over which proceeds must be reported	$100	$120
254.031(a)(11)	Investment Gain: Threshold over which more information is required	$100	$120
254.031(a)(12)	Contribution Gain: Threshold over which more information is required	$100	$120
254.0311(b)(1)	Caucus, contributions from non-caucus members: Threshold over which more information is required	$50	$90
254.0311(b)(2)	Caucus, loans: Threshold over which more information is required	$50	$90
254.0311(b)(3)	Caucus, expenditures: Threshold over which more information is required	$50	$90

Campaign Finance Reports: Section of Election Code	Threshold Description	Original Threshold Amount	Adjusted Amount
254.0311(b)(4)	Caucus, contributions and expenditures: Threshold at or below which more information is not required	$50	$90
254.0312	Contributions, Best Efforts: Threshold under which filer is not required to request contributor information to be in compliance	$500	$720
254.036	Electronic Filing Exemption: Threshold at or below which a filer may qualify	$20,000	$28,800
254.038(a)	Daily Reports by certain candidates and PACs: Contribution threshold triggering report	$1,000	$1,890
254.039	Daily Reports by GPACs: Contribution threshold triggering report	$5,000	$6,450
254.039	Daily reports by GPACs: DCE expenditure thresholds (single candidate/group of candidates)	$1,000/$15,000	$1,890/$28,330
254.0611(a)(2)	Judicial candidates, contributions: Threshold over which more information is required	$50	$90
254.0611(a)(3)	Judicial candidates, asset purchase: Threshold over which more information is required	$500	$940
254.0612	Statewide executive and legislative candidates, contributions: Threshold over which more information is required	$500	$940
254.095	Local officeholders, contributions: Threshold under which reporting is not required	$500	$940
254.151(6)	GPAC, contributions: Threshold over which more information is required	$50	$90
254.1541(a)	GPAC, higher itemization threshold: Threshold under which it applies	$20,000	$27,380
254.1541(b)	GPACs that meet higher itemization threshold: Threshold over which more contributor information is required	$100	$190
254.156(1)	MPAC: Threshold over which contribution, lender and expenditure information is required	$10	$20
254.156(2)	MPACs that meet higher itemization threshold: Threshold over which more contributor information is required	$20	$40

Campaign Finance Reports: Section of Election Code	Threshold Description	Original Threshold Amount	Adjusted Amount
254.181 254.182 254.183	Candidate or SPACs, modified reporting: Contribution or expenditure threshold at or below which filers may avoid pre-election reports	$500	$940
254.261	DCE filers: Threshold over which a report must be filed	$100	$140

Figure 2: 1 TAC §18.31(a)

Lobby Registrations and Reports: Section of Government Code	Threshold Description	Original Threshold Amount	Adjusted Amount
305.003(a)(1)	Lobbyist, expenditures: Threshold over which registration is required	$500, by 1 Tex. Admin. Code §34.41	$820
305.003(a)(2)	Lobbyist, compensation: Threshold over which registration is required	$1,000, by 1 Tex. Admin. Code §34.43	$1,640
305.004(7)	Lobbying for political party: Threshold at or below which registration is not required	$5,000	$9,440
305.005(g)(2)	Lobbyist: Compensation threshold	$10,000	Less than $18,890
305.005(g)(3)	Lobbyist: Compensation threshold	$25,000	$18,890 to less than $47,220
305.005(g)(4)	Lobbyist: Compensation threshold	$50,000	$47,220 to less than $94,440
305.005(g)(5)	Lobbyist: Compensation threshold	$100,000	$94,440 to less than $188,890
305.005(g)(6)	Lobbyist: Compensation threshold	$150,000	$188,890 to less than $283,330
305.005(g)(7)	Lobbyist: Compensation threshold	$200,000	$283,330 to less than $377,770
305.005(g)(8)	Lobbyist: Compensation threshold	$250,000	$377,770 to less than $472,220
305.005(g)(9)	Lobbyist: Compensation threshold	$300,000	$472,220 to less than $566,660
305.005(g)(10)	Lobbyist: Compensation threshold	$350,000	$566,660 to less than $661,100
305.005(g)(11)	Lobbyist: Compensation threshold	$400,000	$661,100 to less than $755,540
305.005(g)(12)	Lobbyist: Compensation threshold	$450,000	$755,540 to less than $849,990
305.005(g)(13)	Lobbyist: Compensation threshold	$500,000	$849,990 to less than $944,430

Lobby Registrations and Reports: Section of Government Code	Threshold Description	Original Threshold Amount	Adjusted Amount
305.005(g-1)	Lobbyist: Compensation threshold	$500,000	$944,430 or more
305.0061(c)~~(3)~~	Lobbyist, legislative/executive branch member: Threshold over which gifts, awards and mementos must be disclosed	$50	$90
305.0061(e-1)	Lobbyist, food and beverage: Threshold at or below which it is considered a gift and reported as such	$50	$90
305.0063	Lobbyist, annual filer: Expenditure threshold at or below which filer may file annually	$1,000	$1,890

Figure 3: 1 TAC §18.31(a)

Personal Financial Statements: Section of Gov't Code	Threshold Description	Original Threshold Amount	Adjusted Amount
572.022(a)(1)	PFS threshold	less than $5,000	less than $9,440
572.022(a)(2)	PFS threshold	$5,000 to less than $10,000	$9,440 to less than $18,890
572.022(a)(3)	PFS threshold	$10,000 to less than $25,000	$18,890 to less than $47,220
572.022(a)(4)	PFS threshold	$25,000 or more	$47,220 or more
572.005, 572.023(b)(1)	PFS, retainer: Threshold over which filer with a substantial interest in a business entity must report more information	$25,000	$47,220
572.023(b)(4)	PFS, interest, dividends, royalties and rents: Threshold over which information must be reported	$500	$940
572.023(b)(5)	PFS, loans: Threshold over which information must be reported	$1,000	$1,890
572.023(b)(7)	PFS, gifts: Threshold over which information must be reported	$250	$470
572.023(b)(8)	PFS, income from trust: Threshold over which information must be reported	$500	$940
572.023(b)(15)	PFS, government contracts: Threshold of aggregate over which more information must be reported	Exceeds $10,000	$10,370
572.023(b)(15)(A)	PFS, government contracts: Itemization threshold	$2,500 or more	$2,590 or more
572.023(b)(16)(D)(i)	PFS, bond counsel fees paid to legislator: Threshold	less than $5,000	less than $5,180
572.023(b)(16)(D)(ii)	PFS, bond counsel fees paid to legislator: Threshold	at least $5,000 but less than $10,000	at least $5,180 but less than $10,370

Personal Financial Statements: Section of Gov't Code	Threshold Description	Original Threshold Amount	Adjusted Amount
572.023(b)(16)(D)(iii)	PFS, bond counsel fees paid to legislator: Threshold	at least $10,000 but less than $25,000	at least $10,370 but less than $25,920
572.023(b)(16)(D)(iv)	PFS, bond counsel fees paid to legislator: Threshold	$25,000 or more	$25,920 or more
572.023(b)(16)(E)(i)	PFS, bond counsel fees paid to individual's firm: Threshold	less than $5,000	less than $5,180
572.023(b)(16)(E)(ii)	PFS, bond counsel fees paid to individual's firm: Threshold	at least $5,000 but less than $10,000	at least $5,180 but less than $10,370
572.023(b)(16)(E)(iii)	PFS, bond counsel fees paid to individual's firm: Threshold	at least $10,000 but less than $25,000	at least $10,370 but less than $25,920
572.023(b)(16)(E)(iv)	PFS, bond counsel fees paid to individual's firm: Threshold	$25,000 or more	$25,920 or more

Figure 4: 1 TAC §18.31(a)

Speaker Election and Certain Ceremonial Reports: Section of Government Code	Threshold Type	Current Threshold Amount	Adjusted Amount
302.014(4)	Speaker: Expenditures over which more information must be reported	$10	$20
303.005(a)(1) – (10)	Governor for a Day/Speaker's Day: Threshold over which more information must be reported	$50	$90

Figure: 16 TAC §25.475(g)(6)

<table>
<tr><td colspan="5">Electricity Facts Label (EFL)
{Name of REP}, {Name of Product}, {Service area (if applicable)},
{Date}</td></tr>
<tr><td rowspan="4">Electricity price</td><td>Average Monthly Use</td><td>500kWh</td><td>1,000kWh</td><td>2,000kWh</td></tr>
<tr><td>Average price per kWh</td><td>{x.x}¢</td><td>{x.x}¢</td><td>{x.x}¢</td></tr>
<tr><td>For POLR use: Minimum price per kilowatt-hour.</td><td>{x.x}¢</td><td>{x.x}¢</td><td>{x.x}¢</td></tr>
<tr><td colspan="4">{If applicable} On-peak {season or time}:{xxx}
{If applicable} Average on-peak price per kilowatt-hour: {x.x}¢
{If applicable} Average off-peak price per kilowatt-hour: {x.x}¢
{If applicable} Potential surcharges corresponding to the given electric service.
{If variable that does not change within a defined percentage} Except for price changes allowed by law or regulatory action, this price is the price that will be applied during your first billing cycle; this price may change in subsequent months at the sole discretion of {insert REP name}.
{If residential} Please review the historical price of this product available at {insert website address and toll-free number}.

{If variable that changes within a defined percentage}
Except for price changes allowed by law or regulatory action, this price is the price that will be applied during your first billing cycle; this price may increase by no more than {insert percentage} percent from month-to-month. {If residential} Please review the historical price of this product available at {insert website address and toll-free number}.</td></tr>
<tr><td>Other Key Terms and Questions</td><td colspan="4">See Terms of Service statement for a full listing of fees, deposit policy, and other terms.</td></tr>
<tr><td rowspan="4"></td><td colspan="2">Type of Product</td><td colspan="2">(fixed rate indexed or variable)</td></tr>
<tr><td colspan="2">Contract Term</td><td colspan="2">(number of months)</td></tr>
<tr><td colspan="2">Do I have a termination fee or any fees associated with terminating service?</td><td colspan="2">(yes/no) (if yes, how much)</td></tr>
<tr><td colspan="2">Can my price change during contract period?</td><td colspan="2">(yes/no)</td></tr>
</table>

Disclosure Chart	If my price can change, how will it change, and by how much?	(formula/description of the way the price will vary and how much it can change) In addition if the REP chooses to pass through regulatory changes the following must [shall] be required: "The price applied in the first billing cycle may be different from the price in this EFL if there are changes in TDSP charges; changes to the Electric Reliability Council of Texas or Texas Regional Entity administrative fees charged to loads; or changes resulting from federal, state or local laws or regulatory actions that impose new or modified fees or costs that are outside our control."
	What other fees may I be charged?	(List, or give direct location in TOS.)
	Is this a pre-pay or pay in advance product	(yes/no)
	Does the REP purchase excess distributed renewable generation?	(yes/no)
	Renewable Content	(This product is x% renewable)
	The statewide average for renewable content is	(% of statewide average for renewable content)
	Contact info, certification number, version number *Additional information may be added below.*	

Figure: 19 TAC Chapter 228 - Preamble

Implications of Proposed Rule Changes for EPPs Conducting Formal Observations

Candidate Population	If EPPs Conduct Only In-Person Observations	If EPPs Conduct In-Person and Virtual Observations
• Intern Certificate Holders	*5	3 in-person and 2 virtually
• 28 Week Clinical Teaching	4	2 in-person and 2 virtually
• Probationary Certificate Holders • 14 Week Clinical Teaching	*3	2 in-person and 2 virtually

**Individuals who are seeking more than one certificate field are required to receive more observations based on the total number of certificate fields being sought.*

Figure: 19 TAC §228.10(b)(1) [~~Figure: 19 TAC §228.10(b)(1)~~]

Component I: Governance	Evidence
19 TAC §228.20(b): The representative nature of an advisory committee.	Records of advisory committee membership reflecting at least three of the groups listed in this subsection; and Advisory committee meeting attendance records.
19 TAC §228.20(b): Input provided by an advisory committee.	Advisory committee member input reflected in the advisory committee minutes.
19 TAC §228.20(b): EPP informed advisory committee members of their roles and responsibilities.	Advisory committee training materials, date(s), attendance records; or Advisory committee handbook with acknowledgement of receipt by advisory committee member; or Letter of invitation with roles and responsibilities outlined and acknowledged by invitee as to accept or decline; or Bylaws acknowledged receipt by advisory committee member.
19 TAC §228.20(b): Advisory committee meeting.	Dated minutes of each advisory committee meeting.
19 TAC §228.20(e): The EPP provided notice of amendments to its approved program.	Record of notification to TEA.
19 TAC §228.20(f): The EPP provided notice and received approval of amendments to its approved program.	Record of approval or denial from TEA.
19 TAC §228.20(g): The EPP published a calendar of activities.	Calendar posted on EPP website.
19 TAC §228.10(a): The EPP has met the requirements for approval.	EPP accreditation status on file with TEA.
19 TAC §228.10(b): The EPP has met the requirements for continuing approval.	EPP accreditation status on file with TEA.
19 TAC §228.10(c): The EPP has met the requirements to offer clinical teaching.	EPP clinical teaching status on file with TEA.
19 TAC §228.10(d): The EPP has met the requirements to offer a certification class and/or category.	EPP certification class and/or category status on file with TEA.
19 TAC §228.10(e): The EPP provided notice of an additional location.	Record of letter(s) on letterhead signed by an EPP's legally authorized agent or representative sent by email or regular mail.
19 TAC §228.15: The EPP has met the requirements for consolidation or closure.	EPP notice of consolidation or closure; and EPP notification of candidates; and EPP completion of required SBEC and TEA actions. If closing, EPP notification of representative.

19 TAC §228.17: The EPP has met the requirements for changing ownership.	EPP notice of change of ownership.

Component II: Admission	Evidence
19 TAC §227.1(c): The EPP has informed applicants of the required information.	Website; or Recruitment information; or Orientation materials; or Admission material.
19 TAC §227.10(a)(1) and (2): Candidates have met the required institution of higher education (IHE) enrollment or degree requirements.	Original transcripts.
19 TAC §227.10(e): Out-of-country candidates have met the required degree requirement.	Official transcript evaluated by approved entity with equivalent report issued.
19 TAC §227.10(a)(3)(A): Candidates have met the minimum grade point average (GPA) requirement.	Official transcripts; and Documentation of calculations to determine GPA in the last 60 hours.
19 TAC §227.10(a)(3)(B) and (D): Candidates that have been admitted with a GPA less than the 2.5 minimum have met the requirements for the GPA exception.	Program policy; and Documentation signed by the director that certifies each applicant's work, business, or career experience demonstrates achievement equivalent to the academic achievement represented by the GPA requirement; and Pre-Admission Content Test score report.
19 TAC §227.10(a)(4): Applicants demonstrated content knowledge prior to admission.	Official transcripts; and Record of calculation of content hours by course; and Score report for a comparable examination approved by TEA; or Score report for Pre-Admission Content Test.
19 TAC §227.10(a)(5): The EPP has informed non-teacher applicants in writing of any certificate issuance deficiencies prior to admission.	Letter, email, or completed form identifying deficient areas
19 TAC §227.10(a) (6) [~~(5)~~] : Applicants demonstrated basic skills prior to admission.	Score reports; or Official transcripts bearing TSI requirements.

Component II: Admission	Evidence
19 TAC §227.10(a) (7) [(6)] : Applicants demonstrated proficiency in English language skills prior to admission.	Official transcripts with degree from U.S. university or college; or A letter from the out-of-country institution stating the language of instruction is English; or Official TOEFL scores.
19 TAC §227.10(a) (8) [(7)] : A screening device has been used to determine applicant admission.	Completed application; and Interview with standard questions and evaluated with a cut score or rubric that includes descriptions of levels of performance quality based on a coherent set of criteria; or Other screening instrument evaluated with a cut score or a rubric that includes descriptions of levels of performance quality based on a coherent set of criteria.
19 TAC §227.10(a) (9) [(8)] : Applicants have met other academic criteria for admission.	Application for admission; and Records of academic requirements; and Academic requirements are published on website, or catalogues, or brochures, or orientation materials.
19 TAC §227.10(b): Applicants have met additional admission requirements.	Records of admission requirements; and Documentation of published requirements in candidate records; and Admission requirements are published on website, or catalogues, or brochures, or orientation materials.
19 TAC §227.10(c): The EPP has appropriately admitted applicants who have transferred from other EPPs.	Transfer form; and Application for admission; and Official transcripts.
19 TAC §227.10(d): Career and Technical Education applicants have been admitted with the required documentation of licensure and experience.	License and/or other supporting documentation of work experience; and Statement of qualifications; and Diploma or Transcript.
19 TAC §227.17(a): Applicants have been formally admitted to the EPP.	Required admission documents; and Written formal admission offer letter; and Written and dated formal admission acceptance letter.

Component II: Admission	Evidence
19 TAC §227.17(e) and (f): Candidates were admitted prior to beginning coursework and training or receiving approval to test.	Written and dated formal admission acceptance letter; and Coursework record with start and completion dates; and Testing history.
19 TAC §227.15(a): Applicants admitted on a contingency basis met all admission requirements relating to contingency admission.	Written contingency admission offer letter; and Written and dated contingency admission acceptance letter; and Required admission documents; and Official transcripts; and Information from university confirming date of graduation; and Program records indicating which semester admission applies.
19 TAC §241.5(c), Principal, and 19 TAC §242.5(c), Superintendent: Candidates admitted met all admission requirements.	Screening instrument with rubric and cut score.
19 TAC §242.5(a): Superintendent applicants were admitted with required degree requirements.	Official transcript.

Component III: Curriculum	Evidence
19 TAC §228.30(a): The curriculum is based on approved educator standards.	Charts identifying alignment of educator standards in curriculum; and Application of educator standards identified in syllabi/course outlines; or Application of educator standards identified in course/training lesson plans.
19 TAC §228.30(a): The curriculum addresses the relevant Texas Essential Knowledge and Skills (TEKS).	Charts identifying alignment of educator standards in curriculum; and Syllabi/course outlines identifying training in using TEKS to inform instruction and assessment; or Instructor lesson plans reflecting instruction and use of TEKS.
19 TAC §228.40(a): The EPP uses assessments to measure candidate progress.	Syllabi/course outlines reflecting assessments of knowledge and skills; and Assessments that measure mastery of educator standards.
19 TAC §228.30(b): The curriculum is research-based.	Syllabi/course outlines with bibliographies/references.
19 TAC §228.30(c)-(e): The required subject matter has been included in the curriculum for candidates seeking initial certification in any certification class.	Charts identifying alignment of educator standards in curriculum; and Syllabi/course outlines; or Coursework.

Component IV: Coursework, Training, Program Delivery, and Ongoing Support	Evidence
19 TAC §228.35(a)(1): The EPP provides candidates with adequate preparation and training.	Candidate testing history; and Syllabi/course outlines; and Program benchmarks; and Degree plan/transcripts.
19 TAC §228.35(a)(2): Coursework and/or training meets requirements.	Syllabi/course outline; or Coursework.
19 TAC §228.35(a)(3): Candidates complete coursework and training prior to EPP completion and standard certification.	Program benchmarks; and Attendance records or attendance policies that require a certain level of attendance for a passing grade; and Program schedule of courses/modules; and Degree plan/transcripts for each candidate reviewed.
19 TAC §228.35(a)(4): Late hire candidates may receive a portion of the required coursework and training by their school district or campus.	Certificate of attendance; or Sign-in sheet; or Other written school district verification.
19 TAC §228.35(a)(5)(A): The EPP has procedures for allowing relevant military experiences.	Policies and procedures in handbooks; and Advisory committee minutes; or Admission information; or Orientation material; or Website information.
19 TAC §228.35(a)(5)(B): The EPP has procedures for allowing prior experience, education, or training.	Policies and procedures in handbooks; and Advisory committee minutes; or Admission information; or Orientation material; or Website information.
19 TAC §228.35(a)(6): Coursework and training that is offered online meets standards.	Accreditation documentation; or Quality assurance documentation; or THECB compliance documentation.
19 TAC §228.35(b): Candidates for initial teacher certification receive the required number of hours of coursework and training.	Document tracking hours for courses; or Degree plans; or Transcripts; or Program Course/Module Schedule; or Benchmarks.
19 TAC §228.35(b)(1): Candidates have completed the field-based experience requirements prior to clinical teaching or internship.	Start date of clinical teaching or internship; and Field-based experience observation log reflecting date, subject area, grade level, campus, district, time in and time out, and interaction with students; verifying signatures of observed teacher; and Written or videotaped reflections of observation.
19 TAC §228.35(b)(2): Candidates have completed the required coursework and/or training prior to clinical teaching or internship.	Start date of clinical teaching or internship; and Document tracking hours for courses; or Degree plans; or Transcripts; or Program Course/Module Schedule; or Benchmarks.
19 TAC §228.35(c): Candidates seeking initial certification in a class other than classroom teacher have completed the required clock hours of coursework and/or training.	Document tracking hours for courses; or Degree plans; or Transcripts; or Program Course/Module Schedule; or Benchmarks.

Component IV: Coursework, Training, Program Delivery, and Ongoing Support	Evidence
19 TAC §228.35(d): Late hire candidates have completed the pre-internship requirements.	Record of coursework completed (start and end dates); and Field-based experience observation log reflecting date, subject area, grade level, campus, district, time in and time out, and interaction with students; verifying signatures of observed teacher; and Reflections of observation; and Record of assignment date.
19 TAC §228.35(e)(1)(A): Teacher candidates complete required field-based experiences.	Field-based experience observation log reflecting date, subject area, grade level, campus, district, time in and time out, and interactions with students; verifying signatures of observed teacher; and Reflections of observation.
19 TAC §228.35(e)(1)(B): Field-based experience via electronic transmission or other video or technology-based method meets requirements.	Field-based observation log reflecting date, subject area, and grade level; verifying signatures of program staff; and Reflections of observation.
19 TAC §228.35(e)(2)(A) and (B): Candidates seeking initial teacher certification have completed clinical teaching.	Clinical teaching placement lists with placement information including start and end dates, start and end time; grade level, subject area, cooperating teacher name, and field supervisor assigned; and Clinical teaching log including dates, start and end times each day; verified by cooperating teacher.
19 TAC §228.35(e)(2)(C)(i): Candidates seeking initial teacher certification have completed an internship.	Completed statement of eligibility; and Internship placement lists with placement information including tests passed, start and end dates, start and end times, district, campus, grade level, subject area, mentor, and field supervisor assigned. If more than 30 days of internship are missed: • Request letter from candidate; and • Approval by appropriate program staff; and • Identified start date and end date of internship; and • Make-up plan if more than thirty days; and • Documentation of make-up time.
19 TAC §228.35(e)(2)(C)(iii): Candidates complete additional internship assignments that meet requirements for an internship and are appropriately supervised by the EPP.	Record of coursework completed; and Completed statement of eligibility; and Internship placement lists with placement information including tests passed, start and end dates, start and end times, district, campus, grade level, subject areas, mentor, and field supervisor assigned; and Intern or probationary certificates; and Field supervisor observation logs; and Letter from school district.
19 TAC §228.35(e)(2)(C)(iv): Candidates hold probationary or intern certificates while completing internship assignments.	Intern or probationary certificate.
19 TAC §228.35(e)(2)(C)(v): Additional internships recommended by the EPP have met the requirements for allowing candidates to complete additional internships.	Record of successful or unsuccessful internship; and Deficiency plan; and Benchmarks.

Component IV: Coursework, Training, Program Delivery, and Ongoing Support	Evidence
19 TAC §228.35(e)(2)(C)(vi)(I): The EPP supports the candidate during an additional internship unless the internship is ended early due to issuance of a standard certificate.	Standard certificate.
19 TAC §228.35(e)(2)(C)(vi)(II) The EPP supports the candidate during an additional internship unless the internship is ended early because the candidate is non-renewed by, resigns from, or is terminated by the employer.	Written notice from candidate; and Written notice to candidate; and Written notice to TEA.
19 TAC §228.35(e)(2)(C)(vi)(III): The EPP supports the candidate during an additional internship unless the internship is ended early because the candidate is released from the EPP.	Written notice to candidate; and Written notice to school or district; and Written notice to TEA.
19 TAC §228.35(e)(2)(C)(vi)(IV): The EPP supports the candidate during an additional internship unless the internship is ended early because the candidate withdraws from the EPP.	Written notice to program; and Written notice to candidate; and Written notice to school or district; and Written notice to TEA.
19 TAC §228.35(e)(2)(E): The EPP requested and was approved for an exception to the clinical teaching option.	Record of approval from SBEC.
19 TAC §228.35(e)(2)(F): Candidate training included experiences with a full range of professional responsibilities including the start of the school year.	Documentation of field-based experiences and/or clinical teaching experiences.
19 TAC §228.35(e)(3): An internship or clinical teaching experience was completed at a Head Start Program that meets requirements.	Teacher certification and mentor training records; and Federal and TEA approval records; and Records documenting Head Start student population; and Head Start curriculum.
19 TAC §228.35(e)(4) and (5): The internship or clinical teaching experiences take place in setting that meets requirements.	Internship or clinical teaching placement lists with placement information including tests passed, start and end dates, start and end times, district, campus, grade level, subject areas, mentor, and field supervisor assigned; and Statement of eligibility (only required for internship).
19 TAC §228.35(e)(6)(A) and (B): Candidates seeking certification in a class other than classroom teacher complete a practicum that meets the requirements.	Field supervisor observation logs reflecting educator standards based activities; and Practicum information with start and end dates, district, campus, site, and field supervisor assigned.
19 TAC §228.35(e)(6)(C)(i): An intern or probationary certificate has been issued to a candidate for a certification class other than classroom teacher who meets the requirements and conditions.	Statement of eligibility; and Program requirements; and Testing history.
19 TAC §228.35(e)(6)(C)(ii): Additional practicums recommended by the EPP have met the requirements for allowing candidates to complete additional practicums.	Record of successful or unsuccessful practicum; and Deficiency plan; and Benchmarks.
19 TAC §228.35(e)(7): The EPP applied and received approval for a candidate to complete field-based experience, clinical teaching, internship, or practicum in an out-of-state or out-of-country placement.	Record of approval from TEA.

Component IV: Coursework, Training, Program Delivery, and Ongoing Support	Evidence
19 TAC §228.35(f): Candidates placed in clinical teaching, internship, or practicum assignments were assigned cooperating teachers, mentors, or site supervisors as appropriate.	Candidate placement information showing date of placement, name of candidate, name of cooperating teacher/mentor/site supervisor, subject area, grade level, supervising administrator name, campus name, and district name.
19 TAC §228.2(12) and (23): The cooperating teachers and mentors were trained and held the required credentials.	Service record and teaching certificate; or A form signed by the campus or district administrator attesting that the cooperating teachers and mentors meet the certification, experience, and accomplishment as an educator criteria; and Evidence of training; and Evidence of accomplishment as an educator includes: • Evaluations that include evidence of student learning; or • Campus or district reports that include evidence of student learning; or • Letters of recommendation that include evidence of student learning. Documentation from EPP and campus or district administrator is required if an individual with the required credentials is not available.
19 TAC §228.2(30): The site supervisors were trained and held the required credentials.	Service record and educator certificate; or A form signed by the campus or district administrator attesting that the cooperating teachers and mentors meet the certification, experience, and accomplishment as an educator criteria; and Evidence of training; and Evidence of accomplishment as an educator includes: • Evaluations that include evidence of student learning; or • Campus or district reports that include evidence of student learning; or • Letters of recommendation that include evidence of student learning. Documentation from EPP and campus or district administrator is required if an individual with the required credentials is not available.
19 TAC §228.35(f): The EPP provided scientifically-based training to cooperating teachers, mentors, and site supervisors.	Training materials and dated attendance records with signatures; or School district/ESC certificate of completion; or Cooperating teacher/mentor/site supervisor handbook acknowledgement; or Training materials and dated attendance information for online training.
19 TAC §228.35(g): Candidates have been assigned to field supervisors who held the required credentials.	Candidate placement information showing date of placement and field supervisor assigned; or Field supervisor logs; and Records of field supervisor certification, degree, experience, and/or continuing professional education.

Component IV: Coursework, Training, Program Delivery, and Ongoing Support	Evidence
19 TAC §228.35(g) and (h): Field supervisors have been trained.	Training material and dated attendance records with signature of field supervisor; or Handbook acknowledged with field supervisor signature; or Training materials and dated attendance information for online training. After 9/1/2017, certificate of completion of TEA-approved observation training.
19 TAC §228.35(g): Field supervisors made the required initial contact.	Field supervisor log; or Emails; or Phone records; or Other electronic communication; or Course syllabi with first contact class noted with attendance records.
19 TAC §228.35(g): For each observation, the field supervisor has held the required conferences with each candidate. Each candidate has received written feedback that meets the requirements.	Documentation verifying pre-conference and individualized post-conference; and Observation documents signed by candidate and field supervisor with date, start and stop time, subject, and grade level with record of instructional strategies observed.
19 TAC §228.35(g): The field supervisor has provided a copy of the written observation feedback to the required individuals.	Observation instrument with cooperating teacher, mentor, and/or campus supervisor signature; or Email with delivery/read receipt; or Dated copy of letter on program letterhead sent with observation results.
19 TAC §228.35(g): The candidate receives informal observations and ongoing coaching as appropriate.	Field supervisor log; or Email records with delivery/read receipts; or Phone records; or Observation forms; or Other electronic records of observation and coaching.
19 TAC §228.35(g): The field supervisor collaborates with the required individuals.	Field supervisor log; or Email records with delivery/read receipts; or Phone records; or Signed observation forms.
19 TAC §228.35(g)(1)- (9) [(8)] : Formal observations conducted by field supervisors meet the requirements for duration, frequency, and format.	Observation forms signed by candidate and field supervisor with date, start and stop time, subject, and grade level with record of instructional strategies observed.
19 TAC §228.35(h): Candidates seeking certification in a class other than Classroom Teacher are assigned to field supervisors who have the required education and credentials.	Candidate placement information showing date of placement and field supervisor assigned; and Records of field supervisor certification, degree, experience, and continuing professional education.
19 TAC §228.35(h): Field supervisors make required initial contact with candidates.	Field supervisor log; or Emails; or Phone records; or Other electronic communication; or Course syllabi with first contact class noted with attendance records.

Component IV: Coursework, Training, Program Delivery, and Ongoing Support	Evidence
19 TAC §228.35(h): For each observation, the field supervisor has held the required conferences with each candidate. Each candidate has received the required written feedback.	Documentation verifying pre-conference and individualized post-conference; and Observation documents signed by candidate and field supervisor with date, start and stop time, subject, and grade level with record of instructional strategies observed.
19 TAC §228.35(h): The field supervisor has provided a copy of the written observation feedback to the candidate's site supervisor.	Field supervisor log; or Email records with delivery/read receipts; or Signed observation forms.
19 TAC §228.35(h): The field supervisor provides informal observations and coaching as appropriate.	Field supervisor log; or Email records with delivery/read receipts; or Phone records; or Observation forms; or Other electronic records of observation and coaching.
19 TAC §228.35(h): The field supervisor collaborates with the candidate and site supervisor throughout the practicum experience.	Field supervisor log; or Email records with delivery/read receipts; or Phone records; or Signed observation forms.
19 TAC §228.35(h)(1)-(4): Observations conducted by field supervisors meet the requirements for duration, frequency, and format.	Observation forms signed by candidate and field supervisor with date, start and stop time, subject, and grade level, with record of instructional strategies observed; and/or Field supervisor contact log with date and signatures.
19 TAC §228.35(i): A candidate seeking certification as a teacher has been exempt from completing field-based experience, clinical teaching or internship by meeting requirements.	Record from the THECB documenting exemption eligibility.
19 TAC §228.35(i)(2): A candidate that currently is or was a JROTC instructor has been exempt from completing field-based experience, clinical teaching, or internship by meeting requirements.	Service record; or Record of current employment.
19 TAC §241.10(b), Principal; 19 TAC §242.10(b), Superintendent; 19 TAC §239.10(b), Counselor; 19 TAC §239.50(a), Librarian; 19 TAC §239.82(a), Educational Diagnostician; 19 TAC §239.92(a), Reading Specialist; and 19 TAC §239.100(c), Master Teachers: During the practicum, candidates demonstrate proficiency in the standards.	Field supervisor logs of educator standards based activities with verifying signatures; or Candidate journals which reflect standards; or Completed educator standards based projects and activities.

Component V: Assessment and Evaluation of Candidates and Program	Evidence
19 TAC §228.40(a): The EPP has established benchmarks to measure candidate progress.	Benchmarks.
19 TAC §228.40(b): The EPP has processes to ensure candidates are prepared to be successful on their content examinations.	Candidate document(s) reflecting meeting criteria for testing with date; and Syllabi/course outlines; or Benchmarks.

Component V: Assessment and Evaluation of Candidates and Program	Evidence
19 TAC §228.40(c): A candidate who is prepared in different certification in which the candidate was admitted.	Written request of candidate.
19 TAC §228.40(d): The EPP has a process for determining that formally admitted candidates are prepared to take certification examinations.	Criteria for testing published; and Dated record verifying criteria met.
19 TAC §228.40(e): The EPP uses information from a variety of sources to evaluate program design and delivery.	Evaluation plan detailing the activity, timeline, person responsible; and Data results from internal and external sources; and Dated evaluation reports; and Advisory committee minutes.

Component VI: Professional Conduct	Evidence
19 TAC §228.50: EPP staff and candidates adhere to the Educators' Code of Ethics.	Signed statement by staff and candidates of reading, understanding and abiding.

Component VII: Complaints Procedures	Evidence
19 TAC §228.70(b)(1): The EPP has sent a copy of the EPP complaint procedure to TEA.	Complaint process on file with TEA.
19 TAC §228.70(b)(2): The EPP has posted on its website the complaint policy and a link to the TEA complaints website.	Web posting.
19 TAC §228.70(b)(3): The EPP complaint policy is posted on-site.	Notification posting at physical site.
19 TAC §228.70(b)(4): The EPP provides written information about filing complaints.	Written information for candidate available.

Component VIII: Certification Procedures	Evidence
19 TAC §230.13(a)(1): The candidate has met the appropriate degree and/or experience requirements.	Official transcripts; and/or Documentation of experience.
19 TAC §230.13(b)(2): The candidate has met the appropriate preparation, experience, and/or licensure certification, or registration requirements.	Documentation of preparation, experience, and/or licensure certification, or registration requirements.
19 TAC §230.13(a)(2) and (b)(3): The candidate has completed an EPP.	Record of EPP completion.
19 TAC §230.13(a)(3) and (b)(4): The candidate has passing scores on required certification examinations.	Testing history.

Component VIII: Certification Procedures	Evidence
19 TAC §241.20, Principal; 19 TAC §242.20, Superintendent; 19 TAC §239.20, Counselor; 19 TAC §239.60, Librarian; 19 TAC §239.84, Educational Diagnostician; 19 TAC §239.93, Reading Specialist; and 19 TAC §239.100, Master Teachers: Candidates have passed appropriate certification examinations.	Testing history.
19 TAC §241.20, Principal; 19 TAC §242.20, Superintendent; 19 TAC §239.20, Counselor; 19 TAC §239.60, Librarian; 19 TAC §239.84, Educational Diagnostician; and 19 TAC §239.93, Reading Specialist: Candidates have met the degree requirement.	Official transcripts.
19 TAC §241.20, Principal, and 19 TAC §239.84, Educational Diagnostician; Candidates have met the certification requirement.	Valid classroom teaching certificate.
19 TAC §242.20, Superintendent: Candidates have met the certificate requirement.	Principal certificate or equivalent.
19 TAC §241.20, Principal; 19 TAC §239.20, Counselor; 19 TAC §239.60, Librarian; 19 TAC §239.84, Educational Diagnostician; and 19 TAC §239.93, Reading Specialist: Candidates have met the creditable years of teaching experience requirement.	Service records.
19 TAC §241.20, Principal; 19 TAC §242.20, Superintendent; 19 TAC §239.20, Counselor; 19 TAC §239.60, Librarian; 19 TAC §239.84, Educational Diagnostician; and 19 TAC §239.93, Reading Specialist: Candidates have successfully completed an EPP.	Record of EPP completion.
19 TAC §239.101, Master Reading Teacher: Candidates either 1) hold the Reading Specialist Certificate & complete an EPP; OR 2) hold a valid teaching certificate with the required creditable years of service, and complete an EPP.	Reading Specialist Certificate; and Record of EPP completion; or Valid teaching certificate; and Official service records; and Record of EPP completion.
19 TAC §239.102, Master Mathematics Teacher: Candidates hold a valid teaching certificate, the required creditable years teaching experience, and complete an EPP.	Valid teaching certificate; and Official service records; and Record of EPP completion.

Component VIII: Certification Procedures	**Evidence**
19 TAC §239.103, Master Technology Teacher: Candidates either 1) hold the Technology Applications Certificate or the Technology Education Certificate, and complete an EPP; OR 2) hold a valid teaching certificate with the required creditable years of teaching experience and complete an EPP.	Technology Application or Technology Education Certificate; and Record of EPP completion; or Valid teaching certificate; and Official service records; and Record of EPP completion.
19 TAC §239.104, Master Science Teacher: Candidates hold a valid teaching certificate with the required creditable years of teaching experience, and complete an EPP.	Valid teaching certificate; and Official service records; and Record of EPP completion.

Component IX: Integrity of Data Submission	**Evidence**
19 TAC §229.3(f)(1): The EPP has reported required data in an accurate and timely manner.	Met timeline for reporting; and Accuracy of ASEP reports.

Component X: Candidate Training and Support on Inclusive Practices for Students with Disabilities	**Evidence**
19 TAC §228.30(c)(9): The curriculum includes instruction regarding students with disabilities, the use of proactive instructional planning techniques, and evidence-based inclusive instructional practices, as required under Texas Education Code, §21.044(a-1).	Charts identifying alignment of educator standards in curriculum; and Application of educator standards identified in syllabi/course outlines; or Application of educator standards identified in course/training lesson plans.
19 TAC §228.35(e)(2)(A)(iii), (e)(2)(B)(ix), and (e)(8): Candidates have successfully completed clinical teaching, internship, or practicum when the candidate demonstrates proficiency in each of the educator standards for the assignment.	Observation forms signed by candidate and field supervisor with date, start and stop time, subject, and grade level, with record of educational practices observed.

Figure: 25 TAC §289.252(jj)(2)

RADIONUCLIDES	Limit	Unsealed Sources			Sealed Sources	
		10^3	10^4	10^5	10^{10}	10^{12}
Pr-141 Gd-152 Bi-209m U-232 Pu-240 Cm-245 Cf-252 Ce-142 Dy-154 Po-208 U-233 Pu-241 Cm-246 Es-254 Nd-144 Dy-156 Po-209 U-234 Pu-242 Cm-247 Nd-145 Tb-159 Po-210 U-235 Pu-244 Cm-248 Sm-146 Ho-165 Ra-226 U-236 Am-241 Bk-247 Sm-147 Hf-174 Ac-227 Np-235 Am-242m Bk-249 Sm-148 W-180 Th-228 Np-237 Am-243 Cf-248 Gd-148 Pt-190 Th-229 Pu-236 Cm-242 Cf-249 Gd-150 Pb-210 Th-230 Pu-238 Cm-243 Cf-250 Gd-151 Bi-209 Pa-231 Pu-239 Cm-244 Cf-251 and any alpha-emitting radionuclide not listed above or mixtures of alpha emitters of unknown composition.	0.01 µCi	0.01 mCi	0.1 mCi	1.0 mCi	100 Ci	10 kCi
Be-10 Fe-60 Rh-102 Te-123 Sm-145 Lu-175 Ir-199m Al-26 Zn-70 Pd-107 Te-130 Nd-150 Lu-176 Pt-192 Si-32 Ge-68 Ag-108m I-129 Eu-150 Lu-177m Pt-198 Ar-39 Ge-76 Cd-113m La-137 Tb-157 Hf-172 Hg-194 K-40 Kr-81 Cd-116 La-138 Tb-158 Hf-182 Pb-202 Ar-42 Sr-90 Sn-121m Ce-139 Dy-159 Ta-179 Pb-205 Ca-48 Zr-96 Sn-123 Pm-143 Ho-166m Re-184m Bi-208 Ti-44 Mo-100 Sn-124 Pm-144 Lu-173 Re-187 Ra-228 V-49 Tc-98 Sn-126 Pm-145 Lu-174 Re-189 Np-236 V-50 Rh-101 Te-121m Pm-146 Lu-174m Os-194 Bk-248 and any radionuclide other than alpha-emitting radionuclides, not listed above or mixtures of beta emitters of unknown composition.	0.1 µCi	0.1 mCi	1.0 mCi	10 mCi	1.0 kCi	100 kCi
Na-22 Ru-106 Cs-134 Eu-152 Bi-210 U (natural) Co-60 Ag-110m Ce-144 Eu-154 Th (natural)	1.0 µCi	1.0 mCi	10 mCi	100 mCi	10 kCi	1 MCi

Cl-36 Ni-63 Rb-87 Cd-109 Ba-133 Gd-153 Tm-171 Ca-45 Zn-65 Zr-93 In-115 Ba-135 Eu-155 W-181 Mn-54 Se-75 Nb-93m Sb-125 Cs-137 Tm-170 Tl-204	10 µCi	10 mCi	100 mCi	1.0 Ci	100 kCi	10 MCi
C-14 Co-57 Kr-85 Tc-99 Ir-194 U-238 Fe-55 Ni-59 Tc-97 Pt-193, Th-232	100 µCi	100 mCi	1.0 Ci	10 Ci	1.0MCi	100 MCi
H-3	1.0 mCi	1 Ci	10 Ci	100 Ci	10 MCi	1000 MCi

Figure: 25 TAC §289.252(jj)(10)

Broad Scope License Limits

Radioactive material	Type B curies	Type C curies
Antimony-122	1	.01
Antimony-124	1	.01
Antimony-125	1	.01
Arsenic-73	10	.1
Arsenic-74	1	.01
Arsenic-76	1	.01
Arsenic-77	10	.1
Barium-131	10	.1
Barium-140	1	.01
Beryllium-7	10	.1
Bismuth-210	.1	.001
Bromine-82	10	.1
Cadmium-109	1	.01
Cadmium-115m	1	.01
Cadmium-115	10	.1
Calcium-45	1	.01
Calcium-47	10	.1
Carbon-14	100	1
Cerium-141	10	.1
Cerium-143	10	.1
Cerium-144	.1	.001
Cesium-131	100	1
Cesium-134m	100	1
Cesium-134	.1	.001
Cesium-135	1	.01
Cesium-136	10	.1
Cesium-137	.1	.001
Chlorine-36	1	.01
Chlorine-38	100	1
Chromium-51	100	1
Cobalt-57	10	.1
Cobalt-58m	100	1
Cobalt-58	1	.01
Cobalt-60	.1	.001
Copper-64	10	.1
Dysprosium-165	100	1
Dysprosium-166	10	.1
Erbium-169	10	.1
Erbium-171	10	.1
Europium-152 9.2 h	10	.1

Europium-152 13 y	.1	.001
Europium-154	.1	.001
Europium-155	1	.01
Fluorine-18	100	1
Gadolinium-153	1	.01
Gadolinium-159	10	.1
Gallium-72	10	.1
Germanium-71	100	1
Gold-198	10	.1
Gold-199	10	.1
Hafnium-181	1	.01
Holmium-166	10	.1
Hydrogen-3	100	1
Indium-113m	100	1
Indium-114m	1	.01
Indium-115m	100	1
Indium-115	1	.01
Iodine-125	.1	.001
Iodine-126	.1	.001
Iodine-129	.1	.01
Iodine-131	.1	.001
Iodine-132	10	.1
Iodine-133	1	.01
Iodine-134	10	.1
Iodine-135	1	.01
Iridium-192	1	.01
Iridium-194	10	.1
Iron-55	10	.1
Irion-59	1	.01
Krypton-85	100	1
Krypton-87	10	.1
Lanthanum-140	1	.01
Lutelium-177	10	.1
Manganese-52	1	.01
Manganese-54	1	.01
Manganese-56	10	.1
Mercury-197m	10	.1
Mercury-197	10	.1
Mercury-203	1	.01
Molybdenum-99	10	.1
Neodymium-147	10	.1
Neodymium-149	10	.1
Nickel-59	10	.1
Nickel-63	1	.01

Nickel-65	10	.1
Niobium-93m	1	.01
Niobium-95	1	.01
Niobium-97	100	1
Osmium-185	1	.01
Osmium-191m	100	1
Osmium-191	10	.1
Osmium-193	10	.1
Palladium-103	10	.1
Palladium-109	10	.1
Phosphorus-32	1	.01
Platinum-191	10	.1
Platinum-193m	100	1
Platinum-193	10	.1
Platinum-197m	100	1
Platinum-197	10	.1
Polonium-210	.01	.0001
Potassium-42	1	.01
Praseodymium-142	10	.1
Praseodymium-143	10	.1
Promethium-147	1	.01
Promethium-149	10	.1
Radium-226	0.01	0.0001
Rhenium-186	10	.1
Rhenium-188	10	.1
Rhodium-103m	1,000	10.
Rhodium-105	10	.1
Rubidium-86	1	.01
Rubidium-87	1	.01
Ruthenium-97	100	1
Ruthenium-103	1	.01
Ruthenium-105	10	.1
Ruthenium-106	.1	.001
Samarium-151	1	.01
Samarium-153	10	.1
Scandium-46	1	.01
Scandium-47	10	.1
Scandium-48	1	.01
Selenium-75	1	.01
Silicon-31	10	.1
Silver-105	1	.01
Silver-110m	.1	.001
Silver-111	10	.1
Sodium-22	0.1	.001

Sodium-24	1	.01
Strontium-85m	1,000	10
Strontium-85	1	.01
Strontium-89	1	.01
Strontium-90	.01	.0001
Strontium-91	10	.1
Strontium-92	10	.1
Sulphur-35	10	.1
Tantalum-182	1	.01
Technetium-96	10	.1
Technetium-97m	10	.1
Technetium-97	10	.1
Technetium-99m	100	1
Technetium-99	1	.01
Tellurium-125m	1	.01
Tellurium-127m	1	.01
Tellurium-127	10	.1
Tellurium-129m	1	.01
Tellurim-129	100	1
Tellurium-131m	10	.1
Tellurium-132	1	.01
Terbium-160	1	.01
Thallium-200	10	.1
Thallium-201	10	.1
Thallium-202	10	.1
Thallium-204	1	.01
Thulium-170	1	.01
Thulium-171	1	.01
Tin-113	1	.01
Tin-125	1	.01
Tungsten-181	1	.01
Tungsten-185	1	.01
Tungsten-187	10	.1
Vandadium-48	1	.01
Xenon-131m	1,000	10
Xenon-133	100	1
Xenon-135	100	1
Ytterbium-175	10	.1
Yttrium-90	1	.01
Yttrium-91	1	.01
Yttrium-92	10	.1
Yttrium-93	1	.01
Zinc-65	1	.01
Zinc-69m	10	.1

Zinc-69	100	1
Zirconium-93	1	.01
Zirconium-95	1	.01
Zirconium-97	1	.01
Any radioactive material other than alpha emitting radioactive material not listed above	.1	.001

Figure: 25 TAC §289.252(mm)

Rule Cross Reference	Name of Records/Documents	Time Interval for Keeping Record/Document
(l)(7)(D)	Documentation of all receipts and transfers for the manufacture and commercial distribution of devices	3 years after the date of the event (i.e. receipt or transfer)
(r)(2)(C)	Records of tests and checks of measurements of the radioactivity of radioactive drugs	A minimum of 3 years after when the record was made
(r)(3)(G)	A complete description of any deviation from the manufacturer's instructions when eluting generators or processing radioactive materials with a reagent kit	3 years after the record was made
(s)(4)(G)	Records including the name, address, and point of contact for each general licensee to whom depleted uranium in products or devices is distributed	2 years after the record was made
(x)(10)	Test results and records for generator eluates of molybdenum-99 breakthrough or strontium-82 and strontium-85 contamination	3 years after the record was made
(cc)(6)(B)(v)	All information supporting the report of a transfer of small quantities of source material	1 year after the transfer event is included in a report to the agency, the NRC, or any agreement state
(gg)(7)	Records of information important to the safe and effective decommissioning of the facility	Until the license is terminated by the agency
(ii)(3)(G)(i)	Confirmation of receipt of a notification to the individual of the right to complete, correct and explain any reasons for denial of personnel access authorization	1 year after the date of the notification
(ii)(3)(H)(i)	Documentation regarding the trustworthiness and reliability of individual employees	3 years after the date the individual no longer requires unescorted access to category 1 or category 2 quantities of radioactive material
(ii)(3)(H)(ii)	Copy of the current access authorization program procedures	3 years after the procedure is no longer needed
(ii)(3)(H)(ii)	Superseded material for any portion(s) of the access authorization program procedures that is superseded	3 years after the procedure or any portion(s) of the procedure is superseded

Rule Cross Reference	Name of Records/Documents	Time Interval for Keeping Record/Document
(ii)(3)(H)(iii)	List of persons approved for unescorted access authorization	3 years after the list is superseded or replaced
(ii)(4)(A)(ii)	Certification in writing that each individual employee's identification was properly reviewed and any documents used for the review	3 years after the date an individual granted unescorted access to category 1 or category 2 quantities of radioactive material no longer requires such access, or, for an individual denied access, 3 years from the date the record was made
(ii)(6)(A)(xii)	Written confirmation of an active security clearance from the agency or employer that granted the clearance or reviewed the criminal history records check of the individual	3 years after the date the individual no longer requires unescorted access to category 1 or category 2 quantities of radioactive material
(ii)(6)(A)(xiii)	Written verification from a service provider licensee for an individual employed by that service provider that it has conducted a background investigation for the individual and approved that individual for unescorted access to category 1 or category 2 quantities of radioactive material	3 years after the date the individual employee no longer requires unescorted access to category 1 or category 2 quantities of radioactive material
(ii)(6)(B)	Written confirmation from an agency or employer that reviewed the criminal history records check for an individual who has had a favorably adjudicated U.S. Government criminal history records check within the last 5 years, under a comparable U.S. Government program involving fingerprinting and an FBI identification and criminal history records check provided that he or she makes available the appropriate documentation	3 years after the date the individual no longer requires unescorted access to category 1 or category 2 quantities of radioactive material
(ii)(7)(E)	All fingerprint and criminal history records on an individual (including data indicating no record) received from the FBI, or a copy of these records if the individual's file has been transferred	3 years after the date the individual no longer requires unescorted access to category 1 or category 2 quantities of radioactive material

§289.252 Rule Cross Reference	Name of Records/Documents	Time Interval for Keeping Record/Document
(ii)(8)(C)	Access authorization program review records	3 years after the record was made
(ii)(10)(A)(iv)	Copy of the current security plan	3 years after the record is no longer needed
(ii)(10)(A)(iv)	Copy of superseded material from any portion of the security plan that is superseded	3 years after the record is superseded
(ii)(10)(B)(iii)	Copy of the current implementing procedures	3 years after the procedure is no longer needed
(ii)(10)(B)(iii)	Any superseded portion(s) of the implementing procedures	3 years after the record is superseded
(ii)(10)(C)(iv)	Copies of initial and refresher training	3 years after the date of the training
(ii)(10)(D)(viii)(I)	Copy of the information protection procedures	3 years after the document is no longer needed
(ii)(10)(D)(viii)(II)	List of individuals approved for access to the security plan, implementing procedures, or the list of individuals that have been approved for unescorted access	3 years after the document is no longer needed
(ii)(11)(C)	Documentation of the licensee's efforts to coordinate with the LLEA	3 years after the record was made
(ii)(14)(B)	Records on maintenance and testing activities	3 years after the record was made
(ii)(16)(C)	Security program review documentation	3 years after the record was made
(ii)(18)(D)	Verification documentation for any transfer of category 1 or category 2 quantity of radioactive material	3 years after the record was made
(ii)(20)(E)	Documentation, and any revisions thereof, for the preplanning and coordination of shipments of category 1 or category 2 quantities of radioactive material	3 years after the record was made
(ii)(21)(E)	Copy of the advance notification and any revision and cancellation notices for the shipment of category 1 quantities of radioactive material through or across boundaries of a State	3 years after the record was made
(ll)(2)	Documentation of any installation, repair, or maintenance of devices containing sealed sources of radioactive material	5 years after date of service

Figure: 25 TAC §289.256(xxx)

Rule Cross Reference	Name of Records/Documents	Time Interval for Keeping Records/Documents
§289.201(d)(1)	Records of receipt, transfer, and disposal of radioactive material	Until disposal is authorized by the agency
§289.203(b)(1)(B)	Current applicable sections of this chapter as listed in the radioactive material license	Until termination of the radioactive material license
§289.203(b)(1)(B)	Copy of the current radioactive material license	Until termination of the radioactive material license
§289.203(b)(1)(C), §289.256(f)(3)(A)	Current operating, safety, and emergency procedures	Until termination of the radioactive material license
§289.256 (f)(3)(C)(i)	Qualifications of RSO	Duration of employment
§289.256(f)(3)(C)(ii)	Qualifications of authorized users	Duration of employment
§289.256(f)(3)(C)(iii)	Qualifications of authorized medical physicist	Duration of employment
§289.256(f)(3)(C)(iv)	Qualifications of authorized nuclear pharmacist, if applicable	Duration of employment
§289.256(g)(7)	Qualifications and dates of service for temporary RSO	3 years
§289.256(g)(9)(A)	Actions taken by the licensee's management	5 years
§289.256(g)(9)(B)	Authority, duties, and responsibilities of the RSO and the RSO's agreement to implement the radiation safety program.	Until termination of the radioactive material license
§289.256(g)(9)(C)	Document appointing the ARSO	5 years after the ARSO is removed from the license
§289.256(i)(4)	RSC meetings	3 years
§289.256(t)(3)	Written directives	3 years
§289.256(t)(4)(C)	Procedures for administrations requiring a written directive	Until termination of the radioactive material license
§289.256(v)(4)	Calibration of instruments (dose calibrators)	3 years
§289.256(w)(5)	Calibration of survey instruments	3 years
§289.256(x)(6)	Dosage determinations of unsealed radioactive material for medical use	3 years
§289.256(z)(2)	Physical inventory for all sealed source/brachytherapy inventory	3 years
§289.256(bb)(3)	Surveys for ambient radiation exposure rate	3 years

Rule Cross Reference	Name of Records/Documents	Time Interval for Keeping Records/Documents
§289.256(cc)(3) §289.256(eee)(2)	Patient release	3 years after date of release
§289.256(dd)(3)	Mobile nuclear medicine service client letters	Duration of licensee/client relationship
§289.256(dd)(3)	Mobile nuclear medicine service surveys	3 years
§289.256(ee)(2)	Decay in storage/disposal	3 years
§289.256(ii)(4)	Permissible Molybdenum-99, Strontium-82, and Strontium-85 concentrations	3 years
§289.256(ll)(2)	Safety instructions - unsealed radioactive materials	3 years
§289.256(ss)(3)	Surveys after sealed source implant and removal	3 years
§289.256(tt)(3)	Brachytherapy sealed sources accountability	3 years
§289.256(uu)(2)	Safety instruction to personnel	3 years
§289.256(ww)(4)	Calibration measurements of brachytherapy sealed sources	3 years
§289.256(xx)(3)	Activity of each Strontium 90 source	Duration of life of source
§289.256(bbb)(2)	Service provider documentation	3 years
§289.256(fff)(4)	Installation, maintenance, adjustment and repair-remote afterloader units, teletherapy units, and gamma stereotactic radiosurgery units	3 years
§289.256(ggg)(6)	Written safety and operating procedures	Until licensee no longer possesses unit
§289.256(ggg)(7)	Instruction/drills for remote afterloader units, teletherapy units, and gamma stereotactic radiosurgery units	3 years
§289.256(iii)(3)	Dosimetry equipment calibration, intercomparison and comparison	Until termination of the radioactive material license
§289.256(jjj)(7)	Calibration – teletherapy units	3 years
§289.256(kkk)(9)	Calibration – remote afterloader units	3 years

Rule Cross Reference	Name of Records/Documents	Time Interval for Keeping Records/Documents
§289.256(lll)(7)	Calibration – gamma stereotactic radiosurgery units	3 years
§289.256(mmm)(2)	Written procedures for spot checks- teletherapy units	Until licensee no longer possesses unit
§289.256(mmm)(6)	Spot checks- teletherapy units	Until licensee no longer possesses unit
§289.256(nnn)(2)	Written procedures for spot checks - remote afterloaders	3 years
§289.256(nnn)(6)	Spot checks- remote afterloader	3 years
§289.256(ooo)(2)	Written procedures for spot checks-gamma stereotactic radiosurgery units	3 years
§289.256(ooo)(8)	Spot checks-gamma stereotactic radiosurgery units	3 years
§289.256(ppp)(5)	Technical requirements for mobile remote afterloader units	3 years
§289.256(qqq)(3)	Radiation surveys	Duration of the use of the unit
§289.256(rrr)(3)	Full-inspection servicing records for teletherapy and gamma stereotactic radiosurgery units	Duration of the use of the unit
§289.256(uuu)(9)	Annotated report – medical event	Until termination of the radioactive material license
§289.256(vvv)(8)	Annotated report – dose to embryo/fetus or nursing child	Until termination of the radioactive material license

Figure: 25 TAC §289.257(i)(3)(E)(i)

$$CSI = 10\left[\frac{grams\,^{235}U}{X} + \frac{grams\,^{233}U}{Y} + \frac{grams\,Pu}{Z}\right]$$

Figure: 25 TAC §289.257(i)(3)(E)(iii)

Table 257-1
Mass Limits for General License Packages Containing Mixed Quantities of Fissile Material or Uranium-235 of Unknown Enrichment per §289.257(i)(3)(E)

Fissile Material	Fissile material mass mixed with moderating substances having an average hydrogen density less than or equal to H_2O. (grams)	Fissile material mass mixed with moderating substances having an average hydrogen density greater than H_2O [a]. (grams)
^{235}U (X)......................	60	38
^{233}U (Y)......................	43	27
^{239}PU or ^{241}PU (Z)..........	37	24

[a]When mixtures of moderating substances are present, the lower mass limits shall be used if more than 15% of the moderating substance has an average hydrogen density greater than H_2O.

Table 257-2
Mass Limits for General License Packages Containing Uranium-235 of Known Enrichment per §289.257(i)(3)(E)

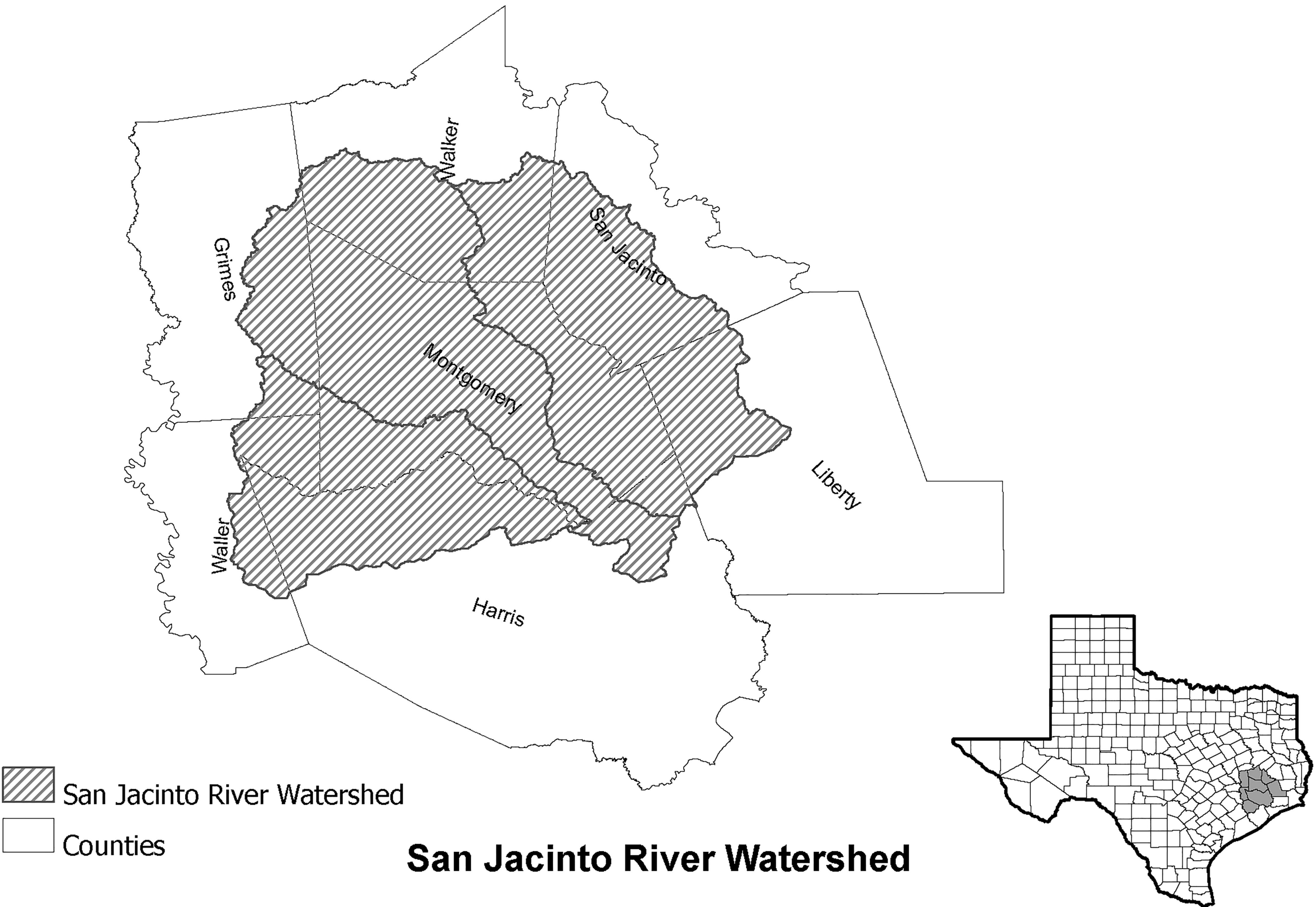
Uranium enrichment in weight percent of ^{235}U not exceeding	Fissile material mass of ^{235}U (X). (grams)
24..	60
20..	63
15..	67
11..	72
10..	76
9.5..	78
9..	81
8.5..	82
8...	85
7.5..	88
7..	90
6.5..	93
6..	97

5.5	102
5	108
4.5	114
4	120
3.5	132
3	150
2.5	180
2	246
1.5	408
1.35	480
1	1,020
0.92	1,800

Figure: 25 TAC §289.257(i)(4)(E)(i)

$$CSI = 10\left[\frac{grams^{239}Pu + grams^{241}Pu}{24}\right]$$; and

Figure: §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

Draft 2022 Annual Action Plan Available For Public Comment

The Texas State Affordable Housing Corporation presents for public comment its Draft 2022 Annual Action Plan, which is a component of the 2022 State Low Income Housing Plan. A copy of the Draft 2022 Annual Action Plan may be found on our website - *https://www.tsahc.org/about/plans-reports.*

The public comment period for the Corporation's Draft 2022 Annual Action Plan is December 16, 2021, through January 21, 2022.

Written comment may be sent to Michael Wilt by email at *mwilt@tsahc.org.*

TRD-202105091
David Long
President
Texas State Affordable Housing Corporation
Filed: December 15, 2021

♦ ♦ ♦

Office of the Attorney General

Notice Regarding Private Real Property Rights Preservation Act Guidelines

In 1995, the Texas Legislature enacted the "Private Real Property Rights Preservation Act" (the Property Rights Act). Tex. Gov't Code Ch. 2007. As required by section 2007.041 of the Property Rights Act, the Texas Attorney General's Office prepared guidelines to assist governmental entities in identifying and evaluating those governmental actions that might result in a taking of private real property. These guidelines were first published in 1996 in the *Texas Register* and have been updated since that time. 21 Tex. Reg. 387 (Jan. 12, 1996). The Property Rights Act requires that the Texas Attorney General's Office review and revise the guidelines as necessary. The current guidelines can be found at

https://texasattorneygeneral.gov/sites/default/files/files/divisions/general-oag/TexasPropertyRightsPreservationActGuidelines.pdf.

The Texas Attorney General's Office invites comments, suggestions, or information from the public on whether the public views the guidelines as consistent with the actions of the Texas Legislature and decisions of the United States and Texas Supreme Courts through December 10, 2021. In addition, based on the review of cases issued prior to December 10, 2021, proposed updates to the guidelines are set out below.

Any comments must be submitted no later than 30 days from publication of this notice. Please address comments to J. Amber Ahmed, Assistant Attorney General, Environmental Protection Division, Office of the Attorney General, P.O. Box 12548, MC-066, Austin, Texas 78711-2548, or at Amber.Ahmed@oag.texas.gov. The Texas Attorney General's Office will review any comments submitted and will later publish notice of any revisions to the guidelines.

TRD-202105193
Austin Kinghorn
General Counsel
Office of the Attorney General
Filed: December 21, 2021

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Comptroller of Public Accounts

Certification of the Average Closing Price of Gas and Oil - November 2021

The Comptroller of Public Accounts, administering agency for the collection of the Oil Production Tax, has determined, as required by Tax Code, §202.058, that the average taxable price of oil for reporting period November 2021 is $49.88 per barrel for the three-month period beginning on August 1, 2021, and ending October 31, 2021. Therefore, pursuant to Tax Code, §202.058, oil produced during the month of November 2021, from a qualified low-producing oil lease, is not eligible for credit on the oil production tax imposed by Tax Code, Chapter 202.

The Comptroller of Public Accounts, administering agency for the collection of the Natural Gas Production Tax, has determined, as required by Tax Code, §201.059, that the average taxable price of gas for reporting period November 2021 is $3.41 per mcf for the three-month period beginning on August 1, 2021, and ending October 31, 2021. Therefore, pursuant to Tax Code, §201.059, gas produced during the month of November 2021, from a qualified low-producing well, is eligible for a 25% credit on the natural gas production tax imposed by Tax Code, Chapter 201.

The Comptroller of Public Accounts, administering agency for the collection of the Franchise Tax, has determined, as required by Tax Code, §171.1011(s), that the average closing price of West Texas Intermediate crude oil for the month of November 2021 is $79.18 per barrel. Therefore, pursuant to Tax Code, §171.1011(r), a taxable entity shall not exclude total revenue received from oil produced during the month of November 2021, from a qualified low-producing oil well.

The Comptroller of Public Accounts, administering agency for the collection of the Franchise Tax, has determined, as required by Tax Code, §171.1011(s), that the average closing price of gas for the month of November 2021 is $5.10 per MMBtu. Therefore, pursuant to Tax Code, §171.1011(r), a taxable entity shall not exclude total revenue received from gas produced during the month of November 2021, from a qualified low-producing gas well.

This agency hereby certifies that legal counsel has reviewed this notice and found it to be within the agency's authority to publish.

Issued in Austin, Texas, on December 15, 2021.

TRD-202105092
William Hamner
Special Counsel for Tax Administration
Comptroller of Public Accounts
Filed: December 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, 303.009 and 304.003, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 12/27/21 - 01/02/22 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 12/27/21 - 01/02/22 is 18% for Commercial over $250,000.

The judgment ceiling as prescribed by §304.003 for the period of 01/01/22 - 01/31/22 is 5.00% for Consumer/Agricultural/Commercial credit through $250,000.

The judgment ceiling as prescribed by §304.003 for the period of 01/01/22 - 01/31/22 is 5.00% for Commercial over $250,000.

[1] Credit for personal, family or household use.

[2] Credit for business, commercial, investment or other similar purpose.

TRD-202105185
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: December 21, 2021

♦ ♦ ♦

Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code, (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 **February 2, 2022.** 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 **February 2, 2022.** 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: ASGI Homes LLC; DOCKET NUMBER: 2021-1549-WQ-E; IDENTIFIER: RN102685393; LOCATION: Onalaska, Polk County; TYPE OF FACILITY: residential home construction; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a construction general permit (stormwater); PENALTY: $875; ENFORCEMENT COORDINATOR: Stephanie Frederick, (512) 239-1001; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(2) COMPANY: City of Leonard; DOCKET NUMBER: 2021-0539-PWS-E; IDENTIFIER: RN102687209; LOCATION: Leonard, Fanning County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.46(q)(1), by failing to issue a boil water notice to customers of the facility using one or more of the Tier 1 delivery methods as described in 30 TAC §290.122(a)(2); PENALTY: $267; ENFORCEMENT COORDINATOR: Samantha Duncan, (512) 239-2511; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(3) COMPANY: Eric Allen Newby; DOCKET NUMBER: 2021-1567-WOC-E; IDENTIFIER: RN111167763; LOCATION: Weimar, Colorado County; TYPE OF FACILITY: operator; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: $175; ENFORCEMENT COORDINATOR: Epifanio Villarreal, (361) 825-3421; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(4) COMPANY: G Square Ventures LLC dba Fast Trip; DOCKET NUMBER: 2021-0929-PST-E; IDENTIFIER: RN101378040; LOCATION: Arlington, Tarrant County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to renew a previously issued undergound storage tank (UST) delivery certificate by submitting a properly completed UST registration and self-certification form at least 30 days before the expiration date; 30 TAC §334.48(g)(1)(A)(ii), (B), and (h)(1)(A)(i), and §334.51(a)(6), and TWC, §26.3475(c)(2), by failing to test the spill prevention equipment at least once every three years to ensure the equipment is liquid tight, failing to conduct a walkthrough inspection for the spill prevention equipment at least once every 30 days, and failing to inspect the overfill prevention equipment at least once every three years, also failing to ensure that all installed spill and overfill prevention devices are maintained in good operating condition and inspected and serviced in accordance with manufactures specification; 30 TAC §334.49(a)(4) and (c)(4)(C) and TWC, §26.3475(d), by failing to inspect and test the corrosion protection system for operability and adequacy of protection at a frequency of at least once every three years, and failing to provide corrosion protection to all underground metal components of the UST system; 30 TAC §334.50(b)(1)(A) and (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, and failing to monitor the USTs in a manner which will detect a release at a frequency of at least once every 30 days; 30 TAC §334.77 and §334.78, by failing to initiate required abatement measures and submit a report to the TCEQ within 20 days after a release of a regulated substance from an UST system; 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, Class B, and Class C, for the facility; PENALTY: $31,688; ENFORCEMENT COORDINATOR: Alain Elegbe, (512) 239-6924; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(5) COMPANY: LION ELASTOMERS ORANGE, LLC; DOCKET NUMBER: 2021-0664-PWS-E; IDENTIFIER: RN100224468; LO-

CATION: Orange, Orange County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.110(b)(5) and (f)(7) and Texas Health and Safety Code, §341.0315(c), by failing to comply with the maximum residual disinfectant level of 4.0 milligrams per liter for chlorine based on a running annual average; PENALTY: $1,987; ENFORCEMENT COORDINATOR: Miles Wehner, (512) 239-2813; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(6) COMPANY: Midcoast G & P (East Texas) L.P.; DOCKET NUMBER: 2021-1117-AIR-E; IDENTIFIER: RN102735800; LOCATION: Avinger, Marion County; TYPE OF FACILITY: natural gas processing plant; RULES VIOLATED: 30 TAC §§101.20(1), 116.115(c), and 122.143(4), 40 Code of Federal Regulations §60.18(c)(3)(ii), New Source Review (NSR) Permit Number 558, Special Conditions (SC) Number 10.A, Federal Operating Permit (FOP) Number O3037, General Terms and Conditions (GTC) and Special Terms and Conditions (STC) Numbers 1.A and 9, and Texas Health and Safety Code (THSC), §382.085(b), by failing to comply with the minimum net heating value of 300 British thermal units per standard cubic foot or greater for the gas being combusted if the flare is steam-assisted or air-assisted; and 30 TAC §116.115(c) and §122.143(4), NSR Permit Number 588, SC Number 10.D, FOP Number O3037, GTC and STC Number 9, and THSC, §382.085(b), by failing to operate the monitors and analyzers at least 95% of the time when the flare is operational, averaged over a rolling 12-month period; PENALTY: $17,575; ENFORCEMENT COORDINATOR: Kate Dacy, (512) 239-4593; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(7) COMPANY: Petra Firma Development Group, Incorporated; DOCKET NUMBER: 2021-0566-PWS-E; IDENTIFIER: RN109875062; LOCATION: Christoval, Tom Green County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.41(c)(3)(O), by failing to protect the well unit by intruder-resistant fences, the gates of which are provided with locks or enclose the well in a locked, ventilated well house that remains locked during periods of darkness and when the facility is unattended; 30 TAC §290.42(m) and §290.43(e), by failing to provide an intruder-resistant fence around each water treatment plant, potable water storage tank, pressure maintenance facility, and related appurtenances that remains locked during periods of darkness and when the facility is unattended; 30 TAC §290.43(c)(2), by failing to provide the ground storage tank with a roof opening designed in accordance with current American Water Works Association standards that has a raised curbing at least four inches in height with a lockable cover that overlaps the curbing at least two inches in a downward direction; and 30 TAC §290.46(q)(2), by failing to institute special precautions as described in the flowchart found in 30 TAC §290.47(e) in the event of low distribution pressure and water outages; PENALTY: $1,145; ENFORCEMENT COORDINATOR: Epifanio Villarreal, (361) 825-3421; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7035, (325) 655-9479.

(8) COMPANY: RIO GRANDE GROWERS COOPERATIVE dba Rio Grande Growers Coop 1 and dba Rio Grande Growers Coop 2; DOCKET NUMBER: 2021-1173-PST-E; IDENTIFIERS: RN101447753 and RN102479441; LOCATION: Rio Grande City, Starr County; TYPE OF FACILITY: convenience stores with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.50(b)(2) and TWC, §26.3475(a), by failing to provide release detection for the pressurized piping associated with the underground storage tank system; PENALTY: $7,313; ENFORCEMENT COORDINATOR: Karolyn Kent, (512) 239-2536; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(9) COMPANY: T & W WATER SERVICE COMPANY; DOCKET NUMBER: 2021-0466-PWS-E; IDENTIFIER: RN101282895; LOCATION: Magnolia, Montgomery County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.41(c)(3)(A), by failing to submit well completion data for review and approval prior to placing the facility's Well Number 2 into service; PENALTY: $90; ENFORCEMENT COORDINATOR: Ronica Rodriguez, (361) 825-3425; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(10) COMPANY: WM Trucking & Excavating Incorporated; DOCKET NUMBER: 2021-0794-WQ-E; IDENTIFIER: RN109637827; LOCATION: New Caney, Montgomery County; TYPE OF FACILITY: aggregate production operation; RULE VIOLATED: 30 TAC §342.25(d), by failing to renew the aggregate production operation registration annually as regulated activities continued; PENALTY: $5,000; ENFORCEMENT COORDINATOR: Steven Van Landingham, (512) 239-5717; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

TRD-202105144
Charmaine Backens
Deputy Director, Litigation
Texas Commission on Environmental Quality
Filed: December 17, 2021

Enforcement Orders

An agreed order was adopted regarding Oxy Vinyls, LP, Docket No. 2019-0870-AIR-E on December 21, 2021, assessing $5,925 in administrative penalties with $1,185 deferred. Information concerning any aspect of this order may be obtained by contacting Johnnie Wu, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Valley Municipal Utility District No. 2, Docket No. 2020-1443-MWD-E on December 21, 2021, assessing $5,625 in administrative penalties with $1,125 deferred. Information concerning any aspect of this order may be obtained by contacting Alyssa Loveday, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Valley Municipal Utility District No. 2, Docket No. 2020-1520-IWD-E on December 21, 2021, assessing $5,625 in administrative penalties with $1,125 deferred. Information concerning any aspect of this order may be obtained by contacting Alyssa Loveday, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Haldor Topsoe, Inc., Docket No. 2020-1581-AIR-E on December 21, 2021, assessing $5,588 in administrative penalties with $1,117 deferred. Information concerning any aspect of this order may be obtained by contacting Mackenzie Mehlmann, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding DAISY AND SONS INC. dba Circle B, Docket No. 2021-0062-PST-E on December 21, 2021, assessing $4,500 in administrative penalties with $900 deferred. Information concerning any aspect of this order may be obtained by contacting Alain Elegbe, Enforcement Coordinator at (512) 239-2545, Texas

Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding R & T KELLEY, LLC dba Kelleys Chevron, Docket No. 2021-0063-PST-E on December 21, 2021, assessing $2,562 in administrative penalties with $512 deferred. Information concerning any aspect of this order may be obtained by contacting Alain Elegbe, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding PREETI, INC. dba The Store of Paducah, Docket No. 2021-0264-PST-E on December 21, 2021, assessing $3,563 in administrative penalties with $712 deferred. Information concerning any aspect of this order may be obtained by contacting Terrany Binford, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Beard's Exxon LLC, Docket No. 2021-0267-PST-E on December 21, 2021, assessing $7,376 in administrative penalties with $1,475 deferred. Information concerning any aspect of this order may be obtained by contacting John Fennell, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Red River Authority of Texas, Docket No. 2021-0273-PWS-E on December 21, 2021, assessing $3,451 in administrative penalties with $690 deferred. Information concerning any aspect of this order may be obtained by contacting Ryan Byer, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding H O E Water Supply Corporation, Docket No. 2021-0291-MLM-E on December 21, 2021, assessing $7,415 in administrative penalties with $1,483 deferred. Information concerning any aspect of this order may be obtained by contacting Steven Hall, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Antonio Morales, Docket No. 2021-0311-PST-E on December 21, 2021, assessing $3,563 in administrative penalties with $712 deferred. Information concerning any aspect of this order may be obtained by contacting Hailey Johnson, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Grassland Water Supply Corporation, Docket No. 2021-0414-PWS-E on December 21, 2021, assessing $2,835 in administrative penalties with $567 deferred. Information concerning any aspect of this order may be obtained by contacting Samantha Salas, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding San Antonio River Authority, Docket No. 2021-0434-MWD-E on December 21, 2021, assessing $4,687 in administrative penalties with $937 deferred. Information concerning any aspect of this order may be obtained by contacting Harley Hobson, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was adopted regarding Stephen Brent Casteel, Docket No. 2021-0631-WOC-E on December 21, 2021, assessing $175 in administrative penalties. Information concerning any aspect of this citation may be obtained by contacting Julianne Matthews, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was adopted regarding Royal Crest Custom Homes, Ltd., Docket No. 2021-0815-WQ-E on December 21, 2021, assessing $875 in administrative penalties. Information concerning any aspect of this citation may be obtained by contacting Ellen Ojeda, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was adopted regarding CUSTOM SKIN CO, Docket No. 2021-0816-WQ-E on December 21, 2021, assessing $875 in administrative penalties. Information concerning any aspect of this citation may be obtained by contacting Stephanie Frederick, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was adopted regarding Mearstone Properties, L.P., Docket No. 2021-0902-WQ-E on December 21, 2021, assessing $875 in administrative penalties. Information concerning any aspect of this citation may be obtained by contacting Alyssa Loveday, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was adopted regarding CHRIS LICATOVICH, Docket No. 2021-1171-WOC-E on December 21, 2021, assessing $175 in administrative penalties. Information concerning any aspect of this citation may be obtained by contacting Carlos Molina, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was adopted regarding David Ryan Bills, Docket No. 2021-1183-WQ-E on December 21, 2021, assessing $175 in administrative penalties. Information concerning any aspect of this citation may be obtained by contacting Mark Gamble, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was adopted regarding Isaiah Martinez, Docket No. 2021-1245-WQ-E on December 21, 2021, assessing $875 in administrative penalties. Information concerning any aspect of this citation may be obtained by contacting Mark Gamble, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was adopted regarding Alan Utz & Associates, Inc., Docket No. 2021-1264-WQ-E on December 21, 2021, assessing $875 in administrative penalties. Information concerning any aspect of this citation may be obtained by contacting Harley Hobson, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-202105218
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 22, 2021

Notice of Application and Public Hearing for an Air Quality Standard Permit for a Concrete Batch Plant with Enhanced Controls: Proposed Air Quality Registration Number 167311

APPLICATION. The Precast Company, LLC, 8510 East Sam Houston Parkway North, Houston, Texas 77044-1840 has applied to the Texas Commission on Environmental Quality (TCEQ) for an Air Quality Standard Permit for a Concrete Batch Plant with Enhanced Controls Registration Number 167311 to authorize the operation of a per-

manent concrete batch plant. The facility is proposed to be located at 8510 East Sam Houston Parkway North, Houston, Harris County, Texas 77044. This application is being processed in an expedited manner, as allowed by the commission's rules in 30 Texas Administrative Code, Chapter 101, Subchapter J. This link to an electronic map of the site or facility's general location is provided as a public courtesy and not part of the application or notice. For exact location, refer to application. *http://www.tceq.texas.gov/assets/public/hb610/index.html?lat=29.849188&lng=-95.184278&zoom=13&type=r.* This application was submitted to the TCEQ on December 6, 2021. The primary function of this plant is to manufacture concrete by mixing materials including (but not limited to) sand, aggregate, cement and water. The executive director has determined the application was technically complete on December 8, 2021.

PUBLIC COMMENT / PUBLIC HEARING. Public written comments about this application may be submitted at any time during the public comment period. The public comment period begins on the first date notice is published and extends to the close of the public hearing. Public comments may be submitted either in writing to the Texas Commission on Environmental Quality, Office of the Chief Clerk, MC-105, P.O. Box 13087, Austin, Texas 78711-3087, or electronically at *www14.tceq.texas.gov/epic/eComment/.* Please be aware that any contact information you provide, including your name, phone number, email address and physical address will become part of the agency's public record.

A public hearing has been scheduled, that will consist of two parts, an informal discussion period and a formal comment period. During the informal discussion period, the public is encouraged to ask questions of the applicant and TCEQ staff concerning the application, but comments made during the informal period will not be considered by the executive director before reaching a decision on the permit, and no formal response will be made to the informal comments. During the formal comment period, members of the public may state their comments into the official record. **Written comments about this application may also be submitted at any time during the hearing.** The purpose of a public hearing is to provide the opportunity to submit written comments or an oral statement about the application. **The public hearing is not an evidentiary proceeding.**

The Public Hearing is to be held:

Wednesday, January 26, 2022, at 6:00 p.m.

Members of the public who would like to ask questions or provide comments during the hearing may access the hearing via webcast by following this link: *https://www.gotomeeting.com/webinar/join-webinar* and entering Webinar ID 959-329-571. It is recommended that you join the webinar and register for the public hearing at least 15 minutes before the hearing 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 must call (512) 239-1201 at least one day prior to the hearing to register for the meeting and to obtain information for participating telephonically. Members of the public who wish to only listen to the hearing may call, toll-free, (415) 655-0060 and enter access code 678-284-793.

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.*

RESPONSE TO COMMENTS. A written response to all formal comments will be prepared by the executive director after the comment period closes. The response, along with the executive director's decision on the application, will be mailed to everyone who submitted public comments and the response to comments will be posted in the permit file for viewing.

The executive director shall approve or deny the application not later than 35 days after the date of the public hearing, considering all comments received within the comment period, and base this decision on whether the application meets the requirements of the standard permit.

CENTRAL/REGIONAL OFFICE. The application will be available for viewing and copying at the TCEQ Central Office and the TCEQ Houston Regional Office, located at 5425 Polk Street, Suite H, Houston, Texas 77023-1452, during the hours of 8:00 a.m. to 5:00 p.m., Monday through Friday, beginning the first day of publication of this notice.

INFORMATION. If you need more information about this permit application or the permitting process, please call the Public Education Program toll-free at (800) 687-4040. Si desea información en español, puede llamar al (800) 687-4040.

Further information may also be obtained from The Precast Company, LLC, 8510 East Sam Houston Parkway North, Houston, Texas 77044-1840, or by calling Mrs. LaCretia White REM, Project Manager, Elm Creek Environmental LLC at (972) 768-9093.

Notice Issuance Date: December 10, 2021

TRD-202105099
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 16, 2021

Notice of Completion of Technical Review for Minor Amendment: Radioactive Material License Number R04100

APPLICATION: Waste Control Specialists LLC (WCS) applied to the Texas Commission on Environmental Quality (TCEQ) for minor amendment to Radioactive Material License R04100 with an application received May 17, 2021, to exclude depleted uranium from the 30,000,000 grams above ground possession limit for source material for the low-level radioactive waste (LLRW) disposal facility to conform with previous major amendment 26, add the GeoMelt In Container Vitrification (ICV) for processing radioactive waste at the storage and processing facility, modify the modular concrete canister (MCC) design to authorize a variable range of height from 4 feet to 10 feet 4 inches, and to extend the time that the Licensee can store transuranic waste that originated at the Los Alamos National Laboratory (LANL) to December 23, 2022.

Radioactive Material License R04100 authorizes commercial disposal of LLRW and storage and processing of radioactive waste. WCS currently conducts a variety of waste management services at its site in Andrews County, Texas and is the licensed operator of the Compact Waste Facility and the Federal Waste Facility for commercial and federal LLRW disposal. The land disposal facility and the storage and processing facility are located at 9998 State Highway 176 West in Andrews County, Texas.

The Executive Director has determined that a minor amendment to the license is appropriate because the amendment application does not pose a detrimental impact and is in consideration of maintaining public health and safety, worker safety, and environmental health. The license will be amended to exclude depleted uranium from the 30,000,000 grams above ground possession limit for source material for the LLRW disposal facility to conform with previous major amendment 26, add the GeoMelt ICV for processing radioactive waste at the storage and

processing facility, modify the MCC design to authorize a variable range of height from 4 feet to 10 feet 4 inches, and tie down the minor amendment application dated May 7, 2021, and the letters from WCS dated June 4, 2021, June 25, 2021, Attachment A of July 2, 2021, July 9, 2021, and July 23, 2021. The license will not be amended to extend the time that the Licensee can store transuranic waste that originated at LANL to December 23, 2022.

The following link to an electronic map of the facility's general location is provided as a public courtesy and is not part of the notice: *https://tceq.maps.arcgis.com/apps/webappviewer/index.html?id=db5bac44afbc468bbddd360f8168250f&marker=-103.063055%2C32.4425&level=12. For an exact location, refer to the application.*

The TCEQ Executive Director has completed the technical review of the amendment and supporting documents and has prepared a draft license. The draft license, if approved, would refine and add detail to the conditions under which the land disposal facility and the storage and processing facility must operate with regard to existing authorized receipt of wastes and does not change the type or concentration limits of wastes to be received. The Executive Director has made a preliminary decision that this license, if issued, meets all statutory and regulatory requirements. The license amendment application with supporting documents, the Executive Director's technical summary, and the amended draft license are available for viewing and copying at the Andrews Public Library, 109 NW 1st Street, Andrews, Texas, 79714.

INFORMATION AVAILABLE ONLINE: For details about the status of the application, visit the Commissioners' Integrated Database at *www.tceq.texas.gov/goto/cid.* Once you have access to the CID using the above link, enter the permit number for this application, which is provided at the top of this notice.

AGENCY CONTACTS AND INFORMATION: Public comments and requests must be submitted either electronically at *https://www.tceq.texas.gov/agency/decisions/cc/comments.html,* or in writing to the Texas Commission on Environmental Quality, Office of the Chief Clerk, MC-105, P.O. Box 13087, Austin, Texas 78711-3087. Please be aware that any contact information you provide, including your name, phone number, email address and physical address will become part of the agency's public record.

PUBLIC COMMENT/PUBLIC MEETING: You may submit public comments or request a public meeting about this application. The purpose of a public meeting is to provide the opportunity to submit comments or to ask questions about the amendment. The TCEQ holds a public meeting if the Executive Director determines that there is a significant degree of public interest in the applications/amendments or if requested by a local legislator. A public meeting is not a contested case hearing. After the deadline for submitting public comments, the Executive Director may consider all timely comments and prepare a response to all relevant and material or significant public comments.

EXECUTIVE DIRECTOR ACTION: The amendment is subject to Commission rules which direct the Executive Director to act on behalf of the Commission and provide authority to the Executive Director to issue final approval of the application for amendment after consideration of all timely comments submitted on the application.

MAILING LIST: If you submit public comments or a request for reconsideration of the Executive Director's decision, you will be added to the mailing list for this specific application to receive future public notices mailed by the Office of the Chief Clerk. In addition, you may request to be placed on: (1) the permanent mailing list for a specific applicant name and license or permit number; and/or (2) the mailing list for a specific county. If you wish to be placed on the permanent and/or the county mailing list, clearly specify which list(s) and send your request to TCEQ Office of the Chief Clerk at the address below.

All written public comments and requests must be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087 or electronically at *https://www.tceq.texas.gov/agency/decisions/cc/comments.html* within 10 days from the date of this notice or 10 days from the date of publication in the *Texas Register,* whichever is later.

AGENCY CONTACTS AND INFORMATION: If you need more information about this license application or the licensing process, please call the TCEQ Public Education Program, toll-free, at (800) 687-4040. Si desea información en español, puede llamar al (800) 687-4040. General information about the TCEQ can be found at our website at *https://www.tceq.texas.gov.*

Further information may also be obtained from WCS at the address stated above or by calling Mr. Jay Cartwright at (432) 525-8698.

TRD-202105143
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 17, 2021

Notice of District Petition

TCEQ Internal Control No. D-11182021-029; Terrell Timmermann Farms, LP, a Texas limited partnership and Timmermann Properties, Inc., a Texas corporation, (Petitioners) filed a petition for creation of Williamson County Municipal Utility District No. 36 (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 822.02 acres located within Williamson 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, construct, acquire, provide, operate, maintain, repair, improve, or extend, inside or outside of its boundaries, any and all works, improvements, facilities, systems, plants, equipment, and appliances necessary or helpful to supply and distribute water for municipal, domestic, industrial, and commercial purposes; (2) collect, transport, process, dispose of, and control domestic, industrial, and commercial wastes; (3) gather, conduct, divert, abate, amend, and control local storm water or other local harmful excesses of water or provide adequate drainage in the proposed District; (4) to purchase, construct, acquire, provide, operate, maintain, repair, improve, or extend inside or outside of its boundaries, such additional facilities, systems, plants, equipment, appliances, and enterprises as shall be consonant with all of the purposes for which the proposed District is created. Additionally, work and services which may be performed by the proposed District include the purchase, construction, acquisition, provision, operation, maintenance, repair, improvement, extension, and development of a roadway system and park and recreational facilities for the inhabitants of the proposed District. 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 $76,300,000 ($62,000,000 for water, wastewater, and drainage plus $10,700,000 for roads plus $3,600,000 for recreation).

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.

Notice issued December 15, 2021

TRD-202105090
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 15, 2021

Notice of Hearing on Brickston Municipal Utility District: SOAH Docket No. 582-22-0863; TCEQ Docket No. 2021-1210-MWD; Permit No. WQ0015839001

APPLICATION.

Brickston Municipal Utility District, 3300 Bee Caves Road, Suite 650, No. 189, West Lake Hills, Texas 78746, has applied to the Texas Commission on Environmental Quality (TCEQ) for new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0015839001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 200,000 gallons per day. TCEQ received this application on November 22, 2019.

The facility will be located approximately 2,000 feet northwest of the intersection of Albert Voelker Road and U.S. Highway 290 East, in Travis County, Texas 78621. The treated effluent will be discharged to Willow Creek, thence to Cottonwood Creek, thence to Wilbarger Creek, thence to Colorado River Above La Grange in Segment No. 1434 of the Colorado River Basin. The unclassified receiving water uses are limited aquatic life use for Willow Creek and Cottonwood Creek and high aquatic life use for Wilbarger Creek. The designated uses for Segment No. 1434 are primary contact recreation, public water supply, and exceptional aquatic life use. 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=-97.455555%2C30.353611&level=12.* For the exact location, refer to the application.

In accordance with 30 Texas Administrative Code (TAC) §307.5 and the TCEQ's Procedures to Implement the Texas Surface Water Quality Standards (June 2010), 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 Wilbarger Creek, 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.

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 Elgin Public Library, 404 North Main Street, Elgin, Texas. The permit application, Executive Director's preliminary decision and draft permit are also posted online at *https://www.doucetengineers.com/projects/brickston-municipal-utility-district-wastewater-treatment-plant/* and are available for viewing and downloading.

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. - January 31, 2022

To join the Zoom meeting via computer:

https://soah-texas.zoomgov.com/

Meeting ID: 161 447 2230

Password: 64wrrm

or

To join the Zoom meeting via telephone:

(669) 254-5252 or (646) 828-7666

Meeting ID: 161 447 2230

Password: 145400

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 October 27, 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 Brickston Municipal Utility District at the address stated above or by calling Mr. Keith Young, P.E., Doucet and Associates, Inc., at (512) 583-2600.

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: December 15, 2021

TRD-202105097
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 16, 2021

Notice of Hearing on Diamond Back Recycling And Sanitary Landfill: SOAH Docket No. 582-22-0844; TCEQ Docket No. 2021-1000-MSW; Proposed Permit No. 2404

APPLICATION.

Diamond Back Recycling And Sanitary Landfill, LP, P.O. Box 2283, Odessa, Ector County, Texas 79760, a municipal solid waste storage and disposal company, has applied to the Texas Commission on Environmental Quality (TCEQ) for a permit to authorize the proposed Diamond Back Solid Waste Facility and Recycling Center, a Type I municipal solid waste landfill, for acceptance and disposal of solid waste from and incidental to municipal, community, commercial, institutional, recreational, and industrial activities, including garbage, putrescible wastes, rubbish, ashes, brush, street cleanings, dead animals, abandoned automobiles, construction-demolition waste, yard waste, non-hazardous industrial solid waste, and some special waste from Ector and surrounding counties. The Diamond Back Solid Waste Facility and Recycling Center will be located at 2301 South FM 866, Odessa, Ector County, Texas 79763. 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://arcg.is/1uLquW0.* 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 321 W. 5th Street, Odessa, Texas 79761. The permit application may be viewed online at *http://www.team-psc.com/engineering-sector/solid-waste/tceq-permits/.*

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. - February 1, 2022

To join the Zoom meeting via computer:

https://soah-texas.zoomgov.com/

Meeting ID: 160 338 1354

Password: 9J9vrj

or

To join the Zoom meeting via telephone:

(669) 254-5252 or (646) 828-7666

Meeting ID: 160 338 1354

Password: 068469

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 October 19, 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 361, Texas Health and Safety Code; TCEQ rules including 30 Texas Administrative Code (TAC) Chapter 330; 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.* The mailing address for the TCEQ is P.O. Box 13087, Austin, Texas 78711-3087.

Further information may also be obtained from Diamond Back Recycling and Sanitary Landfill, LP at the address stated above or by calling Todd E. Stiggins, P. E. at (806) 473-3683.

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: December 15, 2021

TRD-202105098
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 16, 2021

Notice of Minor Amendment

APPLICATION NO. WQ0010053009; The Texas Commission on Environmental Quality (TCEQ) has initiated a minor amendment of the Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0010053009 issued to City of Pasadena, 1149 Ellsworth Street, Pasadena, Texas 77506, to authorize the correction of a typographical error to the term of the existing permit, correction of a typographical error in the sublethal WET limit, and to remove the WET Compliance Plan reporting requirements that are not required to be in the Other Requirements section of the permit. The existing permit authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 14,000,000 gallons per day.

The facility is located at 209 North Main Street, in Harris County, Texas 77506. The treated effluent is discharged to Little Vince Bayou, thence to Vince Bayou, thence to the Houston Ship Channel/Buffalo Bayou Tidal in Segment No. 1007 of the San Jacinto River Basin. The unclassified receiving water use is limited aquatic life use for Little Vince Bayou. The designated uses for Segment No. 1007 are navigation and industrial water supply. This link to an electronic map of the site or facility's general location is provided as a public courtesy and is not part of the application or notice. For the exact location, refer to the application.

https://tceq.maps.arcgis.com/apps/webappviewer/index.html?id=db5bac44afbc468bbddd360f8168250f&marker=-95.209444%2C29.715277&level=12

The TCEQ Executive Director has completed the technical review of the application and prepared a draft permit. The draft permit, 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.

You may submit public comments or request a public meeting about this application. The purpose of a public meeting is to provide the opportunity to submit written or oral comment or to ask questions about the application. Generally, the TCEQ will hold a public meeting if the Executive Director determines that there is a significant degree of public interest in the application or if requested by a local legislator. A public meeting is not a contested case hearing.

All written public comments and requests for a public meeting must be submitted to the Office of the Chief Clerk, MC 105, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or electronically at *www14.tceq.texas.gov/epic/eComment/* within 30 days of the date of publication of this notice in the *Texas Register.*

After the deadline for public comments, the Executive Director will consider the comments and prepare a response to all relevant and material, or significant public comments. The response to comments will be mailed to everyone who submitted public comments or who requested to be on a mailing list for this application.

If you submit public comments, you will be added to the mailing list for this specific application to receive future public notices mailed by the Office of the Chief Clerk. In addition, you may request to be placed on: (1) the permanent mailing list for a specific applicant name and permit number; and/or (2) the mailing list for a specific county. If you wish to be placed on the permanent and/or the county mailing list, clearly specify which list(s) and send your request to TCEQ Office of the Chief Clerk at the address below.

For details about the status of the application, visit the Commissioners' Integrated Database at www.tceq.texas.gov/goto/cid. Search the database using the permit number for this application, which is provided at the top of this notice.

Public comments and requests must be submitted either electronically at *www14.tceq.texas.gov/epic/eComment/,* or in writing to the Texas Commission on Environmental Quality, Office of the Chief Clerk, MC-105, P.O. Box 13087, Austin, Texas 78711-3087. Any personal information you submit to the TCEQ will become part of the agency's record; this includes email addresses.

For more information about this permit application or the permitting process, please call the TCEQ Public Education Program, Toll-Free, at (800) 687-4040 or visit their website at *www.tceq.texas.gov/goto/pep.*

Si desea información en español, puede llamar al (800) 687-4040.

Further information may also be obtained from City of Pasadena at the address stated above or by calling Mr. David Pitocchelli at (281) 995-8947.

Notice Issued December 17, 2021

TRD-202105167
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 20, 2021

Notice of Public Hearing on Assessment of Administrative Penalties and Requiring Certain Actions of The American Legion, Mission in Action Post No. 231, The American Legion, Department of Texas, Pottsboro, Texas: SOAH Docket No. 582-22-1015; TCEQ Docket No. 2019-1329-PWS-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. - January 13, 2022

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 November 13, 2020 concerning assessing administrative penalties against and requiring certain actions of THE AMERICAN LEGION, MISSING IN ACTION POST NO. 231, THE AMERICAN LEGION, DEPARTMENT OF TEXAS, POTTSBORO, TEXAS, for violations in Grayson County, Texas, of: Texas Health & Safety Code §341.0315(c); 30 Texas Administrative Code §§290.41(c)(3)(A), 290.41(c)(3)(J), 290.41(c)(3)(K), 290.42(e)(3)(D), 290.42(l), 290.43(e), 290.45(b)(1)(B)(i), 290.45(b)(1)(B)(iv), 290.46(f)(2) and (f)(3)(A)(ii)(III), 290.46(i), 290.46(n)(1), 290.46(m), 290.46(n)(2), 290.46(s)(2)(C)(i), 290.46(t), 290.46(v), 290.121(a) and (b), and 290.110(c)(4)(A); and TCEQ Agreed Order No. 2018-0048-PWS-E, Ordering Provisions Nos. 2.a., 2.c. and 2.e.

The hearing will allow THE AMERICAN LEGION, MISSING IN ACTION POST NO. 231, THE AMERICAN LEGION, DEPARTMENT OF TEXAS, POTTSBORO, TEXAS, 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 THE AMERICAN LEGION, MISSING IN ACTION POST NO. 231, THE AMERICAN LEGION, DEPARTMENT OF TEXAS, POTTSBORO, TEXAS, 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 THE AMERICAN LEGION, MISSING IN ACTION POST NO. 231, THE AMERICAN LEGION, DEPARTMENT OF TEXAS, POTTSBORO, TEXAS 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.** THE AMERICAN LEGION, MISSING IN ACTION POST NO. 231, THE AMERICAN LEGION, DEPARTMENT OF TEXAS, POTTSBORO, TEXAS, the Executive Director of the Commission, and the Commission's Public Interest Counsel are the only designated parties to this proceeding.

Legal Authority: Texas Water Code §7.054, Texas Health & Safety Code ch. 341 and 30 Texas Administrative Code chs. 70 and 290; Texas 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 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 Jim Sallans, 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: December 14, 2021

TRD-202105219
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 22, 2021

Notice of Public Hearing on Proposed Revision to 30 TAC Chapter 331

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 331, Underground Injection Control, under the requirements of Texas Government Code, Chapter 2001, Subchapter B.

The proposed rulemaking would implement House Bill 1284, 87th Texas Legislature, Regular Session, 2021, which requires an amendment to the regulation of the injection and geologic storage of carbon dioxide in this state.

Virtual Public Hearing

The commission will hold a virtual public hearing on this proposal on **January 25, 2022,** at 10:00 a.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 virtual hearing; however, commission staff members 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 January 24, 2022.** 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 **January 24, 2022,** 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, they may do so at no cost at:

https://teams.microsoft.com/l/meetup-join/19%3ameeting_YzFiMTViZDMtMTllNC00NDRmLTgwNWYtNzA0ZGE4N2JiYTIz%40thread.v2/0?context=%7b%22Tid%22%3a%22871a83a4-a1ce-4b7a-8156-3bcd93a08fba%22%2c%22Oid%22%3a%2230ec-010b-ff0b-4618-bbc4-622a14f9cb18%22%2c%22IsBroadcastMeeting%22%3atrue%7d&btype=a&role=a

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy

Wong, Office of Legal Services at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

Written Comments

Written comments may be submitted to Cecilia Mena, 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 2021-025-331-WS. The comment period closes February 1, 2022.** Please choose one of the methods provided to submit your *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 Dan Hannah, Radioactive Materials Division, (512) 239-2161.

TRD-202105139
Guy Henry
Deputy Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: December 17, 2021

Notice of Public Hearing on Proposed Revisions to 30 TAC Chapter 60

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 60, Compliance History, under the requirements of Texas Government Code, Chapter 2001, Subchapter B.

The proposed rulemaking would add new §60.4, which would allow for the executive director to make designation to and reclassify a compliance history classification for a site involved in an emergency event that causes or results in exigent circumstances.

Virtual Public Hearing

The commission will hold a virtual public hearing on this proposal on **January 27, 2022,** 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 virtual hearing; however, commission staff members 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 January 25, 2022.** 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 **January 25, 2022,** to those who register for the hearing.

Persons 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_MTR-mYjg0NGYtYjhjYi00YWNjLThkNmUtMTUxZjk4MjUwYzli%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

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

Written Comments

Written comments may be submitted to Gwen Ricco, 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 2020-049-060-CE. The comment period closes on February 1, 2022.** Please choose one of the methods provided to submit your *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 Melissa Cordell, Office of Compliance and Enforcement, (512) 239-2483.

TRD-202105142
Charmaine Backens
Deputy Director, Litigation Division
Texas Commission on Environmental Quality
Filed: December 17, 2021

Texas Health and Human Services Commission

Notice of Public Hearing on Proposed Medicaid Payment Rates for the Healthcare Common Procedure Coding System (HCPCS) Updates

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on January 12, 2022, at 2:00 p.m., to receive public comments on proposed Medicaid payment rates for the HCPCS Updates.

Due to the declared state of disaster stemming from COVID-19, this hearing will be conducted both in-person and as an online event. To join the hearing from your computer, tablet, or smartphone, register for the hearing in advance using the following link:

Registration URL:

https://attendee.gotowebinar.com/register/2693551020086627343

Webinar ID: 246-180-883

After registering, you will receive a confirmation email containing information about joining the hearing. You can also dial in using your phone by calling:

Conference Number: (562) 247-8422

Phone Audio Passcode: 704-650-405

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 pro-

posed Medicaid reimbursements. A recording of the hearing will be archived and can be accessed on demand at https://hhs.texas.gov/about-hhs/communications-events/live-archived-meetings.

Members of the public may attend the rate hearing in person, which will be held in the Public Hearing Room 125 in the John H Winters Building located at 701 W 51st Street, Austin, Texas or may access a live stream of the meeting by following the link above. For the live stream, select the "Winters Live" tab.

Proposal. The proposed payment rates for the HCPCS Updates will be effective January 1, 2022 for the following topics:

Proposed to be effective January 1, 2022: 2021 Q3 HCPCS Updates:

Blood - TOS 0 (Blood);

Physician Administered Drugs - TOS 1 (Medical Service); and

Durable Medical Equipment, Prosthetics, Orthotics, and Supplies - TOS 9 (Other Medical Items or Services).

Proposed to be effective January 1, 2022: 2022 Annual HCPCS Updates:

Physician Administered Drugs - Type of Service (TOS) 1 (Medical Services);

Surgery, Assistant Surgery Services - TOS 2 (Surgery Services), and TOS 8 (Assistant Surgery);

Consultation - TOS 3 (Consultation);

Radiological Services - TOS 4 (Radiology), TOS I (Professional Component), and TOS T (Technical Component);

Clinical Diagnostic Laboratory Services - TOS 5 (Laboratory);

Anesthesia - TOS 7 (Anesthesia);

Durable Medical Equipment, Prosthetics, Orthotics, and Supplies - TOS 9 (Other Medical Items or Services), TOS J (DME Purchase-New), and TOS L (DME Rental-Monthly);

Ambulatory Surgical Center - TOS F (Ambulatory Surgical Center and Hospital-based Ambulatory Surgical Center); and

Dental Services - TOS W (Texas Health Steps Dental/Orthodontia).

Methodology and Justification. The proposed payment rates were calculated in accordance with Title 1 of the Texas Administrative Code:

§355.8021, Reimbursement Methodology for Home Health Services;

§355.8023, Reimbursement Methodology for Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS);

§355.8061, Outpatient Hospital Reimbursement;

§355.8085, Reimbursement Methodology for Physicians and Other Practitioners;

§355.8121, Reimbursement for Ambulatory Surgical Centers;

§355.8221, Reimbursement Methodology for Certified Registered Nurse Anesthetists and Anesthesiologist Assistants;

§355.8441, Reimbursement Methodologies for Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Services, also known as Texas Health Steps (THSteps) and the THSteps Comprehensive Care Program (CCP); and

§355.8610, Reimbursement for Clinical Laboratory Services.

Rate Hearing Packet. A briefing packet describing the proposed payment rates will be made available at https://pfd.hhs.texas.gov/rate-packets on or after January 2, 2022. Interested parties may obtain a copy of the briefing packet on or after that date by contacting Provider Finance by telephone at (512) 730-7401; by fax at (512) 730-7475; or by e-mail at PFDAcuteCare@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 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 e-mail to PFDAcuteCare@hhs.texas.gov. In addition, written comments may be sent by overnight mail to Texas Health and Human Services Commission, Attention: Provider Finance, Mail Code H-400, North Austin Complex, 4601 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 quickest response, and to help curb the possible transmission of infection, please use e-mail or phone if possible, for communication with HHSC related to this rate hearing.

Persons with disabilities who wish to participate in the hearing and require auxiliary aids or services should contact Provider Finance at (512) 730-7401 at least 72 hours before the hearing so appropriate arrangements can be made.

TRD-202105184
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Filed: December 20, 2021

Notice of Stakeholder Engagement Meetings on Potential Medicaid and Title XX Payment Rates

The Texas Health and Human Services Commission (HHSC) will conduct stakeholder engagement meetings on January 27, 2022, to receive comments on the Medicaid and Title XX payment rates that can be addressed at the May 2022 rate hearings. The meetings will begin at 9:00 a.m. CST.

Note: HHSC will not publish proposed rates at this time, and the stakeholder engagement meetings are solely to receive commentary on the topics listed below.

Due to the declared state of disaster stemming from COVID-19, these meetings will be conducted online only.

The stakeholder engagement meetings will be held as follows:

- Acute Care Services: January 27, 2022, 9:00 - 11:00 a.m.

- Hospital Services: January 27, 2022, 12:30 - 2:30 p.m.

- Long-Term Services & Supports: January 27, 2022, 3:00 - 5:00 p.m.

HHSC may limit speakers' time to ensure all attendees wishing to present public comment are afforded an opportunity to do so.

HHSC reserves the right to end an engagement meeting if no participants have registered to present public comments within the first 30 minutes of the meeting.

Please register for HHSC Provider Finance Department Stakeholder Engagement Meetings on January 27, 2022, at:

https://attendee.gotowebinar.com/register/6116977230038797067

Webinar ID: 759-403-763

After registering, you will receive a confirmation email containing information about joining the webinar.

If you are new to GoToMeeting, please download the GoToMeeting app at https://global.gotomeeting.com/install/626873213 before the hearing starts.

HHSC will record the meetings. The recording will be archived and can be accessed on-demand at https://hhs.texas.gov/about-hhs/communications-events/live-archived-meetings.

Topics. The topics for the Stakeholder Engagement Meetings are below. Please note that the topics listed in this notice comprise a provisional list of topics to be presented at the May 2022 rate hearing. The final list of topics to be presented at the May 2022 rate hearing is at the discretion of HHSC.

Acute Care Services

- Calendar Fee Review

--- Ambulance

--- Birthing Centers

--- Cardiovascular System Surgery

--- Dental Services

--- Digestive System Surgery

--- Family Planning

--- Female Genital System Surgery

--- Indian Health Services

--- Nervous System Surgery

--- Physician Administered Drugs - Discontinued National Drug Codes (NDCX)

--- Physician Administered Drugs - Non-Oncology

--- Physician Administered Drugs - Oncology

--- Physician Administered Drugs - Vaccines & Toxoids

--- Proton Therapy Codes

--- Respiratory System Surgery

--- Urinary System Surgery

--- Vision Devices

--- "G" Codes Acute Care and Hospitals

--- "K" Codes

--- "T" Codes

- Medical Policy Review

--- THSTEPS Medical Checkup

- HCPCS

--- Quarterly Healthcare Common Procedure Coding System (HCPCS) Updates

Hospital Services

- Rural Health Clinic Reimbursement (Title 1 Texas Administrative Code section 355.8101)

Long-Term Services & Supports (LTSS)

- Community Living Assistance and Support Services (CLASS) Waiver Program

--- Community First Choice (CFC) CLASS Financial Management Services (FMS) Fee

--- CLASS FMS Fee

- Title XX Consumer Managed Personal Attendant Services (CMPAS)

--- CMPAS FMS Fee

- Deaf Blind with Multiple Disabilities (DBMD) Waiver Program

--- CFC DBMD FMS Fee

--- DBMD FMS Fee

- Home and Community-based Services (HCS)

--- CFC HCS FMS Fee

--- HCS FMS Fee

- Primary Home Care (PHC)/Community Attendant Services (CAS)/ Title XX Family Care (FC)

--- PHC/CAS/FC FMS Fee

- STAR Kids

--- CFC STAR Kids FMS Fee, non-MDCP

- STAR Kids Medically Dependent Children Program (MDCP)

--- CFC MDCP FMS Fee

--- MDCP FMS Fee

- STAR+PLUS

--- STAR+PLUS FMS Fee (CDS) (HCBS)

--- STAR+PLUS FMS Fee (non-HCBS)

- Texas Home Living (TxHmL)

--- CFC TxHmL FMS Fee

--- TxHmL FMS Fee

- Nursing Facilities (NF) Rehabilitation and Therapy

--- Occupational Therapy (OT) Rehabilitative Therapy - Assessment

--- OT Rehabilitative Therapy - Assessment (Contracted)

--- OT Rehabilitative Therapy - Service

--- OT Rehabilitative Therapy - Service (Contracted)

--- OT Specialized Therapy - Assessment

--- OT Specialized Therapy - Assessment (Contracted)

--- OT Specialized Therapy - Service

--- OT Specialized Therapy - Service (Contracted)

--- Physical Therapy (PT) Rehabilitative Therapy - Assessment

--- PT Rehabilitative Therapy - Assessment (Contracted)

--- PT Rehabilitative Therapy - Service

--- PT Rehabilitative Therapy - Service (Contracted)

--- PT Specialized Therapy - Assessment

--- PT Specialized Therapy - Assessment (Contracted)

--- PT Specialized Therapy - Service

--- PT Specialized Therapy - Service (Contracted)

--- Speech Therapy (ST) Rehabilitative Therapy - Assessment

--- ST Rehabilitative Therapy - Assessment (Contracted)

--- ST Rehabilitative Therapy - Service

--- ST Rehabilitative Therapy - Service (Contracted)

--- ST Specialized Therapy - Assessment

--- ST Specialized Therapy - Assessment (Contracted)

--- ST Specialized Therapy - Service

--- ST Specialized Therapy - Service (Contracted)

A final agenda for the Stakeholder Engagement Meetings will be made available at *https://pfd.hhs.texas.gov/provider-finance-communications* by January 14, 2022. Interested parties may also obtain a copy of the agenda on or after that date by contacting Provider Finance by telephone at (512) 730-7401; by fax at (512) 730-7475; or by email at ProviderFinanceDept@hhs.texas.gov.

Written Comments. Written comments regarding the proposed topics may be submitted in lieu of, or in addition to, oral comments until 5:00 p.m. the day following the meetings, January 28, 2022. Written comments may be sent by U.S. mail, overnight mail, fax, or email.

U.S. Mail

Texas Health and Human Services Commission

Attention: Provider Finance Department

Mail Code H-400

P.O. Box 149030

Austin, Texas 78714-9030

Overnight mail or special delivery mail

Texas Health and Human Services Commission

Attn: Provider Finance Department

North Austin Complex

Mail Code H-400

4601 Guadalupe St.

Austin, Texas 78751

Fax

Attention: Provider Finance at (512) 730-7475

Email

ProviderFinanceDept@hhs.texas.gov

Preferred Communication. Email or telephone communication is preferred due to the current state of the COVID-19 disaster. These forms of communication will ensure the fastest possible response and help reduce infection transmission.

TRD-202105213
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Filed: December 22, 2021

♦ ♦ ♦

Department of State Health Services

Licensing Actions for Radioactive Materials

During the first half of November 2021, the Department of State Health Services (Department) has taken actions regarding Licenses for the possession and use of radioactive materials as listed in the tables (in alphabetical order by location). The subheading "Location" indicates the city in which the radioactive material may be possessed and/or used. The location listing "Throughout TX [Texas]" indicates that the radioactive material may be used on a temporary basis at locations throughout the state.

In issuing new licenses and amending and renewing existing licenses, the Department's Business Filing and Verification Section has determined that the applicant has complied with the licensing requirements in Title 25 Texas Administrative Code (TAC), Chapter 289, for the noted action. In granting termination of licenses, the Department has determined that the licensee has complied with the applicable decommissioning requirements of 25 TAC, Chapter 289. In granting exemptions to the licensing requirements of Chapter 289, the Department has determined that the exemption is not prohibited by law and will not result in a significant risk to public health and safety and the environment.

A person affected by the actions published in this notice may request a hearing within 30 days of the publication date. A "person affected" is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to the county, in which radioactive material is or will be located, or (b) doing business or has a legal interest in land in the county or adjacent county. 25 TAC §289.205(b)(15); Health and Safety Code §401.003(15). Requests must be made in writing and should contain the words "hearing request," the name and address of the person affected by the agency action, the name and license number of the entity that is the subject of the hearing request, a brief statement of how the person is affected by the action what the requestor seeks as the outcome of the hearing, and the name and address of the attorney if the requestor is represented by an attorney. Send hearing requests by mail to: Hearing Request, Radiation Material Licensing, MC 2835, PO Box 149347, Austin, Texas 78714-9347, or by fax to: 512-834-6690, or by e-mail to: RAMlicensing@dshs.texas.gov.

NEW LICENSES ISSUED:

Location of Use/Possession of Material	Name of Licensed Entity	License Number	City of Licensed Entity	Amend-ment Number	Date of Action
THROUGHOUT TX	MULTI PHASE METER SOLUTIONS LLC	L07141	MIDLAND	00	11/10/21

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location of Use/Possession of Material	Name of Licensed Entity	License Number	City of Licensed Entity	Amend-ment Number	Date of Action
AUSTIN	WESTLAKE SURGICAL LP DBA THE HOSPITAL AT WESTLAKE MEDICAL CENTER	L06234	AUSTIN	11	11/01/21
AUSTIN	WESTLAKE SURGICAL LP DBA THE HOSPITAL AT WESTLAKE MEDICAL CENTER	L06234	AUSTIN	12	11/10/21
BAYTOWN	ENTERPRISE PRODUCTS OPERATING LLC	L06963	BAYTOWN	03	11/02/21
BEDFORD	TEXAS ONCOLOGY PA	L05545	BEDFORD	74	11/01/21
BROWNSVILEE	JAIME L SILVA MD PA	L05245	BROWNSVILLE	10	11/01/21
CROCKETT	CROCKETT MEDICAL CENTER LLC	L06967	CROCKETT	03	11/02/21
EL PASO	TEXAS ONCOLOGY PA DBA EL PASO CANCER TREATMENT CENTER	L05774	EL PASO	16	11/03/21
EL PASO	EL PASO HEALTHCARE SYSTEM LTD	L02551	EL PASO	81	11/02/21
EL PASO	EL PASO HEALTHCARE SYSTEM LTD	L02715	EL PASO	100	11/02/21
FLOWER MOUND	TEXAS ONCOLOGY PA	L05502	FLOWER MOUND	25	11/03/21
FORT WORTH	XS SIGHT SYSTEMS INC	L06946	FORT WORTH	04	11/09/21
FORT WORTH	TEXAS HEALTH HUGULEY INC	L06514	FORT WORTH	07	11/01/21

AMENDMENTS TO EXISTING LICENSES ISSUED: (continued)

HOUSTON	UIH AMERICA INC	L07090	HOUSTON	04	11/12/21
HOUSTON	METHODIST HEALTH CENTERS DBA HOUSTON METHODIST WILLOWBROOK HOSPITAL	L05472	HOUSTON	67	11/08/21
HOUSTON	MEMORIAL HERMANN HEALTH SYSTEM	L03457	HOUSTON	74	11/05/21
HOUSTON	HOUSTON REFINING LP	L00187	HOUSTON	81	11/02/21
HOUSTON	HARRIS COUNTY HOSPITAL DISTRICT DBA HARRIS HEALTH SYSTEM	L01303	HOUSTON	105	11/01/21
HOUSTON	MEMORIAL HERMANN HEALTH SYSTEM	L01168	HOUSTON	191	11/03/21
LEWISVILLE	MED FUSION LLC	L06966	LEWISVILLE	03	11/02/21
NEW BRAUNFELS	TXI OPERATIONS LP DBA MARTIN MARIETTA	L01421	NEW BRAUNFELS	64	11/04/21
ORANGE	THE DOW CHEMICAL COMPANY	L07026	ORANGE	04	11/10/21
PASADENA	TECHCORR USA MANAGEMENT LLC	L05972	PASADENA	131	11/02/21
STANTON	ALAMO PRESSURE PUMPING LLC	L07094	STANTON	03	11/02/21
THROUGHOUT TX	PIONEER WIRELINE SERVICES LLC	L06220	CONVERSE	44	11/02/21
THROUGHOUT TX	OCEANEERING INTERNATIONAL INC	L06845	HOUSTON	02	11/03/21
THROUGHOUT TX	NEXTIER COMPLETION SOLUTIONS INC	L06712	HOUSTON	18	11/08/21
THROUGHOUT TX	KLEINFELDER INC	L06590	IRVING	07	11/01/21
THROUGHOUT TX	THE WIRELINE GROUP INC	L07036	MIDLAND	02	11/01/21

AMENDMENTS TO EXISTING LICENSES ISSUED: (continued)

VICTORIA	THE DOW CHEMICAL COMPANY	L07038	VICTORIA	02	11/03/21
WACO	TEXAS ONCOLOGY PA	L05940	WACO	17	11/10/21

TERMINATIONS OF LICENSES ISSUED:

Location of Use/Possession of Material	Name of Licensed Entity	License Number	City of Licensed Entity	Amendment Number	Date of Action
PARIS	HARRISON WALKER AND HARPER LP	L05992	PARIS	04	11/05/21
TOMBALL	BJ SERVICES LLC	L06859	TOMBALL	06	11/08/21

TRD-202105169
Cynthia Hernandez
General Counsel
Department of State Health Services
Filed: December 20, 2021

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Texas Department of Insurance

Company Licensing

Application for incorporation in the state of Texas for Curative Insurance Company, a domestic life, accident and/or health company. The home office is in Austin, Texas.

Any objections must be filed with the Texas Department of Insurance, within twenty (20) calendar days from the date of the *Texas Register* publication, addressed to the attention of John Carter, 333 Guadalupe Street, MC 103-CL, Austin, Texas 78701.

TRD-202105217
James Person
General Counsel
Texas Department of Insurance
Filed: December 22, 2021

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Texas Department of Licensing and Regulation

Notice of a Vacancy on the Auctioneer Advisory Board

The Texas Department of Licensing and Regulation (Department) announces one vacancy on the Auctioneer Advisory Board (Board) established by Texas Occupations Code, Chapter 1802. The pertinent rules may be found in 16 Texas Administrative Code §67.65. The purpose of the Auctioneer Advisory Board is to advise the Texas Commission of Licensing and Regulation (Commission) on educational matters, operational matters, and common practices within the auction industry. **This announcement is for:**

- one member who is the administrative head, or the administrative head's designee, of any state agency or office that is selected by the Commission.

The Board is composed of seven members appointed by the presiding officer of the Commission, with the Commission's approval. The auctioneer members appointed under Section 1802.102(a)(1) serve two-year terms that expire on September 1 and may not serve more than two consecutive terms. The composition of the board shall include:

four members who are licensed auctioneers;

one member who is the administrative head, or the administrative head's designee, of any state agency or office that is selected by the Commission; and

two public members.

Interested persons should submit an application on the Department website at: *https://www.tdlr.texas.gov/AdvisoryBoard/login.aspx.* Applicants can also request an application via e-mail at *advisory.boards@tdlr.texas.gov.*

This is not a paid position and there is no compensation or reimbursement for serving on the Board.

Issued in Austin, Texas on December 17, 2021.

TRD-202105121
Brian E. Francis
Executive Director
Texas Department of Licensing and Regulation
Filed: December 17, 2021

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Notice of Vacancies on Code Enforcement Officers Advisory Committee

The Texas Department of Licensing and Regulation (Department) announces three vacancies on the Code Enforcement Officers Advisory Committee (Committee) established by 16 Texas Administrative Code §62.65. The purpose of the Code Enforcement Officers Advisory Committee is to provide advice and recommendations to the Department on technical matters relevant to the administration of this chapter. **This announcement is for:**

- one consumer who is a certified building official;

- one registered code enforcement officer; and

- one structural engineer or licensed architect.

The Committee is composed of nine members appointed by the presiding officer of the Commission, with the approval of the Commission. Members serve staggered six-year terms, with the terms of three members expiring on February 1 of each odd-numbered year. The Committee is composed of the following members:

(1) five registered code enforcement officers;

(2) one structural engineer or licensed architect;

(3) two consumers, one of which must be a certified building official; and

(4) one person involved in the education and training of code enforcement officers.

Interested persons should submit an application on the Department website at: *https://www.tdlr.texas.gov/AdvisoryBoard/login.aspx.* Applicants can also request an application via e-mail at *advisory.boards@tdlr.texas.gov.*

This is not a paid position and there is no compensation or reimbursement for serving on the Committee.

Issued in Austin, Texas this December 17, 2021.

TRD-202105122
Brian E. Francis
Executive Director
Texas Department of Licensing and Regulation
Filed: December 17, 2021

Notice of Vacancies on Licensed Breeders Advisory Committee

The Texas Department of Licensing and Regulation (Department) announces four vacancies on the Licensed Breeders Advisory Committee (Committee) established by Texas Occupations Code, Chapter 802. The purpose of the Committee is to provide advice and recommendations to the Texas Commission of Licensing and Regulation (Commission) and the Department on matters related to the administration and enforcement of Chapter 802, including licensing fees and standards adopted under Subchapter E. **This announcement is for:**

- two veterinarians; and

- two public members.

The Committee is composed of nine members appointed by the presiding officer of the Commission, with the Commission's approval. Members of the committee serve staggered four-year terms. The terms of four or five members expire on February 1 of each odd-numbered year.

The committee consists of the following members:

1. two members who are licensed breeders;

2. two members who are veterinarians;

3. two members who represent animal welfare organizations, each of which has an office based in this state;

4. two members who represent the public; and

5. one member who is an animal control officer as defined in Section 829.001, Health and Safety Code.

Interested persons should submit an application on the Department website at: *https://www.tdlr.texas.gov/AdvisoryBoard/login.aspx.* Applicants can also request an application via e-mail at *advisory.boards@tdlr.texas.gov.*

These are not paid positions and there is no compensation or reimbursement for serving on the board.

Issued in Austin, December 17, 2021.

TRD-202105118
Brian E. Francis
Executive Director
Texas Department of Licensing and Regulation
Filed: December 17, 2021

Notice of Vacancies on Orthotists and Prosthetists Advisory Board

The Texas Department of Licensing and Regulation (Department) announces two vacancies on the Orthotists and Prosthetists Advisory Board (Board) established by Texas Occupations Code, Chapter 605. The purpose of the Orthotists and Prosthetists Advisory Board is to provide advice and recommendations to the Department on technical matters relevant to the administration of this chapter. **This announcement is for:**

- one member who is a representative of the public who uses an orthosis; and

- one member who is a licensed prosthetist who has practiced for the five years preceding the date of appointment.

The Board consists of seven members appointed by the presiding officer of the Texas Commission of Licensing and Regulation (Commission), with the approval of the Commission. Members serve staggered six-year terms with the terms of two or three members expiring on February 1 of each odd-numbered year. The Board is composed of the following members:

1. two licensed orthotists who each have practiced orthotics for the five years preceding the date of appointment;

2. two licensed prosthetists who each have practiced prosthetics for the five years preceding the date of appointment;

3. one licensed prosthetist orthotist who has practiced orthotics and prosthetics for the five years preceding the date of appointment;

4. one member who is a representative of the public who uses an orthosis; and

5. one member who is a representative of the public who uses a prosthesis.

Interested persons should submit an application on the Department website at: *https://www.tdlr.texas.gov/AdvisoryBoard/login.aspx.* Applicants can also request an application via e-mail at *advisory.boards@tdlr.texas.gov.*

These are not paid positions and there is no compensation or reimbursement for serving on the Board.

Issued in Austin, Texas this December 17, 2021.

TRD-202105119
Brian E. Francis
Executive Director
Texas Department of Licensing and Regulation
Filed: December 17, 2021

Notice of Vacancies on Speech-Language Pathologists and Audiologists Advisory Board

The Texas Department of Licensing and Regulation (Department) announces two vacancies on the Speech-Language Pathologists and Audiologists Advisory Board (Board) established by Texas Occupations Code, Chapter 401. The purpose of the Speech-Language Pathologists and Audiologists Advisory Board is to provide advice and recommendations to the Department on technical matters relevant to the administration of this chapter. **This announcement is for:**

- one public member; and

- one audiologist.

The Board is composed of the following nine members appointed by presiding officer of the Texas Commission of Licensing and Regulation (Commission), with the Commission's approval. Members serve staggered six-year terms with the terms of three members expiring September 1 of each odd-numbered year. The Board is composed of the following members:

1. three audiologists;

2. three speech-language pathologists; and

3. three members who represent the public.

Advisory board members must:

1. be from the various geographic regions of the state; and

2. be from varying employment settings.

The advisory board members appointed under subsections (a)(1) and (2) must:

1. have been engaged in teaching, research, or providing services in speech-language pathology or audiology for at least five years; and

2. be licensed under this chapter.

One of the public members must be a physician licensed in this state and certified in otolaryngology or pediatrics.

This is not a paid position and there is no compensation or reimbursement for serving on the Board.

Issued in Austin, Texas this December 17, 2021.

TRD-202105128
Brian E. Francis
Executive Director
Texas Department of Licensing and Regulation
Filed: December 17, 2021

Notice of Vacancies on the Dietitians Advisory Board

The Texas Department of Licensing and Regulation (Department) announces three vacancies on the Dietitians Advisory Board (Board) established by Texas Occupations Code, Chapter 701. The purpose of the Dietitians Advisory Board is to provide advice and recommendations to the Department on technical matters relevant to the administration of this chapter. **This announcement is for:**

- two public members; and

- one dietitian with education expertise.

The Board is composed of nine members appointed by the presiding officer of the Texas Commission of Licensing and Regulation (Commission), with the approval of the Commission. In appointing dietitian members to the advisory board, the presiding officer of the commission shall attempt to maintain balanced representation among the following primary areas of expertise included in the professional discipline of dietetics: clinical, educational, management, consultation and community. Members serve staggered six-year terms. The terms of three members begin on September 1 of each odd-numbered year. The Board is composed of the following members:

1. six licensed dietitians, each of whom has been licensed under Chapter 701 for not less than three years before the member's date of appointment; and

2. three members who represent the public.

Interested persons should submit an application on the Department website at: *https://www.tdlr.texas.gov/AdvisoryBoard/login.aspx.* Applicants can also request an application via e-mail at *advisory.boards@tdlr.texas.gov.*

This is not a paid position and there is no compensation or reimbursement for serving on the Board.

Issued in Austin, Texas this December 17, 2021.

TRD-202105123
Brian Francis
Executive Director
Texas Department of Licensing and Regulation
Filed: December 17, 2021

Notice of Vacancy on Dyslexia Therapists and Practitioners Advisory Committee

The Texas Department of Licensing and Regulation (Department) announces one vacancy on the Dyslexia Therapists and Practitioners Advisory Committee (Committee) established by 16 Texas Administrative Code §120.65. The purpose of the Dyslexia Therapists and Practitioners Advisory Committee is to advise the Texas Commission of Licensing and Regulation (Commission) regarding rules relating to the licensure and regulation of dyslexia therapists and dyslexia practitioners, including continuing education requirements and the approved examinations for licensure. **This announcement is for:**

- one public member who is a person with dyslexia or parent of a person with dyslexia.

Members serve staggered six-year terms, at the will of the Commission. The terms of three of the members begin on December 31st of each odd-numbered year. The Committee consists of five members appointed by the presiding officer of the Commission, with the Commission's approval. The Committee consists of the following members:

1. two dyslexia therapists licensed under the Act;

2. one dyslexia practitioner licensed under the Act; and

3. two consumer or public members, one of whom must be a person with dyslexia or the parent of a person with dyslexia.

Interested persons should submit an application on the Department website at: *https://www.tdlr.texas.gov/AdvisoryBoard/login.aspx.* Applicants can also request an application via e-mail at *advisory.boards@tdlr.texas.gov.*

This is not a paid position and there is no compensation or reimbursement for serving on the Committee.

Issued in Austin, Texas this December 17, 2021.

TRD-202105124
Brian E. Francis
Executive Director
Texas Department of Licensing and Regulation
Filed: December 17, 2021

Notice of Vacancy on Hearing Instrument Fitters and Dispensers Advisory Board

The Texas Department of Licensing and Regulation (Department) announces one vacancy on the Hearing Instrument Fitters and Dispensers Advisory Board (Board) established by 16 Texas Administrative Code §112.10. The purpose of the Hearing Instrument Fitters and Dispensers Advisory Board is to provide advice and recommendations to the Department on technical matters relevant to the administration of this chapter.

This announcement is for:

- one member who is actively practicing as a physician licensed by the Texas Medical Board and who:

(A) is a citizen of the United States; and

(B) specializes in the practice of otolaryngology.

The Board is composed of nine members appointed by the presiding officer of the Commission, with the approval of the Commission. Members serve staggered six-year terms, with the terms of three members expiring on February 1 of each odd-numbered year. The Board is composed of the following members:

1. six members licensed under this chapter who have been engaged in fitting and dispensing hearing instruments for at least five years preceding appointment, not more than one of whom may be licensed under Chapter 401;

2. one member who is actively practicing as a physician licensed by the Texas Medical Board and who:

(A) is a citizen of the United States; and

(B) specializes in the practice of otolaryngology; and

3. two members of the public.

Interested persons should submit an application on the Department website at: *https://www.tdlr.texas.gov/AdvisoryBoard/login.aspx.* Applicants can also request an application via e-mail at *advisory.boards@tdlr.texas.gov.*

This is not a paid position and there is no compensation or reimbursement for serving on the Board.

Issued in Austin, Texas this December 17, 2021.

TRD-202105126
Brian E. Francis
Executive Director
Texas Department of Licensing and Regulation
Filed: December 17, 2021

Notice of Vacancy on Massage Therapy Advisory Board

The Texas Department of Licensing and Regulation (Department) announces one vacancy on the Massage Therapy Advisory Board (Board) established by Texas Occupations Code, Chapter 455. The purpose of the Board is to provide advice and recommendations to the Texas Commission of Licensing and Regulation (Commission) and the Department on technical matters relevant to the administration of this chapter. **This announcement is for:**

- one member of the public.

The Board is composed of the following nine members appointed by the presiding officer of the Commission, with the Commission's approval. Members serve staggered six-year terms with the terms of three members expiring September 1 of each odd-numbered year. The Board is composed of the following members:

1. two members who are licensed massage therapists;

2. two members who represent licensed massage schools;

3. two members who represent licensed massage establishments;

4. one member who is a peace officer with expertise in the enforcement of Chapter 20A, Penal Code, and Subchapter A, Chapter 43, Penal Code; and

5. two members of the public.

Interested persons should submit an application on the Department website at: *https://www.tdlr.texas.gov/AdvisoryBoard/login.aspx.* Applicants can also request an application via e-mail at *advisory.boards@tdlr.texas.gov.*

This is not a paid position and there is no compensation or reimbursement for serving on the Committee.

Issued in Austin, Texas this December 17, 2021.

TRD-202105117
Brian E. Francis
Executive Director
Texas Department of Licensing and Regulation
Filed: December 17, 2021

Notice of Vacancy on Midwives Advisory Board

The Texas Department of Licensing and Regulation (Department) announces one vacancy on the Midwives Advisory Board (Board) established by Texas Occupations Code, Chapter 203. The pertinent rules may be found in 16 Texas Administrative Code Chapter 55. The purpose of the Midwives Advisory Board is to provide advice and recommendations to the Department on technical matters relevant to the administration of this chapter. **This announcement is for:**

- one public member who represents the public and who is not practicing or trained in a health care profession.

The Board consists of nine members appointed by the presiding officer of the Texas Commission of Licensing and Regulation (Commission), with the approval of the Commission. Members serve staggered terms of six years. The terms of three members expire on January 31 of each odd-numbered year. The Board consists of the following members:

1. five licensed midwives each of whom has at least three years' experience in the practice of midwifery;

2. one physician who is certified by a national professional organization of physicians that certifies obstetricians and gynecologists;

3. one physician who is certified by a national professional organization of physicians that certifies family practitioners or pediatricians; and

4. two members who represent the public and who are not practicing or trained in a health care profession, one of whom is a parent with at least one child born with the assistance of a midwife.

Interested persons should submit an application on the Department website at: *https://www.tdlr.texas.gov/AdvisoryBoard/login.aspx.* Applicants can also request an application via e-mail at *advisory.boards@tdlr.texas.gov.*

These are not paid positions and there is no compensation or reimbursement for serving on the Board.

Issued in Austin, Texas this December 17, 2021.

TRD-202105116
Brian E. Francis
Executive Director
Texas Department of Licensing and Regulation
Filed: December 17, 2021

Notice of Vacancy on Property Tax Consultants Advisory Council

The Texas Department of Licensing and Regulation (Department) announces one vacancy on the Property Tax Consultants Advisory Council (Council) established by Texas Occupations Code, Chapter 1152. The pertinent rules may be found in 16 Texas Administrative Code §66.65. The purpose of the Property Tax Consultants Advisory Council is to provide advice and recommendations to the Texas Commission of Licensing and Regulation (Commission) on standards of practice, conduct, and ethics for registrants; setting fees; examination contents and standards of performance for senior property tax consultants; recognition of continuing education programs and courses for registrants; and establishing educational requirements for initial applicants. Service as a Council member is voluntary, and compensation is not authorized by law. **This announcement is for:**

- one public member.

The Council is composed of seven members appointed by the presiding officer of the Commission, with the approval of the Commission. Members of the Council are appointed for staggered three-year terms. The terms of two members expire on February 1 of each year. The Council consists of the following members:

1. six registered senior property tax consultants; and

2. one public member.

All members who are property tax consultants must be:

- a registered senior property tax consultant;

- a member of a nonprofit and voluntary trade association:

a. whose membership consists primarily of persons who perform property tax consulting services in this state or who engage in property tax management in this state for other persons;

b. have written experience and examination requirements for membership; and

c. that subscribes to a code of professional conduct or ethics;

- be a resident of this state for the five years preceding the date of the appointment; and

- have performed or supervised the performance of property tax consulting services as the person's primary occupation continuously for the five years preceding the date of appointment.

Interested persons should submit an application on the Department website at: *https://www.tdlr.texas.gov/AdvisoryBoard/login.aspx.* Applicants can also request an application via e-mail at *advisory.boards@tdlr.texas.gov.*

This is not a paid position and there is no compensation or reimbursement for serving on the Council.

Issued in Austin, Texas this December 17, 2021.

TRD-202105127
Brian E. Francis
Executive Director
Texas Department of Licensing and Regulation
Filed: December 17, 2021

Notice of Vacancy on Used Automotive Parts Recycling Advisory Board

The Texas Department of Licensing and Regulation (Department) announces one vacancy on the Used Automotive Parts Recycling Advisory Board (Board) established by Texas Occupations Code, Chapter 2309. The purpose of the Board is to provide advice and recommendations to the Texas Commission of Licensing and Regulation (Commission) and the Department on technical matters relevant to the administration and enforcement of Chapter 2309, including licensing standards. Service as a Board member is voluntary, and compensation is not authorized by law. **This announcement is for:**

- a member who represents a used automotive parts business owned by a domestic entity.

The Board is composed of five members appointed by the presiding officer of the Commission, with the Commission's approval. Members serve terms of six years, with the terms of one or two members expiring on February 1 of each odd-numbered year. The Board consists of the following:

(1) four members who represent used automotive parts businesses owned by domestic entities, as defined by Section 1.002, Business Organizations Code;

(2) one member who represents a used automotive parts business owned by a foreign entity, as defined by Section 1.002, Business Organizations Code; and

(3) may not include more than one member from any one used automotive parts business entity.

Interested persons should complete an application on the Department website at: *https://www.tdlr.texas.gov/AdisoryBoard/login.aspx.* Applicants can also request an application from the Department by telephone (800) 803-9202 or e-mail *advisory.boards@tdlr.texas.gov.*

This is not a paid position and there is no compensation or reimbursement for serving on the Board.

Issued in Austin, Texas on this December 17, 2021.

TRD-202105115
Brian E. Francis
Executive Director
Texas Department of Licensing and Regulation
Filed: December 17, 2021

Supreme Court of Texas

Misc. Docket No. 21-9155

Final Approval of Amendments to Texas Rule of Appellate Procedure 57

ORDERED that:

1. On August 27, 2021, in Misc. Dkt. No. 21-9100, the Court preliminarily approved amendments to Texas Rule of Appellate Procedure 57, effective January 1, 2022, and invited public comment.

2. No comments were received, but additional changes have been made to the rule. This Order contains the final version of the amendments to Rule 57, effective January 1, 2022.

3. The Clerk is directed to:

   a. file a copy of this Order with the Secretary of State;

   b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*;

   c. send a copy of this Order to each elected member of the Legislature; and

   d. submit a copy of this Order for publication in the *Texas Register*.

Dated: December 20, 2021.

Rule 57. Direct Appeals to the Supreme Court

57.1. Application

Except when inconsistent with a statute, ~~T~~this rule governs direct appeals to the Supreme Court that are authorized by the Constitution and by statute.~~ Except when inconsistent with a statute or this rule, the rules governing appeals to courts of appeals also apply to direct appeals to the Supreme Court.~~

57.2. ~~Jurisdiction~~Perfecting Direct Appeal

~~The Supreme Court may not take jurisdiction over a direct appeal from the decision of any court other than a district court or county court, or over any question of fact. The Supreme Court may decline to exercise jurisdiction over a direct appeal of an interlocutory order if the record is not adequately developed, or if its decision would be advisory, or if the case is not of such importance to the jurisprudence of the state that a direct appeal should be allowed.~~

(a) *Notice of Direct Appeal.* A direct appeal to the Supreme Court authorized by law is perfected when a written notice of direct appeal is filed with the trial court clerk. The notice of direct appeal must be filed within the time provided by Rule 26.1 or as extended by Rule 26.3. The trial court clerk must immediately send a copy of the notice of direct appeal to the clerk of the Supreme Court. If a notice of direct appeal is mistakenly filed with the Supreme Court or the court of appeals, the notice is deemed filed the same day with the trial court clerk, and the Supreme Court clerk or the court of appeals' clerk must immediately send the trial court clerk a copy of the notice.

(b) *Contents of Notice.* The notice of direct appeal must:

(1) identify the trial court and state the case's trial court number and style;

(2) state the date of the judgment or order appealed from;

(3) state that the party desires to take a direct appeal to the Supreme Court;

(4) state the name of each party filing the notice;

(5) specify the law or laws under which the direct appeal is authorized;

(6) in an accelerated appeal, state that the appeal is accelerated; and

(7) state, if applicable, that the appellant is presumed indigent and may proceed without advance payment of costs as provided in Rule 20.1.

(c) *Amending the Notice.* An amended notice of direct appeal correcting a defect or omission in an earlier filed notice may be filed with the Supreme Court at any time before the appellant's brief is filed. The amended notice is subject to being struck for cause on the motion of any party affected by the amended notice. After the appellant's brief is filed, the notice may be amended only on leave of the Supreme Court and on such terms as the Supreme Court may prescribe.

(d) *Other Requirements.* Promptly upon filing the notice of direct appeal, appellant must file in the Supreme Court a docketing statement as provided in Rule 32.1 and pay all required fees authorized to be collected by the clerk of the Supreme Court.

(e) *The Appellate Record.* Rules 34 and 35 governing the appellate record apply to direct appeals to the Supreme Court.

57.3. ~~Statement of~~ Jurisdiction of Supreme Court

(a) *Statement of Jurisdiction.* The ~~A~~appellant must file with ~~the record~~the Supreme Court a statement ~~fully but~~of jurisdiction within ten days after the notice of appeal is filed with the trial court clerk.

(b) *Contents of Statement.* The statement of jurisdiction must plainly ~~setting out~~state the basis ~~asserted~~ for the exercise of the Supreme Court's direct appeal jurisdiction; insofar as appropriate, follow the form and contents of a petition for review prescribed by Rule 53; and conform to the length requirements prescribed for a petition for review by Rule 9.4.

(c) *Response to Statement.* An ~~A~~appellee may file a response to the appellant's statement of jurisdiction challenging the exercise of direct appeal jurisdiction or a waiver of the response within ten days after the statement is filed with the Supreme Court. If filed, the response must, insofar as appropriate, follow the form and contents of a response to a petition for review prescribed by Rule 53 and conform to the length requirements prescribed for a response to a petition to review by Rule 9.4.

57.4. Preliminary Ruling on Probable Jurisdiction; Dismissal of Appeal

~~If the Supreme Court notes probable jurisdiction over a direct appeal, the parties must file briefs under Rule 38 as in any other case.~~The Supreme Court may determine whether the Court has probable jurisdiction based on the statement of jurisdiction and any response. If the Supreme Court determines that it does not ~~note probable~~have or will not exercise jurisdiction over a direct appeal, the ~~appeal~~Court will ~~be~~ dismiss~~ed~~ the appeal.

57.5. Direct Appeal Exclusive While Pending~~.~~

If a direct appeal to the Supreme Court is filed, the parties to the appeal must not, while that appeal is pending, pursue an appeal to the court of appeals. But if the direct appeal is dismissed, any party may pursue any other appeal available at the time when the direct appeal was filed. The other appeal must be perfected within ~~ten~~ 15 days after dismissal of the direct appeal or the date of the Supreme Court's ruling on a timely filed motion for rehearing.

57.6. Determination of Direct Appeal

(a) *Ruling on Merits*. If the Supreme Court determines that it has probable jurisdiction, the Court:

(1) may request full briefing under Rule 55;

(2) may set the case for submission under Rule 59; and

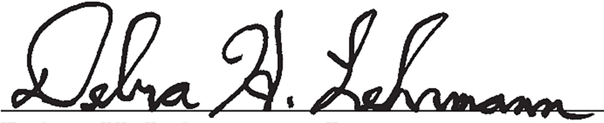
(3) may render judgment or make an appropriate order under Rule 60.

(b) *Rehearing*. A motion for rehearing may be filed with the Supreme Court clerk within 15 days after the Court renders judgment or makes an order disposing of the direct appeal. The motion must clearly state the issues relied on for rehearing.

Notes and Comments

Comment to 1997 change: This is former Rule 140. The rule is amended without substantive change except subdivision 57.5 is amended to make clear that no party to the direct appeal may pursue the appeal in the court of appeals while the direct appeal is pending, but allowing 10 days to perfect a subsequent appeal.

Nathan L. Hecht, Chief Justice



Debra H. Lehrmann, Justice

Jeffrey S. Boyd, Justice

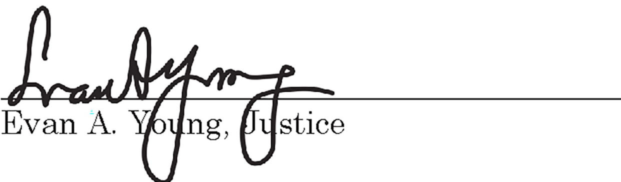
John P. Devine, Justice

James D. Blacklock, Justice

J. Brett Busby, Justice

Jane N. Bland, Justice

Rebeca A. Huddle, Justice



Evan A. Young, Justice

TRD-202105216
Jaclyn Daumerie
Rules Attorney
Supreme Court of Texas
Filed: December 22, 2021

Texas Windstorm Insurance Association

Announcement: Request for Proposals

Request for Proposal Posted - Call Center Services

TWIA and TFPA invites all qualified Respondents to submit proposals in accordance with the requirements outlined in this Request for Pro-

posals (RFP). The purpose of this RFP is to obtain proposals from qualified Respondents for the Call Center services described in this RFP.

For more information on the requirements for proposals to be submitted by interested Respondents, please download and read the full document, which can be found at www.twia.org.

Important deadlines pertaining to this RFP are as follows:

January 7, 2022 - Submission of Written Questions

January 10, 2022 - Responses to Written Questions Provided by TWIA

January 14, 2022 - Deadline for Submission of Proposals

January 21, 2022 - Staff Review of Proposals

February 7, 2022 - TWIA Executive Committee Evaluation of Staff Recommendations

March 31, 2022 - Anticipated Contract Award

For more information, or for questions regarding submission of proposals, please contact aalexander@twia.org.

All deadlines are subject to change at our discretion.

TRD-202105221
Sonya Palmer
Staff Attorney
Texas Windstorm Insurance Association
Filed: December 22, 2021

Request for Proposals Announcement

On December 16, 2021, the Texas Windstorm Insurance Association (TWIA) issued a Request for Proposals **("RFP")** to solicit proposals from vendors who are qualified to assist and advise TWIA in the production of modeled hurricane estimates to be used in the determination of its 100-year PML and its rates.

Available December 16, 2021

The **RFP** was published on the TWIA website December 16, 2021.

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 contracts 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 the **RFP** and/or to issue alternate or additional RFPs at its discretion.

Target dates

December 16, 2021, **RFP** issued

December 29, 2021, Deadline for submission of questions/requests for clarification

January 5, 2022, Responses to Written Questions Posted on the TWIA Website

January 12, 2022, Deadline for submission of responses

Contact Information

Any requests for information should be directed to:

Texas Windstorm Insurance Association

Attention: Jim Murphy ActuarialServices@twia.org

TRD-202105220
James Murphy
Chief Actuary
Texas Windstorm Insurance Association
Filed: December 22, 2021

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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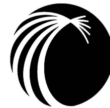

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