TEXAS REGISTER

IN THIS ISSUE

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Part I - Volume 20, Number 50

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Texas Register

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How to Use the Texas Register

Information Available: The 11 sections of the *Texas Register* represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following a 30-day public comment period.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Open Meetings - notices of open meetings.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

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 19 (1994) is cited as follows: 19 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 "19 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 19 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the *Texas Register* office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using *Texas Register* indexes, the *Texas Administrative Code*, section numbers, or TRD number.

Texas Administrative Code

The *Texas Administrative Code* (*TAC*) is the official 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*. West Publishing Company, the official publisher of the *TAC*, publishes on an annual basis.

The *TAC* volumes are arranged into Titles (using Arabic numerals) and Parts (using Roman numerals) The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency. The *Official TAC* also is available on WESTLAW, West's computerized legal research service, in the TX-ADC database.

To purchase printed volumes of the *TAC* or to inquire about WESTLAW access to the *TAC* call West: 1-800-328-9352.

The Titles of the *TAC*, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the *TAC* scheme, each section is designated by a *TAC* number. For example in the citation 1 TAC §27.15:

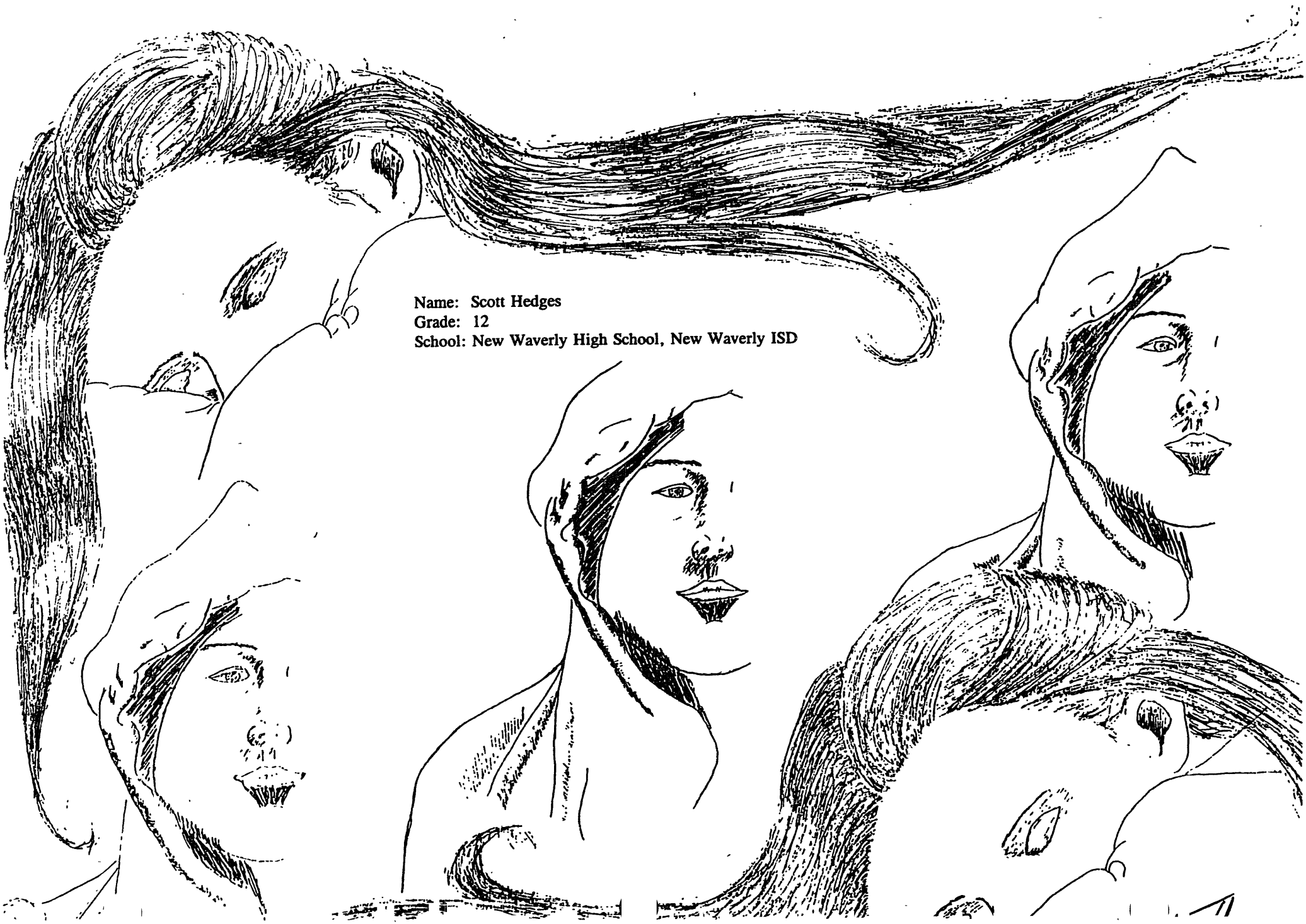
1 indicates the title under which the agency appears in the *Texas Administrative Code*; *TAC* stands for the *Texas Administrative Code*; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the *Texas Administrative Code*, please look at the *Table of TAC Titles Affected*. The table is published cumulatively in the blue-cover quarterly indexes to the *Texas Register* (January 21, April 15, July 12, and October 11, 1994). In its second issue each month the *Texas Register* contains a cumulative *Table of TAC Titles Affected* for the preceding month. If a rule has changed during the time period covered by the table, the rule's *TAC* number will be printed with one or more *Texas Register* page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The *Table of TAC Titles Affected* is cumulative for each volume of the *Texas Register* (calendar year).

Update by FAX: An up-to-date *Table of TAC Titles Affected* is available by FAX upon request. Please specify the state agency and the TAC number(s) you wish to update. This service is free to *Texas Register* subscribers. Please have your subscription number ready when you make your request. For non-subscribers there will be a fee of $2.00 per page (VISA, MasterCard). (512) 463-5561.



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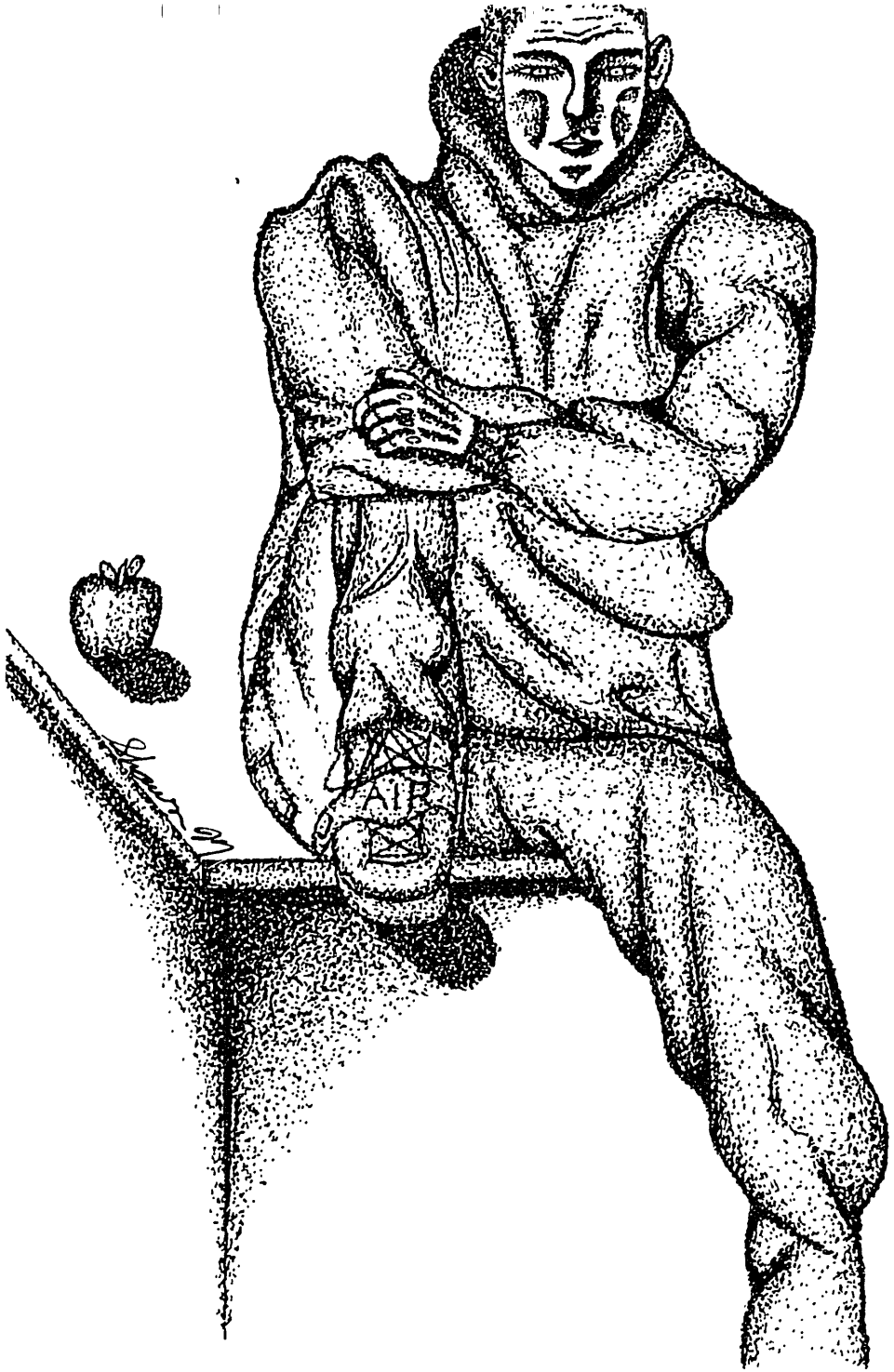
Grade: 12
School: New Waverly High School, New Waverly ISD



School District: NWTSD
School: New Waverly High
Grade: 12
City: New Waverly

Name: David Houston
Grade: 12
School: New Waverly High School, New Waverly ISD

Name: Leslie Lippincott
Grade: 11
School: Plano Senior High School, Plano ISD

ATTORNEY GENERAL

Under provisions set out in the Texas Constitution, the Texas Government Code, Title 4, §402.042 and numerous statutes, the attorney general is authorized to write advisory opinions for state and local officials. These advisory opinions are requested by agencies or officials when they are confronted with unique or unusually difficult legal questions. The attorney general also determines, under authority of the Texas Open Records Act, whether information requested for release from governmental agencies may be held from public disclosure. Requests for opinions, opinions, and open record decisions are summarized for publication in the ***Texas Register***. The Attorney General responds to many requests for opinions and open records decisions with letter opinions. A letter opinion has the same force and effect as a formal Attorney General Opinion, and represents the opinion of the Attorney General unless and until it is modified or overruled by a subsequent letter opinion, a formal Attorney General Opinion, or a decision of a court of record. To request copies of opinions, phone (512) 462-0011. To inquire about pending requests for opinions, phone (512) 463-2110.

Letter Opinions

LO-95-030 (ID#-31512). Request by Honorable David M. Motley, Kerr County Attorney, County Courthouse, Suite B20, 700 East Main Street, Kerrville, Texas 78018-5324, concerning whether a transfer of a juvenile case under Family Code, §51.07(a), requires the consent of the receiving court

Summary of Opinion. A transfer of a juvenile case under Family Code, §51.07(a) does not require the consent of the receiving court.

Issued in Austin, Texas on June 21, 1995

TRD-9507555

♦ ♦ ♦

LO-95-031 (ID#-30282). Request of Rufus P. Cormier, Chair, Texas Southern University, Board of Regents, 3100 Cleburne Avenue, Houston, Texas 77004, concerning propriety of a state university allowing a religious group to use its facilities

Summary of Opinion. If a state university allows a broad class of groups access to university facilities, but does not favor, sponsor, or lend its imprimatur to particular viewpoints beyond the allowance of access, allowing access to a religiously-oriented organization would not violate the Establishment Clause of the First Amendment. Furthermore, denial of access in such context, if done solely on the basis of the organization's religious orientation, would violate First Amendment speech protections.

Issued in Austin, Texas on June 21, 1995.

TRD-9507554

♦ ♦ ♦

LO-95-032 (ID#-30527). Request of Honorable Jerry Don Evans, Uvalde County Attorney, 127 North West Street, Uvalde, Texas 78801, concerning whether a regular called session of a county commissioners court is valid if that regular session is convened on a Tuesday following a Monday holiday and related question.

Summary of Opinion. If a commissioners court's regular term commences on a legal holiday, the commissioners court does not violate the Local Government Code, §81.005(a) by convening on the succeeding day. The court must post proper notice of the meeting in accordance with the Open Meetings Act, Government Code Chapter 551.

While any county commissioner may place items for discussion on the commissioners court's agenda, a commissioners court need not delay discussion of items placed on the agenda by a particular commissioner if the commissioner is absent. So long as a quorum of the commissioners court is present, it may discuss any items on the agenda. Consequently, the Uvalde County Commissioners Court did not violate any law by discussing items placed on its agenda by a commissioner who was absent from the meeting.

Issued in Austin, Texas on June 21, 1995.

TRD-9507553

♦ ♦ ♦

LO-95-033 (ID#-33425). Request of Honorable Judith Zaffirini, Chair, Health and Human Services Committee, Texas State Senate, P.O. Box 12068, Austin, Texas 78711-2068, concerning whether the Texas Constitution, Article III, §18, prohibits the granting of an option to purchase and subsequent sale of a tract of land by a corporation, the stock of which is owned by the spouse of a legislator, to an optionee/purchaser who intends to submit a bid to the state to construct improvements on the tract and lease them to the state.

Summary of Opinion. The facts of this transaction suggest as a matter of law that for purposes of the Texas Constitution, Article III, §18, the legislator is not directly or indirectly interested in the contemplated contract between the state and the optionee/purchaser.

Issued in Austin, Texas on June 21, 1995.

TRD-9507552

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Opinions

DM-347 (RQ-656). Request from Honorable Bill Sims, Chair, Committee on Natural Resources, Texas State Senate, P.O. Box 12068, Austin, Texas 78711-2068O, concerning whether, under Education Code, §21.901, a school district must competitively bid a contract for the purchase of insurance.

Summary of Opinion. To the extent Attorney General Opinion MW-342 (1981) concludes that a contract for the purchase of insurance under Education Code, §21.901 is a contract for professional services that §21.901(c) excepts from the competitive bidding process, it is overruled. Furthermore, to the extent Attorney General Opinion MW-342 concludes that a contract for the purchase of insurance is not a contract for the purchase of personal property subject to competitive bidding under Education Code, §21.901(a), it is overruled. Likewise, to the extent Attorney General Opinion Attorney General Opinion MW-494 (1982) suggests that a contract for the purchase of insurance is not personal property for purposes of the Education Code, §21.901(a), we overrule it.

Under the Education Code, §21.901(a), a school board must competitively bid a contract for the purchase of insurance if the contract is valued at $25,000 or more for a twelve-month period. In evaluating which bid to accept, the school board may consider factors other than cost, such as the insurer's professionalism and the promptness, efficiency, and honesty with which the insurer services claims.

When a school board must competitively bid a contract under §21.901(a), it must comply with the notice requirements set out in subsection (d). The school board must devise the remainder of the competitive bidding procedure consistent with good business management. In the event a school board need not competitively bid a contract for the purchase of insurance because the contract is valued at less than $25,000 for a twelve-month period, the school board may choose to competitively bid the contract if the board determines that good business management requires it. The school board must devise a competitive bidding procedure that is consistent with good business management.

Issued in Austin, Texas on June 21, 1995.

TRD-9507551

♦ ♦ ♦

DM-348 (RQ-673). Request from Honorable Tim Curry, Tarrant County Criminal District Attorney, 401 West Belknap, Fort Worth, Texas 76196-0201, concerning validity and constitutionality of the Local Government Code, §117.002, which concerns the turn over of abandoned funds held by the county or district clerk to the State of Texas.

Summary of Opinion. The Local Government Code, §117.002, is both valid and constitutional. Funds subject to §117.002 are those funds covered by Chapter 117, as defined by Attorney General Opinion JM-1162 (1990). To the extent of conflict between the Local Government Code, §117.002 and §117.058, §117.002 prevails as more specific and later adopted.

Issued in Austin, Texas, on June 21, 1995.

TRD-9507550

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Requests for Opinions

(RQ-802). Request from Honorable John Sharp, Comptroller of Public Accounts, LBJ State Office Building, Austin, Texas 78774, concerning allocation of funds collected from a convicted individual who is unable to pay the full amount required by statute.

(RQ-803). Request from Honorable James M. Kuboviak, Brazos County Attorney, 300 East 26th Street, Suite 325, Bryan, Texas 77803, concerning whether the Texas Guaranteed Student Loan Corporation may garnish the wages of a county employee for the purpose of collecting a federally guaranteed student loan.

(RQ-804). Request by Leala Mann, Associate General Counsel, Texas Department of Transportation, Dewitt C. Greer State Highway Building, 125 East 11th Street, Austin, Texas 78701-2483; Tamara Armstrong, Assistant County Attorney, County of Travis, P.O. Box 1748, Austin, Texas 78767; and Mark Dempsey, Assistant City Attorney, City of Garland, P.O. Box 469002, Garland, Texas 75046-9002, concerning whether a notice of claim by itself shows that litigation is reasonably anticipated for purposes of the Government Code, §552.103(a).

(RQ-805). Request by Honorable Harvey Hilderbran, Chair, Committee on Human Services, P.O. Box 2910, Austin, Texas 78768-2910, concerning authority of a general law municipality to re-annex territory which has been disannexed under the provisions of Local Government Code, §43.033.

(RQ-806). Request by Rebecca E. Forkner, Executive Director, Texas State Board of Examiners of Psychologists, 9101 Burnet Road, Suite 212, Austin, Texas 78758, concerning authority of the Board of Examiners of Psychologists to regulate the conduct of non-licensed persons acting under the supervision of a licensed psychologist.

(RQ-807). Request by Honorable Mike Driscoll, Harris County Attorney, 1001 Preston, Suite 634, Houston, Texas 77002-1891, concerning legal representation in child protective custody litigation in Harris County.

(RQ-808). Request by Sheree L. Rabe, Assistant City Attorney, City of Georgetown, P.O. Box 409, Georgetown, Texas 78627-0409, concerning burden a governmental body must carry in establishing the applicability of the Government Code, §552.103.

(RQ-809). Request by Tim Rodgers, Wise County Auditor, P.O. Box 899, Decatur, Texas 76234, concerning whether a justice of the peace may maintain a checking account, separate from the county treasury, into which he or she deposits hot check restitution and fines and related questions.

(RQ-810). Request by David M. Motley, Kerr County Attorney, County Courthouse, Suite B20, 700 East Main Street, Kerrville, Texas 78028-5324, and James W. Carr, Lavaca County Attorney, Box 576, Second Floor Courthouse, Hallettsville, Texas 77964, concerning proper jurisdiction of prosecution under various sections of the Alcoholic Beverage Code, Chapter 106, which regulates the possession, consumption, and purchase of alcoholic beverages by persons under the age of 21. (Briefs will be accepted through June 30, 1995.)

(RQ-811). Request by James A. Collins, Executive Director, Texas Department of Criminal Justice, P.O. Box 99, Huntsville, Texas 77340, concerning responsibility of the Texas Department of Criminal Justice for conducting an audit of a particular intermediate sanctions facility in Harris County.

(RQ-812). Request by Honorable John Vance, Dallas County District Attorney, Civil Section, Administration Building, 411 Elm Street, Dallas, Texas 75202, concerning duties of a district or county clerk with regard to the filing of federal tax liens.

(RQ-813). Request by Honorable James M. Kuboviak, Brazos County Attorney, Brazos County Courthouse, Bryan, Texas 77803, concerning whether a tax assessor-collector may, without approval of the commissioners court of his county, expend funds accrued as interest under the Tax Code, §23.12B.

Issued in Austin, Texas, on June 21, 1995.

TRD-9507556

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SECRETARY OF STATE

Office of the Secretary of State

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Beginning July 1, 1995, SOS customers can take advantage of LegalEase, a new electronic payment service. The payment method has been successfully used by the Texas Department of Transportation and the Travis County Clerk's Office. We hope that this new service will also be advantageous to our frequent customers at the Office of the Secretary of State.

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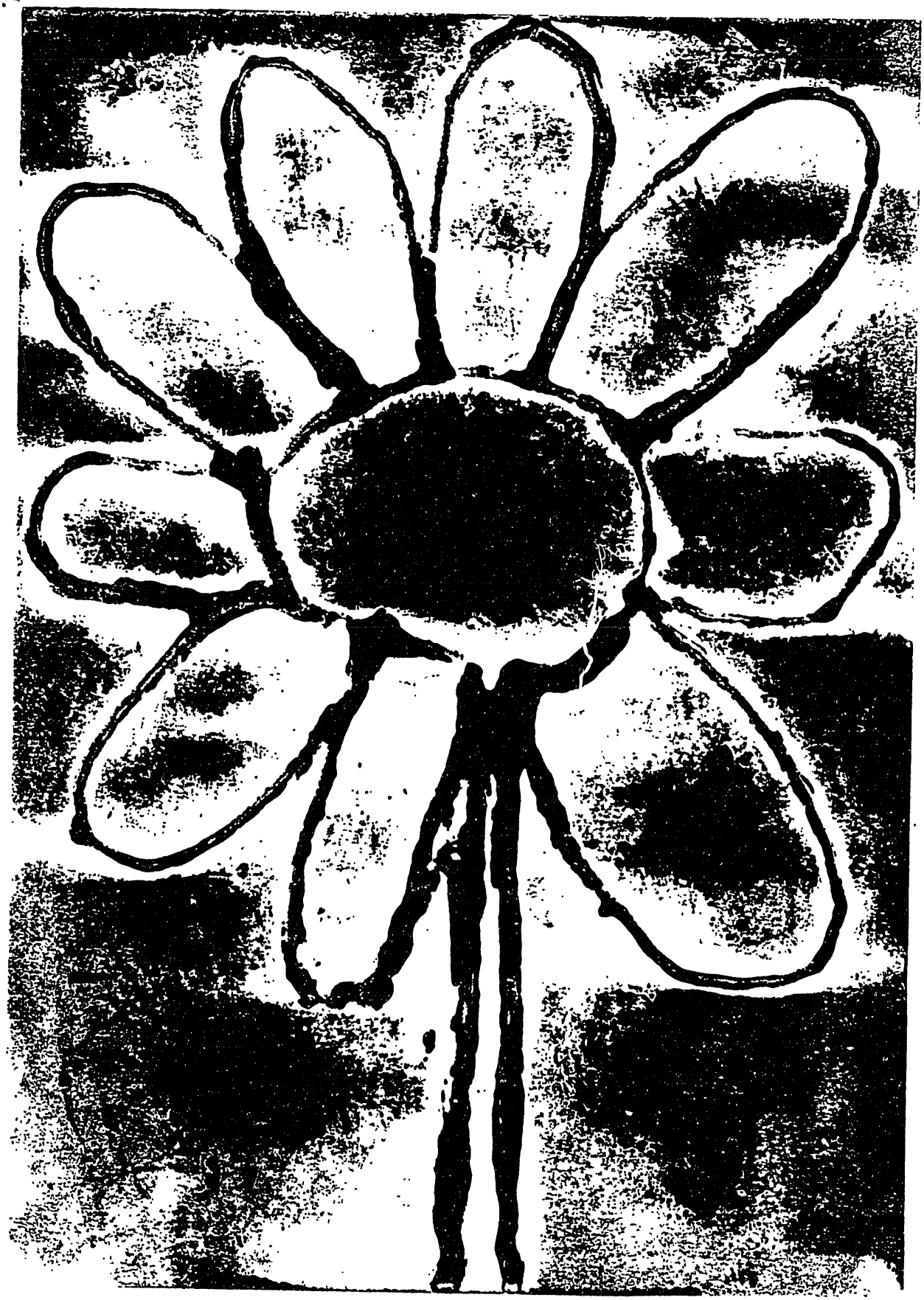
Issued in Austin, Texas on June 27, 1995.

TRD-9507793



Name: Ernesto Lozano
Grade: 4
School: Pillow Elementary School, Austin ISD

PROPOSED RULES

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

Symbology in proposed amendments. New language added to an existing section is indicated by the use of **bold text.** [Brackets] indicate deletion of existing material within a section.

TITLE 16. ECONOMIC REGULATION

Part III. Texas Alcoholic Beverage Commission

Chapter 33. Licensing

License and Permit Surcharges

• **16 TAC §33.24**

The Texas Alcoholic Beverage Commission proposes new §33 24, concerning conduct surety bonds. New §11.11 and §61.13 of the Alcoholic Beverage Code added additional bonding requirements to certain licenses and permits.

Jeannene Fox, Director of Licensing and Compliance, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section

Ms Fox also has determined that for each year of the first five years the section as proposed is in effect, the public benefit anticipated as a result of enforcing the section will be extra incentive to permittees and licensees to comply with the Alcoholic Beverage Code. The anticipated cost of compliance with the section for small businesses will be the cost of the bond or its equivalent. The possible economic cost to persons who are required to comply with the section as proposed will be cost of the bond provided by statute in each year required.

Comments on the proposal may be submitted to Lou Bright, General Counsel, P. O. Box 13127, Austin, Texas 78711, (512) 206-3204

The new section is proposed under the Alcoholic Beverage Code, §5.31, which provides the Texas Alcoholic Beverage Commission with the authority to prescribe and publish rules necessary to carry out the provision of the Alcoholic Beverage Code

The new section affects the Alcoholic Beverage Code, §11.11(c) and §61 13(c)

§33.24. Conduct Surety Bond.

(a) A bond required under the Alcoholic Beverage Code, Texas Civil Statutes, §11 11 and §61.13, must be executed only on forms prescribed by this agency with the licensee or permittee as principal, a qualified surety company doing business in this state as surety and the state as payee.

(b) All bonds of permittees and licensees shall be payable in Travis county

(c) A separate surety, in the amount of $5,000 or $10,000, shall be obtained, submitted and maintained for each license or permit as set out in the Alcoholic Beverage Code, §11.11 and §61.13.

(d) If certificates of deposit, savings accounts or letters of credit are furnished, the administrator or his designee shall keep them in his possession. Interest earned on a certificate of deposit or savings account is not subject to the assignment and remains the property of the owner of the certificate of deposit or savings account.

(e) A certificate of deposit or savings account furnished by a licensee or permittee must be assigned to the state, in a manner approved by the administrator or his designee, to secure payment to the state.

(f) A letter of credit furnished by a licensee or permittee, under this rule, must be on a form approved by the administrator or his designee and contain any conditions required by the administrator to secure payment to the state.

(g) The surety bond, assignment of certificate of deposit, savings account, or letter of credit may be continuous in nature and must cover the minimum time required of the applicant to qualify for exemption from the surety imposed by the Alcoholic Beverage Code, §11.11 and §61.13.

(h) Qualifications of Surety.

(1) A surety company, to qualify to provide bonds under this rule, must be licensed by this state and in "good standing" with the State Board of Insurance, Comptroller of Public Accounts, Secretary of State and any other regulatory agencies with jurisdiction over its affairs.

(2) A bank, savings institution or credit union, in addition to the requirements of the Alcoholic Beverage Code, §11.11 and §61.13, must have a physical facility in this state to accept cash deposits, make cash advances to customers and carry out day-to-day operations within this state.

(i) Submission of Security.

(1) An applicant for an original or renewal license or permit must submit, at the time of their application, the security as prescribed by the Alcoholic Beverage Code, §11.11 and §61.13, and meet the requirements of this rule.

(2) Failure to submit the necessary surety in proper form will result in the denial of the application.

(j) License/Permit Cancelled or Suspended

(1) If a license or permit is cancelled by the commission or a suspension has been imposed and no appeal is pending, the commission shall notify the surety company, bank, savings institution or credit union to remit to the state the amount of surety required within ten days after notification.

(2) The commission may institute action in its own name, for the benefit of the state, on the surety supporting the bond, and against the bank, savings institution or credit union, as set forth in the Alcoholic Beverage Code, §11 70, to recover the security.

(k) Release of Surety.

(1) A surety company may terminate liability by giving the proper 30 day written notice, as provided in the Alcoholic Beverage Code, §11.71.

(2) Grounds for termination of a permit/license upon termination of liability by surety is the same as provided in the Alcoholic Beverage Code, §11.71.

(3) Upon expiration of the license or permit, its voluntary cancellation, or upon the applicant's subsequent approval for exemption from the surety requirement, the licensee or permittee may request the release and return of the security supporting their license or permit.

(4) The release of this security will not be unreasonably withheld; however, the surety company, bank, savings institution or credit union is not released from its obligation until they receive written notice of the release from this agency.

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

Issued in Austin, Texas, on June 23, 1995.

TRD-9507665 Doyne Bailey
Administrator
Texas Alcoholic Beverage Commission

Earliest possible date of adoption: July 31, 1995

For further information, please call: (512) 206-3204

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Chapter 50. Alcohol Awareness and Education

• 16 TAC §50.9

The Texas Alcoholic Beverage Commission proposes an amendment to §50.9 concerning exemptions from certain administrative actions. The amendment clarifies when, and under what circumstances, licensees and permittees can claim exemption from administrative actions under the Texas Alcoholic Beverage Code, §106.14.

Lou Bright, General Counsel, has determined that for the first five year period these amendments are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering this section

Mr. Bright also has determined that these proposed amendments will benefit the public in that enforcement of the Texas Alcoholic Beverage Code provisions will be enhanced by greater efficiency and certainty of application. There will be no effect on small businesses. There is no increased economic cost to persons required to comply with the sections as proposed.

Comments should be submitted to Lou Bright, General Counsel, Texas Alcoholic Beverage Commission, P.O. Box 13127, Austin, Texas 78711-3127.

These amendments are proposed under the authority of §5.31 of the Texas Alcoholic Beverage Code.

Section 106.04 of the Texas Alcoholic Beverage Code is affected by this proposed amendment.

§50.9. Licensee/Permittee Exemption from Administrative Action.

(a) The commission shall require each licensee/permittee who claims exemption from administrative action under the Texas Alcoholic Beverage Code, §106.14, to produce evidence by affidavit indicating that the licensee/permittee met the three criteria outlined in §106.14(a).

(b) The licensee/permittee shall not be deemed to require its employees to attend a commission approved seller-server training program unless employees are required to attend such program within thirty days of their initial employment. The administrator or his designee may relax the requirements of this paragraph in individual cases for good cause shown by the licensee/permittee claiming exemption.

(c) Proof by the commission that an employee or agent of a licensee/permittee sold, delivered or served alcoholic beverages to a minor or intoxicated person, or allowed consumption of same by a minor or intoxicated person, more than twice within a twelve month period, shall constitute prima facie evidence that the licensee/permittee has directly or indirectly encouraged violation of the relevant laws.

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

Issued in Austin, Texas, on June 26, 1995.

TRD-9507714 Doyne Bailey
Administrator
Texas Alcoholic Beverage Commission

Earliest possible date of adoption: July 31, 1995

For further information, please call: (512) 206-3204

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TITLE 22. EXAMINING BOARDS

Part XII. Board of Vocational Nurse Examiners

Chapter 231. Administration

Definitions

• 22 TAC §231.1

The Board of Vocational Nurse Examiners proposes an amendment to §231.1, relating to definitions of language as used in the Rules and Regulations. The rule is amended to remove the reference to deadline under Hardship, to delete the definition of Sponsorship as it is no longer required and to identify and define the national examination.

Marjorie A. Bronk, executive director, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mrs. Bronk also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be removal of the deadline for submitting hardship information, removal of the requirement for sponsorship for endorsement applicants and a definition of the National Council Licensure Examination. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Comments on the proposal may be submitted to Marjorie A. Bronk, R.N., M.S.H. P., Executive Director, Board of Vocational Nurse Examiners, 9101 Burnet Road, Suite 105, Austin, Texas 78758, (512) 835-2071.

The amendment is proposed under Texas Civil Statutes, Article 4528c, §5(h) , which provide the Board of Vocational Nurse Examiners with the authority to make such rules and regulations as may be necessary to carry in effect the purposes of the law.

No other statute, article or code will be affected by this proposal.

§231.1. Definitions. The following words and terms, when used throughout this manual, shall have the following meanings, unless the context clearly indicates otherwise.

Hardship-A circumstance which results in failure to meet **board requirements for examination** [the National Examination application deadline] due to natural disaster, personal illness, injury, or medical emergency of self or immediate family, death in immediate family or other extraordinary circumstances.

[Sponsorship-To qualify for a temporary license as a licensed vocational nurse by endorsement, the applicant must submit to the Board notice of employment by the holder of a Texas professional license under whom the applicant will practice.]

National Council Licensure Examination for Practical Nurses (NCLEX-PN)-The practical/vocational nurse licensure examination developed by the National Council of State Boards of nursing, Inc., and Used for licensure by those jurisdictions whose boards of nursing are National Council members.

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

Issued in Austin, Texas, on June 19, 1995.

TRD-9507481 Marjorie A. Bronk, R.N., M.S.H.P
Executive Director
Board of Vocational Nurse Examiners

Earliest possible date of adoption: July 31, 1995

For further information, please call: (512) 835-2071

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Chapter 233. Education

General Provisions

• 22 TAC §233.1

The Board of Vocational Nurse Examiners proposes an amendment to §233.1, relating to Definitions of language as used in the Rules and Regulations. This rule is being amended to address essential competencies.

Marjorie A. Bronk, executive director, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mrs. Bronk also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be clear definitions of Entry-level Competencies and Essential Competencies. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Comments on the proposal may be submitted to Marjorie A. Bronk, R.N., M.S.H. P., Executive Director, Board of Vocational Nurse Examiners, 9101 Burnet Road, Suite 105, Austin, Texas 78758, (512) 835-2071.

The amendment is proposed under Texas Civil Statutes, Article 4528c, §5(h) , which provide the Board of Vocational Nurse Examiners with the authority to make such rules and regulations as may be necessary to carry in effect the purposes of the law.

No other statute, article or code will be affected by this proposal.

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

Entry-level Competencies-Describe the desirable behaviors exhibited by graduates of vocational nursing programs and are in accord with statutes governing nursing care and are **based on the Essential Competencies.** [loosely organized under the format of assessment, planning, implementation and evaluation]

Essential Competencies-The expected educational outcomes to be demonstrated by nursing students at the time of graduation, as published in Nursing Education Advisory Committee, Report Volume I: Essential Competencies of Texas Graduates of Education Programs in Nursing, March 1993, as amended.

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

Issued in Austin, Texas, on June 19, 1995.

TRD-9507482 Marjorie A. Bronk, R.N , M.S.H.P.
Executive Director
Board of Vocational Nurse Examiners

Earliest possible date of adoption: July 31, 1995

For further information, please call: (512) 835-2071

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Operation of a Vocational Nursing Program

• 22 TAC §233.12, 233.21

The Board of Vocational Nurse Examiners proposes amendments to §233.12, relating to Controlling Agency; and §23.21, relating to Director. The amendment of §233.12 is proposed for consistency and to specify the two state education agencies that are involved with credentialing director/faculty. The amendment of §233.21 reflects the January 1995 change in agency procedure requiring program directors to issue temporary permits to eligible graduates of Texas VN programs.

Marjorie A. Bronk, executive director, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mrs. Bronk also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be consistency and clarity of the rules. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Comments on the proposal may be submitted to Marjorie A. Bronk, R.N., M.S.H. P., Executive Director, Board of Vocational Nurse Examiners, 9101 Burnet Road, Suite 105, Austin, Texas 78758, (512) 835-2071.

The amendments are proposed under Texas Civil Statutes, Article 4528c, §5(h), which provide the Board of Vocational Nurse Examiners with the authority to make such rules and regulations as may be necessary to carry in effect the purposes of the law.

No other statute, article or code will be affected by this proposal.

§233.12. Controlling Agency. The controlling agency shall:

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

(3) Select and appoint a qualified **registered** [licensed] director for the program who **meet the requirements of the board and appropriate state education accrediting agencies (Texas Education Agency or Texas Higher Education Coordinating Board).** [will be agreeable to the board and other allied agencies.]

(4)-(7) (No change.)

§233.21. Director.

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

(c) Responsibilities-The director shall:

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

(5) distribute the Application for Licensure and Application for Examination forms to **students** [graduates].

(6) have sole responsibility for certifying on a Director Affidavit, provided by the Board, that each graduate who is an applicant for licensure by examination has:

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

(C) **holds a high school diploma issued by an accredited secondary school or equivalent credentials as established by the General Education Development Equivalency Text (GED).** [had at least two years of high school or its equivalent as established by the General Education Equivalency Test.]

(D) (No change.)

(7)-(8) (No change.)

(9) as agency for the board, issues temporary permits to eligible graduates upon program completion.

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

Issued in Austin, Texas, on June 19, 1995.

TRD-9507483 Marjorie A. Bronk, R.N., M.S.H.P.
Executive Director
Board of Vocational Nurse Examiners

Earliest possible date of adoption: July 31, 1995

For further information, please call: (512) 835-2071

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Approval of Programs

• 22 TAC §233.42

The Board of Vocational Nurse Examiners proposes an amendment to §233. 42, relating to Factors Jeopardizing School Approval. The rule is amended as the term "writers" is obsolete since the paper and pencil examination was discontinued in April 1994 and the NCLEX-PN computer adaptive examination is now given.

Marjorie A. Bronk, executive director, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mrs. Bronk also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be clarity of the rule. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Comments on the proposal may be submitted to Marjorie A. Bronk, R.N., M.S.H. P., Executive Director, Board of Vocational Nurse Examiners, 9101 Burnet Road, Suite 105, Austin, Texas 78758, (512) 835-2071.

The amendment is proposed under Texas Civil Statutes, Article 4528c, §5(h) , which provide the Board of Vocational Nurse Examiners with the authority to make such rules and regulations as may be necessary to carry in effect the purposes of the law.

No other statute, article or code will be affected by this proposal.

§233.42. Factors Jeopardizing School Approval. Approval may be reduced to conditional status or withdrawn for the following reasons:

(1)-(8) (No change.)

(9) failure to maintain a 75% passing rate on the licensing examination by first time candidates [writers].

(10)-(12) (No change.)

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

Issued in Austin, Texas, on June 19, 1995.

TRD-9507484 Marjorie A. Bronk, R N., M.S.H.P.
Executive Director
Board of Vocational Nurse Examiners

Earliest possible date of adoption: July 31, 1995

For further information, please call: (512) 835-2071

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Vocational Nursing Education Standards

• 22 TAC §233.58

The Board of Vocational Nurse Examiners proposes an amendment to §233. 58, relating to Curriculum Requirements. The amendment is made to encompass the essential competencies.

Marjorie A. Bronk, executive director, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mrs. Bronk also has determined that for each year of the first five years the section is in effect there is no public benefit anticipated as a result of enforcing the section. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Comments on the proposal may be submitted to Marjorie A. Bronk, R.N., M.S.H. P., Executive Director, Board of Vocational Nurse Examiners, 9101 Burnet Road, Suite 105, Austin, Texas 78758, (512) 835-2071.

The amendment is proposed under Texas Civil Statutes, Article 4528c, §5(h) , which provide the Board of Vocational Nurse Examiners with the authority to make such rules and regulations as may be necessary to carry in effect the purposes of the law.

No other statute, article or code will be affected by this proposal.

§233.58. Curriculum Requirements.

(a) (No change.)

(b) Framework. The philosophy shall be the basis for curriculum development and shall reflect the purpose of the organization, faculty beliefs, and educational concepts. Terminal learning objectives derived from the philosophy shall be representative of the **Essential Competencies** [competencies] for preparation of a vocational nurse graduate. Level and course objective shall be stated in behavioral terms and shall serve as the mechanism for student progression. The conceptual framework shall define the internal and external influences impacting vocational nursing education and shall identify the education method and focus.

(c) Design **and implementation. The curriculum shall be designed and implemented to prepare students to demonstrate the Essential Competencies.** The curriculum design shall allow for flexibility to incorporate current nursing education theories and the implications of current developments in health care and health care delivery to assist graduates in meeting professional, legal, and societal expectations. **Educational** [Career] mobility shall also be a consideration in curriculum design. [Vocational nursing educational programs shall implement a curriculum plan that will enable students to acquire knowledge, skills, and abilities to develop competencies in:

[(1) understanding and providing for essential human needs as related to health and therapeutics;

[(2) gathering, recording, and communicating information;

[(3) participating as a team member in planning, implementing, and evaluating nursing care of individuals in all age groups;

[(4) developing and implementing safe practices in meeting health needs;

[(5) understanding the impact of hygienic and environmental influences upon the health status of individuals;

[(6) influencing health status through promotion of hygiene, self-awareness, and individual participation in improving or maintaining a state of health or wellness.]

(d)-(i) (No change.)

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

Issued in Austin, Texas, on June 19, 1995.

TRD-9507485 Marjorie A. Bronk, R.N., M.S.H.P.
Executive Director
Board of Vocational Nurse Examiners

Earliest possible date of adoption: July 31, 1995

For further information, please call: (512) 835-2071

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Chapter 235. Licensing

Application for Licensure

• 22 TAC §§235.3, 235.6, 235.8, 235.9, 235.14, 235.15, 235.17, 235.18

The Board of Vocational Nurse Examiners proposes amendments to §§235.3, 235.6, 235.8, 235.9, 235.14, 235.15, 235.17, and 235.18, relating to application for licensure. Section 235.3 is amended to reflect the 1995 change in statutory requirement for high school diploma or GED to apply for the examination. Section 235.6 is amended for consistency with §235.17(d)(1)(D). Section 235.8 is amended to clarify the name of the United States Army program. Section 235.9 is amended because with implementation of the computer adaptive examination, applications and fees are not required to be submitted for any specified length of time prior to examination date. Section 235.14 is amended so that the one year rule applies to all applicants. Section 235.15 is amended to accurately reflect curriculum components needed to apply for licensure by examination in Texas. Section 235.17 is amended to resequence and to reflect 1995 legislative change in statute. Section 235.18 is amended to remove the requirement of submitting application at least 30 days prior to examination.

Marjorie A. Bronk, executive director, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mrs. Bronk also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be consistency and clarification of the rules. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Comments on the proposal may be submitted to Marjorie A. Bronk, R.N., M.S.H. P., Executive Director, Board of Vocational Nurse Examiners, 9101 Burnet Road, Suite 105, Austin, Texas 78758, (512) 835-2071.

The amendments are proposed under Texas Civil Statutes, Article 4528c, §5(h), which provide the Board of Vocational Nurse Examin-

ers with the authority to make such rules and regulations as may be necessary to carry in effect the purposes of the law.

No other statute, article or code will be affected by this proposal.

§235.3. Qualifications for Licensure by Examination. The vocational/practical nurse shall:

(1) have successfully completed an approved program for educating vocational/practical nurses; and

(2) **hold a high school diploma issued by an accredited secondary school or equivalent educational credentials as established by the General Education Development Equivalency Test(GED)** [have at least two years of high school education or its equivalent (equivalency to be established by the General Education Equivalency Test]; and

(3) (No change.)

§235.6. Applications for Licensure by Endorsement. An applicant for licensure in Texas by endorsement shall:

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

(5) have passed or achieved a passing score acceptable to Texas on the national examination for practical/vocational nurses.

(6) hold an active and current vocational/practical nurse license in another state;

(7) (No change.)

[(8) submit to the Board a notice of sponsorship of the applicant by the holder of a Texas health care professional license under whom the applicant will practice;]

(8)[(9)] file another application if original application is not completed within six months;

(9)[(10)] not be refunded fees.

§235.8. Military Programs Acceptable for Licenses by Examination. The U.S. Army **Practical Nurse Course (formerly the 91C** Clinical Specialist Course) is the only military program acceptable for licensure by examination.

§235.9. Applications and Fees.

(a) (No change.)

(b) The application for licensure by examination shall:

(1) (No change.)

[(2) be received in the Board office at least 30 days prior to the date set for the initial examination or the reexamination;]

(2)[(3)] be returned to the applicant if application or fee is incorrect;

(3)[(4)] submit fee in the form of cash, cashier's check, money order, individual institutional check, or state warrant made payable to the Board of Vocational Nurse Examiners; and

(4) [(5)] be nonrefundable.

(c) (No change.)

§235.14. Failure to Make Application for the Licensing Examination Within One Year of Eligibility [Graduation]. **Applicants** [Graduates] who do not apply to take [write] the examination within one year of **eligibility** [graduation] will not be eligible.

§235.15. Out-of-State Practical/Vocational Nurse Graduate. An out-of-state graduate shall:

(1) (No change.)

(2) provide evidence of satisfactory completion of **comparable curriculum content as specified in §233.58 of this title (relating to Curriculum Requirements) including, but not limited to, medical-surgical nursing, maternity nursing, nursing care of children, pharmacology, and mental health/mental illness** [curricula inclusive of maternal-child nursing, medical-surgical nursing, and pharmacology] (a grade of C evidences satisfactory completion.);

(3) (No change.)

(4) if licensed by a board constructed examination, be allowed three opportunities for the licensing examination within one year of **eligibility** [first time scheduled].

(5) (No change.)

§235.17. Temporary Permits.

[(a) Holders of Temporary Permits. Holders of temporary permits must practice under the direct supervision of a registered professional nurse, licensed vocational nurse, or a licensed physician.]

(a)[(b)] Graduates of approved vocational nursing programs in this state, another state, or the District of Columbia.

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

(3) The temporary permit will expire on the applicant's receipt of a license or on receipt of notification of examination failure; [on the date indicated on the permit for applicants who fail the examination.]

(4) (No change.)

(b)[(c)] Professional nursing education applicants.

(1) (No change.)

(2) Temporary permits will expire on the applicants' receipt of a license or on receipt of notification of examination failure. [the date indicated on the permit for applicants who fail the examination.]

(c)[(d)] Endorsement applicants.

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

(d) Restrictions on temporary permits.

(1) Holders of temporary permits must practice under the direct supervision of a registered nurse, licensed vocational nurse, or a licensed physician.

(2) Temporary permits will not be issued to any examination or endorsement applicant under investigation.

[(e) Temporary permits will not be issued to any examination or endorsement applicant under investigation.]

§235.18. Disabled Candidate.

(a) (No change.)

(b) A written request for appropriate accommodations must be submitted to the Board [30 days] prior to the examination date. Procedural guidelines and criteria from the National Council of State Boards of Nursing shall be followed.

(c)-(d) (No change.)

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

Issued in Austin, Texas, on June 19, 1995.

TRD-9507486

Marjorie A. Bronk, R.N., M.S.H.P.
Executive Director
Board of Vocational Nurse Examiners

Earliest possible date of adoption: July 31, 1995

For further information, please call: (512) 835-2071

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Examination

• 22 TAC §235.31, §235.32

The Board of Vocational Nurse Examiners proposes an amendment to §235. 31, relating to the examination; and new §235.32, relating to notification of exam results. The amendment to §235.31 reflects changes in the examination process since the advent of computerized adaptive testing. New §235.32 is proposed to reflect 1995 legislative change in statutory requirement.

Marjorie A. Bronk, executive director, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as

a result of enforcing or administering the sections.

Mrs. Bronk also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be a better understanding of the process for applying for examination and compliance with the statute. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Comments on the proposal may be submitted to Marjorie A. Bronk, R.N., M.S.H. P., Executive Director, Board of Vocational Nurse Examiners, 9101 Burnet Road, Suite 105, Austin, Texas 78758, (512) 835-2071.

The amendment and new section are proposed under Texas Civil Statutes, Article 4528c, §5(h), which provide the Board of Vocational Nurse Examiners with the authority to make such rules and regulations as may be necessary to carry in effect the purposes of the law.

No other statute, article or code will be affected by this proposal.

§235.31. Applicability. The following will apply for persons making application under the Act, §6(a) or (b), and §7. Pursuant to the Board's authority as provided by §231.40 of this title (relating to State Board Examination) and other provisions herein.

(1) The examination will be administered at sites approved [designated] by the Board according to the test administration agency's schedule.

(2) After approval to take the examination by Board staff, applicants will be notified of eligibility by the test administration agency. [Applications of individuals who do not appear for an examination within two years after board approval will be rejected unless a ligitimate excuse is presented and approved by the board.]

(3) Applications of individuals who do not appear for an examination within one year of graduation or eligibility will be rejected unless evidence of hardship is presented and approved by the Board.

§235.32. Notification of Examination Results. Service of notice of examination results shall be complete and effective if the document to be served is sent by regular mail to the applicant at the most recent address shown in the application records of the Board.

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

Issued in Austin, Texas, on June 19, 1995.

TRD-9507487 Marjorie A. Bronk, R.N., M.S.H.P.
Executive Director
Board of Vocational Nurse Examiners

Earliest possible date of adoption: July 31, 1995

For further information, please call: (512) 835-2071

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Issuance of Licenses

• 22 TAC §235.41, §235.51

The Board of Vocational Nurse Examiners proposes an amendment to §235. 41, relative to issuance of certificate of licensure; and new §235.51, relative to traveling nurses. The amendment to §235.41 is due to the licensure examination results are now reported as pass/fail only and no longer reported in numerical scores. Section 235.51 is proposed to reflect 1995 legislative changes in the statute.

Marjorie A. Bronk, executive director, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mrs. Bronk also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be clarification of when a certificate of license will be issued following the examination and sets forth guidelines for out-of-state nurses traveling through Texas with patients. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Comments on the proposal may be submitted to Marjorie A. Bronk, R.N., M.S.H. P., Executive Director, Board of Vocational Nurse Examiners, 9101 Burnet Road, Suite 105, Austin, Texas 78758, (512) 835-2071.

The amendment and new section are proposed under Texas Civil Statutes, Article 4528c, §5(h), which provide the Board of Vocational Nurse Examiners with the authority to make such rules and regulations as may be necessary to carry in effect the purposes of the law.

No other statute, article or code will be affected by this proposal.

§235.41. Issuance of Certificate of Licensure. As soon as possible after the board has received notice of passing the examination, [the examination score,] a Certificate of Licensure will be issued, signed by the Executive Director of the Board, bearing the Seal of the Board and also bearing the licensee's name, license number, and date license number was issued.

§235.51. Traveling Nurses. A vocational/practical nurse who holds a current and active license issued by another state who is in Texas on a nonroutine basis for a period not to exceed five days or 120 hours to provide care to a patient who is being transported into, out of, or through the state is not required to hold a Texas license.

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

Issued in Austin, Texas, on June 19, 1995.

TRD-9507488 Marjorie A. Bronk, R.N., M.S.H.P.
Executive Director
Board of Vocational Nurse Examiners

Earliest possible date of adoption: July 31, 1995

For further information, please call: (512) 835-2071

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

Part I. Texas Department of Human Services

Chapter 12. Special Nutrition Programs

The Texas Department of Human Services (DHS) proposes amendments to §§12.203, 12.207, and 12.211, concerning the Special Milk Program; §12.307, concerning the School Breakfast Program; and §§12.407, 12.410, and 12. 413-12.415, concerning the National School Lunch Program, in its Special Nutrition Programs chapter. The purpose of the amendments is to correct references to federal citations that were reorganized, to correct typographical errors, and to reflect the name change of Food and Nutrition Service to Food and Consumer Service.

Burton F. Raiford, commissioner, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Raiford also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be public access to accurate rules. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Questions about the content of this proposal may be directed to Nancy Hill at (512) 467-5852 in DHS's Special Nutrition Programs. Written comments on the proposal may be submitted to Nancy Murphy, Media and Policy Services-452, Texas Department of Human Services E-205, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register.*

Special Milk Program

• **40 TAC §§12.203, 12.207, 12.211**

The amendments are proposed under the Human Resources Code, Title 2, Chapters 22 and 33, which authorizes the department to administer public and nutritional assistance programs.

The amendments implement the Human Resources Code, §§22.001-22.024 and §§33.001-33.024.

§12.203. Administration. The Special **Milk Program (SMP)** [SMP] in [private] schools and [residential] child care institutions is a joint operation of the United States Department of Agriculture (USDA), Food and **Consumer** [Nutrition] Service **(FCS)** [(FNS)], and **the Texas Department of Human Services (DHS)** [DHS]. USDA-FCS [USDA-FNS] provides funding, guidelines, and approval for the state plan of operation. DHS enters into agreements with eligible contractors to operate the program in [private] schools and [residential] child care institutions. DHS is responsible for ensuring that the contractor administers the program according to the applicable requirements of 7 Code of Federal Regulations, §§215, 245, and 3015; FNS instructions; and other requirements specified by FCS [FNS].

§12.207. Contractor Participation Requirements. To participate in the program, the contractor must:

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

(3) provide free milk according to requirements stipulated in 7 Code of Federal Regulations, **§215.13a** [§215.13(a)];

(4) (No change.)

(5) comply with verification requirements stipulated in 7 Code of Federal Regulations, **§245.6a(a)(1)** [§245.6(a)];

(6) (No change.)

§12.211. Procurement. Procurement is performed according to requirements stipulated in 7 Code of Federal Regulations, **§215.14a** [§215.14(a)].

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

Issued in Austin, Texas, on June 26, 1995.

TRD-9507735 Nancy Murphy
Section Manager, Media and Policy Services
Texas Department of Human Services

Proposed date of adoption: September 1, 1995

For further information, please call: (512) 450-3765

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School Breakfast Program

• **40 TAC §12.307**

The amendment is proposed under the Human Resources Code, Title 2, Chapters 22 and 33, which authorizes the department to administer public and nutritional assistance programs.

The amendment implements the Human Resources Code, §§22.001-22.024 and §§33.001-33.024.

§12.307. Contractor Participation Requirements. To participate in the program, the contractor must:

(1) (No change.)

(2) provide nutritious and well-balanced meals to children according to the requirements stipulated in 7 Code of Federal Regulations, §220.8 and §220, **Appendices A, B, and C** [Appendix A];

(3)-(7) (No change.)

(8) comply with verification requirements stipulated in 7 Code of Federal Regulations, **§245.6a** [§245.6(a)];

(9)-(10) (No change.)

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

Issued in Austin, Texas, on June 26, 1995.

TRD-9507734 Nancy Murphy
Section Manager, Media and Policy Services
Texas Department of Human Services

Proposed date of adoption: September 1, 1995

For further information, please call: (512) 450-3765

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National School Lunch Program

• **40 TAC §§12.407, 12.410, 12.415**

The amendments are proposed under the Human Resources Code, Title 2, Chapters 22 and 33, which authorizes the department to administer public and nutritional assistance programs.

The amendments implement the Human Resources Code, §§22.001-22.024 and §§33.001-33.024.

§12.407. Contractor Participation Requirements. To participate in the program, the contractor must:

(1) (No change.)

(2) provide nutritious and well-balanced meals to children according to the requirements stipulated in 7 Code of Federal Regulations, §210.10 and §210, **Appendices A, B, and C** [Appendix A];

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

(7) comply with reporting and record-keeping requirements as specified in 7 Code of Federal Regulations, **§210.9,** §210.15, and §210.23(c) and other requirements as may be specified by DHS;

(8)-(10) (No change.)

(11) comply with verification requirements stipulated in 7 Code of Federal Regulations, **§245.6a** [§245.6(a)];

(12) (No change.)

§12.410. Management Evaluations. **Food and Consumer Service (FCS)** [FNS] and the United States Office of Inspector General (OIG) retain the right to visit contractor operations, and OIG has the right to make audits of the records and operations of any contractor as stipulated in 7 Code of Federal Regulations, §210.19 **and §210.30.**

§12.413. Educational Prohibitions. **The Texas Department of Human Services (DHS)** [DHS] complies with the prohibitions specified in 7 Code of Federal Regulations, **§210.27** [§210.26].

§12.414. Penalties. Penalties are assessed as stipulated in 7 Code of Federal Regulations, **§210.26** [§210.25].

§12.415. Contract Termination or Suspension. Contract termination or suspension is done according to guidelines and procedures as stipulated in 7 Code of Federal Regulations, **§210.25** [§210.24].

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

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TRD-9507733 Nancy Murphy
Section Manager, Media and Policy Services
Texas Department of Human Services

Proposed date of adoption: September 1, 1995

For further information, please call: (512) 450-3765

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School: Pillow Elementary School, Austin ISD

WITHDRAWN RULES

An agency may withdraw a proposed action or the remaining effectiveness of an emergency action by filing a notice of withdrawal with the ***Texas Register***. The notice is effective immediately upon filling or 20 days after filing as specified by the agency withdrawing the action. If a proposal is not adopted or withdrawn within six months of the date of publication in the ***Texas Register***, it will automatically be withdrawn by the office of the Texas Register and a notice of the withdrawal will appear in the ***Texas Register***.

TITLE 22. EXAMINING BOARDS

Part VI. Texas State Board of Registration for Professional Engineers

Chapter 131. Practice and Procedure

Registration

• 22 TAC §131.138

The Texas State Board of Registration for Professional Engineers has withdrawn from consideration for permanent adoption a proposed amendment to §131.138, which appeared in the May 12, 1995, issue of the *Texas Register* (20 TexReg 3546). The effective date of this withdrawal is June 23, 1995.

Issued in Austin, Texas, on June 23, 1995.

TRD-9507658 John R. Speed, P.E.
Executive Director
Texas State Board of Registration for Professional Engineers

Effective date: June 23, 1995

For further information, please call: (512) 440-7723

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Part XXI. Texas State Board of Examiners of Psychologists

Chapter 473. Fees

• 22 TAC §473.3

The Texas State Board of Examiners of Psychologists has withdrawn from consideration for permanent adoption a proposed amendment to §473.3, which appeared in the December 23, 1994, issue of the *Texas Register* (19 TexReg 10171). The effective date of this withdrawal is June 21, 1995.

Issued in Austin, Texas, on June 21, 1995.

TRD-9507560 Rebecca E. Forkner
Executive Director
Texas State Board of Examiners of Psychologists

Effective date: June 21, 1995

For further information, please call: (512) 835-2036

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TITLE 25. HEALTH SERVICES

Part I. Texas Department of Health

Chapter 133. Hospital Licensing

Subchapter A. General Provisions

• 25 TAC §§133.1-133.3

The Texas Department of Health has withdrawn from consideration for permanent adoption a proposed repeal of §§133.1-133.3, which appeared in the March 21, 1995, issue of the *Texas Register* (20 TexReg 1931). The effective date of this withdrawal is June 23, 1995.

Issued in Austin, Texas, on June 23, 1995.

TRD-9507684 Susan K. Steeg
General Counsel
Texas Department of Health

Effective date: June 23, 1995

For further information, please call: (512) 458-7236

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• 25 TAC §§133.1-133.4

The Texas Department of Health has withdrawn from consideration for permanent adoption a proposed new §§133.1-133.4, which appeared in the March 21, 1995, issue of the *Texas Register* (20 TexReg 1932). The effective date of this withdrawal is June 23, 1995.

Issued in Austin, Texas, on June 23, 1995.

TRD-9507693 Susan K. Steeg
General Counsel
Texas Department of Health

Effective date: June 23, 1995

For further information, please call: (512) 458-7236

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Subchapter B. Application and Issuance of a Hospital License

• 25 TAC §§133.11-133.14

The Texas Department of Health has withdrawn from consideration for permanent adoption a proposed repeal of §§133.11-133.14, which appeared in the March 21, 1995, issue of the *Texas Register* (20 TexReg 1936). The effective date of this withdrawal is June 23, 1995.

Issued in Austin, Texas, on June 23, 1995.

TRD-9507685 Susan K. Steeg
General Counsel
Texas Department of Health

Effective date: June 23, 1995

For further information, please call: (512) 458-7236

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The Texas Department of Health has withdrawn from consideration for permanent adoption a proposed new §§133.11-133.14, which appeared in the March 21, 1995, issue of the *Texas Register* (20 TexReg 1937). The effective date of this withdrawal is June 23, 1995.

Issued in Austin, Texas, on June 23, 1995.

TRD-9507694 Susan K. Steeg
General Counsel
Texas Department of Health

Effective date: June 23, 1995

For further information, please call: (512) 458-7236

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Subchapter C. Operation Requirements for All Hospitals

• 25 TAC §133.21, §133.22

The Texas Department of Health has withdrawn from consideration for permanent adoption a proposed repeal of §133.21 and §133.22, which appeared in the March 21, 1995, issue of the *Texas Register* (20 TexReg 1940). The effective date of this withdrawal is June 23, 1995.

Issued in Austin, Texas, on June 23, 1995.

TRD-9507686 Susan K. Steeg
General Counsel
Texas Department of Health

Effective date: June 23, 1995

For further information, please call: (512) 458-7236

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• 25 TAC §§133.21-133.23

The Texas Department of Health has withdrawn from consideration for permanent adoption a proposed new §§133.21-133.23, which appeared in the June 23, 1995, issue of the *Texas Register* (20 TexReg 1940). The effective date of this withdrawal is June 23, 1995.

Issued in Austin, Texas, on June 23, 1995.

TRD-9507695 Susan K. Steeg
General Counsel
Texas Department of Health

Effective date: June 23, 1995

For further information, please call: (512) 458-7236

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Subchapter D. Requirements for General Hospitals

• 25 TAC §§133.31-133.33

The Texas Department of Health has withdrawn from consideration for permanent adoption a proposed new §§133.31-133.33, which appeared in the March 21, 1995, issue of the *Texas Register* (20 TexReg 1943). The effective date of this withdrawal is June 23, 1995.

Issued in Austin, Texas, on June 23, 1995.

TRD-9507696 Susan K. Steeg
General Counsel
Texas Department of Health

Effective date: June 23, 1995

For further information, please call: (512) 458-7236

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Subchapter E. Requirements for Special Hospitals

• 25 TAC §§133.41-133.49

The Texas Department of Health has withdrawn from consideration for permanent adoption a proposed new §§133.41-133.49, which appeared in the March 21, 1995, issue of the *Texas Register* (20 TexReg 1944). The effective date of this withdrawal is June 23, 1995.

Issued in Austin, Texas, on June 23, 1995.

TRD-9507697 Susan K. Steeg
General Counsel
Texas Department of Health

Effective date: June 23, 1995

For further information, please call: (512) 458-7236

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Subchapter D. Special Service Requirements

• 25 TAC §§133.51-133.54

The Texas Department of Health has withdrawn from consideration for permanent adoption a proposed repeal of §§133.51-133.54, which appeared in the March 21, 1995, issue of the *Texas Register* (20 TexReg 1947). The effective date of this withdrawal is June 23, 1995.

Issued in Austin, Texas, on June 23, 1995.

TRD-9507687 Susan K. Steeg
General Counsel
Texas Department of Health

Effective date: June 23, 1995

For further information, please call: (512) 458-7236

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Subchapter F. Requirements for Hospital Services

• 25 TAC §§133.61-133.64

The Texas Department of Health has withdrawn from consideration for permanent adoption a proposed new §§133.61-133.64, which appeared in the March 21, 1995, issue of the *Texas Register* (20 TexReg 1948). The effective date of this withdrawal is June 23, 1995.

Issued in Austin, Texas, on June 23, 1995.

TRD-9507698 Susan K. Steeg
General Counsel
Texas Department of Health

Effective date: June 23, 1995

For further information, please call: (512) 458-7236

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Subchapter E. Physical Plant and Fire Safety Requirements

• 25 TAC §133.71, §133.72

The Texas Department of Health has withdrawn from consideration for permanent adoption a proposed repeal of §133.71 and §133.72, which appeared in the March 21, 1995, issue of the *Texas Register* (20 TexReg 1971). The effective date of this withdrawal is June 23, 1995.

Issued in Austin, Texas, on June 23, 1995.

TRD-9507688 Susan K. Steeg
General Counsel
Texas Department of Health

Effective date: June 23, 1995

For further information, please call: (512) 458-7236

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Subchapter G. Operational Requirements for All Hospitals

• 25 TAC §§133.71-133.73

The Texas Department of Health has withdrawn from consideration for permanent adoption a proposed new §§133.71-133.73, which appeared in the March 21, 1995, issue of the *Texas Register* (20 TexReg 1971). The effective date of this withdrawal is June 23, 1995.

Issued in Austin, Texas, on June 23, 1995.

TRD-9507699 Susan K. Steeg
General Counsel
Texas Department of Health

Effective date: June 23, 1995

For further information, please call: (512) 458-7236

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Subchapter H. Physical Plant and Construction

• 25 TAC §§133.91-133.101

The Texas Department of Health has withdrawn from consideration for permanent adoption a proposed new §§133.91-133.101, which appeared in the March 21, 1995, issue of the *Texas Register* (20 TexReg 1973). The effective date of this withdrawal is June 23, 1995.

Issued in Austin, Texas, on June 23, 1995.

TRD-9507700 Susan K. Steeg
General Counsel
Texas Department of Health

Effective date: June 23, 1995

For further information, please call: (512) 458-7236

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Subchapter F. Patient Transfer

• 25 TAC §133.101, §133.102

The Texas Department of Health has withdrawn from consideration for permanent adoption a proposed repeal of §133.101 and §133.102, which appeared in the March 21, 1995, issue of the *Texas Register* (20 TexReg 2008). The effective date of this withdrawal is June 23, 1995.

Issued in Austin, Texas, on June 23, 1995.

TRD-9507689 Susan K. Steeg
General Counsel
Texas Department of Health

Effective date: June 23, 1995

For further information, please call: (512) 458-7236

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Subchapter G. Enforcement

• **25 TAC §§133.111-133.113**

The Texas Department of Health has withdrawn from consideration for permanent adoption a proposed repeal of §§133.111-133.113, which appeared in the March 21, 1995, issue of the *Texas Register* (20 TexReg 2008). The effective date of this withdrawal is June 23, 1995.

Issued in Austin, Texas, on June 23, 1995.

TRD-9507690 Susan K. Steeg
General Counsel
Texas Department of Health

Effective date: June 23, 1995

For further information, please call: (512) 458-7236

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Subchapter I. Patient Transfer

• **25 TAC §133.111, §133.112**

The Texas Department of Health has withdrawn from consideration for permanent adoption a proposed new §133.111 and §133.112, which appeared in the March 21, 1995, issue of the *Texas Register* (20 TexReg 2008). The effective date of this withdrawal is June 23, 1995.

Issued in Austin, Texas, on June 23, 1995.

TRD-9507701 Susan K. Steeg
General Counsel
Texas Department of Health

Effective date: June 23, 1995

For further information, please call: (512) 458-7236

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Subchapter H. Hospital Investigation

• **25 TAC §133.121**

The Texas Department of Health has withdrawn from consideration for permanent adoption a proposed repeal of §133.121, which appeared in the March 21, 1995, issue of the *Texas Register* (20 TexReg 2013). The effective date of this withdrawal is June 23, 1995.

Issued in Austin, Texas, on June 23, 1995.

TRD-9507691 Susan K. Steeg
General Counsel
Texas Department of Health

Effective date: June 23, 1995

For further information, please call: (512) 458-7236

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Subchapter J. Enforcement

• **25 TAC §§133.121-133.124**

The Texas Department of Health has withdrawn from consideration for permanent adoption a proposed new §§133.121-133.124, which appeared in the March 21, 1995, issue of the *Texas Register* (20 TexReg 2014). The effective date of this withdrawal is June 23, 1995.

Issued in Austin, Texas, on June 23, 1995.

TRD-9507702 Susan K. Steeg
General Counsel
Texas Department of Health

Effective date: June 23, 1995

For further information, please call: (512) 458-7236

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Subchapter I. Cooperative Agreements

• **25 TAC §133.131**

The Texas Department of Health has withdrawn from consideration for permanent adoption a proposed repeal of §133.131, which appeared in the March 21, 1995, issue of the *Texas Register* (20 TexReg 2019). The effective date of this withdrawal is June 23, 1995.

Issued in Austin, Texas, on June 23, 1995.

TRD-9507692 Susan K. Steeg
General Counsel
Texas Department of Health

Effective date: June 23, 1995

For further information, please call: (512) 458-7236

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Subchapter K. Internal Investigation

• **25 TAC §133.131**

The Texas Department of Health has withdrawn from consideration for permanent adoption a proposed new §133.131, which appeared in the March 21, 1995, issue of the *Texas Register* (20 TexReg 2020). The effective date of this withdrawal is June 23, 1995.

Issued in Austin, Texas, on June 23, 1995.

TRD-9507703 Susan K. Steeg
General Counsel
Texas Department of Health

Effective date: June 23, 1995

For further information, please call: (512) 458-7236

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Subchapter I. Cooperative Agreements

• **25 TAC §133.141**

The Texas Department of Health has withdrawn from consideration for permanent adoption a proposed new §133.141, which appeared in the March 21, 1995, issue of the *Texas Register* (20 TexReg 2020). The effective date of this withdrawal is June 23, 1995.

Issued in Austin, Texas, on June 23, 1995.

TRD-9507704 Susan K. Steeg
General Counsel
Texas Department of Health

Effective date: June 23, 1995

For further information, please call: (512) 458-7236

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Chapter 143. Medical Radiologic Technologists

• **25 TAC §143.9**

The Texas Department of Health has withdrawn from consideration for permanent adoption a proposed repeal of §143.9, which appeared in the March 7, 1995, issue of the *Texas Register* (20 TexReg 1626). The effective date of this withdrawal is June 26, 1995.

Issued in Austin, Texas, on June 23, 1995.

TRD-9507720 Susan K. Steeg
General Counsel
Texas Department of Health

Effective date: June 26, 1995

For further information, please call: (512) 458-7236

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The Texas Department of Health has withdrawn from consideration for permanent adoption a proposed new §143.9, which appeared in the March 7, 1995, issue of the *Texas Register* (20 TexReg 1619). The effective date of this withdrawal is June 26, 1995.

Issued in Austin, Texas, on June 23, 1995.

TRD-9507719 Susan K. Steeg
General Counsel
Texas Department of Health

Effective date: June 26, 1995

For further information, please call: (512) 458-7236

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Name: Adam Jenkins
Grade: 12
School: Plano Senior High School, Plano ISD

ADOPTED RULES

An agency may take final action on a section 30 days after a proposal has been published in the ***Texas Register***. The section becomes effective 20 days after the agency files the correct document with the ***Texas Register***, unless a later date is specified or unless a federal statute or regulation requires implementation of the action on shorter notice.

If an agency adopts the section without any changes to the proposed text, only the preamble of the notice and statement of legal authority will be published. If an agency adopts the section with changes to the proposed text, the proposal will be republished with the changes.

TITLE 22. EXAMINING BOARDS

Part XXI. Texas State Board of Examiners of Psychologists

Chapter 461. General Rulings

• 22 TAC §461.4

The Texas State Board of Examiners of Psychologists adopts the repeal of §461.4, concerning Replacement of Certificate/License, without changes to the proposed text as published in the April 18, 1995, issue of the *Texas Register* (20 TexReg 2768).

The rule is being repealed because the Board is replacing the current rule with a rule which more accurately reflects the Board's requirements and professional standards.

The repeal of the rule will better inform the public if certificands and licensees no longer have to adhere to this rule.

No comments were received regarding adoption of the repeal.

The repeal is adopted under Texas Civil Statutes, 4512c, which provide the Texas State Board of Examiners of Psychologists with the authority to promulgate rules consistent with the Statute.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on June 20, 1995.

TRD-9507561 Rebecca E. Forkner
Executive Director
Texas State Board of Examiners of Psychologists

Effective date: July 12, 1995

Proposal publication date: April 18, 1995

For further information, please call: (512) 835-2036

♦ ♦ ♦

The Texas State Board of Examiners of Psychologists adopts new §461.4, concerning Replacement and Duplicate Certificates/Licenses, without changes to the proposed text as published in the April 18, 1995, issue of the *Texas Register* (20 TexReg 2768).

The new rule is being adopted to more accurately reflect the Board's requirements and professional standards and to allow for duplicate licenses.

The new rule will allow those professionals with more than one office to have duplicate licenses at each location where the professional may practice so that the general public will be better informed of the professional's certification/licensure.

No comments were received regarding adoption of the new rule.

The new rule is adopted under Texas Civil Statutes, 4512c, which provide the Texas State Board of Examiners of Psychologists with the authority to promulgate rules consistent with the Statutes.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on June 20, 1995.

TRD-9507562 Rebecca E Forkner
Executive Director
Texas State Board of Examiners of Psychologists

Effective date: July 12, 1995

Proposal publication date: April 18, 1995

For further information, please call: (512) 835-2036

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Chapter 463. Applications

• 22 TAC §463.6

The Texas State Board of Examiners of Psychologists adopts an amendment to §463.6, concerning Experience, without changes to the proposed text as published in the April 18, 1995, issue of the *Texas Register* (20 TexReg 2769).

The rule is being amended to permit interrupted, rather than continuous, supervised experience for good cause, to require that school psychologist trainees have an organized internship program, and to ensure that supervised experience received from a psychologist under an Agreed Board Order shall not qualify as supervised experience for licensure purposes regardless of the setting.

The amendment will permit otherwise qualified supervisees to count interrupted supervision experience for good cause, will guarantee that school psychologist trainees have successfully completed an organized internship program, and will prohibit a supervisee from obtaining supervisory experience from a psychologist under an Agreed Board Order, thereby ensuring that the general public will receive quality psychological services at the earliest possible date.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Texas Civil Statutes, 4512c, which provide the Texas State Board of Examiners of Psychologists with the authority to promulgate rules consistent with the Statute.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on June 20, 1995.

TRD-9507563 Rebecca E. Forkner
Executive Director
Texas State Board of Examiners of Psychologists

Effective date: July 12, 1995

Proposal publication date: April 18, 1995

For further information, please call: (512) 835-2036

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Chapter 465. Rules of Practice

• 22 TAC §465.34

The Texas State Board of Examiners of Psychologists adopts an amendment to §465.34, concerning Legal Actions Reported, without changes to the proposed text as published in the April 18, 1995, issue of the *Texas Register* (20 TexReg 2771).

The rule is being amended to simplify the reporting requirements and to allow additional explanation if the licensee and/or certificand so desires.

The amendment will ensure compliance with the reporting requirement and will better inform the public of the nature of the action.

Comments were received from Floyd L. Jennings, Ph.D. in support of the amendment due to the clarification that reporting under this rule is directed toward the individual as well as the individual's practice. Further com-

ment was made that additional clarification was necessary regarding the term "legal action" so that an individual would not be led to believe that no "legal action" had been taken against him or her until the matter was actually resolved in a court of law. The agency believes the rule is clear as written and wants to leave the wording to encourage individuals requested by the board to report anything that may be relevant.

The amendment is adopted under Texas Civil Statutes, 4512c, which provide the Texas State Board of Examiners of Psychologists with the authority to promulgate rules consistent with the Statute.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on June 20, 1995.

TRD-9507564 Rebecca E Forkner
Executive Director
Texas State Board of
Examiners of
Psychologists

Effective date: July 12, 1995

Proposal publication date: April 18, 1995

For further information, please call: (512) 835-2036

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Chapter 466. Procedure

• 22 TAC §466.2

The Texas State Board of Examiners of Psychologists adopts an amendment to §466.2, concerning Definitions, without changes to the proposed text as published in the April 18, 1995, issue of the *Texas Register* (20 TexReg 2771).

The rule is being amended to correct and add to the definitions so that they more closely follow the Board's procedure and use of terms.

The amendment will better inform the public of the process by which the Board conducts informal settlements.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Texas Civil Statutes, 4512c, which provide the Texas State Board of Examiners of Psychologists with the authority to promulgate rules consistent with the Statute.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on June 20, 1995

TRD-9507565 Rebecca E. Forkner
Executive Director
Texas State Board of
Examiners of
Psychologists

Effective date: July 12, 1995

Proposal publication date: April 18, 1995

For further information, please call: (512) 835-2036

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• 22 TAC §466.15

The Texas State Board of Examiners of Psychologists adopts an amendment to §466.15, concerning Informal Disposition, without changes to the proposed text as published in the April 18, 1995, issue of the *Texas Register* (20 TexReg 2772).

The rule is being amended to more fully outline the procedure for informal settlement conferences.

The amendment will better inform the public of the process by which the Board conducts informal settlements.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Texas Civil Statutes, 4512c, which provide the Texas State Board of Examiners of Psychologists with the authority to promulgate rules consistent with the Statute.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on June 20, 1995.

TRD-9507566 Rebecca E. Forkner
Executive Director
Texas State Board of
Examiners of
Psychologists

Effective date: July 12, 1995

Proposal publication date: April 18, 1995

For further information, please call: (512) 835-2036

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Chapter 473. Fees

• 22 TAC §473.5

The Texas State Board of Examiners of Psychologists adopts an amendment to §473.5, concerning Miscellaneous Fees, without changes to the proposed text as published in the April 18, 1995, issue of the *Texas Register* (20 TexReg 2773).

The rule is being amended to include those fees charged for duplicate certificates/licenses and those fees charged for duplicate renewal permits and notices.

The amendment will generate adequate funds to function efficiently and to ensure that the Board has an adequate cash balance to carry out the mandates of the Psychologists' Certification and Licensing Act.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Texas Civil Statutes, 4512c, which provide the Texas State Board of Examiners of Psychologists with the authority to promulgate rules consistent with the Statute.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on June 20, 1995.

TRD-9507567 Rebecca E. Forkner
Executive Director
Texas State Board of
Examiners of
Psychologists

Effective date: July 12, 1995

Proposal publication date: April 18, 1995

For further information, please call: (512) 835-2036

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TITLE 25. HEALTH SERVICES

Part I. Texas Department of Health

Chapter 143. Medical Radiologic Technologists

• 25 TAC §§143.2, 143.4, 143.11, 143.15

The Texas Department of Health (department) adopts amendments to §§143. 2, 143.4, 143.11, and 143.15, concerning the certification of medical radiologic technologists. Section 143.4 and §143.11 are adopted with changes to the proposed text as published in the March 7, 1995, issue of the *Texas Register* (20 TexReg 1619). Section 143.2 and §143.15 are adopted without changes and will not be republished. A correction of error for §143.15 was published in the April 4, 1995, issue of the *Texas Register* (20 TexReg 2558). The department has withdrawn from consideration for permanent adoption the proposed repeal of §143.9 and new §143.9.

The amendments update definitions as the professional organizations change names, establish fees in amounts equal to the cost of administering the certification program, coordinate continuing education procedures with other organizations which require continuing education for radiologic technologists, limit examination attempts and limit the period of examination eligibility.

A summary of the comments received and the department's responses are as follows.

COMMENT: A commenter questioned the $500 cost to businesses as stated in the proposed preamble. The commenter indicated that the minimum cost to businesses would be $1,750.

RESPONSE: The preamble format requested the "anticipated economic cost to persons who are required to comply with the section as proposed." Thus, the cost was determined considering the proposed new renewal fee and other expenses to comply with the new section as it applied to the businesses which are actually operating limited certificate programs, not a business which may start up a new program at a future date.

The annual instructor renewal fee, the annual limited curriculum renewal fee and the program director change fee as proposed in §143.4(b)(18)-(20) are not included in the

adopted §143.4(b). These particular fees are strictly related to the procedures included in the proposed new §143.9, and the proposed repeal of existing §143.9. The department held a hearing for public comment on April 28, 1995, in Austin. The repeal of §143.9 and the proposed new §143.9, based on written and oral comments, are being withdrawn at this time.

COMMENT: Concerning §143.4(b)(12) the chiropractic examination fee, a commenter suggested using a fee of $50 because negotiations with two possible examination contractors which have occurred since February indicated a more realistic cost of $40 to $50.

RESPONSE: The department agrees and has increased the cost of this examination from $25 to $50.

COMMENT: Concerning the site visit fee set out in §143.4(b)(7), commenters suggested that the fee remain based on the actual expenses of the site visit team.

RESPONSE: The department agrees and has retained the original wording.

COMMENT: In §143.11(b)(8) and §143.11(f) a commenter suggested that alternative wording be adopted to avoid duplicate rulemaking, and to consider the rapidly changing continuing education (CE) requirements of national certifying or registry organizations and other state programs which are equally or more restrictive.

RESPONSE: The department agrees and has added wording to include certain other agencies and organizations provided the CE requirements are equivalent to or more stringent than those in §143.11, and provided that the information can be provided to the department electronically or by other means acceptable to the department.

COMMENT: In §143.11(b)(8) a commenter suggested that an effective date be established in the rule. Otherwise, the rule would not function as intended because the American Registry of Radiologic Technologists, Inc. did not require mandatory reporting of continuing education until 1997.

RESPONSE: The department agrees and has added wording so that the rule is effective for renewals beginning in 1997.

COMMENT: A commenter requested that a new paragraph be added to §143.11(e) (5) so that credit for attending local society meetings would be recognized.

RESPONSE: The department disagrees with the comment. The department believes that existing wording in §143.11(d)(3) allows such credit. A local society or association must obtain approval from the parent organization or association which is accepted or recognized by the department to assign continuing education credits in radiologic technology.

COMMENT: A commenter was opposed to the "unspecified time limit" on audits of continuing education (CE) records as set out in §143.11(f)(1). The commenter suggested the time limit on the period of eligibility to be considered for an audit of CE records should not to exceed three months, based on a one-year license renewal.

RESPONSE: The department disagrees with the suggested three month limit and notes that the renewal is biennial. The basis for the amendment is to allow the department flexibility in conducting CE audits if the information received from a verifying agency such as the American Registry of Radiologic Technologists is delayed or is retrospective. The department may need to include these records in those eligible for auditing even though the records are not for those renewing during the month prior to the audit selection process. Thus, the opportunity to audit a person's CE records would not be limited only to the month following the renewal of the certificate.

COMMENT: A commenter stated that the new language in §143.11(i)(4) was confusing and asked questions about how the 120-day extension functioned.

RESPONSE: The department disagrees. When paragraphs (1)-(3) are read with paragraph (4), the questions and concerns about the procedure appear to be answered. Technologists who renew by the renewal date and who have not completed the required CE are eligible for the 120-day extension. The intent of the amendment was to clarify that if the technologist in an extension fails to meet the CE requirements, the technologist may renew late after the CE requirements have been met, but is not eligible for another extension.

Minor editorial changes were made for clarification purposes.

The following provided comments on the proposed rules: Health Education and X-ray Institute, The Texas Association of Rural Health Clinics, the Texas Hospital Association, the Texas Organization of Rural and Community Hospitals and department staff.

While none of the commenters were against the rules in their entirety, they expressed concerns, questions and made recommendations.

The amendments are adopted under the Medical Radiologic Technologist Certification Act, Texas Civil Statutes, Article 4512m, §2.05(e), which provide the Texas Board of Health with the authority to adopt rules necessary to implement the Act; and the Texas Health and Safety Code, §12.001, which provides the Texas Board of Health with the authority to adopt rules for the performance of every duty imposed by law on the Texas Board of Health, Texas Department of Health and the commissioner of health.

§143.4. Fees.

(a) (No change.)

(b) The schedule of fees is as follows:

(1) certification fee-$75;

(2) biennial certificate renewal fee-$40;

(3) one to 90-day late renewal fee-$25 (plus all unpaid renewal fees when the certificate is renewed within 90 days of expiration);

(4) 91-day to one year late renewal fee-$50 (plus all unpaid renewal fees when the certificate is renewed more than 90 days after expiration but not more than one year after expiration);

(5) certificate and/or identification card replacement or duplicate fee-$20;

(6) general certificate to limited certificate conversion fee-$20;

(7) temporary certificate fee-$25;

(8) temporary certificate and/or identification card replacement or duplicate fee-$20;

(9) general examination fee-$25;

(10) alternate eligibility fee-$150,

(11) dental examination fee-$25 (which shall be paid directly to Dental Assisting National Board (DANB));

(12) chiropractic examination fee-$50;

(13) skull, chest, spine, extremities or podiatric examination fee-$25 for the first examination and $20 for each additional examination taken on the same day;

(14) upgrade of a temporary certificate to a renewable certificate, limited or general-$42 (prorated at $3.50 per month);

(15) limited instructor approval fee-$50;

(16) limited curriculum application fee-$100 per year per course of study; and

(17) site visit fee-a fee equal to the round trip travel expenses including meals and lodging of the inspection committee members, not to exceed $1,000.

§143.11. Continuing Education Requirements.

(a) (No change.)

(b) General. Continuing education requirements for recertification shall be fulfilled during each biennial renewal period beginning on the first day of the month following each MRT's or LMRT's birth month and ending on the last day of each MRT's or LMRT's birth month two years hence.

(1) (No change.)

(2) An MRT must complete 24 contact hours of continuing education acceptable to the department during each biennial renewal period.

(3) An LMRT must complete 12 contact hours of continuing education acceptable to the department during each biennial renewal period. The continuing education activities must be general radia-

tion health and safety topics or related to the categories of limited certificate held.

(4) Each MRT or LMRT shall be notified of the continuing education requirements with the first biennial renewal certificate sent by the department.

(5)-(7) (No change.)

(8) An MRT or LMRT who holds a current and active annual registration or credential card issued by the ACRRT, ARRT, DANB or NMTCB indicating that the MRT is in good standing and not on probation satisfies the continuing education requirement for renewal of the general or limited provided the hours accepted by the agency or organization which issued the card meet or exceed the requirements set out in subsection (c) of this section. The department shall be able to verify the status of the card presented by the MRT or LMRT electronically or by other means acceptable to the department. The department may review documentation of the continuing education activities in accordance with subsection (f)(1) of this section. This procedure shall be effective for renewals beginning in 1997.

(9) A contact hour shall be defined as 50 minutes of attendance and participation. One-half contact hour shall be defined as 30 minutes of attendance and participation during a 30 minute period.

(10) Persons who hold temporary certificates, either general or limited, are not subject to these continuing education requirements.

(c) (No change.)

(d) Types of acceptable continuing education. Continuing education shall be acceptable if the experience or activity is at least 30 consecutive minutes in length and:

(1) (No change.)

(2) is offered for continuing education credit by an institution accredited by the JRCERT, JRCENMT, the Commission on Dental Accreditation of the American Dental Association or the Council on Chiropractic Education (CCE) and is directly or indirectly related to the disciplines of radiologic technology; or

(3) is an educational activity which meets the following criteria:

(A) the content meets the requirements set out in subsection (c) of this section; and

(B) (No change.)

(e) Additional acceptable activities. The additional activities for which continuing education credit will be awarded are as follows:

(1) (No change.)

(2) attendance and participation in tumor conferences, inservice education and training offered or sponsored by Joint Commission on Accreditation of Healthcare Organizations (JCAHO) -accredited or Medicare certified hospitals, provided the education/training is properly documented and is related to the profession of radiologic technology;

(3) teaching in a program described in subsection (d) of this section with a limit of one contact hour of credit for each hour of instruction per topic item once during the continuing education period for up to a total of five hours. Credit may be granted in direct, indirect or non-ionizing radiation based on the topic; or

(4) developing and publishing a manuscript of at least 1,000 words in length related to radiologic technology with a limit of five contact hours of credit during a continuing education period. Upon audit by the department the MRT must submit a letter from the publisher indicating acceptance of the manuscript for publication or a copy of the published work. The date of publication will determine the continuing education period for which credit will be granted. Credit may be granted in direct, indirect or non-ionizing radiation based on the topic.

(f) Reporting of continuing education. Each MRT or LMRT is responsible for and shall complete and file with the department at the time of renewal or to be considered for renewal when in an extension, a continuing education report form approved by the department listing the title, date and number of hours for each activity for which credit is claimed. In the alternative, a technologist may request an exemption as set out in subsection (j) of this section or may submit a copy of the technologist's current and active annual registration or credential card indicating that the technologist is in good standing and not on probation in accordance with subsection (b)(8) of this section, with a signed statement that the technologist completed during the renewal period at least 12 clock hours of continuing education directly related to the performance of a procedure utilizing ionizing radiation for medical purposes.

(1) Following each renewal month or at other times determined by the department, the department will select a random sample of technologists to verify compliance with the continuing education requirements. The technologists selected in the random sample shall submit within 30 days following notification from the department:

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

(2)-(3) (No change.)

(g) Determination of contact hour credits. The department shall credit continuing education experiences and activities as follows.

(1) (No change.)

(2) Activities or experiences as set out in subsection (d)(2) and (3) of this section shall be credited on a one-for-one basis with one contact hour credit for each contact hour of attendance and participation. Credit will be accepted only in whole hour or half-hour increments. Minutes in excess of whole or half-hour increments shall not be aggregated for additional credit.

(h) Activities unacceptable as continuing education. The department shall not grant credit for:

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

(5) verifiable independent study activities as set out in subsection (b)(6) of this section which exceed 50% of the clock hour requirements;

(6) learning activities indirectly related to radiologic technology as set out in subsection (c)(3) of this section which exceed 50% of the contact hour requirement;

(7) learning activities which are related to non-ionizing forms of radiation as set out in subsection (c)(2) of this section which exceed 50% of the contact hour requirements;

(8) any activities or experiences which do not meet the criteria set out in subsection (b), (c), (d) or (e) of this section;

(9)-(11) (No change.)

(i) Failure to complete the required continuing education.

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

(4) The person may renew late under §143.10(f) of this title (relating to Certificates, Renewals, and Late Renewals) after all the continuing education requirements have been met. A person who renews late is not eligible for a 120-day extension.

(j)-(k) (No change.)

(l) Record keeping. An MRT or LMRT shall be responsible for keeping, for a period of not less than two years, accurate and complete documentation or other records of continuing education reported to the department. An MRT or LMRT shall submit documentation of attendance and participation in continuing education activities upon written request by the department.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on June 23, 1995.

TRD-9507718 Susan K. Steeg
General Counsel
Texas Department of Health

Effective date: July 17, 1995

Proposal publication date: March 7, 1995

For further information, please call: (512) 458-7236

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Chapter 181. Vital Statistics

Miscellaneous Provisions

• 25 TAC §181.1

The Texas Department of Health (department) adopts an amendment to §181. 1, relating to definitions of terms commonly used in the vital records system, without changes to the proposed text as published in the May 9, 1995, issue of the *Texas Register* (20 TexReg 3427) and will not be republished.

The amendment will alleviate confusion as to who qualifies as an applicant for certified copies of vital records. The amendment will increase flexibility, clarify, and streamline to issuance of certified copies of vital records.

No comments were received concerning the proposed amendment.

The amendment is adopted under authority of the Health and Safety Code, §192.003, which provides the Board of Health (board) with authority to adopt necessary rules for collecting, recording, transcribing, compiling and preserving vital statistics; §194.004, which requires state registrar to prepare and issue detailed instructions necessary for the uniform observance of Title 3, Vital Statistics, and maintenance of a perfect system of registration; and §12.001 which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, or the commissioner of health.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on June 16, 1995.

TRD-9507721 Susan K. Steeg
General Counsel
Texas Department of Health

Effective date: July 17, 1995

Proposal publication date: May 9, 1995

For further information, please call: (512) 458-7236

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Vital Records

• 25 TAC §181.22

The Texas Department of Health (department) adopts an amendment to §181. 22 which establishes a fee relating to the issuance of a new heirloom birth certificate, with changes to the proposed text as published in the May 9, 1995, issue of the *Texas Register* (20 TexReg 3428).

The Health and Safety Code, §192.0021 provides the department with the authority to design, promote and sell heirloom birth certificates. The new heirloom certificate will have the same force and effect as any certified copy of a certificate of birth.

No comments were received however, departmental staff determined an error had been made in the calculations of the amount of the fee to be returned to a customer which has been reduced from $16 to $14 when service cannot be provided.

The amendment is adopted under authority of Health and Safety Code, §191. 003 which provides the Board of Health (board) with authority to supervise the bureau of vital statistics; §191.0045 which provides the bureau the authority to charge fees for providing services; §192.0021 which authorizes the department to prescribe a fee for an heirloom birth certificate in an amount not to exceed $30; and §12.001 which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, or the commissioner of health

§181.22. Fees Charged for Vital Records Services.

(a)-(o) (No change.)

(p) The fee for issuing each heirloom certificate of birth, or gift certificate for such, shall be $25. If a record is not found, $14 of the fee shall be returned to the applicant for service not performed.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on June 16, 1995.

TRD-9507722 Susan K Steeg
General Counsel
Texas Department of Health

Effective date: July 17, 1995

Proposal publication date: May 9, 1995

For further information, please call: (512) 458-7236

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• 25 TAC §181.29

The Texas Department of Health (department) adopts new §181.29, relating to the filing of adoptions for children born in foreign countries, without changes to the proposed text as published in the May 9, 1995, issue of the *Texas Register* (20 TexReg 3428) and will not be republished.

The department presently files such adoptions after they have been authenticated by a district court of this state. Many judges have expressed reservations relating to this procedure as no agency rule presently exists. This rule is intended to alleviate this condition and provide for the orderly and uniform filing of foreign adoptions.

No comments were received concerning the proposed new section.

This new section is adopted under authority of Health and Safety Code, §192.003, which provides the Board of Health (board) with authority to adopt necessary rules for collecting, recording, transcribing, compiling, and preserving vital statistics; §194.004 which requires the state registrar to prepare and issue detailed instructions necessary for the uniform observance of Title 3, Vital Statistics and maintenance of a perfect system of registration; and §12.001 which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, or the commissioner of health.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on June 26, 1995.

TRD-9507723 Susan K. Steeg
General Counsel
Texas Department of Health

Effective date: July 17, 1995

Proposal publication date: May 9, 1995

For further information, please call. (512) 458-7236

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Part II. Texas Department of Mental Health and Mental Retardation

Chapter 406. ICF/MR Programs

Subchapter D. Reimbursement Methodology

• 25 TAC §406.157

The Texas Department of Mental Health and Mental Retardation (TDMHMR) adopts an amendment to §406.157,, concerning reimbursement methodology for ICF/MR programs, with changes to the proposed text as published in the December 30, 1994, issue of the *Texas Register* (19 TexReg 10415). One change included a change from proposed rule numbers to the rules currently in place. The other change involved replacing the word "if" with the word "when".

The purpose of the amendment to §406.157(c)(4)(A)-(B)(iii) is to develop a rate class for six-bed facilities operated by state schools of TDMHMR.

A public hearing was held on January 10, 1995, in Austin, to accept oral and written testimony concerning the amendment. Comment was received by Bill McIlhany, Carole Smith of the Private Provider Association of Texas, Tom Plowman of the Texas Health Care Association, Steve Kitchen, Randy Donaldson, Steve Wirth of Concept Six, Dennis Hennegar of Educare, and Anita Bradberry. Two commenters addressed these amendments by stating that the establishment of a separate state operated small facility class is unnecessary. The commenters stated that this policy widens the gap of public services from private services, promotes class distinctions, and affords public sector services access to funds not available to the private sector creating a competitive disadvantage to the private sector. The

commenters questioned how the new class rates will be determined and what is enough Medicaid cost data.

This rule was created to comply with the legislative directives to obtain an appropriate share of federal funding for services provided by the state. The new rate class will not impact other rate classes. It will take at least two years of operation before cost data can be used to set rates for the new class. TDMHMR is adopting this subparagraph and clause with only editorial changes.

The amendment is adopted under the Texas Health and Safety Code, §532.015, which provides the Texas Mental Health and Mental retardation Board with broad rulemaking authority, and under the provisions of Texas Civil Statutes, Article 4413(502), §16, which provide the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

§406.157. Rate Setting Methodology.

(a) (No change.)

(b) Classes of service. A separate set of reimbursement rates corresponding to classes of service is determined within each provider class. The classes of service for state schools are ICF/MR I, ICF/MR V, ICF/MR VI, and small facility ICF/MR V, and small facility ICF/MR VI. The classes of service for community-based providers are ICF/MR I, large ICF/MR V facilities, small ICF/MR V facilities, large ICF/MR VI facilities, small ICF/MR VI facilities, and small ICF/MR VIII facilities. Large facilities are those with more than six Medicaid-contracted beds. Small facilities are those with six or fewer Medicaid-contracted beds.

(c) Rate determination. The Texas Mental Health and Mental Retardation Board determines reimbursement in accordance with Chapter 409, Subchapter A, §§409.001 and 409.002-409.007 of this title (relating to General Reimbursement Methodology for all Medical Assistance Programs). These rates are uniform, determined prospectively, cost related, and determined annually. To develop a separate set of reimbursement rate recommendations for each class of service within each provider class, TDMHMR or its authorized agent applies the following procedures.

(1) For each class of service, a cost component for each cost center is calculated at the adjusted per diem expense corresponding to the provider delivering the median day of service. (In calculating the median day of service, days of service delivered by each provider included in the rate base are summed cumulatively in the order which corresponds to the array of adjusted per diem costs, from lowest to highest.) When cost reports covering less than a full fiscal year of operation are used in reimbursement determination, costs and other data are not annualized for purposes of determining per diem costs and reimbursement.

(2,-(3) (No change.)

(4) Alternate state operated small facility rates effective September 1, 1994.

(A) Description of rate class. The state operated small facility rate class consists of Level V and VI group homes with six or fewer Medicaid-contracted beds that are operated by TDMHMR.

(B) Determination of state operated small facility rates. Eligible state operated small facilities are reimbursed in the following manner:

(i) Rates are based on projected costs of the respective ICF/MR Level V or Level VI community-based facilities as described in §406.156 of this title (relating to Cost Finding Methodology) with additional adjustments for wages and benefits paid by the state.

(ii) TDMHMR will continue to set rates for this class in this manner until enough Medicaid cost report data become available to determine rates on the basis of cost reports.

(iii) Cost reports from facilities in this class will not be included in the cost arrays that are used to determine reimbursement rates for other classes of providers.

(d)-(e) (No change.)

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on June 26, 1995.

TRD-9507710 Ann Utley
Chair, Texas MHMR Board
Texas Department of
Mental Health and
Mental Retardation

Effective date: July 17, 1995

Proposal publication date: December 30, 1994

For further information, please call: (512) 206-4516

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TITLE 28. INSURANCE

Part I. Texas Department of Insurance

Chapter 5. Property and Casualty Insurance

Subchapter E. Texas Catastrophe Property Insurance Association

Manual

• 28 TAC §5.4501

The Texas Department of Insurance adopts an amendment to §5.4501, concerning the adoption by reference of a revised Texas Catastrophe Property Insurance Association (TCPIA) manual of rules to include a new rule relating to the charging of minimum earned premium on windstorm and hail insurance policies issued by the TCPIA. The amendment is adopted with changes to the proposed text as published in the February 28, 1995, issue of the *Texas Register* (20 TexReg 1393).

Pursuant to the Catastrophe Property Insurance Pool Act (the Insurance Code, Article 21.49), the TCPIA was created by the Texas legislature in 1971 and is composed of all property insurers authorized to transact property insurance in Texas, except those insurers prevented by law from writing coverages available through the TCPIA on a statewide basis. The purpose of the TCPIA is to provide windstorm and hail insurance coverage to coastal residents who are unable to obtain such coverage in the voluntary market. Currently the TCPIA provides this coverage to residents of 14 coastal counties, including Aransas, Brazoria, Calhoun, Cameron, Chambers, Galveston, Jefferson, Kenedy, Kleberg, Matagorda, Nueces, Refugio, San Patricio and Willacy Counties. The TCPIA rules manual, which is adopted by reference in 28 TAC §5.4501, governs the writing of windstorm and hail insurance by the TCPIA. It is necessary to revise the rules manual to include a new rule relating to the charging of minimum earned premium on windstorm and hail insurance policies issued by the TCPIA. The newly adopted rule is needed to establish a minimum earned premium to be retained by the TCPIA in the event a policy issued by the TCPIA is canceled by the policyholder. The manual that is amended pursuant to this adoption became effective on January 1, 1994, and was a complete revision of previous manual rules. A rule addressing retention of minimum earned premium was inadvertently omitted from the 1994 revision. The manual adopted previous to the 1994 revision, however, contained a rule that provided that the TCPIA could retain a minimum of $25 in earned premium in the event a TCPIA policy was canceled. The increase to $50 authorized in the adopted rule is necessary because of the increased expense of issuing a TCPIA policy. In addition to the increase in minimum earned premium, the new rule requires the actual unearned premium to be refunded to the policyholder in the event of cancellation of the policy by the TCPIA. This exception ensures that for property that is not insurable by the TCPIA the full unearned premium is returned to the policyholder. The only change in the text as published is the change in the effective date of the adoption by reference from May 1, 1995, to July 14, 1995, in order to comply with the Government Code, §2001.036 provision on effective date of rules. The Government Code, §2001.036(a) provides that a rule takes effect 20 days after the date on which it is filed in the office of the Secretary of State unless a later date is required by statute or specified in the rule.

The adopted rule provides that the minimum earned premium per TCPIA policy that can be retained by the TCPIA in the event a policy issued by the TCPIA is canceled by the poli-

cyholder shall be $50 and provides an exception that in the event of cancellation of a policy by the TCPIA, the actual unearned premium must be refunded to the policyholder. The adopted rule is contained in subsection L in the General Rules section (section I) of the manual. The new rule reads: "The minimum earned premium per policy shall be $50. Exception: In the event of cancellation of the policy by the TCPIA, the actual unearned premium must be refunded." The revised manual is effective July 14, 1995.

No comments were received regarding adoption of the amendment.

The amendment is adopted pursuant to the Insurance Code, Articles 21.49, 1. 02, 1.03A, and the Government Code, §§2001.004-2001.038. Article 21.49, §5A authorizes the Commissioner of Insurance to issue, after notice and hearing, any orders which are considered necessary to carry out the purposes of Article 21.49, including, but not limited to, maximum rates, competitive rates, and policy forms. Article 21.49, §8 authorizes the Commissioner of Insurance to approve, modify, or disapprove every manual of classifications, rules, rates, rating plans, and every modification of any of the foregoing proposed for use by the TCPIA. Article 21.49, §5A and §8, by their terms delegate the foregoing authority to the State Board of Insurance. However, under the Insurance Code, Article 1.02, as amended by the 73rd Texas Legislature in House Bill 1461 (Acts 1993, 73rd Legislature, Chapter 685, §1. 01, effective September 1, 1993), a reference in the Insurance Code or another insurance law to the State Board of Insurance means the Commissioner of Insurance or the Texas Department of Insurance, as consistent with the respective powers and duties of the Commissioner and the Department under Article 1.02. Article 1.03A, as enacted by the 73rd Texas Legislature in House Bill 1461 (Acts 1993, 73rd Legislature, Chapter 685, §1.03, effective September 1, 1993), provides that the Commissioner of Insurance may adopt rules and regulations, which must be for general and uniform application, for the conduct and execution of the duties and functions of the Texas Department of Insurance only as authorized by a statute. The Government Code, §§2001. 004-2001.038 (Administrative Procedure Act) authorize and require each state agency to adopt rules of practice stating the nature and requirements of available formal and informal procedures and prescribe the procedures for adoption of rules by a state agency.

§5.4501. Rules and Regulations for Texas Catastrophe Property Insurance Association (association). The Texas Department of Insurance adopts by reference a rules manual for the association as amended effective July 14, 1995. Copies of the rules manual may be obtained by contacting the Property/Casualty Division, Mail Code 103-1A, Texas Department of Insurance, 333 Guadalupe Street, P.O. Box 149104, Austin, Texas 78714-9104.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on June 23, 1995.

TRD-9507675 Alicia M. Fechtel
General Counsel and Chief Clerk
Texas Department of Insurance

Effective date: July 14, 1995

Proposal publication date: February 28, 1995

For further information, please call: (512) 463-6327

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Chapter 7. Corporate and Financial Regulation

Subchapter A. Examination and Corporate Custodian and Tax

• 28 TAC §7.18

The Texas Department of Insurance adopts new §7.18, concerning the National Association of Insurance Commissioners Accounting Practices and Procedures manuals, without changes to the proposed text as published in the January 13, 1995, issue of the *Texas Register* (20 TexReg 210).

The new section is necessary to clarify which versions of the NAIC Accounting Practices and Procedures manuals have been officially adopted by reference by the Texas Department of Insurance. The new section is adopted to comply with a newly enacted provision of the Insurance Code, Article 1.27, which recites that the Department may not require an insurer to comply with any rule, regulation, directive, or standard adopted by the National Association of Insurance Commissioners unless it is expressly authorized by statute and approved by the Commissioner. The new section will allow interested persons notice and opportunity for a hearing if the Department proposes to adopt a particular version of any NAIC Accounting Practices and Procedures manual.

Section 7.18 specifies which version of any NAIC Accounting Practices and Procedures manual has been officially adopted by reference by the Texas Department of Insurance. Subsection (a) defines terms used in the new section. Subsection (b) recites that the Department adopts by reference specific (by date) NAIC Accounting Practices and Procedures manuals as the accounting standard for the Department when examining financial reports and for conducting statutory examinations and rehabilitations of insurers licensed in Texas. Subsection (c) lists exceptions to the NAIC Accounting Practices and Procedures Manual for Life, Accident and Health Insurance Companies. Subsection (d) lists exceptions to the NAIC Accounting Practices and Procedures Manual for Property and Casualty Companies. Subsection (e) lists an exception to the NAIC Accounting Practices and Procedures Manual for Health Maintenance Organizations.

Four commenters objected to §7.18(b),(c)(1),(d)(1), and (e) because the rule will not allow goodwill as an admitted asset of an insurer or an insurer's insurance subsidiaries on any filing with the Department by insurers domiciled outside Texas. The commenters stated that the NAIC manuals provide for goodwill to be admitted as an asset in an amount not to exceed 10% of an insurer's capital and surplus, and for amortization of goodwill over a 10-year period, and that the NAIC codification project will consider in the future whether goodwill should be an admitted asset. The Department disagrees with the comments because Texas has not allowed goodwill as an admitted asset for a domestic or foreign insurer for the past two years, as recorded in the annual statement rule. Thus, §7.18 does not alter the currently existing requirement that goodwill is a nonadmitted asset. However, foreign insurers will not be required to prepare a separate annual statement for Texas; rather, the Department will accept additional pages to the annual statement filing which eliminate goodwill in considering the amount of a foreign insurer's admitted assets and surplus.

One commenter objected to §7.18(c)(2) and (d)(2) because the nature of the trusts in these subsections is not clear. The Department disagrees. Chapter 1 of the NAIC manuals in question outlines procedures for such trusts, which are described as trusts whose holdings include collaterallized mortgage obligations.

Ernst and Young, CIGNA, Alliance of American Insurers, and AFLAC objected to certain provisions in the proposed rule. No comments were received in favor of the new section.

The new section is adopted pursuant to the Insurance Code, Articles 1.03A and 1.27. Article 1.03A authorizes the Commissioner of Insurance to promulgate and adopt rules and regulations for the conduct and execution of duties and functions by the Department. Article 1.27 recites that the Department may not require an insurer to comply with any rule, regulation, directive, or standard adopted by the National Association of Insurance Commissioners unless it is expressly authorized by statute and approved by the Commissioner.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on June 22, 1995.

TRD-9507645 Alicia M. Fechtel
General Counsel and Chief Clerk
Texas Department of Insurance

Effective date: July 13, 1995

Proposal publication date: January 13, 1995

For further information, please call: (512) 463-6327

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Subchapter A. Examination and Corporate Custodian and Tax

• 28 TAC §7.85

The Texas Department of Insurance adopts new §7.85, concerning the contents of au-

dited financial reports and work papers, which requires certain information to be included in the audited financial report and work papers. The section is adopted with changes to the proposed text as published in the December 23, 1994, issue of the *Texas Register* (19 TexReg 10201).

The new section is necessary to define what is required to be included in the audited financial report and work papers. The Insurance Code, Article 1. 15A, requires the audited financial report to be prepared by accountants or accounting firms, and Article 1.15 requires that statutory examinations are periodically conducted by department examiners. The Insurance Code, Article 1. 15, §8(a), requires the department, when examining insurance carriers, to utilize the audited financial statements and related work papers of the accountant or accounting firm which performed the annual audit of a company pursuant to Article 1.15A. The proposed section is necessary because of a newly enacted provision of the Insurance Code, Article 1.15A, §10(f), which requires the Commissioner to adopt rules governing the information to be included in the audited financial report, which is used by the Department to conduct the examination of insurers under Article 1.15.

Section 7.85 specifies certain information which must be included in the audited financial report and work papers. Subsection (a) defines terms used in the new section. Subsection (b) provides a hierarchy of authority for determination of accounting standards, and was amended as a result of comments to include a provision reciting that GAAP is prescribed to the extent not conflicting with the hierarchy of authority set out in subsection (b). Subsection (c) specifies an effective date for audited financial reports which are subject to §7.85, and provides which foreign or alien insurers are exempt from the new section. Subsection (c) was also amended as a result of a comment. The amendment changes the effective date of §7.85 to December 31, 1995, and recites that currently exempted companies under Insurance Code, Article 1.15A, §6(a) are exempt from §7.85 based upon current requirements of other states. Subsection (d) provides the purpose of the new section. Subsection (e) describes the conduct of the audit, and was amended as the result of a comment to recite that it is not the department's intent to expand audit testing beyond the requirements of GAAS. Subsection (f) outlines the contents of audited financial reports, and was amended as a result of a comment. Subsection (f)(3) specifies that any noncompliance with the financial, investment, and holding company provisions of the Insurance Code or the Texas Administrative Code noted during the audit should be recorded. A nonsubstantive change was made to subsection (f)(1) to indicate that balance sheet reserves and other liabilities have also been computed in accord with the Texas Administrative Code. In response to another comment to subsection (f) (3), a definition of "material" was added in subsection (a)(11) to clarify the phrase "schedule of material nonadmitted assets." Subsection (g) describes the contents of work papers, and in response to a comment subsection (g)(1) was amended to clarify the items subjected to detailed tests during the audit. In response to a comment, subsections (g)(1)(C) and (D) were amended and moved to subsections (g)(3)(E) and (F). The phrase "and received" will be deleted from new subsection (g)(3)(E). Subsection (g)(3)(F) will be amended to recite "For all other liabilities, that all material liabilities of the company have been properly recorded." Former subsection (g)(1)(D)(ii) will also be deleted as a result of the comment. These changes will more accurately reflect that the accountant's opinion covers the financial statements as a whole and not individual financial statement captions or underlying accounts. Subsection (g) (2) was also amended as a result of a comment. The amendment provides that the contents of work papers should only reflect "material" reinsurance agreements. Subsection (g)(2)(D) was amended as a result of a comment to require "verification" of reinsurance balances. Subsection (g)(3)(C) was amended as a result of a comment by deleting the word "reports." Subsection (g)(3)(G), dealing with internal control work papers, was added for clarification. Subsection (g)(4)(A) was also amended as a result of a comment. The new rule adds §4 of Article 21.49-1 of the Insurance Code to the reference to Article 21.49-1, §3 with regard to the filing requirements which must be noted in the work papers. Subsection (h) provides for the accessibility of work papers. Subsection (i) outlines penalties for not complying with the new section.

Four commenters objected to §7.85(b) because the rule does not indicate whether GAAP is considered a "prescribed" or "permitted" practice. The department agrees with the comment. GAAP is a prescribed procedure only to the extent that the other items listed in the hierarchy of authority in §7.85(b) do not address the accounting issue in question. Section 7.85(b) specifies that if items (1) through (3) in the hierarchy, and other nonadopted NAIC handbooks, manuals, and instructions, do not address the accounting issue in question, then GAAP is to be relied upon for the accounting issue in question.

Five commenters objected to §7.85(c) because audits of 1994 financial statements are substantially complete for many companies and that an effective date of December 31, 1994, would be costly to implement. The department agrees with this comment and has changed the effective date to December 31, 1995.

Three commenters objected to §7.85(c) because it is unclear how many states have requirements for audited financial reports that are similar to §7.85(c), and so a company and its independent accountant will not know if the company is exempt from §7.85. The department agrees with this comment and has determined that the currently exempted companies under Insurance Code, Article 1.15A, §6(a) are exempt from §7.85 based upon the current requirements of other states. This exemption from §7.85 will continue for foreign and alien companies until the commissioner finds that a particular state's requirements are no longer substantially similar to the requirements in §7.85.

Four commenters objected to §7.85(e)(1)-(4) because the items listed in paragraphs (1)-(4) relate to accounting matters rather than the conduct of a GAAS audit. The department agrees with this comment because the annual audits must be conducted in accordance with GAAS. The NAIC Examiners Handbook, NAIC Accounting Practices and Procedures manuals, NAIC Purposes and Procedures of the Securities Valuation Office manual, and commissioner orders are listed in these paragraphs for the direction of the accountant to utilize beyond the requirements of GAAS if needed for specific portions of the audit. It is not the department's intent to expand audit testing beyond the requirements of GAAS.

One commenter objected to §7.85(e)(1) because accountants will be required to document in the work papers nonperformance of any procedures included in the Examiners Handbook. The department disagrees with this comment. Documentation of nonperformance of testing procedures is generally not required under GAAS, and §7.85(e)(1) requires documentation of nonperformance only to the extent as required by the Examiners Handbook. Additionally, documentation of nonperformance of testing for material items is already recorded in the audit program reports pursuant to GAAS.

Two commenters objected to §7.85(f)(3) because clarification was needed as to what kind of explanation is required in the schedule of material nonadmitted assets. The department agrees with this comment and has added a definition of "material" in §7.85(a)(11).

Three commenters objected to §7.85(f)(3) because of the phrase "material exceptions to compliance with the Insurance Code or the Texas Administrative Code." They stated that compliance cannot be a material issue. The department agrees and has struck the term "material" from this portion of §7.85(f)(3).

Four commenters objected to §7.85(f)(3) because the requirement to include any exceptions to compliance with the Insurance Code or the Texas Administrative Code in the footnotes of the work papers would not be appropriate under GAAS, and that an "agreed-upon" procedures engagement may be required as a result of the proposed rule. In addition, the commenters reasoned that accountants cannot have a working knowledge of the entirety of both the Insurance Code and the Texas Administrative Code. The department agrees with this comment and has revised this paragraph to recite in part that "... any exceptions to compliance with the financial, investment, and holding company provisions of the Insurance Code or the Texas Administrative Code noted during the audit and a schedule and explanation of material non-admitted assets shall also be recorded in notes." Section 7.85 does not require accountants to perform an extensive list of standardized procedures or document the justification for not doing so.

One commenter objected to §7.85(g)(1) because the phrase "items tested by the accountant during the course of the audit" should be clarified. The department agrees with this comment although GAAS dictates what items are tested by the auditor-such

testing may include items subjected to confirmation, verification of purchase, or some other test of details. The phrase has been revised to recite "items subjected to detailed tests by the accountant during the course of the audit."

Three commenters objected to §7.85(g)(1)(C) and(D) because the accountant's opinion covers the financial statements as a whole and not individual financial statement captions or underlying accounts. The department agrees with this comment and has made the following revisions: subsection (g) (1)(C)(i) has been moved to subsection (g)(3)(E); the phrase "and received" will be deleted from subsection (g)(1)(C)(ii); subsection (g)(1)(C)(iii) will be deleted; subsection (g)(1)(D) will be moved to subsection (g)(3)(F) and will be amended to recite "For all other liabilities other than policy liabilities, that other material liabilities of the company have been properly recorded"; and subsection (g)(1)(D)(ii) will be deleted.

Two commenters objected to §7.85(g)(2) because they believed that the contents of work papers should only reflect "significant" reinsurance agreements. The department agrees with this comment but has instead inserted the word "material."

Two commenters objected to §7.85(g)(2)(D) because of the use of the term "confirmation" with regard to reinsurance balances. The department agrees and has inserted the word "verification" in place of "confirmation."

One commenter objected to §7.85(g)(3)(C) because the term "audit program reports" is unclear. The department agrees with this comment, and has deleted the word "reports." This term refers to the accountant's report setting out the planning for the audit, also known as audit planning records.

One commenter objected to §7.85(g)(4)(A) because Insurance Code, Article 21.49-1, §4 should be included along with Article 21.49-1, §3 in the filing requirements which must be noted in the work papers. The department agrees and has added "§4" to the subparagraph.

Four commenters objected to §7.85(h) because they believed the requirement to give access and provide photocopies of work papers to examiners should not occur until the completion of the audit. The commenters wrote that the work papers are incomplete until the audit is finished because additional information may be added as a result of further tests and review by supervisory personnel. The department disagrees with this comment. Work papers can be photocopied in the conduct of the periodic review by the department's examiners, as authorized by Insurance Code, Article 1.15A, §17(c). Audits often take several months to complete, and during that time period it may be crucial to the department to have access to work papers. Photocopying work papers allows examiners to obtain the work papers without interfering in the accountant's work by remaining present at the audit site, and speeds up the examination. The accountant may choose to mark uncompleted work papers with a phrase such as "In Progress" or "Subject to Revision" to ensure that the work papers' status is correctly identified and not to be relied upon as final by examiners. Additionally, the work papers are confidential by law. Articles 1. 15, §8 and §9 recite that any information obtained during the course of an examination is confidential, and Article 1.15A, §17(c) designates work papers as confidential. Article 1.18 prohibits examiners from revealing any information secured in the course of any examination except to the department or when required as a witness in an administrative hearing or in court. Likewise, examinations of any holding company are also declared confidential pursuant to Article 21.49-1, §10.

One commenter objected to §7.85(i) because it is not clear whether the insurance carrier or the accountant will be liable for noncompliance with §7. 85. The department disagrees. Section 7.85(i) recites that non-compliance with §7.85 may result in the commissioner initiating action pursuant to Insurance Code, Article 1.10, §7, or Article 1.15A, §12(d). The accountant has the responsibility of preparing the financial reports in accordance with §7.85, and may be subject to action pursuant to Article 1.15A, §12(d). Article 1.10, §7, would more likely be utilized in less common situations, such as when a company refuses to comply with an order issued under Article 1.15A, §12(e).

Three commenters objected to §7.85 because the amount of the projected increase in audit costs as a result of implementing the testing and documentation required by §7.85 is too low. They reasoned that the actual increase would be higher than the projected 10% increase. The department disagrees with this comment because the rule does not greatly alter the current practices for GAAS audits. Also, the previously-described changes to §7.85 further limit the financial impact of the new section.

One commenter objected to §7.85 because the department will, as a result of the adoption of the new section, have need for fewer examination division personnel and resources. The department disagrees. It is projected that adoption of §7.85 will reduce the amount of time required to complete a typical examination of insurers only and that, as a result, examination costs will be lower for insurers. However, no impact on the budget of the financial division is anticipated by the adoption of §7.85 because the savings in staff time will be utilized to supplement examinations of other regulated entities, such as managing general agents and premium finance companies.

One commenter objected to §7.85 because a written procedure may be needed in the new rule for arbitration between companies and examiners regarding interpretation of accounting standards and issues described in the Insurance Code, Texas Administrative Code, and the NAIC handbooks, manuals, and instructions. The department disagrees with this comment. Appeal procedures are available to companies regarding interpretation of accounting standards and issues pursuant to §7.83 of the Texas Administrative Code.

KPMG Peat Marwick, Texas Legal Reserve Officials Association, Ernst and Young, Price Waterhouse, Transport Life Insurance Company, and Coopers and Lybrand objected within the comment period to certain provisions in the proposed rule. No comments in favor of the amendment were received.

The new section is adopted under the authority of the Insurance Code, Articles 1.03A and 1.15A, §10(f). Article 1.03A authorizes the Commissioner of Insurance to promulgate and adopt rules and regulations for the conduct and execution of duties and functions by the Department. Article 1.15A, §10(f), requires the Commissioner to adopt rules governing the information to be included in the audited financial report prepared by an accountant or accounting firm, which is used by the Department to conduct the examination of insurers under Article 1.15.

§7.85. Audited Financial Reports.

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

(1) Accountant-An independent certified public accountant or accounting firm that meets the requirements of Insurance Code, Article 1.15A, §12.

(2) Audited Financial Report-The annual audit report required by Insurance Code, Article 1.15A.

(3) Commissioner-The Commissioner of Insurance.

(4) Department-The Texas Department of Insurance.

(5) Examiner-Staff appointed by the Commissioner pursuant to Insurance Code, Articles 1.17 and 1.18.

(6) Generally Accepted Accounting Principles ("GAAP")-The conventions, rules, and procedures that define accepted accounting practice, including broad guidelines and detailed procedures, set forth by the Accounting Principles Board of the American Institute of Certified Public Accountants, which was superseded by the Financial Accounting Standards Board, and which principles are specifically defined by SAS Number 69 (AU §411.05).

(7) Generally Accepted Auditing Standards ("GAAS") -The standards adopted by the American Institute of Certified Public Accountants to conduct an audit and to ensure the quality of the performance by accountants who are engaged in an audit of financial statements.

(8) NAIC-The National Association of Insurance Commissioners.

(9) Statutory Examination-An examination performed by the Department's examiners or other persons or firms retained by the Department specifically for examination of insurers, corporations, or associations.

(10) Work Papers-The records kept by the accountant supporting that ac-

countant's audit opinion, including the audit records defined by Insurance Code, Article 1.15A, §17(a); the accountant's audit planning records, and any record of communications related to the audit between the accountant and the insurer pursuant to the Insurance Code, Article 1.15A, §17(b).

(11) Material–An item of information that should be reported if it is significant enough to have an effect on the decision maker. Materiality is dependent upon the relative size of an item, the precision with which the item can be estimated, the nature of the item, and the dollar amount above which the auditor's perspective of the item will be influenced. An item is material for accounting purposes if the omission or misstatement of it, in light of surrounding circumstances, makes it probable that the judgment of a reasonable person relying on the information would have been changed or influenced by the omission or misstatements.

(b) Hierarchy of Authority. The priority for determination of accounting standards is set out in paragraphs (1)-(3) of this subsection. For guidance on matters not specifically addressed by the resources set out in paragraphs (1)-(3) of this subsection, the Department shall first rely upon other NAIC handbooks, manuals, and instructions, and if further direction is needed shall rely upon GAAP. GAAP is prescribed to the extent not conflicting with the hierarchy of authority set out in this subsection.

(1) Texas statutes.

(2) Department rules and regulations.

(3) Directives and orders of the Commissioner, and any examiner's handbooks, manuals, bulletins, and/or instructions adopted by the Department.

(c) Applicability. This section applies only to audited financial reports with audit dates as of December 31, 1995, or later. A foreign or alien insurer may be exempt from this rule if the foreign or alien insurer files an audited financial report in another state and the requirements for that state's audited financial reports are determined by the Commissioner pursuant to the Insurance Code, Article 1.15A, §6(a), to be substantially similar to the requirements in Insurance Code, Article 1.15A. A foreign or alien insurer is exempt from this rule if the foreign or alien insurer files an audited financial report in another state and the requirements for that state's audited financial reports have already been determined by the Commissioner pursuant to the Insurance Code, Article 1.15A, §6(a), to be substantially similar to the requirements in Insurance Code, Article 1.15A.

(d) Purpose. The Department recognizes that the Insurance Code, Article 1.15A, requires audited financial reports to be prepared, and that statutory examinations are periodically conducted pursuant to the Insurance Code. To improve coordination between the audited financial reports and statutory examinations, and to promote the utilization of work papers to the fullest extent during the conduct of statutory examinations, certain minimum standards, guidelines, and procedures must be incorporated by the accountant during the preparation of the work papers and the audited financial report. The purpose of this section is to establish those requirements.

(e) Conduct of audit. The annual audit required by the Insurance Code, Article 1.15A, shall be conducted in accordance with GAAS. It is not the department's intent to expand audit testing beyond the requirements of GAAS. To the extent not inconsistent with GAAS, consideration shall be given to the procedures and conventions set out in paragraphs (1) through (4) of this subsection, as follows:

(1) audit procedures and format contained in the NAIC Examiners Handbook;

(2) accounting treatments for the particular line(s) of insurance contained in the NAIC Accounting Practices and Procedures manuals and the NAIC Annual Statement Instructions;

(3) valuation procedures contained in the NAIC Purposes and Procedures of the Securities Valuation Office manual; and

(4) any order(s) of the Commissioner issued to a particular company.

(f) Contents of audited financial reports. In addition to the contents specified in the Insurance Code, Article 1.15A, §10(a)-(c), audited financial reports shall contain the statements and reports set out in paragraphs (1)-(3) of this subsection.

(1) Balance sheet assets shall be limited to only those assets satisfying the admissibility issues of verified title and ownership, possession, valuation, and limitation. Asset admissibility issues are to be measured by compliance with the appropriate provisions of the Insurance Code and the Texas Administrative Code. The balance sheet shall include reserve and other liabilities which have been computed in accordance with the Insurance Code and the Texas Administrative Code.

(2) The statement of gain or loss from operations, statement of changes in capital and surplus, and the statement of cash flow prepared in accordance with the Texas Administrative Code and the NAIC Annual Statement Instructions.

(3) In addition to the items that must be recorded in the notes to the financial statements as required by the Insurance Code, Article 1.15A, §10(c), any exceptions to compliance with the financial, investment, and holding company provisions of the Insurance Code or the Texas Administrative Code noted during the audit and a schedule and explanation of material nonadmitted assets shall also be recorded in notes.

(g) Contents of work papers.

(1) For those items subjected to detailed tests by the accountant during the course of the audit, the work papers shall contain notation of whether any material exceptions exist for each of the items set out in subparagraphs (A) and (B) of this paragraph.

(A) For invested assets:

(i) compliance as an authorized investment has been determined and does not exceed statutory limitations;

(ii) ownership and possession have been verified; and

(iii) securities are valued in accordance with the instructions of the NAIC Purposes and Procedures of the Securities Valuation Office manual.

(B) For assets other than invested assets:

(i) such assets are admitted in accordance with the appropriate provision of the Insurance Code or Texas Administrative Code; and

(ii) such assets are valued in accordance with the Texas Administrative Code and the appropriate section of the NAIC Accounting Practices and Procedures manual.

(2) If the regulated entity subject to the audit has any material reinsurance agreement or agreements, the work papers shall contain an outline addressing the items set out in subparagraphs (A) through (E) of this paragraph as follows:

(A) summary of the insurer's overall reinsurance program;

(B) explanation of relevant provisions by which liabilities are transferred to the reinsurer and any contingency provisions by which the reinsurer can cause the ceding insurer to reassume liabilities previously transferred to the reinsurer;

(C) explanation about assets held in trust, depositories, or letters of credit by which any reserve liabilities are collateralized;

(D) verification of any material reinsurance balance ceded or assumed; and

(E) explanation of amounts recoverable from unlicensed reinsurers that are not collateralized, or disputed reinsurance recoverables.

(3) The work papers of any audited entity shall contain:

(A) any letters from the accountant to management commenting on or explaining internal management operating procedures;

(B) computer-generated work papers;

(C) audit program;

(D) reports prepared by outside consultants;

(E) for policy liabilities, a note that reserves are established in accordance with policy and statutory provisions, and that required payments were made pursuant to any contract provisions;

(F) for all other liabilities, that all material liabilities of the company have been properly recorded; and

(G) internal control work papers.

(4) The work papers of any audited entity shall contain a notation that the accountant has determined that such entity met the requirements of subparagraphs (A) and (B) of this paragraph.

(A) Filing requirements have been met of the Insurance Code, Article 21.49-1, §3 and §4, and the Texas Administrative Code, including but not limited to the requirements that all dividends have been reported to the Department within two business days after declaration and at least ten days prior to payment, and that all dividends have been declared to have been paid in accordance with the provisions of Insurance Code, Articles 3. 11, 21.31, 21.32, 21.32A, or 22.08, whichever statute is applicable.

(B) Unencumbered assets have been maintained in an amount at least equal to reserve liabilities as required by Insurance Code, Article 21.39-A.

(h) Accessibility of work papers. The accountant shall provide all work papers to the examiner, whether during or after the preparation of the audited financial report. The examiner may obtain, if necessary, photocopies of work papers as provided by the Insurance Code, Article 1.15A, §17(c), so as not to burden the accountant if a statutory examination is occurring at the same time as an annual audit. Information obtained under this section is subject to the confidentiality standards imposed by Insurance Code, Articles 1.15, §8(b) ; 1.15A, §17(c); 1.18; and 21.49-1, §10.

(i) Non-compliance with this section may result in the Commissioner initiating action pursuant to Insurance Code, Articles 1.10, §7, and 1.15A, §12(d).

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas on June 22, 1995.

TRD-9507644 Alicia M. Fechtel
General Counsel and Chief Clerk
Texas Department of Insurance

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For further information, please call: (512) 463-6327

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TITLE 30. ENVIRONMENTAL QUALITY

Part I. Texas Natural Resource Conservation Commission

Chapter 279. Water Quality Certification

• **30 TAC §§279.1-279.13**

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts amendments to §§279.1-279.13, concerning Water Quality Certification of federal licenses and permits pursuant to the Federal Clean Water Act (CWA), §401. Sections 279.2-279.13 are adopted with changes to the proposed text as published in the December 27, 1994, issue of the *Texas Register* (19 TexReg 10309). Section 279.1 is adopted without changes and will not be republished.

The intent and purpose of these amendments is to comply with existing federal requirements and to ensure consistency with regard to federal actions. Section 401 provides that federal licenses and permits which may result in a discharge into navigable waters of the United States must comply with applicable state surface water quality standards and other applicable state laws. In Texas, such standards are established by the commission and are contained in Chapter 307 of this title. Certifications authorized by the commission include permits for point source discharges under §402 and discharges of dredged and fill material under the Clean Water Act, §404; permits for activities in navigable waters which may affect navigation under the Rivers and Harbors Act, §9 and §10; and licenses required for hydroelectric projects issued under the Federal Power Act. There are other federal permits and licenses, such as permits for activities on public lands and Nuclear Regulatory Commission licenses, which may result in a discharge and, thus, require §401 certification. However, activities associated with the exploration, development, and production of oil and gas or geothermal resources are certified by the Railroad Commission of Texas as provided by the Texas Water Code, §26.131.

The adopted revisions to the Water Quality Certification rules include both editorial revisions and substantive changes. Editorial revisions were needed to improve clarity, correct grammatical errors, revise wording, and reletter subsections as needed. Substantive changes were needed to clarify commission policy on wetlands protection and to provide consistency between related state and federal rules.

A public hearing was held on January 31, 1995 in Austin. Comments were received from the following groups, associations, businesses, and industries: Texas Ports Association, Texas Water Conservation Association, U.S. Department of the Army Corps of Engineers, U.S. Department of Commerce National Oceanic and Atmospheric Administration, Texas General Land Office, Texas Utilities Services, and The San Marcos River Foundation. The commission responds to the comments received as follows:

Several of the comments were general in nature or addressed the preamble as published in the December 27, 1994, issue of the *Texas Register*. One commenter requested that the preamble include a statement that "The policies and procedures discussed in §279.11 are consistent with current Federal Clean Water Act, §404 regulatory practices and are incorporated into these regulations in abbreviated form for ease of reference. Section 279.11 does not change the substantive requirements of the Guidelines." The commission agrees that §279.11 does not change the substantive requirements of the Guidelines and that the policies and procedures are consistent with the U.S. Army Corps of Engineers (Corps) current regulatory practices. However, the commission does not agree that the regulations are being adopted by reference, or that the mitigation sequence adopted in §279.11 is a federal requirement for water quality certifications under existing Corps regulations. The commission is adopting the mitigation sequence identified in §279.11(c) (avoidance, minimization, compensation) which is only a portion of the §404(b)(1) Guidelines, not the entire federal procedure.

One commenter argued that to the extent the proposed rules include, as part of the certification process, a review of matters outside of certifying compliance with state water quality standards the rules are without statutory authority. Specifically, the commenter objected to the TNRCC seeking to adopt the "§404(b)(1) guidelines" to review U.S. Army Corps of Engineers' dredging permits.

The commission disagrees with the commenter that the §279.11(c) review is outside the commission's authority. The Texas Water Code, §5.102(a) gives the commission the authority and powers "to perform any acts whether specifically authorized by the Texas Water Code or other law or implied by this code or other law, necessary and convenient to the exercise of its jurisdiction and powers as provided by this code and other laws." The commission also has the authority to adopt rules necessary to carry out its powers and duties, Id. at §5.103(a), and has the responsibility to "administer the law so as to promote the judicious use and maximum conservation and protection of the quality of the environment and the natural resources of the state." Id. at §5.120. In addition, for certain activities within the delineated Coastal Zone Boundary, the Texas Natural Resources Code, §33.205(a) requires that a state agency shall take into account the goals and policies of the Coastal Management Plan (CMP) in developing rules and policies. All TNRCC actions that may adversely affect coastal natural resource areas, including discharges that may affect water quality in waters subject to tidal influence, must comply with the goals and policies of the CMP. The goals and policies of the CMP relating to dredging are found at 31 TAC §501.14(h). These rules are consistent with such CMP goals and policies.

Also, reviewing 404 permit applications using the §404(b)(1) mitigation sequence is within the commission's state statutory authority and the authority given to the states under the Clean Water Act, §401. By reviewing federal permits pursuant to the mitigation sequencing guidelines, the TNRCC will ensure that federal permits promote the judicious use, maximum conservation, and protection of the Texas environment and natural resources. Chapter 279 is necessary to carry out these duties by explaining the procedures and standards the TNRCC will use in conducting a §401 review. This review is in harmony with the general objectives of the Water Code, the Natural Resources Code, and the CMP. See Gerst *v.* Oak Cliff Savings and Loan Association, 432 S.W.2d 702, 706 (Texas 1968). Considering the mitigation sequence will assure that the discharge will comply with the state water quality standards and other state water quality related laws, pursuant to the Clean Water Act (CWA), §401. See, PUD Number 1 of Jefferson County *v.* Washington Department of Ecology, 114 S.Ct. 1900, 1909 (1994). The commission has added §5.102 to the statement of authority for adopting these rules.

One comment addressed the need for the commission to commit additional staff and resources to the certification process. The commission acknowledged these additional costs in the December 27, 1994 preamble and stated, "...any increases in cost will be met within existing financial resources available to the agency."

Several comments were received requesting clarification of the link between these rules and the antidegradation policy contained in the Texas Surface Water Quality Standards (WQS) found at §307.5 of this title. Section 279.2(b) and §279.9(3) clearly state that all activities under the authority of the TNRCC requiring a federal license or permit and which may result in any discharge will be reviewed for consistency with the WQS. The intent of including the mitigation sequence language in §279.11 is to provide the TNRCC with a mechanism to certify a class of activities authorized by the federal Clean Water Act (§404 permits) and to adhere to the WQS antidegradation policy. Specifically, §404 of the CWA establishes a permit to allow complete destruction of the uses of waters of the United States due to filling. At the federal level the §404(b)(1) Guidelines have been established to prevent a net loss of wetlands functions and values. By incorporating the sequencing requirements of these existing guidelines into the Water Quality Certification rules, the TNRCC will have a mechanism to comply with the WQS antidegradation policy regarding protection of existing uses. Finally, application of this wetlands protection policy to water quality certification is consistent with commission review and action on an application for a water use permit where habitat mitigation is required under the Texas Water Code, §11.152.

Several comments were received concerning the purpose and policy in §279. 2 which addresses achieving no overall net loss of the existing wetlands resource base with respect to functions and values. One commenter requested deleting the reference to "functions and values" from both §279.2(b) and §279.11(c)(3). The commenter states "The proposed qualifying language included here is unnecessary, duplicative, and potentially confusing and conflicting with federal guidance. Some might also interpret this language as more stringent than federal requirements." The commission disagrees with these comments. The term "function and values" refines the federal language of "unacceptable adverse impacts" to address those water quality related attributes that may be impacted by a permitted activity. These wetlands functions include but are not limited to: nutrient and toxicant removal, transformation and retention; sediment retention; groundwater recharge; shoreline stabilization and protection; floodwater storage and flood attenuation; and habitat for wetland dependent species. The proposed language is not intended to conflict or be more stringent than federal requirements. In fact, the memorandum of agreement between the U.S. Environmental Protection Agency (EPA) and the Department of the Army concerning the determination of mitigation under the Clean Water Act §404(b)(1) Guidelines states: "The Corps will strive to avoid adverse impacts and offset unavoidable adverse impacts to existing aquatic resources, and for wetlands, will strive to achieve a goal of no overall net loss of values and functions." Another commenter commended the commission for incorporating this statement into the policy. The commission has adopted the "function and values" language into the rule.

One commenter suggested clarification of the function and value policy by, "further detailing the State's policy on protecting important values, functions and benefits of existing coastal wetlands (versus restoration and creation of new wetlands); and any priority consideration given to uses which result in the loss or long term degradation of these resources." The commission agrees with this comment but believes this is more appropriate as part of the guidelines being developed for implementation of these mitigation requirements.

Two commenters requested clarification of the terms "water in the state" and "waters of the United States." While the definition of these terms are very similar, the commission's authority is limited by Chapter 26 of the Texas Water Code to "waters in the state." Waters in the state has been substituted throughout the rule except in §279.1 which deals with the statutory authority of the §401 certification in the federal Clean Water Act.

One commenter states that "401 Certification is not required for projects authorized only under §10 (of the Rivers and Harbors Act of 1899)." The commission disagrees with this comment.

Section 10 authorizes the U.S. Army Corps of Engineers to regulate all work or structures in or affecting the course, condition, or capacity of the navigable waters of the United States. 33 United States Code, §403. The Clean Water Act, §401 provides that an applicant for a federal license or permit to conduct an activity that may result in a discharge must obtain a certification from the state that the discharge will comply with the state water quality standards and other state laws (33 United States Code, §1341). If an activity that requires a §10 permit may result in a discharge, then the state must provide the Corps with a state 401 certification before the permit can be issued. Many times there will be concurrent Corps jurisdiction under the Rivers and Harbors Act, §10 and the Clean Water Act, §404. However, in those instances where an applicant need only apply for a §10 permit, the state must provide a 401 certification before the Corps can issue the permit. This process has been recognized by the EPA, the U.S. Supreme Court, and various states.

A comment was received asking how the State would apply the proposed procedures statewide since the Railroad Commission of Texas (RRC) has certification authority for activities relating to oil and gas production. As stated in §279.2 regarding the purpose and policies, these rules are only for activities under the authority of the TNRCC. The statutory authority for the separation of responsibility for oil and gas related activities is found in the Texas Water Code, §26.131. Therefore, these rules are not applicable to the RRC. Under the requirements of §401 and the responsibility established by the Texas Water Code, the RRC is responsible for certifying that oil and gas related activities are in compliance with the WQS and other state laws.

One commenter pointed out that while the new language in §279.2(d) concerning the Purpose and Policy was discussed in the preamble, it was listed as "no change" in the published text. This section has been deleted from the adopted rule. The commission will continue to coordinate the certification of federal permits and licenses with other state resource agencies. Any Memorandums Of Agreement concerning this coordination would be published in the *Texas Register* for public comment.

A variety of comments addressed the definitions found in §279.3. One commenter requested several changes in definitions to make them consistent with the federal regulations found at 33 Code of Federal Regulations, §322.1. The commission agrees with the following changes. "U.S. Army Corps of Engineers Permits" will be identified as "Department of the Army permits" in accordance with 33 Code of Federal Regulations, §322.1. This change had been incorporated at all points of reference to the "U.S. Army Corps of Engineers." The commission has also modified the following definitions for consistency with 33 Code of Federal Regulations, §§320-330. A statement that "404 permits" can be "either individual, general or by letter of permission" has been included in the definition of a "404 permit."

One comment was received in support of the proposed definition of water dependent activities.

One commenter requested that the commission include a definition of "significant degradation" in §279.3 consistent with the definition in 31 TAC §501.14(h)(1)(G), and 40 Code of Federal Regulations, §230.10(c), subparts (B)-(G). The commission disagrees with this comment since the state's antidegradation policy contained in 30 TAC Chapter 307, defines how this term is to be applied.

One commenter requested the definitions of "Individual Permits" and "General Permits" be made consistent with the Department of Army's definitions in 33 Code of Federal Regulations, §322.2. The commission disagrees with this comment since the permits certified under these rules include several different federal agency's permits. The various regulations which define a particular federal agency's permit must be uniquely detailed to describe that particular agency's permitting requirements. The commission's definitions are appropriate for defining all the various types of federal permits.

One commenter requested addition of the statement "nationwide permits are a type of general permit." The commission has adopted this additional language to the definition of "Nationwide Permit."

Several commenters requested the addition of an emergency provision for certifications allowing less than 30 days for public notices. The commission agrees with this comment and has added a definition for emergency to §279.3.

One commenter requested the deletion of the provision in §279.4(b)(3) for the executive director to "delay acting on a request for certification until after a review of the draft permit and/or the Statement of Findings." Because the certification decision is typically included as part of the Statement of Findings, the commission agrees that this would lead to an unworkable situation. However, the commission does reserve the right to "review a preliminary permit decision" on a discretionary basis. This revised language has been incorporated into §279.4(b)(3).

Several comments were received concerning the list of parties to receive notice of applications in §279.5. One commenter suggested deleting §279. 5(b) which provides a mechanism for certification in the event a joint public notice is not utilized. The commission disagrees with this comment and will provide a mechanism for certification in the event there is no joint public notice in §279.5(b). Another commenter thought this section required the commission to notice the parties listed for all certification actions. This is incorrect. Section 279.5(a) declares: "The executive director to the greatest extent practicable shall utilize a joint mailed notice issued by the [appropriate federal agency] after agreements with those agencies have been reached regarding the content of the notice and the persons entitled to notice in Texas." The commission would only use a separate notice under §279.5(b) in exceptional circumstances. If a joint notice is used, §279.5(b) is not applicable.

Several commenters requested modifying §279.5(c)(4) to allow a provision to shorten the public comment period for emergency situations. The commission agrees with this comment and has included a definition of emergency in §279. 3. The commission has also added language to §279.5(c)(7) to clarify existing emergency authority of the commission established in 30 TAC §305.

One commenter questioned noticing all the parties listed in §279.8, regarding nonadjudicative public hearings. This notice is only sent when a hearing is conducted and the commission will continue to notice the parties listed when a hearing is held so that potentially affected persons and entities are aware of the opportunity to make verbal comment and hear the comments of others.

One commenter requested that the title to §279.9 be changed to "Executive Director Review of Water Quality Certification Application." The commission agrees with this comment since it is consistent with the December 27, 1994 *Texas Register* (19 TexReg 10309) preamble to delegate the responsibilities for performing all certification functions to the executive director. The commission has adopted this title change and has also incorporated the change in all points of reference to §279.9.

One commenter suggested adding language to §279.11(a) stating that "water quality certification may be explicitly waived or will be deemed to have been waived by the district engineer if the TNRCC fails or refuses to act on a request for certification within 60 days after receipt of such a requests unless the Corps determines a shorter or longer period is reasonable to act. In any case, water quality certification will be deemed to have been waived if the TNRCC does not take a specific action within 60 days or alternate period." The commenter referenced 33 Code of Federal Regulations, §325.2(b). While the commission will continue to provide certification decisions in the 60 day period established by U.S. Army regulations, there may be occasions when a longer period is reasonable and necessary. In support of the language adopted in §279.11(a) the commission references the Federal Clean Water Act, §401 which states "if the state...fails or refuses to act on a request for certification within a reasonable time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived."

One commenter suggested that the criteria in §279.11(c) for 404 permits would result in an unnecessary duplication between the commission and the Corps. The commission disagrees with this comment since the commission is not adopting the entire §404(b)(1) Guidelines, or duplicating the review by the Corps. As shown in the response to a comment addressing §279.4(b)(3), the commission's decision regarding water quality protection is made before the Corps drafts its permit, so the TNRCC does not have the opportunity to base its certification decision on the Corps review. Additionally, the commission is reviewing this information for a different purpose than the Corps, i.e., consistency with state water quality standards, for which the commission has sole and exclusive authority.

One commenter supported the "practicable alternatives" language in §279. 11(c)(1) and the "minimization requirements" found in §279 11(c)(2).

One commenter recommended that the commission include a requirement in §279.11(c) that discharges be prohibited if they result in "significant degradation" in order to be consistent with 31 TAC §501.14(h)(1)(G) of the Texas Coastal Management Program. The commission disagrees that this language should be included in a rule that is applicable statewide. The antidegradation policy of the Surface Water Quality Standards are applicable statewide for water quality certification Section 279 9(4) provides a mechanism to assure consistency between these rules and "other appropriate requirements of state law" which would include 31 TAC §501.

One commenter supported the provisions in §279.11(c)(3) to require compensatory mitigation for unavoidable impacts remaining after practicable avoidance and minimization are completed. This commenter thought the rules should provide predictable guidance on how to achieve the goal of replacement of impacted functions and values by including language in §279.11(c)(3) which would state: "compensatory mitigation must be appropriate and practicable and must comply with the requirements in 31 TAC §501.14(h)(1)(d). ..." The commission agrees with the intent of these statements and will provide for predictable guidance in the procedures for implementing the requirements of this rule which are being developed separately.

One commenter recommended including the mitigation sequencing criteria of §279.11(c) in the review of §10 Rivers and Harbor permits. The commission disagrees with this recommendation because this would create an inconsistency between federal and state requirements.

One commenter felt the provision for an administrative appeal established in §279.11(d) would unnecessarily increase the processing time for every conditional certification or denial. The commission agrees with this commenter and has deleted §279.11(d). Subsequent sections have been relettered accordingly. Adequate alternatives for this appeal process already exist, including the applicants refusal to accept a final permit from the Corps; working with either the TNRCC or the Corps to modify any condi-

tions by providing additional information or modifying the proposed work; or appealing an agency's decision to the appropriate court of jurisdiction.

One commenter requested the addition of language to clarify that certification of Nationwide and General Permits is completed at the time of issuance of the permit and that following issuance of a Nationwide or General Permit, water quality certification is not required for each action authorized under that permit. The commission agrees that this will clarify the process of certifying Nationwide and General Permits and has added language to §279. 12(a)(1) and §279.12(b)(1).

One commenter requested that notification for Nationwide and General permits be published in the *Texas Register*. The commission supports this approach and will experiment with publishing notifications for these permits in the *Texas Register* However, because of concerns with the potential for unnecessary delays in the permitting process, the commission is not incorporating the requirement to publish these notices in the *Texas Register* into the rule. The commission also notes that all Nationwide permits are published in the *Federal Register* and that any person who so requests may be placed on the TNRCC's mailing list for notification of Nationwide and General Permits.

One commenter misunderstood that the exemption for activities less than 1000 cubic yards was proposed for deletion in §279.12(c)(1)(C) and was not a new proposal. The commission is adopting the deletion of this exemption. One commenter supported this deletion and stated "The State has rectified a major gap in the certification authority by removing this language."

One commenter expressed support for the change to §279.13 concerning the commissions enforcement under 30 TAC §337. The terms and conditions of a certification granted under this chapter shall be enforceable by the commission through the issuance of orders and the assessment of penalties, if appropriate, under Chapter 337 of this title (relating to Enforcement) and pursuant to the Texas Water Code, §§26.011, 26.019, 26.123, and 26.136. The commission may also seek injunctive relief and civil penalties in state district court in accordance with the Texas Water Code, §26.122. The commission has adopted this section with these clarifications as to the nature and extent of applicable enforcement actions.

The amendments are adopted under the authority of the Texas Water Code, §§5.102, 5.103, 5.105, and 5.120, which provides the Texas Natural Resource Conservation Commission with authority to promulgate rules as necessary to protect the quality of the state's waters.

§279.2. Purpose and Policy.

(a) This chapter establishes procedures and criteria for the application, processing and review of state water quality certifications for activities under the jurisdiction of the Texas Natural Resource Conservation Commission as required by the Federal Clean Water Act. It is the purpose of this chapter, consistent with the Federal Clean Water Act, to maintain the chemical, physical, and biological integrity of the State's waters.

(b) It is the policy of the Commission to achieve no overall net loss of the existing wetlands resource base with respect to wetlands functions and values in the State of Texas. All activities under the jurisdiction of the Texas Natural Resource Conservation Commission which require a federal license or permit and which may result in any discharge to waters of the United States will be reviewed for consistency with the Federal Clean Water Act and the Texas Surface Water Quality Standards. After such a review, the commission shall:

(1) grant certification for any activity which will not result in any discharge in violation of water quality standards or any other appropriate requirements as set forth in §279. 9 of this title (relating to Executive Director Review of Water Quality Certification Application);

(2) grant conditional certification stating the conditions necessary to prevent any activity which will result in a discharge from violating water quality standards or any other appropriate requirements as set forth in §279.9 of this title;

(3) deny certification for any activity which will result in a discharge in violation of water quality standards or any other appropriate requirements as set forth in §279.9 of this title; or

(4) waive certification for any activity which the Commission finds will result in no discharge, or, which does not fall within the purview of the Commission's authority, or concerning which the Commission expressly waives its authority to act on a request for certification for other reasons.

(c) (No change.)

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

401 Certification–A certification issued by the state to assure that a federal permit or license is consistent with state law as authorized under the Federal Clean Water Act, §401.

402 Permit–See NPDES permit.

404 Permit–A Department of the Army permit issued under the authority of the Federal Clean Water Act, §404 which authorizes the discharge of dredged or fill material into waters of the United States. 404 permits can be either individual, general, or by letter of permission. Individual 404 permits are only issued following a case-by-case evaluation of a specific structure or work in accordance with 33 Code of Federal Regulations, Part 325, a determination that the proposed structure or work is in the public interest pursuant to 33 Code of Federal Regulations, Part 320, and that the proposed action is consistent with 40 Code of Federal Regulations, Part 230 (§404(b)(1) Guidelines).

Affected person–Any person who is determined by the commission to have a legally justiciable interest that may be adversely affected by an action taken on a certification.

Aquatic Ecosystem–Waters in the state, including wetlands, that serve as habitat for interrelated and interacting communities and populations of plants and animals.

Clean Water Act–33 United States Code, §§1151, et seq, and the Clean Water Act, §§101, et seq.

Commission–The Texas Natural Resource Conservation Commission, acting through the executive director pursuant to §279.2(c) of this title (relating to Purpose and Policy).

Department of the Army Permits–All permits and licenses issued by the Department of the Army Corps of Engineers including 404 permits and permits issued under the authority of the Rivers and Harbors Act of 1899, §10.

Discharge–Deposit, conduct, drain, emit, throw, run, allow to seep, or otherwise release or dispose of any pollutant, or to allow, permit, or suffer any of these acts or omissions.

District engineer–The Department of the Army representative responsible for administering, processing, and enforcing federal laws and regulations relating to the U.S. Army Corps of Engineers, including permitting.

Emergency–A condition either meeting the requirements of federal law as constituting an emergency or applicable provisions of §305.23 of this title (relating to Emergency Orders).

Executive Director–The executive director of the Texas Natural Resource Conservation Commission.

General permit–A permit authorized by a federal licensing or permitting agency on a regional basis. General permits are designed to regulate with little delay or paperwork, certain activities having minimal impacts.

Individual permit–A permit that is issued by a federal licensing or permitting agency following an evaluation of any activity including, but not limited to, the construction or operation of facilities which may result in any discharge into waters of the United States.

Nationwide permit–A type of General permit authorized by a federal licensing or permitting agency through publication in the "Federal Register" that is applicable throughout the nation. Nationwide permits are designed to regulate with little delay or paperwork, certain activities having minimal impacts.

NPDES permit–A written document issued by the regional administrator of the United States Environmental Protection Agency (EPA) as required by the Federal Clean Water Act, §402 which authorizes the discharge of any pollutant, or combination of pollutants, into navigable waters of the United States.

Practicable–Available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

Water dependent activity–An activity which is proposed for or adjacent to an aquatic site that requires access, proximity to, or siting within an aquatic site to fulfill its basic purpose.

Water quality limited segment–Any segment where it is known that water quality does not meet applicable water quality standards, and/or is not expected to meet applicable water quality standards, even after the application of the technology-based effluent limitations required by the Federal Clean Water Act, §301(b) and §306.

Water Quality Standards–Texas Surface Water Quality Standards, 30 TAC §§307.1, et seq.

§279.4. Application for Certification.

(a) NPDES permits. No person may conduct any activity under federal permit or license which may result in any discharge into or adjacent to waters in the state unless the person has received a certification or waiver under this chapter. The regional administrator or the permit applicant may submit a request for certification.

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

(3) The executive director may elect to delay acting upon a request for certification until the draft NPDES permit is prepared and notice thereof has been issued.

(b) Department of the Army Permits. No person may conduct any activity under federal permit or license which may result in any discharge into or adjacent to waters in the state unless the person has received a certification or waiver under this chapter. The district engineer or the permit applicant may submit a request for certification.

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

(3) The executive director may elect to delay acting on a request for certification until after a review of a preliminary permit decision.

(c) Other federal licenses or permits. For those federal licenses or permits issued by federal agencies other than United States Environmental Protection Agency or the Department of the Army which may result in any discharge into or adjacent to waters in the state, the permittee must receive a certification or waiver under this chapter prior to conducting any permitted activity.

(i)-(2) (No change.)

(3) The executive director may elect to delay acting on a request for certification until the licensing or permitting agency publishes notice of the application and/or the executive director has reviewed the draft permit.

(d)-(e) (No change.)

§279.5. Notice of Application.

(a) The executive director to the greatest extent practicable shall utilize a joint mailed notice issued by the Department of the Army, or the United States Environmental Protection Agency, or other licensing or permit agency after agreements with those agencies have been reached regarding the content of the notice and the persons entitled to notice in Texas.

(b) If a joint notice is not utilized as provided in subsection (a) of this section and the executive director finds that all necessary materials have been received, he shall mail notice of the application for certification to:

(1)-(6) (No change.)

(7) the United States Commerce Department, National Marine Fisheries Service;

(8) the United States Environmental Protection Agency, Region 6;

(9) the Texas General Land Office;

(10) the Secretary of the Coastal Coordination Council;

(11) any known interested persons; and

(12) the applicant.

(c) Any public notice issued under subsection (b) of this section shall contain:

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

(3) a statement that the applicant is seeking certification under the Federal Clean Water Act, §401;

(4) a statement that any comments concerning the application may be submitted to the executive director of the Texas Natural Resource Conservation Commission, Attention 401 Coordinator, P. O. Box 13087, Austin, Texas 78711-3087, and a deadline for written public comment of no less than 30 days;

(5) a statement that a copy of the application is available for review in the office of the federal licensing or permitting agency's office; and

(6) (No change.)

(d) The executive director may waive notice and hearing requirements of this subsection and §§279.6-279.8 of this title (relating to Public Comments, Nonadjudicated Public Hearings, and Notice of Public Hearing) and issue a final commission action pursuant to §§279.10-279.12 of this title (relating to Final Commission on NPDES Permits, Final Commission Action on the Department of the Army Corps of Engineer Permits and Other Permits, and General State Certification) when an emergency as defined in §279.3 of this title has been determined to exist and it is in the public interest to provide a certification in less than 30 days.

§279.6. Public Comments. The executive director shall consider all comments related to the impacts of the proposed activity submitted in accordance with these rules.

§279.7. Nonadjudicative Public Hearings.

(a) The executive director may conduct a nonadjudicative public comment hearing on any application for 401 certification if the executive director determines that such a hearing would be appropriate or if such a hearing is requested by any affected person in writing within 30 days after the publication of notice of application. The executive director shall conduct a nonadjudicative public comment hearing on an application for 401 certification if a request for such a hearing is made by a Commissioner. The written request shall contain the following information:

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

(b) If a hearing is held, the executive director shall notify the regional administrator in the case of a NPDES permit certification or the district engineer in the case of a Department of the Army permit certification or the designated department of any other licensing or permitting agency, giving an estimate of the additional time necessary to consider the certification, and stating that the executive director is not waiving certification.

(c) All hearings held under this section shall be conducted by a representative of the executive director. Such representative shall receive comments concerning all matters affecting the 401 certification.

(d) After the hearing the executive director may consider any information provided at the hearing and any other information appropriate to determine whether to certify the activity.

§279.8. Notice of Nonadjudicative Public Hearing.

(a) The executive director shall notify the applicant not less than 30 days

before the date set for hearing that a nonadjudicative public hearing will be held on the application. Such notice shall be by certified mail, return receipt requested.

(b) Such notice of hearing shall identify the application; the date; time; place and nature of the hearing; the legal authority and jurisdiction under which the hearing is to be held; the proposed action; the requirements for submitting written comments; the method for obtaining additional information; and such other information as the executive director deems necessary.

(c) The executive director will transmit the notice by first-class mail or by personal service to:

(1)-(6) (No change.)

(7) the United States Commerce Department, National Marine Fisheries Service;

(8) the United States Environmental Protection Agency, Region 6;

(9) the Texas General Land Office;

(10) the Secretary of the Coastal Coordination Council; and

(11) any known interested persons.

(d) (No change.)

§279.9. Executive Director Review of Water Quality Certification Application. The executive director shall determine whether the proposed activity will:

(1) (No change.)

(2) result in any violation of the Federal Clean Water Act, and the criteria in §279.11(c) for 404 permits;

(3) result in any violation of applicable water quality standards or

(4) result in any violation of any other appropriate requirements of state law.

§279.10. Final Commission Action on NPDES Permits.

(a) The executive director shall issue a final determination within 60 days from the date the draft permit is mailed by the Regional Administrator, United State Environmental Protection Agency, as required by 40 Code of Federal Regulation, §124.53, unless the executive director in consultation with the Regional Administrator finds that unusual circumstances require a longer time. The executive director shall send notice, including a copy of the certification, to the applicant, the regional administrator and any person so requesting of the decision to deny, grant, grant conditionally or waive the certification. Such notification shall be in writing and shall include:

(1) (No change.)

(2) conditions which are necessary to assure compliance with the applicable provisions of the Federal Clean Water Act, §§208(e), 301, 302, 303, 306, and 307, and with appropriate requirements of state law;

(3) when the state certifies a draft permit instead of a permit application, any condition required to assure compliance with the provisions of the Federal Clean Water Act, §§208(e), 301, 302, 303, 306, and 307, and with appropriate requirements of state law shall be identified citing the Federal Clean Water Act or state law references upon which that condition is based. Failure to provide such a citation waives the right to certify with respect to that condition; and

(4) a statement of the extent to which each condition of the draft permit can be made less stringent without violating the requirements of state law, including water quality standards. Failure to provide this statement for any condition waives the right to certify or object to any less stringent condition which may be established during the United States Environmental Protection Agency permit issuance process.

(b) The executive director shall not condition or deny an NPDES certification on the grounds that state law allows a less stringent permit condition.

§279.11. Final Commission Action on Department of the Army Permits.

(a) The executive director shall review all permit applications for consistency with §279.9 of this title (relating to Executive Director Review of Water Quality Certification) and shall issue a final determination within 60 days after receipt of a certification request from the district engineer as required by 33 Code of Federal Regulations, §325.2(b) unless the executive director, in consultation with the district engineer, determines a shorter or longer period is reasonable.

(b) Certification of discharges into aquatic ecosystems shall avoid unacceptable adverse impacts, including cumulative and secondary impacts.

(c) The executive director shall review all request for certification of 404 permit activities using the following criteria;

(1) No discharge shall be certified if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other more significant adverse environmental consequences. Activities which are not water dependent are presumed to have practicable alternatives, unless the applicant clearly demonstrates otherwise. For the purposes of this section compensatory mitigation is not considered an alternative.

(2) No discharge of dredged or fill material shall be certified unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem.

(3) Certification shall require appropriate and practicable compensatory mitigation for all unavoidable adverse impacts which remain after all practicable avoidance and minimization has been completed. Compensatory mitigation requirements will provide for a replacement of impacted functions and values.

(4) There may be circumstances where the impacts of the project are so significant that even if alternatives are not available, certification may be denied regardless of the compensatory mitigation proposed.

(d) The executive director shall send notice, including a copy of the certification, to the applicant, the district engineer, the designated contact of any other licensing or permitting agency and any person so requesting of the decision to deny, grant, grant conditionally or waive certification. Such notification shall be in writing and shall include:

(1) the name and address of the applicant;

(2) a statement that the executive director:

(A) examined the complete application, specifically identifying the number or code affixed to such application, and based its determination upon an evaluation of the information contained in the application which is relevant to the 401 certification; and/or

(B) examined other information, sufficient to enable the executive director to reach the decision;

(3) a statement of basis for the executive director's decision:

(A) if a waiver of certification is made, a statement explaining the determination that no discharge will result from the activity, or that the activity does not fall within the jurisdiction of the Commission's authority, or the Commission expressly waives its authority to act on a request for certification for other reasons; or

(B) if a certification or conditional certification is made:

(i) a statement that there is a reasonable assurance the activity will be

conducted in a manner which will not violate the criteria enumerated in §279.9 of this title; or

(ii) a statement of conditions, including any monitoring and reporting requirements, which are necessary to assure compliance with the criteria enumerated in §279.9 of this title;

(C) if a denial of certification is made, a statement explaining why the activity will result in the unacceptable discharge of pollutants into or adjacent to waters in the state and detailing the criteria enumerated in §279.9 of this title which will be violated.

§279.12. Other State Certification.

(a) Nationwide Permit Certification.

(1) The executive director shall consider all proposed nationwide permits for certification for activities which may result in any discharge into or adjacent to waters in the state consistent with §279.9 of this title (relating to Executive Director Review of Water Quality Certification Application). Water Quality Certification for activities authorized under a nationwide permit is complete at the time the permit is issued. No additional certification is required for activities authorized under that nationwide permit.

(2) When a federal licensing or permitting agency proposes a nationwide permit for an activity which may result in a discharge, the executive director shall notify:

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

(C) the Texas General Land Office;

(D) (No change.)

(E) any person who requests to be put on the mailing list; and

(F) any other appropriate person.

(3) After considering comments and other information, the executive director shall grant, grant conditionally, deny or waive certification.

(4) (No change.)

(b) General Permit Certification.

(1) The executive director shall consider all proposed general permits for certification for activities which may result in any discharge into or adjacent to waters in the state consistent with §279.9 of this title (relating to Executive Director Review of Water Quality Certification Application). Water Quality Certification for activities authorized under a general permit is complete at the time the permit is issued. No additional certification is required for activities authorized under that general permit.

(2) When a federal licensing or permitting agency proposes a general permit for an activity which may result in a discharge, the executive director shall notify:

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

(C) the Texas General Land Office;

(D) (No change.)

(E) any person who requests to be put on the mailing list; and

(F) any other appropriate person.

(3) After considering public comments and other information the executive director shall grant, grant conditionally, deny or waive certification.

(4) (No change.)

(c) Final Action on Other Certification.

(1) The executive director shall send notice, including a copy of the certification, to the applicant, the designated contact of the licensing or permitting agency, and any person so requesting of the decision to deny, grant, grant conditionally or waive certification. Such notification shall be in writing and shall include:

(A) the name and address of the applicant;

(B) a statement that the executive director has either:

(i) examined the complete application, specifically identifying the number or code affixed to such application, and based its determination upon an evaluation of the information contained in the application which is relevant to the 401 certification; and/or

(ii) examined other information furnished by the applicant or provided in a nonadjudicative public hearing, sufficient to permit the executive director to reach the decision;

(C) a statement of basis for the executive director's decision:

(i) if a waiver of certification is made, a statement explaining the determination that no discharge will result from the activity, or that the activity does not fall within the jurisdiction of the Commission's authority, or the Commission expressly waives its authority to act on a request for certification for other reasons; or

(ii) if a grant or conditional grant of certification is made:

(I) a statement that there is a reasonable assurance the activity will be conducted in a manner which will not violate the criteria enumerated in §279.9 of this title; or

(II) a statement of conditions which the executive director deems necessary with respect to the discharge, including any necessary monitoring requirements to assure the discharge will not violate applicable water quality standards;

(iii) if a denial of certification is made, a statement explaining why the activity will result in the unacceptable discharge of pollutants into or adjacent to waters in the state and detailing the criteria enumerated in §279.9 of this title which will be violated.

(2) After considering public comments and other information the executive director shall grant, grant conditionally, deny or waive certification.

§279.13. Enforcement. Any certification issued by the executive director pursuant to the provisions of this chapter shall not preclude the commission from undertaking any action under the provisions of Chapter 337 of this title (relating to Enforcement). Pursuant to the Texas Water Code, §§26.019, 26.121(c), and 26.136 and rules contained in Chapter 337 of this title, the commission may issue orders, assess administrative penalties, and take other necessary action if a person violates the state water quality standards or other applicable state water quality requirements. The commission may also seek civil penalties and injunctive relief in state district court in response to a violation of the state water quality standards in accordance with the Texas Water Code, §26.016 and §26.123.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on June 22, 1995.

TRD-9507591

Lydia Gonzalez-Gromatzky
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Chapter 286. On-Site Wastewater Treatment Research Council

The On-site Wastewater Treatment Research Council adopts the repeal of §§286.1-286.15, 286.31-286.34, 286.51-286.53, 286.71-286.74, 286.91-286.97, 286.111-286.114, and 286.141, concerning the activities of the On-site Wastewater Treatment Research Council (Council), without changes to the proposed text as published in the March 28, 1995, issue of the *Texas Register* (20 TexReg 2276). The repeal of the rules allows the Council to adopt new rules.

This action was taken to clarify the structure of the Council and to clarify the process for application and awards of grants that support applied research and demonstration projects and/or enhance technology transfer regarding on-site sewage.

No comments were received regarding adoption of the repeals.

Subchapter A. Council Procedures

- **30 TAC §§286.1-286.15**

The repeals are adopted pursuant to the Texas Health and Safety Code, §367.008, which authorizes the Council to establish procedures for awarding competitive grants and disbursing grant money.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on June 23, 1995.

TRD-9507727 Lydia Gonzalez Gromatzky
Acting Director, Legal Division
Texas Natural Resource Conservation Commission

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Subchapter B. Grants

- **30 TAC §§286.31-286.34, 286.51-286.53, 286.71-286.74, 286.91-286.97, 286.111-286.114, 286.141**

The repeals are adopted pursuant to the Texas Health and Safety Code, §367.008, which authorizes the Council to establish procedures for awarding competitive grants.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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For further information, please call: (512) 239-4640

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The On-site Wastewater Treatment Research Council adopts new §§286.1-286.14, 286.31-286.34, 286.51-286.53, 286.74, 286.91-286.98, and 286. 131, concerning the activities of the On-site Wastewater Treatment Research Council (Council). Section 286.2 is adopted with changes to the proposed text as published in the March 28, 1995, issue of the *Texas Register* (20 TexReg 2276). Sections 286.1, 286.3-286.14, 286.31-286.34, 286.51-286.53, 286. 74, 286.91-286.98, and 286.131 are adopted without changes and will not be republished.

The new rules replace the repealed rules and clarify the role of the Executive Secretary, clarify the grant application process, clarify the Council consideration of grant applications, clarify the grant award process, and adds a section related to receipt of grants and donations.

One commenter noted that the reference to the commission in the definition of "donor" was incorrect and should refer to the Council. The Council agrees with this comment and §286.2 has been changed accordingly.

No other comments were received regarding adoption of the new sections.

Subchapter A. Council Procedures

- **30 TAC §§286.1-286.14**

The new sections are adopted pursuant to the Texas Health and Safety Code, §367.008, which authorizes the Council to establish procedures for awarding competitive grants and disbursing grant money.

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

Commission–The Texas Natural Resource Conservation Commission.

Council–The On-site Wastewater Treatment Research Council.

Demonstrate–To make a display of, to show outwardly, hence, to show or prove publicly as by the actual operation, the special value or merits of an article or product with a view to its introduction or sale, also to teach by demonstration, to explain, or illustrate.

Donor–One or more individuals or organizations that offer to give financial assistance to the council.

Executive Secretary–An employee of the commission who acts as a liaison between the council and the commission.

Officer or member–Any one of the eleven members of the council that has duly been appointed by the governor.

Other council representative–An employee of the council, an employee of the commission acting on behalf of the council, and any other person(s) acting on behalf of the council.

Research–Studious inquiry or examination and usually critical and exhaustive investigation or experimentation having for its aim the discovery of new facts and their correct interpretation, the revision of accepted conclusions, theories or laws in the light of newly discovered facts or the practiced application of such new or revised conclusions.

UG&CMS–Uniform Grant and Contract Management Act, Texas Government Code, Chapter 783, and the rules promulgated thereunder in 1 TAC §§5.141-5.167.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Subchapter B. Grants

- **30 TAC §§286.31-286.34, 286.51-286.53, 286.74, 286.91-286.98**

The new sections are adopted pursuant to the Texas Health and Safety Code, §367.008, which authorizes the Council to establish procedures for awarding competitive grants and disbursing grant money and Texas Water Code, §§5.103, 5.105, and 5.120, which provides the Texas Natural Resource Conservation Commission with the authority to promulgate rules as necessary to carry out its powers and duties under the Texas Water Code and other laws of the state and to establish and approve all general policies of the commission.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Texas Natural Resource Conservation Commission

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For further information, please call: (512) 239-4640

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Subchapter C. Grants and Donations to the Council

• 30 TAC §286.131

The new section is adopted pursuant to the Texas Health and Safety Code, §367.008, which authorizes the Council to establish procedures for awarding competitive grants and disbursing grant money and Texas Water Code, §§5.103, 5.105, and 5.120, which provides the Texas Natural Resource Conservation Commission with the authority to promulgate rules as necessary to carry out its powers and duties under the Texas Water Code and other laws of the state and to establish and approve all general policies of the commission.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Chapter 307. Texas Surface Water Quality Standards

• 30 TAC §§307.2-307.10

The Texas Natural Resource Conservation Commission (TNRCC or Commission) adopts amendments to §§307.2-307.10, with changes to the proposed text as published in the December 30, 1994, issue of the *Texas Register* (19 TexReg 10479).

TNRCC has the sole and exclusive authority to establish and revise water quality standards for the State of Texas. The standards are required to be established and reviewed on a periodic basis pursuant to the Texas Water Code, §26.023, as amended, and the Federal Water Pollution Control Act (Clean Water Act), 33 United States Code, §1313(c), as amended. The existing statewide Texas Surface Water Quality Standards were adopted by the TNRCC on June 12, 1991, and subsequently approved by the United States Environmental Protection Agency (EPA), pursuant to the Federal Clean Water Act, §304(a), on September 24, 1991.

The adopted revisions to the standards include editorial revisions and substantive changes. Editorial revisions are adopted to improve clarity and include grammatical corrections, revisions of wording, and renumbering or relettering of subsections. Editorial revisions also include changing references to the Texas Water Commission to the Texas Natural Resource Conservation Commission as provided in Senate Bill 2 (1991). Substantive changes are adopted to incorporate new information on toxic materials, to incorporate new data on waters in the state, and to meet EPA requirements as provided by the Federal Clean Water Act.

The adopted standards are submitted to EPA through the Texas Attorney General, and EPA reviews the revised standards to ensure compliance with the Federal Clean Water Act and with EPA regulations as authorized under the Federal Clean Water Act. As specified in the Federal Clean Water Act, §303(c) , EPA has 60 days to approve the revised standards, and 90 days to disapprove all or part of the revised standards.

The public hearing on the proposed standards was conducted on January 31, 1995 in Austin, Texas. Oral and/or written testimony was provided by representatives of the following groups: Amoco Corporation, Central and South West Services Company, City of Amarillo, City of Austin Electric Utility Department, City of Austin Water and Wastewater Utility Department, City of Houston, City of Jacksonville, City of Kilgore, City of La Grange, City of Marshall, City of Rusk, City of San Marcos, City of Smithville, City of Vernon, Dow Chemical, Eastman Kodak Company, Gulf Coast Waste Disposal Authority, Houston Lighting and Power Company, Lone Star Chapter of the Sierra Club, Lone Star Steel Company, Lower Colorado River Authority, Marathon Oil Company, Miles Inc., National Oceanic and Atmospheric Administration, Parsons Engineering Science Inc., Phillips 66 Company, Printing Industries Association of Texas, Railroad Commission of Texas, Rhone-Poulenc Inc., San Marcos River Foundation, Shell Oil Company, Silver Coalition, Texas Association of Metropolitan Sewerage Agencies, Texas Chemical Council, Texas Dental Association, Texas Environmental Advisory Council, Texas Municipal League, Texas Parks and Wildlife Department, Texas Water Conservation Association, Texas Utilities Services Inc., The San Marcos River Foundation, United States Environmental Protection Agency, United States Fish and Wildlife Service, and the Upper Colorado River Authority.

Several of the comments were general in nature. One commenter requested that the standards implementation procedures be adopted concurrently with the standards. The commission responds that the general intent of the public hearing was to propose revisions to both documents, but the standards implementation procedures will require additional time to complete in order to fully incorporate standards revisions.

One commenter suggested that the state should develop improved cost-benefit analyses. The commission agrees that such methods are needed. Available approaches are currently being evaluated, and the commission will continue to explore ways to assess costs and benefits.

One commenter suggested that references to attainable uses should be removed from the standards, and site-specific standards should be based only on designated or existing uses. The commission responds that the Federal Clean Water Act and EPA regulations require that standards be based on reasonably attainable uses, but the commission acknowledges that the determination of attainable uses can be difficult at some sites.

One commenter indicated that standards should not be applied to wet-weather conditions, and that wet-weather criteria should not be developed until technical guidance from EPA is complete. The commenter also suggested that standards should not apply when wet-weather stream-flows exceed specified rates. The commission responds that the narrative general criteria and other narrative criteria of the standards, such as the antidegradation policy, are generally applicable at all in-stream flows. However, the commission acknowledges that many numerical criteria are applied as an average concentration over a specified time period, and existing numerical criteria may not be applicable to individual rainfall-runoff events. In addition, numerical criteria in the standards are generally not directly applicable to storm water outfalls, since the standards are designed to be applied to in-stream conditions, after mixing of an outfall with in-stream waters occurs. The commission will coordinate with interested parties before changing the existing standards in order to address wet-weather conditions.

One commenter suggested that the standards should include a clear policy statement related to preserving, protecting, or conserving existing coastal wetlands. The commission responds that the standards already explicitly apply to wetlands in the state, and the definition of wetlands clearly includes coastal wetlands. Therefore the commitments to protect water quality in the general policy statement of the standards, §307.1, as well as the other major provisions of the water quality standards, apply to coastal wetlands.

The commission notes some editorial changes in §307.2(a)(10), relating to the contents of Appendices A-E of the water quality standards, which more clearly identify the applicability of each appendix. Appendices A-C are noted to apply to classified segments. Appendix D is noted to apply to partially classified waterbodies, and Appendix E is noted to apply to site-specific criteria that may be derived for any waters in the state. The title of Appendix E is changed from "Site-specific Standard Changes" to "Site-specific Criteria."

With regard to §307.2(b), concerning the description of standards, one commenter supported the proposed deletion of the language which limits the applicability of the standards to wetlands during periods of inundation. The commission notes that the protection of other intermittent waterbodies applies at all flow conditions. For example, some standards provisions apply to water from wastewater discharges in dry, intermittent streams. In order to be consistent with standards applicability in intermittent waterbodies, the commission agrees with the comment, and the phrase is deleted in the adopted rule.

Another commenter stated that the commission has no legal jurisdiction to set standards for wetlands, since the Texas Water Code expressly includes wetlands in the definition of waters in the state upon delegation of federal NPDES permit authority to the state. The commenter also suggested that the definition of "surface water in the state" in

§307.3(a) be changed in accordance with the request. The commission disagrees with the comment. The existing definition in the standards of waters in the state, which includes wetlands, was incorporated into the standards in 1991. The definition is consistent with the federal definition of waters in the nation, which are subject to the provisions of the Federal Clean Water Act. In addition, the Texas Water Code, §26.001 defines water in the state to include marshes. Marshes are wetlands as defined by the Texas Water Code, §11.502, which provides the definition of wetlands for all purposes of The Water Code. The protection of water quality in wetlands is consistent with the goals and purposes of the Texas Water Code, Chapter 26 as well as the Federal Clean Water Act.

One commenter suggested that a scientifically sound database should be used to establish new wetland criteria or to define wetland categories. The commission agrees, and specific wetlands criteria or wetlands categories may be subsequently added to the standards after such information has been fully developed.

One commenter noted that the language in §307.2(d)(3), concerning the modification of standards, appears to require EPA approval before a state standards revision could be adopted. The commission agrees that EPA approval is not required before state adoption; and §307.2(d)(3) is revised in order to incorporate the clarification.

One commenter noted that temporary variances, which allow additional compliance time in order to develop site-specific standards, may only be applied to existing permitted discharges which could potentially be unfair to existing discharges which were not previously required to have a discharge permit. In response, §307.2(d)(4) is changed so that a variance is applicable to a permit issued to an existing discharge, rather than to a previously permitted facility.

One commenter suggested that the extension of interim limits to allow time for a site-specific standard, in §307.2(f), should be applicable only to effluent limits which would be affected by the site-specific standards change under consideration. The commission agrees, and the suggestion is incorporated into the adopted rule.

Another commenter suggested that the language allowing an extension of an interim limit was inconsistent with the language in §307.2(d)(4) which allows a maximum of three years for a variance period. The commission agrees with the assessment and adopts language allowing an extension of the variance period for the same reasons as provided in §307.2(f).

One commenter requested that the interim compliance period for permits should be greater than three years. The commission responds that the three-year interim compliance period has been in effect for a number of years, and it has been a reasonably sufficient interval, particularly since total terms for permits are five years.

Numerous comments were received on §307.3, concerning definitions and abbreviations. Several commenters requested that new definitions be added for "perennial pools," "seasonal aquatic life use," and "significant aquatic life use." The commission agrees that the application of the terms is important in the implementation of aquatic life criteria. However, the definition of the terms will require additional procedural development in order to incorporate a definition in the standards rule.

Various commenters requested new definitions for "waterfowl habitat," "incidental fisheries," "lethality," "aquifer protection," "agricultural water supply," and "public water supply." The commission responds that, except for "waterfowl habitat," an explanation of the terms and a description of their applicability are included in other sections of Chapter 307. A definition for "waterfowl habitat" is not added at this time as specific numerical criteria were not proposed. However, in the general sense, the term means that "waterfowl habitat use" is a primary function of any waterbodies so designated.

Several commenters objected to the proposed change in the definition of "acute toxicity," indicating that acute toxicity should only be applicable to lethal effects and not to adverse effects. In response, the commission acknowledges that although an acute effect is not always measured in terms of lethality, lethality is the most common endpoint currently measured in short-term toxicity assays. The commission therefore deletes "adverse" from the definition of acute toxicity in §307.3(a)(1) and adds a sentence which notes that lethality is normally used as the measure of acute impacts.

One commenter requested that the definition of "best management practice" be revised in order to note that a permittee, not the commission, should determine best management practices. The commission agrees that the issue is significant, but a discussion of applicability and implementation of best management practices is beyond the scope of the basic definition provided here.

One commenter suggested that the definition of "bioaccumulative toxic" should refer only to edible tissue, since that is the context of the term in the water quality standards. The commission responds that the adopted definition is revised to be more encompassing, since bioaccumulation is the process by which a compound is taken up by an aquatic organism, both from food and water. Additionally, a definition for bioconcentration factor is added which describes the degree to which a chemical can be concentrated in the tissue of an aquatic organism, both from a human health and an ecological perspective. For further clarification, the commission adds a definition of the term "bioconcentration factor" at §307.3(51).

With regard to the definition of "chronic toxicity," several commenters suggested alternative definitions, and other commenters requested that the term "sub-lethal" be explained. The commission responds that the term "chronic" is defined in the standards as a measurement of an effect such as reduced growth and reduced reproduction (defined as "sub-lethal") in addition to lethality.

With regard to the definition of "discharge permit," one commenter noted that the proposed change of "effluent" to "treated effluent" was not accurate, since permits for discharges of cooling water might not be considered treated. The commission agrees, and the term "treated effluent" is changed to "treated effluent or cooling water" in the adopted definition.

One commenter noted that the definition of "marine waters" should clearly exclude inland waters. The commission agrees and the suggestion is incorporated by adding the word "coastal" to the definition of marine waters.

Several commenters supported the proposed definitions of "ambient" and "background." One commenter requested that the definitions of "ambient" and "background" be expanded to clarify how the levels will be determined; other commenters requested further explanation of the term "relatively unaffected by human activities" in the definition of "background." The commission responds that background refers to a concentration of any substance that would occur in an area which receives minimal or no sources of man-made pollution. Some streams in Texas have natural, in-stream concentrations of dissolved salts that are relatively high and may by themselves exert lethal or sub-lethal effects on organisms that inhabit the waters; thereby causing the stream to exceed the total toxicity provisions in §307.6(e). However, native organisms inhabiting waters with naturally high salt concentrations have been exposed to such concentrations for very long periods of time, and have either been able to adapt, or find other suitable habitat. By comparison, organisms in surface waters that receive high concentrations of dissolved salts as the result of man-induced activities do not have the same time frame for adaptation. The commission further responds that the proposed definitions are sufficiently expansive for present applications in the standards, and the definitions are adopted as proposed.

Various commenters suggested changes to the definition of "method detection limit" (MDL) and "minimum analytical level" (MAL). In response to the comment on the definition of MDL, the commission agrees that the proposed definition is not consistent with the EPA definition. The commission incorporates the definition as taken from 40 Code of Federal Regulations, Appendix B to Part 136. Several commenters supported the proposed change in the definition of "minimum analytical level," and the commission adopts the definition as proposed.

One commenter requested that the definition of "bedslope" provide some indication of the stream distance over which the bedslope should be measured. The commission responds that an appropriate distance for the measurement is on the order of several miles, and more specific guidance will be developed in the standards implementation procedures.

One commenter suggested changes in the proposed definition of "sustainable fishery." The commission notes that the proposed definition is intended to be identical to the definition which was adopted in §307.6(d)(5) in 1991. The commission previously conducted a review and evaluation of available informa-

tion on fish production in Texas streams in order to develop the current definition of sustainable fisheries. In response to the suggestion, the commission adds the rest of the definition from §307.6(d)(5), which indicates that sustainable fisheries can also include other waters with sufficiently high fish production.

Regarding the definition of "toxicity," one commenter indicated that the terms "background" and "adverse effects" were confusing and vague. In response, the commission notes that the term toxicity, in itself, implies an adverse effect; something not beneficial to the organism. The commission agrees with comments on the term "background," and the word is deleted from the definition of "toxicity."

Another commenter suggested that naturally occurring constituents (such as microorganisms) that cause adverse effects should be excluded from the definition of "toxicity." The commission responds that significant mortality due to naturally occurring microorganisms is an uncommon phenomenon, and that there is no clear basis for suggesting that naturally occurring microorganisms cause toxicity. Ubiquitous, opportunistic bacteria and fungi will normally affect a toxicity test organism when 1) that organism is already stressed and 2) the bacteria or fungi are present in sufficient quantities. Findings of toxicity reduction evaluations should be evaluated on a case-by-case basis where some test organism mortality is attributed to biological agents, rather than to toxic materials.

Several commenters suggested removing the exclusion for adverse effects caused by dissolved salts from the definition of "toxicity" because it is inconsistent with the Federal Clean Water Act. The commission responds that the previous definition excluded adverse effects caused by dissolved salts from the definition of "toxicity" no matter what the source of the salts may be. The proposed definition only excludes adverse effects caused by dissolved salts if the source of the salts is the water supply. The exclusion of adverse effects caused by dissolved salts from the definition of "toxicity" is warranted, because some waterbodies in Texas have natural, concentrations of dissolved salts that could cause an exceedance of the total toxicity provisions in §307.6(e). The proposed definition of "toxicity" is meant to encompass toxicity from anthropogenic sources.

Another commenter suggested that the exclusion of dissolved salts in the definition of "toxicity" should refer to concentrations of dissolved salts at a facility's water intake point (including groundwater sources), rather than refer to background concentration. The commission responds that the definition of "toxicity" is revised for clarity in the adopted rule. Adverse effects in effluent toxicity tests, which are caused by salinity in surface and groundwater sources for municipal and industrial uses, are excluded from the definition of toxicity. Adverse effects caused by salinity, which is added to water by industrial processes or by produced brine waters from oil and gas production, are not excluded from the definition of toxicity.

In the definition of "water-effects ratio," one commenter responded that the term "bioassay" is ambiguous, and the commission responds by substituting the term "toxicity test" for the term "bioassay."

Another commenter suggested that the definition of "water-effects ratio" should note that a site-specific standards amendment is needed in order to adjust toxic criteria with a water-effects ratio. The commission adopts the suggestion in order to ensure consistency with the applicability of the water-effects ratio as described in §307.6(c)(9)(G). The commission also adds narrative to provide a better general definition of the term "water-effects ratio."

One commenter stated that in the proposed addition to the definition of "wetlands," there should be no limitation on the exclusion of man-made wetlands to those which were constructed on or after August 28, 1989, and that the date was not specified in the Texas Wetlands Act. The commission responds that the date is specified in the Texas Water Code, §11.503, which is part of the Texas Wetlands Act.

Another commenter suggested that in the proposed addition to the definition of "wetlands," the commission should note which federal definition of wetlands would supersede the state definition. The commission responds that the applicable federal definitions are those used by EPA and the U.S. Corps of Engineers in accordance with provisions of the Federal Clean Water Act. The addition to the definition of "wetlands" in the standards, which is taken directly from the Texas Water Code, §11.506, is adopted as proposed.

One commenter suggested that the term "ZID," which is an abbreviation for "zone of initial dilution," should be listed under abbreviations. The commission adopts the addition in §307.3(b).

Comments were received on §307.4, which concerns general criteria. One commenter suggested that narrative statements on biological criteria should be used to link standards with other programs such as nonpoint source assessment. Several other commenters recommended that biological criteria be improved and applied to waters in the state. The commission agrees with the utility of biological indicators, but additional procedural development and adjustment of the indicators to address different ecoregions is needed prior to any major changes in the standards with respect to biocriteria.

One commenter requested additional narrative criteria to protect coastal wetlands. The commission responds that the general criteria in the standards for all waters in the state already provide substantial protection to coastal wetlands. Any specific new provisions for wetlands will need the support of additional data on the physical, chemical, and biological characteristics of coastal wetlands in Texas.

Another commenter expressed concern that the applicability of general criteria to wetlands could impose requirements which are more stringent than natural conditions in wetlands. The commission responds that the basic minimal requirements which are established for any water in the state are not unrealistic for wetlands. Additional data may provide more specific criteria which are appropriate for some types of wetlands.

One commenter indicated that nutrient criteria should be developed for watersheds which are sensitive to nutrient impacts, and another commenter stated that no recent progress has been made in evaluating nutrient impacts and controls The commission acknowledges the need for additional review of nutrient impacts, as indicated in responses to the previous revisions of the water quality standards. The Watershed Texas program and TNRCC public advisory groups provide opportunities to address nutrients as well as other water quality concerns. The commission does note that several ongoing site-specific studies may help to better define procedures to address nutrient impacts in Texas In addition, the 1992 and 1994 Texas Water Quality Inventories and the Clean Rivers basin assessments contained improved procedures to screen for excessive nutrients and symptoms of eutrophication.

Two commenters stated that salinity criteria are needed for Texas estuaries The commission will continue to coordinate with interagency and public efforts to establish freshwater inflow needs and appropriate salinity ranges for Texas estuaries

Numerous comments were received on §307.4(h)(1), concerning dissolved oxygen and aquatic life uses for unclassified streams. Five commenters were opposed to the proposed lowering of the presumed high aquatic life use to intermediate for unclassified perennial streams in eastern and southern Texas. One commenter supported the proposed revision, another commenter stated that burdensome studies should not be required to lower presumed uses, and a third commenter believed that the presumed use should be lowered to limited for the entire state. Most of the commenters that opposed the lowering of the presumed use cited EPA regulations which stipulate that a use-attainability analysis must be completed before a designated use can be removed or lowered, and that the data from the commission's ecoregion studies do not support a lowering of the presumed use Some of the commenters stated 1) that if the commission felt compelled to lower the presumed use based on results of receiving water assessments on urban streams, then only uses for urban streams should be lowered or 2) that the area where the lowered use applies should be confined to a smaller area of east Texas. Most of the commenters supported the proposed concept of adjusting dissolved oxygen criteria in southeast and northeast Texas based on stream hydrologic and physical characteristics as derived from the ecoregion studies. One commenter stated that the existing presumption of a limited aquatic life use for intermittent streams with perennial pools should be changed to a presumption of high aquatic life use.

The commission responds that based on data collected from urban streams which receive wastewater discharges, the proposed intermediate aquatic life use is protective of approximately 80% to 90% of the streams studied. For those streams where higher uses exist, the commission will protect those uses

in accordance with §307.4(k), concerning assessment of unclassified waters. The commission agrees with concerns that the area proposed for the lowering of the presumptive aquatic life use for perennial streams should be reduced. The area which was originally proposed was the same as the area to which additional modifications of dissolved oxygen criteria were proposed in §307. 7(b)(3)(A) of this title. Subsequently, commission staff have conducted further evaluations of numerous stream studies at permit sites. The results of the studies indicate that most cases where the presumed use of high has been inappropriate have occurred in a more limited area of East Texas. In the adopted standards, the presumption of intermediate aquatic life for perennial, unclassified streams applies to an area defined as east of a line demarcated by Interstate Highway 35 and 35W from the Red River southward to the Williamson County and Travis County line and then northward and eastward of the Colorado River Basin divide to the Texas coast. The commission does not agree with changing the presumptive uses for intermittent streams with perennial pools, since available studies at permit sites on such streams indicate that the existing presumptions are appropriate. For the same reason, the commission does not agree with changing the presumptive use for perennial streams to limited aquatic life. The commission notes that it does not have enough resources to conduct actual field studies on every regulatory action related to a wastewater discharge. Currently, the commission annually conducts approximately 25 to 30 "receiving water assessments," which are sampling studies that determine appropriate in-stream standards for permitting actions at discharge sites. Since the resources to conduct receiving water assessments are limited, permittees may sometimes wish to obtain additional in-stream data in order to augment or re-assess standards determinations by the commission. Also, it is not unreasonable to expect that dischargers may have to conduct studies on receiving streams when disagreements over use determinations arise. The commission also adopts the adjustment of dissolved oxygen criteria for a portion of Texas as proposed.

One commenter stated that the terms seasonal aquatic life uses and significant aquatic life uses must be defined before the provisions of §307. 4(h)(2) have meaning. The commission responds that additional definitions of the terms will be developed in the standards implementation procedures and adopts the provision as proposed.

Concerning the antidegradation policy, two commenters questioned the proposed change in §307.5(a), which broadens the applicability of the policy to include actions by agencies other than the commission. One of the commenters also requested more specificity on how the antidegradation policy will address activities that could affect coastal wetlands. The commission responds that the change in §307.5(a) ensures that the antidegradation policy is applicable to other state and federal agencies-as indicated by EPA regulation. The change provides an improved framework of antidegradation protection for waters in the state, including coastal wetlands.

One commenter noted that including actions other than the commission might be construed as an inappropriate requirement for local governments to independently enforce the antidegradation policy. The commission responds by explicitly noting in the adopted standards that the antidegradation requirements apply to actions which are subject to state and federal regulatory authority. As an additional clarification, the commission changes the term "permitted wastewater discharges" to "authorized wastewater discharges" in §307.5(a) and (b).

One commenter noted that the language in §307.5(b)(1), which states that "water quality sufficient to protect existing uses will be maintained" is not in accordance with EPA regulation in 40 Code of Federal Regulations, §131. 12(a)(1), which requires that "existing instream uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." The difference in language can be evaluated in subsequent revisions of the standards. The suggested change may have significant effects, and public review and comment would be needed to incorporate it.

One commenter suggested that additional antidegradation protection (sometimes called "Tier 2"), which is afforded in §307.5(b)(2) to waters which "exceed fishable/swimmable quality," should be applied on a broader basis in the standards implementation procedures. The commenter was concerned that the use of aquatic life categories to define high quality waters does not fully address situations where parameters other than dissolved oxygen exceed fishable/swimmable quality. The commission responds that the current approach will be reviewed as part of the revisions to the standards implementation procedures. The commission also notes that the current approach provides "Tier 2" antidegradation protection to the majority of reservoirs, bays, estuaries, and larger rivers and streams in the state.

One commenter expressed concern that no designations for outstanding national resource waters were proposed for addition to the standards. The commission responds that substantial public and legislative concern was expressed over draft proposals for designating outstanding national resource waters, and no designations were considered for this revision of the standards.

Several commenters emphasized the need for more definition and procedural development in the implementation of the antidegradation policy. Specific needs, which were noted, included a definition of "de minimus" impacts on water quality, a description of what level of potential impact would be considered degradation, a definition of "important economic and social development," and a better description of how antidegradation provisions apply to nonpoint sources. The commission concurs with the need for further review of the antidegradation process in the standards implementation procedures, and the review will be facilitated through the coordination of public advisory groups.

Numerous comments addressed 1) Table 1 in §307.6(c), which contains numerical criteria for substances which are potentially toxic to aquatic life and 2) Table 3 in §307.6(d), which contains numerical criteria for toxic substances which can affect human health.

Several commenters objected to the methodology used to analyze for cyanide because it accounts for toxic and nontoxic forms when the standard is free cyanide, for which no approved method is available. The commission agrees with the commenters that no method is currently available to measure free cyanide. It is the commission's understanding that matrix interferences using the cyanide amenable to chlorination method in marine environments has led to erroneous measurements of cyanide and that the inclusion of an additional analytical method in Tables 1 and 3, as proposed, will alleviate much of the problem. The commission also responds that other alternative methods will be considered on a case-by-case basis. A few commenters objected to the fact that permit limits are calculated as free cyanide but not measured as such. The commission replies that the standard for cyanide is appropriately set as free cyanide despite the absence of an analytical method to measure free cyanide. The most appropriate test available to approximate free cyanide is the "amenable to chlorination" test; with the allowance of an alternative test. The "amenable to chlorination" method assumes that all chlorinated cyanide will dissociate to free cyanide and is therefore, toxic. The commission agrees that the assumption may be conservative. The commission notes, however, that cyanide toxicity is dependent on pH and temperature, so that additional uncertainties are involved in establishing criteria. The form of cyanide to which the criteria apply is adopted as proposed and is a reasonable means of addressing available data and uncertainties concerning cyanide toxicity.

Several commenters requested that the proposed footnote in Table 1 and Table 3 for cyanide be changed from "weak and dissociable cyanide" to "weak-acid dissociable cyanide" to be consistent with *Standard Methods for the Examination of Water and Wastewater, 18th edition*. The commission agrees, and the suggestion is adopted.

Two commenters suggested that the criteria for cyanide in Table 1 are too conservative since the TNRCC did not address the effects of low persistence and time-varying concentrations of cyanide in the aquatic environment. The commenters pointed out that the calculations were based on toxicity tests ranging from 96 hours to an organism's full life cycle. The commission notes that the cyanide standard is less stringent than EPA criteria developed from the same 1984 criteria document. In 1991, the cyanide criteria were recalculated to exclude nonnative species. From freshwater, the recalculation eliminated the top three Genus Mean Ranked species, which drive the federal criterion. In the recalculation procedure, only five out of a total of 57 individual freshwater toxicity tests did not report measured concentrations. All five of the nominal concentrations were well within the range of measured concentrations reported for either the genus or same species. The freshwater chronic value was derived from partial life-cycle and life-cycle tests on fish and full life-cycle tests on invertebrates.

One of the commenters requested that the marine standard for cyanide in Table 1, concerning aquatic life criteria, be deleted due to uncertainty in the toxicity data used to develop the standard. The commission responds that the saltwater chronic value was derived from early life-stage tests with fish and the mysid shrimp. For saltwater tests, the majority of test concentrations were not measured. The commission agrees with the commenters that measured tests are always preferable; however, EPA guidelines for calculation of aquatic life criteria do not preclude the use of tests with nominal concentrations. The guidelines indicate that when measured tests are available they should be used. Permittees have performed the recalculation procedures on other state standards, and the commission points out that the option is available for the cyanide standard as well. The commission also responds to the comment that hydrocyanic acid may only exist for a short period of time in the environment. Most discharges are of a continuous nature. Therefore, the commission must assume that cyanide complexes are being continuously discharged and have the potential to exert toxicity, especially under low pH and temperature conditions. In addition, the cyanide ion can be converted to the more toxic hydrocyanic form at pH values that commonly exist in surface waters in Texas. The commission therefore adopts the numerical criteria for cyanide as proposed.

One commenter asked why there were no criteria for DDE and DDD in Table 1. The commission responds that at the time the 1991 Water Quality Standards were developed, there were not enough toxicity data available to formulate criteria for the two metabolites. The commission will review the literature for further toxicity information that may be used to develop appropriate criteria for aquatic life protection in the future.

The commenter also mentioned that not all the isomers of DDT, DDD, and DDE were being regulated in Table 3. After further research, the commission offers the following response. Technical DDT is usually composed of 77.1% *p, p'*-DDT, 14.9% *o,p'*-DDT, 0.3% *p,p'*-DDD, 0.1% *o, p'*-DDD, 4.0% *p,p'*-DDE, and 0.1% *o,p'*-DDE. Unidentified compounds compose 3.5% of total DDT. The *p,p'* isomer of each metabolite is associated with toxicity, chromosomal aberrations, and reproductive effects in mammals. Since the *p,p'* isomer (also named as the 4,4' isomer) makes up the largest percent composition of each metabolite found in food and human tissue, that isomer is the one regulated. The decrease in DDT residues in various food classes indicate that the ban on DDT has indeed lowered the exposure of humans to the chemical via the diet. For the preceding reasons, no additional forms of DDT are added to the adopted standards.

Similarly, one commenter asked why only seven congeners of polychlorinated biphenyls (PCB's) are proposed to be included in Tables 1 and 3. The commission responds that PCB is a generic name for 209 possible isomers and congeners. PCB's with greater than five chlorine atoms are more environmentally persistent than those with less chlorine atoms. The seven regulated congeners (1016, 1221, 1232, 1242, 1248, 1254, and 1260) have chlorine atoms ranging from a low of 21% (1221) to a high of 60% (1260). In addition, the sole producer of PCB's in the United States since 1971 marketed only four mixtures containing 1016, 1221, 1242, and 1254 for use in closed electrical systems. Based on available information, the commission believes that the most toxic forms of PCB's are adequately regulated. Since there is no environmental data currently available to support the addition of new PCB congeners, the commission does not believe it prudent to impose on the regulated community the additional financial burden associated with the cost of having PCB's analyzed for individual arochlors. Therefore, the commission adopts the standards for PCB's in Tables 1 and 3 as proposed.

One commenter suggested that equivalency factors for PCB's should be added in Tables 1 and 3, such as the equivalency factors which are applied to congeners of dioxin. The commission responds that no information has been presented to substantiate the use of equivalency factors for PCB's, and the suggestion is not incorporated in the adopted standards.

There was unanimous support among commenters for the proposed changes to the silver criteria as proposed in both Tables 1 and 3. Several commenters noted that the revisions to numerical toxic criteria will reduce the burden of needless analyses and help municipalities in their pretreatment programs. Some commenters suggested that the silver criterion be deleted entirely from Table 3, since the criterion for human health protection in Table 3 is based on a secondary drinking water standard. The commission concurs, because the protocol for applying drinking water standards in Table 3 is to apply the primary drinking water standard. Since there is no primary drinking water standard for silver, silver is deleted from Table 3. Silver concentrations in state waters will still be effectively controlled by the acute aquatic life criterion in Table 1, since the acute criterion is more stringent than the secondary drinking water standard which was deleted from Table 3. The commission also adopts the current drinking water standards or MCL's in Table 3 for chromium (100 µg/L), Endrin (2.0 µg/L), selenium (50 µg/L) and deletes the proposed value for chloroform in column A, since this value is taken into account under total trihalomethanes in Table 3.

Several commenters noticed that Table 1 contained the following typographical errors: the criteria for lead were missing, the chronic mercury criterion should be 1.3 µg/L, the freshwater chronic nickel value should be 13.2 µg/L, and the saltwater acute nickel value should be 119 µg/L. In Table 3, the list of PCB congeners should include 1221. Commission staff responds that all the criteria were correct as published in the Texas Register on December 30, 1994. A separate draft which was provided to some commenters inadvertently contained some omissions.

With regard to §307.6(c)(5) and §307.6(d)(8), one commenter was curious as to why the commission would expand the provisions for toxic substances that are not listed in Tables 1 and 3. The commission responds that procedures to calculate additional criteria are sometimes needed to effectively regulate toxicants which occur infrequently-such as in the remediation and discharge of groundwater to surface waters. The general requirements for developing criteria from limited data were already established in existing §307.6(c)(5) and (7), §307.6(d)(8), and in 40 Code of Federal Regulations, Part 131, §122.44(d)(1). The proposed additions are adopted as reasonable and useful clarifications of the general requirements.

Three commenters stated that toxic criteria are not in compliance with EPA guidance documents due to the failure to include an allowable frequency of exceedance. The commission responds that reasonable duration and frequency of excursions are established 1) by the applicability of criteria over a specified time frame in §307.6(c)(3) and §307.6(d)(5) and 2) the applicability of the criteria to a specified range of stream-flow conditions in §307.8(a). In addition, permits for wastewater discharges incorporate environmentally protective assumptions which allow only very low frequencies of potential exceedances of permit limits for effluent flow and in-stream pollutant concentrations. No change in applicability of toxic criteria is adopted for this revision of the standards.

One commenter supported the proposed human health criteria for benzo(a) anthracene, benzo(a)pyrene, and chrysene in freshwater and also recommended that saltwater criteria for the parameters be adopted since they were detected in fish tissue in a Galveston Bay study. The commission acknowledges that alkylated polycyclic aromatic hydrocarbons (PAH's) do provide an indicator of PAH's from petroleum sources. The alkylated PAH's in the study were low at all except at one site when compared to the total PAH's. The absence of alkylated PAH's indicates that the main input source of the PAH's is from combustion sources, not petroleum. The elevated levels seen at the one site were attributable to a barge oil spill. However, due to the presence of the compounds in various species of fauna, the commission will continue to aggressively monitor water quality near urban areas and will implement source control strategies where applicable. The commission also notes that the criterion for benzo(a)pyrene in column A should be 0.0261 µg/L, not the proposed drinking water standard of 0.2 µg/L. The correction is needed because he value in Column A cannot be greater than the value in Column B.

In addition, one commenter suggested that criteria be adopted for 1,1,2' trichloroethane as elevated levels were documented in waterbodies near a superfund site. Criteria for 1,1,2' trichloroethane were developed by staff who also consulted with the State Superfund Team on the site. It was determined that the responsible party was cleaning up 1,1,2' trichloroethane at the site to the federal criteria value, which is at a risk level of $1x10^{-6}$. Since the federal criteria value is more protective than the "draft" state criteria and there were no additional sites in Texas where the compound was a concern, the commission will not adopt a standard for 1,1, 2' trichloroethane at this time.

Two commenters requested that at a minimum, aquatic life standards be added for chlorine and ammonia in streams with endangered species. The commenters were especially concerned about the impact from facilities discharging less than 1 MGD that are not required to biomonitor or dechlorinate. The commission responds that ammonia and chlorine toxicity will continue to be addressed by total toxicity requirements in facilities discharging greater than 1 MGD. In addition, the commission is currently investigating the feasibility of requiring more stringent effluent limits for the smaller facilities discharging to streams with endangered species. The need for the state to develop sediment standards was mentioned by one commenter. The commission responds that sediment criteria development is still emerging, and the implementation of such criteria is highly controversial. The state currently uses sediment screening values as a potential indicator of problem areas. The staff currently employs a tiered approach to look at contaminated sediments and the toxicity associated with sediments in areas to be dredged. The screening procedures do not currently apply to wastewater dischargers.

Several commenters noticed that the language for calculation of criteria was inconsistent with that in the standards implementation procedures, namely that the standards refer to a "representative sensitive species" while the procedures refer to the "most sensitive species." One commenter suggested that the term "most sensitive species" be used in both documents. The commission will alleviate the inconsistency in wording between the two documents by using the term "most sensitive organism."

One commenter explained that the change in the hardness value proposed to Basin 10 in Table 2 would have an adverse economic impact on ratepayers in the area. The commenter questioned the implementation of the 15th percentile hardness value, which is more likely in a high flow event, to the low-flow scenario upon which permit limits are based. The commission has been investigating the same issue by looking at the available data. The commission has reviewed available hardness data and has re-evaluated the changes proposed in Table 2, especially Basin 10. The current value for Basin 10 hardness in Table 2 was taken from Basin 11 due to lack of data in Basin 10 at the time. In May of 1995, there were 809 hardness values for Basin 10 in the stream monitoring database. The 15th percentile hardness value for all waterbody types was 54 mg/L, 41 mg/L for freshwater streams, and 118 mg/L for tidal streams. The commission recognizes that implementation of the 15th percentile hardness value in a discharge permit may be overly conservative, since the value may not reflect the in-stream low-flow conditions upon which discharge permits are based. In response, the commission has reviewed hardness data from the last twenty years and finds that there is essentially no difference in the 15th percentile hardness value during the low-flow months (June-September) compared with the 15th percentile value for all months. The same conclusion was drawn from looking at the 50th percentile values. The commission has no information in hand to show that a percentile less conservative than the 15th, would be protective. As proposed, the commission will use segment hardness values to implement permit limits for hardness dependent criteria. The values will be listed in the standards implementation procedures document. If the permittee believes that either the segment or basin values are not reflective of actual conditions in the waterbody, there is a simple procedure outlined in the standards implementation procedures that a permittee can use to gather site-specific hardness data.

One commenter indicated that the aldrin standard may be based on the Federal Drug Administration's action levels in edible food. The commission responds that it is not, although it may have been in the past. The same commenter noted that the standard for benzidine in Table 3 was incorrect. Commission staff responds that the criteria for benzidine were correct as published in the *Texas Register* on December 30, 1994. A separate draft provided to some commenters inadvertently contained errors.

One commenter requested that the pH and hardness of the effluent be used to calculate relevant standards in receiving waters that are effluent dominated. The commission responds that the issue pertains to the implementation of the pH and hardness values, not the standards themselves. The commission also responds that it is necessary to protect the downstream fauna in an effluent dominated situation. The commission will continue to accept site-specific pH and hardness data from permittees who believe the values used to calculate their permit limits are not valid.

One commenter suggested that dissolved hardness be measured in order to be consistent with the dissolved metals standards. The commission responds that the hardness based equations used to derive criteria for most of the metals listed in Table 1 and Table 3 were not derived from dissolved hardness concentrations. As defined in *Standard Methods for the Examination of Water and Wastewater, 18th Edition*, total hardness is the sum of the calcium and magnesium concentrations expressed as calcium carbonate in mg/L.

One commenter requested that separate limits for both total and dissolved metals be included in a permit. Permittees would then be allowed the opportunity to demonstrate that effluent concentrations may be below dissolved metals criteria even though the total measured metal concentration in the effluent may exceed the permit limit. The comment will be addressed as an implementation issue rather than a standards issue. The commission agrees that if total recoverable metal is used for the purpose of water quality standards, compounding of factors due to the lower bioavailability of particulate metal and lower bioavailability of metals as they are discharged may result in an over-conservative water quality standard. The use of dissolved metals for water quality standards gives a more accurate picture of bioavailability and potential toxicity. However, the majority of expert scientists in the field believe that 1) total recoverable measurements in ambient water are of value and 2) exceedances of criteria on a total recoverable basis are indications that metal loadings could be a stress to the ecosystem. Therefore, for comparison reasons, EPA still requires states to measure effluents for total recoverable constituents. The commission also notes that the permittee has the opportunity to develop a site-specific translator, as outlined in the standards implementation procedures, for any metal limit believed to be unduly restrictive. The procedure allows the actual in-stream dissolved and total metal concentrations to be used in permit limit calculations. Currently, the commission uses a default statewide translator value for each metal.

Several commenters suggested that in §307.6(c)(7)(A), clarification should be added to state that techniques for calculating aquatic life criteria not found in Table 1 should only be based on acute LC_{50} toxicity tests; chronic toxicity tests would be too conservative. The commission responds that acute LC_{50} values are used in the equation to calculate numerical values in section §307.6(c)(7). The duration of an acute toxicity test is defined in §307.3(a)(1) as normally being 96 hours or less. For clarification, the commission adds the word "acute" to the equations in §307.6(c)(7)(A) and adopts the provision as revised. In the case where only toxicity tests of longer duration are available, the commission will look at chronic data in conjunction with NOEC data. One commenter suggested that §307.6(c)(7) be revised to state that acute criteria are "generally" calculated as noted since §307.6(c)(9) allows the calculation of a site-specific standards amendment. The commission responds that the wording describing the derivation of criteria does not preclude additional methods of calculation for a site-specific amendment. One commenter suggested that the acute value obtained in the derivation of aquatic life criteria not found in Table 1, be divided by 2. In previous versions of the standards implementation procedures, the equation to derive acute numerical values not found in Table 1 was the LC_{50} multiplied by 0.3, divided by 2. The value 2 in the denominator was used as a safety factor since the most sensitive species might not be that which was tested. Upon further review of the standards implementation procedures, the calculation was found to be unnecessarily conservative. The commission has defaulted back to the equation suggested in EPA's *Technical Support Document* and included that equation in the proposed standards. The factor of 0.3 is used to adjust the typical LC_{50} endpoint of an acute toxicity test to an LC_1 value (virtually no mortality).

Numerous commenters were supportive of the commission's inclusion of the water-effects ratio test as a methodology to derive site-specific standards. One commenter suggested that water-effects ratio should not be part of a long and expensive site-specific standards amendment process but should be included as a permit limit procedure. The commission responds that since the water-effects ratio changes a specific standard, a rule change must be initiated which incorporates the opportunity for public input. The commission is exploring the possibility of having site-specific standard amendments incor-

porated into the rule at a frequency of more than once every three years.

A few comments were received concerning the use and definition of the term "unimpacted" and "background" in the language for variance justification and definitions section respectively. One commenter suggested that the word unimpacted should be removed from §307.6(c)(9)(A), §307.6(d)(11)(A), and §307.6(e)(2)(F)(i). The commission agrees with the comment, and the word "unimpacted" is deleted from the adopted sections. By definition in the standards, the word background indicates the water quality of a stream relatively unaffected by anthropogenic activities. Numerous commenters supported the addition of the definition for background water quality and the revision to the definition of ambient water quality.

Two commenters suggested that biomonitoring is an expensive test that has questionable benefits and that it is not a reliable way to determine effluent toxicity. The commission responds that whole effluent toxicity testing is well established as a tool for assessing and protecting against impacts upon water quality and designated uses caused by the aggregate toxic effects of pollutants. The commission adds that in many instances, all potentially toxic pollutants cannot be identified by chemical methods alone. One commenter added that chronic whole effluent tests have not been validated by the EPA. The commission responds that the precision of the whole effluent toxicity tests is well established, and that the EPA has published detailed written protocols for conducting toxicity tests. The protocols, which are referenced in TNRCC permits, specify minimum quality control and quality assurance guidelines as well as minimum acceptability criteria for survival, growth, and reproduction in the test controls. For the chronic fathead minnow, sheepshead minnow, inland silverside, and mysid shrimp toxicity tests, the commission allows a coefficient of variation of no more than 40% for survivorship in the controls. For toxicity tests with coefficient of variations reported, the variation in the tests has been consistently less than 40%.

In §307.6(e)(2)(B), regarding the requirement for dischargers to test for and preclude short-term lethality in the discharge effluent, three commenters indicated their support for the proposed language that excludes mortality that is a result of an excess or deficiency of dissolved inorganic salts. Four commenters suggested additional language to also exclude mortality that is a result of an imbalance of dissolved inorganic salts. Since several toxicity reduction evaluations suggest that test organisms are sensitive to the relative proportion of cations and anions in an effluent, the commission agrees, adds the term "imbalance" to the exclusion, and adopts the provision as revised. Another commenter suggested that the dissolved inorganic salt exclusion clause specified in §307.6(e)(2)(B) be extended to chronic biomonitoring tests. As indicated in the discussion of comments related to the definition of toxicity (§307.3(a)(45)), the commission does not believe the exclusion is warranted except where toxicity is attributed to dissolved salts in source waters. The definition of toxicity is meant to encompass toxicity from anthropogenic sources.

Two commenters opposed the proposed language in §307 6(e)(2)(B) that excludes mortality as a result of excess or deficient dissolved inorganic salts. The commission responds that the exclusion of adverse effects caused by dissolved salts from the definition of toxicity applies to the 24-hour tests as well as the chronic and 48-hour acute tests. Unlike the end-of-pipe performance standard associated with the 24-hour tests, the chronic and 48-hour acute tests require additional actions for biomonitoring failures at the effluent concentrations expected to occur after mixing with the receiving waters during critical conditions. In the 24-hour tests, the exclusion of effects caused by dissolved salts was expanded to include effects caused by dissolved salts whose source is process water or effluent. The exclusion was expanded to account for discharges with high dissolved salt concentrations in their effluent because of water conservation programs. The conservation programs, some required by the TNRCC, could result in higher dissolved salt concentrations in final effluents to levels that cause failure of the 24-hour toxicity tests Because permittees must still pass chronic or 48-hour acute toxicity tests at the mixing zone and because of the environmental benefits of water conservation, the commission believes the exclusion is warranted. The exclusion is therefore retained in the adopted version, with additional language that clearly stipulates that the exemption of inorganic salts does not apply to toxic substances listed in Table 1 in §307 6(c).

Three commenters requested that §307.6(e)(2)(B) be deleted from the rule because they believe the provision· 1) is more stringent than the Federal Clean Water Act requirements, 2) is not necessary to prevent toxicity in the receiving water, 3) conflicts with §307.8(b)(4), and 4) does not recognize in-stream dilution. The commission responds that the provision provides a minimum effluent standard statewide for controlling lethal toxicity. Since the standards currently preclude acute (short-term) toxicity in all water in the state with the exception of the small zones of initial dilution (ZIDs) in the receiving waters immediately adjacent to a discharge, the provision was designed to provide more direct evidence that in-stream short-term lethality is prevented in the ZID for dischargers required to conduct the test. Because the first sentence of the provision states that "discharges shall not be acutely toxic," and the following sentence states that the criterion for "lethality shall be mortality of 50% or more of the test organisms after 24 hours of exposure," one commenter noted that for consistency, the criterion described in the second sentence of the section should be "acute toxicity" rather than "lethality" and suggested rewording of the sentence. The commission agrees with the recommendation and adopts the provision as revised.

In §307.6(e)(2)(D), concerning resolution of toxicity reduction evaluations through whole effluent toxicity limits, chemical specific limits, and best management practices (BMP), three commenters expressed support for the proposed language which allows a chemical specific limit rather than a total toxicity limit to reduce or eliminate effluent toxicity. One commenter requested that language be included to clarify that chemical specific limits would be in lieu of, rather than in addition to, whole effluent toxicity limits. The commission responds that not all situations lend themselves to such a resolution, e g , when both species of test organisms are simultaneously affected by different toxicants

Another commenter suggested that the permittee be given the option of which type of limit would be imposed, and also suggested that any BMPs should be mutually acceptable to both the commission and the permittee, especially when used in lieu of whole effluent toxicity limits Similarly, a third commenter proposed that the word "consensual" be included in the section for BMPs. The commission responds that the permittee bears the burden of proof in demonstrating the cause of toxicity; the commission then chooses an appropriate limit based on the information presented.

Three commenters expressed support for the language in §307 6(e)(2)(D) that allows a compliance period to achieve toxicity-based permit limits or conditions Regarding what constitutes persistent lethality, one commenter felt that the commission should re-evaluate the definition. The commission believes the issue is best addressed in the standards implementation procedures The standards state that a permittee shall conduct a toxicity identification evaluation and a toxicity reduction evaluation if the discharge is exceeding the restrictions on total toxicity.

In §307 6(e)(2)(D), regarding whole effluent toxicity limits, one commenter felt that they were inappropriate for municipal wastewater facilities, and if used, should only be used when: 1) there is a persistent pattern of lethality; 2) the toxicity reduction evaluation successfully establishes a means of eliminating the lethality; 3) compliance with the limit is technically, legally, and economically feasible, 4) the toxicant is not authorized for sale by EPA under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA); 5) achieving the limit is necessary to attain and maintain the designated aquatic life use in the stream; and 6) establishing a chemical specific limit is not the best means to attain and maintain applicable numeric and narrative water quality standards The commission will consider the comments when revising the standards implementation procedures because the commission believes the comment is related more to implementation of the standards, than the standards themselves. The proposed standards state that, after a toxicity reduction evaluation, additional conditions may be established in the permit. Whole effluent toxicity limits are one of the conditions listed in the standards, and the commission believes they are an appropriate method to maintain water quality Section 307 6(e)(2)(D), as proposed, specifically states that a chemical specific limit rather than a total toxicity limit may be established in the permit Further, §307.6(e)(2) (F)(v), as proposed, provides a discharger with the flexibility of justifying a site-specific standard for total toxicity due to technological, economic,

or legal limits of treatability or control for specific toxic materials. The commission does not support the commenter's suggestion that whole effluent toxicity limits only be used for pesticides that are not authorized for sale under FIFRA. Registration or re-registration of pesticides under FIFRA does not necessarily preclude chronic toxicity to aquatic life that are exposed to the pesticides so registered. Initial hazard evaluation studies evaluate acute toxicity. FIFRA uses a tiered approach to determine the necessity of further tests such as life-cycle and field studies. The FIFRA registration program includes a risk/benefit analysis that may dismiss an apparent ecological risk.

One commenter expressed support for the alternative diazinon toxicity control measures detailed in §307.6(e)(2)(E). Two commenters recommended that diazinon toxicity be addressed on a case-by-case basis on the grounds that the language, as proposed, would not allow the specification of a whole effluent toxicity limit which is in conflict with the Federal Clean Water Act. One commenter suggested further that the language be an option, as opposed to a mandate, and recommended that the rule state that diazinon toxicity will be addressed on a case-by-case basis in accordance with the standards implementation procedures.

The commission responds that the proposed language in §307.6(e)(2)(E) is appropriate for controlling effluent toxicity where the toxicity is primarily attributed to diazinon and where it is ubiquitous within the wastewater system. During the 1991 triennial standards revisions, the agency proposed freshwater (0.06 µg/L) and marine (0.39 µg/L) acute criteria for diazinon. On August 14, 1991, the commissioners voted to delete the proposed diazinon standard but passed a resolution related to diazinon and whole effluent toxicity testing. More recently during the May 25, 1994, agenda, the commissioners requested that the proposed standards provide language to address diazinon toxicity similar to that in the 1991 resolution. Proposed §307.6(e)(2)(E) responds to that directive. Where a permittee demonstrates that diazinon is the primary cause of total toxicity and that it is ubiquitous within the wastewater system, the permittee will be required to implement a public education program, a source evaluation, and a diazinon monitoring program. Currently (as of April 1995), seven municipalities out of the 37 conducting toxicity reduction evaluations have confirmed diazinon as a primary toxicant, and four more suspect diazinon is a primary toxicant. Pursuant to permit or compliance agreement requirements, four TNRCC permittees are currently implementing a public education program related to diazinon toxicity. Generally, effluent toxicity has decreased since the initiation of the programs.

In §307.6(e)(2)(F), concerning site-specific standards for total toxicity, two commenters stated that the requirement "that a site-specific standard should not result in the impairment of an existing, attainable, or designated use" should be deleted or changed to read "shall not impair existing uses." The commission believes that attainable uses should be maintained when site-specific standards are used and that the provision does not preclude the permittee from demonstrating that a designated use is not the attainable use.

In §307.6(e)(2)(F)(i), where background toxicity of unimpacted receiving waters may be a factor justifying a temporary variance or a site-specific standards amendment, two commenters indicated that the word "unimpacted" should be deleted. The commission agrees that "unimpacted," when taken in context with "background," is redundant, and will delete all references to "unimpacted background" throughout the document.

Two commenters expressed support for §307.6(e)(2)(F)(v), as proposed, which provides additional factors that may justify a temporary variance or site-specific standard for total toxicity. The factors include technological, economic, or legal limits of treatability or control for specific toxic materials. Because of its general nature, one commenter expressed opposition to the proposed language. The commenter suggested that guidance should be provided to clarify that a discharger's lack of economic resources is not an adequate basis to allow the continued discharge of a toxic effluent. The commission responds that the economic considerations should not be construed as a mechanism to allow a discharge which would preclude a reasonably attainable water quality use. Further, both the Texas Water Code, §26.003 and §307.1 of this rule state in part that "it is the policy of this state and the purpose of this chapter to maintain the quality of water in the state consistent with public health and enjoyment, propagation and protection of terrestrial and aquatic life, operation of existing industries, and economic development [emphasis added] of the state; ...."

In §307.7(b)(3)(A), concerning site-specific aquatic life dissolved oxygen criteria, four commenters expressed general support of the concept of the proposal identifying critical low-flow values for dissolved oxygen criteria for unclassified streams and partially classified streams (listed in §307.10, Appendix D, relating to site-specific receiving water assessments). One of the commenters expressed concern that the area affected by the proposal is too large and should be confined to east Texas because little data exist for the south and south-central part of the state. As a point of clarification, the commission responds that the same independent variables used to develop the regression equation for the area defined also produced regression equations for the entire state which were statistically significant. Utilizing data from the ecoregion streams in the defined area produced the highest coefficient of determination or r^2 value. Another of the commenters stated that more detailed procedures on how bedslopes are to be calculated and what sources are to be used should be provided in the standards or the standards implementation procedures. The commission responds that the procedures will be developed in the standards implementation procedures.

One commenter suggested that the phrase "significant aquatic life use" in §307.7(b)(3)(A)(ii) should be changed to "high aquatic life use." The commission does not concur with the suggestion since the flow values in Table 5, relating to critical low-flow values for dissolved oxygen, can apply to any of the aquatic life subcategories defined in Table 4, relating to aquatic life subcategories.

One commenter objected to utilizing multiple flow values to model dissolved oxygen criteria attainment. The commenter stated that the higher flow values in Table 5, relating to critical low-flow values for dissolved oxygen, may not be the critical low-flow value for a given stream, and therefore the application of the higher flow values is inconsistent with §307.3(a)(11) and (34), relating to definitions of critical low-flow and seven-day, two-year low-flow, respectively. The commission responds that the flow values in Table 5 provide a mechanism, based on observed data, to allow the use of lower dissolved oxygen criteria to protect aquatic life uses which normally require the criteria specified in Table 4. The normally required dissolved oxygen criteria associated with a given aquatic life subcategory are also protected but at flows that may exceed 7Q2 values. The provision is necessary because 1) summer-time steady-state flow conditions higher than 7Q2 flows are known to occur and 2) if the conditions are not protected, aquatic life uses could be impaired. When the aquatic life subcategory dissolved oxygen criteria (from Table 4) are attained at a 7Q2 flow, then higher flow regimes are protected as well, and it will not be necessary to use flow values from Table 5. The commission notes that even though the provisions are adopted as proposed, further refinement and testing of the methodology will continue, and future revisions to these paragraphs are likely.

Also in §307.7(b)(3), one commenter noted that the description in Table 4 under trophic structure for a high aquatic life use is incomplete. The commission acknowledges the inadvertent error and adopts Table 4, as corrected.

Comments were received on §307.8, which concerns the application of standards. One commenter indicated that the differentiation between acute total toxicity levels and lethality in §307.8(b)(2) is confusing, and the commenter requests better definitions for the terms. The commission response is partly provided by responses to §307.3 above, concerning definitions and abbreviations. In addition, the commission notes that lethality which could occur in a zone of initial dilution would be in response to very short-term exposure in comparison to the exposure intervals which are used for acute toxicity tests.

One commenter requested that mixing zone sizes should be specified in §307.8(b)(9). The commission responds that typical mixing zone sizes are more appropriately specified in the standards implementation procedures. Placement in the standards implementation procedures allows for a presumed typical mixing zone and retains the flexibility to address receiving waters with unusual morphometry.

Several commenters supported proposed provisions in §307.8(d) to address pollutants in the intake source of cooling water discharges. Two commenters requested addi-

tional information on how it will be determined if a cooling water discharge measurably alters the concentration of a pollutant. The commission agrees that procedures for the determination will be needed in the standards implementation procedures.

One commenter suggested that the proposed provisions should also be potentially applicable to cooling water discharges which have the intake and discharge points in different bodies of water. The commission incorporates the change in the adopted standards, with the condition that the water quality standards of the receiving waterbody must be maintained.

Comments were received on §307.9, which concerns the determination of standards attainment. Two commenters suggested that §307.9(b) should contain a citation for the commission's field procedures manual. The commission agrees, but §307.9(b)(1) was not proposed for changes. Therefore the reference cannot be added until the next revision of Chapter 307.

One commenter suggested that the sampling procedures for dissolved oxygen in bays and tidal streams, as set forth in §307.9(b)(2)(C) and §307.9(b)(2) (D), should always be based on an average of the entire water column. The commission responds that the criteria for dissolved oxygen were not developed to address average dissolved concentrations in vertically stratified waters, where dissolved oxygen concentrations in deeper layers can become very low even during natural conditions. Site-specific criteria would be needed in order to assess standards attainment under stratified conditions, and the criteria would generally be lower than the existing criteria which are appropriately applied to the mixed surface layers.

On the proposed additions to §307.9(d)(1), which specifies that assessments of total dissolved solids (TDS) are to be based on conversions from measurements of specific conductance, one commenter stated that the use of specific conductance as an estimate of TDS should be an allowable option, rather than a required procedure. In response, the commission agrees that flexibility is needed and adopts the suggestion.

Two commenters requested that more specific procedures for the determination of chronic and acute toxic criteria to protect aquatic life should be added to §307.9(d)(4). The commission agrees that additional procedural development for aquatic life toxic criteria, and other criteria, will be useful, but further evaluation will be needed prior to incorporation into the standards. Additional procedures for measuring standards attainment from periodic in-stream data are contained in the current edition of the *Texas Water Quality Inventory*, as published by the commission every two years under §305(b) of the Federal Clean Water Act.

One commenter requested a detailed description in §307.9(d)(6)(A) of how time-weighted averages will be calculated in order to assess attainment of criteria for dissolved oxygen. The commission responds that the level of specificity requested could inadvertently preclude using much of the available data on dissolved oxygen for standards attainment.

One commenter also suggested that measurements of dissolved oxygen taken during daylight hours could also be used for assessing standards attainment, when such measurements were below the criteria for minimum dissolved oxygen. The commission agrees, but §307.9(d)(6) was not proposed for changes. Therefore a statement cannot be added to §307.9(d)(6) that describes the applicability of single measurements of dissolved oxygen which are taken during daylight hours until the next revision of Chapter 307. The commission notes that more details on procedures to screen in-stream data for standards compliance are contained in the current edition of the *Texas Water Quality Inventory*.

The commission notes some editorial changes, particularly title changes, in §307.10, Appendices A-E. The title of Appendix A is changed from "Water Uses and Numerical Criteria" to "Site-specific Uses and Criteria for Classified Segments," and the title of Appendix E is changed from "Site-specific Standard Changes" to "Site-specific Criteria." Also, in the introductory page of Appendix A, the term "saltwater segments" is changed to "marine segments" to be consistent with the definition of marine waters found at §307.3(a)(23).

In §307.10, Appendix A, relating to site-specific uses and criteria for classified segments, two commenters stated that they were not aware of a use attainability analysis providing documentation to support the change in uses for Segment 0105-Rita Blanca Lake. The commenters supported the proposed designation of waterfowl use, but wanted clarification as to whether any specific criteria associated with such designation were included in the standards. The commission responds that subsequent to publishing the proposed revisions, a use attainability analysis justifying the use and criteria changes for Rita Blanca Lake was completed and found to be acceptable by EPA. The commission also responds that specific numeric toxic criteria for waterfowl protection are not proposed at this time, but development of wildlife/waterfowl criteria for Rita Blanca Lake and other water bodies will be considered for future revisions of the water quality standards as EPA further develops national wildlife criteria.

Two commenters stated that Segment 0220-Pease/North Fork Pease River is incorrectly designated as having a high aquatic life use. One commenter indicated that the river is intermittent and that the 5.0 mg/L dissolved oxygen criterion for a high aquatic life use is unattainable. The other commenter indicated that the use should be intermediate at best. The commission responds that a use attainability analysis will have to be conducted on Segment 0220 before a lowering of the aquatic life use can be considered in future revisions to the water quality standards.

One commenter recommended changing the chloride criterion for Segment 0229-Upper Prairie Dog Town Fork Red River from 300 mg/L to 600 mg/L. The commenter also objected to the high aquatic life use designation for the segment. The commission responds that both of the issues may be resolved by the results of on-going studies on the segment and any appropriate changes may be proposed in future revisions of the water quality standards following completion of a use attainability analysis.

One commenter stated that the proposed lower criteria for chloride, sulfate, and total dissolved solids in Segment 0401-Caddo Lake may have been calculated from data representing conditions existing during higher than average rainfall years and, if so, the criteria should be recalculated to exclude those years. The commission responds that the data used to calculate the proposed criteria were from the period of 1973 to 1992. The proposed criteria were recalculated by removing 25% and 50% of the lowest values, which should serve to remove data from high rainfall periods, and neither method resulted in higher calculated criteria for any of the parameters.

One commenter stated that documentation has not been provided to EPA with regard to the proposed removal of public water supply (PS) use for the following segments: 0824-Elm Fork Trinity River Above Ray Roberts Lake, 1218-Nolan Creek/South Nolan Creek, and 1255-Upper North Bosque River. In response, the commission checked the water rights files and did not find any existing rights to use waters for public water supply purposes in either Segment 1218 or Segment 1255. Also, EPA has previously approved a use attainability analysis removing the PS use from Segment 1218. The commission did discover that one water right permit exists for municipal drinking water in the upper reach of Segment 0824 in Montague County which was inadvertently missed during preparations for the proposed revisions. Therefore, the commission does not remove the public water supply use for Segment 0824; however, a footnote will be added to indicate that the PS use does not apply to the lower reach of the segment from a point 9.5 kilometers (5.9 miles) downstream of the confluence of Pecan Creek in Cooke County up to FM 373 in Cooke County. In addition, the commission notes that PS uses for portions of Segment 1903-Medina River Below Medina Diversion Lake and Segment 1906-Lower Leon Creek were proposed for removal since water rights within the designated river miles were only for irrigation. The proposed changes in PS use designations are adopted as revised.

Two commenters supported the use of enterococcus criteria instead of fecal coliform criteria for Segments 1006-Houston Ship Channel Tidal and 1007-Houston Ship Channel/Buffalo Bayou Tidal. One of the commenters also requested that fecal coliform criteria be retained so that a comparison between the two criteria could be made. The commission responds that having two different indicator bacteria would cause difficulty in determining standards attainment for the segments. However, a criteria change would not preclude the commission or other agencies from also sampling fecal coliform for comparative purposes to determine if enterococcus criteria would be appropriate for other segments.

One commenter asserted that the Dow A Effluent Canal, which discharges to Segment 1201-Brazos River Tidal, is water of the United States and also a water of the state by legal definition. The commenter also stated that the canal is perennial and heavily utilized by aquatic life and therefore should be included in either §307.10, Appendix A or Appendix D, relating to site-specific uses and criteria for classified segments and site-specific receiving water assessments, respectively. The commission respectively disagrees that the Dow A Effluent Canal should be included in the appendices of the standards since the waterbody is a totally man-made ditch wholly contained on Dow Chemical Company property.

Two commenters requested that several streams and rivers in the upper Colorado River Basin be designated as stream segments The streams included Brady Creek, a tributary of Segment 1416-San Saba River; Spring Creek and Dove Creek, tributaries of Segment 1423-Twin Buttes Reservoir; and the North Concho River, a tributary of Segment 1425-O.C. Fisher Lake. The commenters also suggested that the existing designation of Segment 1424-Middle Concho/South Concho River be changed to separate segment numbers and descriptions for the two rivers. The commission responds that documentation of appropriate uses, criteria, and segment boundaries should be provided to the commission for consideration in future revisions to the water quality standards. The commission also notes that a portion of Brady Creek is currently partially classified in §307.10, Appendix D.

In §307.10, Appendices A and C, relating to site-specific uses and criteria for classified segments and segment descriptions, respectively, three commenters supported the creation of proposed Segment 1434-Colorado River Above La Grange from the existing lower portion of Segment 1428-Colorado River Below Town Lake and the existing upper portion of Segment 1402-Colorado River Below Smithville. The commenters also supported the proposed exceptional aquatic life use for proposed Segment 1434, the proposed revision of Segment 1428-Colorado River Below Town Lake from high aquatic life use to exceptional, and the corresponding increase of the dissolved oxygen criterion from 5.0 to 6.0 mg/L for both segments. A fourth commenter supported the proposed increase in dissolved oxygen criteria from 5.0 to 6.0 mg/L for both of the segments since dissolved oxygen concentrations are currently averaging above 6.0 mg/L. However, the fourth commenter was concerned that the change to exceptional aquatic life use is not appropriate since fish "index of biotic integrity" scores and macroinvertebrate data indicate a high aquatic life use. The commenter also requested that Segment 1428 be protected by a 5.0 mg/L criterion at stream flows from the 7Q2 flow value up to 150 cfs. One of the other commenters requested that the 5.0 mg/L dissolved oxygen criteria apply to flows between 100 and 150 cfs. The commission responds that even though an exceptional aquatic life use may not be an existing use in the two segments, water quality modeling simulations indicate that an exceptional aquatic life use should be attainable. The commission further responds that the proposed footnote for dissolved oxygen criteria for Segment 1428, which states that a 6.0 mg/L dissolved oxygen criterion applies to flows greater than or equal to 150 cfs, is expanded to include a 5.0 mg/L dissolved oxygen criterion which will apply to stream flows greater than or equal to the 7Q2 flow (which is less than 100 cfs) up to 150 cfs.

In §307.10, Appendix A, one commenter supported the application of the 6. 0 mg/L dissolved oxygen criterion to newly defined Segment 1814-Upper San Marcos River as proposed in §307 10, Appendix C. The commission responds that the 6.0 mg/L dissolved oxygen criterion will continue to apply within the boundaries of Segment 1814, as defined (see response to Appendix C comments).

One commenter recommended changing the high aquatic life use designation to exceptional aquatic life use for the following Galveston Bay complex segments: Segment 2423-East Bay, Segment 2424-West Bay, Segment 2433-Bastrop Bay/Oyster Lake, Segment 2434-Christmas Bay and Segment 2435-Drum Bay. The commenter stated that the segments are similar and that the Christmas Bay complex (Segments 2433-2435), in particular, has been shown to be unique, of high environmental quality, and biologically diverse and productive. The commission responds that the recommendations may have merit and may be considered in future revisions to the water quality standards.

In §307.10, Appendix B, one commenter, while agreeing that Segment 1814-Upper San Marcos River was deserving of extra protection, suggested replacing the proposed 0.1% occurrence probability low-flow value of 58 cfs with a 1.0% occurrence probability low-flow value of 74 cfs, which would still be considerably lower than the 7Q2 flow value of 122 cfs. Another commenter supported the proposed 0.1% probability low-flow value. The commission responds that since the revised low-flow criterion was proposed, additional studies have led to the development of an improved water quality simulation model for the San Marcos River which demonstrates that the 6.0 mg/L dissolved oxygen criterion can be achieved with a 58 cfs low-flow criterion in Segment 1814 if adjustments are made to the proposed revision of the downstream boundary of Segment 1814.

In §307.10, Appendix C, relating to segment descriptions, one commenter recommended changing the proposed revision of the downstream boundary of Segment 1814 from the confluence of the Blanco River to a point approximately 3,000 feet upstream to the beginning of the backwater caused by Cummings Dam. Another commenter supported the proposal to move the downstream boundary of Segment 1814 to the confluence of the Blanco River. After further consideration, the commission agrees with the first commenter that the proposed boundary of Segment 1814 be changed to a point 1.0 kilometer upstream of the confluence of the Blanco River to better reflect the spring-run aspects of Segment 1814. As stated in the response to Segment 1814 comments under §307.10, Appendix B, the exceptional aquatic life dissolved oxygen criterion of 6.0 mg/L is predicted to be achievable in revised Segment 1814 at a low-flow criterion of 58 cfs.

Several comments were received for §307.10, Appendix D, concerning the aquatic life use designations of Eightmile Creek and Rabbit Creek which are tributaries to Segment 0505-Sabine River Above Toledo Bend Reservoir and perennial streams in Harris County and the Houston Ship Channel watershed located in the San Jacinto River Basin. One commenter supported the change in Eightmile Creek to intermediate aquatic life use and a site-specific 3.0 mg/L dissolved oxygen criterion during the months of June-October. Another commenter stated that documentation does not exist for a change from the presumed high aquatic life use in Eightmile Creek. The commission responds that an analysis of the data on Eightmile Creek indicates that the proposed use and criteria are appropriate and that documentation to justify the aquatic life use change will be submitted to EPA. Another commenter contended that the existing and attainable aquatic life use and associated dissolved oxygen criterion for Rabbit Creek should be limited with 3.0 mg/L and not intermediate with 4.0 mg/L. The commission agrees that data indicate that the existing aquatic life use is limited; however, the question of what should be the attainable use is still to be resolved. The commission, in cooperation with others, plans to conduct further studies to address the question of an appropriate attainable use for Rabbit Creek. In the interim, an intermediate aquatic life use, which was recommended in the use attainability analysis and found to be acceptable by EPA, will remain as proposed.

Site-specific additions in aquatic life use for tributaries to Segments 1006-Houston Ship Channel Tidal and 1007-Houston Ship Channel/Buffalo Bayou Tidal are not appropriate according to one commenter since the Houston Ship Channel segments include only tidal portions of tributaries and the additions are not tidal portions. The commenter also stated that documentation does not exist for the site-specific designations. The commission agrees that the site-specific designations are for nontidal tributaries of the Houston Ship Channel segments. There are also site-specific designations for other tributaries in Harris County. The designations are for tributaries that are not classified segments but whose flow eventually enters the segments. Documentation in the form of a use attainability analysis for the site-specific designations has been submitted to and approved by EPA subsequent to publication of the proposed revisions to the water quality standards.

The commission notes that two streams, Chacon Creek and Fort Ewell Creek, in the watershed of Segment 2108-San Miguel Creek are assigned intermediate aquatic life uses and 4.0 mg/L dissolved oxygen criteria. A use attainability analysis was conducted on the streams and accepted by EPA. The streams were inadvertently omitted from §307.10, Appendix D, in the initial proposal. The commission also notes that subsequent to publication of the initial proposal, further information regarding Linnville Bayou, a tributary to Segment 1304-Caney Creek Tidal,

has been received and evaluated. As a result of the new information, the description for Linnville Bayou is changed from a perennial stream to an intermittent stream with perennial pools. The assigned aquatic life use of limited remains unchanged, and the provision is adopted as revised.

There were four comments received on §307.10, Appendix E, relating to site-specific criteria. Three commenters stated that the site-specific criteria proposed for lead in Segment 0404-Big Cypress Creek Below Lake Bob Sandlin were mathematically incorrect. The commission responds that all parties are aware of the error and includes the equation for the criteria in Appendix E. The correct equation and values for lead using a site-specific hardness value of 40.1 mg/L are: Acute = $e^{[1.273(\ln \text{Hardness})-0.9744]}$ = 41.5 µg/L and Chronic = $e^{[1.273(\ln \text{Hardness})-2.958]}$ = 5.7 µg/L.

The other commenter suggested that a general note be added to the summary page at the beginning of Appendix E to eliminate confusion concerning how site-specific values are interpreted and suggested specific language. The commission incorporates the suggested language in an effort to eliminate confusion.

The amendments are adopted under the Texas Water Code, §26.023, which provides the Texas Natural Resource Conservation Commission with the authority to make rules setting water quality standards for all waters in the state; and under the Texas Water Code, §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of this state.

§307.2. Description of Standards.

(a) Contents of the Texas Surface Water Quality Standards.

(1) (No change.)

(2) Section 307.2 lists the major sections of the standards, defines basin classification categories, and describes justifications for standards modifications.

(3)-(9) (No change.)

(10) Section 307.10 of this title (relating to Appendices A-E) lists site-specific standards and supporting information for each classified segments (Appendices A-C), partially classified waterbodies (Appendix D), and site-specific criteria that may be derived for any waters in the state (Appendix E). Specific appendices are as follows:

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

(E) Appendix E-Site-specific Criteria

(b) Applicability. The Texas Surface Water Quality Standards apply to surface waters in the state-including wetlands.

(c) (No change.)

(d) Modification of standards.

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

(3) The narrative provisions, designated uses, and numerical criteria of the Texas Surface Water Quality Standards may be amended for a specific waterbody to account for local conditions. A site-specific standard is an explicit amendment to this title, §307 (relating to the Texas Surface Water Quality Standards), and adoption of a site-specific standard requires the procedures for public notice and hearing established under the Texas Water Code, §26.024 and §26.025. An amendment which establishes a site-specific standard will require a use-attainability analysis which demonstrates that reasonably attainable water-quality related uses will be protected. Upon adoption, site-specific amendments to the standards will be listed in §307.10 of this title.

(4) When preliminary evidence indicates that a site-specific standards amendment is appropriate, the commission may allow a temporary variance to the water quality standards. A temporary variance is only applicable to an existing discharge facility. A permittee may apply for a temporary variance prior to or during the permit application process. The temporary variance request shall be included in the public notice for the permit application, and the request may be considered in any public hearing on the permit application. The temporary variance must have the approval of the Texas Natural Resource Conservation Commission before issuance of a final permit. A temporary variance for an NPDES permit will also require approval by the U.S. Environmental Protection Agency. The permit shall contain interim limits based upon the variance approval, and final limits based upon existing water quality standards. A variance shall not exceed a time period of three years. A temporary variance may be extended to allow additional time for a site-specific standard to be adopted in this title. This extension can be granted only after a site-specific study that supports a standards change has been completed. If the commission adopts the proposed site-specific standard prior to the expiration of the variance period, then the permit may be amended to meet the revised water quality standards. If the commission does not adopt the proposed site-specific standard prior to the expiration of the variance period, then the final effluent limits based on existing water quality standards will remain in effect, but the permit may be amended to include a permit schedule to meet standards in accordance with subsection (f) of this section.

(5) (No change.)

(e) Implementation procedures. Provisions for implementing the water quality standards are described in a document entitled *Implementation of the Texas Natural Resource Conservation Commission Standards via Permitting*.

(f) Permit schedules to meet standards. Upon permit amendment or permit renewal, the commission may establish interim discharge limits to allow a permittee time to modify effluent quality in order to attain final effluent limits. The duration of any interim limit may not be longer than three years from the effective date of the permit issuance. An interim limit may be extended to allow additional time for a site-specific standard to be adopted in this title. This extension can be granted only after a site-specific study that supports a standards change has been completed, and the extension will only be granted for effluent limits that are affected by the site-specific standard under consideration.

§307.3. Definitions and Abbreviations.

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

(1) Acute toxicity-Toxicity which exerts a stimulus severe enough to rapidly induce an effect. The duration of exposure applicable to acute toxicity is typically 96 hours or less. Tests of total toxicity normally use lethality as the measure of acute impacts. (Direct thermal impacts are excluded from definitions of toxicity.)

(2) Ambient-Refers to the existing water quality in a particular waterbody.

(3) Background-Refers to the water quality in a particular waterbody that would occur if that waterbody were relatively unaffected by human activities.

(4) Bedslope-Stream gradient, or the extent of the drop in elevation encountered as the stream flows downhill. One measure of bedslope is the elevation decline in meters over the stream distance in kilometers.

(5) Best management practice-A practice or combination of practices determined to be the most practicable means of preventing or reducing, to a level compatible with water quality goals, the amount of pollution generated by point and nonpoint sources.

(6) Bioaccumulative toxic-A chemical which is taken up by aquatic organisms from water directly or through the consumption of food containing the chemicals.

(7) Chronic toxicity-Toxicity which continues for a long-term period after exposure to toxic substances. Chronic exposure produces sub-lethal effects, such as growth impairment and reduced reproductive success, but it may also produce lethal-

ity. The duration of exposure applicable to chronic toxicity is normally seven days or more.

(8) Commission-The Texas Natural Resource Conservation Commission.

(9) Contact recreation-Recreational activities involving a significant risk of ingestion of water, including wading by children, swimming, water skiing, diving, and surfing.

(10) Criteria-Water quality conditions which are to be met in order to support and protect desired uses.

(11) Critical low-flow-Low-flow condition (e.g., 7Q2 flow) below which some standards do not apply. The impacts of permitted discharges are analyzed at critical low-flow.

(12) Discharge permit-A permit issued by the state to discharge treated effluent or cooling water into waters of the state.

(13) EC_{50}-The concentration of a toxicant that produces an adverse effect on 50% of the organisms tested in a specified time period.

(14) Effluent-Wastewater discharged from any point source prior to entering a waterbody.

(15) Epilimnion-The upper mixed layer of a lake (including impoundments, ponds, and reservoirs).

(16) Fecal coliform-That portion of the coliform bacteria group which is present in the intestinal tracts and feces of warm-blooded animals.

(17) Freshwaters-Inland waters which exhibit no measurable elevation changes due to normal tides.

(18) Halocline-A vertical gradient in salinity under conditions of density stratification that is usually recognized as the point where salinity exhibits the greatest difference in the vertical direction.

(19) Harmonic mean flow-A measure of mean flow in a water course which is calculated by summing the reciprocals of the individual flow measurements, dividing this sum by the number of measurements, and then calculating the reciprocal of the resulting number.

(20) Industrial cooling impoundments-An impoundment which is owned or operated by, or in conjunction with, the water rights permittee, and which is designed and constructed for the primary purpose of reducing the temperature and removing heat from an industrial effluent.

(21) Intermittent stream-A stream which has a period of zero flow for at least one week during most years. Where flow records are available, a stream with a 7Q2 flow of less than 0.1 ft^3/s is considered intermittent.

(22) LC_{50}-The concentration of a toxicant that is lethal (fatal) to 50% of the organisms tested in a specified time period.

(23) Marine waters-Coastal waters which have measurable elevation changes due to normal tides. Marine waters are considered to be saltwater for purposes of standards application. In the absence of tidal information, marine waters are generally considered to be coastal waters which typically have salinities of two parts per thousand or greater in a significant portion of the water column.

(24) Method detection limit-The minimum concentration of a substance that can be measured and reported with 99% confidence that the analyte concentration is greater than zero and is determined from analysis of a sample in a given matrix containing the analyte. The method detection limit (MDL) is estimated in accordance with 40 Code of Federal Regulations, 136, Appendix B.

(25) Minimum analytical level-The lowest concentration at which a particular substance can be quantitatively measured with a defined precision level, using approved analytical methods. The minimum analytical level is not the published method detection limit for an EPA-approved analytical method, which is based on laboratory analysis of the substance in reagent (distilled) water. The minimum analytical level is based on analyses of the analyte in the matrix of concern (i.e., wastewater effluents). The commission will establish general minimum analytical levels that will be applicable when information on matrix-specific minimum analytical levels is unavailable.

(26) Mixing zone-The area contiguous to a discharge where mixing with receiving waters takes place and which may not meet certain criteria applicable to the receiving water.

(27) No significant aquatic life use-The instream use that is typically assigned to a waterbody, such as an intermittent stream, which is not appropriate for an aquatic life use category of limited or greater. There can be some aquatic life present in a waterbody which is designated as having no significant aquatic life use. Basic water quality standards-such as the general criteria in §307.4 of this title, the numerical acute aquatic life criteria in §307.6(c) of this title, and the biomonitoring requirements to preclude acute toxicity to aquatic life in §307.6(e) of this title-apply to waterbodies with no significant aquatic life use.

(28) Noncontact recreation-Recreational pursuits not involving a significant risk of water ingestion, including fishing, commercial and recreational boating, and limited body contact incidental to shoreline activity.

(29) Nonpersistent toxic-A toxic substance that readily degrades in the aquatic environment, exhibits a half-life of less than 96 hours, and does not have a tendency to accumulate in organisms.

(30) Oyster waters-Waters producing edible species of clams, oysters, or mussels.

(31) Persistent toxic-A toxic substance that is not readily degraded and exhibits a half-life of 96 hours or more in an aquatic environment.

(32) Salinity-The total dissolved solids in water after all carbonates have been converted to oxides, all bromide and iodide have been replaced by chloride, and all organic matter has been oxidized. For most purposes, salinity is considered equivalent to total dissolved salt content. Salinity is normally expressed in parts per thousand.

(33) Settleable solids-The volume or weight of material which will settle out of a water sample in a specified period of time.

(34) Seven-day, two-year low-flow-The lowest average flow for seven consecutive days with a recurrence interval of two years, as statistically determined from historical data. It is the flow used for determining the allowable discharge load to a stream.

(35) Shellfish-Clams, oysters, mussels, crabs, crayfish, lobsters, and shrimp.

(36) *Standard Methods for the Examination of Water and Wastewater*-A document describing sampling and analytical procedures, which is published by the American Public Health Association, American Water Works Association, and Water Environment Federation. The most recent edition of this document is to be followed whenever its use is specified by these rules.

(37) Standards-The designation of water bodies for desirable uses and the narrative and numerical criteria deemed necessary to protect those uses.

(38) Standards implementation procedures-Procedures entitled *Implementation of the Texas Natural Resource Conservation Commission Standards via Permitting*.

(39) Stream order-A classification of stream size, where the smallest, unbranched tributaries of a drainage basin are designated first order streams. Where two first order streams join, a second order stream is formed; and where two second order streams join, a third order stream is formed, etc. For purposes of water quality

standards application, stream order is determined from USGS topographic maps with a scale of 1:24,000.

(40) Surface water in the state-Lakes, bays, ponds, impounding reservoirs, springs, rivers, streams, creeks, estuaries, wetlands, marshes, inlets, canals, the Gulf of Mexico inside the territorial limits of the state, and all other bodies of surface water, natural or artificial, inland or coastal, fresh or salt, navigable or nonnavigable, and including the beds and banks of all water-courses and bodies of surface water, that are wholly or partially inside or bordering the state or subject to the jurisdiction of the state; except that waters in treatment systems which are authorized by state or federal law, regulation, or permit, and which are created for the purpose of waste treatment are not considered to be waters in the state.

(41) Sustainable Fisheries-Descriptive of waterbodies which potentially have sufficient fish production or fishing activity to create significant long-term human consumption of fish. Sustainable fisheries include perennial streams and rivers with a stream order of three or greater; lakes and reservoirs greater than or equal to 150 acre-feet and/or 50 surface acres; all bays, estuaries, and tidal rivers. Waterbodies which are presumed to have sustainable fisheries include all designated segments listed in Appendix A unless specifically exempted.

(42) Total dissolved solids-The amount of material (inorganic salts and small amounts of organic material) dissolved in water and commonly expressed as a concentration in terms of milligrams per liter. The term is equivalent to the term filterable residue, as used in the publication entitled, *Standard Methods for the Examination of Water and Wastewater*.

(43) Total suspended solids-Total suspended matter in water, which is commonly expressed as a concentration in terms of milligrams per liter. The term is equivalent to nonfilterable residue, as used in the publication entitled, *Standard Methods for the Examination of Water and Wastewater*.

(44) Total toxicity-Toxicity as determined by exposing aquatic organisms to samples or dilutions of instream water or treated effluent. Also referred to as whole effluent toxicity or biomonitoring.

(45) Toxicity-The occurrence of adverse effects to living organisms due to exposure to toxic materials. Adverse effects caused by conditions of temperature and dissolved oxygen are excluded from the definition of toxicity. With respect to the provisions of §307.6(e) of this title (relating to Toxic Materials), which concerns total toxicity and biomonitoring requirements, adverse effects caused by concentrations of dissolved salts (such as sodium, potassium, calcium, chloride, carbonate) in source waters are excluded from the definition of toxicity. Source water is defined as surface water or groundwater that is used as a public water supply or industrial water supply (including a cooling-water supply). Source water does not include brine water that is produced during the extraction of oil and gas, or other sources of brine water that are substantially uncharacteristic of surface waters in the area of discharge. In addition, adverse effects caused by concentrations of dissolved salts which are added to source water by industrial processes are not excluded from the requirements of §307.6(e) of this title, except as specifically noted in §307.6(e)(2)(B) of this title, which concerns requirements for toxicity testing of 100% effluent. This definition of toxicity does not affect the standards for dissolved salts in this chapter other than §307.6(e) of this title. The standards implementation procedures contain provisions to protect surface waters from adverse effects of dissolved salts and methods to address the effects of dissolved salts on total toxicity tests.

(46) Toxicity biomonitoring-The determination of total toxicity. Documents which describe procedures for toxicity biomonitoring are cited in §307.6 of this title.

(47) Water-effects ratio-The quantifiable difference in the toxicity of a substance at an instream site, in comparison to the toxicity that was measured in experiments using laboratory water. The water-effects ratio provides an estimate of the bioavailability and toxicity of a substance in a particular waterbody. It may be used to establish site-specific criteria for aquatic life protection. The water-effects ratio is calculated as the toxic concentration (LC_{50}) of a substance in water at a particular site, divided by the toxic concentration of that substance as reported in lab toxicity tests. The site-specific criterion is equal to the water-effects ratio times the statewide aquatic life criterion in §307.6(c) of this title.

(48) Water quality management program-The commission's overall program for attaining and maintaining water quality consistent with state standards, as authorized under the Texas Water Code, the Texas Administrative Code, and the Clean Water Act, §§106, 205(j), 208, 303(e), and 314 (33 United States Code, §§1251 et seq).

(49) Wetland-An area (including a swamp, marsh, bog, prairie pothole, or similar area) having a predominance of hydric soils that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support and that under normal circumstances supports the growth and regeneration of hydrophytic vegetation. The term "hydric soil" means soil that, in its undrained condition, is saturated, flooded, or ponded long enough during a growing season to develop an anaerobic condition that supports the growth and regeneration of hydrophytic vegetation. The term "hydrophytic vegetation" means a plant growing in: water or a substrate that is at least periodically deficient in oxygen during a growing season as a result of excessive water content. The term "wetland" does not include irrigated acreage used as farmland; a man-made wetland of less than one acre; or a man-made wetland for which construction or creation commenced on or after August 28, 1989, and which was not constructed with wetland creation as a stated objective, including but not limited to an impoundment made for the purpose of soil and water conservation which has been approved or requested by soil and water conservation districts. If this definition of wetland conflicts with the federal definition in any manner, the federal definition prevails.

(50) Zone of initial dilution-The small area at the immediate point of discharge where initial dilution with receiving waters occurs, and which may not meet certain criteria applicable to the receiving water. A zone of initial dilution is substantially smaller than a mixing zone.

(51) Bioconcentration factor (BCF)-A unitless value describing the degree to which a chemical can be concentrated in the tissues of an organism in the aquatic environment. The BCF is the concentration of a chemical in one or more tissues of the organism divided by the average exposure concentration the organism received.

(b) Abbreviations. The following abbreviations apply to this chapter:

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

(5) Cl^{-1}-chloride.

(6) CR-contact recreation.

(7) (No change.)

(8) E-exceptional aquatic life use.

(9)-(11) (No change.)

(12) H-high aquatic life use.

(13) I-intermediate aquatic life use.

(14) (No change.)

(15) L-limited aquatic life use.

(16)-(23) (No change.)

(24) SO_4^{-2}-sulfate.

(25) TDS-total dissolved solids.

(26) USFDA-U.S. Food and Drug Administration.

(27) USGS-U.S. Geological Survey.

(28) WF-waterfowl habitat.

(29) WQM-water quality management.

(30) µg/L-micrograms per liter.

(31) ZID-zone of initial dilution.

§307.4. General Criteria.

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

(c) Radiological parameters. Radioactive materials shall not be discharged in excess of the amount regulated by Chapter 336 of this title (relating to Radiation Rules).

(d)-(e) (No change.)

(f) Temperature. Consistent with §307.1 of this title (relating to General Policy Statement) and in accordance with state water rights permits, temperature in industrial cooling lake impoundments and all other surface water in the state shall be maintained so as to not interfere with the reasonable use of such waters. Numerical temperature criteria have not been specifically established for industrial cooling lake impoundments, which in most areas of the state contribute to water conservation and water quality objectives. With the exception of industrial cooling impoundments, temperature elevations due to discharges of treated domestic (sanitary) effluent, and designated mixing zones, the following temperature criteria, expressed as a maximum temperature differential (rise over ambient) are established: freshwater streams -5 degrees Fahrenheit; freshwater lakes and impoundments-3 degrees Fahrenheit; tidal river reaches, bay and gulf waters-4 degrees Fahrenheit in fall, winter, and spring, and 1.5 degrees Fahrenheit in summer (June, July, and August). Additional temperature criteria (expressed as maximum temperatures) for classified segments are specified in Appendix A of §307.10 of this title (relating to Appendices A-E).

(g) Salinity.

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

(3) Concentrations and the relative ratios of dissolved minerals such as chlorides, sulfates, and total dissolved solids will be maintained such that attainable uses will not be impaired.

(h) Dissolved oxygen and aquatic life uses.

(1) Dissolved oxygen criteria for unclassified waters with aquatic life uses will be sufficient to support appropriate aquatic life use categories, in accordance with §307.7 of this title (relating to Site-specific Uses and Criteria). Except for perennial pools in intermittent streams and perennial streams and rivers in the northeast and southeast portion of the state defined as an area east of a line demarcated by Interstate Highway 35 and 35W from the Red River southward to the Williamson County and Travis County line and then northward and eastward of the Colorado River Basin divide to the Texas coast, those perennial streams, rivers, lakes, bays, estuaries, and other appropriate perennial waters which are not specifically listed in Appendix A or D of §307.10 of this title are presumed to have a high aquatic life use and corresponding dissolved oxygen criteria. Those perennial streams and rivers located in the northeast and southeast portion of the state (as defined above in §307.7(b)(3)(A)(ii)) which are not specifically listed in Appendix A or D of §307.10 of this title are presumed to have an intermediate aquatic life use and corresponding dissolved oxygen criteria. In accordance with results from statewide ecoregion studies, unclassified perennial streams in southeast and northeast Texas are assigned dissolved oxygen criteria as indicated in §307.7(b)(3)(A)(ii) of this title. Higher uses will be maintained where they are attainable.

(2) Intermittent streams which are not specifically listed in Appendix A or D of §307.10 of this title will maintain a 24-hour dissolved oxygen mean of 2.0 mg/L and an absolute minimum dissolved oxygen concentration of 1.5 mg/L. For intermittent streams with seasonal aquatic life uses, dissolved oxygen concentrations commensurate with the aquatic life uses will be maintained during the seasons in which the aquatic life uses occur. Unclassified intermittent streams with significant aquatic life uses created by perennial pools are presumed to have a limited aquatic life use and corresponding dissolved oxygen criteria. Additional definitions of significant aquatic life, perennial pools, and seasonal uses will be developed in the standards implementation procedures. Higher uses will be maintained where they are attainable.

(i) Bacteria. A fecal coliform criterion of not more than 200 bacteria per 100 ml shall apply to all water bodies not specifically listed in Appendix A of §307.10 of this title (relating to Appendices A-E). Application of this criterion shall be in accordance with §307.7(b)(1) of this title.

(j) (No change.)

(k) Assessment of unclassified waters. Waters which are not specifically listed in Appendices A or D of §307.10 of this title are designated for the specific uses that are attainable or characteristic of those waters. Upon administrative or regulatory action by the commission which affects a particular unclassified waterbody, the characteristics of the affected waterbody will be reviewed to determine which aquatic life uses are appropriate. Additional uses so determined shall be indicated in public notices for discharge applications. Uses which are not applicable throughout the year in a particular unclassified waterbody will be assigned and protected for the seasons in which such uses are attainable. Initial determinations of use shall be considered preliminary, and in no way preclude redeterminations of use in public hearings conducted by the commission under the provisions of the Texas Water Code. For unclassified waters where the presumed minimum uses or criteria specified in this section are inappropriate, site-specific standards may be developed in accordance with §307.2(d) of this title (relating to Modification of Standards). Uses and criteria will be assigned in accordance with this section and with §307.7(3) of this title. Procedures for assigning uses and criteria are described in the standards implementation procedures.

§307.5. Antidegradation.

(a) Application. The antidegradation policy and implementation procedures set forth in this section shall apply to actions regulated under state and federal authority which would increase pollutant loads to the water in the state. Such actions include authorized wastewater discharges, waste load evaluations, and any other miscellaneous actions, such as those related to man-induced nonpoint sources of pollution, which may impact the water in the state.

(b) Antidegradation policy. In accordance with the Texas Water Code, §26.003, it is the policy of the commission that:

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

(4) Authorized wastewater discharges or other activities will not result in the quality of any water being lowered below water quality standards without complying with federal and state laws applicable to water quality standards amendment.

(5)-(6) (No change.)

(c) Antidegradation implementation procedures.

(1) The commission staff will review any wastewater discharge permit application or amendment in accordance with permitting procedures described in the standards implementation procedures. This review will include a preliminary determination of the existing uses of the receiving water. These existing uses will be maintained and protected.

(2)-(6) (No change.)

(7) Additional implementation procedures for the antidegradation policy

are described in the standards implementation procedures.

§307.6. Toxic Materials.

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

(c) Specific numerical aquatic life criteria.

(1) Numerical criteria are established in Table 1 for those specific toxic substances for which adequate toxicity information is available, and which have the potential for exerting adverse impacts on water in the state.
Figure 1: §307.6(c)(1)

(2) Numerical criteria are based on ambient water quality criteria documents published by EPA. EPA guidance criteria have been appropriately recalculated to eliminate the effects of toxicity data for aquatic organisms which are not native to Texas, in accordance with procedures in the EPA guidance document entitled *Guidelines for Deriving Numerical Site-specific Water Quality Criteria* (EPA 600/3-84-099).

(3) (No change.)

(4) Ammonia and chlorine toxicity will be addressed by total toxicity biomonitoring requirements in subsection (e) of this section.

(5) Specific numerical aquatic life criteria for metals and metalloids in Table 1 apply to dissolved concentrations (unless otherwise stated), which can be estimated by filtration of samples prior to analysis, or by converting from total recoverable measurements in accordance with procedures approved by the commission in the latest revision of the standards implementation procedures. Specific numerical aquatic life criteria for non-metallic substances in Table 1 apply to total recoverable concentrations unless otherwise noted.

(6) Specific numerical acute criteria for toxic substances are applicable to all waters in the state except for small zones of initial dilution (ZIDs) at discharge points. Acute criteria may be exceeded within a ZID, but there shall be no lethality to aquatic organisms which move through a ZID, and the sizes of ZIDs are limited in accordance with §307.8 of this title. Specific numerical chronic criteria are applicable to all waters in the state with designated or existing aquatic life uses, except inside mixing zones and below critical low-flow conditions, in accordance with §307.8 of this title.

(7) For toxic materials for which specific numerical criteria are not listed in Table 1, the appropriate criteria for aquatic life protection may be derived in accordance with current EPA guidelines for deriving site-specific water quality criteria. When insufficient data are available to use EPA guidelines, the following provisions shall be applied in accordance with this section and §307.8 of this title:

(A) acute criteria will be calculated as 0.3 of the LC_{50} of the most sensitive aquatic organism; LC_{50} x (0.3)= acute criteria;

(B) concentrations of non-persistent toxic materials shall not exceed concentrations which are chronically toxic (as determined from appropriate chronic toxicity data or calculated as 0.1 of acute LC_{50} values) to the most sensitive aquatic organisms; LC_{50} x (0.1) = chronic criteria;

(C) concentrations of persistent toxic materials that do not bioaccumulate shall not exceed concentrations which are chronically toxic (as determined from appropriate chronic toxicity data or calculated as 0.05 of LC_{50} values) to the most sensitive aquatic organisms; and

(D) concentrations of toxic materials that bioaccumulate shall not exceed concentrations that are chronically toxic (as determined from appropriate chronic toxicity data or calculated as 0.01 of LC_{50} values) to the most sensitive aquatic organisms.

(8) For toxic substances where the relationship of toxicity is defined as a function of pH or hardness, numerical criteria are presented as an equation based on this relationship. Appropriate pH or hardness values for such criteria are listed for each basin in Table 2. The indicated pH and hardness values (Table 2) for each basin will be assumed unless sufficient data are available to derive segment specific pH and hardness values.
Figure 2: §307.6(c)(8)

(9) Additional site-specific factors may indicate that the numerical criteria listed in Table 1 are inappropriate for a particular waterbody. These factors are applied as a site-specific standards modification in accordance with §307.2(d) of this title (relating to Modification of Standards). The application of a site-specific standard must not impair an existing, attainable, or designated use. Factors which may justify a temporary variance or site-specific standards amendment include the following:

(A) background concentrations of specific toxics of concern in receiving waters, sediment, and/or indigenous biota;

(B) persistence and degradation rate of specific toxic materials;

(C) synergistic, additive, or antagonistic interactions of toxic substances with other toxic or nontoxic materials;

(D) measurements of total effluent toxicity;

(E) indigenous aquatic organisms, which may have different responses to particular toxic materials;

(F) technological or economic limits of treatability for specific toxic materials;

(G) bioavailability of specific toxic substances of concern, as determined by water-effect ratio tests or other analyses approved by the commission; and

(H) new information concerning the toxicity of a particular substance.

(d) Specific numerical human health criteria.

(1) Numerical human health criteria are established in Table 3.
Figure 3: §307.6(d)(1)

(2) Categories of human health criteria:

(A) (No change.)

(B) concentration criteria in freshwaters to prevent contamination of fish and other aquatic life to ensure that they are safe for human consumption. These criteria apply to freshwater which have sustainable fisheries, and which are not designated or used for public water supply (column B in Table 3);

(C) (No change.)

(3) Specific assumptions and procedures (except where noted in Table 3).

(A) Criteria were derived from information on toxicity in EPA's Integrated Risk Information Systems (IRIS) for both cancer potency slopes (q1*) and reference doses for non-carcinogens (Rfd). The values in Table 3 reflect values found in IRIS as of January 1994.

(B) For known or suspected carcinogens (Types A, B, B_2, or C in IRIS), an incremental cancer risk level of 10^{-5} (1 in 100,000) was used to derive criteria. A RfD (reference dose) was determined for noncarcinogens and for carcinogens for

which EPA has not derived cancer slope factors.

(C)-(F) (No change.)

(G) Numerical human health criteria were derived in accordance with the general procedures and calculations in the EPA guidance documents entitled *Technical Support Document for Water Quality-based Toxics Control* (EPA/505/2-90-001); and *Guidance Manual for Assessing Human Health Risks from Chemically Contaminated Fish and Shellfish* (EPA/503/8-89-002).

(H) If a calculated criterion to prevent contamination of drinking water and fish to ensure they are safe for human consumption (column A in Table 3) was greater than the applicable maximum contaminant level (MCL) in Chapter 290 of this title (relating to Water Hygiene), then the maximum contaminant level was used as the criterion. MCL's were updated February 1993.

(I) (No change.)

(4) Human health criteria for additional toxic materials will be adopted by the Commission as appropriate.

(5) Specific human health concentration criteria for water are applicable to waters in the state which have sustainable fisheries, and/or designation or use as a public drinking water supply, except within mixing zones and below harmonic mean stream flows, in accordance with §307.8 of this title. The following waters are considered to have sustainable fisheries:

(A) all designated segments listed in Appendix A of §307.10 of this title (relating to Appendices A-E), unless specifically exempted;

(B) perennial streams and rivers with a stream order of three or greater, as defined in §307.3 of this title (relating to Definitions and Abbreviations);

(C) lakes and reservoirs greater than or equal to 150 acre feet and/or 50 surface acres;

(D) all bays, estuaries, and tidal rivers and;

(E) any other waters which potentially have sufficient fish production or fishing activity to create significant long-term human consumption of fish.

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

(8) For toxic materials of concern for which specific human health criteria are not listed in Table 3, the following provisions shall apply:

(A) for known or suspected carcinogens (Types A, B, B_2, or C in IRIS), a cancer risk of 10^{-5} (1 in 100,000) shall be applied to the numerical criteria published in 57 FR 60848 December 22, 1992.

(B) for toxic materials not defined as carcinogens, the numerical criteria in 57 FR 60848 shall directly apply.

(C) in the absence of available criteria, numerical criteria may be developed from information available in IRIS and Quantitative Structure Activity Relationships Database (QSAR) and calculated in accordance with the provisions of §307.6(d)(3) of this title.

(9) Numerical criteria for bioconcentratable pollutants will be derived in accordance with the general procedures in the EPA guidance document entitled, *Assessment and Control of Bioconcentratable Contaminants in Surface Waters* (March 1991). The commission may develop discharge permit limits in accordance with the provisions of this section.

(10) Numerical human health criteria are expressed as total recoverable concentrations for nonmetals, and for mercury, and as dissolved concentrations for other metals and metalloids.

(11) Additional site-specific factors may indicat· that the numerical human health criteria listed in Table 3 are inappropriate for a particular waterbody. These factors are applied as a site-specific standards modification in accordance with §307.2(d) of this title (relating to Modification of Standards). The application of site-specific criteria shall not impair an existing, attainable, or designated use or affect human health. Factors which may justify a temporary variance or site-specific standards amendment include the following:

(A) background concentrations of specific toxics of concern in receiving waters, sediment, and/or indigenous biota;

(B) persistence and degradation rate of specific toxic materials;

(C) synergistic or antagonistic interactions of toxic substances with other toxic or nontoxic materials;

(D) technological or economic limits of treatability for specific toxic materials;

(E) bioavailability of specific toxic substances of concern;

(F) local water chemistry and other site-specific conditions which may alter the bioconcentration, bioaccumulation, or toxicity of specific toxic substances;

(G) site-specific differences in the bioaccumulation responses of indigenous, edible aquatic organisms to specific toxic materials;

(H) local differences in consumption patterns of fish and shellfish or drinking water, but only if any changes in assumed consumption rates will be protective of the local population that frequently consumes fish, shellfish, or drinking water from a particular waterbody and;

(I) new information concerning the toxicity of a particular substance.

(e) Total toxicity.

(1) (No change.)

(2) General provisions for controlling total toxicity.

(A) Dischargers whose effluent has a significant potential for exerting toxicity in receiving waters will be required to conduct whole effluent toxicity biomonitoring at appropriate dilutions.

(B) In addition to the other requirements of this section, the effluent of discharges to waters in the state shall not be acutely toxic to sensitive species of aquatic life, as demonstrated by effluent toxicity tests. Toxicity testing for this purpose shall be conducted on samples of 100% effluent, and the criterion for acute toxicity shall be mortality of 50% or more of the test organisms after 24 hours of exposure. These observations for acute toxicity may be conducted during either acute or chronic toxicity tests, which are described in the standards implementation procedures. This provision does not apply to mortality that is a result of an excess, deficiency, or imbalance of dissolved inorganic salts (such as sodium, calcium, potassium, chloride, carbonate) which are in the effluent and are not listed in Table 1 in §307.6(c) of this title or which are in source waters.

(C) The latest revisions of the following EPA publications provide methods for appropriate biomonitoring procedures: *Methods for Measuring the Acute Toxicity of Effluents and Receiving Waters to Freshwater and Marine Organisms, Short-term Methods for Estimating the Chronic Toxicity of Effluents and Receiving*

Waters to Freshwater Organisms, Short-term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Marine and Estuarine Organisms, and the *Technical Support Document for Water Quality-based Toxics Control*. The use of other procedures approved by the commission is also acceptable. Toxicity tests must be conducted using representative, sensitive aquatic organisms as approved by the commission, and any such testing must adequately determine if toxicity standards are being attained.

(D) If toxicity biomonitoring results indicate that a discharge is exceeding the restrictions on total toxicity in this section, then the permittee shall conduct a toxicity identification evaluation and toxicity reduction evaluation in accordance with permitting procedures of the commission. As a result of a toxicity reduction evaluation, additional conditions may be established in the permit. Such conditions may include total toxicity limits, chemical specific limits, and/or best management practices designed to reduce or eliminate toxicity. Where sufficient to attain and maintain applicable numeric and narrative state water quality standards, a chemical specific limit rather than a total toxicity limit may be established in the permit. Where conditions may be necessary to prevent or reduce effluent toxicity, permits shall include a reasonable schedule for achieving compliance with such additional conditions.

(E) If a permittee demonstrates, using the toxicity identification evaluation and toxicity reduction evaluation procedures, that diazinon is the primary cause of total toxicity, and that diazinon is ubiquitous within the wastewater system, the toxicity will be addressed in §307.6(e)(2)(E)(i) and (ii) of this title. If diazinon is not the primary cause of total toxicity, or if the permittee does not proceed with due diligence in controlling and investigating toxicity, or if diazinon is not ubiquitous within the wastewater system, the toxicity may be addressed in accordance with §307.6(e)(2)(D) of this title.

(i) the permittee will be required to implement a public education and awareness campaign designed to control the introduction of diazinon into the wastewater system, and the permittee will be required to conduct an investigation into the sources of diazinon; and

(ii) the permittee will be required to monitor for diazinon.

(F) Discharge permit limits based on total toxicity may be established in consideration of site-specific factors, but the application of such factors shall not result in impairment of an existing, attainable, or designated use. These factors are applied as a site-specific standards modification in accordance with §307. 2(d) of this title. A demonstration that uses are protected may consist of additional effluent toxicity testing, instream monitoring requirements, and/or other necessary information as determined by the commission. Factors which may justify a temporary variance or site-specific standards amendment include the following:

(i) background toxicity of receiving waters;

(ii) persistence and degradation rate of principal toxic materials which are contributing to the total toxicity of the discharge;

(iii) site-specific variables which may alter the impact of toxicity in the discharge; and

(iv) indigenous aquatic organisms, which may have different levels of sensitivity than the species used for total toxicity testing; and

(v) technological, economic, or legal limits of treatability or control for specific toxic materials.

§307.7. Site-Specific Uses and Criteria.

(a) Uses and numerical criteria are established on a site-specific basis for classified segments in Appendix A of §307.10 of this title (relating to Appendices A-E). Site-specific uses and numerical criteria may also be applied to unclassified waters in accordance with §307.4(h) of this title (relating to General Criteria) and §307.5(c) of this title (relating to Antidegradation). Site-specific criteria apply specifically to substances attributed to waste discharges or the activities of man. Site-specific criteria do not apply to those instances in which surface waters exceed criteria limits due to natural phenomena. The application of site-specific uses and criteria is described in §307.8 of this title (relating to the Application of Standards) and §307.9 of this title (relating to the Determination of Standards Attainment).

(b) Appropriate uses and criteria for site-specific standards are defined as follows:

(1) Recreation. Recreational use consists of two subcategories–contact recreation waters and noncontact recreation waters. Classified segments will be designated for contact recreation unless elevated fecal coliform bacteria concentrations frequently occur due to sources of pollution which cannot be reasonably controlled by the existing regulations or contact recreation is considered unsafe for other reasons such as ship or barge traffic. In a classified segment where contact recreation is considered unsafe for reasons unrelated to water quality, a designated use of noncontact recreation may be assigned the fecal coliform criteria normally associated with contact recreation. A designation of contact recreation is not a guarantee that the water so designated is completely free of disease-causing organisms. Fecal coliform bacteria, although not generally pathogenic, are indicative of potential contamination by feces of warm blooded animals. The criteria for contact recreation are based on these indicator bacteria, rather than direct measurements of pathogenic bacteria. Even where the concentration of fecal coliform is below the criteria for contact recreation, there is still some risk of contracting waterborne diseases.

(A) Contact recreation waters.

(i)-(ii) (No change.)

(B) Noncontact recreation waters.

(i)-(ii) (No change.)

(2) Domestic water supply.

(A) Use categories. Domestic water supply consists of two use subcategories–public water supply and aquifer protection.

(i) Public water supply. Segments designated for public water supply are those known to be used as the supply source for public water systems, as defined by Chapter 290 of this title (relating to Water Hygiene).

(ii) (No change.)

(B) Use criteria. The following use criteria apply to both domestic water supply use subcategories.

(i) Radioactivity associated with dissolved minerals in the freshwater portions of river basin and coastal basin waters should not exceed levels established by drinking water standards as specified in Chapter 290 of this title unless the conditions are of natural origin.

(ii) Surface waters utilized for domestic water supply shall not exceed toxic material concentrations that prevent them from being treated by conventional surface water treatment to meet drinking water standards as specified in Chapter 290 of this title.

(iii) Chemical and microbiological quality of surface waters used for domestic water supply should conform to drinking water standards as specified in Chapter 290 of this title.

(3) Aquatic life. The establishment of numerical criteria for aquatic life is highly dependent on desired use, sensitivities of usual aquatic communities, and local physical and chemical characteristics. Five subcategories of aquatic life use are established. They include limited, intermediate, high, and exceptional aquatic life and oyster waters. Aquatic life use subcategories designated for segments listed in Appendix A of §307.10 of this title recognize the natural variability of aquatic community requirements and local environmental conditions.

(A) Dissolved oxygen.

(i) The definitions and associated dissolved oxygen criteria for limited, intermediate, high, and exceptional aquatic life use subcategories are indicated in Table 4.

Figure 4: §307.7(b)(3)(A)(i)

(ii) The dissolved oxygen criteria and associated critical low-flow values in Table 5 apply to unclassified streams which have significant aquatic life uses, and to streams which are specifically listed in Appendix D of §307.10 of this title. The criteria in Table 5 apply to all parts of Texas which are east of a line defined by Interstate Highway 35 and 35W from the Red River to the community of Moore in Frio County, and by U.S. Highway 57 from the community of Moore to the Rio Grande. The critical low-flow values in Table 5 (at the appropriate stream bedslope) will be utilized as headwater flows to determine discharge effluent limits necessary to achieve dissolved oxygen criteria. The required effluent limits will be those necessary to achieve each level of dissolved oxygen (as defined in §307.7(b)(3)(A)(i), Table 4) at or below an assigned or presumed aquatic life use. Presumed aquatic life uses will be in accordance with those required by §307.4(h) of this title. The dissolved oxygen criteria in Table 5 do not apply to tidal streams or streams which are specifically listed in Appendix A of §307.10 of this title.

(iii) The dissolved oxygen criteria in Table 5 are based upon data from the commission's least impacted stream study (Texas Aquatic Ecoregion Project). Results of this study indicate a strong dependent relationship for average summertime background dissolved oxygen concentrations and several hydrologic and physical stream characteristics-particularly bedslope (stream gradient) and stream flow. The dissolved oxygen criteria in Table 5 are derived from a multiple regression equation for the eastern portion of Texas as defined in §307.7(b)(3)(A)(ii) of this title. Further explanation of the development of the regression equation and its application will be contained in the standards implementation procedures.

Figure 5: §307.7(b)(3) (A)(iii)

(B) Oyster waters.

(i)-(iii) (No change.)

(4)-(5) (No change.)

§307.8. Application of Standards.

(a) Low-flow conditions.

(1) The following standards do not apply below seven-day, two-year low-flows:

(A) site-specific criteria, as defined in §307.7 of this title (relating to Site-specific Criteria and Uses) and listed for each classified segment in Appendix A of §307.10 of this title (relating to Appendices A-E);

(B)-(G) (No change.)

(2) (No change.)

(3) Low-flow criteria in Appendix B of §307.10 of this title are solely for the purpose of defining the flow conditions under which water quality standards apply to a given waterbody. Low-flow criteria listed in Appendix B of §307.10 of this title are not for the purpose of regulating flows in water bodies in any manner or requiring that minimum flows be maintained in classified segments.

(4) Low-flow criteria defined in this section and listed in Appendix B of §307.10 of this title apply only to river basin and coastal basin waters. They do not apply to bay or gulf waters or reservoirs or estuaries.

(5) Seven-day, two-year low-flows (7Q2) and harmonic mean flows in Appendix B of §307.10 of this title were calculated from historical U.S. Geological Survey (USGS) daily streamflow records. The low-flow criterion was set at 0.1 of one cubic foot per second (ft^3/s) when the calculated 7Q2 was equal to or less than 0.1 of one ft^3/s.

(6)-(8) (No change.)

(b) Mixing zones. A reasonable mixing zone will be allowed at the discharge point of permitted discharges into surface water in the state, in accordance with the following provisions.

(1) The following portions of the standards do not apply within mixing zones:

(A) site-specific criteria, as defined in §307. 7 of this title and listed for each classified segment in Appendix A of §307. 10 of this title;

(B)-(H) (No change.)

(2)-(3) (No change.)

(4) Water quality standards do not apply to treated effluents at the immediate point of discharge-prior to any contact with either ambient waters or a dry streambed. However, effluent total toxicity requirements may be specified to preclude acute lethality near discharge points, or to preclude acute and chronic instream toxicity.

(5)-(10) (No change.)

(c) (No change.)

(d) Once-through cooling water discharges. When a discharge of once-through cooling water does not measurably alter intake concentrations of a pollutant, then water-quality based effluent limits for that pollutant are not required. For facilities which intake and discharge cooling-water into different waterbodies, this provision only applies if water quality and applicable water quality standards in the receiving water are maintained and protected.

§307.9. Determination of Standards Attainment.

(a) (No change.)

(b) Collection and preservation of water samples.

(1) (No change.)

(2) Bacterial and temperature determinations will be conducted on samples or measurements taken within one foot of the surface. Depth collection procedures for chloride, sulfate, total dissolved solids, dissolved oxygen, and pH to determine standards attainment may vary depending on the waterbody being sampled. Where standards apply to the mixed surface layer, the depth of this layer is determined in accordance with procedures in the latest published edition of the *Texas Surface Water Quality Inventory*. Standards for chloride, sulfate, total dissolved solids, and pH are applicable to the mixed surface layer, but a single sample taken near the surface (at a depth of approximately one foot) normally provides an adequate representation of these parameters. For dissolved oxygen, the following procedures are generally applicable:

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

(3) (No change.)

(c) Sample analysis.

(1) Numerical values. Numerical values in the water quality standards shall be determined by analytical procedures recommended in the most recently published edition of the book entitled *Standard Methods for the Examination of Water*

and Wastewater, the quality assurance program plan for the commission, Title 40 Chapter 136 of the Code of Federal Regulations, or other reliable methods acceptable to the commission.

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

(d) Sampling periodicity and evaluation.

(1) Chloride, sulfate, total dissolved solids (TDS). Standards attainment determinations shall be based on the average of measurements taken on at least four different dates within one year. Results from all monitoring stations within the segment will be averaged to allow for reasonable parametric gradients. TDS determinations may be based on measurements of specific conductance. Conversion factors are presented in the latest publication of the *Texas Surface Water Quality Inventory* or may be based on additional site-specific data.

(2)-(6) (No change.)

§307.10. Appendices A-E. The following appendices are integral components of this chapter of the Texas Surface Water Quality Standards:

(1) Appendix A-Site-specific Uses and Criteria for Classified Segments; Figure 6: §307.10(1)

(2) Appendix B-Low-Flow Criteria;
Figure 7: §307.10(2)

(3) Appendix C-Segment Descriptions;
Figure 8: §307.10(3)

(4) Appendix D-Site-specific Receiving Water Assessments;
Figure 9: §307.10(4)

(5) Appendix E-Site-specific Criteria;
Figure 10: §307.10(5)

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on June 22, 1995.

TRD-9507592 Lydia Gonzalez-Gromatzky
Acting Director, Legal Division
Texas Natural Resource Conservation Commission

Effective date: July 13, 1995

Proposal publication date: December 30, 1994

For further information, please call: (512) 239-4640

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Chapter 321. Control of Certain Activities by Rule

The Texas Natural Resource Conservation Commission (TNRCC or Commission) adopts the repeal of §321.34, new §321.34, and §§321.181-321.198, relating to Concentrated Animal Feeding Operations (CAFOs). New §321.34 and §§321.181-321.198 are adopted with changes to the proposed text as published in the March 21, 1995, issue of the *Texas Register* (20 TexReg 2028). The repeal of §321.34 is adopted without changes and will not be republished.

The purpose of the rules is to streamline and consolidate the existing authorization procedures for new CAFOs under the Texas Water Code, Chapter 26 and the Texas Clean Air Act, while still maintaining air and water quality. Such streamlining shall be accomplished by: allowing all new and certain existing permitted CAFOs to be authorized by rule if certain conditions are met; making consistent state and federal requirements; avoiding the duplication of actions of the commission and the State Soil and Water Conservation Board; shortening the application review period and making more explicit performance standards and best management practices to be utilized and/or to be met; providing for both air and water quality issues to be addressed in a simultaneous and comprehensive manner; and focusing the agency's limited resources on those areas of the state being designated under these rules as Dairy Outreach Program Areas.

A public hearing was held on January 30, 1995, in Austin. The comment period closed on February 9, 1995. Comments were received from the following groups, associations, businesses, industries, public officials, and educational entities that provided comment in general support of the rules: one state senator; the Texas Agricultural Extension Service; Texas Pork Producers Association; Texas Farm Bureau; Texas Poultry Federation; Texas Cattle Feeders Association; Associated Milk Producers, Incorporated; and Texas Association of Dairymen.

The following groups, associations, businesses, industries, public officials, and educational entities provided comment in general disagreement with the proposed rules: Two state representatives, the Sierra Club, Cross Timbers Concerned Citizens, Sabine River Authority, Brazos River Authority, Cities of Waco, Clifton, Meridian, Cleburne, Dallas, and concerned citizens.

There were two main categories of comments: those who are in general support of the rules as proposed; and those who were in general disagreement with the rules and wanted the proposed rules to be modified to take into account their concerns for their particular watershed or area of the state.

Those in general support of the rules stated that although they had suggested changes to specific sections of the rules they thought the TNRCC was pursuing the proper course of action by adopting the United States Environmental Protection Agency (EPA) Region VI General Permit for CAFOs as the base permit for the Subchapter K rules. They felt this would make it easier for CAFO owners and operators in the state to comply with one set of common regulations versus trying to comply with two sets of regulations with different requirements. In addition, the commenters expressed support for the permit-by-rule process established in these rules. The process established under these rules allows for a consolidated and streamlined process while still maintaining protection of the state's air and water resources. Whereas, in previous rules an owner or operator would have to make two separate applications (one for water quality and one for air quality) and go through two separate processes to obtain two separate authorizations to operate a CAFO facility, while under these rules the same person would need to file one application, and go through a single process to obtain an authorization to operate a CAFO facility.

These comments expressed concern about the perceived limited public involvement in determining whether CAFOs can meet the requirements of Subchapter K. These comments also expressed the opinion that notice and opportunity to third parties for an evidentiary hearing on an individual permit basis provided greater assurance that water quality would be more protected than authority granted under these activities by rule with only certain larger CAFOs required to submit an application subject to public notice and comment. Finally, these comments stated that existing as well as the proposed rules were insufficient to address the particular water quality problems in the respective watersheds.

One commenter recommended that §321.181(a) be amended by deleting the comma and inserting "and" after "this section...". The commission disagrees with the correction as submitted, but agrees that clarification is needed and has modified the language to delete the comma and insert "or" after "this section...".

Two commenters expressed concern regarding continued use of the 25-year, 24-hour rainfall event as the design standard indicating it has proven to be effective due to chronic rainfall events. The commission disagrees and believes that proper design of facilities based on the hydrologic balance, along with proper operation and maintenance will minimize the potential for discharges. In addition, this design standard is consistent with the EPA National Pollution Discharge Emissions Standards (NPDES) General Permit for CAFOs and provides for consistency between federal and state requirements.

One commenter questioned whether small streams and rivers and lakes are protected and suggested that §321.181 should be clarified to indicate what is meant by waters in the state. The commission believes that the term "waters in the state" is clearly defined in the Water Code, Chapter 26, which is referenced in this section. By definition, waters in the state includes all lakes, springs, rivers, streams and creeks, etc., which are protected under these rules.

One commenter questioned whether fly problems constitute a nuisance. The commission replies that flies and other animal related pests are not considered a condition of air pollution as provided in the definition of nuisance in §321.182 (relating to Definitions). Specific provisions addressing fly management are not contained in these rules. However, basic conditions and operational requirements for CAFOs contained in these

rules will indirectly serve to minimize potential fly problems.

One commenter was concerned that the definition of nuisance and its application in §321.181(c) were not consistent. The commission disagrees and believes that the term nuisance as defined and utilized in these rules is consistent with the definition in Chapter 116 of this title.

With regard to proposed §321.182 providing definition of terms used in this subchapter one commenter stated that the definition of "affected person" was too narrow and they inquired about the meaning of "personal, justiciable interest" in the definition of "Affected person". The Commission disagrees that the proposed rules substantially alter the use of this term as it is construed under state law. However, this definition is unnecessary for these rules since authorizations under Subchapter K are granted by rule subject, in certain cases, to public notice and comment, and, therefore, the term has been deleted.

Several commenters suggested that the "agronomic rate" definition be modified by deleting the word "growth" from the definition statement. The commission disagrees and states that the definition in the proposed rules is consistent with EPA requirements.

One commenter urged that the definition of "animal unit" be modified to consider total live weight of animals versus the multiplying factors used in the proposed rules. The Commission disagrees and states that one of the major reasons for consideration of these rules is to make the state and federal requirements the same, so that there is one set of standards for the CAFO industry in Texas.

In the definition of "CAFO" in §321.182, several commenters urged the following changes: redefining Subchapter B to increase the number of birds under confinement before being considered a CAFO; rewriting Subchapter B to clarify if anyone indirectly discharges they are also considered a CAFO; clarifying what the term "day" means in the definition-24 hours or any part of a day; clarifying the confusion of a C referring to A or B or both; and deleting the provision related to feed mills under Subpart C. The agency disagrees and states that a major element of the rules is to provide for consistency between state and federal requirements, therefore it is not appropriate to increase the poultry numbers under Subpart B. It is clear under these rules that if any operation is determined by the Executive Director to be discharging they will be subject to the provisions of these rules. The term "day" under these rules is intended to mean any part of a day. It is not the intention of the commission to consider this issue on an hourly basis. The commission feels that Subparts A, B, and C are clear in their intent and purpose, and also consistent with the EPA definitions. The commission disagrees with the request to delete the provision associated with feed mills, however it does agree, in part, to clarify that this part of the definition is for air quality purposes only, and has therefore modified the language.

Several commenters suggested that the definition of "chronic and catastrophic rainfall" should be more specific as to what is meant by chronic. One commenter suggested a water balance equation to determine when a chronic condition would exist, while another commenter stated that this definition would change the state's no discharge policy. The commission believes that the definition for chronic rainfall events is clear and that it is consistent with the EPA requirements. The commission also believes that provisions under §321.192 will not alter the state's no discharge policy, but rather will provide greater environmental protection by reducing potential impacts from uncontrolled discharges.

One commenter urged the agency to adopt a definition for "disposal area" which would include all land used as a part of the CAFO including all pens, lots, ponds and disposal areas and any other types of control or retention facilities, including all areas used for off-site land application of manure whether or not that land is owned, operated or controlled by the applicant. The commission disagrees and states that the existing definitions and provisions under the subchapter are consistent with existing requirements of the state and federal regulations.

In the definition of "hydrologic connection" several commenters urged the agency to delete references to aboveground corridors since this was not in the EPA requirements and is already covered under the no discharge policy statement. The commission agrees and amends the definition accordingly.

Several commenters urged the agency to modify the definition of "no discharge" to change "animal feeding operation" to "concentrated animal feeding operation" indicating that animal feeding operations are not regulated under this subchapter and are not subject to the no discharge requirements. The commission disagrees. Although it is true that animal feeding operations as defined under this subchapter are not required to perform certain functions under these rules, they are required to adhere to the upfront requirement that their operation cannot discharge, except in accordance with the provisions of this subchapter.

In the definition of "nuisance" several commenters wanted to know what the quantitative standards or criteria were for determining nuisance and who applies them. In addition, one commenter wanted to know why the definition did not include water contaminants. The commission replies, that the standards for determining if emissions are considered a nuisance come from the definition itself. There are no numerical standards or odor units associated with nuisance in the proposed rule. Rather such standards are narrative form. Enforcement of the nuisance rule typically occurs after the agency has received a complaint and after a trained investigator from one of the regional offices has made an inspection. Narrative criteria for nuisance include frequency, intensity, duration, and objectionability. The investigator must determine whether emissions are of such concentration and duration to adversely affect human health or welfare or interfere with the normal use and enjoyment of property. The term does not address water quality since related standards already exist under Chapter 307 of this title relating to Texas Surface Water Quality Standards. Since contaminants are not authorized to be discharged into water in the state except in extraordinary rainfall events, no numeric criteria for water quality outside of those now contained in Chapter 307 of this title, relating to Texas Surface Water Quality Standards, are necessary.

Several commenters urged the commission to make the following changes to the definition "technical merit": one mile limitation should be removed because it is too narrow and arbitrary; concerns about the required showing of detrimental impacts to ground water underlying the CAFO when impacts could be felt miles away; and the definition should be clarified to ensure that an ordinary citizen may be able to offer comment without the aid of an expert. The commission disagrees with expanding the one-mile limitation. This provision is intended to focus evaluation efforts to the area directly associated with the proposed facility. Any potential impacts beyond the one-mile zone should be measurable/discernable within the one-mile zone, and thus allow for due consideration of the proposed facility. Additionally, the commission believes that some demonstration that a technical merit issue exists is justified to reasonably determine whether a potentially costly and lengthy delay and/or possible hearing is warranted. Such *prima facie* demonstration of technical merit would not require a conclusive demonstration which would necessitate expert testimony. The proposed rule has been changed to clarify the commission's intent.

In the definition of "technical merit", several other commenters suggested that the phrase "may result in detrimental impact" be changed to "will result in detrimental impact". The commission agrees that mere speculation that detrimental impacts may occur would not, in itself, be enough to demonstrate technical merit. Some evidence must be shown in order to reach the technical merit threshold, for example, photographs of a recharge feature not identified in the application, maps showing drinking water wells located within required buffer zones, or other information of this nature. The change suggested by the commenter[s], however, is not adopted. The commission is concerned that this change would decrease an applicant's flexibility in resolving a comment that has demonstrated technical merit, since the agency would have concluded at an early stage in the process that the application would certainly have a detrimental environmental impact.

With regard to proposed §321.183 determining the applicability of who is subject to the provisions of this subchapter, several commenters suggest the following general comments: these rules violate the Texas Water Code, §26. 028; and that a pollution prevention plan should be required for all dairies regardless of size. The commission disagrees that the rules violate the Texas Water Code, §26.028. Section 26.028 applies to individually issued permits. However, authorizations under Subchapter K are by rule in accordance with §26.040 of the Code, rather than by permit subject to §26.028. The commission disagrees with the comment that a pollution prevention plan (PPP) should be required for all facilities and believes that ap-

propriate provisions have been established under §321.183(f) which require all animal feeding operations to locate, manage and construct necessary facilities to protect air and water quality.

One commenter suggested that there is no evidence for the agency to treat CAFOs as authorizations by rule under Texas Water Code, §26.040. The commission disagrees with the comment that the rules are not authorized by the Texas Water Code, §26.040. Section 26.040 provides that activities may be authorized by rule rather than individual permit if the quality of water in an area is adversely affected or threatened by the combined effects of several relatively small-quantity discharges of waste for which it is not practical to issue individual permits or is unnecessarily burdensome to the waste discharger and the commission. These rules prohibit the discharge of wastewater except in cases of extraordinary stormwater events. Thus, they meet the criteria under §26.040 for activities which are authorized to discharge relatively small quantities. Additionally, to require individual permits for these numerous no-discharge facilities would be unreasonably burdensome to both the agency and the regulated community.

In relation to §321.183(a), several commenters stated that the commission should make the provisions under this subsection apply to all CAFOs including those now authorized under Subchapter B of this chapter. The commission disagrees and states that it is within the commission's authority to allow existing CAFOs to operate under the provisions of Subchapter B, while applying a new standard to those new CAFOs beginning operation after the effective date of these rules. These rules still allow the commission to pursue the appropriate requirements, conditions or level of compliance against any facility which does not protect the natural resources of this state.

In relation to §321.183(e), several commenters expressed the following: it is unclear whether a permit which must be obtained by facilities with more than 300 animal units is a contested case hearing permit or a permit-by-rule; all CAFOs in the Dairy Outreach Program Areas (DOPAs) should be required to obtain site specific individual permits; CAFOs in the DOPAs should remain under Subchapter B of this chapter for site specific review and contested case option; the Bosque River watershed should be excluded from Subchapter K; and animal thresholds for permitting should be the same for all areas across the state. In response to these comments, the commission has clarified that Subchapter K provides that all new and certain existing CAFOs may be authorized by rule, but that facilities of a certain size and location are required to submit an application, subject to public notice and comment, to obtain such authorization under Subchapter K. The application process and notice and opportunity for comment provided under Subchapter K for new CAFOs of a certain size and location are to ensure that facilities with a greater potential for waste generation meet the requirements of Subchapter K. The commission further responds that individually issued permits, whether as currently provided by Subchapter B, chapter 321, or under Subchapter K suggested by the commenter, do not provide greater water quality protection than authorization by rule.

One commenter wanted to know why under §321.183(f) new CAFOs were being prohibited over the Edwards Aquifer recharge zone and not others. The commission responds that the Edwards Aquifer has been designated as a sole source aquifer by EPA because of its unique hydro-geologic characteristics, susceptibility to rapid and direct contamination through recharge features from surface activities and its use by the San Antonio metropolitan area as a sole source of drinking water supply. Thus, special protective measures are warranted. The commission has established in these rules a clear standard that any CAFO locating near a recharge feature will have to address any potential impacts that operation will have in association with the corresponding ground water supply.

One commenter wanted the agency to clarify §321.183(g) to say whether or not an animal feeding operation would have to have a PPP, and if so what would be the number of head which would trigger such a requirement. The commission agrees that additional clarification is needed. Facilities defined as concentrated animal feeding operations in §321.182(A) are required to obtain a permit (which includes the PPP), while those defined under paragraph (B) of this definition are only required to develop and implement a PPP.

For clarification, §321.183(g) has been modified by adding a first sentence which reads: "All concentrated animal feeding operations which are authorized under this subchapter must develop and implement a pollution prevention plan."

Several commenters urged the commission to delete the phrase "physical construction and/or" from §321.183(h) because construction was not an activity the agency is empowered to regulate. The commission disagrees with this comment in part. The commission has authority to regulate construction activities which have the potential to contaminate water in the state. However, the proposed rule has been revised to clarify the commission's intent to only regulate activities with such potential. A provision has been added requiring the registration and inspection by the Executive Director of all CAFOs greater than 300 animal units which are located in the Dairy Outreach Program Areas and are not required to file an application under this subchapter prior to their being authorized to operate. Such facilities can not commence operation until the Executive Director has determined that the facilities have been constructed in accordance with the provisions of this subchapter.

In relation to §321.183(i), several commenters suggested that an additional sentence be added to the subsection clarifying that any CAFO holding a permit under Chapter 116 of this title would continue to operate under such a permit and be subject to the permit renewal, amendment and transfer provisions of Chapter 116. The commission agrees and has made the appropriate changes to the subsection.

Several commenters suggested that §321.183(k) be modified to do the following: the ability to get a Texas State Soil and Water Conservation Board (TSSWCB) certified water quality management plan should be limited to CAFOs with animal numbers less than those required to get a permit under either Subchapter B or K; and replace CAFO with animal feeding operation to make it clear that if a facility does not hold a certified water quality management plan from the TSSWCB they are covered under this subchapter. The commission disagrees that any further modification of subsection (k) is needed. The TNRCC and the TSSWCB have developed a Memorandum of Agreement (MOA) which clearly states how the two agencies will coordinate on this issue. The issues raised under these comments are specifically addressed in the MOA which clearly indicate that the TSSWCB will only certify water quality management plans for those facilities which are not required to obtain a permit under TNRCC rules. In addition, those facilities who do not wish to voluntarily obtain a water quality management plan with the TSSWCB will be under this agency's jurisdiction.

Several commenters urged that §321.183(l) be rewritten to do the following: not allow the transfer of authorization from Subchapter B to Subchapter K; not allow unconditional transfer from Subchapter B to Subchapter K without meeting the additional requirements of this subchapter and require all renewals, amendments and transfers of permits under Subchapter B to meet additional requirements of Subchapter K; and all CAFOs in the DOPAs should not be allowed to shift from Subchapter B to Subchapter K. The intent of subsection (l) is to enable existing facilities to transfer authorization to this subchapter without meeting selected limitations related to §321.183 (relating to Application Requirements). Specifically, these include provisions not appropriate for existing facilities, such as buffer distance requirements and certification of no hydrologic connection. However, the commission agrees that clarification is needed regarding requirements for facilities seeking authorization under Subchapter K, and language has been added to subsection (l) .

One commenter suggested that §321.183(l) needed to define the process for converting from Subchapter B to Subchapter K, while another commenter asked if the conversion from Subchapter B to subchapter K would require the filing of an application. The commission disagrees and states that the language of this subsection is self-explanatory in that the conversion under this subsection has to be a request in writing by the owner/operator, and that the conversion will take place without notice and hearing.

With regard to §321.184 which establishes the requirements for an application for authorization under Subchapter K, several commenters offered the following general comments: rules are lax on setting up requirements for the kinds of land that can be used for irrigation and application fields; rules should require specific buffer distances from streams and have specific requirements about highly erodible land; and application forms should be published with the final rule

or proposed as own separate rule at later time. The commission believes that the rules must allow for consideration of the range of edaphic and climatic conditions which may be encountered, as well as the range of potential management options which may be utilized Provisions for the use and consideration of site-specific characteristics are included and recommended The commission also disagrees with the recommendation to publish the application form, since this would reduce flexibility and the ability to update forms as technology changes

One commenter suggested that §321 184(c) be clarified to have a provision for later completion of a liner certification because a PPP filed with the application for a proposed facility will not have a completed liner certification. The commission agrees and language has been added to provide for submission of liner certification after facilities have been completed.

One commenter asked the commission to explain what "applicable fee" under §321.184(c)(2) means. The commission responds that the applicable fee for facilities authorized under Subchapter K would be $350 for a new application or major amendment, $150 for a minor amendment or $315 for a permit renewal as required by Chapter 305 of this title (relating to Consolidated Permits).

One commenter urged the agency to modify §321.184(c)(7) to add the requirement of the applicant showing the location of all "springs, lakes, ponds, and water supply reservoirs downstream of the facility " The commission disagrees and states that it considered this issue and believes the existing requirement in the rules of notifying a regional body such as a river authority was sufficient, since river authorities are involved with most of the water supply reservoirs in the state Furthermore, since the authorization prohibits the discharge of any waste except in extraordinary stormwater events, the existence and location of all waterbodies is unnecessary to determine what is required to prevent an authorized discharge

One commenter requested the commission change §321.184(c)(5) and (9) so as to not have the limitation on disposal areas and to require certain information be provided for any off-site disposal of waste in the DOPAs. The commission responds that one reason why off-site disposal areas not owned by the CAFO operator are not included in the rules is that persons who dispose of another's waste under contract or other agreement must still apply such waste in a manner which is considered beneficial reuse and subject to the no discharge provision as specified under the Texas Water Code, §226.121.

One commenter urged the agency to modify the requirement under §321 184(c) (10) to require the certification that no recharge features exist be limited to only those areas where animal confinement and waste treatment take place and to not include areas of land application. The commission disagrees and states that the potential for contamination from a land application area is just as serious a threat where recharge features exist as in the confinement and waste treatment areas.

One commenter requested that the agency require the applicant to show proof of the absence of recharge zones. The commission agrees that all recharge zone/features associated with a facility must be identified. However, specific provisions are stipulated under §321 184 (c)(11) for certification of a plan to provide protection for such recharge zone/features where they are found to exist. The commission will review such plans as part of the application process and determine appropriateness and adequacy.

Several commenters wanted an explanation of how representative wells will be chosen under §321.184(c)(11) and whether background testing should be required prior to establishing the CAFO. Due to site-specific variations in geologic and hydrologic conditions, detailed ground water monitoring plans must be designed for each individual facility. Requirements for the location of representative wells and testing procedures will be a component of the detailed monitoring plan. Commission staff will then review certified monitoring plans to determine their appropriateness and adequacy based on site-specific conditions and characteristics of the proposed facility.

Several commenters urged the agency to increase the one mile distance under §321.184(c)(12) to not less than two, preferably four miles, while several other commenters indicated that the one mile distance should be reduced to one-quarter mile. The commission disagrees with both sets of comments and states that the one mile is reasonable and sufficient to address issues associated with the protection of air quality.

Several commenters requested that §321.184(g) be modified to increase the buffer distance from one-quarter mile to one mile or to a proportional distance based on the square root of the number of animal units. Another commenter suggested that the commission was retreating from present rules by reducing buffer requirements and increasing number of head. The commission believes 0.25 mile separation distance is reasonable and is intended to be the minimum distance required. Other factors that affect odor levels include design, maintenance and climatic conditions. The proposed rules contain several provisions which aid in minimizing odors such as pond sizing, application limitations, manure scraping schedules, and manure handling requirements. It would be difficult to establish a relationship between herd size and needed buffer zones for different animal species and different waste management designs. The compliance history established by the TNRCC (and TACB) on existing animal feed operations (AFOs) does not support different buffer zone distances for different herd sizes Regardless of buffer distances, operators are still required to adhere to the general prohibition against "nuisance".

One commenter suggested that §321.184(g) should be changed such that the buffer requirement would be required for any CAFO of 1000 animal units instead of the dual requirement as proposed. The commission agrees and makes the suggested change.

One commenter requested clarification on §321.184(g) as to whether a permittee will have to obtain permission or be affected at renewal time if someone moves into the buffer area after they are authorized. The commission feels the language of this subsection is clear in that the buffer requirement is required to be met at the time of the initial application. Anyone moving into the buffer area after the authorization is granted is presumed to have made the decision knowingly.

One commenter urged the agency to modify §321.185 to increase the review period for the administrative and technical completeness from 15 to 30 days and to require the Chief Engineer to endorse the technical completeness of all applications. The commission disagrees and states that one of the stated purposes of these rules is to streamline the process by which a CAFO obtains authorization to operate. Since these rules clearly indicate the performance criteria by which the facility operator, obtaining authorization under these rules, is required to meet, the suggested comments would significantly increase the processing timeframes rather than reduce them. Finally, the timeframe under these rules does not prevent the Chief Engineer from reviewing any application pending before the agency.

In relation to §321.186 regarding the public notice requirements, one commenter suggested the agency require that a complete copy of the application be made available locally and the appropriate TNRCC Regional Office in the DOPAs. The commission agrees and makes the appropriate changes to the rules.

One commenter requested the commission modify §321.186(a) to require the comment period in DOPAs be increased to 60 days and that the notice of application should only be made after approval of the Executive Director and the endorsement of technical completeness by the Chief Engineer. The agency disagrees and believes that the proposed timelines are both sufficient and consistent with existing regulatory programs. Including additional time for comment, approval of the Executive Director and endorsement by the Chief Engineer would cause unnecessary delays in the processing of applications.

One commenter indicated that §321.186(b) is deficient in requiring only one published notice, indicating that affected persons may be out of town, and that multiple notice are more consistent with Texas Rule of Civil Procedures 116 which requires four consecutive weeks of publication. The commission disagrees with these comments and finds the notice provisions consistent with the commission regulations of CAFOs under permit-by-rule and applicable law contained in the Water Code, Chapter 26.

Several commenters urged that §321.186 (d) be changed to allow notice be given to one or more of the following: downstream property owners; local governments; entities dependent on the water source in the DOPAs; water supply reservoir operators downstream of the proposed facilities; all downstream water right holders; all landowners adjacent to any land disposal areas in the DOPAs; and all mayors, health officials and water right holders in the DOPAs. The commission disagrees with the comment that notice must be provided to a

broad range of persons. Notice under the rules and related statutory law is intended to be provided to those who have a reasonably affected justiciable interest if the application is granted. The suggested list of notice recipients goes far beyond those who may have a potential justiciable interest.

One commenter indicated that subsection (a) of §321.187 regarding public comments does not tell a person what they need to do to make a comment sworn, the subsection does not explain whether a person other than the owner perform these duties for the owner, i.e. older person, absentee owner, etc., and these provisions deny the right of a person to appeal with the burden of proof on person commenting. In response to the comment regarding what is necessary to execute a sworn statement, the commission responds that Texas law provides that to be sworn, a statement must be witnessed and notarized by a qualified public notary. Additionally, since authorizations by rule are not required to be subject to third party requests for evidentiary hearing, public notice and comment are provided only for CAFOs of a certain size or larger and location in a designated area.

Several commenters suggested that §321.187(a) be modified to increase the comment period to 45 days. The commission finds that a thirty-day comment period is sufficient and consistent with similar rules and actions of the commission.

One commenter requested the following changes be made: delete "in detail" from §321.187(a)(3) and (4); delete §321.187(e)(2) completely, since this is always an option before a contested case; delete §321.187(f); modify §321.187 (e)(3) by deleting existing language and replace with "set the application for contested case". The commission disagrees with the first comment and states that it is important that anyone making a comment in regard to a permit-by-rule process should provide the commission with specific information as to the how the application will affect them and what about the application will fail to meet the requirements of these rules. Without this information, it is difficult for the agency to act quickly and efficiently for all parties concerned. The second and third comments the commission agrees with and the appropriate changes have been made.

One commenter urged the agency to not make the provisions of §321.187(e), (f), and (g) available to CAFOs in the DOPAs. The commission agrees that portions of §321.187(e), (f) and (g) did not offer an equal opportunity for all parties concerned to obtain commission review of proposed applications. Accordingly, this section has been revised and reorganized to provide both the commenter and the applicant the opportunity to request commission review of the Executive Director's determination of whether a comment demonstrated technical merit. Additionally, the applicant may, in the alternative, either withdraw the application, remedy the defect in the application, or request a contested case hearing.

One commenter recommended the agency extend the public comment procedure under the proposed rules to all CAFOs in the 300 to 1000 animal unit range located in the DOPAs. The commission disagrees and states that the public comment provision under these rules is sufficient and consistent with similar rules of the commission.

One commenter stated that relying on the permit engineer to judge technical merit in DOPAs is not sufficient, this process does not consider cumulative impacts associated with high density of CAFOs. The commission disagrees that the permit engineer is unable to determine whether or not a comment has demonstrated technical merit. Permits and authorizations obtained under Subchapters B and K are designated as "no-discharge". The agency review of proposed facility designs ensures that adequate facilities are available to achieve the no-discharge policy. Thus, an evaluation of cumulative impacts or loadings typically required by TNRCC for discharge permits is not warranted.

One commenter urged the agency that the person protesting should be notified of whether or not the permit was granted or denied. The commission agrees and points to the language in §321.187(b), (d), and (h) which does reflect that type of notification.

One commenter asserted that the notice provisions in the proposed Subchapter K rules provide less notice to persons potentially affected by CAFO operations than the comparable provisions in the Code of Federal Regulation that apply to NPDES permits. The commission disagrees. The proposed Subchapter K rules (§321.186 (b) and (d)) contain provisions that require an applicant for a CAFO authorization by rule to provide both mailed and published notice of the application. Under the EPA CAFO general permit, by contrast, there is no requirement that a facility provide notice that it will commence operations, except a "Notice of Intent" to the TNRCC and EPA Region 6. CAFO General Permit sec. I.E, 58 FedReg 7610, 7628 (February 8, 1993). Accordingly, the Subchapter K authorization by rule process establishes notice and public participation opportunities that significantly exceed the comparable provisions under the EPA CAFO general permit.

When compared to the notice requirements that apply to individual NPDES permits, moreover, Subchapter K provides for mailed notice to neighboring landowners that exceeds NPDES requirements. Section 321.186(d)(2)(A), read together with §321.184(c)(5), requires mailed notice of an application to be sent to "adjacent landowners within 500 feet of the property line of all tracts containing facilities and all on-site or off-site waste disposal areas". The NPDES individual permit process does not require mailed notice to adjacent landowners. See 40 Code of Federal Regulations, §124.10(c).

In relation to §321.188 in regard to permit issuance, one commenter asked subsection (b) be modified to allow any additional requirements or conditions as determined appropriate as a result of ADR process. The commission agrees and the appropriate changes have been made.

In relation to §321.189 in regard to amendments, several commenters suggested the following: modification of subsection (a) by adding "by the permittee" between "any request" and "for a change in term"; and adding a simplified process for minor amendments because proposed language does not distinguish between major or minor. The commission does not agree with adding the language "by the permittee", because the Executive Director must also have the authority to initiate an amendment, if necessary. The commission agrees with the comment regarding amendments and clarifies the rule to define "major" and "minor" amendments to be that as defined by existing §305.62 of this title, relating to amendment, and to provide that applications for a minor amendment to an authorization does not require notice and public comment as provided by §321.190 of the rules relating to renewal.

One commenter made the following recommendations: opposed to any automatic renewals in DOPAs; if automatic renewals are allowed they should be based on no major permit violations versus enforcement actions, and there should be at least one official compliance inspection within 12 months or two within 24 months; and give the Executive Director 30 days to determine whether applicants in DOPAs meets the criteria. The commission disagrees with the first recommendation and states that is unfair to a CAFO operator who is doing a good job, no matter where they are located, to be penalized for the action of others. One of the clear reasons behind this provision is to install clear incentives for CAFO operators to comply. If they do what is necessary, then they should be entitled with a speedier renewal process. On the second recommendation, the commission agrees in part and states that the term "major enforcement action" should include those violations which would contribute to pollution of surface or ground water, and that at least one official TNRCC compliance inspection shall have been completed within the last 12 months. Such inspections will be dependent upon sufficient funding being available. On the third recommendation, the commission disagrees and states that the timeframe for review under the rule is sufficient.

One commenter suggested the agency extend all existing permits for renewal for two years to allow for inspections prior to renewal and that the TNRCC should do in-stream monitoring to identify areas for inspection. Section 321. 190 provides for all permitted facilities to receive an annual compliance inspection within 12 months prior to the Executive Director processing the application. The commission intends to ensure compliance with the rule and will take those actions necessary to do so. With regard to in-stream monitoring, the commission in conjunction with other state agencies and river authorities currently collects routine stream monitoring data throughout the state for use in evaluation of water quality impacts and to identify areas of concern.

In relation to §321.192, regarding pollution prevention plans one commenter stated that the requirement under subsection (b) for facilities with Natural Resources Conservation Service (NRCS) waste management plans developed prior to 1989 submit those plans for renewal before 1995 is beyond the resources of the NRCS. The agency recognizes

the limitation of NRCS in processing all renewals prior to the end of 1995.

Several commenters requested that §321.192(f)(8) be modified to exclude chronic rainfall events from design calculations for evaporation systems. Two commenters suggested this provision for evaporation systems be eliminated. One commenter suggested that evaporation systems be designed for the 25-year period of maximum rainfall. The commission responds that evaporation systems are specific and distinct type of retention facility design. Evaporation systems are designed to manage all wastewater so as to prevent discharge to waters in the state without the use of irrigation. Thus, these control facilities must be capable of retaining not only the 25-year, 24-hour storm event, but also potentially more frequent chronic rainfall events. Design of these facilities based on the 10-year period of maximum recorded monthly rainfall is consistent with current regulations for these types of facilities under Subchapter B.

Two commenters suggested that the requirement under §321.192 (f)(12) for lagoons to maintain a predetermined treatment volume be modified by adding the term "treatment" for clarification. Section 321.182 defines a lagoon as an earthen structure for the biological treatment of liquid organic wastes which effectively identifies it as a distinct type of retention facility. Consequently, lagoons are the only type of retention facilities which are required to maintain a minimum, predetermined treatment volume.

Several commenters suggested that §321.192(f)(24)(H) be reworded for clarification of the phrase "other areas". The commission agrees and subsection (f)(24)(H) has been reworded to better clarify the intent of the rule.

Two commenters suggested that recharge zone/feature certification requirements contained in §321.184(c)(10) and §321.92(f)(1)(B) are the same and should not be duplicated. The commission disagrees and states that the existing language is appropriate to require both those facilities who are required to file an application for authorization and those who are not required to do such, to locate recharge features and, if such features are found, develop the appropriate plans to address those features.

Two commenters requested that all references to requirements for a hydrologic needs analysis be removed from §321.192(f)(4) and that §321. 192(f)(5) be eliminated. The commission notes that the hydrologic needs analysis (water balance) is a design tool which is consistently used by NRCS engineers and consulting engineers for determining the proper size (volume capacity) of retention structures. Commission staff believe the hydrologic needs analysis is crucial to ensure proper sizing of retention facilities based on realistic projections of proposed system management.

Two commenters suggested that §321.192(f)(4)(F)-(K) be eliminated since they are in addition to the requirements under the EPA NPDES General Permit. The commission believes that consideration of each of these volumes in preparing the hydrologic needs analysis is consistent with good engineering practices. In §321.192(f)(4) (F) and (H) these are standard design parameters and are consistent with current facility designs prepared by the NRCS and standards set by the Agricultural Society of Agricultural Engineers. Section §321.192(f)(4)(G) and (I) are provisions added to address the potential for impacts on ground and surface water resulting from failure to consider variations in crop irrigation demands. Section 321.192(k) provides for consideration of site-specific parameters which may be considered by the system designer as justification for additional storage.

Two commenters suggested that §321.192(f)(7) regarding lagoon design be eliminated. The commission disagrees. Provisions for treatment lagoons were defined to protect air quality and are essential to satisfy statutory requirements currently defined under Chapter 116 such that the goal of consolidated air and water permitting can be achieved.

Several commenters recommended the agency delete the phrase "At a minimum" from §321.192(f)(31). The commission disagrees. This phrase is intended to clarify statutory requirements defined in Texas Water Code, §26.048 as minimum standards which must be satisfied. More extensive testing could be conducted if deemed necessary and appropriate by the permittee.

One commenter recommended that the lagoon freeboard requirement in §321. 192(f)(6) should be defined as part of the retention facility design, not the design capacity of the retention facility. The commission agrees and has substituted the term "retention facility" for the term "design capacity".

One commenter requested clarification of §321.192(a) regarding which facilities are covered under this subchapter. Section 321.183 (relating to Applicability) stipulates that all new and existing CAFOs as defined in §321. 182 are regulated under Subchapter K, except for existing facilities which were authorized under Subchapter B on the date of these rules.

One commenter stated that the rules do not require facilities to file periodic (monthly) reports with TNRCC documenting compliance which will inhibit the ability of citizens to demonstrate technical merit. The commission disagrees, since only applications for new facilities are subject to the notice and comment provisions under §321.186 (relating to Notice of Application) and §321.187 (relating to Public Comments). If the facility has not previously been in operation no historical data regarding facility management will be available. However, if the facility has previously been in operation, a compliance history will be on record at the TNRCC and evaluated as part of the application process.

One commenter recommended that the term "should" be changed to "shall" in §321.192(f)(16)(A). The commission agrees with this change to clarify this requirement as part of the rules.

One commenter asked who determines when local water quality is threatened by phosphorus as stated in §321.192(f)(19)(B). The commission will make determinations on specific sites or areas where water quality is threatened by elevated phosphorus levels. Such determinations will be based on all available and appropriate water quality data collected and/or obtained by the TNRCC.

Several commenters suggested that the agency delete the second sentence of §321.192(f)(20). The commission disagrees. The TNRCC considers ponds to be permanent odor sources under the proposed regulations and pond cleaning is acknowledged as a necessary activity to maintain proper treatment volume for continued odor control. Scheduling of pond cleaning during favorable wind conditions as well as notification requirements for the applicant have been included in the provisions as an effort to provide as much assurance as possible to the applicant that cleanout has occurred at the optimum time. Although the general prohibition against "nuisance" is still applicable during this activity, additional language is included that allows the Executive Director discretion associated with a properly managed cleanout. This statement was included to help deal with situations such as changing or erratic wind conditions.

One commenter asked whether the statement in §321.192 (f)(20) "At no time shall emission for any activity create a nuisance" prohibitory or declaratory? The commission believes the statement was intended to be a prohibitory statement. The general prohibition against nuisance or air pollution is statutory requirement in the Texas Health and Safety Code and is included as an air limitation in §321.181 (c). The presence of emissions alone does not signify a nuisance, and once nuisance level emissions are verified, action can be taken by the agency to prevent or minimize reoccurring nuisance on a case by case basis through enforcement action.

One commenter asked whether specified weekly periods for cleaning under §321.192(f)(24)(I) & (J) is a minimum requirement or can they be more or less. The commission considers once a week to be a minimum unless otherwise specified in an approved design plan.

One commenter asked what the basis was for determining the appropriate rates for land application of wastes. Significant amounts of research data are available to establish recommended crop nutrient requirements based on type of crop and expected yield. Proposed application rates can readily be evaluated based upon these standards to ensure that they are reasonable and appropriate. A typical source of such information is the Texas Agricultural Extension Service.

One commenter questioned whether the statement "No land application under this subchapter shall cause or contribute to a violation of surface water quality standards, contaminate ground water or create a nuisance." is declaratory or prohibitory. The commission responds that §321.181(a) states that the policy of the TNRCC is that there shall be no discharge or disposal of waste and/or wastewater from animal feeding operations into or adjacent to waters in the state except in accordance with provisions of this subchapter, which directly prohibits such actions.

Two commenters stated that sampling frequencies are inadequate for wastewater and solid waste, and for soil samples collected from land application sites. Annual monitoring of waste materials and soils from land application sites is consistent with current state regulatory guidelines. Although more frequent sampling would be beneficial, the commission believes that annual sampling in conjunction with facility records on waste utilization is sufficient to monitor and determine that facilities are operating effectively and within established regulatory guidelines.

One commenter suggested that PPPs should be reviewed annually by a qualified professional and updated. The commission requires a complete inspection of the facility to be done and the results documented at least once/year as shown in §321.194 (relating to Other Requirements). TNRCC personnel are responsible for conducting periodic inspections of permitted facilities and determining compliance/noncompliance with provisions of the PPP and agency rules. Furthermore, §321.189 (relating to Amendments) establishes requirements for facilities to file an application in accordance with this subchapter for any request for a change in term, condition or provision of a permit.

One commenter suggested that allowance of discharges resulting from chronic rainfall events grants blanket approval for this type of discharge and that greater volumes of wastewater than necessary to prevent overflow of the retention facilities could be applied. The commission agrees and language has been added to §321.192(f)(19)(E) which states "Only that portion of the total retention facility wastewater volume necessary to prevent overflow due to chronic or catastrophic rainfall shall be land applied for filtering prior to discharging to waters in the state."

One commenter noted the omission of the words "the discharge of" from §321.192(a). This section has been modified to read "Pollution prevention plans shall be prepared in accordance with good engineering practices and should include measures necessary to limit the discharge of pollutants to waters in the state and nuisance and odor conditions."

One commenter questioned whether post-1989 NRCS waste management plans consider basin-specific conditions or if they used state-wide criteria. NRCS waste management plans are based on site-specific conditions developed from localized NRCS technical guides. The standards and specifications in these technical guides are based on specific local soils, climatic, geologic and hydrologic conditions. Plan designs are based on the most appropriate current technology related to the specific type of operation.

One commenter questioned what constitutes "significant materials" as described in §321.192(f)(1)(C). Although referred to and not defined by EPA in the NPDES General Permit for CAFOs, TNRCC considers significant materials to refer to sufficient quantities or concentrations of materials containing potential pollutants such that a spill of these materials at the facility could present a pollution hazard. These materials would include pesticides, cleaning agents, fuels, etc.

One commenter recommended that structural controls be inspected monthly with annual inspections by TNRCC. The commission believes that the requirement for quarterly inspection of structural controls in §321.192(f)(3) is sufficient to ensure structural integrity and maintenance. Section 321.194 (relating to Other Requirements) also stipulates that follow-up procedures shall be used to ensure that appropriate action has been taken in response to visual inspections.

One commenter expressed confusion with the components of the hydrologic needs analysis related to crop irrigation and questioned whether adequate irrigation water to meet crop demands must be provided in the system. Section 321.192(f)(4)(I) requires consideration of the volume of wastewater applied to crops in response to crop demand. This ensures that realistic values for quantity of wastewater for crop utilization are included such that retention facility design is not underestimated.

One commenter suggested that additional structural control be required downgradient of irrigation fields and manure spreading areas, including runoff control berms and manure detention ponds. Section 321.192 (relating to Pollution Prevention Plans) and §321.193 (relating to Best Management Practices) include provisions which prohibit the discharge of pollutants from wastewater and solid waste application sites. The PPP is required to contain all necessary design, construction, operation and maintenance parameters, including structural controls required to assure compliance with the limitations and conditions of this subchapter.

One commenter questioned why the minimum storage volume for waste and wastewater in hydraulic needs analysis is 21 days and recommended that it be based on a given return frequency. The 21-day minimum storage volume is consistent with requirements in the EPA NPDES General Permit for CAFOs. Specifically, §321.192 (f)(4)(E) requires that a minimum of 21 days be utilized; however, a greater storage period should be used when required based on the specific geographic location and design of the facility.

One commenter suggested that §321.192(f)(4)(G) should precede or be made part of §321.192(f)(4)(E). The commission considers these components to be related, but distinct. For example, if the 21-day storage period were insufficient to provide adequate storage for all wastewater and runoff during periods of low crop demand, then additional storage should be provided as necessary. However, a minimum of 21 days storage is required regardless of the volume required to manage periods of low crop demand.

One commenter questioned why two levels for freeboard in retention facilities are identified in the rule, and recommended that the top freeboard be not less than two feet in the Dairy Outreach Project Areas. The minimum freeboard requirement of one foot is consistent with existing federal requirements.

One commenter suggested that evaporation systems should be designed for the 25-year period of maximum recorded rainfall. The commission disagrees and believes that the 10-year period of maximum recorded monthly rainfall is an effective design standard for this type of retention facility and is consistent with current state regulatory requirements under Subchapter B.

One commenter suggested that the 10-year (consecutive) period of maximum recorded monthly rainfall be used as the definition for a chronic event. The definition for chronic and catastrophic rainfall as defined in §321.182 (relating to Definitions) is consistent with the EPA NPDES General Permit for CAFOs. It was utilized in this subchapter to help achieve one of the primary goals of consistency with federal regulations.

One commenter recommended that site-specific information should always be used to determine retention capacity and land application rates in Dairy Outreach Project Areas. The commission agrees that site-specific information should always be used and believes that this is effectively stated in §321. 192(f)(9). Most importantly, these rules require that all assumptions and calculations used in determining the appropriate volume capacity of retention facilities must be documented in the PPP. This enables any such determinations to be reviewed and evaluated by agency personnel for adequacy and appropriateness.

One commenter questioned how the term "weather permitting" will be defined. This terminology is intended to indicate that irrigation during unsatisfactory weather conditions in the absence of an imminent threat of discharge is prohibited. Dewatering of retention facilities is required to be conducted in accordance with §321.192(f)(5) and (19). These provisions stipulate that the discharge or drainage of irrigated wastewater is prohibited where it will result in a discharge to waters in the state. In addition, stipulations are provided to address land application in response to crop needs and soil infiltration rates. All of these factors must be considered collectively, to determine when land application should occur and at what rates.

One commenter suggested that normal water level fluctuations be allowed in the primary lagoon. Section 321.192(f)(18) provides for fluctuations in the lagoon level where maintaining a constant level is prohibited by climatic conditions.

One commenter questioned whether technical information required in §321. 192(f)(15) and (16) would be provided by qualified personnel. Provision is made for all construction and design to be in accordance with good engineering practices. Minimum standards must be consistent with the current technical standards developed by the NRCS. Special requirements are provided for certification of specific facility components, i.e., hydrologic connection and recharge zone/feature certification.

One commenter questioned whether the proposed rules allowed non-licensed engineers to submit engineering to the agency. The commission has carefully reviewed the rules and removed such references.

Two commenters recommended that permittees be required to report any discharge of wastewater from land application sites to TNRCC. The commission agrees that any release of wastewater under conditions other than those designed to provide crop irrigation, e g., discharge of wastewaters for filtering due to the danger of imminent overflow (§321.192(f)(19)(E)), should require notification of the TNRCC Section 321.192(f)(19)(E) has been modified by adding a final sentence which reads: "Monitoring and reporting requirements for such discharges shall be consistent with §321.195".

One commenter indicated that language under §321.192(f)(19)(H), regarding land application at rates in excess of crop uptake, is ambiguous and could lead to misinterpretation. The commission disagrees since both restrictions apply in all cases, i.e., the land application sites must be isolated and there must be no potential for runoff to reach waters in the state

One commenter suggested that the 100-year flood plain in the Dairy Outreach Project Areas be determined by a professional engineer and certified by the TNRCC Chief Engineer. Based on the requirements of §321.192(f)(24), the responsibility for verification of proximity to the flood plain is placed on the applicant. In any case where the proximity to the 100-year flood plain is a concern, an on-site determination should be made by a professional engineer. As part of the technical review of applications conducted by the TNRCC, parameters associated with waste storage and land application will be reviewed by agency personnel for suitability and compliance with these provisions.

One commenter indicated that annual soil testing is not frequent enough to detect seasonal variability and that the sampling period should be further specified based on season and cultural practices Annual monitoring is the standard frequency recommended to facilitate annual nutrient management planning by agricultural operations and is the frequency recommended by the Texas Agricultural Extension Service Annual monitoring is considered sufficient to enable assessment of overall nutrient loadings and to facilitate appropriate adjustments to facility pollution prevention plans. In addition, the 45-day sampling window provides a relatively narrow time frame during which annual samples may be collected The commission believes that this narrow window will provide for more reliable results given that basic environmental parameters and cultural practice cycles will be consistent over time.

One commenter asked whether the statement "There shall be no water quality impairment to public and neighborhood private drinking water wells due to waste handling at the permitted facility" is prohibitory or declaratory. The commission responds that this statement is prohibitory and refers to all facilities covered under Subchapter K. The term "permit" under §321.182 (relating to Definitions) has been redefined to read as follows: "For the purposes of this subchapter, the term "permit" means an authorization by rule as provided by the Texas Water Code, §26.040."

One commenter asked how "economic conditions" will be applied under §321. 193 (relating to Best Management Practices (BMPs)), and stated that BMPs should be made part of a site-specific PPP and should not conflict with requirements of the PPP section. This provision is consistent with requirements in the EPA Region 6 NPDES Permit for CAFOs. The commission believes that all necessary and appropriate BMPs should be implemented. However, in cases where economic constraints occur, alternative strategies may be acceptable if the purpose and intent of the Subchapter K rules is achieved.

One commenter questioned the reference to allowances for infiltration in §321.193(1). This best management practice refers to the need to consider all necessary factors involved in determining appropriate design characteristics for waste control facilities. Depending on site-specific design requirements, accepted technical standards for runoff and infiltration from lots and waterways must be used for calculations of the total storage volume requirements.

One commenter suggested that facility expansion as described in §321. 193(2) should be addressed by permit and not by a best management practice. This provision relates only to those facilities under §321.183 (relating to Applicability) that are not required to file an application for authorization. For facilities required to file an application under this subchapter, §321. 189(a) states that any change in term, condition or provision of a permit-by-rule issued under this subchapter or a modification of a final site plan will require the permittee to file an application for amendment. However, all facilities must amend the PPP prior to any change in design, construction, operation or maintenance, which has a significant effect on the potential for the discharge of pollutants to waters in the state

One commenter suggested that vegetated buffers should be included in §321. 192(5) to prevent direct contact between animals in the CAFO and waters in the state. The commission believes this is unnecessary since provision for vegetative buffer strips is included in §321.192(F). Further, this section allows for the use of "other methods" which may include vegetated buffer strips if necessary and appropriate.

One commenter suggested that the training program under §321.194 (relating to Other Requirements) would be enhanced by a licensing program and that no CAFO should be operated without licensed operators. Section 321 194(a) (1) requires that the owner/operator or his designee with operational responsibilities complete the required training, thus the actual facility operator will receive the appropriate training The commission disagrees with a licensure program. However, §321.194(a)(1) has been modified by adding a sentence which state: "Verification of the date and time(s) of attendance and completion of required training shall be documented to the pollution prevention plan."

One commenter suggested that self-inspections of facilities in the Dairy Outreach Project Areas should be conducted four times per year with records of the inspections submitted to TNRCC. The commission disagrees and believes that the requirement for quarterly inspection of structural controls in §321. 192(f)(3) is sufficient to ensure structural integrity and maintenance. Section 321.194 (relating to Other Requirements) also stipulates that follow-up procedures shall be used to ensure that appropriate action has been taken in response to visual inspections.

Several commenters referenced the audit and liability provisions. Commenters suggested that the qualifications of the third party auditor and the extent of the audit should be further specified; audit criteria be developed with participation from the Natural Resource Conservation Service; audits be conducted annually not every five years; and that these provisions constitute a loophole that allows CAFOs to escape liability from polluting. The commission disagrees with the first point regarding auditor qualifications, and believes that this should be at the discretion of the permittee. The commission also disagrees with annual audits and believes that such a frequency is unnecessary given the requirements for other routine monitoring and reporting in the rules. However, because the commission may hold a facility liable for any violations not identified through the audit, and must by review, agree that the proposed workplan will effectively solve identified problems within a reasonable time, it is recommended that only qualified individuals be utilized as auditors. In developing the minimum criteria for conducting an audit, the TNRCC will utilize all relevant sources of information and support including the Texas Agricultural Extension Service, Natural Resource Conservation Service, and others.

One commenter suggested that the requirement to provide written notification to the TNRCC within five days be changed to allow 14 days for such notification. Because oral notice must be given within 24 hours, the commission agrees that additional time to forward written notice would not limit commission action. Furthermore, this timeframe is consistent with that required by the EPA NPDES permit for CAFOs.

One commenter suggested that the PPP should include provisions for sampling and laboratory analysis; several constituents should be added to the list of required test parameters; and that the discharge information should be submitted to TNRCC for review. The commission disagrees. The provisions as written are consistent with requirements of the EPA NPDES General Permit for CAFOs.

One commenter suggested that permittees in the Dairy Outreach Project Areas be required to install automatic surface water monitors at designated locations. The TNRCC disagrees and believes that this would be a substantial and unnecessary expense for many facilities. The purpose of the pollution prevention plan is to establish all requirements for the design and installation of all necessary components to provide for no discharge of pollutants into waters in the state.

Several commenters urged that §321.194(h) should be amended so that other agency enforcement and penalty provisions shall not take priority over protection from liability. The

commission agrees subsection (h) may insulate a CAFO from violations of Subchapter K identified during subsequent inspections, if the violation is caused by management practices which are the subject of an approved workplan. However, as stated in §321.194(f), §321.194(h) does not insulate a CAFO from the necessity of complying with any TNRCC rules or regulations, statutes, federal, local regulations or requirements. It is not the intention of the TNRCC to relieve CAFOs from the responsibility contained in §321.181 to operate in a manner to prevent the creation of a nuisance.

Subchapter B. Commercial Livestock and Poultry Production Operations

• 30 TAC §321.34

The repeal is adopted under the Texas Water Code, §§5.103, 5.105, 5.120, 26.028(c), and 26.040, which provides the commission with the authority to promulgate rules as necessary to carry out its powers and duties under the Codes and other laws of the state, and to establish and approve all general policies of the commission. The repeal is also adopted under the the Texas Health and Safety Code, §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the Texas Clean Air Act.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on June 22, 1995.

TRD-9507590 Lydia Gonzalez-Gromatzky
Acting Director, Legal Division
Texas Natural Resource Conservation Commission

Effective date: July 13, 1995

Proposal publication date: March 21, 1995

For further information, please call: (512) 239-4640

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The new section is adopted under the Texas Water Code, §§5. 103, 5.105, 5.120, 26.028(c), and 26.040, which provides the Commission with the authority to promulgate rules as necessary to carry out its powers and duties under the Texas Water Code and other laws of the state, and to establish and approve all general policies of the Commission.

321.34. Procedures for Making Application for a Permit.

(a) Any person whose feedlot operation does not conform to the criteria for regulation by rule set forth under §321.33 of this title (relating to Applicability) shall apply for a permit. Application for a permit shall be made on forms provided by the Executive Director. The applicant shall provide such additional information in support of the application as may be necessary for an adequate technical review of the application. At a minimum, the application shall demonstrate compliance with the technical requirements set forth in §321.35 of this title (relating to Surface Water Protection), §321.36 of this title (relating to Ground Water Protection), §321.37 of this title (relating to Feedlot Waste Utilization or Disposal by Land Spreading), §321.38 of this title (relating to Other Waste Disposal Methods) and §321.39 of this title (relating to Pesticide Use), or other equivalent technical requirements. Applicants shall comply with §§305.41-305.45 of this title (relating to Applicability; Application Required; Who Applies; Signatories to Applications, Contents of Application for Permit). Each applicant shall pay an application fee as required by §305.53 of this title (relating to Application Fees). An annual waste treatment inspection fee is also required of each permittee as required by §305.503 of this title (relating to Fee Assessments). Except as provided in subsections (b)-(e) of this section, each permittee shall comply with §305.61-305.68 of this title (relating to Applicability, Amendment, Renewal, Transfer of Permits, Corrections of Permits; Permit Denial, Suspension and Revocation; Revocation and Suspension Upon Request or Consent; and Action and Notice on Petition for Revocation or Suspension). Each permittee shall comply with §305.125 of this title (relating to Standard Permit Conditions). Permits authorized under this subchapter may be effective for the life of the project as determined by §305.127(1)(C) of this title (relating to Conditions to be Determined for Individuals Permits).

(b) Permit renewal will be according to the following procedure:

(1) An application to renew a permit for a confined animal feeding operation which was issued between July 1, 1974, and December 31, 1977, may be renewed by the commission at a regular meeting without holding a public hearing if the applicant does not seek to discharge into or adjacent to waters in the state and does not seek to change materially the pattern or place of disposal.

(2) Except as provided by §305. 63(3) of this title (relating to Consolidated Permits-Renewals), an application for a permit renewal which does not propose any other change to the permit and where there has been no related formal major enforcement action against the permitted facility during the last 36 months of the term of the permit may be granted by the Executive Director without a public hearing. As used in this subchapter, the term "major enforcement action" shall apply to those enforcement actions in which the Executive Director or the commission has determined that a violation which would contribute to pollution of surface or ground water or an unauthorized discharge has occurred; such discharge was within the reasonable control of the permittee; and such discharge could have been reasonably foreseen by the permittee. In addition to the provisions listed in this section, for any application for renewal of a permit within an area designated under §321.197 of this title (relating to Dairy Outreach Program Areas), an annual compliance inspection shall have been completed within the 12 months prior to the Executive Director processing the application.

(c) A fee of $315 to be applied toward processing of the application.

(d) A permittee submitting an application for renewal satisfying the criteria in subsection (b)(2) of this section will automatically be issued a notice of renewal for the existing permit by the Executive Director.

(e) If the application for renewal cannot meet all of the criteria in subsection (b) of this section, then an application for renewal shall be filed in accordance with subsection (a) of this section.

(f) Any permittee with an issued and effective permit shall submit an application for renewal at least 180 days before the expiration date of the effective permit, unless permission for a later date has been granted by the Executive Director. The Executive Director shall provide the permittee notice of deadline for the application for renewal at least 240 days before the permit expiration date. The Executive Director shall not grant permission for applications to be submitted later than the expiration date of the existing permit.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on June 22, 1995.

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Acting Director, Legal Division
Texas Natural Resource Conservation Commission

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For further information, please call: (512) 239-4640

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Subchapter K. Concentrated Animal Feeding Operations

• 30 TAC §§321.181-321.198

The new sections are adopted under the Texas Health and Safety Code, §382.017, which provides the Commission with the au-

thority to adopt rules consistent with the policy and purposes of the Texas Clean Air Act, and Texas Water Code, §§5.103, 5.105, 5.120, 26.028(c), and 26.040, which provides the Commission with the authority to promulgate rules as necessary to carry out its powers and duties under the Texas Water Code and other laws of the state, and to establish and approve all general policies of the Commission.

§321.181. Waste and Wastewater Discharge and Air Emission Limitations.

(a) It is the policy of the Texas Natural Resource Conservation Commission that there shall be no discharge or disposal of waste and/or wastewater from animal feeding operations into or adjacent to waters in the state, except in accordance with subsection (b) of this section or Subchapter B of this chapter (relating to Commercial Livestock and Poultry Production Operations) or §305.1 of this title (relating to Scope and Applicability). Waste and/or wastewater generated by a concentrated animal feeding operation under this subchapter shall be retained and utilized or disposed of in an appropriate and beneficial manner as provided by commission rules, orders, authorizations or permits.

(b) Wastewater pollutants in the overflow may be discharged to waters in the state whenever rainfall events, either chronic or catastrophic, cause an overflow of process wastewater from a facility designed, constructed and operated to contain process generated wastewaters plus the runoff (storm water) from a 25-year, 24-hour rainfall event for the location of the point source (facility authorized under this subchapter). There shall be no effluent limitations on discharges from retention structures constructed and maintained to contain the 25-year, 24-hour storm event if the discharge is the result of a rainfall event which exceeds the design capacity and the retention structure has been properly maintained. Retention structures shall contain process wastewaters plus the 25-year, 24-hour storm event in accordance with §321.192 of this subchapter (relating to Pollution Prevention Plans).

(c) Facilities shall be operated in such a manner as to prevent the creation of a nuisance or a condition of air pollution as mandated by Chapters 341 and 382 of the Texas Health and Safety Code.

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

Agronomic rates–The land application of animal wastes and/or wastewater at rates of application which provide the crop or forage growth with needed nutrients for optimum health and growth.

Air contaminant–Particulate matter, radioactive material, dust, fumes, gas, mist, smoke, vapor, or odor or any combination thereof produced by processes other than natural. Water vapor is not an air contaminant.

Animal feeding operation–A lot or facility (other than an aquatic animal production facility) where animals have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and the animal confinement areas do not sustain crops, vegetation, forage growth, or post harvest residues in the normal growing season. Two or more animal feeding operations under common ownership are a single animal feeding operation if they adjoin each other, or if they use a common area or system for the disposal of wastes.

Animal unit–A unit of measurement for any animal feeding operation calculated by adding the following numbers: the number of slaughter and feeder cattle and dairy heifers multiplied by 1.0, plus the number of mature dairy cattle multiplied by 1.4, plus the number of swine weighing over 55 pounds multiplied by 0.4, plus the number of sheep multiplied by 0.1, plus the number of horses/mules multiplied by 2.0.

Aquifer–A saturated permeable geologic unit that can transmit, store and yield to a well, the quality and quantities of ground water sufficient to provide for a beneficial use. An aquifer can be composed of unconsolidated sands and gravels, permeable sedimentary rocks such as sandstones and limestones, and/or heavily fractured volcanic and crystalline rocks. Ground water within an aquifer can be confined, unconfined or perched.

Auction market–Any person engaged in the business of buying or selling livestock on a commission basis; or furnishing stockyard services for livestock producers, feeders, market agencies, and buyers. Stockyard services include pens or other enclosures and their appurtenances, in which live cattle, sheep, goats, swine, horses/mules are received, held, or kept for sale or shipment. For the purposes of this subchapter, the term auction market is synonymous with the terms sale ring, auction barn, livestock commission companies and livestock sale barn, as these terms are commonly used in the agriculture industry.

Best Management Practices ("BMPs")–The schedules of activities, prohibitions of practices, maintenance procedures , and other management practices to prevent or reduce the pollution of waters in the state. Best Management Practices also include treatment requirements, operating procedures, and practices to control site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.

Chronic or catastrophic rainfall event–For the purposes of these rules, these terms shall mean a series of rainfall events which would not provide opportunity for dewatering and which would be equivalent to or greater than the 25-year, 24-hour storm event or any single event which would be equivalent to or greater than the 25-year, 24-hour storm event. Catastrophic conditions could include tornados, hurricanes, or other catastrophic conditions which could cause overflow due to the high winds or mechanical damage.

Commission–The Texas Natural Resources Conservation Commission.

Concentrated animal feeding operation "CAFO"–Any animal feeding operation which the Executive Director designates as a significant contributor of pollution or any animal feeding operation defined as follows:

(A) Any new and existing operations which stable and confine and feed or maintain for a total of 45 days or more in any 12-month period more than the numbers of animals specified in any of the following categories:

(i) 1,000 slaughter or feeder cattle;

(ii) 700 mature dairy cattle (whether milkers or dry cows);

(iii) 2,500 swine weighing over 55 pounds;

(iv) 500 horses;

(v) 10,000 sheep;

(vi) 55,000 turkeys;

(vii) 100,000 laying hens or broilers when the facility has unlimited continuous flow watering systems;

(viii) 30,000 laying hens or broilers when facility has a liquid waste handling system;

(xi) 5,000 ducks; or

(x) 1,000 animal units from a combination of slaughter steers and heifers, mature dairy cattle, swine over 55 pounds and sheep.

(B) Any new and existing operations covered under this subchapter which discharge pollutants into waters in the state either through a man-made ditch, flushing system, or other similar man-made device, or directly into the waters in the state, and which stable or confine and feed or maintain for a total of 45 days or more in any 12-month period more than the numbers or types of animals in the following categories:

(i) 300 slaughter or feeder cattle;

(ii) 200 mature dairy cattle (whether milkers or dry cows);

(iii) 750 swine weighing over 55 pounds;

(iv) 150 horses;

(v) 3,000 sheep;

(vi) 16,000 turkeys;

(vii) 30,000 laying hens or broilers when the facility has unlimited continuous flow watering systems;

(viii) 9,000 laying hens or broilers when facility has a liquid waste handling system;

(ix) 1,500 ducks; or

(x) 300 animal units from a combination of slaughter steers and heifers, mature dairy cattle, swine over 55 pounds and sheep.

(C) Provided, however, that no animal feeding operation is a concentrated animal feeding operation as defined above if such animal feeding operation discharges only in the event of a 25-year, 24-hour storm event. Poultry facilities that have no discharge to waters in the state normally are not considered a concentrated animal feeding operation. However, poultry facilities that use a liquid waste handling system or stockpile litter near watercourses or dispose of litter on land such that stormwater runoff or flooding can wash it into surface water or ground water may be considered a concentrated animal feeding operation. For the purposes of air quality, the term CAFO, as used in this subchapter, includes any associated feed handling and/or feed milling operations located on the same site as the CAFO.

Control facility-Any system used for the retention of wastes on the premises until their ultimate disposal. This includes the collection and retention of manure, liquid waste, process wastewater and runoff from the feedlot area.

Dairy Outreach Program Areas-The areas of the state involved in the Commission's Dairy Outreach Program as of the effective date of these rules. The areas include all of the following counties: Erath, Bosque, Hamilton, Comanche, Johnson, Hopkins, Wood and Rains.

Edwards Aquifer-That portion of an arcuate belt of porous, waterbearing limestones composed of the Comanche Peak, Edwards,and Georgetown formations trending from west to east to northeast through Kinney, Uvalde, Medina, Bexar, Comal, Hays, Travis and Williamson counties. (See Chapter 313 of this title relating to Edwards Aquifer).

Edwards Aquifer recharge zone-Generally, that area where the Edwards and associated limestones crop out in Kinney, Uvalde, Medina, Bexar, Comal, Hays, Travis and Williamson counties and the outcrops of other formations in proximity to the Edwards limestone, where faulting and fracturing may allow recharge of the surface waters to the Edwards Aquifer, and the area in Uvalde County within 500 feet of the Nueces, Dry Frio, Frio, and Sabinal Rivers downstream from the northern Uvalde County line to the recharge zone as otherwise defined. The recharge zone is specifically that geological area delineated on official maps located in the offices of the commission and the Edwards Underground Water District. (See Chapter 313 of this title relating to Edwards Aquifer).

Executive Director-The Executive Director of the commission or an employee of the commission acting in the behalf of and under the direction of the Executive Director.

Flushwater waste handling system-A system in which fresh water or wastewater is recycled or used in transporting waste.

Ground water-Subsurface water that occurs below the water table in soils and geologic formations that are saturated, and is other than underflow of a stream or an underground stream.

Houses or housed lot-Totally roofed buildings with open or enclosed sides wherein livestock or poultry are housed on solid concrete or dirt floors, slotted (partially open) floors over pits or waste collection areas in pens, stalls or cages, with or without bedding materials and mechanical ventilation. For the purposes of this subchapter, the term housed lot is synonymous with the terms slotted floor building, barn, stable, or house, for livestock or poultry.

Hydrologic connection-The interflow and exchange between control facilities or surface impoundments and waters in the state through an underground corridor or connection.

Lagoon-An earthen structure for the biological treatment of liquid organic wastes. Lagoons can be aerobic, anaerobic, or facultative depending on their design and can be used in series to produce a higher quality effluent.

Land application-The removal of wastewater and waste solids from a control facility and distribution to, or incorporation into the soil mantle primarily for beneficial reuse purposes.

Liner-Any barrier in the form of a layer, membrane or blanket, naturally existing, constructed or installed to prevent a significant hydrologic connection between liquids contained in retention structures and waters in the state.

Natural Resources Conservation Service "NRCS"-An agency of the U.S. Department of Agriculture which includes the agency formerly known as the Soil Conservation Service "SCS".

New concentrated animal feeding operation-A new concentrated animal feeding operation which is not authorized under Subchapter B of this chapter (relating to Commercial Livestock and Poultry Production Operations) as of the effective date of these rules.

No discharge-The absence of flow of waste, process generated wastewater, contaminated rainfall runoff or other wastewater from the premises of the animal feeding operation, except for overflows which result from chronic or catastrophic rainfall.

Nuisance-Any discharge of air contaminant(s), including but not limited to odors, of sufficient concentration and duration that are or may tend to be injurious to or which adversely affects human health or welfare, animal life, vegetation, or property, or which interferes with the normal use and enjoyment of animal life, vegetation, or property.

Open lot-Pens or similar confinement areas with soil, concrete, or other paved or hard surfaces wherein animals or poultry are substantially or entirely exposed to the outside environment except for small portions of the total confinement area affording protection by windbreaks or small shed-type shade areas. For the purposes of this subchapter, the term open lot is synonymous with the terms dirt lot or dry lot, for livestock or poultry, as these terms are commonly used in the agricultural industry.

Operator-The owner or one who is responsible for the management of a concentrated animal feeding operation or animal feeding operation subject to the provisions of this subchapter.

Permanent Odor Sources-Those odor sources which may emit odors 24 hours per day. For the purposes of this subchapter, permanent odor sources include but are not limited to pens, confinement buildings, lagoons, retention facilities, manure stockpile areas and solid separators. For the purposes of this subchapter, permanent odor sources shall not include any feed handling facilities, land application equipment or land application areas.

Permit-by-rule-An authorization by rule as provided by this subchapter in accordance with the Texas Water Code, §26.040.

Permittee-Any person granted authorization under an individual permit or order, as well as by rule.

Pesticide-A substance or mixture of substances intended to prevent, destroy, repel, or mitigate any pest, or any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant.

Process wastewater-Any process generated wastewater directly or indirectly used in the operation of a CAFO (such as spillage or overflow from animal or poultry watering systems which comes in contact with waste); washing, cleaning or flushing pens, barns, manure pits, direct contact swimming, washing, or spray cooling of animals; and dust control), and precipitation which comes into contact with any manure

or litter, bedding, or any other raw material or intermediate or final material or product used in or resulting from the production of animals or poultry or direct products (e.g. milk, meat or eggs).

Qualified ground water scientist-A scientist or engineer who has received a baccalaureate or post-graduate degree in natural sciences or engineering and has sufficient training and experience in ground water hydrology and related fields as may be demonstrated by state registration, professional certification, or completion of accredited university programs that enable that individual to make sound professional judgements regarding ground water monitoring, contamination fate and transport, and corrective action.

Recharge zone/feature-Those natural features either on or beneath the ground surface, in any location specific to the site under evaluation where, due to surface and/or geologic features, a significant hydrologic connection exists between the ground surface and the underlying ground water within an aquifer. Examples include, but are not limited to: a permeable and porous soil material that directly overlies a weakly cemented or fractured limestone, sandstone, or similar type aquifer; and fractured or karstified limestone or similar type formation that crops out on the surface, especially near a water course.

Retention facility or retention structure-All collection ditches, conduits and swales for the collection of runoff and wastewater, and all basins, ponds, pits, tanks and lagoons used to store wastes, wastewaters and manures.

Technical merit-For the purpose of this subchapter, "technical merit" means evidence demonstrating that the application on its face does not meet all technical requirements of this subchapter and therefore the granting of an authorization under this subchapter may result in detrimental impacts to ground water underlying the related CAFO, detrimental impacts to surface water quality within one mile of the CAFO, or evidence demonstrating that history of compliance by the applicant has resulted in detrimental impacts to such ground water or surface water quality within these geographic limits.

25-Year, 24-Hour rainfall event/25-Year rainfall event-The maximum rainfall event with a probable recurrence interval of once in 25-years, with a duration of 24 hours, as defined by the National Weather Service in Technical Paper Number 40, "Rainfall Frequency Atlas of the United States", May 1961, and subsequent amendments, or equivalent regional or state rainfall information developed therefrom.

Waste-Manure (feces and urine), litter, bedding, or feedwaste from animal feeding operations.

Wastewater-Water containing waste or contaminated by waste contact, including process-generated and contaminated rainfall runoff.

Waters in the state-Ground water, percolating or otherwise, lakes, bays, ponds, impounding reservoirs, springs, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Gulf of Mexico inside the territorial limits of the state, and all other bodies of surface water, natural or artificial, inland or coastal, fresh or salt, navigable or nonnavigable, and including the beds and banks of all watercourses and bodies of surface water, that are wholly or partially inside or bordering the state or inside the jurisdiction of the state.

§321.183. Applicability.

(a) Any existing feedlot/concentrated animal feeding operation as defined and authorized under Subchapter B of this chapter (relating to Commercial Livestock and Poultry Production Operations) on the effective date of these rules shall continue to be regulated in accordance with Subchapter B of this chapter and subject to the terms and conditions of any permit issued under Subchapter B of this chapter. Any CAFO which has submitted an administratively complete permit application under Subchapter B of this chapter on the effective date of these rules shall be subject to the terms and conditions of Subchapter B of this chapter in the processing and/or issuance of any such permit and shall continue to be regulated under Subchapter B of this title following issuance of the permit. Any application for permit renewal, amendment or transfer for any permit issued under Subchapter B of this title shall be reviewed and/or issued under the provisions of Subchapter B of this title.

(b) In accordance with Texas Water Code, §26.040, any new concentrated animal feeding operation may be regulated by rule, rather than by individual permit, subject to subsections (b)-(l) of this section, provided such operations comply with §§321.191-321.197 of this title (relating to Proper CAFO Operation and Maintenance; Pollution Prevention Plans; Best Management Practices; Other Requirements; Monitoring and Reporting Requirements; Registration; and Dairy Outreach Program Areas). The provisions of this subsection are applicable to all new concentrated animal feeding operations, either housed or open lots, including beef cattle, dairy cattle or milk production areas; swine; sheep; goats; horses; chickens, including broilers, layers and/or breeders; turkeys, including breeders and/or feeders; any other animal species not specifically listed; and auction markets for which an authorization is required on or after the effective date of these rules.

(c) The Executive Director may require any animal feeding operation to comply with the requirements of this subchapter in order to achieve the policy and purposes enumerated in the Texas Water Code, §5.120 and §26.003; the Health and Safety Code, Chapters 341, 361 and 382; and §321.181 of this title (relating to Waste and Wastewater Discharge and Air Emission Limitations) . The Executive Director may require the operator of any new concentrated animal feeding operation to apply for and obtain an authorization under this subchapter. Cases for which an authorization may be required include, but are not limited to, situations where:

(1) the operation is located near surface and/or ground water resources;

(2) compliance with standards in addition to those listed in this subchapter is necessary in order to protect fresh water from pollution; or

(3) the operation is not in compliance with the standards of this subchapter. A CAFO operator shall submit a complete application within 90 days of notification from the Executive Director that adherence to this subchapter is required.

(d) Any new or expanding concentrated animal feeding operation not authorized pursuant to subsection (a) of this section and which is designed to stable or confine and feed or maintain for a total of 45 days or more in any 12-month period more than the numbers of animals specified in the definition of CAFO in §321. 182(A) of this title (relating to Definitions) shall apply for and obtain authorization under this subchapter.

(e) Any new or expanding CAFO located in areas designated under §321.197 of this title (relating to Dairy Outreach Program Areas), and that is designed to stable or confine and feed or maintain for a total of 45 days or more in any 12-month period more than the number of animals specified in the definition of CAFO in §321.182(B) of this title (relating to Definitions) but less than or equal to the number of animals specified in the definition of CAFO in §321.182(B) shall either apply for and obtain authorization under this subchapter or comply with the provisions of §321.194(a)(1), (g), and (h) of this title (relating to Other Requirements) and the provisions of §§321.191-321.195 of this title (relating to Proper CAFO Operation and Maintenance, Pollution Prevention Plans, Best Management Practices, Other Requirements, and Monitoring and Reporting Requirements).

(f) New concentrated animal feeding operations are prohibited on the Edwards Aquifer recharge zone.

(g) All concentrated animal feeding operations which are authorized under this

subchapter must develop and implement a pollution prevention plan. Operators of an animal feeding operation not required to obtain authorization under this section must locate, construct and manage waste control facilities and air control facilities (where applicable) to protect the air, surface water and ground water in accordance with the requirements of this subchapter.

(h) Any new or expanding concentrated animal feeding operation, which is required to submit an application in accordance with this subchapter may not commence operation of any waste management facilities or any facility that has the potential to emit air contaminants without first receiving authorization in accordance with this subchapter. Any new or expanding CAFO located in the Dairy Outreach Program Areas as designated under §321.197 of this title (relating to Dairy Outreach Program Areas), having more than 300 animal units and which is not required to submit an application in accordance with this subchapter shall not commence operation of any waste management facilities or any facility that has the potential to emit air contaminants without first filing for registration in accordance with §321.196 of this subchapter (relating to Registration) and securing the necessary approval from the Executive Director that such facilities have been constructed in accordance with provisions of this subchapter. The Executive Director shall conduct an on-site inspection after receipt of the request for approval and may issue a written approval or denial as soon as possible but not later than 21 days of the request seeking approval.

(i) Any CAFO which has existing authority under the Texas Clean Air Act does not have to meet the air quality criteria of this subchapter. Pursuant to the Texas Clean Air Act (TCAA), §382.051, any new CAFO which meets all of the requirements of this subchapter is hereby entitled to an air quality standard permit authorization under this subchapter in lieu of the requirement to obtain an air quality permit under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification). Those CAFO's which would otherwise be required to obtain an air quality permit under Chapter 116 of this title, which cannot satisfy all of the requirements of this subchapter shall apply for and obtain an air quality permit pursuant to Chapter 116 of this title in addition to any authorization required under this subchapter. Those animal feeding operations which are not required to obtain authorization under this subchapter may be subject to requirements under Chapter 116 of this title. Any change in conditions such that a person is no longer eligible for authorization under this section requires authorization under Chapter 116 of this title. No person may concurrently hold an air quality permit issued under Chapter 116 of this title and an authorization with air quality provisions under this subchapter for the same site. Any application for a permit renewal, amendment or transfer for any permit issued under the Texas Clean Air Act shall be reviewed and/or issued under the provisions of Chapter 116 of this title.

(j) Any animal feeding operation authorized under this subchapter which is a new major source, or major modification as defined in Chapter 116 of this title shall obtain a permit under Chapter 116 of this title.

(k) Any facility operating under a certified water quality management plan from the Texas State Soil and Water Conservation Board or any facility which qualifies for and obtains such a plan, is not a CAFO for purposes of this subchapter and is not covered by the provisions of this subchapter, unless referred to the commission in accordance with the Texas Agriculture Code, §201.026.

(l) Upon written request to the Executive Director by the owner/operator, any facility authorized under Subchapter B of this title (relating to Commercial Livestock and Poultry Production Operations) shall be authorized under this subchapter without notice and hearing. Such new authorization under this subchapter shall not impose any additional conditions or other requirements unless there is substantial modification to the facility constituting a major amendment as defined by §305.62 of this title (relating to Amendment) or to address compliance problems with the facility or its operations in accordance with a commission order or amendment. Transfer of authorization under this subsection will require compliance with the appropriate provisions of §§321.191-321.197 of this title (relating to Proper CAFO Operation and Maintenance, Pollution Prevention Plans, Best Management Practices, Other Requirements, and Monitoring and Reporting Requirements) Such transfer shall not require any changes to existing structural measures which are documented to meet design and construction standards in effect at the time of installation. Any owner/operator of a CAFO having less than or equal to 1,000 but more than 300 animal units, located in any area designated under §321.197 of this title (relating to Dairy Outreach Program Areas) and requesting coverage under this subsection are subject to provisions of subsection (e) of this section. A request for transfer that also proposes a major amendment shall be subject to notice and comment provisions of this section.

§321.184. Application Requirements.

(a) Any person whose concentrated animal feeding operation is required to file an application for an authorization under this subchapter, or who requests an amendment, modification or renewal of such authorization granted under this subchapter shall complete, sign and submit an application to the Executive Director, according to the provisions of this section.

(b) Applicants shall comply with the applicable provisions of §§305.43, 305.44, 305.46, and 305. 47 of this title (relating to Who Applies; Signatories to Applications; Designation of Material as Confidential; and Retention of Application Data).

(c) Application for authorization under this subchapter shall be made on forms prescribed by the Executive Director. The applicant shall submit an original completed application with attachments and three copies to the Executive Director at the headquarters in Austin, Texas, and one additional copy of the application with attachments to the appropriate TNRCC regional office. The completed application shall be submitted to the Executive Director signed and notarized and with the following information:

(1) The verified legal status of the applicant.

(2) The payment of applicable fees.

(3) The signature of the applicant, in accordance with agency requirements.

(4) The maximum number of animals for which the facilities have been designed.

(5) A final site plan for the facility showing the boundaries of land owned, operated or controlled by the applicant and to be used as a part of a concentrated animal feeding operation, the locations of all pens, lots, ponds, disposal areas and any other types of control or retention facilities, and all adjacent landowners within 500 feet of the property line of all tracts containing facilities and all on-site or off-site waste disposal areas, including their name, address and telephone number. As used in this subchapter, the term "disposal area" does not apply to any lands not owned, operated or controlled by the concentrated animal feeding operation operator for the purpose of off-site land application of manure, wherein the manure is given or sold to others for beneficial use.

(6) A County General Highway Map (with graphic scale clearly shown) to identify the relative location of the concentrated animal feeding operation and at least a one mile area surrounding the facility.

(7) One original (remainder in copies) U.S. Geological Survey 7 1/2 minute quadrangle topographic map or an

equivalent high quality copy showing the boundaries of land owned, operated or controlled by the applicant and to be used as a part of a concentrated animal feeding operation, and the location of all private water wells (abandoned or in use) within 150 feet and public wells within 500 feet of the outer boundary of retention facilities and all springs, lakes or ponds downstream of the facility within one mile of the outer boundary of the retention facilities.

(8) A copy of the pollution prevention plan for the concentrated animal feeding operation for which the application is filed. Prior to utilization of wastewater retention facilities, documentation of liner certifications by a professional engineer must be submitted (if applicable).

(9) A copy of a recorded deed or tax records showing ownership, or a copy of a contract or lease agreement between the applicant and the owner of any lands to be utilized under the proposed concentrated animal feeding operation. This requirement does not apply to any lands not owned, operated or controlled by the applicant for the purpose of off-site land application of manure wherein the manure is given or sold to others for beneficial use.

(10) A certification by a NRCS engineer, registered professional engineer or qualified ground water scientist that no recharge features exist on any tracts owned, operated or controlled by the applicant and utilized under the application.

(11) Where the applicant can not document the absence of recharge features on the tracts for which an application is being filed, the final site plan shall also indicate the specific location of any and all recharge features on any property owned, operated or controlled by the applicant under the application as certified by a NRCS engineer, registered professional engineer or qualified ground water scientist. The applicant shall also submit a plan, developed by a NRCS engineer or registered professional engineer, to prevent impacts on the recharge zone/feature and associated ground water formation which may include the following:

(A) Installation of the necessary and appropriate protective measures such as impervious cover, berms or other equivalent protective measures covering all affected facilities and disposal areas; or

(B) Submission of a detailed ground water monitoring plan covering all affected facilities and disposal areas. At a minimum, the ground-water monitoring plan shall specify procedures to annually collect a ground-water sample from representative wells, have each sample analyzed for chlorides, nitrates and total dissolved solids and compare those values with background values for each well; or

(C) Any other similar method or approach demonstrated by the applicant to be protective of any associated recharge zone/feature.

(12) Area land use map (Air quality only). This map should identify the property line, the permanent odor sources and the distance and direction to any residences, animal feeding operations, businesses or occupied structures within a one mile radius of the permanent odor sources. The map shall include the north arrow and scale of map.

(13) The applicant shall indicate in the application the location and times where the application may be inspected by the public. Within 48 hours of receiving notice of administrative and technical completeness, the applicant shall either make a copy of the application available for public inspection at the applicant's place of business during normal business hours, Monday through Friday, or shall provide a copy of the application to a public place within the county where the proposed facility is to be located so that the copy may be made available for inspection at a public place during regular business hours. Such places may include, but are not limited to, public libraries; district, county, or municipal court offices; community recreation centers; or public schools.

(d) Each applicant shall pay an application fee as required by §305.53 of this title (relating to Application Fees). An annual waste treatment inspection fee is also required of each permittee as required by §305.503 of this title (relating to Fee Assessment). No fees under Chapter 116 (relating to Control of Air Pollution by Permits for New Construction or Modification) shall be required of an applicant for a permit-by-rule issued under this subchapter.

(e) Each permittee shall comply with §§305.61 and 305.64-305.68 of this title (relating to Applicability, Transfer of Permits, Corrections of Permits, Revocation and Suspension, Revocation and Suspension Upon Request or Consent, Action and Notice on Petition for Revocation or Suspension).

(f) Authorizations granted under this subchapter shall be effective for a term not to exceed five years, unless extended by order of the commission.

(g) Air quality buffer distance requirements for new concentrated animal feeding operations. At the time of initial application, any CAFO designed to confine livestock in numbers equal to or greater than 1,000 animal units, or confine poultry at numbers greater than 30,000 with a liquid waste handling system shall not locate any permanent odor sources within 0.25 miles of any occupied residence or business structure, school, church, or public park without written consent and approval from the landowner. For the purposes of this subchapter, any measurement of a buffer distance shall be from the nearest edge of the permanent odor source to the nearest edge of an occupied structure or designated recreational area listed under this subsection.

§321.185. Application Review.

(a) Applications for authorizations or major amendments to such authorizations under this subchapter shall be reviewed by the Executive Director for administrative and technical completeness within 15 working days of receipt of the application by the Executive Director. Upon determination that the application contains the information and attachments required under this subchapter, the Executive Director shall declare that the application is administratively and technically complete.

(b) Within five working days of declaration of administrative completeness, the Executive Director shall assign the application a number for identification purposes, and prepare a statement of the receipt of the application and declaration of administrative and technical completeness which is suitable for publishing or mailing, under the requirements of §321.186(b) of this title (relating to Notice of Application) , and shall forward that statement to the applicant.

§321.186. Notice of Application.

(a) Notice of application. The notice of application and administrative/technical completeness shall contain the following information:

(1) the identifying number given the application by the commission;

(2) the type of authorization being sought under the application;

(3) the name and address of the applicant;

(4) the date on which the application was submitted;

(5) a brief summary of the information included in the application, including but not limited to the general location of facilities and disposal areas associated with the application, and the location where a copy of the application may be reviewed by interested persons;

(6) the format for submission of a comment in accordance with this subchapter to the Executive Director regarding the application; and

(7) the date, time and place where all comments are to be received by the Executive Director in relation to the

numbered application, such comment period shall not be less than 30 days or more than 35 days from the actual date of publication.

(b) Publication.

(1) The applicant shall cause the notice of application and administrative/technical completeness approved by the Executive Director to be published once in a newspaper regularly published, and generally circulated within the county and area wherein the proposed facility is to be located, and within an adjoining county wherein any potential affected person may reside.

(2) The date of publication for notice of application and administrative/technical completeness shall not be later than the date set by the Executive Director.

(3) The applicant is responsible for the cost of publication. The applicant shall notify the Executive Director verbally or by facsimile within 24 hours of the first available working day after the publication of the notice, and shall provide the Executive Director a certified copy of the publication, within 20 calendar days of the date established by the Executive Director for publication. If the applicant does not provide the Executive Director with the appropriate publisher's affidavit within 20 days of the date established by the Executive Director, the Executive Director shall cease processing and return the application.

(c) Application returned. If an application is received which is not administratively/technically complete, the Executive Director shall notify the applicant of the deficiencies prior to expiration of the review period (15 working days) by certified mail return receipt requested. If the additional requested information is received within 30 days of receipt of the deficiency notice, the Executive Director will evaluate the information within eight working days and, where applicable, shall prepare a statement of receipt of the application and declaration of administrative/technical completeness in accordance with subsection (a) of this section. If the requested information is not submitted by the applicant within 30 days of the date of receipt of the deficiency notice, the Executive Director shall return the incomplete application to the applicant.

(d) Notice by mail.

(1) The Executive Director will transmit the notice of application and administrative/technical completeness by first-class mail to persons listed in paragraph (2) of this subsection and to other persons who, the judgment of the Executive Director, may be affected. The applicant is responsible for the cost of required notice. A record on file with the staff of the Executive Director which includes the list of persons to whom notice was mailed and the date of mailing, signed by a person with personal knowledge that the mailout occurred, shall create a presumption that notice was mailed in accordance with this section.

(2) the notice shall be mailed by the Executive Director to the following:

(A) the potentially affected landowners named on the final site plan submitted with the application;

(B) the mayor and health officials of the city or town in which the facility is or will be located or in which waste is or will be disposed of;

(C) the county judge and health authorities of the county in which the facility is located or in which waste is or will be disposed of;

(D) the Texas Department of Health;

(E) the Texas Parks and Wildlife Department;

(F) the applicant;

(G) persons who request to be put on the mailing list, including participants in past commission proceedings for the facility who have submitted a written request to be put on the mailing list;

(H) state and federal agencies for which notice is required in 40 Code of Federal Regulations, §124.10(c); and

(I) for applications regarding operations located in an area designated under §321.197 of this title (relating to Dairy Outreach Program Areas), notice shall be mailed to the river authority whose jurisdictional watershed includes that location; and

(3) the date of mailing for a notice of application and administrative/technical completeness shall be established by the Executive Director.

(4) The notice shall include instructions regarding the requirements contained in §321.187 of this title (relating to Public Comments) providing the manner and timeframe for the submission of comments to the proposed application.

§321.187. Public Comments.

(a) For comments to the application to be qualified and considered by the Executive Director, such comments must:

(1) be sworn and in writing;

(2) be received by the Executive Director not later than 30 days from the date of publication or actual receipt of the notice;

(3) describe in detail how the application, if approved, would affect a personal, property, or other legally justiciable interest of the commenter;

(4) describe in detail how the application technical merit, i.e., fails to meet the applicable requirements set forth in this subchapter and therefore issuance of the permit-by-rule may result in detrimental impacts to ground water underlying the related CAFO, detrimental impacts to surface water quality within one mile of the facility or evidence demonstrating that the history of compliance by the applicant has resulted in detrimental impacts to such ground or surface water quality within these geographic limits; and

(5) the specific action, e.g., special conditions, denial of application, etc., the commenter wishes the commission to take in response to the application.

(b) The Executive Director shall, within 21 days of the deadline by which comments must be received by the Executive Director, prepare and make available to all commenters, the applicant, and the public interest counsel a copy of, and the Executive Director's responses to, all comments to the proposed application or amended application which were timely filed with the Executive Director. Such notification shall include the Executive Director's determination of whether any comments did or did not demonstrate technical merit.

(c) Not later than the 20th day after the date of the Executive Director's letter notifying the applicant, commenter(s) and public interest counsel of the Executive Director's determination that a comment(s) has demonstrated technical merit, applicant shall either:

(1) file a request, in accordance with subsection (e) of this section, to have the commission review the Executive Director's determination that a comment has demonstrated technical merit;

(2) request the Executive Director to suspend processing of the application for a period of time not to exceed 30 days to enable the applicant to provide additional information in accordance with subsection (g) of this section;

(3) request the Executive Director to forward the application for a contested case hearing in accordance with applicable rules; or

(4) withdraw the application from consideration without prejudice and without reimbursement of fees.

(d) Not later than the 20th day after the date of the Executive Director's letter notifying the applicant, commenters and public interest counsel of the Executive Director's determination that no comments demonstrated technical merit, any qualified commenter may file with the chief clerk, general counsel and Executive Director a request to have the commission review the Executive Director's determination that the commenter's comments have not demonstrated technical merit.

(e) Any person requesting commission review of the Executive Director's determination of whether any comments did or did not demonstrate technical merit shall also provide copies of the request to the applicant or commenters, whichever is applicable, as well as the public interest counsel, at the same time the request is filed with the chief clerk, general counsel and the Executive Director. The commission shall consider a request to review the Executive Director's determination of whether any comments did or did not demonstrate technical merit within 30 days of receipt by the chief clerk of the request for review. The applicant or commenter may not request more than one review each of an original or amended application by the commission under this subsection.

(f) If the commission has affirmed the Executive Director's determination that a comment did demonstrate technical merit, then the applicant shall request, within 20 days after the date of issuance of the commission's written order, one of the actions specified under subsection (c)(2)-(4) of this section.

(g) Any submission of additional information or other change to the application under subsection (c)(2) of this section can not constitute a major amendment to the application as provided by §281.23 of this title (relating to Application Amendment). The Executive Director and chief clerk shall hold in abeyance all requests for commission review submitted in accordance with subsection (d) of this section. Not later than 14 days following the submission of an amended application under this subsection, the Executive Director shall provide a copy of the amended application to the commenters requesting review and the public interest counsel and shall notify the applicant, commenters and the public interest counsel of whether any of the original comments received still demonstrate technical merit. Not later than the 20th day after the date of the letter notifying the applicant, commenters requesting review and the public interest counsel, the commenters and applicant shall notify the Executive Director, chief clerk and general counsel in writing of whether they wish to request commission review of the Executive Director's determination in reference to the amended application.

(h) The issuance of a permit-by-rule under this subsection can only occur if all technical merit issues have been resolved and there has been no substantial modification(s), which would constitute a major amendment to the application as provided by §281.23 of this title (relating to Application Amendment). The Executive Director shall issue a permit-by-rule in accordance with this subchapter within 14 days of the following, whichever is applicable, if:

(1) no timely comments demonstrating technical merit were received by the end of the comment period, as specified under subsection (a)(2) of this section;

(2) no requests for review by the commission were filed by commenters on the original application, in accordance with subsections (d) and (e) of this section;

(3) no commenter pursued a request for a review before the commission on the amended application, in accordance with subsection (g) of this section; or

(4) the issuance of a commission order affirming the Executive Director's determination that no comment demonstrated technical merit.

(i) In the event the applicant does not provide written response to the Executive Director in accordance with subsections (c) or (g) of this section, then the Executive Director may notify the applicant and person(s) commenting in writing that the application is denied or returned, or take other appropriate action as authorized by Chapter 305 of this title (relating to Consolidated Permits) and the provisions of this subchapter.

§321.188. Permit Issuance.

(a) A permit-by-rule issued under this subchapter by the Executive Director shall contain the following:

(1) name and address of the permittee;

(2) the maximum number and type of animals authorized for confinement at the facility;

(3) the applicable water quality and/or air quality provisions of §§321.191-321.195 of this title (relating to Proper CAFO Operation and Maintenance, Pollution Prevention Plans, Best Management Practices, Other Requirements, and Monitoring and Reporting Requirements); and

(4) the applicable provisions of §305.125 of this title (relating to Standard Permit Conditions) .

(b) A permit-by-rule issued by the commission after contested case hearing as provided by §321.187 of this title (relating to Public Comments) shall contain the elements listed under subsection (a) of this section and either any requirements or additional conditions determined appropriate as a result of an alternative dispute resolution process or any additional conditions or provisions the commission has determined appropriate in accordance with its findings of fact and conclusions of law.

§321.189. Amendments.

(a) Any request for a change in term, condition or provision of a permit-by-rule issued under this subchapter or a modification of the final site plan will require the permittee to file an application in accordance with §321.184 of this title (relating to Application Requirements).

(b) Amendment initiated permit-by-rule expiration. The existing permit-by-rule will remain effective and will not expire until action on the application for amendment is final. The commission or Executive Director, in accordance with this subchapter, may extend the term of a permit-by-rule when taking action on an application for amendment.

(c) Amendment application considered a request for renewal. For applications filed in accordance with this subchapter, an application for an amendment to a permit-by-rule may also be considered as an application for renewal of the permit-by-rule if so requested by the applicant.

§321.190. Renewal. The permittee shall file an application for renewal of a permit-by-rule issued under this subchapter. Any permittee with an issued and effective permit-by-rule shall submit an application for renewal at least 180 days before the expiration date of the effective permit-by-rule, unless permission for a later date has been granted by the Executive Director. The Executive Director shall provide the permittee notice of deadline for application for renewal at least 240 days before the permit-by-rule expiration date. The Executive Director shall not grant permission for applications to be submitted later than the expiration date of the existing permit-by-rule.

(1) An application for a renewal of a permit-by-rule which does not propose any other change to the authorization and where there has been no related formal major enforcement action against the authorized facility during the last 36 months of the term of the permit-by-rule may be granted by the Executive Director without notice and public comment. As used in this subchapter, the term "major enforcement action" shall apply to those enforcement actions in which the Executive Director or the commission has determined that a violation which would contribute to pollution of surface water or ground water, or an unau-

thorized discharge has occurred; such discharge was within the reasonable control of the permittee; and such discharge could have been reasonably foreseen by the permittee. In addition to the above provisions, for any application for renewal of a permit-by-rule within an area designated under §321.197 of this title (relating to Dairy Outreach Program Areas), an annual compliance inspection shall have been completed within the 12 months prior to the Executive Director processing the application.

(2) A fee of $315 to be applied toward processing of the application.

(3) Upon receipt of the application, the Executive Director shall determine whether the application for renewal satisfies the criteria in paragraph (1) of this section within 15 working days. A permittee submitting an application for renewal satisfying the criteria in subsection (a) of this section will automatically be issued a notice of renewal by the Executive Director in accordance with §321.188(a) of this title (relating to Permit Issuance).

(4) If the application for renewal cannot meet all of the criteria in paragraph (1) of this subsection, then an application for renewal shall be filed in accordance with §321.184 of this title (relating to Application Requirements).

(5) If an application for renewal requests a major amendment, as defined by §305.62 of this title (relating to Amendment), of the existing permit-by-rule, an application shall be filed in accordance with §321.184 of this title (relating to Application Requirements).

(6) If renewal procedures have been initiated before the permit-by-rule expiration date, the existing permit-by-rule will remain in full force and effect and will not expire until action on the application for renewal is final.

(7) The Executive Director may deny an application for renewal for the grounds set forth in §305.66 of this title (relating to Revocation and Suspension).

§321.191. Proper CAFO Operation and Maintenance. The facilities covered under this subchapter are required to document all Best Management Practices (BMPs) used to comply with all applicable waste and wastewater discharge and air emission limitations in this subchapter. Such documentation shall be included in the Pollution Prevention Plan (PPP) outlined in this subchapter and shall be made available to the Executive Director upon request. Where applicable, equivalent and applicable measures contained in a site specific animal waste management plan prepared by the Natural Resources Conservation Service (NRCS), may be substituted for the BMPs and PPP requirements in this subchapter. Where provisions in the NRCS plan are substituted for applicable BMPs or portions of the PPP, the PPP must refer to the appropriate section of the NRCS plan. If the PPP contains reference to the NRCS Plan, a copy of the NRCS plan must be kept on site.

§321.192. Pollution Prevention Plans.

(a) A pollution prevention plan shall be developed for each facility covered under this subchapter. Pollution prevention plans shall be prepared in accordance with good engineering practices and should include measures necessary to limit the discharge of pollutants to waters in the state and nuisance and odor conditions. The plan shall describe and ensure the implementation of practices which are to be used to assure compliance with the limitations and conditions of this subchapter. The plan shall identify a specific individual(s) at the facility who is responsible for developing, implementation, maintenance, and revision of the pollution prevention plan. The activities and responsibilities of the pollution prevention personnel should address all aspects of the facility's pollution prevention plan.

(b) Where a NRCS plan has been prepared for the facility, the pollution prevention plan may refer to the NRCS plan when the NRCS plan documentation contains equivalent requirements for the facility. When the permittee uses a NRCS plan as partial completion of the pollution plan, the NRCS plan must be kept on site. Design and construction criteria developed by the NRCS can be substituted for the documentation of design capacity and construction requirements (see subsection (f) of this section) of the pollution prevention plan provided the required inspection logs and water level logs in §321.192(f)(3) and (11) of this title (relating to Pollution Prevention Plans) are kept with the NRCS Plan. Waste management plans developed by the NRCS can be substituted for the documentation of application rate calculations in subsection (f)(19) and (24) of this section. NRCS Waste Management Plans which have been prepared since January 1, 1989 are considered by the Natural Resources Conservation Service to contain adequate management practices. To insure the protection of water quality, the Natural Resources Conservation Service has determined that NRCS plans prepared prior to 1989 must be submitted for renewal with the Natural Resources Conservation Service or a waste management professional before December 1995. NRCS has determined that all plans should be reviewed every five years to insure proper management of wastes.

(c) The plan shall be signed by the owner or other signatory authority in accordance with §305.44 of this title (relating to Signatories to Applications), and be retained on site in accordance with §305.39(d) of this title (relating to Monitoring and Reporting Requirements). The plan shall be updated as appropriate.

(d) Upon completion of a plan review, the Executive Director may notify the permittee at any time that the plan does not meet one or more of the minimum requirements of this subchapter. After such notification from the Executive Director, the permittee shall make changes to the plan within 90 days after such notification unless otherwise provided by the Executive Director.

(e) The permittee shall amend the plan prior to any change in design, construction, operation, or maintenance, which has a significant effect on the potential for the discharge of pollutants to waters in the state or if the pollution prevention plan proves to be ineffective in achieving the general objectives of controlling pollutants in discharges or creating a nuisance condition from concentrated animal feeding operations.

(f) The plan shall include, at a minimum, the following items:

(1) Each plan shall provide a description of potential sources which may reasonably be expected to add pollutants to waters in the state or create a nuisance condition from the facility. Each plan shall identify activities and materials which may potentially be pollutant sources or create a nuisance. Each plan shall include:

(A) A site plan/map, or topographic map indicating, an outline of the drainage area of the concentrated animal feeding area; each existing structural control measure to reduce pollutants in wastewater and precipitation runoff; and surface water bodies.

(B) The plan shall identify the specific location of any recharge zones/features located on any tracts of land planned to be utilized under the provisions of this subchapter. In addition, the plan should also locate and describe the function of all measures installed to prevent impacts to identified recharge zones/features.

(C) A list of significant materials that are used, stored or disposed of at the concentrated animal feeding operation (such as pesticides, cleaning agents, fuels etc.). And a list of any significant spills of these materials at the facility after the effective date of these rules, or for new facilities, since date of operation.

(D) All existing sampling data.

(2) The pollution prevention plan for each facility shall include a description of management controls appropriate for the facility, and the permittee must implement such controls. The appropriateness and priorities of any controls shall reflect the identified sources of pollutants or nuisance at the facility.

(3) The plan shall include the location and a description of existing structural and nonstructural controls. Structural controls shall be inspected at least four times per year for structural integrity and maintenance. The plan shall include dates for inspection of the retention facility, and a log of the findings of such inspections.

(4) The plan must include documentation of the assumptions and calculations used in determining the appropriate volume capacity of the retention facilities. In addition to the 25-year, 24-hour rainfall, the volume capacity of the retention facility shall be designed to meet the demands of a hydrologic needs analysis (water balance) which demonstrates the irrigation water requirements for the cropping system maintained on the wastewater application site(s). Precipitation inputs to the hydrologic needs analysis (water balance) shall be the average monthly precipitation taken from an official source such as the "Climatic Atlas of Texas", LP-192, published by the Texas Department of Water Resources, dated December, 1983, or the most recent edition, or successor publication. The consumptive use requirements of the cropping system shall be developed on a monthly basis, and shall be calculated as a part of the hydrologic needs analysis (water balance). The following volumes shall be considered in determining the analysis:

(A) the runoff volume from all open lot surfaces;

(B) the runoff volume from all areas between open lot surfaces that is directed into the retention facilities;

(C) the rainfall multiplied by the area of the retention and waste basin;

(D) the volume of rainfall from any roofed area that is directed into the retention facilities;

(E) all waste and process generated wastewater produced during a 21-day, or greater, period;

(F) the estimated storage volume for a minimum one year of sludge accumulation;

(G) the storage volume required to contain all wastewater and runoff during periods of low crop demand;

(H) the evaporation volume from retention facility surfaces;

(I) the volume applied to crops in response to crop demand;

(J) the minimum treatment volume required for waste treatment, if treatment lagoon; and/or

(K) any additional storage volume required as a safety measure as determined by the system designer.

(5) The maximum required storage value calculated by the hydrologic analysis requirements should not encroach on the storage volume required for the 25-year, 24-hour rainfall event. Wastewater application rates utilized in the hydrologic needs analysis (water balance) should not induce runoff or create tailwater.

(6) In addition, the retention facility should include a top freeboard of two feet and in no case less than one foot.

(7) A lagoon in a single lagoon system and a primary lagoon in a multistage lagoon system shall be designed to maintain the necessary treatment volume or surface area as calculated using the manure production data (mean plus one standard deviation) published by American Society of Agricultural Engineers (ASAE) standards D384.1, dated June, 1988, and applicable updates to comply with anaerobic lagoon design criteria as established by ASAE standards EP-403.2, dated December, 1992, and applicable updates, or other site-specific data documented in the PPP.

(8) Evaporation systems shall be designed to withstand a 10-year (consecutive) period of maximum recorded monthly rainfall (other than catastrophic), as determined by a hydrologic needs analysis (water balance), and sufficient freeboard (not less than one foot) shall be maintained to dispose of rainfall and rainfall runoff from the 25-year, 24-hour rainfall event without overflow. In the hydrologic needs analysis determination, any month in which a catastrophic event occurs the analysis shall replace such an event with not less than the long term average rainfall for that month.

(9) Where appropriate, site specific information should be used to determine retention capacity and land application rates. All site specific information used must be documented in the pollution prevention plan.

(10) The plan shall include a description of the design standards for the retention facility embankments. The following minimum design standards are required for construction and/or modification of a retention facility:

(A) Soils used in the embankment shall be free of foreign material such as trash, brush, and fallen trees;

(B) The embankment shall be constructed in lifts or layers no more than six inches thick and compacted at optimum moisture content;

(C) Site specific variation in embankment construction must be accompanied by compaction testing, certification by a professional engineer, or certified to be in accordance with NRCS design standards. Compaction tests must be certified by a professional engineer; and

(D) All embankment walls shall be stabilized to prevent erosion or deterioration.

(11) The plan must include a schedule for liquid waste removal. A date log indicating weekly inspection of wastewater level in the retention facility, including specific measurement of wastewater level will be kept with the plan. Retention facilities shall be equipped with either irrigation or evaporation or liquid removal systems capable of dewatering the retention facilities. Operators using pits, ponds, tanks or lagoons for storage and treatment of storm water, manure and process generated wastewater, including flush water waste handling systems, shall maintain in their wastewater retention facility sufficient freeboard to contain rainfall and rainfall runoff from a 25-year, 24-hour rainfall event. The operator shall restore freeboard for a 25-year, 24-hour rainfall event after any rainfall event or accumulation of wastes or process generated wastewater which reduces such freeboard, weather permitting. Equipment capable of dewatering the wastewater retention structures of waste and/or wastewater shall be available whenever needed to restore the freeboard required to accommodate the rainfall and runoff resulting from the 25-year, 24-hour rainfall event.

(12) A permanent marker (measuring device) shall be maintained in the wastewater retention facilities to show the following: the volume required for a 25-year, 24-hour rainfall event; and the predetermined minimum treatment volume within any treatment pond. The marker shall be visible from the top of the levee. At no time shall a treatment lagoon at a CAFO that is operated under an air quality authorization be dewatered to a level below the predetermined treatment volume, except for cleanout periods or periods where the net

effect of evaporation and rainfall render it impractical to maintain the treatment volume without pumping fresh ground water from an aquifer.

(13) The primary lagoon in a multi-stage lagoon system shall be designed and operated so that the lagoon maintains a constant level at all times unless prohibited by climatic conditions. Where practical, any contaminated runoff should be routed around the primary lagoon into the secondary lagoon.

(14) A rain gauge shall be kept on site and properly maintained. A log of all measurable rainfall events shall be kept with the pollution prevention plan.

(15) Concentrated animal feeding operations constructing a new or modifying an existing wastewater retention facility shall insure that all construction and design is in accordance with good engineering practices. Where site specific variations are warranted, the permittee must document these variations and their appropriateness to the plan. Existing facilities which have been properly maintained and show no signs of structural breakage or leakage will be considered to be properly constructed. Structures built in accordance with site specific Natural Resources Conservation Service plans and specifications will be considered to be in compliance with the design and capacity requirements of this subchapter if the site specific conditions are the same as those used by the NRCS to develop the plan (numbers of animals, runoff area, wastes generated, etc.) All retention structure design and construction shall, at a minimum, be in accordance with the technical standards developed by the NRCS. The permittee must use those standards that are current at the time of construction.

(16) The permittee shall include in the plan, site specific documentation that no significant hydrologic connection exists between the contained wastewater and waters in the state. Where the permittee cannot document that no significant hydrologic connection exists, the ponds, lagoons and basins of the retention facilities must have a liner which will prevent the potential contamination of surface waters and ground waters.

(A) The permittee can document lack of hydrologic connection by either: documenting that there will be no significant leakage from the retention structure; or documenting that any leakage from the retention structure would not migrate to waters in the state. This documentation shall be certified by a NRCS engineer, professional engineer or qualified groundwater scientist and must include information on the hydraulic conductivity and thickness of the natural materials underlying and forming the walls of the containment structure up to the wetted perimeter.

(B) For documentation of no significant leakage, in-situ materials must, at a minimum, meet the minimum criteria for hydraulic conductivity and thickness described below. Documentation that leakage will not migrate to waters in the state must include maps showing ground water flow paths, or that the leakage enters a confined environment. A written determination by a NRCS engineer, or a professional engineer that a liner is not needed to prevent leakage of significant amounts of pollutants into waters in the state will be considered documentation that no significant hydrologic connection exists.

(17) Site-specific conditions shall be considered in the design and construction of liners. NRCS liner requirements or liners constructed and maintained in accordance with NRCS design specifications in Technical Note 716 (or its current equivalent) shall be considered to prevent hydrologic connections which could result in the contamination of waters in the state. Liners for retention structures should be constructed in accordance with good engineering practices. Where no site specific assessment has been done by a NRCS engineer, professional engineer, or qualified groundwater scientist the liner shall be constructed to have hydraulic conductivities no greater than 1×10^{-7} cm/sec, with a thickness of 1.5 feet or greater or its equivalency in other materials.

(18) Where a liner is installed to prevent hydrologic connection the permittee must maintain the liner to inhibit infiltration of wastewaters. Liners shall be protected from animals by fences or other protective devices. No trees shall be allowed to grow within the potential distance of the root zone. Any mechanical or structural damage to the liner will be evaluated by a NRCS engineer or a professional engineer within 30 days of the damage. Documentation of liner maintenance shall be kept with the pollution prevention plan. The permittee shall have a NRCS engineer, professional engineer, or qualified groundwater scientist review the documentation and do a site evaluation every five years. If notified by the Executive Director that significant potential exists for the contamination of waters in the state or drinking water, the permittee shall install a leak detection system or monitoring well(s) in accordance with that notice. Documentation of compliance with the notification must be kept with the pollution prevention plan, as well as all sampling data. In the event monitoring well(s) are required, the permittee must sample each monitor well annually for nitrate as nitrogen, chloride, and total dissolved solids using the methods outlined in the PPP, and compare the analytical results to the baseline data. If a 10% deviation in concentration of any of the sampled constituents is found, the permittee must notify the Executive Director within 30 days of receiving the analytical results. Data from any monitoring wells must be kept on site for three years with the pollution prevention plan. The first year's sampling shall be considered the baseline data and must be retained on site for the life of the facility.

(19) Retention facilities shall be equipped with either irrigation or evaporation systems capable of dewatering the retention facilities, or a regular schedule of wastewater removal by contract hauler. The pollution prevention plan must include all calculations, as well as, all factors used in determining land application rates, acreage, and crops. Land application rates must take into account the nutrient contribution of any land applied manures. If land application is utilized for disposal of wastewater, the following requirements shall apply:

(A) The discharge or drainage of irrigated wastewater is prohibited where it will result in a discharge to waters in the state.

(B) When irrigation disposal of wastewater is used, application rates shall not exceed the nutrient uptake of the crop coverage or planned crop planting with any land application of wastewater and/or manure. Land application rates of wastewaters should be based on the available nitrogen content, however, where local water quality is threatened by phosphorus, the permittee shall limit the application rate to the recommended rates of available phosphorus for needed crop uptake and provide controls for runoff and erosion as appropriate for site conditions.

(C) Wastewater shall not be irrigated when the ground is frozen or saturated or during rainfall events (unless in accordance with subparagraph (E) of this paragraph.

(D) Irrigation practices shall be managed so as to reduce or minimize ponding or puddling of wastewater on the site, contamination of waters in the state, and the occurrence of nuisance conditions.

(E) It shall be considered "Proper Operation and Maintenance" for a facility which has been properly operated, and that is in danger of imminent overflow due to chronic or catastrophic rainfall, to discharge wastewaters to land application sites for filtering prior to discharging to waters in the state. Only that portion of the total retention facility wastewater volume

necessary to prevent overflow due to chronic or catastrophic rainfall shall be land applied for filtering prior to discharging to waters in the state. Monitoring and reporting requirements for such discharges shall be consistent with §321.195 of this title (relating to Monitoring and Reporting Requirements).

(F) Facilities including ponds, pipes, ditches, pumps, diversion and irrigation equipment shall be maintained to insure ability to fully comply with the terms of this subchapter and the pollution prevention plan.

(G) Adequate equipment or land application area shall be available for removal of such waste and wastewater as required to maintain the retention capacity of the facility for compliance with this subchapter.

(H) Where land application sites are isolated from surface waters and ground waters and no potential exists for runoff to reach any waters in the state, application rates may exceed nutrient crop uptake rates only upon written approval of the Executive Director. No land application under this subsection shall cause or contribute to a violation of water quality standards or create a nuisance.

(20) Solids shall be removed in accordance with a pre-determined schedule for cleanout of all treatment lagoons to prevent the accumulation of solids from exceeding 50% of the original treatment volume. Removal of solids shall be conducted during favorable wind conditions that carry odors away from nearby receptors and the operator shall notify the regional office of the commission as soon as the lagoon cleaning is scheduled, but not less than ten days prior to cleaning, and verification shall be reported to the same regional office within five days after the cleaning has been completed. At no time shall emissions from any activity create a nuisance. Any increase in odors associated with a properly managed cleanout under this subsection will be taken into consideration by the Executive Director when determining compliance with the provisions of this subchapter.

(21) Manure and Pond Solids Handling and Land Application. Storage and land application of manure shall not cause a discharge of significant pollutants to waters in the state, cause a water quality violation in waters in the state or cause a nuisance condition. At all times, sufficient volume shall be maintained within the control facility to accommodate manure, other solids, wastewaters and rain waters (runoff) from the concentrated animal feeding areas.

(22) Where the permittee decides to land apply manures and pond solids the plan shall include: a description of waste handling procedures and equipment availability; the calculations and assumptions used for determining land application rates; and any nutrient analysis data. Land application rates of wastes should be based on the available nitrogen content of the solid waste. However, where local water quality is threatened by phosphorus, the application rate shall be limited to the recommended rates of available phosphorus for needed crop uptake and provide controls for runoff and erosion as appropriate for site conditions.

(23) If the waste (manure) is sold or given to other persons for disposal, the permittee must maintain a log of: date of removal from the CAFO; name of hauler; and amount, in wet tons, dry tons or cubic yards, of waste removed from the CAFO. (Incidental amounts, given away by the pick-up truck load, need not be recorded.) Where the wastes are to be land applied by the hauler, the permittee must make available to the hauler any nutrient sample analysis from that year.

(24) The procedures documented in the pollution prevention plan must ensure that the handling and disposal of wastes as defined in §321.182 of this title (relating to Definitions) comply with the following requirements:

(A) Adequate manure storage capacity based upon manure and waste production and land availability shall be provided. Storage and/or surface disposal of manure in the 100-year flood plain, near water courses or recharge zone/feature is prohibited unless protected by adequate berms or other structures. The land application of wastes at agricultural rates shall not be considered surface disposal in this case and is not prohibited.

(B) When manure is stockpiled, it shall be stored in a well drained area with no ponding of water, and the top and sides of stockpiles shall be adequately sloped to ensure proper drainage. Runoff from manure storage piles must be retained on site.

(C) Waste shall not be applied to land when the ground is frozen or saturated or during rainfall events.

(D) Waste manure shall be applied to suitable land at appropriate times and rates. Discharge (run-off) of waste from the application site is prohibited. Timing and rate of applications shall be in response to crop needs, assuming usual nutrient losses, expected precipitation and soil conditions.

(E) All necessary practices to minimize waste manure transport to waters in the state shall be utilized and documented to the plan.

(F) Edge-of-field, grassed strips shall be used to separate water courses from runoff carrying eroded soil and manure particles. Land subject to excessive erosion shall be avoided.

(G) Where land application sites are isolated from surface waters and no potential exists for runoff to reach waters in the state, application rates may exceed nutrient crop uptake rates only upon written approval by the Executive Director. No land application under this subchapter shall cause or contribute to a violation of surface water quality standards, contaminate ground water or create an nuisance condition.

(H) Nighttime application of liquid and/or solid waste shall only be allowed in areas with no occupied residence(s) within 0.25 mile from the outer boundary of the actual area receiving waste application. In areas with an occupied residence within 0.25 mile from the outer boundary of the actual area receiving waste application, application shall only be allowed from one hour after sunrise until one hour before sunset, unless the current occupants of such residences have in writing agreed to such nighttime applications.

(I) Accumulations of solids on concrete cow lanes at dairies and concrete swine pens, without slotted floors, shall be scraped or flushed at least once per week or in accordance with proper design and maintenance of the facility. Farrowing pens at swine facilities which are not scraped or flushed once per week shall be scraped/flushed after each group of sows have been removed from the facility.

(J) Buildings designed with mechanical flush/scrape systems shall be flushed/scraped at least once per week or as often as necessary to maintain the design efficiency. This provision would include, but would not be limited to swine and caged poultry operations.

(K) Earthen pens shall be designed and maintained to ensure good drainage and to prevent ponding.

(L) Facilities that utilize a solid settling basin(s) shall remove solids from the basin as often as necessary to maintain the design efficiency.

(25) The plan shall include an appropriate schedule for preventative maintenance. Operators will provide routine maintenance to their control facilities in accordance with a schedule and plan of operation to ensure compliance with this subchapter. The permittee shall keep a maintenance log documenting that preventative maintenance was done. A preventive maintenance program shall involve inspection and maintenance of all runoff management devices (mechanical separators, catch basins) as well as inspecting and testing facility equipment and containment structures to uncover conditions that could cause breakdowns or failures resulting in discharge of pollutants to waters in the state or the creation of a nuisance condition.

(26) The plan shall identify areas which, due to topography, activities, or other factors, have a high potential for significant soil erosion. Where these areas have the potential to contribute pollutants to waters in the state the pollution prevention plan shall identify measures used to limit erosion and pollutant runoff.

(27) The permittee shall document to the pollution prevention plan as soon as possible, any planned physical alterations or additions to the permitted facility. The permittee must insure that any change or facility expansion will not result in a discharge in violation of the provisions of this subchapter or will require an amendment to an existing permit-by-rule in force at the time of modification.

(28) Prior to commencing wastewater irrigation and/or waste application on land owned or operated by the permittee, and annually thereafter, the permittee shall collect and analyze representative soil samples of the wastewater and waste application sites according to the following procedures:

(A) Sampling procedures shall employ accepted techniques of soil science for obtaining representative and analytical results.

(B) Samples should be taken within the same 45-day time-frame each year.

(C) Obtain one composite sample for each soil depth zone per land management unit and per uniform (soils with the same characteristics and texture) soil type within the land management unit. For the purposes of this subchapter, a land management unit shall be considered to be an area associated with a single center pivot system or a tract of land on which similar soil characteristics exist and management practices are being used.

(D) Composite samples shall be comprised of 10-15 randomly sampled cores obtained from each of the following soil depth zones:

(i) Zone 1: 0-6 inches

(ii) Zone 2: 6-24 inches

(E) Soil samples shall be submitted to a soil testing laboratory along with a previous crop history of the site, intended crop use and yield goal. Soil reports should include nutrient recommendations for the crop yield goal.

(F) Chemical/nutrient parameters and analytical procedures for laboratory analysis of soil samples from wastewater and waste application sites shall include the following:

(i) Nitrate reported as nitrogen in parts per million (ppm)

(ii) Phosphorus (extractable, ppm)-Texas Agricultural Extension Service Soil Testing Laboratory-TAMU extractant, P1 Weak Bray, or Mehlich III extraction

(iii) Potassium (extractable, ppm)

(iv) Sodium (extractable, ppm)

(v) Magnesium (extractable, ppm)

(vi) Calcium (extractable, ppm)

(vii) Soluble salts/electrical conductivity (dS/m)-Determined from extract of 2:1 (v/v) water/soil mixture

(viii) Soil water pH

(G) When results of the annual soil analysis for extractable phosphorus in subparagraph (F) of this paragraph indicates a level greater than 200 ppm of extractable phosphorus (reported as P) in the 0-6 inch depth (Zone 1) for a particular waste and/or wastewater disposal field, then the permittee shall limit waste and/or wastewater application on that site to the recommended P rates based on crop uptake. Waste and/or wastewater application shall remain limited to recommended P rates until soil analysis indicates extractable phosphorus levels have been reduced below 200 ppm P.

(29) The permittee shall annually analyze at least one representative sample of irrigation wastewater and one representative sample of solid waste for total nitrogen, total phosphorus and total potassium.

(30) Results of initial and annual soils, wastewater and solid waste analyses shall be maintained on-site as part of the pollution prevention plan.

(31) Permittees submitting applications for renewal or expansion of existing facilities authorized under this subchapter to utilize a playa lake as a wastewater retention structure shall within 90 days of the effective date of the renewal, submit a ground water monitoring plan to the Agriculture Permitting and Enforcement Section, Agriculture and Rural Assistance Division of the Texas Natural Resource Conservation Commission. At a minimum, the ground water monitoring plan shall specify procedures to annually collect a ground water sample from each well providing water for the facility, have each sample analyzed for chlorides and nitrates and compare those values to background values for each well.

§321.193. Best Management Practices. The following Best Management Practices (BMPs) shall be utilized by concentrated animal feeding operations owners/operators, as appropriate, based upon existing physical and economic conditions, opportunities and constraints. Where the provisions in a NRCS plan are equivalent or more protective the permittee may refer to the NRCS plan as documentation of compliance with the BMPs required by this subchapter.

(1) Control facilities must be designed, constructed, and operated to contain all process generated wastewaters and the contaminated runoff from a 25-year, 24-hour rainfall event for the location of the point source. Calculations may also include allowances for surface retention, infiltration, and other site specific factors. Waste control facilities must be constructed, maintained and managed so as to retain all contaminated rainfall runoff from open lots and associated areas, process generated wastewater, and all other wastes which will enter or be stored in the retention structure.

(2) Facilities shall not expand operations, either in size or numbers of animals, prior to amending or enlarging the waste handling procedures and structures to accommodate any additional wastes that will be generated by the expanded operations.

(3) Open lots and associated wastes shall be isolated from outside surface drainage by ditches, dikes, berms, terraces or other such structures designed to carry peak flows expected at times when the 25-year, 24-hour rainfall event occurs.

(4) New or expanding facilities shall not be built in any stream, river, lake, wetland, or playa lake (except as defined by and in accordance with the Texas Water Code, §26.048).

(5) No waters in the state shall come into direct contact with the animals confined on the concentrated animal feeding operation. Fences and other methods may be used to restrict such access.

(6) Wastewater retention facilities or holding pens may not be located in the 100-year flood plain unless the facility is protected from inundation and damage that may occur during that flood event.

(7) There shall be no water quality impairment to public and neighboring private drinking water wells due to waste handling at the permitted facility. Facility wastewater retention facilities, holding pens or waste/wastewater disposal sites shall not be located closer than 500 feet of a public water supply well or 150 of a private water wells, except in accordance with Chapter 338 of this title (relating to Water Well Drillers).

(8) Waste handling, treatment, and management shall not create a nuisance condition or an environmental or a public health hazard; shall not result in the contamination of drinking water; shall conform with State guidelines and/or regulations for the protection of surface and ground water quality.

(9) Solids, sludges, manure, or other pollutants removed in the course of treatment or control of wastewaters shall be disposed of in a manner such as to prevent significant pollutants from being discharged into waters in the state or creation of a nuisance condition.

(10) The operator shall prevent the discharge of pesticide contaminated waters into waters in the state. All wastes from dipping vats, pest and parasite control units, and other facilities utilized for the application of potentially hazardous or toxic chemicals shall be handled and disposed of in a manner such as to prevent any significant pollutants from entering the waters in the state or create a nuisance condition.

(11) Dead animals shall be properly disposed of within three days unless otherwise provided for by the Executive Director. Animals shall be disposed of in a manner to prevent contamination of waters in the state or create a nuisance or public health hazard.

(12) Collection, storage, and disposal of liquid and solid waste should be managed in accordance with recognized practices of good agricultural management. The economic benefits derived from agricultural operations carried out at the land disposal site shall be secondary to the proper disposal of waste and wastewater.

(13) Appropriate measures necessary to prevent spills and to clean up spills of any toxic pollutant shall be taken. Where potential spills can occur materials, handling procedures and storage shall be specified. Procedures for cleaning up spills shall be identified and the necessary equipment to implement a clean up shall be available to personnel.

§321.194. Other Requirements.

(a) Education and Training.

(1) Any CAFO owner/operator with greater than 300 animal units but less than or equal to 1,000 animal units and located within an area designated under §321.197 of this title (relating to Dairy Outreach Program Areas) shall either file an application and obtain authorization under this subchapter or, within 12 months of coming under the provisions of §321.183(b) or (l) of this title (relating to Applicability), the owner/operator or his designee with operational responsibilities shall complete an eight hour course or its equivalent on animal waste management. In addition, that owner/operator shall also complete at least eight additional hours of continuing animal waste management education for each two-year period after the first 12 months. The minimum criteria for the initial eight hours and the subsequent eight hours of continuing animal waste management education shall be developed by the Executive Director and the Texas Agricultural Extension Service. Verification of the date and time(s) of attendance and completion of required training shall be documented to the pollution prevention plan.

(2) Where the employees are responsible for work activities which relate to compliance with provisions of this subchapter, those employees must be regularly trained or informed of any information pertinent to the proper operation and maintenance of the facility and waste disposal. Employee training shall inform personnel at all levels of responsibility of the general components and goals of the pollution prevention plan. Training shall include topics as appropriate such as land application of wastes, proper operation and maintenance of the facility, good housekeeping and material management practices, necessary recordkeeping requirements, and spill response and clean up. The permittee is responsible for determining the appropriate training frequency for different levels of personnel and the pollution prevention plan shall identify periodic dates for such training.

(b) Inspections and Recordkeeping. The operator or the person named in the pollution prevention plan as the individual responsible for drafting and implementing the plan shall be responsible for inspections and recordkeeping.

(c) Recordkeeping and Internal Reporting Procedures. Incidents such as spills, other discharges or nuisance conditions, along with other information describing the pollution potential and quality of the discharge shall be included in the records. Inspections and maintenance activities shall be documented and recorded. These records must be kept on site for a minimum of three years.

(d) Visual Inspections. The authorized person shall inspect designated equipment and facility areas. Material handling areas shall be inspected for evidence of, or the potential for, pollutants entering the drainage system or the creation of a nuisance. A follow-up procedure shall be used to ensure that appropriate action has been taken in response to the inspection.

(e) Site Inspection. A complete inspection of the facility shall be done and a report documenting the findings of the inspection made at least once/year. The inspection shall be conducted by the authorized person named in the pollution prevention plan, to verify that the description of potential pollutant sources is accurate; the drainage map has been updated or otherwise modified to reflect current conditions; and the controls outlined in the pollution prevention plan to reduce pollutants and avoid nuisance conditions are being implemented and are adequate. Records documenting significant observations made during the site inspection shall be retained as part of the pollution prevention plan. Records of inspections shall be maintained for a period of three years.

(f) Additional Requirements. No condition of this authorization shall release the permittee from any responsibility or requirements under other statutes or regulations, Federal, State or Local.

(g) Audits. Any CAFO owner/operator with greater than 300 animal units but less than or equal to 1,000 animal units and located within an area designated under §321.197 of this title (relating to Dairy Outreach Program Areas) shall either file an application and obtain authorization under this subchapter or have an independent third party conduct a detailed audit of the owner's/operator's facility at least once every five years beginning with the date the facility initially came under the provisions of this subchapter. The minimum criteria of the audit shall be developed by the Executive Director and the Texas Agricultural Extension Service. Any CAFO owner/operator having an audit conducted in accordance with this section shall notify the Executive Director of the initial date of an audit inspection. Such notification shall be made to the Executive Director not less than five calendar days after the date of initial inspection. The final audit inspection shall be completed within ten days of the initial date, unless an extension is agreed to in writing by the Executive Director.

(h) Protection from Liability to the State. Any CAFO owner/operator who conducts the audit identified in subsection (g) of this section, in accordance with the following requirements, shall not be liable to the state for violations identified during a subsequent inspection by the state, if the management circumstances which form the basis for the violation are identified as problems in the audit and are the subject of an on-going workplan, agreed to by the Executive Director, to correct the problem. An audit report and detailed workplan must be provided to the Executive Director for agreement within 90 days of the final day of the audit inspection and shall provide the following information.

(1) Identify all problems which could contribute to a detrimental impact on air, surface or ground water quality;

(2) Provide a workplan which specifically lists action to be taken to assure that the problems identified are solved so that these circumstances can no longer contribute to detrimental impacts on air, surface or ground water quality; and

(3) Provide a detailed schedule showing the initiation and completion date for each item on the list of actions to be taken. Within 30 days of actual receipt of an audit report and workplan, the Executive Director shall inform the owner/ operator submitting the audit report and workplan that the Executive Director agrees that the workplan submitted solves the problems identified in the audit report within a reasonable period of time or the Executive Director shall inform the owner/operator that it does not. If the Executive Director does not agree that the workplan will solve the problems identified within a reasonable period of time, the Executive Director shall inform the owner/operator specifically what changes must be made to the workplan in order to obtain such agreement. The Executive Director shall presume agreement with the owner/operator on the needed changes unless the owner/operator notifies the Executive Director in writing. Unless agreement can be reached between the Executive Director and the owner/operator within 30 days of the date the Executive Director notifies the owner/operator of disagreement, then protection pursuant to this subsection shall not apply. Upon agreement between the Executive Director and the owner/operator on the workplan, the owner/operator shall have a protection from liability from the state for any violation identified in an inspection by the state subsequent to the initial audit inspection date to the completion date of the items in the workplan which specifically address the cause of the violations.

§321.195. Monitoring and Reporting Requirements.

(a) If, for any reason, there is a discharge to waters in the state, the permittee is required to notify the Executive Director orally within 24 hours and in writing within 14 working days of the discharge from the retention facility or any component of the waste handling or disposal system. In addition, the permittee shall document the following information to the pollution prevention plan within 14 days of becoming aware of such discharge:

(1) A description and cause of the discharge, including a description of the flow path to the receiving waterbody. Also, an estimation of the flow and volume discharged.

(2) The period of discharge, including exact dates and times, and, if not corrected the anticipated time the discharge is expected to continue, and steps being taken to reduce, eliminate and prevent recurrence of the discharge.

(3) If caused by a precipitation event(s), information from the on site rain gauge concerning the size of the precipitation event.

(4) Unless otherwise directed by the Executive Director, facilities authorized under this subchapter shall sample and analyze all discharges from retention facilities. Sample analysis shall be documented to the pollution prevention plan.

(5) Samples shall consist of grab samples taken from the over-flow or discharges from the retention structure. A minimum of one sample shall be taken from the initial discharge (within 30 minutes). The sample shall be taken and analyzed in accordance with EPA approved methods for water analysis listed in 40 Code of Federal Regulations, 136. Measurements taken for the purpose of monitoring shall be representative of the monitored discharge.

(6) Sample analysis of the discharge must, at a minimum, include the following: Fecal Coliform bacteria; five-day Biochemical Oxygen Demand (BOD5); Total Suspended Solids (TSS); ammonia nitrogen; and any pesticide which the operator has reason to believe could be in the discharge.

(7) In lieu of discharge sampling data, the permittee must document description of why discharge samples could not be collected when the discharger is unable to collect samples due to climatic conditions which prohibit the collection of samples including weather conditions that create dangerous conditions for personnel (such as local flooding, high winds, hurricane, tornadoes, electrical storms, etc.). Once dangerous conditions have passed, the permittee shall collect a sample from the retention structure pond or lagoon. The sample shall be analyzed in accordance with paragraph (6) of this subsection.

(b) All discharge information and data will be made available to the Executive Director upon request. Signed copies of monitoring reports shall be submitted to the Executive Director if requested at the address specified in the request.

(c) Any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under the provisions of this subchapter, including reports of compliance or noncompliance shall be subject to administrative penalties not to exceed $10,000 per violation. Such person(s) may also be subject to civil and criminal penalties pursuant to the Texas Water Code, §26.122 and §26.213.

(d) The permittee shall retain copies of all records required by this subchapter for a period of at least three years from the date reported. This period may be extended by request of the Executive Director at any time.

(e) The permittee shall furnish to the Executive Director, within a reasonable time, any information which the Executive Director may request to determine compliance with the provisions of this subchapter. The permittee shall also furnish to the Executive Director, upon request, copies of records required to be kept by the provisions of this subchapter.

(f) When the permittee becomes aware that they failed to submit any relevant facts or submitted incorrect information in any report to the Executive Director, they shall promptly submit such facts or information.

(g) All reports or information submitted to the Executive Director shall be signed and certified in accordance with §305.44 of this title (relating to Signatories to Applications).

(h) The permittee shall maintain ownership, operation or control over the retention facilities, disposal areas and control facilities identified in the final site plan submitted with the application under §321.184 of this title (relating to Application Requirements). In the event permittee loses ownership, operation or control of any of these areas, the permittee shall notify the Executive Director prior to such loss of control and immediately request and file an application to amend the existing permit-by-rule, an application for a new permit-by-rule under this subchapter or present the Executive Director with a plan to cease all concentrated animal feeding operations at that site.

(i) Any permittee required to obtain authorization under §321.183 of this title (relating to Applicability) shall locate and maintain all facilities in accordance with the final site plan submitted with the application as required under §321.184 of this title (relating to Application Requirements). In

the event the permittee does not properly locate and maintain such facilities in accordance with the final site plan they shall be deemed in noncompliance with the provisions of this subchapter.

§321.196. Registration. All new animal feeding operations which confine more than 300 animal units and/or any animal feeding operation which confines more than 300 head of a species or combination of species not specifically listed under the definition of CAFO as stated in §321.182 of this title (relating to Definitions) and have a potential to discharge into the waters in the state shall notify the Executive Director of their business name, physical location including a map or hand drawn sketch, mailing address and number of head in confinement. Such notification shall be in writing and signed by the owner/operator and shall be submitted not later than 180 days of the effective date of these rules or commencement of operation, whichever is later. Additionally, should an animal feeding operation covered by this section change ownership or substantially change the number of head in confinement, that operator shall submit an amended notification. No fees are associated with registration of animal feeding operations under this section.

§321.197. Dairy Outreach Program Areas. For the purposes of this subchapter involve all of the following counties: Erath, Bosque, Comanche, Hamilton, Johnson, Hopkins, Wood and Rains. The commission shall review the areas designated under this section on at least a triennial basis to determine whether counties should be deleted or other areas should be added. Areas under this section shall be added or deleted in accordance with the rulemaking process.

§321.198. Effect of Conflict or Invalidity of Rule.

(a) If any provision of this subchapter or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the provisions contained in this subchapter which can be given effect without the invalid provision or application, and to this end the provisions of this subchapter are severable.

(b) To the extent of any irreconcilable conflict between provisions of this subchapter and other rules of the commission, the provisions of this subchapter shall supersede.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on June 22, 1995.

TRD-9507589 Lydia Gonzalez-Gromatzky
Acting Director, Legal Division
Texas Natural Resource Conservation Commission

Effective date: July 13, 1995

Proposal publication date: March 21, 1995

For further information, please call: (512) 239-4640

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TITLE 43. TRANSPORTATION

Part II. Texas Turnpike Authority

Chapter 52. General Rules and Policies

• **§§52.1-52.7**

The Texas Turnpike Authority adopts new §§52.1-52.7, concerning General Rules and Policies of the Texas Turnpike Authority (the "Authority") without changes to the proposed text as published in the April 11, 1995, issue of the *Texas Register* (20 TexReg 2697) and will not be republished.

The new rules are for the purpose of providing guidance for Authority personnel, accessibility to and ability to comment on Authority meetings and operations, and opportunity for public complaints to be heard by the Board of Directors and staff of the Authority.

The new rules will have the effect of maximizing the efficiency of Authority operations, enhancing the availability of equal employment opportunity, increasing the level of access to Authority meetings and deliberations, and increasing the number of opportunities to comment on and critique Authority operations.

No comments were received regarding adoption of the General Rules and Policies.

The new sections are adopted pursuant to the Texas Civil Statutes, Article 6674v, §§4c(a), 4d(a), 4d(b), 4d(c), 5(o), 5(p), 20a(f), and 25(a), which provide the Authority with the authority to promulgate rules.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Dallas, Texas on June 13, 1995.

TRD-9507599 James W. Griffin
Executive Director
Texas Turnpike Authority

Effective date: July 13, 1995

Proposal publication date: April 11, 1995

For further information, please call: (214) 522-6200

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