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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Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.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 20 (1995) is cited as follows: 20 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 "20 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 20 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
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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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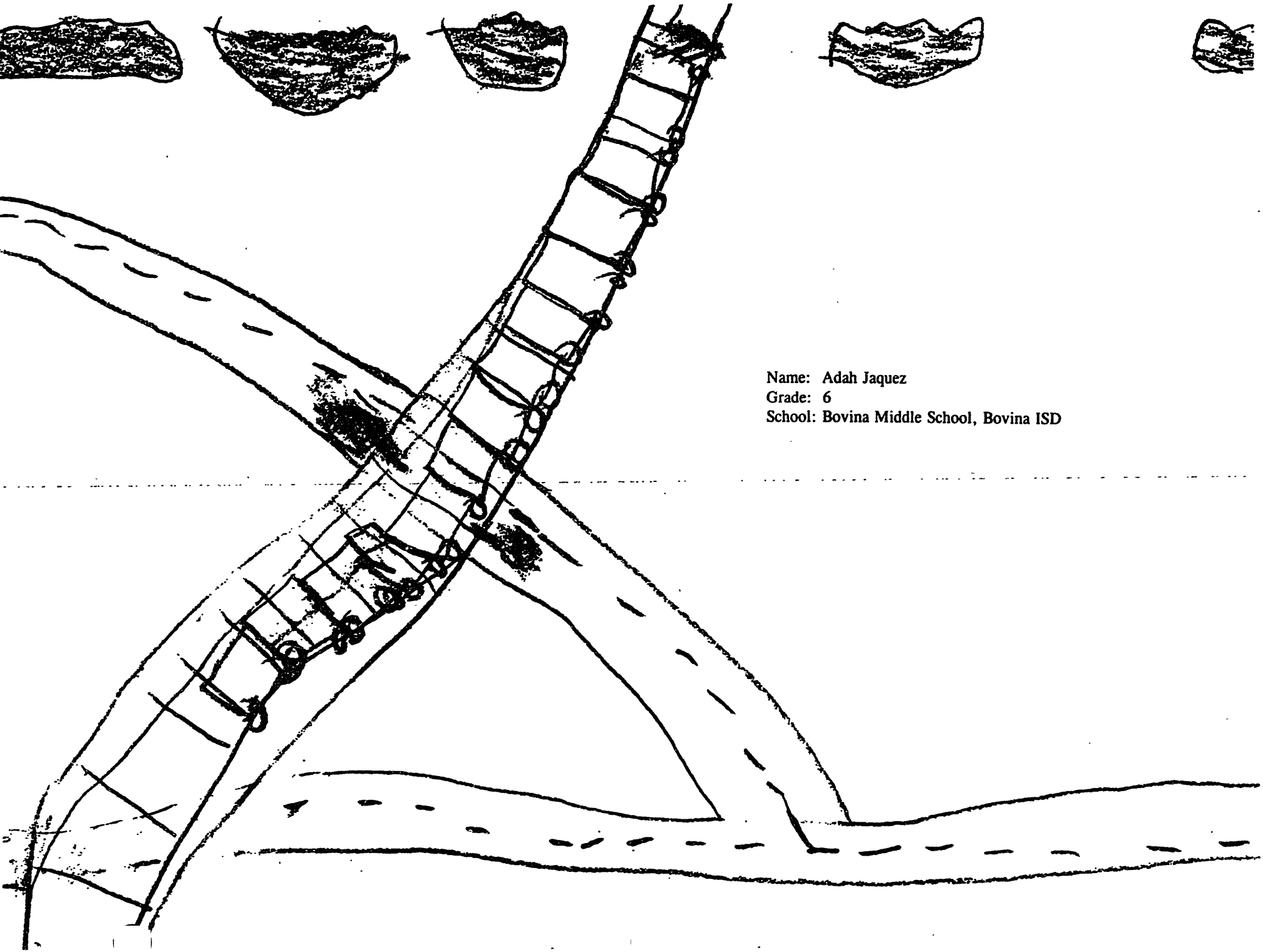

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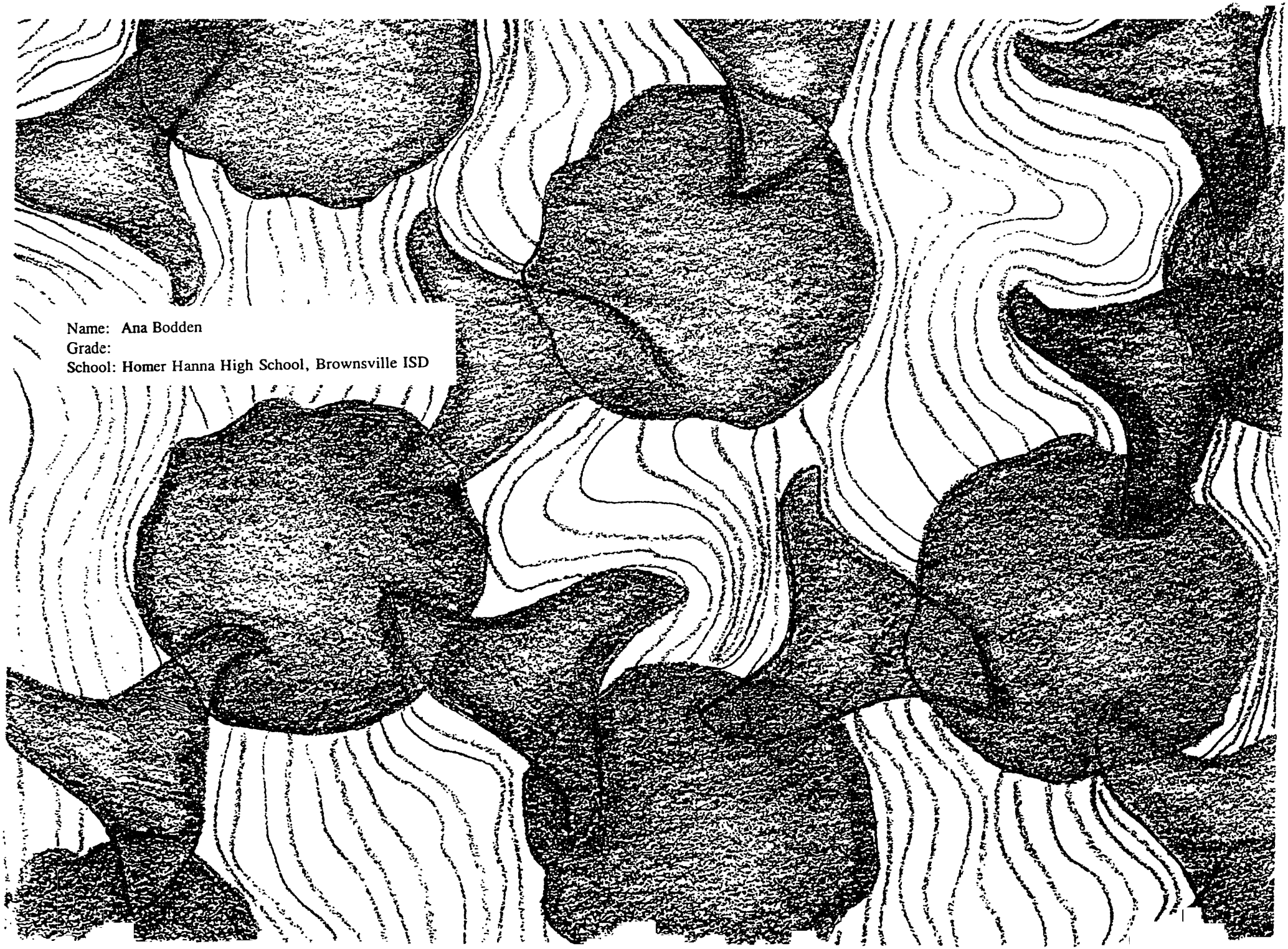
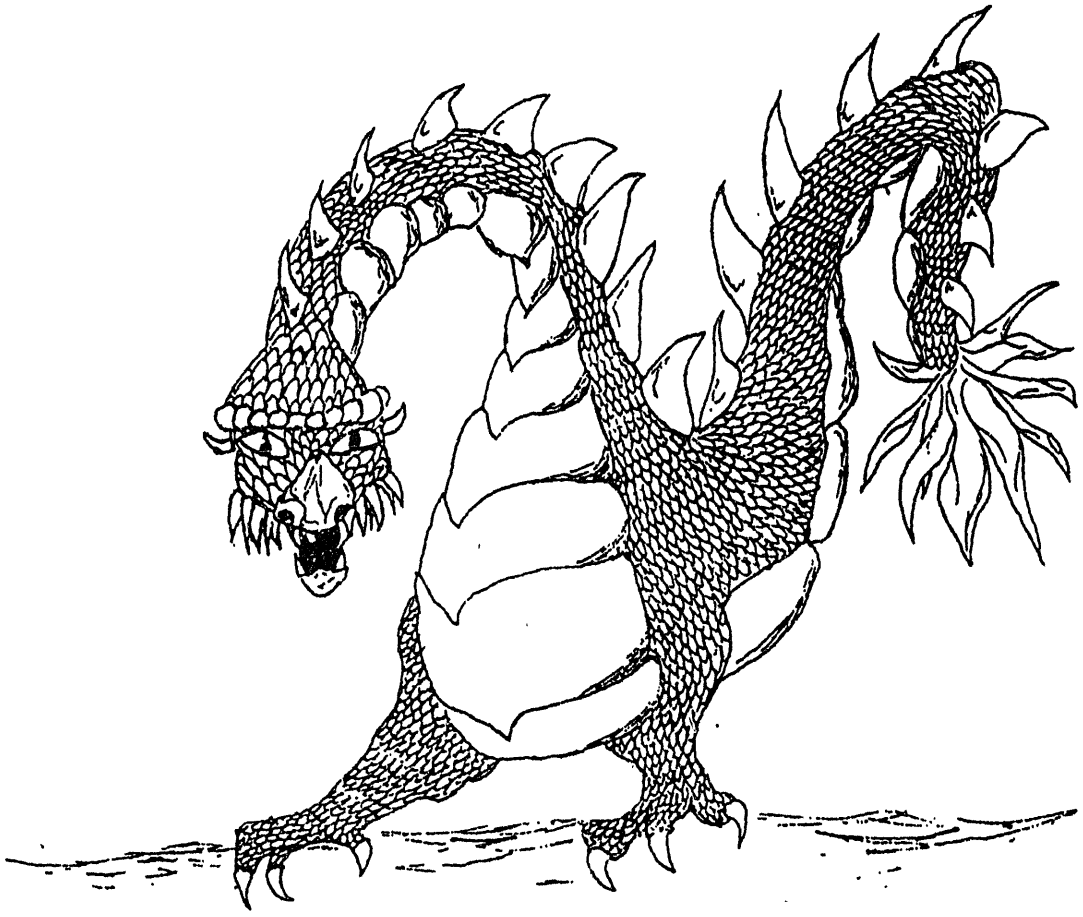
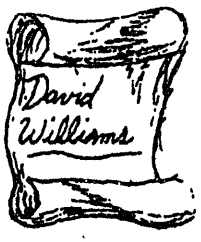
School: Bovina Middle School, Bovina ISD



Name: Ana Bodden
Grade:
School: Homer Hanna High School, Brownsville ISD

Name: Rosendo Garza
Grade:
School: Homer Hanna High School, Brownsville ISD





Name: David Williams
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School: Buffalo Jr. High School, Buffalo ISD

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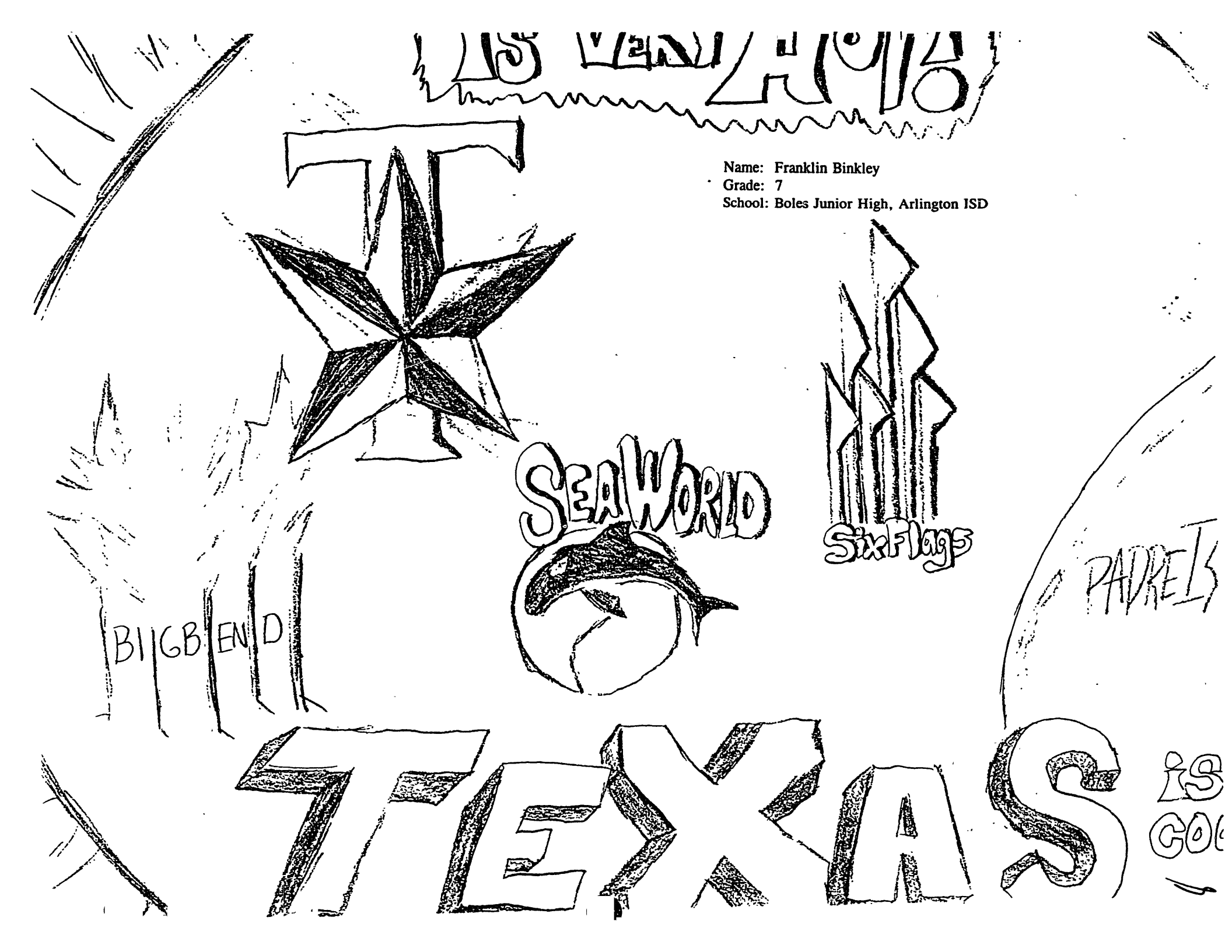
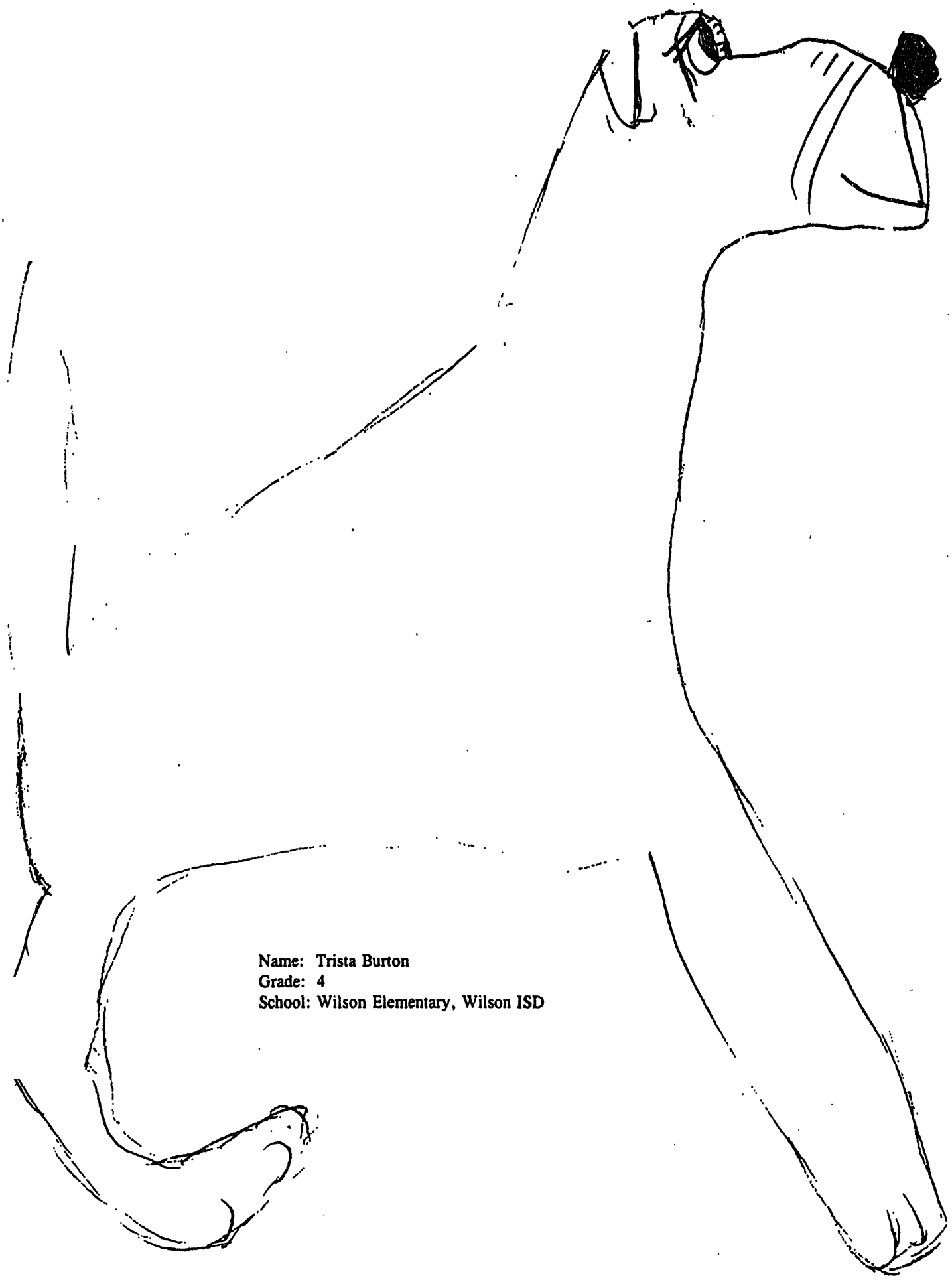
School: Boles Junior High, Arlington ISD





Name: Trista Burton
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EMERGENCY RULES

An agency may adopt a new or amended section or repeal an existing section on an emergency basis if it determines that such action is necessary for the public health, safety, or welfare of this state. The section may become effective immediately upon filing with the ***Texas Register***, or on a stated date less than 20 days after filing and remaining in effect no more than 120 days. The emergency action is renewable once for no more than 60 additional days.

Symbology in amended emergency sections. 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 30. ENVIRONMENTAL QUALITY

Part I. Texas Natural Resource Conservation Commission

Chapter 114. Control of Air Pollution From Motor Vehicles

• 30 TAC §§114.3, 114.6, 114.7

The Texas Natural Resource Conservation Commission is renewing the effectiveness of the emergency adoption of repealed §§114.3, 114.6, and 114. 7, for a 60-day period effective October 12, 1995. The text of repealed §§114.3, 1114.6, 114.7, was originally published in the June 23, 1995, issue of the *Texas Register* (20 TexReg 4523).

Issued in Austin, Texas, on October 5, 1995.

TRD-9513077 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Effective date: October 12, 1995

Expiration date: December 11, 1995

For further information, please call: (512) 239-1966

♦ ♦ ♦

• 30 TAC §114.3

The Texas Natural Resource Conservation Commission is renewing the effectiveness of the emergency adoption of new §114.3, for a 60-day period effective October 12, 1995. The text of new §114.3, was originally published in the June 23, 1995, issue of the *Texas Register* (20 TexReg 4523).

Issued in Austin, Texas, on October 5, 1995.

TRD-9513076 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Effective date: October 12, 1995

Expiration date: December 11, 1995

For further information, please call: (512) 239-1966

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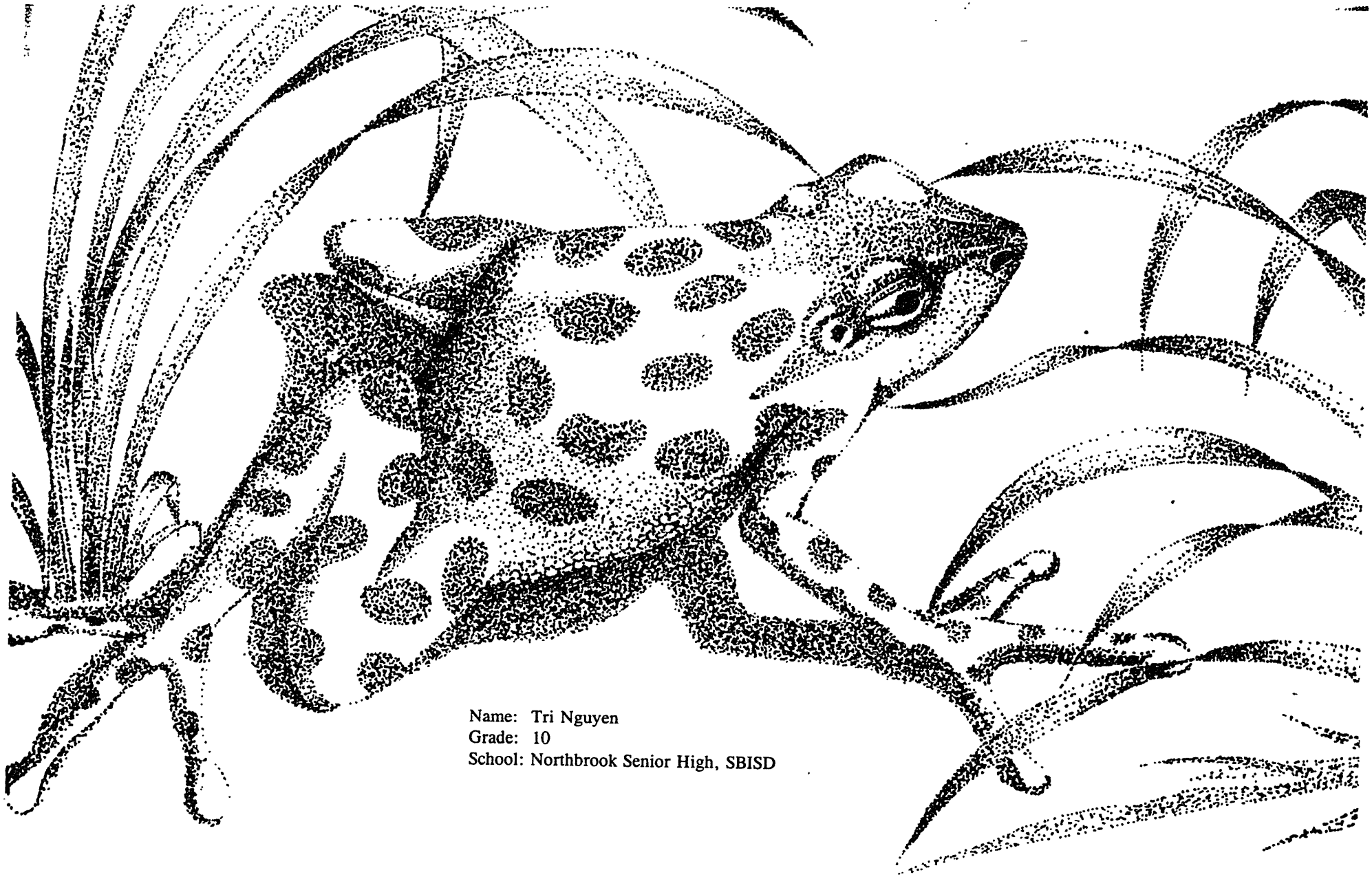

Name: Tri Nguyen
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School: Northbrook Senior High, SBISD

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 II. Public Utility Commission of Texas

Chapter 22. Practice and Procedure

Subchapter G. Prehearing Proceedings

- **16 TAC §22.123**

The Public Utility Commission of Texas proposes an amendment to §22.123, concerning Appeal of an Interim Order. The proposed amendment removes the time limitation for ruling on appeals to allow the commission more flexibility in managing its meeting agendas, and establishes a procedure for determining when an appeal will be placed on an open meeting agenda.

Paula Mueller, Secretary of the Commission, 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. Mueller also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be the increased efficiency that is expected to result from the proposed section. There will be no impact on the opportunities for employment in the geographic areas of Texas affected by implementing the section. No cost increases to persons will result from the proposed section.

Comments on the proposed amendment (13 copies) may be submitted to Paula Mueller, Secretary of the Commission, 7800 Shoal Creek Boulevard, Austin, Texas 78757, within 20 days after publication. All comments should refer to Project Number 14793.

The amendment is proposed under the Public Utility Regulatory Act of 1995 §1.101, which provides the Public Utility Commission of Texas with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction.

The following statute is affected by this rule: the Public Utility Regulatory Act of 1995.

§22.123. Appeal of an Interim Order.

(a)-(f) (No change.)

(g) Denial. If after ten days of the filing of an appeal, the commissioners have not, by agenda ballot, placed the appeal on the agenda of an open meeting, the appeal is deemed denied. **If two or more commissioners have balloted in favor of the appeal, it shall be placed on the next regularly scheduled open meeting or such other meeting as the commissioners may direct by the agenda ballot. In the event two or more commissioners vote to hear the appeal, but differ as to the date the appeal shall be heard, the appeal shall be placed on the latest of the dates specified by the ballots. The time for ruling on the appeal shall expire one day after the date of the meeting, unless extended by action of the commission.** [The commissioners shall rule on the interim order within 20 days of the filing of the appeal. If the commissioners do not rule on the appeal within 20 days of its filing, or extend the time for ruling, the interim order is deemed approved and any granted stay is lifted.]

(h) (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 October 13, 1995.

TRD-9513228 Paula Mueller
Secretary of the Commission
Public Utility Commission of Texas

Earliest possible date of adoption: November 20, 1995

For further information, please call: (512) 458-0100

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TITLE 19. EDUCATION

Part II. Texas Education Agency

Chapter 61. School Districts

Subchapter CC. Commissioner's Rules Concerning School Facilities

- **19 TAC §61.1031**

The Texas Education Agency (TEA) proposes new §61.1031, concerning the school facility assistance program. The program grants state funds to eligible school districts for school facility improvements. The rule establishes requirements of the program, including school district eligibility, the application process, the payment schedule, and required reports. The rule is necessary to provide uniform criteria for administering the assistance program.

Joe Wisnoski, coordinator for school finance and fiscal analyses, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government or small businesses as a result of enforcing or administering the rule.

Mr. Wisnoski and Criss Cloudt, associate commissioner for policy planning and research, have determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that school districts will have well-defined guidelines for applying for school facility assistance. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Criss Cloudt, Policy Planning and Research, 1701 North Congress Avenue, Austin, Texas 78701, (512) 463-9701. All requests for a public hearing on the proposed rule submitted under the Administrative Procedure Act and the Texas Register Act must be received by the commissioner of education not more than 15 calendar days after notice of a proposed change in the rule has been published in the *Texas Register.*

The new rule is proposed under the Texas Education Code, §42.004, which authorizes the commissioner of education, in accordance with the rules of the State Board of

Education, to take such action and require such reports as may be necessary to implement and administer the Foundation School Program.

The new rule implements the Texas Education Code, §42.004.

§61.1031. School Facility Assistance Program.

(a) Application process. A school district must complete an application requesting funds under the School Facility Assistance Program. The application shall contain the following elements:

(1) a project description sufficiently detailed to identify the instructional use of the facility;

(2) an estimated cost; and

(3) a description of the source of funds for the district share of project cost.

(b) District eligibility.

(1) To be eligible for a grant of state funds, a school district must have property wealth per student in average daily attendance no greater than an amount determined annually by the commissioner of education. For this purpose, the property values to be used shall be the values certified by the Comptroller of Public Accounts for the prior tax year. The count of students in average daily attendance shall be the projected attendance for the school year of the grant as reported to the Texas Education Agency (TEA) and used in the legislative payment estimate for the school year.

(2) A district must also have exhibited a total tax rate of $1.30 or a debt service tax rate of $0.20 in the last school year of the preceding biennium to be considered eligible. These tax rates are defined as taxes collected from September 1 through August 31 of the last year of the preceding biennium, divided by the values certified by the Comptroller of Public Accounts for the tax year that precedes the year of the collections.

(3) In the case of a district that has used state funds provided by the guaranteed yield as a part of the debt service requirement, credit will be given for debt service tax rate computation as if the district had a tax rate sufficient to service the debt without the use of guaranteed yield funds. Districts must be prepared to document this practice in order to receive proper credit.

(c) Payment schedule. Payments shall be made quarterly, beginning in January after the grant award. The payment amount shall be based on a proportionate share of the work completed.

(d) Deadlines. The submission deadline for applications seeking funds shall be a date chosen by the commissioner of education and stated in the request for proposal.

(e) Reports required. The commissioner may require such information and reports as are necessary to assure compliance with applicable 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 October 16, 1995.

TRD-9513254 Criss Cloudt
Associate Commissioner, Policy Planning and Research
Texas Education Agency

Earliest possible date of adoption: November 20, 1995

For further information, please call: (512) 463-9701

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TITLE 22. EXAMINING BOARDS

Part XI. Board of Nurse Examiners

Chapter 215. Nurse Education

• 22 TAC §215.2

The Board of Nurse Examiners proposes an amendment to §215.2, concerning Definitions.

During the 73rd Legislative Session, changes were made in the Nursing Practice Act by Senate Bill 519 which amended Article 4525a by adding language to require the reporting of students in professional nursing programs that may be impaired by chemical dependency. The language further states that in lieu of reporting the student to the board, an RN may report the student to the professional nursing educational program in which the student is enrolled.

The Board has determined that the law will be fulfilled if the institution or the RN suspecting the student is impaired reports that student to the professional nursing education program in which that student is enrolled.

The proposed amendment will support nursing programs to deal internally with students who have chemical dependency problems. It will clarify that the individual nursing program will determine when a student is a "professional nursing student". This amendment will bring the agency into compliance with Senate Bill 519.

Kathy Thomas, MN, RN, CPNP, interim 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.

Ms. Thomas 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 that the public is not affected. 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 Kathy Thomas, Interim Executive Director, Board of Nurse Examiners, Box 140466, Austin, Texas 78714.

The amendment is proposed under the Nursing Practice Act (Texas Civil Statutes, Article 4514), §1, which provides the Board of Nurse Examiners with the authority and power to make and enforce all rules and regulations necessary for the performance of its duties and conducting of proceedings before it.

Articles 4525a is affected by the amendment.

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

Professional nursing student-An individual who is enrolled in a professional nursing program who has met admission criteria and designation as a nursing student according to governing institution's policies.

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 October 13, 1995.

TRD-9513235 Kathy Thomas, MN, RN, CPNP
Interim Executive Director
Board of Nurse Examiners

Earliest possible date of adoption: November 20, 1995

For further information, please call: (512) 835-8675

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Chapter 217. Licensure and Practice

• 22 TAC §217.7

The Board of Nurse Examiners proposes an amendment to §217.7, concerning Failure to Renew License.

During the 72nd Legislative Session, changes were made in the Nursing Practice Act by House Bill 2180 which amended Article 4526 by adding language to require a licensee who has not allowed his or her license to expire and has not been practicing professional nursing for a specified period of time to retest. In addition, the language states that the board by rule may establish additional requirements that apply to the renewal of a license that has been expired for more than one year but less than the time limit set by the board beyond which a license may not be renewed.

Currently, there are more than 47,000 delinquent licenses on the Board's files. However, some of those licensees may be currently licensed in another jurisdiction. The Board's Nursing Practice Advisory Committee has met and recommended a draft rule amend-

ment. The Board reviewed and revised the proposed language, and authorized publication.

The proposed amendment will require reexamination of a licensee who has been delinquent four or more years; however reexam will not apply to the nurse who holds a current license in another state and has been practicing in that jurisdiction. This amendment will bring the agency into compliance with House Bill 2180.

Kathy Thomas, MN, RN, CPNP, interim 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.

Ms. Thomas 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 further protected by ensuring minimal competence of nurses returning to work without recent practice. 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 Kathy Thomas, Interim Executive Director, Board of Nurse Examiners, Box 140466, Austin, Texas 78714.

The amendment is proposed under the Nursing Practice Act (Texas Civil Statutes, Article 4514), §1, which provides the Board of Nurse Examiners with the authority and power to make and enforce all rules and regulations necessary for the performance of its duties and conducting of proceedings before it.

Articles 4526 is affected by the amendment.

§217.7. Failure to Renew License.

(a) A registered nurse who is not practicing professional nursing in Texas and who allows his or her license to lapse for a period of time less than four years may bring his or her license up-to-date by filing such forms as the board may require, showing evidence of having completed 20 contact hours of acceptable continuing education within two years immediately preceding the application for relicensure, and paying the current licensure fee **plus a late fee and any applicable fines, which are not refundable** [and a fee equal to the examination fee].

(b) A registered nurse who is not practicing professional nursing and who allows his or her license to lapse for four or more years will be required to:[.]

(1) complete a board approved refresher course, extensive orientation to the practice of professional nursing, or a reeducation program in an accredited nursing program. The applicant will submit an application [submit a duly executed application] for temporary permit for the limited purpose of completing a refresher course, extensive orientation to the practice of professional nursing, or academic course.

(2) submit an NCLEX-RN application and examination fee upon successful completion of the course under subsection (b)(1) of this section;

(3) pass the NCLEX-RN; and

(4) submit evidence of successful completion of the requirements of paragraph (1) and (3) of this subsection, the relicensure application, and the current licensure fee, plus a late fee and any applicable fines, which are not refundable.

(c) A registered nurse whose Texas license has been expired four years or more and who is licensed and practicing in another state for two years preceding the application for relicensure in Texas, shall be exempt from requirements of subsection (b)(1), (2), and (3) of this section.

[(c) Upon submission of evidence of completion of the refresher course, extensive orientation to the practice of professional nursing, or academic course, the nurse will be required to submit a duly executed application form obtained from the board's office with the following:

[(1) a current, passport type photograph with the signature, address, license number and date photograph was made written on the back;

[(2) evidence of having completed 20 contact hours of acceptable continuing education within two years immediately preceding the application for relicensure; and

[(3) the current licensure fee plus a fee equal to the examination fee.]

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 October 13, 1995.

TRD-9513236 Kathy Thomas, MN, RN, CPNP
Interim Executive Director
Board of Nurse Examiners

Earliest possible date of adoption: November 20, 1995

For further information, please call: (512) 835-8675

Part XX. Texas Board of Private Investigators and Private Security Agencies

Chapter 423. Rules of Procedure and Seal

Hearings, Grievances, and Appeal Procedures

- **22 TAC §423.11, §423.12**

The Texas Board of Private Investigators and Private Security Agencies proposes amendments to §423.11, and §423.12, concerning Grievance and Appeal Procedures and Definitions. The Board has determined that this amendment is necessary because Article 6252, which contained the Administrative Procedure and Texas Register Act, was repealed and was reestablished as the Texas Government Code, Chapters 2001 and 2002.

Clema D. Sanders 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.

Ms. Sanders 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 to ensure due process. 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 Clema D. Sanders, Texas Board of Private Investigators and Private Security Agencies, P.O. Box 13509, Austin, Texas 78711.

The amendments are proposed under Texas Civil Statutes, Article 4413(29bb), §11(a)(3), which provide the Texas Board of Private Investigators and Private Security Agencies with the authority "to promulgate all rules and regulations necessary in carrying out the provisions of this Act."

The following is the statute that is affected by this rule: Texas Civil Statutes, Article 4413(29bb).

§423.11. Grievance and Appeal Procedures Provided. Pursuant to authority granted the Board under the provisions of the Act, and pursuant to the mandate of the Texas Government Code, §2001.004. [§4(A)(1) of the Administrative Procedure and Texas Register Act (Texas Civil Statutes, Article 6252-13a)], the following grievance and appeal procedures and rules [in these sections] are provided.

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

[Register-The Texas Register.]

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 October 12, 1995.

TRD-9513053 Clema D. Sanders
Executive Director
Texas Board of Private Investigators and Private Security Agencies

Earliest possible date of adoption: November 20, 1995

For further information, please call: (512) 463-5545

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• 22 TAC §423.46

The Texas Board of Private Investigators and Private Security Agencies proposes and amendment to §423.46, concerning Depositions. The Board has determined that this amendment is necessary because Article 6252, which contained the Administrative Procedure and Texas Register Act, was repealed and was reestablished as the Texas Government Code, Chapters 2001 and 2002.

Clema D. Sanders 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. Sanders 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 to ensure due process. 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 Clema D. Sanders, Texas Board of Private Investigators and Private Security Agencies, P.O. Box 13509, Austin, Texas 78711.

The amendment is proposed under Texas Civil Statutes, Article 4413(29bb) §11(a)(3), which provide the Texas Board of Private Investigators and Private Security Agencies with the authority "to promulgate all rules and regulations necessary in carrying out the provisions of this Act."

The following is the statute that is affected by this rule: Texas Civil Statutes, Article 4413(29bb).

§423.46. Depositions. The taking and use of depositions in any proceeding shall be governed by §§2001.094-2001.102 [§14] of the Texas Government Code. [Administrative Procedure and Texas Register Act (Texas Civil Statutes, Article 6252-13a)]

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 October 12, 1995.

TRD-9513055 Clema D. Sanders
Executive Director
Texas Board of Private Investigators and Private Security Agencies

Earliest possible date of adoption: November 20, 1995

For further information, please call: (512) 463-5545

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• 22 TAC §423.47

The Texas Board of Private Investigators and Private Security Agencies proposes an amendment to §423.47, concerning Subpeonas. The Board has determined that this amendment is necessary because Article 6252, which contained the Administrative Procedure and Texas Register Act, was repealed and was reestablished as the Texas Government Code, Chapters 2001 and 2002.

Clema D. Sanders 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. Sanders 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 to ensure due process. 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 Clema D. Sanders, Texas Board of Private Investigators and Private Security Agencies, P.O. Box 13509, Austin, Texas 78711.

The amendment is proposed under Texas Civil Statutes, Article 4413(22bb) §11(a)(3), which provide the Texas Board of Private Investigators and Private Security Agencies with the authority "to promulgate all rules and regulations necessary in carrying out the provisions of this Act."

The following is the statute that is affected by this rule: Texas Civil Statutes, Article 4413(29bb).

§423.47. Subpoenas. Following written request by a party or on its own motion:

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

(3) Such subpoenas shall be issued only after a showing of good cause and deposit of sums sufficient to insure payment of expenses incident to the subpoenas. Service of subpoenas and payment of witness fees shall be made in the manner prescribed in §2001.089 and §2001.103 [§14] of the Texas Government Code. [Administrative Procedures and Texas Register Act (Texas Civil Statutes, Article 6252-13a).]

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 October 12, 1995.

TRD-9513056 Clema D. Sanders
Executive Director
Texas Board of Private Investigators and Private Security Agencies

Earliest possible date of adoption: November 20, 1995

For further information, please call: (512) 463-5545

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• 22 TAC §423.60

The Texas Board of Private Investigators and Private Security Agencies proposes an amendment to §423.60, concerning Grievance and Appeal Procedures and Definitions. The Board has determined that this amendment is necessary because Article 6252, which contained the Administrative Procedure and Texas Register Act, was repealed and was reestablished as the Texas Government Code, Chapters 2001 and 2002.

Clema D. Sanders 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. Sanders 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 to ensure due process. 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 Clema D. Sanders, Texas Board of Private Investigators and Private Security Agencies, P.O. Box 13509, Austin, Texas 78711.

The amendment is proposed under Texas Civil Statutes, Article 4413(29bb) §11(a)(3), which provide the Texas Board of Private Investigators and Private Security Agencies with the authority "to promulgate all rules and regulations necessary in carrying out the provisions of this Act."

The following is the statute that is affected by this rule: Texas Civil Statutes, Article 4413(29bb).

§423.60. Amendments to Rules Subsequent to January 1, 1976.

(a) Prior to the adoption of any rule, the agency shall give at least 30 days notice of its intended action. Notice of the proposed rule shall be filed with the Secretary of State and published by the Secretary of State in the *Texas Register*. The notice shall include:

(1) A brief explanation of the proposed rule;

(2) The text of the proposed rule, except any portion omitted as provided in §2002.014 [§6(C)] of the Texas Government Code [Administrative Procedure and

Texas Register Act (Texas Civil Statutes, Article 6252-13a)] prepared in a manner to indicate the words to be added or deleted from the current text, if any;

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

(b)-(f) (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 October 12, 1995.

TRD-9513057 Clema D. Sanders
Executive Director
Texas Board of Private Investigators and Private Security Agencies

Earliest possible date of adoption: November 20, 1995

For further information, please call: (512) 463-5545

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Chapter 429. Application and Examination

• 22 TAC §429.5

The Texas Board of Private Investigators and Private Security Agencies proposes an amendment to §429.5, concerning Fingerprint Cards. The Board has determined that this amendment is necessary because Article 6252, which contained the Administrative Procedure and Texas Register Act, was repealed and was reestablished as the Texas Government Code, Chapters 2001 and 2002.

Clema D. Sanders 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. Sanders 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 to ensure due process. 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 Clema D. Sanders, Texas Board of Private Investigators and Private Security Agencies, P.O. Box 13509, Austin, Texas 78711.

The amendment is proposed under Texas Civil Statutes, Article 4413(29bb), §11(a)(3), which provide the Texas Board of Private Investigators and Private Security Agencies with the authority "to promulgate all rules and regulations necessary in carrying out the provisions of this Act."

The following is the statute that is affected by this rule: Texas Civil Statutes, 4413(29bb).

§429.5. Fingerprint Cards.

(a) All fingerprint cards required by the Act shall be fingerprint cards approved by and obtained from the Board. Two fingerprint cards shall be submitted for each applicant so that if one is not classifiable, the other one may be acceptable. All blank spaces shall be completed and the cards shall be signed by the applicant and the person taking the prints.

(b) Applicants who have fingerprints rejected because of ridge characteristics (not those who are improperly printed) may appeal to the Board through Chapter 2001 of the Texas Government Code [Administrative Procedure and Texas Register Act] by filing a written request for a hearing with the Executive Director. The applicant should bring to the hearing items that may include a birth or marriage certificate, service discharge, a letter from the District Clerk stating the applicant has not been convicted of a felony or a crime involving moral turpitude within the past seven years, and a letter from the sheriff and chief of police of the county and city of the applicant's residence.

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 October 12, 1995.

TRD-9513058 Clema D. Sanders
Executive Director
Texas Board of Private Investigators and Private Security Agencies

Earliest possible date of adoption: November 20, 1995

For further information, please call: (512) 463-5545

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Chapter 435. Training Programs

• 22 TAC §435.16

The Texas Board of Private Investigators and Private Security Agencies proposes new §435.16 concerning Firearm Requalification. This section clearly defines the firearm course which is required for armed security officers at the time of requalification. The Board has determined that this new section is necessary in order to ensure that all armed security officers are trained properly.

Clema D. Sanders 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. Sanders 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 to ensure due process. 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 Clema D. Sanders, Texas Board of Private Investigators and Private Security Agencies, P.O. Box 13509, Austin, Texas 78711.

The new rule is proposed under Texas Civil Statutes, Article 4413(29bb), §11(a)(3), which provide the Texas Board of Private Investigators and Private Security Agencies with the authority "to promulgate all rules and regulations necessary in carrying out the provisions of this Act."

The following is the statute that is affected by this rule: Texas Civil Statutes, 4413(29bb).

§435.16. Firearm Requalification. The firearm requalification training course shall be the same course of fire as required in the basic security officer training course. (§20(e)(3) of the Act.)

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 October 12, 1995.

TRD-9513059 Clema D. Sanders
Executive Director
Texas Board of Private Investigators and Private Security Agencies

Earliest possible date of adoption: November 20, 1995

For further information, please call: (512) 463-5545

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Chapter 445. Employee Records

• 22 TAC §445.1

The Texas Board of Private Investigators and Private Security Agencies proposes an amendment to §445.1, concerning Employee Records. The Board has determined that this amendment is necessary in order comply with House Bill 713 of the 74th Texas Legislature. This section clearly defines the requirements for the content of all employee files.

Clema D. Sanders 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. Sanders 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 to ensure due process. 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 Clema D. Sanders, Texas Board of Private Investigators and Private Security Agencies, P.O. Box 13509, Austin, Texas 78711.

The amendment is proposed under Texas Civil Statutes, Article 4413(29bb) §11(a)(3), which provide the Texas Board of Private

Investigators and Private Security Agencies with the authority "to promulgate all rules and regulations necessary in carrying out the provisions of this Act."

The following is the statute that is affected by this rule: Texas Civil Statutes, Article 4413(29bb).

*§445.1. **Employee Records** [Other Employees].* Licensees shall keep records of all [non-investigative and non-security] employees. These records shall be maintained for a period of five [two] years from the date of termination. The following records shall be maintained:

(1) full name of employee, date of employment, position and address;

(2) social security number;

(3) date of termination; [and]

(4) date and place of birth ; **and**

(5) **one color photograph.**

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 October 12, 1995.

TRD-9513061 Clema D Sanders
Executive Director
Texas Board of Private Investigators and Private Security Agencies

Earliest possible date of adoption: November 20, 1995

For further information, please call: (512) 463-5545

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TITLE 25. HEALTH SERVICES

Part II. Texas Department of Mental Health and Mental Retardation

Chapter 401. System Administration

Subchapter A. Advisory Committees

- **25 TAC §§401.7, 401.8, 401.10, 401.14, 401.16-401.18, 401. 23-401.26**

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

The Texas Department of Mental Health and Mental Retardation (TDMHMR) proposes the repeal of §§401.7, 401.8, 401.10, 401.14, 401.16-401.18, 401. 23-401.26 of Chapter 401, Subchapter A, concerning advisory committees.

The proposed repeal would eliminate reference to all advisory committees that are not recognized by the Appropriations Act, Article II, Rider 27. Elimination of reference to certain advisory committees does not necessarily mean that the committees no longer exist, but rather that the committees are not funded under legislation authorizing advisory committees.

Don Green, chief financial officer, has determined that for the first five-year period the repeals are in effect there will be no additional fiscal cost to state or local government. There will be no significant local economic impact. There will be no effect on small businesses.

Karen Hale, assistant commissioner, has determined that the public benefit is the adoption of department repeals that reflect legislative intent. There are no anticipated economic costs to persons who are required to comply with the repeals as proposed.

Comments on the proposal may be submitted to Linda Logan, Director, Policy Development, Texas Department Mental Health and Mental Retardation, P.O. Box 12668, Austin, Texas 78711-2668, within 30 days of publication.

The repeals are proposed under the Texas Health and Safety Code, Title 7, §532.015, which provides the Texas Board of Mental Health and Mental Retardation with rulemaking powers.

The proposal affects the Texas Health and Safety Code, Chapters 533, 552, and 593.

§401.7. Mental Retardation Planning and Advisory Council.

§401.8. Advisory Committee on Prescription Medication.

§401.10. In-Home and Family Support Steering Committee.

§401.14. Operations Planning Committee-Children's Services.

§401.16. Executive Formulary Committee.

§401.17. Service Equalization Advisory Committee.

§401.18. Nurse Practice Organization.

§401.23. Advisory Committee on Provider/Authority Roles.

§401.24. Advisory Committee on Alternate Uses for the Travis State School.

§401.25. Equity of Access Task Force.

§401.26. Search and Screen Committee.

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 October 13, 1995.

TRD-9513166 Ann Utley
Chairman, Texas Mental Health and Mental Retardation Board
Texas Department of Mental Health and Mental Retardation

Earliest possible date of adoption: November 20, 1995

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

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Subchapter G. Community Mental Health and Mental Retardation Centers

- **25 TAC §401.462**

The Texas Department of Mental Health and Mental Retardation (TDMHMR) proposes amendments to §401.462 of Chapter 401, Subchapter G, concerning community mental health and mental retardation centers.

The proposed amendment would eliminate reference to the "Guidelines for Annual Fiscal Audits of Community MHMR Centers" and reference the performance contract instead.

Don Green, Chief Financial Officer, has determined that for each year of the first five-year period the section as proposed is in effect there will be no significant fiscal impact on state or local government as a result of enforcing the section as proposed.

Karen Hale, assistant commissioner, has determined that the public benefit is to provide for the ability to update audit guidelines in a more timely manner. 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.

Written comments on the proposal may be sent to Linda Logan, Director, Policy Development, Texas Department of Mental Health and Mental Retardation, P.O. Box 12668, Austin, Texas 78711-2668, within 30 days of publication.

The amendment is proposed under the Health and Safety Code, Title 7, §532. 015(a), which provides the Texas Mental Health and Mental Retardation Board with rulemaking powers. The proposed sections would affect the Health and Safety Code, Title 7, Chapter 534.

§401.462. Fiscal Auditing Procedures.

(a) Each board of trustees of a community center shall submit to the department copies of an annual audit of its accounts made by a certified or public accountant licensed by the Texas State Board

of Public Accountancy, which the department shall distribute to the governor, the Legislative Budget Board, the Legislative Audit Committee, and others. Such audit shall follow generally accepted auditing standards and shall be in accordance with the **performance contract** [most recent edition of "Guidelines for Annual Fiscal Audits of Community MHMR Centers," which is herein adopted by reference as Exhibit A and is available from the Texas Department of Mental Health and Mental Retardation, P.O. Box 12668, Capitol Station, Austin, Texas 78711].

(b) (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 October 16, 1995.

TRD-9513167 Ann Utley
Chairman, MHMR Board
Texas Department of
Mental Health and
Mental Retardation

Earliest possible date of adoption: November 20, 1995

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

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TITLE 28. INSURANCE

Part I. Texas Department of Insurance

Chapter 3. Life, Accident, and Health Insurance and Accident and Health Insurance and Annuities

Subchapter A. Requirements for Filing of Policy Forms, Riders, Amendments, and Endorsements for Life, Accident, and Health Insurance and Annuities

- **28 TAC §§3.1-3.21**

The Texas Department of Insurance proposes an amendment to §3.1, and new §§3.2-3.21, concerning requirements for filing of policy forms, riders, amendments, and endorsements for life, accident, and health insurance and annuities. The sections are necessary to streamline and strengthen the overall regulatory process by which life product and health product forms are filed and reviewed for official action, to enhance the overall effectiveness and efficiency of the form filing and review process, and to implement legislation from the 74th legislative session relating to the life/health form filing and review process in the Insurance Code, Article 3.42. Simultaneous to this notice of proposed amendment of §3.1 and proposed new §§3.2-3.21, the department is proposing repeal of existing §§3.2-3.5. Proposed notice of that repeal is published elsewhere in this issue of the Texas Register. The proposed amendment to §3.1 adds viatical settlement forms to the list of forms which must be filed under Chapter 3, Subchapter A of this title. Proposed new §3.2 addresses the adoption by reference of department forms utilized in the policy form review process. Proposed new §3.3 addresses general submission requirements associated with all filings required under the Insurance Code, Article 3.42 and within the scope of Subchapter A. It sets out the procedural details associated with filing and with post-filing communications between the department and the filer. Proposed new §3.4 sets out the general provisions and specific details relating to the regular and general review process. Proposed new §3.5 sets out eligibility criteria and procedural details for an expedited form review process. Proposed new §3.6 sets out specific details for circumstances where a form filing is essentially submissions of corrections for a filing pending official action. Proposed new §3.7 addresses procedural details for filings which are resubmissions of previously disapproved forms. Proposed new §3.8 provides procedural guidance and a cross reference to Subchapter Z for filings that are made pursuant to rules addressing exemption from review for certain forms. Proposed new §3.9 addresses procedural distinctions for filings which are submissions of exact copies of previously approved forms with only a change to the company name, office address, or other company specific identification information. Proposed new §3.10 sets out procedural distinctions for filings which constitute substitutions of previously approved forms which have never been issued in Texas. Proposed new §3.11 sets out procedural distinctions for filings of prototype forms. Proposed new §3.12 addresses specific additional submission requirements for all product types. Proposed new §3.13 addresses specific additional submission requirements for life and annuity forms. Proposed new §3.14 addresses specific additional submission requirements for group life and group accident and health forms. Proposed new §3.15 addresses specific additional submission requirements for individual accident and health forms. Proposed new §3.16 addresses specific additional submission requirements for credit life and credit disability forms. Proposed new §3.17 addresses miscellaneous requirements for specialty coverages and conversion filings. Proposed new §3.18 highlights that form filings cannot be accepted or recognized as filings unless they are in full compliance with provisions of Subchapter A. Proposed new §3.19 provides procedural details for circumstances where a submission meets all procedural requirements of Subchapter A, but fails to fully comply with applicable insurance statutes and rules and for that reason is not capable of affirmative approval unless corrections are submitted to bring the filing in full compliance with the law. Proposed new §3.20 provides an appendix and full reproduction of three forms proposed to be adopted by reference in §3.2 and utilized by the department in the review process in order to make the process flow smoothly and efficiently. The forms relate to required certifications for certain types of filings, and to essential checklists for both routine and expedited review processes. Proposed new §3.21 provides for an effective date.

Rhonda C. Myron, deputy commissioner for the life/health group of the Texas Department of Insurance, 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.

Ms. Myron 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 the more efficient administrative regulation of insurance licensees and the more effective utilization of public resources by an appropriate streamlining of the overall policy form submission, review and official action process. There is no anticipated difference in cost of compliance between small and large businesses, or between business entities and natural persons. There is no anticipated economic cost to persons who are required to comply with the proposal which arises as a result of provisions of these amendments and new sections, since they are for the most part replacing existing sections addressing the same subject matter. There is no anticipated incremental increase to the existing cost of compliance associated with the form filing process addressed by these sections.

Comments on the proposal must be submitted in writing within 30 days after publication of the proposal in the *Texas Register* to the Office of Chief Clerk, P.O. Box 149104, MC 113-2A, Austin, Texas 78714-9104. An additional copy of the comment should be submitted to Rhonda C. Myron, Deputy Commissioner, Life/Health Group, P.O. Box 149104, MC 106-1A, Austin, Texas 78714-9104. A request for public hearing on the proposed sections should be submitted separately to the Office of the Chief Clerk.

The amendment and new sections are proposed pursuant to the Insurance Code, Articles 3.42 and 1.03A. The Insurance Code, Article 3.42(p) provides that the commissioner is authorized to adopt such reasonable rules and regulations as are necessary to implement and accomplish the specific provisions of Article 3. 42 within the standards and purposes of the article. Article 1.03A authorizes the commissioner of insurance to promulgate and adopt rules and regulations for the conduct and execution of the duties and functions by the department.

The proposed amendment and new sections affect regulation pursuant to the following statutes: The Insurance Code, Article 3.42.

§3.1. Scope Subchapter. This subchapter applies to **all forms listed in paragraphs (1)-(10) of this section, as follows:**

(1) individual life forms;[,]

(2) individual annuity forms;[,]

(3) group annuity forms;[,]

(4) group life forms;[,]

(5) group accident and health forms;[,]

(6) group combination life, accident, and health forms;

(7) credit life forms;[,]

(8) credit accident and health forms;[, and]

(9) individual accident and health forms;[,] **and**

(10) viatical settlement forms.

§3.2. Adoption by Reference of Department Forms Utilized in the Review Process. Form CERT FR (a certification for use with certain submission types), Form GEN REV (transmittal checklist for regular and general review process), and Form EXP REV (transmittal checklist for expedited review process), utilized in the filing of policy forms, are adopted by reference in this subchapter. Each is reproduced in detail in §3.20 of this title (relating to Appendix). The forms can be obtained from the Texas Department of Insurance, Publications Department, MC108-5A, P.O. Box 149104, Austin, Texas 78714-9104. A copy of each form has been filed for inspection with the Office of the Secretary of State, Texas Register Division.

§3.3. General Submission Requirements.

(a) Address. Send form filings to the Life/Health Group, Filings Intake, Mail Code 106-1E, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104 or 333 Guadalupe, Austin, Texas 78701. To expedite the return of notices of proposed disapprovals or approvals, a company may enclose an appropriately sized overnight mail envelope together with either a completed form for transmittal or the company's billing number.

(b) Identification of form type. The form filings shall be identified by the type of product and coverage in each of the categories set out in paragraphs (1) and (2) of this subsection, as follows:

(1) Group, Individual, or Credit; and

(2) Accident and Health, Annuity, Conversion, Life, Combination Life, Accident, and Health, Long Term Care, Medicare Supplement, Prepaid Funeral, Chapter 26 (relating to Small Employer Health Insurance Availability), Chapter 26 Prototype, or Rate Filing.

(c) Number of copies. All correspondence, forms and/or rates, including resubmissions and corrections for pending forms, shall be submitted in duplicate.

(d) Specimen language and fill-in material. All forms, except for applications, shall be filled in with specimen language and specimen fill-in material.

(1) Specimen language and fill-in material shall reflect the most restrictive option available under variability. Additional descriptions of variability options shall be provided upon request or as otherwise required.

(2) For life and annuity forms, the fill-in material in both copies of the form shall be completed for specimen age 35 unless the form is not issued at age 35. If the form is not issued at age 35, the youngest age at which the form may be issued shall be used for the fill-in material. If reduced death benefits are provided for any age at issue, the specimen form shall be filled in for the age at issue for which the greatest reduction in benefits is made. The fill-in material shall be for the longest premium paying period available under the form.

(e) Type of paper. Forms shall be submitted on paper that will accept a rubber stamp and that is suitable for permanent filing and microfilming. Glossy stock paper is not acceptable.

(f) Print format. All filings must be legible.

(1) Forms and corrections shall be submitted for review on paper measuring 8 1/2 inches by 11 inches.

(2) Forms and corrections should not be submitted for review in any print format which consists of booklets which are bound or are printed on paper other than 8 1/2 inches by 11 inches in measure.

(3) Forms may be submitted in typewritten, computer generated, or printer's proof format.

(4) Handwritten forms or handwritten corrections will not be accepted.

(g) Form numbers. Each form shall be designated by a form number sufficient to distinguish it from all other forms used by the company. The form number shall be located in the lower left-hand corner of the cover page or on the first page of the form if the form number would be visible with the cover closed.

(1) Forms submitted for consideration pursuant to the Insurance Code, Article 3.53 shall have additional identifying form numbers. Refer to §3.5201, Subchapter FF of this title (relating to Credit Life and Credit Accident and Health) for specific form number requirements.

(2) Forms submitted for consideration pursuant to the Insurance Code, Chapter 26 may require additional identifying form numbers. Refer to §26.14 of this title (relating to Small Employer Health Insurance Availability Act) for specific form number requirements.

(h) Filing fee. Each new submission or resubmission shall be accompanied by the appropriate filing fee required by §7.1301 of this title (relating to Regulatory Fees).

(i) Insurance Code Authority. Each submission shall contain a statement identifying the specific authority of the Insurance Code under which the forms are submitted for review. The statement shall specify whether the filing is being submitted under the Insurance Code, Article 3.42(c) or (d) (relating to Policy Form Approval), or Article 3.53 (relating to Credit Life and Credit Accident and Health). Some of the distinctions between Article 3.42(c) and (d) filings are set forth in paragraphs (1) and (2) of this subsection as follow.

(1) A filing under the Insurance Code, Article 3.42(c), allows the company to immediately issue, deliver, or use such form prior to review and approval, as applicable, after it has been received. All such filings shall be accompanied by the certification required by Article 3.42(c) in the format prescribed in Form CERT FR (See Figure 1, as described in §3.20 of this title (relating to Appendix).) If a form as filed is disapproved by the Commissioner, the company, upon receiving written notice, shall immediately cease issuing or using such form.

(2) A filing under the Insurance Code, Article 3.42(d), requires the company to file the form for review and approval, as applicable, prior to issuance, delivery or use of such form as required by Article 3.42.

(j) Contact Person. One person shall be designated as the contact person for each filing submitted. Each submission should provide the name, address, phone number, and fax number, if available, of the contact person for that filing. If the forms are submitted by anyone other than the company itself, the forms shall be accompanied by a dated letter of specific authorization for such forms, designating the consulting firm, actuary, legal counsel, or other designated contact person for that filing.

(k) Transmittal Letter. The appropriate transmittal letter as described in §3.4 of this title (relating to Regular and General Review Process) or §3.5 of this title (relating to Expedited Review Process) shall be included with a filing made under this section.

§3.4. Regular and General Review Process

(a) General Provisions. Any form filing requiring complete review for approval or acceptance for filing from this department will fall into the category ad-

dressed in this section, including but not limited to filings described in paragraphs (1)-(4) of this subsection, as follow:

(1) any new forms which have not previously been filed under Insurance Code, Article 3.42(c) or (d);

(2) any forms or rates required by statute or regulation to be approved prior to use, including but not limited to forms filed under Insurance Code, Article 3.56 (relating to Credit Life and Credit Accident and Health);

(3) all filings submitted for informational purposes, including but not limited to rate filings; or

(4) any form filings not otherwise meeting the criteria for expedited review as described in §3.5 of this title (relating to Expedited Review Process).

(b) Transmittal Checklist for Regular and General Review Process. A transmittal checklist must accompany any filing of this type and may be in the format prescribed in Form GEN REV. (See Figure 2 as described in §3.20 of this title (relating to Appendix).) or any similar format which supplies the information detailed in paragraphs (1)-(10) of this subsection, as follows.

(1) The identifying form number of each form being submitted must be supplied. (Refer to Figure 2, Form GEN REV, Item 1 , as described in §3.20 of this title (relating to Appendix).)

(2) If the forms are new or informational, a statement to that effect shall be included. (Refer to Figure 2, Form GEN REV, Item 2, as described in §3.20 of this title (relating to Appendix).)

(3) A statement electing review under either Article 3.42(c) or (d), or Article 3.53 must be included. (Refer to Figure 2, Form GEN REV, Item 3, as described in §3.20 of this title (relating to Appendix).)

(4) A statement of the type of product and coverage provided by the forms must be supplied. (Refer to Figure 2, Form GEN REV, Item 4, as described in §3.20 of this title (relating to Appendix).)

(5) If the submission is a rate filing, all specific descriptions and required information related to the rate submission shall be provided. (Refer to Figure 2, Form GEN REV, Item 5, as described in §3.20 of this title (relating to Appendix).)

(6) If the submitted form (application, rider, amendment, endorsement, insert page, or supplemental form) is for use with specific policies, a listing of the policy form numbers with which the submitted form is to be used, approval dates for those forms, along with a statement explaining when the form will be used with the policy forms in the listing, must be supplied. (Refer to Figure 2, Form GEN REV, Item 6, as described in §3.20 of this title (relating to Appendix).)

(7) If the submitted form (application, rider, amendment, endorsement, insert page, or supplemental form) is for general use with various policies, a description of the types of policies with which the submitted form is to be used and a statement explaining when the form will be used with those policies must be supplied. (Refer to Figure 2, Form GEN REV, Item 6, as described in §3.20 of this title (relating to Appendix).)

(8) For any group life forms or group or blanket accident or health forms, the section of the Insurance Code, Article 3.50, Article 3.51-6, or both, that describes the group to be issued the forms must be supplied. (Refer to Figure 2, Form GEN REV, Item 7, as described in §3.20 of this title (relating to Appendix).)

(A) The composition of the group to be covered must meet the definition in the statute.

(B) If the company is submitting the form for consideration for issuance on a discretionary basis under the Insurance Code, Article 3.50, §1(6), Article 3.51-6, §1(a)(6), or Article 3.51-6, §2(a)(9), the company must specify the appropriate statute in the transmittal letter. Consideration under a discretionary group category should only be requested if the group is not otherwise described in the Insurance Code, Article 3.50, §1, Article 3.51-6, §1(a), or Article 3. 51-6, §2(a).

(9) For any group annuity forms, a description of the group to be issued the forms must be supplied.

(10) Any actuarial information necessary for a complete review of the forms must be supplied. (Refer to Figure 2, Form GEN REV, Item 10, as described in §3.20 of this title (relating to Appendix).) Specific requirements are set forth in §§3. 12-3.17 of this title (relating to Specific Additional Submission Requirements) .

(11) Any additional information necessary for a comprehensive review of the forms must be supplied, including but not limited to:

(A) identification of forms submitted for use as alternate or additional plans (Refer to Figure 2, Form GEN REV, Item 8, as described in §3.20 of this title (relating to Appendix).) under the provisions of Insurance Code, Chapter 26 (relating to Small Employer Health Insurance Availability Act); and

(B) any applicable readability certification. (Refer to Figure 2, Form GEN REV, Item 9, as described in §3.20 of this title (relating to Appendix).)

§3.5. Expedited Review Process.

(a) General Provisions. In order to shorten the time required for review and approval, companies may elect to use the expedited review process of this section for form filings which are substantially similar to previously approved forms. Use of the Expedited Review Transmittal Checklist and procedures will provide the Life/Health Group with information necessary to expedite the review process and eliminate unnecessary or duplicative review of previously approved language. If the information required by this section and outlined in subsections (b) and (c) of this section is unavailable or is incomplete, the form filing will be subject to the regular and general review process outlined in §3.4 of this title (relating to Regular and General Review Process).

(b) Information on substantially similar prior approved forms. If the forms are substantially similar to a previously approved form, the information set forth in paragraphs (1)-(4), as follow, shall be provided in order to expedite the review of the forms.

(1) A statement shall be supplied, identifying the forms as substantially similar to previously approved forms. (Refer to Figure 3, Form EXP REV, Item 5, as described in §3.20 of this title (relating to Appendix).)

(2) A statement must be provided which specifically identifies the form number and approval date of the previously approved form, as well as the company name for which the form was previously approved. (Refer to Figure 3, Form EXP REV, Item 5, as described in §3.20 of this title (relating to Appendix).)

(3) A summary of the differences between the previously approved form and the new form shall be provided, including a description of any deleted text. The submitted copy of the form shall clearly identify all changes made to the form. New or modified text must be underlined. Highlighting any portion of the form is strictly prohibited, since the highlighted portions may be illegible when the form is converted to a microform for purposes of tracking and retention.

(4) A certification that no changes have been made to the form other than those identified and that all remaining text complies with all applicable statutes and regulations shall be provided in the format prescribed in Form CERT FR, Item "Similar to Previously Approved Forms."

(See Figure 1 as described in §3.20 of this title (relating to Appendix).)

(c) Transmittal Checklist for Expedited Review Process. A transmittal checklist containing the following information, as applicable, will be required for all expedited review filings in the format prescribed in Form EXP REV. (See Figure 3 as described in §3.20 of this title (relating to Appendix).)

(1) A statement of the type of product and coverage provided by the forms must be supplied. (Refer to Figure 3, Form EXP REV, Item 1, as described in §3.20 of this title (relating to Appendix).)

(2) A statement identifying whether a filing is submitted for review under Insurance Code, Article 3.42(c) or Article 3.42(d) must be supplied, as applicable. (Refer to Figure 3, Form EXP REV, Item 2, as described in §3.20 of this title (relating to Appendix).)

(3) The identifying form number of each form submitted must be supplied. (Refer to Figure 3, Form EXP REV, Item 3, as described in §3.20 of this title (relating to Appendix).)

(4) A readability certification must be supplied, as required. (Refer to Figure 3, Form EXP REV, Item 4, as described in §3.20 of this title (relating to Appendix).)

(5) A statement related to any submissions of substantially similar forms must be supplied, as applicable. (Refer to Figure 3, Form EXP REV, Item 5, as described in §3.20 of this title (relating to Appendix).)

(6) A statement related to any corrections submitted for pending forms must be supplied, as applicable. (Refer to Figure 3, Form EXP REV, Item 6, as described in §3.20 of this title (relating to Appendix).)

(7) A statement related to any resubmissions of previously disapproved forms must be supplied, as applicable. (Refer to Figure 3, Form EXP REV, Item 7, as described in §3.20 of this title (relating to Appendix).)

(8) A statement related to any filing which is exempt must be supplied, as applicable. (Refer to Figure 3, Form EXP REV, Item 8, as described in §3.20 of this title (relating to Appendix).)

(9) A statement related to any submissions of exact copies must be supplied, as applicable. (Refer to Figure 3, Form EXP REV, Item 9, as described in §3.20 of this title (relating to Appendix).)

(10) A statement related to any submissions of substitutions for previously approved forms must be supplied, as applicable. (Refer to Figure 3, Form EXP REV, Item 10, as described in §3.20 of this title (relating to Appendix).)

(11) Any additional information necessary for a comprehensive review of the form must be supplied, including but not limited to information specified in subparagraphs (A)-(C) of this paragraph, as follow:

(A) the identification of any previously approved forms which are intended for use with the forms currently submitted (Refer to Figure 3, Form EXP REV, Item 11, as described in §3.20 of this title (relating to Appendix);

(B) a statement indicating whether or not the forms are intended for general use or for use with a specific form or group (Refer to Figure 3, Form EXP REV, Item 1, as described in §3.20 of this title (relating to Appendix); and

(C) any specific information identified for the applicable product or submission type described §§3.12-3. 17 of this subchapter (relating to Specific Additional Submission Requirements) .

(12) For any group life forms or group or blanket accident or health forms, the section of the Insurance Code, Article 3.50, Article 3.51-6, or both, that describes the group to be issued the forms must be supplied. (Refer to Figure 3, Form EXP REV, Item 13, as described in §3.20 of this title (relating to Appendix).)

(A) The composition of the group to be covered must meet the definition in the statute.

(B) If the company is submitting the form for consideration for issuance on a discretionary basis under the Insurance Code, Article 3.50, §1(6); Article 3.51-6, §1(a)(6); or Article 3.51-6, §2(a)(9), the company must specify the appropriate statute in the transmittal letter. Consideration under a discretionary group category should only be requested if the group is not otherwise described in the Insurance Code, Article 3.50, §1; Article 3.51-6, §1(a); or Article 3. 51-6, §2(a).

(13) For any group annuity forms, a description of the group to be issued the forms must be supplied.

(14) A description of any prescribed prototype forms must be supplied, as applicable. (Refer to Figure 3, Form EXP REV, Item 14, as described in §3.20 of this title (relating to Appendix).) Certifications should be attached as required under §26.19 of this title (relating to Small Employer Health Insurance Availability Act) or other applicable regulation related to a prescribed prototype form.

(15) Any actuarial information necessary for a complete review of the forms must be supplied. (Refer to Figure 3, Form EXP REV, Item 15, as described in §3.20 of this title (relating to Appendix).) Specific requirements are set forth in §§3.12-3.17 of this title (relating to Specific Additional Submission Requirements).

§3.6. Corrections to Pending Forms If the form filing is a corrected version of pending forms which have previously been reviewed, the information set out in paragraphs (1)-(6) of this section shall be provided upon submission for review:

(1) The company shall be required to use the transmittal letter in the format prescribed in Form EXP REV (See Figure 3 as described in §3.20 of this title (relating to Appendix).) in accordance with the applicable provisions described in §3.5(c) of this title (relating to Expedited Review Transmittal Checklist).

(2) A statement identifying the forms as corrected versions of pending forms shall be provided. (Refer to Figure 3, Form EXP REV, Item 6, as described in §3.20 of this title (relating to Appendix).)

(3) The transmittal letter shall be addressed to the analyst reviewing the form.

(4) The form numbers of the pending forms for which the corrections are submitted shall be provided. (Refer to Figure 3, Form EXP REV, Item 6, as described in §3.20 of this title (relating to Appendix).)

(5) A summary of the differences between the reviewed version of the form and the newly corrected version of the form shall be provided, including a description of any deleted text. The submitted copy of the corrected form or corrected pages shall clearly identify all changes made to the form. New or modified text must be underlined. Highlighting any portion of the form is strictly prohibited, since the highlighted portions may be illegible when the form is converted to a microform for purposes of tracking and retention.

(6) A certification that no changes have been made to the form other than those identified shall be provided in the format prescribed in Form CERT FR, Item "Corrections." (See Figure 1 as described in §3.20 of this title (relating to Appendix).)

§3.7. Resubmissions of Previously Disapproved Forms.

(a) The Insurance Code, Article 3.42 (relating to Policy Form Approval), provides the company 45 days from the date

of any order disapproving a form to the make the changes required to obtain approval and resubmit the forms.

(b) If a form filing is a resubmission of previously disapproved forms, all items of information set forth in paragraphs (1)-(5) of this subsection shall be provided upon submission:

(1) The company shall be required to use the Expedited Review Transmittal Checklist in the format prescribed in Form EXP REV (See Figure 3 as described in §3.20 of this title (relating to Appendix) in accordance with the applicable provisions described in §3.5(c) of this title (relating to Expedited Review Transmittal Checklist).

(2) A statement specifying the form numbers of the previously disapproved forms and date of disapproval must be supplied. (Refer to Figure 3, Form EXP REV, Item 7, as described in §3.20 of this title (relating to Appendix).)

(3) A copy of the notice of disapproval prepared by the Department of Insurance shall be provided.

(4) A summary of the differences between the disapproved version of the form and the resubmitted version of the form shall be provided, including a description of any deleted text. The submitted copy of the corrected form shall clearly identify all changes made to the form. New or modified text must be underlined. Highlighting any portion of the form is strictly prohibited, since the highlighted portions may be illegible when the form is converted to a microform for purposes of tracking and retention.

(5) A certification that no changes have been made to the form other than those identified and that all remaining text complies with the applicable statutes and regulations shall be provided in the format prescribed in Form CERT FR, Item "Resubmissions." (See Figure 1 as described in §3.20 of this title (relating to Appendix).)

(c) Previously disapproved forms which are resubmitted within 45 days of any order disapproving a form shall be affirmatively approved or disapproved within the statutory deemer period of 45 days from the receipt date.

(d) Any previously disapproved form which is resubmitted more than 45 days after the date of the order disapproving the form shall be subject to the statutory deemer period for new filings in accordance with Insurance Code, Article 3.42(c) or (d).

§3.8. Submission of Exempt Forms. Submission of forms that are exempt under the provisions of §3.4004 of this title (relating to Exemption from Review for Certain Forms), shall be accompanied by each of the information items set out in paragraphs (1)-(3) of this section.

(1) The form filing shall be accompanied by the Expedited Review Transmittal Checklist in Form EXP REV (See Figure 3 as described in §3.20 of this title (relating to Appendix) in accordance with the applicable provisions of §3. 5(c) of this title (relating to Expedited Review Process)).

(2) A signed copy of the certification form required by §3.4005 of this title (relating to Exemption from Review for Certain Forms, General Information) in the format prescribed in Form CERT FR (See Figure 1 as described in §3.20 of this title (relating to Appendix) must be provided.

(3) Any additional information or documentation generally required under the provisions of this subchapter must be provided.

§3.9. Submission of Exact Copies. If the forms are exact copies of a previously approved form with the exception of the company name, address, phone number, or other similar company identification information, the forms are exempt from review in accordance with §3.4004 of this title (relating to Exemption from Review for Certain Forms). The submission shall be accompanied by the items of information set out in paragraphs (1)-(4) of this section, as follows.

(1) The forms filing shall be accompanied by the Expedited Review Transmittal Checklist in Form EXP REV (See Figure 3 as described in §3.20 of this title (relating to Appendix), and completed in accordance with the applicable provisions of §3.5(c) of this title (relating to Expedited Review Transmittal Checklist).

(2) A statement identifying the forms as exact copies shall be supplied. (Refer to Figure 3, Form EXP REV, Item 9, as described in §3.20 of this title (relating to Appendix).)

(3) The company must provide a statement which specifically identifies the form number and approval date of the previously approved form, as well as the company name for which the form was previously approved.

(4) The company must certify that no changes have been made to the form other than the company name and that all remaining text complies with all applicable statutes and regulations shall be provided in the format prescribed in Form CERT FR, Item "Exact Copy of Previously Approved Forms." (See Figure 1 as described in §3.20 of this title (relating to Appendix).)

§3.10. Substitutions of Previously Approved Forms. If the form filing is a substitution for a previously approved form which has never been issued in this state, the information set out in paragraphs (1)-(4) of this section shall be provided, as follows.

(1) The form filing shall be accompanied by the Expedited Review Transmittal Checklist in Form EXP REV (See Figure 3 as described in §3.20 of this title (relating to Appendix) and completed in accordance with §3.5(c) of this title (relating to Expedited Review Transmittal Checklist).

(2) A statement must be supplied identifying the form number and the approval date of the previously approved form. (Refer to Figure 3, Form EXP REV, Item 10, as described in §3.20 of this title (relating to Appendix).)

(3) A summary of the differences between the previously approved form and the substituted form, including a description of any deleted text, must be provided. The submitted copy of the corrected form shall clearly identify all changes made to the form. New or modified text must be underlined. Highlighting any portion of the form is strictly prohibited, since the highlighted portions may be illegible when the form is converted to a microform for purposes of tracking and retention.

(4) A certification in the format prescribed in Form CERT FR, Item "Substitutions" (See Figure 1 as described in §3.20 of this title (relating to Appendix) must be provided, certifying that:

(A) no changes have been made to the form other than those identified;

(B) all remaining text complies with all applicable statutes and regulations; and

(C) the original version of this form has not been issued or otherwise used in Texas and will not be used in Texas at any time.

§3.11. Submission of Prototype Forms. If the form filing is a submission of a prescribed prototype form adopted by the Department of Insurance (e.g., prototype policies prescribed under §26.14 of this title (relating to Small Employer Health Insurance Availability Act), the information set out in paragraphs (1) and (2) of this section shall be provided upon submission.

(1) The form filing shall be accompanied by the Expedited Review Transmittal Checklist as adopted in Form EXP REV (See Figure 3 as described in §3.20 of

this title (relating to Appendix) and completed in accordance with §3.5(c) of this title (relating to Expedited Review Process Transmittal Checklist).

(2) The submission shall be accompanied by a statement identifying the filing as a prototype form filing, submitted in compliance with any additional procedures otherwise required by applicable statutes and regulations. (Refer to Form EXP REV, Figure 3, Item 14, as described in §3.20 of this title (relating to Appendix).)

§3.12. Specific Additional Submission Requirements for All Product Types.

(a) Riders, endorsements, amendments, insert pages, and other supplemental forms. Although it is recognized that a rider, endorsement, amendment, insert page, or supplemental form is merely a part of the entire written contract between the policyholder and the company, each form will generally be reviewed and approved (as applicable) and/or accepted for filing independently of the base contract of which it is a part, so long as all conditions in paragraphs (1)-(5) of this subsection are met as follow:

(1) the form does not change the basic concept and/or plan of the contract;

(2) the form can be comprehensibly analyzed and reviewed and is understandable apart from the base policy (contract);

(3) the form does not provide benefits which are combined with base policy benefits in a manner such that the benefits of the form cannot be analyzed and reviewed apart from the base policy;

(4) the form, if changing the benefits provided under the base contract for some issues of the base contract, will not be used in such a manner that subsequent issuance of the base contract will provide benefits on a basis which is unfairly discriminatory; and

(5) policy schedule/data pages showing material pertinent to the form are supplied in instances where such material is necessary for comprehensive review of the form, including specimen language in accordance with §3.3(d) of this title (relating to General Submission Requirements).

(b) Severable/Nonseverable. A form which can be reviewed independently of the base contract is considered severable and may be submitted independently of the base contract if the appropriate information is provided with the form filing. A form which cannot be reviewed independently of the base contract is considered nonseverable and will not be accepted for independent review.

(c) Acceptance for independent review. Based on demonstration of conditions set out in subsection (a)(1)-(5) of this section, and all other relevant facts and circumstances, the commissioner will determine whether a form submitted for review pursuant to this subchapter is acceptable for independent review. In addition, the provisions of paragraphs (1) and (2) of this subsection apply to independent review.

(1) For life product and annuity product form filings, the contract form to which a nonseverable rider, endorsement, amendment, insert page, or other supplemental form is to be attached, must be filed under an adjusted form number if that contract form has been previously approved without the nonseverable form. The adjusted form number may be made by a typewritten prefix or suffix or rubber stamp for cases where the contract is issued with the nonseverable form.

(2) For group and individual accident and health, credit life and credit accident and health product form filings, the company may separately submit amendments, riders, endorsements, or alternate insert pages to be added to a previously approved form to make it comply with Texas statutes and rules, to add additional benefits to a previously approved contract, or to amend a previously approved contract. Each must bear an identifying form number as required by §3.3(g) of this title (relating to General Submission Requirements).

(d) Complete submission of a base policy form or certificate form. In order to be complete, the submission of a base policy form or certificate form shall include the application to be used with it, any amendments or endorsements which will be included in all issues of the form, and all insert pages which may be used with the form; however, the provisions of paragraphs (1)-(4) of this subsection also apply completeness of submission.

(1) Any optional rider which is severable should not be included in the base policy.

(2) Any previously approved severable form (e.g., application, rider, endorsement, or amendment) to be used with a new form filing need not be resubmitted; however, the type of form, form number and form approval date must be submitted.

(3) Riders used to provide mandated benefits or other compliance provisions are nonseverable from the policy and/or certificate and must be filed with each new submission bearing a unique identifying form number.

(4) The company is responsible for assuring the appropriate use of previously approved forms.

(e) Resubmitted forms. If the company resubmits previously disapproved forms, or forms which have been withdrawn from the review process, the resubmission must include all forms for which the company is seeking approval, accompanied by the required filing fee.

(f) Variable material. Any variable material in a form must be bracketed. A clear explanation of how the material will vary must be provided. Sample language should represent the most restrictive variable option. The material may not be less favorable than required by Texas statutes or rules.

§3.13. Specific Additional Submission Requirements for Life and Annuity Forms.

(a) Severable forms. In accordance with the definitions provided in §3.12(b) of this title (relating to Specific Additional Submission Requirements for All Product Types), some examples of severable forms are set out in paragraphs (1)-(7) of this subsection, as follow:

(1) a waiver of premium rider;

(2) an application;

(3) an endorsement amending the calculation of nonforfeiture benefits, so long as the endorsement is for use in a particular market (such as all new issues of a particular policy);

(4) an endorsement amending the partial surrender provision, so long as the endorsement is for use in a particular market (such as all new issues of a policy when the initial amount of insurance is $100,000 or more);

(5) an insert page depicting nonforfeiture values for a previously approved form, so long as the policy form is intended for use in a market which requires the use of nonforfeiture values which are different from those approved in the original policy form;

(6) an update endorsement which is optional to existing policyholders of a particular policy form and which provides a benefit that is more favorable than benefits which are provided under the inforce policy; and

(7) an acceleration-of-life-insurance-benefits provision, so long as it is part of a rider which meets the requirements of §3.129 of this title (relating to Acceleration of Life Insurance Benefits) or other applicable statutes or regulations, and further provided that such rider is filed with a listing of the form numbers of approved policy forms to which it will be attached.

(b) Nonseverable forms. In accordance with the definitions provided in §3.12(b) of this title (relating to Specific Additional Submission Requirements for All Product Types), some examples of nonseverable forms are set out in para-

graphs (1)-(7) of this subsection, as follow:

(1) a form which adds an option to suspend premium payments;

(2) a form which changes the contract from a fixed premium life policy to a flexible premium life policy;

(3) a form which changes the contract from a fixed benefit policy to a variable benefit policy;

(4) a policy cover or policy shell;

(5) a corrective endorsement which adds language to a form that is required by state statute or regulation;

(6) a form which is designed to provide additional insurance with cash values and which refers to the policy for the paid-up nonforfeiture benefits to be provided by the cash value of the form; and

(7) an insert page providing nonforfeiture benefits on the basis of one interest rate (such as 6. 0%) which is to be issued as part of a particular policy form when that policy form is also being issued with an insert page providing nonforfeiture benefits on the basis of a different interest rate (such as 5.0%).

(c) Complete submission of a base policy form or certificate form. In accordance with the requirements of §3.12 of this title (relating to Specific Additional Submission Requirements for All Product Types), an example of a complete life insurance submission would consist of an application and the basic life insurance policy form, which if intended for issue as a unisex plan and a sex distinct plan would also include the insert pages for both plans.

(d) Variable material. In addition to the requirements of §3. 12 of this title (relating to Specific Additional Submission Requirements for All Product Types), the provisions in paragraphs (1) and (2) of this subsection apply to submission of variable material.

(1) The text and specifications of nonforfeiture assumptions included in individual life forms generally cannot be considered variable material.

(2) Any variable material in a form should be bracketed and be accompanied with a clear explanation of how the material will vary. It is acceptable for certain material to vary due solely to the age, sex, or classification of the insured; but other types of variations may require a limited partial refiling or a complete refiling, depending on the manner in which the company plans to use the variations.

(e) Limited/partial refilings. Changes to forms or pages of forms which have received prior approval and which meet the criteria for severability set out in §3.12 of this title (relating to Specific Additional Submission Requirements for All Product Types) will be treated as limited/partial refilings. Some examples of acceptable limited/partial refilings include the items described in subsection (a)(3)-(5) of this section. In addition, the examples set forth in paragraphs (1)-(3) of this subsection constitute acceptable limited/partial refilings, as follow, provided that severability criteria is met:

(1) a change in the text or nonforfeiture assumptions of a previously approved form;

(2) a change in the current interest rate of a previously approved form, where such rates are guaranteed and shown in the policy; and

(3) a change in the reserves (if defined in the text) of a previously approved form.

(f) Actuarial information. Each form (including insert pages and other forms which change the nonforfeiture values of a particular form) shall be accompanied by the information set forth in paragraphs (1)-(3) of this section, when applicable.

(1) The mathematical formulas and sample calculations for the items set out in subparagraphs (A)-(D) of this paragraph shall accompany the form submission:

(A) net premiums for the specimen age and plan of insurance;

(B) specimen nonforfeiture calculations necessary to verify consistency between the nonforfeiture values and the text of the form for years one, 20 and 50;

(C) terminal reserves for the specimen age and plan; and

(D) any other calculations necessary to verify nonforfeiture values and reserves.

(2) An actuarial memorandum which provides the information in subparagraphs (A) -(F) of this paragraph shall accompany the form submission, as applicable.

(A) For universal life and interest sensitive forms, the mortality table, guaranteed interest rates, maximum surrender charges, maximum expense charges, maximum risk rates (cost of insurance rates), maximum loads, and maximum fees at issue must be provided. Upon a change in basic coverage, bands and risk classes for all ages should be provided.

(B) For universal life forms, actuarial proof that cash surrender values meet the minimum requirements of the Insurance Code, Article 3.44a, must be provided. The actuarial proof should also include an actuarial certification that cash surrender values will always equal or exceed the minimum values required by law. A comparison table of all guaranteed cash surrender values, standard nonforfeiture law minimum cash surrender values, guaranteed death benefits, and reserves should be provided. Such comparison should be based on the fill-in issue age (usually age 35), a premium which will provide coverage to the latest available maturity date, the minimum issue amount, minimum guaranteed interest rates, maximum guaranteed cost of insurance rates (mortality rates), and maximum guaranteed charges. A month-by-month calculation of the values shown in the comparison for the first and fifteth years should be provided.

(C) For variable life forms, actuarial material should be provided as required by §3.804 of this title (relating to Insurance Contract and Filing Requirements), and as required by this section, if the form contains an option to allocate premiums to a fixed account.

(D) For annuities, an actuarial memorandum should be provided specifying the guaranteed interest rates, the maximum surrender charges, and any other maximum charges applicable in the determination of nonforfeiture values. If the insurer intends to change the guaranteed interest rates specified in the form, notification must be submitted to the department prior to the change. The notification must specify the new guaranteed interest rate and the date when it will be effective for new issues of a specified policy form as required by §3.1004 of this title (relating to Policy Form Review).

(E) For variable annuities, the actuarial material required by §3. 705 of this title (relating to Contract Requirements) should be provided as well as actuarial material required by this section for annuities, to the extent such material is applicable.

(F) For contracts which contain a market-value adjustment, an actuarial memorandum should be provided that addresses the items in clauses (i)-(v) of this subparagraph with respect to the market value adjustment:

(i) identify the name of the separate account;

(ii) indicate the basis for the market-value adjustment formula and that the formula provides the reasonable

equity to both the contract holder and the insurance company;

(iii) detail that the reserve liabilities are established in accordance with actuarial procedures that recognize:

(I) that assets of the separate account are based on market values;

(II) the variable nature of the benefits provided; and

(III) any mortality guarantees;

(iv) include a table of minimum guaranteed values based on the longest guaranteed investment period (The table should show the policy values and cash surrender values, reflecting both upward and downward market-value adjustments. The minimum guaranteed values cannot be less that the minimum values required by law); and

(v) provide a numerical illustration reproducing the values shown in the table for the first, second, and third years of investment, and at the end of the guaranteed investment period.

(3) A statement shall be provided certifying that all plans of insurance, in addition to the specimen plan, for which the form will be used will have premiums, reserves, and nonforfeiture values calculated in a manner consistent with the information furnished with the specimen plan. Any qualifications to such certification must be specified, including any variation in formulas at different ages at issue or at time of a change.

§3.14. Specific Additional Submission Requirements for Group Life and Group Accident and Health Forms.

(a) Severable forms. In accordance with the definitions provided in §3.12(b) of this title (relating to Specific Additional Submission Requirements for All Product Types), some examples of severable forms are set out in paragraphs (1)-(3) of this subsection, as follow:

(1) applications which are for general use;

(2) optional benefit riders; and

(3) endorsements which are to be used to bring previously approved or exempted forms into compliance with newly enacted or adopted legislation or rules.

(b) Nonseverable forms. In accordance with the definitions provided in §3.12(b) of this title (relating to Specific Additional Submission Requirements for All Product Types) , some examples of nonseverable forms are set out in paragraphs (1) and (2) of this subsection, as follow:

(1) certificates of coverage; and

(2) riders containing mandated benefits or Texas specific provisions which are used to bring a new form submission into compliance with Texas laws;

(c) Complete submission of a base policy form or certificate form. In accordance with the requirements of §3.12 of this title (relating to Specific Additional Submission Requirements for All Product Types), two examples of a complete group accident and health submission are provided in paragraphs (1) and (2) of this subsection, as follow.

(1) A long term disability policy for use with multiple employer trusteed group must include the policy form including any alternate face pages for various industries, the certificate of coverage, the group master application, the participation agreement for the employer units, the employee enrollment form or application, any optional benefit riders, any riders or endorsements necessary to bring the policy or certificate into compliance with Texas mandates or specific provisions, and the trust agreement.

(2) A major medical policy for use with an association group must include the master policy form, the certificate of coverage, the group master application, the member application or enrollment form, any optional benefit riders, any riders or endorsements necessary to bring the policy and the certificate into compliance with Texas mandates or specific provisions, the constitution, bylaws, and Articles of Incorporation for the association, and required forms providing conversion coverages.

(d) Submission of certificate. A copy of the master policy must accompany any certificate submitted, even if the master policy is issued outside of Texas.

(e) Designation of group type on form submission. The company must clearly state the type of group to which the form will be issued, by specific reference to the appropriate section of the Insurance Code, Article 3.50, Article 3.51-6, or both. A separate policy and certificate must be submitted for each type of group. A submission of a single policy and certificate for use with more than one type of group is prohibited.

(f) Association group. The instructions in paragraphs (1)-(3) of this subsection apply to submission of a form intended to be issued to an association.

(1) The company shall submit documentation including, but not limited to, a copy of the association constitution and by-laws to show that the association meets the requirements of the Insurance Code, Article 3. 50, §1(10), Article 3.51-6, §1(a)(2), or both.

(2) The company may submit forms on an "ABC association" basis. If a form is approved on this basis, the company shall submit the documentation required in paragraph (1) of this subsection when the form is issued. In addition, the company shall submit an alternate policy face page, identifying the association and the policy number assigned, each time the form is issued to a different eligible association.

(3) The company shall submit a listing of all associations participating in any permitted multiple association trusteed arrangements in addition to a copy of the trust agreement. The listing of participating associations shall be included with the initial submission of the forms. Documentation required in paragraph (1) of this subsection shall be submitted with the required listing. Notification of additional participating associations shall be provided upon enrollment and shall include the documentation required in paragraph (1) of this subsection for each association initiating participation after the initial submission of the forms.

(g) Multiple employer trusteed group. The instructions in paragraphs (1)-(3) of this subsection apply to submission of a form intended to be issued to a multiple employer trusteed group.

(1) The company shall file a copy of the trust agreement for information.

(2) The company shall use alternate policy face pages with the policy numbers assigned, as well as alternate insert pages, for various related industries.

(3) The company may submit forms on an "ABC Trust" basis. If a form is approved on this basis, the company shall file the individual trust agreements when the form is issued. In addition, the company shall submit an alternate policy face page, identifying the policyholder and the policy number assigned, each time the form is issued to a particular trust.

(h) Readability Score. The forms shall be scored for readability, as applicable, in accordance with Subchapter G of this title (relating to Plain Language Requirements for Health Benefit Policies).

(i) Ineligible groups. In the event that the group for which a form is submitted is ineligible under the provisions of Insurance Code Article 3.50, Article 3.51-6, or both, the form shall be affirmatively disapproved within the statutory deemer period. A comprehensive review of the text of the

form will not be completed for forms filed for use with ineligible groups.

§3.15. Specific Additional Submission Requirements for Individual Accident and Health Forms.

(a) Severable forms. In accordance with the definitions provided in §3.12(b) of this title (relating to Specific Additional Submission Requirements for All Product Types), some examples of severable forms follow, in paragraphs (1)-(7) of this subsection:

(1) applications which are for general use;

(2) optional benefit riders;

(3) endorsements which are to be used to bring previously approved or exempted forms into compliance with newly enacted or adopted legislation or rules;

(4) forms defining or identifying premium payor;

(5) riders deleting any waiting period provision;

(6) riders providing a reduction in benefits in lieu of a rate increase; and

(7) riders providing a waiver of premium benefit.

(b) Nonseverable forms. In accordance with the definitions provided in §3.12(b) of this title (relating to Specific Additional Submission Requirements for All Product Types), an example of a nonseverable form is a rider form containing mandated benefits or Texas specific provisions which are used to bring a new form submission into compliance with Texas laws.

(c) Complete submission of a base policy form or certificate form. In accordance with the requirements of §3.12 of this title (relating to Specific Additional Submission Requirements for All Product Types), an example of a complete individual accident and health submission would include a policy form, an application form including any applicable Medicare duplication disclosure, any nonseverable riders, amendments or endorsements, an outline of coverage, a complaint notice, and applicable rates.

(d) Outlines of Coverage. The appropriate outline of coverage shall be filed with each policy form submission. The outline of coverage shall be scored for readability in accordance with §3.3092(c) of this title (relating to Outline of Coverage under Minimum Standards for Individual Accident and Health Insurance). The readability test and the resulting score must be submitted along with the outline.

(e) Readability Score. The forms shall be scored for readability, as applicable, in accordance with Subchapter G of this title (relating to Plain Language Requirements for Health Benefit Policies) or Subchapter S, §3.3102(g) of this title (relating to Language Readability).

(f) Marketing. A brief statement of the marketing approach to be used shall be filed with each form submission.

(g) Rates. The information relating to rate schedules set forth in paragraphs (1)-(3) of this subsection must be submitted.

(1) The rate schedule to be utilized with each individual accident and health policy or rider shall be filed in duplicate at the time the policy or rider form is submitted for approval.

(2) All rate increases shall be filed in duplicate.

(3) Any cumulative rate increases exceeding 150% in any one year period require actuarial data to support the amount of increase.

(h) Supplemental coverages. Any supplemental coverage policy form submitted shall be accompanied by a letter, signed by an officer of the company, certifying that the policy shall be marketed only as supplemental coverage as that term is defined under §3.3080 of this title (relating to Supplemental Coverage).

§3.16. Specific Additional Submission Requirements for Credit Life and Disability Forms.

(a) Severable forms, Nonseverable forms, and Complete submission of a base policy form or certificate form. Generally, examples in each of these categories for credit life and disability forms will be consistent with the examples provided under §3.13 of this subchapter (relating to Specific Additional Submission Requirements for Life and Annuity Forms), §3.14 of this subchapter (relating to Specific Additional Requirements for Group Life and Group Accident and Health Forms), and §3.15 of this subchapter (relating to Specific Additional Requirements for Individual Accident and Health Forms).

(b) Submission of certificate. A copy of the master policy must accompany any certificate submitted, even if the master policy is issued outside Texas.

(c) Submission of rates. A schedule of premium rates to be used with all forms delivered or issued for delivery in the state must be submitted. Additionally, the formula or a reference to the method that is used to compute refunds must be submitted.

(d) Statement of duration of loans. A statement must be supplied specifying the range of duration of loans or credit transactions for which insurance coverage will be provided.

§3.17. Miscellaneous Requirements.

(a) Medicare Supplement Insurance. Supporting actuarial data shall be submitted with all group and individual Medicare supplement policy rate filings. In addition, Medicare supplement products must comply with all filing requirements set forth in §§3.3301-3.3325 of this title (relating to Minimum Standards for Medicare Supplement Policies).

(b) Long Term Care Insurance. Supporting actuarial data shall be submitted with all group and individual long term care policy rate filings. In addition, long term care products must comply with all filing requirements set forth in §§3.3801-3.3850 of this title (relating to minimum Standards for Benefits for Long-term Coverage under Individual and Group Policies).

(c) Small Employer Health Insurance. In addition to the filing requirements identified in this subchapter, small employer health insurance products must comply with all filing requirements set forth in §26. 19 of this title (relating to Filing Requirements for Small Employer Health Insurance). That section provides information regarding the filing requirements for group and individual prototype policy submissions and additional certifications required for small employer health insurance forms submissions generally.

(d) Conversion Policies. In addition to the filing requirements identified in this subchapter, conversion products must comply with all filing requirements set forth in §3.509 of this title (relating to Form Filing Requirements for Group Health Insurance Mandatory Conversion Privileges). That section provides additional information regarding the filing requirements for group and individual prototype conversion policy submissions and general filing requirements related to policies containing conversion options.

§3.18. Filing Forms. Forms submitted in full compliance with the filing requirements of this subchapter will be affirmatively approved or disapproved within the applicable statutory deemer period. No filing is considered complete unless it is in full compliance with this subchapter. Each form filed for use in Texas must strictly comply with §3.3 of this title (relating to General Submission Requirements); otherwise the form will not be accepted for review and approval (as applicable) and/or accepted for filing.

§3.19. Pending Status.

(a) Circumstances resulting in

pending status. Form filings submitted in complete compliance with the requirements of this subchapter, but otherwise failing to completely comply with applicable provisions of the Insurance Code, other insurance statutes, and applicable regulations of the Texas Department of Insurance, will be affirmatively disapproved by the department within the applicable statutory deemer period, unless prior to that time the events outlined in paragraphs (1) and (2) of this subsection occur, as follow:

(1) a Life/Health Group analyst contacts the company to advise it about specific corrections needed to bring the submitted forms into full compliance with the Insurance Code and applicable regulations; and

(2) at the time of initial contact the company requests an extension for purposes of bringing the submission into complete compliance with all applicable law.

(A) If the company makes the request set out in paragraph (2) of this subsection, the submission shall be held in a pending status for 45 days from the date of initial contact awaiting submission of items necessary to correct the filing and bring it into complete compliance.

(B) If no response is received from the company by the end of 30 days following the initial contact, the department shall return one copy of the submitted form material, which shall be considered withdrawn by the company. The matter will then receive no further consideration unless or until the submission is refiled as a new submission.

(b) Declination of pending status. If the company declines to avail itself of the procedural remedy outlined in subsection (a) (2), of this section, the submission will be processed according to standard review procedures.

§3.20. Appendix. The forms adopted by reference in §3.2 of this title (relating to Adoption by Reference of Department Forms Utilized in the Review Process) are included in the Appendix to these sections. The following index refers to the form number its description, and the figure number in the appendix.

FIGURE NUMBER 1: 28 TAC §3.20
FIGURE NUMBER 2: 28 TAC §3.20
FIGURE NUMBER 3: 28 TAC §3.20
FIGURE NUMBER 4: 28 TAC §3.20

§3.21. Effective Date. The provisions of these sections as amended and adopted shall apply to any form filed with the and received by the department on or after January 1, 1996. Forms submitted to and received by this department prior to January 1, 1996, shall be governed by the laws in effect at the time of the submission

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 October 13, 1995.

TRD-9513184 Alicia M. Fechtel
General Counsel and Chief Clerk
Texas Department of Insurance

Earliest possible date of adoption: November 20, 1995

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

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• 28 TAC §§3.2-3.5

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

The Texas Department of Insurance proposes repeal of §§3.2-3.5 concerning requirements for filing of policy forms, riders, amendments, and endorsements for life, accident, and health insurance and annuities. Repeal of the sections is necessary because the provisions of §§3.2 3.5 relate to essentially the same regulatory procedural framework as proposed new §§3.2-3. 21, which are newer and more specific provisions which revise, amend, replace and/or supersede these sections. Simultaneous to this proposed repeal, proposed amendment to §3.1, and proposed new §§3.2-3.21 are published elsewhere in this issue of the *Texas Register*. The purpose and objective of the proposed new sections is to streamline and strengthen the overall regulatory process by which life product and health product forms are filed and reviewed for official action, to enhance the overall effectiveness and efficiency of the form filing and review process, and to implement legislation from the 74th legislative session relating to the life/health form filing and review process in the Insurance Code, Article 3.42.

Rhonda C. Myron, deputy commissioner for the life/health group of the Texas Department of Insurance, has determined that for the first five-year period the repeals are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the repeals.

Ms. Myron also has determined that for each year of the first five years the repeals are in effect the public benefit anticipated as a result of enforcing the repeals will be the more efficient administrative regulation of insurance licensees and the more effective utilization of public resources by an appropriate streamlining of the overall policy form submission, review and official action process. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the repeals as proposed.

Comments on the proposal may be submitted to in writing within 30 days after publication of the proposal in the *Texas Register* to the Office of Chief Clerk, P.O. Box 149104, MC 113-2A, Austin, Texas 78714-9104. An additional copy of the comment should be submitted to Rhonda C. Myron, Deputy Commissioner, Life/Health Group, P.O. Box 149104, MC 106-1A, Austin, Texas 78714-9104. A request for public hearing on the proposed sections should be submitted separately to the Office of the Chief Clerk.

The repeals are proposed pursuant to the Insurance Code, Articles 3.42 and 1.03A. The Insurance Code, Article 3.42(p) provides that the commissioner is authorized to adopt such reasonable rules and regulations as are necessary to implement and accomplish the specific provisions of Article 3.42 within the standards and purposes of the article. Article 1.03A authorizes the commissioner of insurance to promulgate and adopt rules and regulations for the conduct and execution of the duties and functions by the department.

The repeals affect regulation pursuant to the following statutes: The Insurance Code, Article 3.42.

§3.2. General Submission Requirements.

§3.3. Specific Additional Submission Requirements.

§3.4. Pending Status.

§3.5. Filing Forms.

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 October 13, 1995.

TRD-9513183 Alicia M. Fechtel
General Counsel and Chief Clerk
Texas Department of Insurance

Earliest possible date of adoption: November 20, 1995

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

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Part II. Texas Workers' Compensation Commission

Chapter 108. Fees

The Texas Workers' Compensation Commission (the commission) proposes new §108.1, concerning charges for copies of public information, and the simultaneous repeal of current §108.1, concerning charges for copies of public records. The new rule is proposed to implement changes to Chapter 552 of the Texas Government Code.

Recent legislation (House Bill 1718, 74th Legislature, 1995) amended Chapter 552 of the

Texas Government Code relating to open records by amending and adding provisions relating to electronic access to public information, the General Services Commission setting mandatory rules governing the costs that governmental bodies may charge for copies and access to public information, and time limits for answering a public information request. Proposed new §108.1 incorporates these statutory revisions.

Subsection (a) adopts the provisions of the Government Code and the rules of the General Services Commission for allowable charges for copies of public information. Subsection (b) excepts from the charges listed by the General Services Commission requests for copies of confidential information and publications compiled and printed by the commission. Subsection (c) establishes that the charge for information for which the General Services Commission has not set a charge is the actual cost to the commission to provide the information.

Simultaneously with the proposal of this new rule the commission will consider adoption of a fee schedule which will establish fees for copies of records not covered by the General Services Commission rules, such as copies of claim files. After adoption, copies of the fee schedule will be made available upon request.

Janet Chamness, Chief of Budget, has determined that for the first five-year period the proposed rule is in effect there will be fiscal implications for state or local governments as a result of enforcing or administering the rule. The legislative directive contained in House Bill 1718 requires the commission to follow the rules adopted by the General Services commission to determine charges for copies of public information, except to the extent that other law provides for charges for specific kinds of public information. Further, House Bill 1718 mandates that charges for public information may not be excessive nor exceed the actual cost of producing the information. To fully comply with these mandates, the commission will adhere to the charges established by the Government Code, Chapter 552 and the General Services Commission rules. The fiscal impact on local government is expected to be similar to the impact on persons required to comply with the proposed new rule.

Additional costs to the commission are expected to result because House Bill 1718 amends the Government Code to limit the number of copies that may be charged to a requestor for public information when redaction of confidential information is required. The exact amount of additional costs cannot be determined. Previously, all costs to maintain the confidentiality of information were passed to the requestor. The amended statute provides that where a requested paper record contains confidential information that must be edited prior to disclosure of the record, the commission may charge only for the cost of making one copy of the page from which the information must be edited. No charge other than the cost of the copy is permitted. This provision will result in an increase in costs to the commission to provide public information because complete redaction generally requires at least two copies and considerable staff time. These costs can no longer be recouped.

House Bill 1718 also requires the commission to provide one copy of public information that is requested by a member of the legislature in the performance of the member's duties without charge. This provision will also require the commission to experience an increase in costs to provide public information.

Ms. Chamness also has determined that for each year of the first five years the rule as proposed is in effect the public benefit anticipated as a result of enforcing the rule will be implementation of the statutory mandates of House Bill 1718 and continued efficient resource utilization. The commission will continue to provide copies of public information to those requesting copies in an efficient manner.

Anticipated economic costs to persons who are required to comply with the rule as proposed will not change or will decrease as a result of the legislative mandate limiting the redaction costs that the Commission may charge and providing one copy to members of legislature free of charge.

There will be no differences in the costs of compliance for small businesses as compared to large businesses.

Comments on the proposal or requests for public hearing must be received by 5:00 p.m. on November 20, 1995, and submitted to Elaine Crease, Office of the General Counsel, Mailstop #4-D, Texas Workers' Compensation Commission, Southfield Building, 4000 South IH-35, Austin, Texas 78704-7491.

• 28 TAC §108.1

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

The repeal is proposed under the Texas Labor Code, §401.021, which sets out the application of other acts (including the open records law) to the Labor Code; the Texas Labor Code, §402.061, which authorizes the commission to adopt rules necessary to administer the Act; the Texas Labor Code, §402. 083, which provides for confidentiality of claim file information; the Texas Labor Code, §402.086, which provides for transfer of confidentiality of released claim file information; the Texas Labor Code §402.091, which sets out penalties for failure to maintain confidentiality; and the Texas Labor Code §402.092, which provides for the confidentiality of information in commission investigation files; Texas Government Code, Chapter 552, as amended by House Bill 1718, 74th Legislature, 1995, which establishes the definition of public information, exceptions to public information, the procedures for obtaining public information and charges for obtaining copies of establishment of public information.

No other code or statute is affected by this section.

§108.1. Charges for Copies of Public Records.

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 October 13, 1995.

TRD-9513239

Susan Cory
General Counsel
Texas Workers' Compensation Commission

Earliest possible date of adoption: November 20, 1995

For further information, please call: (512) 440-3700

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The new rule is proposed under the Texas Labor Code, §401.021, which sets out the application of other acts (including the open records law) to the Labor Code; the Texas Labor Code, §402.061, which authorizes the commission to adopt rules necessary to administer the Act; the Texas Labor Code, §402.083, which provides for confidentiality of claim file information; the Texas Labor Code, §402.086, which provides for transfer of confidentiality of released claim file information; the Texas Labor Code, §402.091, which sets out penalties for failure to maintain confidentiality; and the Texas Labor Code, §402.092, which provides for the confidentiality of information in commission investigation files; Texas Government Code, Chapter 552, as amended by House Bill 1718, 74th Legislature, 1995, which establishes the definition of public information, exceptions to public information, the procedures for obtaining public information and charges for obtaining copies of establishment of public information.

§108.1. Charges For Copies of Public Information.

(a) The charge to any person requesting access to public information or copies of public information from the commission will be the charges established by the Government Code, Chapter 552, and the General Services Commission rules, 1 TAC §§111.61 et seq, as amended, to the extent that they do not conflict with the Government Code.

(b) The charge provisions established by the General Services Commission do not apply to authorized requests for copies of commission confidential information or to publications compiled and printed by the commission.

(c) Requests for public information for which the Government Code or the General Services Commission have not established a charge will be charged at the actual cost to the commission to provide the item.

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 October 13, 1995.

TRD-9513240 Susan Cory
General Counsel
Texas Workers' Compensation Commission

Earliest possible date of adoption: November 20, 1995

For further information, please call: (512) 440-3700

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Chapter 109. Workers' Compensation Coverage for State Agency Employees

• 28 TAC §109.1

The Texas Workers' Compensation Commission proposes new §109.1, concerning general provisions for state agencies, in a new Chapter 109, concerning workers' compensation coverage for state employees. The new rule is proposed to implement revisions to the Texas Labor Code.

House Bill 1089, 74th Legislature, 1995, amended Texas Labor Code, §501.002 to establish the individual state agency as employer rather than the workers' compensation division of the attorney general's office for all purposes under Chapter 501 and Chapter 451. Amendments to §501.042 of the Texas Labor Code retained the workers' compensation division of the attorney general's office as insurer.

Currently there are no rules which address the state agency's role in the workers' compensation system. New Chapter 109 is proposed to provide a section where rules related to this subject would logically be placed. Section 109.1(a) reiterates that the state agency will act in the capacity of employer and references the section in the Labor Code where applicable sections of the Code are set out. Subsection (b) reiterates that the workers' compensation division of the attorney general's office will continue to act in the capacity of insurer and also references Texas Labor Code, §501.002 where applicable sections of the Code are listed. Subsection (c) requires each state agency to establish and provide to the commission an administrative address for purposes of administering workers' compensation claims. This will give the commission a central location for all communication to the agency regarding workers' compensation.

Janet Chamness, Chief of Budget, has determined that for the first five-year period the proposed rule is in effect there will be fiscal implications for state government as a result of enforcing or administering the rule. If it becomes necessary for an agency to increase staff to comply with the statutorily mandated requirement of the proposed rule, an increase in costs will be experienced. The rule reiterates the language of House Bill 1089 which changes the employer of record from the Office of the Attorney General as the employer to the individual state agency. Those functions previously performed by the Office of the Attorney General as the employer must now be performed by the state agency. Such functions include filing reports required of the employer, and may include attending benefit review conferences and contested case hearings. In addition, state agencies as employer may be subject to administrative penalties for violation of the statute or commission rules. There is no fiscal implication for local government.

Ms. Chamness also has determined that for each year of the first five years the rule as proposed is in effect the public benefit anticipated as a result of enforcing the rule will include: increased involvement in the workers' compensation process by state agency employers; increased awareness of workers' compensation claims filed by state agency employees; and increased emphasis by the state agency employers on accident prevention, claims control and costs.

No persons or businesses are required to comply with the rule as proposed.

Comments on the proposal or requests for public hearing must be received by 5:00 p.m. on November 20, 1995, and submitted to Elaine Crease, Office of the General Counsel, Mailstop #4-D, Texas Workers' Compensation Commission, Southfield Building, 4000 South IH-35, Austin, Texas 78704-7491.

The new rule is proposed under the Texas Labor Code, §402.061, which authorizes the commission to adopt rules necessary to administer the Act; the Texas Labor Code, §501.001, which contains definitions of terms used in Chapter 501; the Texas Labor Code, §501.002, as amended by House Bill 1089, 74th Legislature, 1995, which lists the chapters of the Texas Labor Code, which are applicable to state agencies and establishes each individual state agency as the employer for workers' compensation purposes; the Texas Labor Code, §501.021, which establishes workers' compensation coverage for state employees; the Texas Labor Code, §501.024, which sets out the exclusions from coverage; and the Texas Labor Code, §501.023, which establishes the state as a self-insuring entity.

The proposed new rule affects the following statutes: Texas Labor Code, §501.001, which contains definitions of terms used in Chapter 501; the Texas Labor Code, §501.002, as amended by House Bill 1089, 74th Legislature, 1995, which lists the chapters of the Texas Labor Code, which are applicable to state agencies and establishes each individual state agency as the employer for workers' compensation purposes; the Texas Labor Code, §501.021, which establishes workers' compensation coverage for state employees; the Texas Labor Code, §501.023, which establishes the state as a self-insuring entity; the Texas Labor Code, §501.041, which makes provision for the workers' compensation division of the attorney general's office to administer Chapter 501; the Texas Labor Code, §501.042, as amended by House Bill 1089, 74th Legislature, 1995, which establishes the director of the workers' compensation division of the attorney general's office as the insurer of a state agency; and the Texas Labor Code, §501.048, which requires state agencies to file a summary regarding workers' compensation claims in its budget request.

§109.1. State Agencies: General Provisions.

(a) In administering and enforcing the applicable provisions of the Texas Labor Code as set out in §501.002, a state agency shall act in the capacity of employer.

(b) In administering and enforcing the applicable provisions of the Texas Labor Code as set out in §501.002, the workers' compensation division of the attorney general's office shall act in the capacity of insurance carrier.

(c) Each state agency shall establish within its headquarters a single administrative address, for the purpose of administering workers' compensation claims as employer and shall provide that address in writing to the records division of the Texas Workers' Compensation Commission by December 31, 1995.

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 October 13, 1995.

TRD-9513241 Susan Cory
General Counsel
Texas Workers' Compensation Commission

Earliest possible date of adoption: November 20, 1995

For further information, please call: (512) 440-3700

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Chapter 134. Guidelines for Medical Services, Charges, and Payments

Subchapter B. Disclosure by Health Care Provider of Financial Interest in Referred Provider

• 28 TAC §134.100

The Texas Workers' Compensation Commission (the commission) proposes an amendment to §134.100, concerning provider disclosure of financial interest and submission to the commission. The amendment is proposed to implement recently enacted changes to the Texas Labor Code and to enhance enforceability of the rule.

House Bill 1089, 74th Legislature, 1995, removed two actions from the list of health care provider administrative violations in the Texas Labor Code, §415.003 and placed these actions in new §415.0035. The effect of moving the two violations was to delete the requirement that the act be committed willfully or intentionally by the health care provider to be an administrative violation. Subsection 134.100(c) has been amended to remove references to the prior statute and insert the correct reference.

Subsection (a) of the rule has been amended to provide a timeframe of 30 days for filing the required disclosure with the commission.

Janet Chamness, Chief of Budget, has determined that for the first five-year period the proposed rule is in effect there may be minimal fiscal implications for state government as a result of enforcing or administering the rule. With the removal of the requirement to prove that failure to file a disclosure with the commission was willful and intentional, there may be an increase in prosecution of this violation and an increase in revenue to the state from fines due to the less stringent burden of proof. Local government will be impacted the same as persons required to comply with the rule.

Ms. Chamness also has determined that for each year of the first five years the rule as proposed is in effect the public benefit anticipated as a result of enforcing the rule will be implementation of statutory changes and increased ability to efficiently enforce commission rules.

There may be minimal anticipated economic costs to persons who are required to comply with the rule as proposed. Because the amendments to the Texas Labor Code reduce the commission's burden of proof in enforcement proceedings relating to violations listed in §415.0035, in the event of a violation of the rule, health care providers may experience an increased likelihood of prosecution and resulting penalty.

There will be no greater costs of compliance for small businesses compared to large businesses.

Comments on the proposal or requests for public hearing must be received by 5:00 p.m. on November 20, 1995, and submitted to Elaine Crease, Office of the General Counsel, Mailstop #4-D, Texas Workers' Compensation Commission, Southfield Building, 4000 South IH-35, Austin, Texas 78704-7491.

The amendment is proposed under the Texas Labor Code, §402.061, which authorizes the commission to adopt rules necessary to administer the Act, the Texas Labor Code, §413.041, which requires a health care provider to disclose to the commission any financial interest greater than 5.0% in a referral provider; the Texas Labor Code, §415.021, which provides for assessment of administrative penalties; and the Texas Labor Code, §415.0035, as added by House Bill 1089, 74th Legislature, 1995, which sets out acts which constitute administrative violations by insurance carriers and health care providers.

This proposed amendment affects the following statutes: the Texas Labor Code, §402.061; the Texas Labor Code, §413.041; the Texas Labor Code, §415.021; and the Texas Labor Code, §415.0035, as added by House Bill 1089, 74th Legislature, 1995.

§134.100. Provider Disclosure of Financial Interest, Submission to the Commission.

(a) **In each calendar year during which a** [A] health care provider [who] refers an injured employee to another health care provider in which the referring provider has a greater than 5.0% financial interest, **the referring provider must file a disclosure with the commission within 30 days of the date the first referral is made. This disclosure must be filed for each health care provider to whom an employee is referred. The disclosure must be made on the form prescribed by the commission and must include** [shall, by April 1, 1991, and annually thereafter, provide the following information in writing to the division of medical review in Austin, Texas]:

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

(b) (No change.)

(c) Failure to disclose a financial interest [may subject the health care provider to] is an administrative violation [and] **pursuant to Texas Labor Code, §415.0035, subject to a penalty of not to exceed $500** [as described in the Act, §10.07] **or pursuant to the Texas Labor Code, §415.021 subject to a penalty of not to exceed $10,000 for repeated violation.**

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 October 13, 1995.

TRD-9513242 Susan Cory
General Counsel
Texas Workers' Compensation Commission

Earliest possible date of adoption: November 20, 1995

For further information, please call: (512) 440-3700

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The Texas Workers' Compensation Commission (TWCC) proposes new §134.201, concerning the Medical Fee Guideline for medical treatments and services provided under the Workers' Compensation Act, and the simultaneous repeal of current §134.201, concerning medical fee guideline for medical services and equipment provided under the Texas Workers' Compensation Act. The new rule is proposed to modify the current Medical Fee Guideline to provide for fees which are reflective of the statewide usual, customary and reasonable (UCR) billing, which normalize reimbursement for particular procedures, and which are projected to result in approximately the same total reimbursement from the workers' compensation system (expenditure neutral).

The proposed new rule establishes guidelines for maximum reimbursements made for medical services rendered by health care providers, excluding inpatient hospitalization and ambulatory surgical centers, and for rentals or sales of certain durable medical equipment. The proposed rule adopts by reference the publication of a new fee guideline manual, entitled *Texas Workers' Compensation 1995 Medical Fee Guideline*. The fee guideline is divided into the following sections. Evaluation/Management; Medicine; Surgery, Anesthesia; Radiology/Nuclear; Pathology, Durable Medical Equipment; Orthotics/Prosthetics; and Pharmaceutical. Ground rules at the beginning of each section provide definitions necessary to correctly interpret, report, and reimburse the services and procedures contained in the section. The new rule requires that the maximum allowable reimbursement for medical services rendered under the Texas Workers' Compensation Act will be the lesser of the providers' usual fees and charges or the maximum allowable reimbursement (MAR) established in the Medical Fee Guideline. The proposed rule states that copies of the guideline may be obtained from the Publications Department, Texas Workers' Compensation Commission, the Southfield Building, 4000 South IH-35, Austin, Texas 78704.

Medical services and procedures are identified in the new §134.201 by a five-digit numeric code obtained from *Physicians' Current Procedural Terminology*, Fourth Edition, Copyright 1994 by the American Medical Association. These numeric codes are commonly referred to as "CPT" codes. CPT codes and descriptions only are copyright 1994 American Medical Association (or such other date of publication as defined in the federal copyright laws). The *Physicians' Current Procedural Terminology* includes with the numeric codes a listing of descriptive terms and modifiers for reporting medical services and procedures. The new rule addresses 99.7% of the CPT codes. The use of CPT codes will provide an efficient means to track services in the TWCC data base.

An extensive research program and review of the relevant literature was undertaken by the Commission to assist in evaluating the strengths and deficiencies of the current medical fee guideline. The Workers' Compensation Research Institute in Cambridge, Massachusetts conducted extensive analysis of the medical fee guidelines in 27 states. Fee reimbursement systems were analyzed for reimbursement amounts, restrictions, comprehensiveness, access to care, and regional economics. The results of this analysis revealed that Texas workers' compensation reimbursements are 9.0% above the median state's reimbursement for workers' compensation. Texas workers' compensation reimburses 65% above Medicare reimbursement.

Maximum allowable reimbursements in the proposed Medical Fee Guideline were derived, in part, from the use of relative values contained in *Relative Values for Physicians*, McGraw-Hill, Inc., copyright 1995 and from copyrighted information provided by Innervation Technology Corporation.

TWCC medical forms records from June 1993 to May 1994 were used to do statistical analysis. The top 200 CPT codes by amount of paid reimbursement (representing approximately 81% of the total claims paid amount) were selected for analysis and to compare the present medical fee guideline reimbursements against statewide UCR billing.

To determine usual, customary, and reasonable charges, medical billing data for Texas was grouped by zip code to create 30 re-

gional zones and then analyzed according to the services billed (according to CPT code) and amounts charged. This regional analysis of the data was done not to move to a regional reimbursement schedule, but to determine if there was a substantial regional difference in reimbursements. The analysis revealed little regional variance. The data was then ranked in percentile form. The medical billing data used included only fee for service charges. The relative value of each CPT code is derived by rating the codes as to time, skill, severity of illness, risk to patient, and risk to physician. Conversion factors are determined for every 10th percentile by taking the sum of the fees for each CPT code and dividing it by the sum of the relative values for each code. This is often referred to as a "reality-based" conversion factor. The conversion factors for the 30 Texas zones were discovered to be quite homogenous in nature and were averaged to arrive at a single conversion factor for each medical services group. The resulting conversion factors are reflective of true central tendency and statistically accurate.

Although relative values of services are used in the methodology for the proposed medical fee guideline, the goal is to move toward a totally market-based reimbursement system and away from a system based on relative value of services. Due to the great variation (both above and below) between the current TWCC Medical Fee Guideline and statewide UCR reimbursement rates, it was determined that an immediate conversion to a UCR reimbursement strategy could overwhelm the system, particularly because its effect on utilization of services is unknown. As a result, an expenditure neutral philosophy was used as a method of transition to a market-based, normalized system. This methodology allows for redistribution of the total workers' compensation reimbursement to more closely reflect the statewide usual, customary, and reasonable charges for a particular group of medical services while minimally affecting the overall costs of the system and maintaining access to care.

The reimbursement amount in the current medical fee guideline when multiplied by the frequency of the CPT code, (the number of times a particular CPT code was paid) obtained a product that is reflective of both utilization and cost per CPT code. This data was then matched to the percentile that held the conversion factor, which when multiplied by the relative value of the same CPT code, most closely aligned with the current TWCC medical fee guideline. This method allows for the normalization of maximum allowable reimbursement rates according to usual, customary, and reasonable charges at varying percentiles for all medical services.

Normalizing individual CPT reimbursements according to usual, customary, and reasonable charges presents a problem when dealing with "outliers" (those CPT codes that are, under the current TWCC medical fee guideline, reimbursed at a far greater, or lesser amount than what is reflected at the corresponding percentiles). Using the normalizing method described, all CPT codes would be reimbursed at a level representative of the percentile which is most closely expenditure neutral, greatly affecting some individual medical reimbursements. To reduce this severe effect, an acceptable deviation or range has been identified. The range is created by taking the reimbursement amount indicated by the expenditure neutral percentile and dividing it by the reimbursement for the same CPT code in the current medical fee guideline. The percentage arrived at is the amount of variance allowed (over or under) from the expenditure neutral reimbursement. Reimbursements that fall within the range are considered within the guideline. One deviation from this method is in the area of radiology which is currently reimbursed at a rate so far above the usual, customary, and reasonable charge, that reimbursements for this specialty have been set at the 60th percentile rather than the percentile reflective of a cost neutral reimbursement.

There are two areas which are not reimbursed according to the MAR methodology explained above. Reimbursements for the medical specialty of anesthesia are based on relative value units (RVU) copyrighted by the American Society of Anesthesiologists. To calculate the total anesthesia value, the RVU (which is related to the complexity of the service) is added to modifying units (which adjust for factors such as patient physical status and qualifying circumstances) plus time units (which adjust for the length of the procedure). The use of this relative value methodology for anesthesia reimbursement is widely accepted in the field of anesthesia and is reflective of new technology.

For supplies, durable medical equipment and orthotics/prosthetics, the new Medical Fee Guideline uses the Health Care Financing Administration Procedure Coding System (HCPCS) rather than the CPT coding system. The HCPCS codes have standardized descriptions which contain detail not available in the CPT coding system. Use of HCPCS codes will provide a reliable data base for future modification of the commission's medical fee guideline. Reimbursements for supplies, durable medical equipment, and orthotics/prosthetics are based on documentation of procedure (DOP) rather than MAR. This means the value of the service is to be determined by written documentation attached to or included in the bill. DOP reimbursement was necessary for these areas because currently there is no reliable data base which differentiates the types of materials furnished from which a reimbursement can be calculated. The use of HCPCS codes in this medical fee guideline should soon remedy this lack of data.

The requirements for filing medical reports have been revised and are included in the medical fee guideline.

Janet Chamness, Chief of Budget, has determined that for the first five-year period the proposed rule is in effect there will anticipated fiscal implications for state or local governments as a result of enforcing or administering the rule. State government may realize a savings in costs or resources as the number of disputes regarding payments for medical treatments and services should be reduced because the guideline clarifies the maximum allowable reimbursement for each treatment and service. In addition, disputes as to reimbursements should be resolved more quickly by the Medical Review division for the same reason. There should be no loss or increase in revenue for state government.

Ms. Chamness also has determined that for each year of the first five years the rule as proposed is in effect the public benefit anticipated as a result of enforcing the rule will be the revision of the medical fee guideline to update reimbursement amounts implementing medical cost containment measures designed to assure quality of medical care as required by the Workers' Compensation Act. It is anticipated that clear, fair guidelines will minimize disputes and encourage prompt payments to health care providers.

There will be anticipated economic costs to persons who are required to comply with the rule as proposed. The proposed medical fee guideline is designed to be expenditure neutral, with minimal projected deviation from current total reimbursement. Based on current patterns of utilization, insurance carriers required to comply with the guidelines should experience less than a 1.5% increase in total medical service payments. This increase in medical service payments could be expected to result in a total system cost increase of less than 1.0%; however, total decreases in system costs achieved over the past four years through workers' compensation reform will more than compensate for this adjustment to medical service payments as will savings resulting from fewer medical fee disputes. As a result, no increase in employer's workers' compensation insurance premiums is expected. There will be no fiscal impact on employees as a result of enforcing the rule. Because of some redistribution of total reimbursements, fiscal impact of this proposed revision to the medical fee guidelines on health care providers will depend on their area of practice. Some health care providers will experience an increase in fees for services, while others will experiance a decrease in fees and still others will experience no fiscal impact as a result of the proposed reimbursement system. Providers of radiology services will be most severely affected because current reimbursements for this specialty was generally greater than the usual and customary reimbursements used to normalize fees. The opposite effect will be experienced by those providers which are currently much lower than the usual and customary reimbursements. The inclusion of an acceptable range or deviation in the medical fee guidelines will allow providers whose fees lie outside the usual and customary reimbursement amounts to escape the full impact of being forced into the indicated percentile. Overall there is expected to be a slight increase in payments to health care providers.

There will be no difference in the costs of compliance for small businesses as compared to large businesses.

Comments on the proposal must be received by 5:00 p.m. on November 20, 1995, and submitted to Elaine Crease, Office of General Counsel, Mailstop #4-D, Texas Workers' Compensation Commission, Southfield Building, 4000 South IH-35, Austin, Texas 78704-7491. The proposed *Texas Workers'*

*Compensation Commission 1995 Medical Fee Guideline*is available for inspection at the Commission offices, or may be purchased from the Publications Department as stated in the proposed rule. Copies of the proposed *Guideline* are also available for inspection (but not duplication or sale) at all Commission field offices. Requests should specify that the guideline sought is the proposed *Texas Workers' Compensation Commission 1995 Medical Fee Guideline.*

A public hearing has been scheduled for Thursday, November 9, 1995, (time to be announced) in Room 910A of the commission's central office in the Southfield Building, 4000 South IH-35, Austin, Texas

The Medical Fee Guideline as proposed allows a range for outliers of from 25% above to 25% below the percentile which has been set in an effort to achieve the goals and objectives as stated in this preamble The commission specifically requests comment regarding the extent of this allowed deviation or alternative methods of establishing such a range, including the use of a wider range on a temporary basis. Fee amounts and the method of establishing a range of acceptable deviation may change based upon comments received and the staff's or commissioner's review of those comments, or based upon action by the commissioners at the public meeting Persons in support of fees at the amounts proposed may wish to comment to that effect

Subchapter C. Medical Fee Guidelines

• 28 TAC §134.201

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

The repeal is proposed under the Texas Labor Code, §402.061, which authorizes the commission to adopt rules necessary to administer the Act, the Texas Labor Code, §413.011, which mandates that the Commission by rule establish medical policies and guidelines, and the Texas Labor Code, §413 012, which requires review and revision of the medical policies and fee guidelines at least every two years.

No other code or statute is affected by this section.

§134.201. Medical Fee Guideline For Medical Services and Equipment Provided Under the Texas Workers' Compensation Act

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 October 13, 1995

TRD-9513243 Susan Cory
General Counsel
Texas Workers' Compensation Commission

Earliest possible date of adoption: November 20, 1995

For further information, please call: (512) 440-3700

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The new rule is proposed under the Texas Labor Code, §402 061, which authorizes the commission to adopt rules necessary to administer the Act, the Texas Labor Code, §413.011, which mandates that the Commission by rule establish medical policies and guidelines, and the Texas Labor Code, §413.012, which requires review and revision of the medical policies and fee guidelines at least every two years

§134.201. Medical Fee Guideline For Medical Treatments and Services Provided Under the Texas Workers' Compensation Act.

(a) The maximum allowable payment for medical treatments and services rendered to injured employees in accordance with the Texas Workers' Compensation Act is the lesser of:

(1) the provider's usual fees and charges; or

(2) the maximum allowable reimbursement (MAR) contained in the guideline referenced under subsection (b) of this section

(b) The commission adopts by reference herein, the *Texas Workers' Compensation Commission 1995 Medical Fee Guideline*. The *Guideline* shall be effective for all medical treatments and services rendered on or after January 1, 1996. Medical services rendered and durable medical equipment prescribed prior to January 1, 1996 shall be subject to the *1991 Texas Workers' Compensation Commission Medical Fee Guideline* (December 1991 Version). Copies of the proposed and current guidelines may be obtained from the Publication Department of the Texas Workers' Compensation Commission, 4000 South IH-35, Southfield Building, Austin, Texas 78704

(c) An insurance carrier or health care provider which willfully or intentionally violates the provisions of this rule commits an administrative violation subject to a penalty under Texas Labor Code, §415.002 or §415.003 and may be assessed a penalty. In addition, an insurance carrier or health care provider which repeatedly violates these statutory provisions may be assessed a penalty not to exceed $10,000 under the Texas Labor Code, §415.021, and may be subject to the sanctions specified in the Texas Labor Code, §415.023 including, but not limited to, restriction or revocation of the right to receive reimbursement under the Texas Workers' Compensation Act.

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 October 13, 1995.

TRD-9513244 Susan Cory
General Counsel
Texas Workers' Compensation Commission

Earliest possible date of adoption: November 20, 1995

For further information, please call: (512) 440-3700

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Subchapter G. Treatments and Services Requiring Preauthorization

The Texas Workers' Compensation Commission proposes the simultaneous repeal of existing §134.600 and new §134 601, concerning the services and treatments that require preauthorization and the procedure for requesting and responding to requests for preauthorization of specific treatments and services. The repeal of the existing rule and proposal of the new rule revise the list of services and treatments requiring preauthorization and clarify the preauthorization process and the roles of the requestor and respondent.

The new rule provides a more efficient preauthorization process, by reducing costs and treatment delays, thereby making it easier for the injured employee to obtain treatment in a timely manner. It also provides better coordination of the bill review process by the insurance carrier and its designated agents, a clearer application of the rule (the steps in the process as described are more clearly delineated), and balancing of the responsibilities and accountability of health care providers and insurance carriers.

The new rule is the result of input from the medical and business communities, and input from divisions within the commission. An analysis of the commission's data was performed under several criteria, including the relationship of cost of services and treatments versus the frequency of the services, the number of preauthorization cases that proceeded to dispute resolution, and the number of preauthorization cases for each specific service or treatment that proceeded to dispute resolution. The results of this analysis were used to determine the need for preauthorization of a particular service.

Subsection (a) of the proposed rule sets out definitions for the terms used in the rule. The 19 definitions are essential to the rule and provide clarity. Subsection (b) addresses record keeping and requires both the requestor and respondent to maintain the records listed for a period of three years or until an audit or review by the commission has been resolved. The requestor is required to maintain documentation in the employee's medical file and the respondent is required to set up a system for maintaining preauthorization information which is separate from an individual's claim file. Subsection (c) sets out when a carrier is

liable for services which are required to be preauthorized. Two situations result in liability: when the insurance carrier approves the preauthorization request in writing prior to the initiation of the services; and when the insurance carrier fails to respond within three working days after receipt of the preauthorization request. The provision that the request will be deemed approved if there is no timely response will require greater accountability on the part of the insurance carrier in making timely responses to requests for preauthorization, as well as reduce delays in obtaining treatment for the injured employee.

Subsections (d) and (e) detail the preauthorization request and response process. A request is required to be in the form and manner prescribed by the commission and should not be for services which do not require preauthorization. The rule encourages the use of facsimile for transmission of preauthorization requests by requiring the respondent to provide an accessible facsimile number. This method of transmission saves time in the process. The respondent is required to review the request to determine if it is complete, if it is for services on the preauthorization list, and to respond within three working days. The rule requires the respondent to employ or contract with persons who have clinical knowledge and access to claim file information to review the requests. All denials of preauthorization are required to be reviewed and confirmed by a licensed health care provider of the same specialty as the provider who will perform the service. This provides "peer to peer" review of preauthorization denials. If the carrier chooses to use an outside company to perform the functions of respondent, it is the carrier's responsibility to ensure that the outside company has all relevant claim information. The carrier is ultimately responsible for compliance with the rule. Responses are required to be identified by a reference number and contain information which will inform the requestor of the reason for a denial. If compensability is disputed, the request is still processed but carrier liability does not result unless the injury is held to be compensable.

Appeal of a denied request for preauthorization is addressed in subsection (f). The requestor may seek reconsideration of the request by submitting additional documentation or if a dispute arises over the denial a request for medical dispute resolution may be filed.

Subsection (g) sets out when an insurance carrier will be liable for fees related to an initial mental health evaluation without preauthorization.

Subsection (h) provides for commission review and/or audit of preauthorization records and sets out the penalties for failure to provide records pursuant to a commission order and for denial of preauthorization in violation of the rule.

Subsection (i) lists the treatments and services which require preauthorization. This subsection specifically exempts services provided in response to an emergency from the requirement of preauthorization. The proposed new §134.601 lists 13 specific categories of services and treatments that must be approved in advance by the insurance carrier. The current rule lists 16 categories. The actual reduction in the types of services and treatments requiring preauthorization is much greater than those numbers would indicate, however, because the categories in the new rule are not as broad as those in the old rule. For example, each category in the new rule contains fewer types of services and treatments than those in the current rule.

Subsection (j) requires that the services must be initiated within 30 days after the date of approval or the respondent is relieved from liability for the service. The rule permits resubmission of a request for preauthorization that has expired.

Subsection (f)(3) provides for carrier liability in the situation where a diagnostic test performed substantiates the need for spinal surgery in accordance with §133.206 of this title (relating to Spinal Surgery Second Opinion Process). Subsection (k) allows for substitution of any agreed upon electronic transmission for written communication. Subsection (l) explains the applicability of the rule. Requests submitted on or after the effective date of the rule are governed by the new rule and requests submitted prior to that date are governed by the law in effect at the time of the request.

Janet Chamness, Chief of Budget, has determined that for the first five-year period the proposed new rule and repeal are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the new rule and repeal. Although a number of services and treatments were removed from the list of those requiring preauthorization, those services and treatments removed were not often involved in the preauthorization process and therefore did not have a significant cost impact on the dispute resolution process. State and local governments that must comply with the proposed rule will be impacted in the same manner as other entities discussed in the Public Benefit\Cost Note section of this preamble.

Ms. Chamness also has determined that for each year of the first five years the rule as proposed is in effect the public benefit anticipated as a result of enforcing the rule will be, cost control of medical benefits relating to particular medical services and treatments due to the reduction of unnecessary treatments and over-utilization of services, as well as a clarification of the preauthorization process. There will also be a faster response to requests for preauthorization of services and treatments, eliminating delay in treatment. Further public benefit will be: clarification regarding how to proceed if a response is not received, because the requested services and treatments will be deemed to be approved after three days; a more efficient tracking system that will allow for verification of data; greater efficiency and timeliness in the processing of claims as a result of insurance carriers and their designated agents coordinating their bill review process; a more efficient preauthorization process, resulting from a reduction in the number of services and treatments that require preauthorization; and the assurance that the decision regarding approval or denial of requests for preauthorization of services and treatments is made by a person with the clinical expertise to do so.

There will be an anticipated economic cost to persons who are required to comply with the rule as proposed. These costs are, in general, imposed by Texas Labor Code §413.014 which requires the commission by rule to establish which medical services and treatments require preauthorization. The commission's rule determines the extent and specifics of the cost. The requirement in the rule that the respondent employ a person with clinical expertise to approve or deny requests for preauthorization could minimally increase most carrier's costs, however it is currently common practice for carriers to employ staff with such clinical expertise. Any minimal cost will be offset by the reduction in the number of services and treatments that require preauthorization, which will reduce administrative costs for insurance carriers and health care providers. The requirement that carriers provide accessible facsimile number(s) may result in a minimal increase in cost to carriers that do not currently have facsimile capabilities or will need to purchase additional facsimile equipment or telephone numbers to comply with the rule.

The requirement in the proposed rule for a peer to peer review of all preauthorization denials or negotiations will result in a significant increase in costs to insurance carriers who will be required to hire or contract with health care professionals to perform such reviews.

There will be no difference in the cost of compliance for small businesses as compared with large businesses.

Comments on the proposal must be received by 5:00 p.m. on November 20, 1995 and must be submitted to Elaine Crease, Office of the General Counsel, Mailstop #4-D, Texas Workers' Compensation Commission, Southfield Building, 4000 South IH-35, Austin, Texas 78704-7491. A public hearing has been scheduled for Thursday, November 9, 1995 (time to be announced) in Room 910A of the central office at the address listed in this paragraph.

Treatments and services listed in subsection (i) of the proposed rule may be deleted and treatments and services not listed may be added, based upon comments received or the staff's or commissioners' review of those comments, or based upon action by the commissioners at the public meeting. Persons in support of the list as proposed may wish to comment to that effect.

• 28 TAC §134.600

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

The repeal is proposed under the Texas Labor Code, §402.061, which authorizes the commission to adopt rules necessary to administer the Act; the Texas Labor Code, §411.011(d), which requires the commission

by rule to establish medical policies relating to necessary treatments for injuries and designed to ensure the quality of medical care and to achieve effective medical cost control; the Texas Labor Code, §413.013(1), (2), and (3) which requires the commission by rule to establish: a program for prospective, concurrent, and retrospective review and resolution of a dispute regarding health care treatments and services; a program for the systematic monitoring of the necessity of treatments administered and fees charged and paid for medical treatments or services, including the authorization of prospective, concurrent, or retrospective review under the medical policies of the commission to ensure that the medical policies and guidelines are not exceeded; and a program to detect practices and patterns by insurance carriers in unreasonably denying authorization of payment for medical services requested or performed if authorization is required by the medical policies of the commission; and the Texas Labor Code, §413.014, which requires the commission to specify by rule those health care treatments and services requiring express preauthorization by the insurance carrier, except for medical emergency and states that the insurance carrier is not liable for specified treatments and services that they have not preauthorized, unless ordered by the commission.

The proposed repeal and new rule affect the following statutes: the Texas Labor Code, §402.061, §411.011(d), §413.013(1), (2), and (3), §413.014, §415.002, §415.003, and §415.0035.

§134.600. Procedure for Requesting Pre-Authorization of Specific Treatments and Services.

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 October 13, 1995

TRD-9513245 Susan Cory
General Counsel
Texas Workers' Compensation Commission

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For further information, please call: (512) 440-3700

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• 28 TAC §134.601

The new rule is proposed under the Texas Labor Code, §402.061, which authorizes the commission to adopt rules necessary to administer the Act; the Texas Labor Code, §411.011(d) which requires the commission by rule to establish medical policies relating to necessary treatments for injuries and designed to ensure the quality of medical care and to achieve effective medical cost control; the Texas Labor Code, §413.013(1), (2), and (3), which requires the commission by rule to establish: a program for prospective, concurrent, and retrospective review and resolution of a dispute regarding health care treatments and services; a program for the systematic monitoring of the necessity of treatments administered and fees charged and paid for medical treatments or services, including the authorization of prospective, concurrent, or retrospective review under the medical policies of the commission to ensure that the medical policies and guidelines are not exceeded, and a program to detect practices and patterns by insurance carriers in unreasonably denying authorization of payment for medical services requested or performed if authorization is required by the medical policies of the commission; and the Texas Labor Code, §413.014, which requires the commission to specify by rule those health care treatments and services requiring express preauthorization by the insurance carrier, except for medical emergency and states that the insurance carrier is not liable for specified treatments and services that they have not preauthorized, unless ordered by the commission.

§134.601 Preauthorization of Medical Treatments and Services

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

(1) Regulated services: specific treatment(s) and/or service(s) listed in subsection (i) of this section, which all require preauthorization under this section. All other services do not require preauthorization.

(2) Accessible facsimile number(s): telephone number(s) designated by the respondent for the purpose of and in sufficient quantity to handle the volume of business of receiving requests for preauthorization by facsimile during routine working hours on normal business days.

(3) Claim file information: claim specific information, including but not limited to, medical reports/records, test results, billing and treatment histories, other medical documents, and information required under §133.1 of this title (relating to Information Required in Communications).

(4) Clinical knowledge: basic understanding of comprehensive medical terminology, anatomy, physiology and pathophysiology of regulated services and their interrelatedness with the commission fee and treatment guidelines. Clinical knowledge may be obtained through experience or education.

(5) Electrodiagnostic studies: includes all sensory, motor, and reflex studies, including but not limited to, electromyogram (EMG), surface electromyogram (SEMG), somatosensory evoked potential (SSEP), dermatomal sensory evoked potentials (DSEP), nerve conduction velocity (NCV), and H reflex and F reflex studies.

(6) Emergency:

(A) A medical emergency consists of a documented condition which is critical in nature and threatening to life or limb.

(B) A mental emergency is a documented condition which presents danger to self or others, or significant risk of potential danger.

(7) Nerve or Muscle Stimulators: portable electrical nerve or muscle stimulators that do not require surgical intervention or penetration of the skin surface and may be used in the treatment of pain syndromes.

(8) Preauthorization: statutorily authorized process which affords the insurance carrier (carrier) the opportunity for prospective review utilizing preauthorization criteria to determine the reasonableness and medical necessity of regulated services.

(9) Preauthorization criteria: written medical criteria specifically developed or obtained by the respondent, to govern preauthorization approval of regulated services. These criteria must be consistent with Texas Workers' Compensation Commission (TWCC) treatment and/or fee guidelines, or, in the absence of applicable TWCC guidelines, with established standards of care for the diagnosed injury. Prior to use by the respondent, these criteria must be approved by licensed health care providers (providers) who routinely render such services

(10) Precertification: process by which a carrier may voluntarily prospectively approve for payment, services which do not require preauthorization under this section. Precertification is not provided for by the Texas Labor Code and is not to be equated with preauthorization.

(11) Reference number: specific number assigned by the respondent to a complete request and used to track the status, progress, and decision on a request. The provision of a reference number does not signify approval of the request for preauthorization.

(12) Request: solicitation of preauthorization for regulated services submitted to the respondent by the requestor before the regulated services are provided, and in the form and manner required by the commission.

(13) Requestor: an injured employee, treating doctor, designated doctor, or referred health care provider as described in the Texas Labor Code, §401.011 (42), (15), or (22) respectively, their office staff, or agent who requests preauthorization for regulated services.

(14) Respondent: entity who receives and acts on requests for preauthorization. The respondent must have the authority, clinical knowledge, and claim file information necessary to approve or deny preauthorization. The respondent may be either:

(A) designated carrier staff, or

(B) staff from an outside company that is selected by the carrier to serve as respondent.

(15) Response: written reply by the respondent approving or denying preauthorization for requested regulated services, which must specify the assigned reference number.

(16) Routine working hours on normal business days: at a minimum to include 8:00 a.m. to 5:00 p.m., Central Standard/Daylight Saving Time, on weekdays, not including Saturdays, Sundays, and/or observed national or state holidays.

(17) Specified time frame: three working days after receipt of a complete request with the date of receipt excluded and the last working day included.

(18) Surgical procedures: any procedure represented by a surgical billing code contained in any of the commission's fee guidelines, excluding fracture repair, injections, and laceration repair.

(19) Weight loss services: a medically supervised and interdisciplinary program which has a primary goal of treating an overweight condition by modifying eating behaviors and life-style. Such services include, but are not limited to, patient education regarding weight loss, maintenance of weight loss, nutritional awareness, dietary planning, and exercise regimens. The carrier is not responsible for the cost of food or food supplements provided as a part of weight loss services.

(b) Records.

(1) Both the requestor and the respondent shall maintain records for a period of three years from the date of the request or until the resolution of an audit or review of the records by the commission, whichever is later. Records include the following information for each preauthorization request:

(A) copy of the request including name of the requestor and date of submission;

(B) name of the respondent and date of request receipt;

(C) reference number and the date provided to the requestor by the respondent;

(D) copy of response including applicable modifier as defined in subsection (e)(2) of this section;

(E) date the response is sent by the respondent and received by the requestor;

(F) injured employee's name, social security number, TWCC file number (if known), and date of injury;

(G) name and license number of the provider proposed to perform or supply the regulated services;

(H) name and license number of the treating doctor, if different than subparagraph (G) of this paragraph;

(I) requested regulated services, including the corresponding paragraph number in subsection (i) of this section, and, if applicable, the duration and frequency of treatment;

(J) dates of a request for reconsideration and the response, and the respondent's decision;

(K) if Medical Dispute Resolution (MDR) is requested, the dates of the request, the decision, and the commission's MDR determination; and

(L) if a hearing is requested as provided for by §413.031(d) of the Texas Labor Code, the dates of the request and the decision, and the determination of the Administrative Law Judge.

(2) The requestor shall maintain documentation in the injured employee's medical file to substantiate the information provided to the respondent.

(3) The respondent shall maintain an independent preauthorization record keeping system, separate from the individual claim file, which contains the documentation substantiating which medical records, reports, billing and treatment histories were reviewed. If the carrier is using an outside company for the preauthorization process, the carrier shall maintain documentation regarding the costs incurred by this relationship.

(c) Carrier Liability. Except as provided by subsection (f)(3) of this section, the insurance carrier is liable for the reasonable and necessary cost of regulated services in accordance with TWCC Fee Guidelines and may not dispute their reasonableness or necessity when:

(1) the insurance carrier approves the request pursuant to this section, and the written approval is furnished prior to the initiation of the regulated services; or

(2) the insurance carrier fails to respond in writing to a preauthorization request within the specified time frame.

(d) The Request Process

(1) Submission of a request for preauthorization.

(A) A request shall be on a form and in the manner prescribed by the commission. A complete request includes all information on the form and supporting documentation for medical necessity.

(B) Providers shall not request preauthorization nor invoke the preauthorization process for services which are not regulated, nor unnecessarily delay treatment when requesting precertification for these services. Nothing in this section prohibits prospective communication between a provider and carrier, except as provided by Texas Labor Code, §408.125(f) (relating to communication with a designated doctor).

(C) The requestor, unless the injured employee, must have the clinical knowledge necessary to complete the request in the form and manner required by the commission.

(2) Receipt of a request for preauthorization.

(A) The respondent shall provide accessible facsimile number(s). The designated facsimile line(s) and frequent facsimile retrievals must be provided during routine working hours on normal business days as defined in subsection (a)(16) of this section.

(B) The respondent shall not require the requestor to submit additional copies of previously submitted medical reports or records.

(C) The respondent shall review the request and determine if the request is:

(i) complete, at which point the respondent shall assign a reference number and inform the requestor of the number by facsimile no later than the end of the next working day after receipt of a complete request. This number must be listed on any bill for regulated services;

(ii) incomplete, at which point the respondent shall contact the requestor by facsimile no later than the end of the next working day after receipt of the written request and shall specify what components are missing;

(iii) for preauthorization for services not regulated by this section, at which point the respondent shall notify the requestor by facsimile, no later than the end of the next working day after receipt of the request, that the services do not require preauthorization. The respondent shall further notify the requestor that requested services do not require preauthorization and will be reviewed retrospectively for reasonableness, necessity and cost, in accordance with the commission's fee and treatment guidelines.

(D) If the carrier uses an outside company as the respondent, it is the carrier's responsibility to transfer relevant claim file information to the outside company, and the transfer shall not extend the specified time frame. In evaluating a request for preauthorization, the outside company will be presumed to have available all claim file information available to the carrier.

(e) The Response Process.

(1) A response must be sent to the requestor within the specified time frame, by facsimile and must be faxed or mailed to the treating doctor, if other than the requestor. If the request is denied, the response shall also be mailed concurrently to the injured employee and their representative.

(2) The respondent shall annotate its response with a modifier at the end of the reference number. The modifiers are "A" for approved, "D" for denied, or "N" for negotiated. The modifier "N" must be used when the requestor and respondent agree to a different duration, frequency, and/or type of regulated service than originally requested and is considered an approval for the negotiated services. If the response is a denial, the written notice shall also include the specific medical rationale for the denial including the medical criteria that were not met, and shall list the medical records, reports, and billing and treatment histories reviewed during the review process.

(3) When evaluating the necessity for the requested regulated services, the respondent must base decisions on preauthorization criteria. The respondent shall employ or contract with persons who have clinical knowledge and have access to claim file information to perform preauthorization. The respondent shall ensure that licensed health care providers, of the same specialty as the provider who will perform the service, review and confirm all denials or negotiations of preauthorization prior to sending the response and are otherwise available to support the daily preauthorization process. The respondent shall implement and utilize a system to integrate its preauthorization of regulated services with a review of bills relating to these services to ensure proper reimbursement.

(4) If compensability of the claim is in dispute, the respondent shall process the preauthorization request as required by this section. If the regulated service is approved, respondent shall inform the requestor that a dispute relating to compensability exists and that reasonable and necessary costs for approved regulated services will only be paid if the injury is held compensable. Under no circumstances does preauthorization of regulated services create carrier liability when the injury is ultimately held noncompensable after a timely dispute.

(5) All TWCC-62 forms (Notice of Medical Payment Dispute) submitted with payment, partial payment, or denial of payment, must contain the accessible facsimile number(s), as well as the name of the respondent.

(f) Appeal of a Denial of Request for Preauthorization.

(1) The requestor may seek reconsideration of a denial of preauthorization from the respondent by submitting additional documentation not previously reviewed by the respondent to support the medical necessity of the regulated services.

(A) The respondent shall not require a resubmission of the original preauthorization request and/or information previously submitted.

(B) The respondent must send by facsimile or certified mail, a written decision no later than the end of the third working day after receipt of the request for reconsideration. The respondent must indicate what rationale was used to uphold or overturn the original decision.

(2) If a dispute arises over the denial of preauthorization by the carrier, the requestor or the injured employee may appeal by filing a request for medical dispute resolution as described in the Texas Labor Code, §413.031 and in §133.305 of this title (relating to Request for Medical Dispute Resolution).

(3) The carrier is liable for the reasonable cost of a diagnostic test if the test is performed by the requestor despite a denial of preauthorization by the respondent and a denial of the appeal by the commission, and the test substantiates the need for spinal surgery, which creates carrier liability for the cost of the spinal surgery as described in §133.206 of this title (relating to Spinal Surgery Second Opinion Process).

(g) Initial Mental Health Evaluation. An employee may receive an initial mental health evaluation without preauthorization in the case of a mental emergency or on referral from the treating doctor for a compensable physical or mental trauma injury caused by a sudden and ascertainable traumatic event(s) traceable to a definite time, place, and cause on the job. This evaluation may include testing as outlined in §134.1000 of this title (relating to the Mental Health Treatment Guideline).

(h) Commission Review Process.

(1) Upon request by the commission, the respondent must submit to the commission for review and/or audit, the preauthorization criteria required by this section and records required under subsections (b), (d) and (e) of this section.

(2) Upon request by the commission, the requestor and respondent shall make available to the commission for review and/or audit their records documenting the clinical knowledge of any individual who acts in the capacity of a requestor or respondent.

(3) Failure to provide the records or preauthorization criteria may result in a commission order to submit this information. Failure to respond to the order is an administrative violation and may be subject to an administrative penalty of up to $10,000 as provided by Texas Labor Code, §415.021.

(4) An insurance carrier or its agent which denies preauthorization in a manner that is not consistent with this section, commits a Class C administration violation under §415. 0035 of the Texas Labor Code and may be assessed a penalty not to exceed $1, 000. In addition, a provider or carrier which repeatedly violates this section may be assessed a penalty not to exceed $10,000 under Texas Labor Code, §415. 002, §415.003 and §415.021(b)(2), and may be subject to the sanctions specified in Texas Labor Code, §415.023 including, but not limited to, restriction or revocation of the right to receive reimbursement under the Texas Workers' Compensation Act.

(i) All of the following health care treatment(s) and service(s) require preauthorization unless provided in response to a documented emergency as described in subsection (a)(6) of this section:

(1) inpatient admissions to rehabilitation or psychiatric facilities;

(2) all outpatient surgical procedures related to injuries of the knee;

(3) all surgical procedures related to repetitive trauma injuries as defined in Texas Labor Code, §401.011(36);

(4) repeat diagnostic magnetic resonance imaging studies (MRIs) and computerized tomography (CT) scans to the same body area, excluding initial postoperative diagnostic MRIs and CT scans to the same body area and all scans performed in conjunction with a myelogram;

(5) repeat electrodiagnostic studies;

(6) preoperative or non-operative physical medicine modalities, procedures, activities, or training beyond 24 sessions, and postoperative physical medicine beyond 24 sessions;

(7) psychiatric or psychological evaluation, testing or therapy other than those exempted by subsection (g) of this section;

(8) discograms outside of the TWCC treatment guidelines, or repeat discograms;

(9) durable medical equipment purchases in excess of $600 per item or monthly rentals in excess of $300 per item;

(10) purchases and/or rentals of any nerve or muscle stimulators;

(11) work conditioning (as defined in the commission's Medical Fee Guideline) in excess of a combined total of four weeks of treatment;

(12) interdisciplinary programs in excess of a combined total of six weeks of treatment. Interdisciplinary programs include, but are not limited to, work hardening, chronic pain management, and inpatient/outpatient medical rehabilitation (as defined in the commission's Medical Fee Guideline); and

(13) weight loss services.

(j) The requestor must initiate preauthorized (approved) regulated services on or before 30 days after the date approval is received. The respondent will be relieved of liability if the requestor:

(1) fails to request and obtain preauthorization prior to rendering regulated services, or

(2) fails to initiate the approved regulated services within 30 days after the date approval is received, which shall then necessitate the submission of a new preauthorization request, to be processed in the same manner as the initial request, prior to rendering the regulated services.

(k) Any mutually agreed upon electronic transmission may be substituted for written communication

(l) This section shall apply for all requests for preauthorization submitted on or after the effective date of this section. Requests for preauthorization submitted prior to the effective date of this section shall be subject to §134.600 of this title (relating to Procedure for Requesting Pre-Authorization of Specific Treatments and Services), which was in effect at the time of the request.

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 October 13, 1995

TRD-9513246 Susan Cory
General Counsel
Texas Workers' Compensation Commission

Earliest possible date of adoption: November 20, 1995

For further information, please call: (512) 440-3700

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Chapter 147. Dispute Resolution–Agreements, Settlements, Commutation

• 28 TAC §147.11

The Texas Workers' Compensation Commission (the commission) proposes new §147.11, concerning the filing of settlements and agreements reached after an Appeals Panel decision or after a hearings officer's decision becomes final. The new rule is proposed to establish the requirements for filing a settlement in the situation where the parties enter into the settlement or agreement after an Appeals Panel decision or a final contested case hearing decision.

In the past, settlements have been entered into without the approval of the commission which do not meet the statutory criteria for such settlements. The effects of such illegal settlements can be detrimental to a claimant's statutory rights. In addition, the commission is not always served with a copy of the petition as required by Texas Labor Code, §410.253, when a workers' compensation case is filed in court. As a result, the commission may not know of a pending case or a settlement. This new rule makes it clear that all settlements and agreements must be filed with and approved by the commission.

Recent legislation, House Bill 1089, 74th Legislature, 1995, added §415. 0035 to the Texas Labor Code which sets out actions by an insurance carrier or health care provider which consitute administrative violations. One of the actions described is carrier failure to submit to the commission a settlement or agreement of the parties.

Proposed new §147.11(a) requires an insurance carrier to file a settlement or agreement reached after an Appeals Panel decision with the General Counsel of the commission at least 30 days prior to either the date the settlement or agreement is sent to the parties for signature or the date the settlement or agreement is sent to the court for approval, whichever is earlier. Subsection (b) requires that the settlement or agreement also be submitted by the insurance carrier to the General Counsel of the commission no later than ten days after the court approves the settlement or agreement. Subsection (c) reiterates that violation of the rule is an administrative violation and sets out the statutory penalty.

Janet Chamness, Chief of Budget, has determined that for the first five-year period the proposed rule is in effect there will be fiscal implications for state or local governments as a result of enforcing or administering the rule. It is anticipated that early notice of settlement terms will allow the commission to notify parties of settlements which do not comply with the law prior to execution of the settlement. This early involvement may eventually prevent the necessity of formal court intervention and commission enforcement action, thereby reducing state expenditures in such cases. The costs to local government as a result of enforcing or administering the rule are very minimal mailing or delivery and copying costs.

Ms. Chamness also has determined that for each year of the first five years the rule as proposed is in effect the public benefit anticipated as a result of enforcing the rule will be better claim management by the commission because of timely notice of settlement or agreement terms. In addition, the rule will allow commission intervention at an early stage to prevent illegal settlements or agreements which attempt to illegally affect claimant's benefits

There will be minimal anticipated economic costs to persons who are required to comply with the rule as proposed. Insurance carriers will experience very minimal mailing or delivery and copying costs as a result of complying with the proposed new rule. There will be no greater costs of compliance for small businesses as compared to large businesses.

Comments on the proposal or requests for public hearing must be received by 5:00 p.m. on November 20, 1995, and submitted to Elaine Crease at the Office of the General Counsel, Mailstop #4-D, Texas Workers' Compensation Commission, Southfield Building, 4000 South IH-35, Austin, Texas 78704-7491.

The new rule is proposed under the Texas Labor Code, §402.061, which authorizes the commission to adopt rules necessary to administer the Act; the Texas Labor Code, §415.0035, as amended by House Bill 1089, 74th Legislature, 1995, which provides additional violations by insurance carriers or health care providers and sets out penalties for violations; and the Texas Labor Code, §415.021, which provides for the assessment of administrative penalties.

The new rule affects the following statutes: the Texas Labor Code, §401. 011, which contains the definitions of "agreement" and "settlement"; the Texas Labor Code, §402.061, which authorizes the commission to adopt rules necessary to administer the Act; the Texas Labor Code, §408.005, which sets out

requirements for settlements and agreements; the Texas Labor Code, §410. 254, which establishes the commission's right to intervene in any judicial proceeding under Subtitle A, Title 5 of the Texas Labor Code; the Texas Labor Code, §410.256, which requires court approval of settlements after judicial review of an award is sought; the Texas Labor Code, §415.0035, as amended by House Bill 1089, 74th Legislature, 1995, which provides additional violations by insurance carriers or health care providers and sets out penalties for violations; and the Texas Labor Code, §415.021, which provides for the assessment of administrative penalties.

§147.11. Agreements and Settlements After Final Commission Order or Appeals Panel Decision.

(a) If an agreement or settlement is reached after the issuance of an Appeals Panel decision or after the decision of the hearing officer becomes final in accordance with the Texas Labor Code, §410. 169 or §410.204, the insurance carrier or its representative must file a copy of the agreement or settlement with the General Counsel of the Commission as follows:

(1) at least 30 days prior to the earlier of:

(A) the date the agreement or settlement is sent to the parties for signature; or

(B) the date the agreement or settlement is sent to a court for approval; and

(2) no later than ten days after a court approves the agreement or settlement.

(b) An insurance carrier and/or its representative who violates this section is subject to an administrative penalty of up to $1,000 pursuant to the Texas Labor Code, §415.0035 or up to $10,000 pursuant to the Texas Labor Code, §415.021 for repeated violations.

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 October 13, 1995.

TRD-9513247 Susan Cory
General Counsel
Texas Workers' Compensation Commission

Earliest possible date of adoption: November 20, 1995

For further information, please call: (512) 440-3700

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Chapter 160. Workers' Health and Safety: General Provisions

• 28 TAC §160.2

The Texas Workers' Compensation Commission (the commission) proposes an amendment to §160.2, concerning non-subscribing employer's report of injury. The amendment is proposed to implement recently enacted changes to the Texas Labor Code.

House Bill 1089, 74th Legislature, 1995, amended §411.032 of the Texas Labor Code to add subsection (c) which makes it a class D administrative violation for an employer to fail to report an injury or occupational disease to the commission, unless good cause exists.

The amendment to §160.2 is proposed to add the penalty provision established by the statute for failure to file the required report. Subsection (d) has been added to include the penalty. References to the Texas labor Code and the commission rules have been updated in subsection (a) and the applicability of the rule has been clarified. In subsection (b) "on a form prescribed by the commission" has been replaced by "in the form, format, and manner prescribed by the commission" to make it consistent with other recently amended rules.

Janet Chamness, Chief of Budget, has determined that for the first five-year period the proposed rule is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the rule which reiterates the statutory provisions of the Texas Labor Code as enacted by House Bill 1089.

Ms. Chamness also has determined that for each year of the first five years the rule as proposed is in effect the public benefit anticipated as a result of enforcing the amendment to the rule will be implementation of the amendments to the Workers' Compensation Act and an increase in compliance with the reporting requirements of §160.2. In addition, there should be an increased ability to identify and monitor work-related injuries, resulting in a reduction of such injuries.

There will be no anticipated economic costs to persons who are required to comply with the rule as proposed except in the case of employers who are found in violation of the rule. These employers will experience increased costs as a result of penalties imposed.

The cost of compliance for small businesses as compared to large businesses should be proportionally the same.

Comments on the proposal or requests for public hearing must be received by 5:00 p.m. on November 20, 1995, and submitted to Elaine Crease, Office of the General Counsel, Mailstop #4-D, Texas Workers' Compensation Commission, Southfield Building, 4000 South IH-35, Austin, Texas 78704-7491.

The amendment is proposed under the Texas Labor Code, §402.061, which authorizes the commission to adopt rules necessary to administer the Act; and the Texas Labor Code, §411.032, as amended by House Bill 1089, 74th Legislature, 1995, which requires the filing of a report of injury and occupational disease by non-subscribing employers and establishes a penalty for failure to do so.

The proposed amendment affects the following statutes: the Texas Labor Code, §411.001, which sets out definitions for use in Chapter 411 of the Code; the Texas Labor Code, §411.002, which establishes the applicability of Chapter 411 of the Code; the Texas Labor Code, §411.032, as amended by House Bill 1089, 74th Legislature, 1995, which requires the filing of a report of injury and occupational disease by non-subscribing employers and establishes a penalty for failure to do so; the Texas Labor Code, §411.034, as amended by House Bill 1089, 74th Legislature 1995, which establishes the confidentiality of reports filed pursuant to Texas Labor Code, §411.032 and establishes a penalty for noncompliance.

§160.2. Non-Subscribing Employer's Report of Injury.

(a) [A non-subscribing] **An** employer, as defined by Texas [Civil Statutes, Article 8308-7.01(d), and §164.13 of this title (relating to Applicability)] **Labor Code, §411.001(2) who is a non-subscriber and employs five or more employees not exempt from workers' compensation insurance coverage,** shall file a written report for each death, each occupational disease, and each injury that results in more than one day's absence from work for the injured employee.

(b) The report of injury shall be filed [on a] **in the** form, **format, and manner** prescribed by the commission.

(c) (No change.)

(d) Failure to file a report as required by this section, without good cause, is a class D administrative violation subject to a penalty not to exceed $500 under Texas Labor Code, §411.023 or up to $10,000 pursuant to Texas Labor Code, §415.021 for repeated violations.

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 October 13, 1995.

TRD-9513248 Susan Cory
General Counsel
Texas Workers' Compensation Commission

Earliest possible date of adoption. November 20, 1995

For further information, please call: (512) 440-3700

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TITLE 30. ENVIRONMENTAL QUALITY

Part I. Texas Natural Resource Conservation Commission

Chapter 305. Consolidated Permits

Subchapter D. Amendments, Transfers, Corrections, Revocation, and Suspension of Permits

- **30 TAC §305.70**

The Texas Natural Resource Conservation Commission (TNRCC or commission) proposes an amendment to §305.70, concerning modifications to Municipal Solid Waste (MSW) permits.

The commission is proposing to add new paragraph (25) to §305.70(g) in order to provide a mechanism for processing changes to MSW facility permits to comply with the provisions of §330.203. Under the proposed rule, such changes will be considered permit modifications. The commission emphasizes that this rule affects only those facilities that have received authorization in their permit to construct below the seasonal high water table

In April, 1995, the commission adopted amendments to 30 TAC §330 2 and §330.203 relating to design of municipal solid waste landfills (MSWLF) below the seasonal high water table. The amendments were developed to provide technically based performance standards for those MSWLFs that are designed below the seasonal high groundwater table, and allow for landfills to use waste, rather than soil, as ballast. The amendments to §330.2 and §330.203 were proposed in the November 15, 1994, issue of the *Texas Register* (19 TexReg 8941), and adopted rules appeared in the May 9, 1995, issue of the *Texas Register* (20 TexReg 3463).

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period this section as proposed is in effect there will be fiscal implications as a result of enforcement and administration of the section. The effect on state government will be a moderate cost savings related to the anticipated reduction of workload for processing of applications for permit modifications not requiring public hearings. The number of hearings and the potential cost savings cannot be determined at this time. There are no fiscal implications for local governments in general. Many solid waste disposal facilities subject to this section, however, are owned or operated by local governments and the implications for these local governments will be similar to the economic effects for any other disposal facility owner/operator.

Mr. Minick also has determined that for the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcement of and compliance with the section will be more cost-effective regulation of municipal solid waste and solid waste disposal, reduction in the costs of solid waste management and the more efficient utilization of existing landfill capacity The effect of the rule on persons required to comply with the section will be a reduction in the costs of securing approval for modifications to authorized solid waste facilities. In representative cases, the avoidance of hearing and related costs could result in savings of up to $100,000. Although the average cost savings is anticipated to be less than this amount, for larger, more complex cases greater reductions could potentially be achieved. The cost savings to any affected operator are prospective and will depend on individual site-specific circumstances, however, and cannot be estimated in total. The effect on small business will be equivalent to that for any larger concern and will vary with the size and type of facility, its location and the nature and extent of proposed facility modifications.

Written comments may be submitted to the TNRCC by 5:00 p.m., 30 days from the date of publication of this proposal in the *Texas Register*. Please mail written comments to Bettie Mabry Bell, Texas Natural Resource Conservation Commission, 12118 North IH-35, MC-201, P.O. Box 13087, Austin, Texas 78711-3087, and reference Rule Log Number 95167-305-WS. For further information, contact Clark Talkington, Waste Policy and Regulations Division, at (512) 239-6731.

The amendment is proposed under the Texas Water Code, §5.103, which provides the Texas Natural Resource Conservation Commission with the authority to adopt any rules necessary to carry out the powers and duties under the provisions of the Texas Water Code.

The rule affects Texas Health and Safety Code, Chapter 361, the Texas Solid Waste Disposal Act (the Act).

§305.70. Municipal Solid Waste Class I Modifications

(a)-(f) (No change.)

(g) The following is a list of possible Class I modifications to a MSW permit.

(1)-(24) (No change.)

(25) Changes to comply with the provisions of §330.203 of this title (relating to Special Conditions (Liner Design Constraints)).

(h)-(j) (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 October 16, 1995.

TRD-9513219 Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission

Earliest possible date of adoption: November 20, 1995

For further information, please call: (512) 239-4640

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Chapter 330. Municipal Solid Waste

Subchapter P. Fees and Reporting

- **30 TAC §330.601, §330.602**

The Texas Natural Resource Conservation Commission (TNRCC or commission) proposes amendments to §330.601 and §330.602 concerning the exemption from payment of municipal solid waste fees for certain types of waste.

These proposed amendments are in response to the enactment of House Bill (HB) 2944, Acts of the 74th Legislature, 1995. The bill became effective September 1, 1995 and affects the collection of solid waste disposal fees for waste disposed of in Texas municipal solid waste disposal facilities. This legislation provides that if a disposal facility donates the cost of disposal of solid waste resulting from a public entity's effort to protect the public health and safety of a community from the effects of a natural or man-made disaster or from structures that have been contributing to drug trafficking or other crimes the waste is exempt from the solid waste disposal fee. The legislation also clarifies existing provisions regarding the assessment of fees for disposal of a solid waste to ensure that duplicate assessment of fees does not occur. House Bill 2944 amended the Texas Solid Waste Disposal Act, Health and Safety Code, §361.013(a), to provide that, with certain exceptions, the disposal of all solid waste is subject to a fee. However, fees for disposal of Class I industrial waste and hazardous waste are already being assessed under provisions of Health and Safety Code, §361.136 While the disposal of certain industrial solid wastes could be subject to an assessment under either section, HB 2944 and the proposed rule provide that the commission will not charge an additional solid waste disposal fee under Health and Safety Code, §361.013(a) for the disposal of Class 1 industrial solid waste or hazardous waste that is subject to the fee rates authorized under Health and Safety Code, §361.136.

Section 330.601 is amended by revising paragraph (b)(2) to clarify that only the rates authorized under Chapter 335, Subchapter J, will apply to the disposal of industrial solid waste or hazardous waste, and that the rates authorized under Chapter 330, Subchapter P, will otherwise apply

Section 330.602 is amended by adding new paragraphs to subsections (a) and (b) to provide for the exemption from disposal fee assessment for the donation of certain solid waste services to public entities.

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the sections as proposed are in effect, there will be fiscal implications as a result of enforcement and administration of the sections. The effect on state government will be the potential loss of revenue due to the exemption from fee assessment for disposal services donated by landfill operators. These potential reductions cannot be estimated, but are not anticipated

to be significant and will have no effect on the current legislative appropriations of these revenues to the commission or to anticipated operating budgets. The remaining provisions of the proposed rule are intended to clarify existing authority and agency rules. These amendments are consistent with current agency policies and procedures and will have no anticipated fiscal implications. The effect on local government will be a reduction in potential costs related to disposal services that may be donated by local government which operate solid waste landfills. These cost reductions are not anticipated to be significant for any one local government operator. Similar minor cost savings would also be realized by any private landfill operator donating services under the provisions of HB 2944. There are no anticipated fiscal implications for small businesses.

Mr. Minick also has determined that for each year of the first five-year period the sections as proposed are in effect, the public benefit anticipated as a result of enforcement of and compliance with the sections will be more effective coordination of public projects in response to natural disasters and public health and safety concerns, improved consistency of agency regulations with statutory authority, an more effective administration of commission fee revenue programs. There are no economic costs anticipated to any person required to comply with the sections as proposed.

Comments on the proposal may be submitted to Bettie Mabry Bell, Texas Natural Resource Conservation Commission, Office of Policy and Regulatory Development, MC 201, P.O. Box 13087, Austin, Texas, 78711-3087.

Comments will be accepted until 5:00 p.m., 30 days following the date of this publication. Please refer to Rule Log Number 95149-330-WS when commenting on the proposal. For more information, contact Eddie Molina, Municipal Solid Waste Division, at (512) 239-6702.

The sections are proposed under the Texas Water Code, §5.103 and §26. 011, which provides the commission with authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state. The sections are also promulgated under §361.011 and §361.017 of the Texas Solid Waste Disposal Act, Texas Health and Safety Code, Chapter 361, which provide the commission the authority to regulate municipal solid waste and industrial solid waste and all other powers necessary or convenient to carry out its responsibilities. Section 361.013, of the Texas Solid Waste Disposal Act, Texas Health and Safety Code, Chapter 361, provides specific authority to propose and promulgate the sections for municipal solid waste fees.

The proposed sections implement the Health and Safety Code, Chapter 361

§330.601. Purpose and Applicability.

(a) (No change.)

(b) Applicability.

(1) (No change.)

(2) Industrial solid waste and hazardous waste fees. A fee for disposal of an industrial solid waste or hazardous waste in a municipal solid waste disposal facility shall be assessed at the rates prescribed under the authority of Chapter 335, Subchapter J of this title (relating to Hazardous Waste Generation, Facility and Disposal Fees System). If no fee under Chapter 335, Subchapter J is applicable to the disposal of an industrial solid waste or hazardous waste, then such waste shall be assessed a fee under this chapter for the disposal of solid waste in a municipal solid waste facility.

(3) -(4) (No change.)

§330.602. Fees.

(a) Landfilling. Each operator of a facility in Texas that disposes of municipal solid waste by means of landfilling, including landfilling of incinerator ash, is required to pay a fee to the commission for all waste received for disposal. The fee rate for waste disposed of by landfilling is dependent upon the reporting units used. It is recommended that waste amounts be measured and reported in short tons (2, 000 pounds); however, reporting by cubic yards is acceptable.

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

(7) Exemptions. A fee will not be charged on solid waste resulting from a public entity's effort to protect the public health and safety of the community from the effects of a natural or man-made disaster or from structures that have been contributing to drug trafficking or other crimes if the disposal facility at which that solid waste is offered for disposal has donated to a municipality, county, or other political subdivision the cost of disposing of that waste.

(b) Incinerators and processes for disposal. Each operator of a facility that disposes of or processes municipal solid waste for disposal by means other than landfilling is required to pay a fee to the commission for all waste received for processing or disposal. Facilities and/or processes included in this category include, but are not limited to, incineration; composting; application of sludge, septic tank waste, or shredded waste to the land; and similar facilities or processes. Not included as a process for disposal is land application of waste that has already been properly composted in one of the facilities named. It is recommended that waste amounts be measured and reported in short tons (2,000 pounds); however, reporting by cubic yards is acceptable.

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

(7) Exemptions. A fee will not be charged on solid waste resulting from a public entity's effort to protect the public health and safety of the community from the effects of a natural or man-made disaster or from structures that have been contributing to drug trafficking or other crimes if the disposal facility at which that solid waste is offered for disposal has donated to a municipality, county, or other political subdivision the cost of disposing of that waste.

(c) (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.

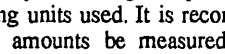
Issued in Austin, Texas, on October 11, 1995.

TRD-9513019

Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: December 7, 1995

For further information, please call: (512) 239-1970



Chapter 335. Industrial Solid Waste and Municipal Hazardous Waste

The Texas Natural Resource Conservation Commission (TNRCC or commission) proposes amendments to §§335.1, 335.6, 335.9, 335.10, 335.18, 335.19, 335. 24, 335.41, 335.164, 335.214, 335.221, 335.323, and 335.503, concerning clarifying the definition of solid waste, expanding and clarifying exemptions from the definition of solid waste, broadening the exemption of the smallest industrial generators from notification, eliminating the annual report requirement for some of the smallest industrial generators, broadening the scope of some variances from classification as solid waste, expanding the exemption from hazardous regulation for petroleum coke produced in a company facility off-site from where the oil bearing hazardous waste was generated, changing elementary neutralization unit\wastewater treatment unit requirements to call for precautions when diluting some ignitable and reactive wastes, adding land disposal restriction requirements to use in a manner that constitutes disposal, and providing an exemption from requirements on burners of hazardous waste in boilers and industrial furnaces for mercury recovery furnaces.

The package also expands the notification exclusion for the smallest industrial generators to extend it to generators who generate equal to or less than 100 kilograms per month of Class 1 non-hazardous waste and less than the Conditionally Exempt Small Quantity Generator (CESQG) limits of hazardous waste. With the new notification exemption, generators who generate no hazardous waste, less than 100 kilograms per month of Class 1 non-hazardous waste, and any quantity of Class 2 and 3 non-hazardous waste will

also be exempt from notification. This package also adds an exemption from annual reporting requirements for industrial CESQGs (as promised in a previous rule adoption, to provide regulatory relief).

In the definition of "Solid Waste" in §335.1, the following amendments are also made: clarification of deed recording on fill exempted from the definition of "Solid Waste" which will be used in construction of surface improvements, if the property is transferred prior to completion of the surface improvement, deletion of the word "discarded" in referring to materials excluded under 40 Code of Federal Regulations (CFR) §261.4(a); clarification of what are considered to be "inherently waste-like materials"; and correction of the asterisk placement in Table 1 on by-products and commercial chemical products. Various other administrative corrections are also made throughout Chapter 335 and explained in more detail in subsequent paragraphs.

These amendments will also incorporate changes from the United States Environmental Protection Agency (EPA) as published in the June 22, 1992 *Federal Register*, 57 FR 27880; August 25, 1992 *Federal Register*, 57 FR 38558, September 30, 1992 *Federal Register*, 57 FR 44999; July 28, 1994 *Federal Register*, 59 FR 38536-38545, and the September 19, 1994 *Federal Register*, 59 FR 47980-48110. The July 28, 1994 preamble (59 FR 38538) states that " ..recovered oil from petroleum refinery operations, petroleum exploration and production, and transportation incident thereto, is excluded from the regulatory definition of solid waste if it is subsequently inserted into the petroleum refining process prior to crude distillation or catalytic cracking. The recovered oil thus need not be generated at the site of the refining process... This exclusion applies, however, only if the oil is not managed in land disposal units or accumulated speculatively before it is inserted ..."; "The agency is slightly broadening the current exemption (coke exemption from hazardous waste) so that it also applies to coke produced by a single petroleum refining entity, but the coker is located at a different facility from where the hazardous wastes are generated (parenthetical phrase added for clarity)...", and "Finally, the EPA is making conforming changes to §261.3(c)(2)(ii)(B) and §266.100(b)(3), both as a result of today's rulemaking, and to reflect conforming changes that EPA inadvertently omitted during promulgation of the used oil final rule (57 FR 41566 (September 10, 1992))."

The recovered oil exclusion from solid waste does not apply to oil from hazardous waste contaminated with oil, prior to recovery of the oil, oil from wastewaters contaminated with oil, prior to recovery of the oil; or recovered "used" oil, unless it is de minimis quantities of used oil that are incidentally captured by a refinery's wastewater treatment system and subsequently recovered along with other oil in a refinery's recovered oil system.

The July 28, 1994 preamble (59 FR 38542 and 38543) further states: "Under §261.2(f), persons claiming that recovered oil is excluded from the definition of solid waste bear the burden of proof in enforcement actions to demonstrate that they qualify for the exclusion. This would normally require some type of demonstration that the recovered oil is going to be and actually is used in a petroleum refining operation prior to crude distillation or catalytic cracking. For on-site sources, this documentation could be entries in the operating records of the facility showing where the oil is recovered and where it re-enters the refining process. For off-site sources, this demonstration is especially important. Adequate documentation could entail bona fide contractual agreements with other facilities to take the recovered oil, shipping or delivery records to the receiving facility, or other similar records."

The September 19, 1994 federal rule change included a broadening of the 40 CFR §261.2(e)(1)(iii) "closed-loop" recycling exclusion from the definition of solid waste. With this change, secondary materials that are recycled back into the secondary production process from which they were generated are also excluded from the definition of solid waste. A "primary production process" uses raw materials as the majority of its feedstock; a "secondary process" uses spent materials or scrap metal as the majority of its feedstock (59 FR 47988 and 48014).

When the EPA did this, they also modified the variance provisions in 40 CFR §260.30(b) and §269.31(b) to delete "primary" from these provisions where they refer to materials that are reclaimed and then re-used as feedstock within the original "primary" production process, so these provisions could also apply to secondary production processes. The modifications broadening these exclusions are less stringent than the current federal program, and the state of Texas need not adopt them However, the state of Texas proposes to adopt them to encourage recycling. Because these exemption expansions are not the result of the Hazardous and Solid Waste Amendments of 1984, they will not be effective in the state of Texas until the TNRCC has an implementing rule amendment.

The September 19, 1994 rule change also makes owners and operators of smelting, melting, and refining furnaces that process mercury containing waste solely for metal recovery, conditionally exempt from regulation under the Boiler and Industrial Furnace (BIF) rules (40 CFR §266.100(c)(1)). To be exempt, the owner or operator must comply with certain notification, sampling and analysis, and recordkeeping provisions (40 CFR §266.100(c)(1)(i)). In addition, the mercury containing waste must be processed solely for metal recovery. To be processed solely for metal recovery, the mercury containing waste cannot have a heating value greater than 5,000 British thermal units per pound (Btu/lb) or have a total concentration of organic compounds listed in Appendix VIII of Part 261 greater than 500 parts per million (ppm) by weight (40 CFR §266.100(c)(3)). Wastes that have a heating value greater than 5,000 Btu/lb or have a total concentration of hazardous organic compounds exceeding 500 ppm are considered by the EPA to be burned for energy recovery and destruction, respectively, and thus are subject to the BIF rules (59 FR 48024).

Last, the September 19, 1994 rule change adds 40 CFR Part 268 land disposal requirements to the list of requirements applicable to users of materials that are used in a manner that constitutes disposal in 40 CFR §266.23(a) (except for those hazardous wastes not satisfying the conditions of 40 CFR §266.20(b)). This change was made to correct an inadvertent omission in the original federal rule and was effective December 19, 1994. (See 59 FR 48026, September 19, 1994 for further details.)

Section 335.1(A)(ii), definition of "Solid Waste," is amended to clarify some of the types of surface improvement that the exempted fill might be used in and to clarify that the deed recording requirement was never intended to apply unless a property is sold before the excluded material is actually used in a completed surface improvement. Section 335.1(A)(iv) is amended to delete the word "discarded," because all of the materials excluded under 40 CFR §261.4(a) are not "discarded" materials; this provision is also amended to assure that all subparagraphs of 40 CFR §261.4 are included in this exclusion to the definition of solid waste, including the newly added §261. 4(a)(12) on recovered oil (59 FR 38545, July 28, 1994). Section 335.1(D)(ii) (II) and Table 1 of the definition of "Solid Waste" are also amended to correct the placement of asterisks in the table on by-products and commercial chemical products to agree with the adopted version of the table published in the June 11, 1985 *Texas Register* (10 TexReg 1903), and to clarify the reclaimed commercial chemical products exclusion from the definition of solid waste by adding that it applies to "unused" and "non-listed, characteristically hazardous" as well as listed hazardous chemical products (50 FR 14219, April 11, 1985). The §335.1 definition of "Solid Waste" (F) (iii) is also amended to broaden the "closed loop" recycling exclusion to include secondary materials returned to secondary processes if the secondary material is not placed on the land, as in the September 19, 1994, 59 FR 48041, change to 40 CFR §261.2(e)(1)(iii). The §335.1 definition of "solid waste, " clause (G)(iv) is proposed to be amended to clarify that the materials that are identified by the administrator of the EPA as "inherently waste-like materials" include those identified under 40 CFR §261.2(d)(1)-§261.2(d)(2), and that they are solid wastes, even if the recycling involves use, reuse, or return to the original process, as described in subparagraph (F) under the definition of "solid waste." This proposed change would clarify that the state rule is equivalent to the federal regulations with regard to "inherently waste-like materials."

Section 335.6 is amended to change the notification requirement for generators of municipal hazardous waste "equal to or greater than 1,000 kilograms in a calendar month" to "greater than the limits specified in §335. 78 (relating to Special Requirements for Hazardous Waste Generated by Conditionally Exempt Small Quantity Generators)," so that the requirement in §335.6(d) for generators of municipal hazardous waste of "more than 100 kilograms but less than 1,000 kilograms per calendar month" to notify can be deleted. This deletion will not change the notification re-

quirements but will help to preclude possible misinterpretation if a municipal hazardous waste generator were to read §335.6 without reading §335.6(d) or visa versa. This section is also amended to expand the notification exclusion to exempt industrial CESQGs who do not generate more than 100 kilograms of Class 1 non-hazardous waste per month, regardless of the amount of Class 2 and 3 non-hazardous waste they generate This effectively excludes from notification an industrial generator that generates no Class 1 waste or less than 100 kilograms per month of Class 1 waste, any amount of Class 2 and 3 non-hazardous wastes, and no hazardous wastes, too. Section 335.6 is also amended to change two Class "I" waste designators to Class "1" waste for clarification purposes. By definition, Class I waste includes both hazardous and non-hazardous waste that might be a threat to the public health or environment. However, Chapter 335, Subchapter R, defines Class 1 waste to be a non-hazardous Class I waste. Class 1 waste is a better, more specific designator where industrial non-hazardous waste that might be a threat to the public health or environment is discussed. Section 335.6(d) is amended by deletion, due to the previous broadening of §335.6 to cover its requirements. Section 335.6(e) is split into a new §335.6(d) revised per the new notification exclusion and a separate §335.6(e) with the transfer facility notification requirement.

Also in Subchapter A, §335.9(a)(3) is amended so that an industrial generator of hazardous waste in a quantity low enough to qualify as a CESQG under §335.78 (relating to Special Requirements for Hazardous Waste Generated by Conditionally Exempt Small Quantity Generators) does not have to submit a completed annual report. A smaller number of industrial CESQGs were relieved from the requirement to notify in a previous adoption. At that time, TNRCC received a comment that a similar change should have been made to §335. 9(a)(3) to be sure to relieve these generators from the annual reporting requirement. The TNRCC concurred with the comment and committed to make this change in a future rule amendment. Section 335.9(a)(3)(A) is amended to delete a Class "I" designation. Section 335.9(a)(3)(B) is deleted, because §335. 78(g)(3) allows CESQGs to process and dispose of their hazardous waste on-site, and the TNRCC has no need to report on these small waste quantities. Section 335.9(a)(3)(C) was relettered to account for the deletion of §335 9(a)(3)(B) and amended to clarify the generation and accumulation limits on acute hazardous waste and to be no more stringent than those limits. Section 335.9(a) (3)(D) was relettered to account for the deletion of §335.9(a)(3)(B); amended to allow a total accumulation of 2,400 kilograms of hazardous and non-hazardous waste (1,200 kilograms of hazardous waste plus 1,200 kilograms of non-hazardous waste); and amended to change two Class "I" designations to Class "1" for clarification reasons previously explained.

Section 335.10 is amended to change a Class "I" designation to Class "1" for clarification reasons previously explained. Section 335.10(a) is amended to change two Class "I" designations to Class "1" for clarification reasons previously explained and to correct an administrative error that unintentionally deleted the words "process" and "or disposal" which are added back in this revision; the revised wording will agree with 40 CFR §262.20(a). Section 335.10(a)(1) is amended to clarify that generators of hazardous waste in excess of CESQG limits or generators of greater than 100 kilograms of Class 1 industrial non-hazardous waste in a calendar month must manifest. Three Texas Water Commission designations were also updated to TNRCC designations. Section 335.10(a)(2) was amended to state that an industrial generator of less than 100 kilograms per month of "Class 1" non-hazardous waste and less than CESQG limits of hazardous waste does not have to manifest. Section 335.10(a)(3) is amended to change a Class "I" designation to Class "1" for clarification reasons previously explained and say that generators exempted from manifesting in §335.10(a)(2) do not have to manifest shipments to another state. Section 335.10(b)(5) is amended to note that an industrial generator of less than 100 kilograms per calendar month of non-hazardous "Class 1" waste and less than CESQG limits of hazardous waste is exempt from manifesting. Section 335.10(b) (8) is amended to indicate that industrial generators that generate less than 100 kilograms per calendar month of "Class 1" non-hazardous waste and less than CESQG hazardous waste quantity limits can use the letters CESQG as their TNRCC transporter registration number when transporting their own hazardous or "Class 1" non-hazardous waste.

Section 335.18(2) is amended to delete "primary," so that a variance on materials that are reclaimed and then reused within the original primary production process can also be granted on a "secondary" production process.

Section 335.19(b) is also amended to delete "primary," so that a variance on materials that are reclaimed and then reused within the original primary production process can also be granted on a "secondary" production process.

Section 335.24(c)(5) is amended to add essentially the same language added to 40 CFR §261.6(a)(3)(iv) (59 FR 38545) as published July 28, 1994, stating that the exemption from regulation for fuels produced from the refining of oil-bearing hazardous waste does not apply to fuels produced from oil recovered from oil-bearing hazardous waste, where such recovered oil is already excluded from being a solid waste when inserted into a petroleum refining process. Section 335.24(c)(6) is deleted (as is 40 CFR §261.6(a)(3) (v) per 59 FR 38545) because it has been replaced by the exclusion from solid waste for recovered oil inserted into a petroleum refining process. Section 335.24(c)(7) is also deleted (as was 40 CFR §261.6(a)(3)(vii) per 56 FR 7207) . This was the exclusion for coke and coal tar from the iron and steel industry that contains EPA Hazardous Waste No. K087 (decanter tank tar sludge from coking operations) hazardous waste from the iron and steel production process. Section 335.24(c)(8) and (9) are renumbered to account for the deletion of §335.24(c)(6) and (7). Section 335.24(c)(9) is also amended to broaden the coke exemption so that it also applies to coke produced by a single petroleum refining entity, where the coker is located at a different facility from where the hazardous wastes are generated Section 335.24(g) is amended to account for the renumbering due to the deletion of §335.24(c)(6) and (7).

Section 335 41(d)(1) is amended to add the same language added to 40 CFR 264.1(g)(6) (59 FR 48042), September 19, 1994, which requires precautions to prevent dangerous reactions when diluting some ignitable or reactive wastes during neutralization treatment. (The added language references 40 CFR §264. 17(b) in 40 CFR Part 264, Subpart B, which is already adopted by reference in 30 Texas Administrative Code §335.152(a)(1).)

Section 335.164(7)(C) is amended to add the word "not" previously omitted in error, the language will then agree with that in 40 CFR 264.98(g)(3).

Section 335.214(a) is amended to add that users of materials that are used in a manner that constitutes disposal are subject to the land disposal restrictions, reflecting the counterpart amendment to 40 CFR §266 23(a) (59 FR 48042), published September 19, 1994.

Section 335 221(a) is amended to add the adoption by reference of changes to 40 CFR Part 266, §266.100(c)(1) and (3) and addition of Appendix XIII, Mercury Bearing Wastes That May Be Processed in Exempt Mercury Recovery Units (59 FR 48042-48043) as published September 19, 1994. These federal rule changes make mercury recovery furnaces, that meet these requirements, exempt from the Boiler and Industrial Furnace rule. Section 335.221(b)(2) is amended to account for the renumbering due to the deletion of §335.24(c)(6) and (7). Other changes to the federal regulations applicable to the burning of hazardous waste in boilers and industrial furnaces are proposed to be adopted by reference by specifically including the following *Federal Register* citations under §335.221(a): 57 FR 27880, June 22, 1992; 57 FR 38558, August 25, 1992; and 57 FR 44999, September 30, 1992. These changes include: requirements applicable to the burning of hazardous waste in boilers and industrial furnaces, including requirements relating to applicability, namely the end of the Coke Oven Administrative Stay; various technical amendments and corrections, including those relating to interim status standards; limits on interim status operating conditions; standards to control organic emissions, metals emissions, hydrogen chloride and chlorine gas; the small quantity on-site burner exemption, regulation of residues; limits on operating conditions; and various typographical corrections.

Section 335.323(a) is amended to change two Class "I" designations to Class "1" for clarification reasons previously explained. Section 335.323 is amended to change four Class "I" designations to Class "1" for clarification reasons previously explained.

Section 335.503(b) is amended to correct a typographical error in a section cross-reference. Section 335.503(b)(6) is amended to instruct industrial CESQGs and industrial

generators that generate less than 100 kilograms per calendar month of Class 1 nonhazardous waste, who voluntarily manifest when it is not required by regulation, that they may use "CESQ" as the first four digits of any waste code they generate.

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five years these sections as proposed are in effect, there will be fiscal implications as a result of enforcement and administration of the sections. There are no significant fiscal implications anticipated for state or local government. Revenues to state government may decrease; however, the fiscal implications are not estimated to be significant. Adoption of the sections as proposed is anticipated to result in some cost savings for generators of small quantities of industrial solid waste. Reductions in operating costs are anticipated as a result of the clarification that certain notification and reporting requirements will not apply to affected generators of small quantities of waste. The costs of notification and reporting will be avoided in addition to the cost savings related to fee assessments. Generators of more than one ton of Class 1 waste or hazardous waste that are exempt from notification or annual reporting requirements will realize a cost savings equal to $50 per year for Class 1 waste and $100 per year for hazardous waste. Many of the affected generators are small businesses and the potential fiscal implications are equivalent to those for any business subject to these sections.

Mr. Minick also has determined that for the first five years the sections as proposed are in effect, the public benefit anticipated as a result of administration of and compliance with the sections will be increased incentives for recycling of industrial solid wastes and hazardous wastes, more cost-effective regulation of generators of small quantities of waste, and improved consistency between state and federal regulatory requirements. There are no additional economic costs anticipated for persons required to comply with the sections as proposed.

Comments on this proposal may be submitted to Bettie Mabry Bell, Texas Natural Resource Conservation Commission, Office of Policy and Regulatory Development (MC-201), Post Office Box 13087, Austin, Texas 78711-3087, (512) 239-6087, and please reference TNRCC Rule Log Number 95126-335-WS. For further information, contact Hygie Reynolds, Waste Policy & Regulations Division, at (512) 239-6825. The deadline for the submission of written comments will be 30 days after the date of publication of this proposal in the *Texas Register*.

Subchapter A. Industrial Solid Waste and Municipal Hazardous Waste Management in General

- **30 TAC §§335.1, 335.6, 335.9, 335.10, 335.18, 335.19, 335. 24**

The amendments are proposed under the Texas Water Code, §§5.103, 5. 105, and 26.11, which provides the commission with authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state; and the Texas Solid Waste Disposal Act, Texas Health and Safety Code, §361.017 and §361.024, which provides the commission authority to regulate industrial solid wastes and hazardous municipal wastes and to adopt and promulgate rules consistent with the general intent and purposes of the Act.

The proposed amendments implement Health and Safety Code, Chapter 361.

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

Solid Waste-

(A) Any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant or air pollution control facility, and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, municipal, commercial, mining, and agricultural operations, and from community and institutional activities, but does not include:

(i) solid or dissolved material in domestic sewage, or solid or dissolved material in irrigation return flows, or industrial discharges subject to regulation by permit issued pursuant to the Texas Water Code, Chapter 26 (an exclusion applicable only to the actual point source discharge that does not exclude industrial wastewaters while they are being collected, stored or processed before discharge, nor does it exclude sludges that are generated by industrial wastewater treatment);

(ii) uncontaminated soil, dirt, rock, sand and other natural or man-made inert solid materials used to fill land if the object of the fill is to make the land suitable for the construction of surface improvements. **The material serving as fill may also serve as a surface improvement such as a structure foundation, a road, soil erosion control, and flood protection.** Man-made materials exempted under this provision shall only be deposited at sites where the construction is in progress or imminent such that rights to the land are secured and engineering, architectural, or other necessary planning have been initiated. **Waste disposal shall be considered to have occurred on** any land which has been **filled with** [used to dispose of] man-made inert materials under this provision **if the land is sold, leased, or otherwise conveyed prior to the completion of construction of the surface improvement. Under such conditions, deed recordation shall be required. The deed recordation shall include** [shall be deed recorded, including] the information required under §335.5(a) (relating to Deed Recordation), prior to sale or other conveyance of the property;

(iii) (No change.)

(iv) a [discarded] material excluded by 40 Code of Federal Regulations §261.4(a)(1)-(12) or by variance granted under §335.18 of this title (relating to Variances from Classification as a Solid Waste) and §335.19 of this title (relating to Standards and Criteria for Variances from Classification as a Solid Waste).

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

(D) Materials are solid wastes if they are "recycled"-or accumulated, stored, or processed before recycling-as specified in this subparagraph. The chart referred to as Table 1 indicates only which materials are considered to be solid wastes when they are recycled and is not intended to supersede the definition of solid waste provided in subparagraph (A) of this paragraph.

(i) (No change.)

(ii) Burning for energy recovery. Materials noted with an asterisk in Column 2 of Table 1 are solid wastes when they are:

(I) (No change.)

(II) Used to produce a fuel or are otherwise contained in fuels (in which cases the fuel itself remains a solid waste). However, **unused** commercial chemical products, listed in 40 Code of Federal Regulations §261.33 **and nonlisted characteristically hazardous,** are not solid wastes if they are fuels themselves.

(iii) (No change.)

(iv) Accumulated speculatively. Materials noted with an asterisk in Column 4 of Table 1 are solid wastes when accumulated speculatively.
Figure 1: 30 TAC 335.1(D)(iv)

(E) (No change.)

(F) Materials are not solid wastes when they can be shown to be recycled by being:

(i)-(ii) (No change.)

(iii) Returned to the original process from which they were generated, without first being reclaimed or **land disposed.** The material must be returned as a substitute for [raw material] **feedstock materials** [, and the process must use raw materials as principal feedstocks]. **In cases where the original process to which the**

material is returned is a secondary process, the materials must be managed such that there is no placement on the land.

(iv) (No change.)

(G) The following materials are solid wastes, even if the recycling involves use, reuse, or return to the original process, as described in subparagraph (F) of this paragraph:

(i)-(iii) (No change.)

(iv) Materials deemed to be inherently waste-like by the administrator of the Environmental Protection Agency, as described in 40 Code of Federal Regulations §261.2(d)(1)-§261.2(d)(2).

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

§335.6. Notification Requirements.

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

(c) Any person who generates [municipal] hazardous waste in **a quantity** [quantities equal to or] greater than **the limits** [1,000 kilograms in a calendar month or quantities of acute municipal hazardous waste in excess of quantities] specified in §335.78 of this title (relating to Special Requirements for Hazardous Waste Generated by Conditionally Exempt Small Quantity Generators) in a calendar month **or greater than 100 kilograms in a calendar month of industrial non-hazardous Class 1 waste**[, or generates any quantities of industrial solid waste,] shall notify the executive director of such activity on forms furnished or approved by the executive director. Such person shall also submit to the executive director upon request such information as may reasonably be required to enable the executive director to determine whether the storage, processing, or disposal is compliant with the terms of this chapter. Notifications submitted pursuant to this section shall be in addition to information provided in any permit applications required by §335.2 of this title (relating to Permit Required), or any reports required by §335.9 of this title (relating to Recordkeeping and Annual Reporting Procedures Applicable to Generators), §335.10 of this title (relating to Shipping and Reporting Procedures Applicable to Generators of Hazardous Waste or Class 1 [I] Waste and Primary Exporters of Hazardous Waste), and §335.13 of this title (relating to Recordkeeping and Reporting Procedures Applicable to Generators of Hazardous Waste or Class 1 [I] Waste and Primary Exporters of Hazardous Waste). Any person who provides notification pursuant to this subsection shall have the continuing obligation to immediately document any changes or additional information with respect to such notification and within 90 days of the occurrence of such change or of becoming aware of such additional information, provide written notice to the executive director of any such changes or additional information, to that reported previously. If waste is recycled on-site or managed pursuant to §335.2(d) of this title (relating to Permit Required), the generator must also comply with the notification requirements specified in subsection (h) of this section. The information submitted pursuant to the notification requirements of this subchapter and to the additional requirements of §335. 503 of this title (relating to Waste Classification and Waste Coding Required) shall include, but is not limited to:

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

(d) Any person who transports hazardous waste or Class 1 waste shall notify the executive director of such activity on forms furnished or approved by the executive director, except:

(1) industrial generators that generate less than 100 kilograms of nonhazardous Class 1 waste per month and less than the quantity limits of hazardous waste specified in §335.78 of this title (relating to Special Requirements for Hazardous Waste Generated by Conditionally Exempt Small Quantity Generators) and who only transport their own waste; and

(2) municipal generators that generate less than the quantity limits of hazardous waste specified in §335.78 and who only transport their own waste;

[(d) Persons generating more than 100 kilograms but less than 1,000 kilograms of hazardous municipal waste in any calendar month shall notify the executive director of such activity on forms provided by the executive director. Such person shall also submit to the executive director upon request such information as may be reasonably required to enable the executive director to determine whether the storage, processing, or disposal of such waste is compliant with the terms of these sections. Notifications submitted pursuant to this section shall be in addition to any information provided on any permit application required by §335.2 of this title (relating to Permit Required), or any reports required by §335.9 of this title (relating to Shipping and Reporting Procedures Applicable to Generators), §335.10 of this title (relating to Shipping and Reporting Procedures Applicable to Generators of Hazardous Waste or Class I Waste and Primary Exporters of Hazardous Waste), and §335.13 of this title (relating to Recordkeeping and Reporting Procedures Applicable to Generators Shipping Hazardous Waste or Class I Waste and Primary Exporters of Hazardous Waste). Any person who provides notification pursuant to this subsection shall have the continuing obligation to immediately document any changes or additional information with respect to such notification and within 90 days of the occurrence of any such change or of becoming aware of such new information provide written notice to the executive director of any such changes or additional information to that reported previously.]

[(e) Except for municipal and industrial conditionally exempt small quantity generators and industrial generators that generate less than 100 kilograms of nonhazardous waste per month who only transport their own hazardous waste, any person who transports hazardous waste or Class I waste shall notify the executive director of such activity on forms furnished or approved by the executive director. Persons operating transfer facilities in accordance with §335.94 of this title (relating to Transfer Facility Requirements) shall notify the executive director of such activity.]

(e) Persons operating transfer facilities in accordance with §335.94 of this title (relating to Transfer Facility Requirements) shall notify the executive director of such activity.

(f)-(i) (No change.)

§335.9. Record Keeping and Annual Reporting Procedures Applicable to Generators.

(a) Except with regard to nonhazardous recyclable materials regulated pursuant to §335.24(h) of this title (relating to Requirements for Recyclable Materials and Nonhazardous Recyclable Materials), each generator of hazardous waste or industrial solid waste shall comply with the following:

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

(3) Generators are not required to submit the information required in paragraph (1) of this subsection if they certify on the annual summary that all of the following conditions have been met:

(A) during the year, total on-site accumulation of hazardous [and Class I] waste did not equal or exceed 1,000 kilograms;

[(B) during the year, no hazardous or Class I waste was processed or disposed of on-site;]

[**(B)**][(C)] no acute hazardous waste was generated **or accumulated** during the year **exceeding the limits specified in §335.78(e)(1) and (2) of this title (relating to Special Requirements for Hazardous Waste Generated By Conditionally Exempt Small Quantity Generators)** [or remained in storage at the end of the year];

(C)[(D)] a total of less than 1,200 kilograms of hazardous waste,**and**a total of less than 1,200 kilograms of Class**1** [I] nonhazardous waste, ([and a combined total of less than]**2,400**[1,200] kilograms or **less** of hazardous waste **plus** [and] Class**1** [I] nonhazardous waste **combined**) was generated during the year.

(4) (No change.)

(b) (No change.)

§335.10. Shipping and Reporting Procedures Applicable to Generators of Hazardous Waste or Class 1 [I] Waste and Primary Exporters of Hazardous Waste.

(a) Except as provided in subsection (g) of this section, no generator of hazardous or Class 1 [I] waste consigned to an off-site solid waste **process**, storage, or **disposal** facility within the United States or primary exporters of hazardous waste consigned to a foreign country shall cause, suffer, allow, or permit the shipment of hazardous waste or Class 1 [I] waste unless:

(1) for generators of **industrial non-hazardous** Class **1 [I] waste in a quantity greater than 100 kilograms per month** and/or generators of [municipal] hazardous waste shipping [municipal] hazardous waste which is part of a total quantity of [municipal] hazardous waste generated in quantities greater than 100 kilograms in a calendar month, or quantities of acute hazardous waste in excess of quantities specified in §335.78(e) of this title (relating to Special Requirements for Hazardous Waste Generated by Conditionally Exempt Small Quantity Generators), who consign that waste to an off-site solid waste storage, processing, or disposal facility in Texas;[,] a Texas **Natural Resource Conservation** [Water] Commission (**TNRCC** [TWC]) manifest on Form **TNRCC** [TWC] -0311, and, if necessary, **TNRCC** [TWC]-0311B is prepared;

(2) the generator is **either an industrial generator that generates less than 100 kilograms of non-hazardous Class 1 waste per month and less than the quantity limits of hazardous waste specified in §335.78 of this title (relating to Special Requirements for Hazardous Waste Generated by Conditionally Exempt Small Quantity Generators) or a municipal generator that generates less than the quantity limit of hazardous waste specified in §335. 78 of this title** [a conditionally exempt small quantity generator (CESQG) of hazardous waste or an industrial generator that generates less than 100 kg per month of non-hazardous waste, who is not required to manifest];

(3) for generators of hazardous waste or Class 1 [I] waste generated in Texas for consignment to another state the consignment state's manifest, if provided, or a Texas state manifest if the consignment state does not provide a manifest, is prepared, **unless the generator is identified in paragraph (2) of this section;**

(4)-(6) (No change.)

(b) The manifest shall contain the following information.

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

(5) The manifest shall contain the generator's Texas Natural Resource Conservation Commission (TNRCC) registration and/or permit number. Conditionally exempt small quantity generators (CESQGs) of hazardous waste or industrial generators of less than 100 kg per month of non-hazardous **Class 1** waste **and less than CESQG limits of hazardous waste** that are exempt from manifesting may voluntarily choose to manifest their hazardous or Class 1 industrial non-hazardous waste. Such exempt generators may utilize the letters "CESQG" for their TNRCC generator registration number unless they have previously been assigned a TNRCC generator registration number.

(6)-(7) (No change.)

(8) The manifest shall contain the first transporter's state registration number. Conditionally exempt small quantity generators **who are not required to notify of their transportation activities as specified in §335.6(d) of this title (relating to Notification Requirements)** [of municipal or industrial hazardous waste and industrial generators that generate less than 100 kilograms per month of non-hazardous waste] are instructed to use the letters "CESQG" as the TNRCC transporter's registration number when transporting their own hazardous **or Class 1 non-hazardous** waste unless they have previously been assigned a TNRCC registration number.

(9)-(24) (No change.)

(c) -(g) (No change.)

§335.18. Variances from Classification as a Solid Waste. In accordance with the standards and criteria in §335.19 of this title (relating to Standards and Criteria for Variances from Classification as a Solid Waste) and the procedures in §335.21 of this title (relating to Procedures for Variances from Classification as a Solid Waste or to be Classified as a Boiler), the executive director may determine on a case-by-case basis that the following recyclable materials and nonhazardous recyclable materials are not solid wastes:

(1) (No change.)

(2) Materials that are reclaimed and then reused within the original [primary] production process in which they were generated; or

(3) (No change.)

§335.19. Standards and Criteria for Variances from Classification as a Solid Waste.

(a) (No change.)

(b) The executive director may grant requests for a variance from classifying as a solid waste those materials that are reclaimed and then reused as feedstock within the original [primary] production process in which the materials were generated if the reclamation operation is an essential part of the production process. This determination will be based on the following criteria:

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

(c) (No change.)

§335.24. Requirements For Recyclable Materials and Nonhazardous Recyclable Materials.

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

(c) The following recyclable materials are not subject to regulation under Subchapters B-I and O of this chapter, (relating to Hazardous Waste Management-General Provisions; Standards Applicable to Generators of Hazardous Waste; Standards Applicable to Transporters of Hazardous Waste; Interim Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities; Permitting Standards for Owners and Operators of Hazardous Waste Storage, Processing, and Disposal Facilities; Location Standards for Hazardous Waste Storage, Processing or Disposal; Standards for the Management of Specific Wastes and Specific Types of Facilities; Prohibition on Open Dumps and Land Disposal Restrictions), respectively, or Chapters 261, 263, 265, 267, 269, 271, 273, and 305 of this title (relating to Introductory Provisions; General Rules; Procedures Before Public Hearing; Procedures During Public Hearing; Procedures After Public Hearing Before an Examiner; Procedures After Public Hearing Before the Full Commission; Procedures After Final Decision; and Consolidated Permits), except as provided in subsections (g) and (h) of this section:

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

(5) Fuels produced from the refining of oil-bearing hazardous wastes along with normal process streams at a petroleum refining facility if such wastes result from normal petroleum refining, production, and transportation practices **(this exemption does not apply to fuels produced from oil recovered from oil-bearing hazardous waste, where such recovered oil is al-**

ready excluded under §335.1 of this title (relating to Definitions);

[(6) Oil reclaimed from hazardous waste resulting from normal petroleum refining, production, and transportation practices, which oil is to be refined along with normal process streams at a petroleum refining facility;

[(7) coke and coal tar from the iron and steel industry that contains EPA Hazardous Waste Number K087 (decanter tank tar sludge from coking operations) hazardous waste from the iron and steel production process;]

(6)[(8)] The following hazardous waste fuels:

(A) hazardous waste fuel produced from oil-bearing hazardous wastes from petroleum refining, production, or transportation practices, or produced from oil reclaimed from such hazardous wastes where such hazardous wastes are reintroduced into a process that does not use distillation or does not produce products from crude oil so long as the resulting fuel meets the used oil specification under 40 Code of Federal Regulations §266.40(e) and so long as no other hazardous wastes are used to produce the hazardous waste fuel;

(B) hazardous waste fuel produced from oil-bearing hazardous waste from petroleum refining production, and transportation practices, where such hazardous wastes are reintroduced into a refining process after a point at which contaminants are removed, so long as the fuel meets the used oil fuel specification under 40 Code of Federal Regulations §266.40(e);

(C) oil reclaimed from oil-bearing hazardous wastes from petroleum refining, production, and transportation practices, which reclaimed oil is burned as a fuel without reintroduction to a refining process, so long as the reclaimed oil meets the used oil fuel specification under 40 Code of Federal Regulations §266.40(e); and

(7)[(9)] Petroleum coke produced from petroleum refinery hazardous wastes containing oil **by the same person who generated the waste** [at the same facility at which such wastes were generated], unless the resulting coke product exceeds one or more of the characteristics of hazardous waste in 40 Code of Federal Regulations Part 261, Subpart C.

(d)-(f) (No change.)

(g) Except as provided in subsection (h) of this section, recyclable materials (excluding those listed in subsection (c)(1) and (5)-(7) [(9)] of this section), remain subject to the requirements of §§335.4, 335.6, and 335.9-335.15 of this title (relating to General Prohibitions; Notification Requirements; Recordkeeping and Annual Reporting Procedures Applicable to Generators; Shipping and Reporting Procedures Applicable to Generators of Hazardous Waste or Class I Waste and Primary Exporters of Hazardous Waste; Shipping Requirements for Transporters of Hazardous Waste or Class I Waste; Shipping Requirements Applicable to Owners or Operators of Storage, Processing, or Disposal Facilities; Recordkeeping and Reporting Procedures Applicable to Generators Shipping Hazardous Waste or Class I Waste; Recordkeeping Requirements Applicable to Transporters of Hazardous Waste or Class I Waste; and Recordkeeping and Reporting Requirements Applicable to Owners or Operators of Storage, Processing, or Disposal Facilities; respectively), as applicable.

(h)-(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 October 11, 1995.

TRD-9512981 Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission

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For further information, please call: (512) 239-6087

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Subchapter B. Hazardous Waste Management General Provisions

• 30 TAC §335.41

The amendment is proposed under the Texas Water Code, §§5.103, 5.105, and 26.11, which provides the commission with authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state; and the Texas Solid Waste Disposal Act, Texas Health and Safety Code, §361.017 and §361.024, which provide the commission authority to regulate industrial solid wastes and hazardous municipal wastes and to adopt and promulgate rules consistent with the general intent and purposes of the Act.

The proposed amendment implements Health and Safety Code, Chapter 361.

§335.41. Purpose, Scope and Applicability.

(a)-(c) (No change.)

(d) Subchapter E of this chapter (relating to Interim Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities) and Subchapter F of this chapter (relating to Permitting Standards for Owners and Operators of Hazardous Waste, Storage, Processing, or Disposal Facilities) do not apply to:

(1) The owner or operator of an elementary neutralization unit or a wastewater treatment unit as defined in §335.1 of this title (relating to Definitions) , **provided that if the owner or operator is diluting hazardous ignitable (D001) wastes (other than the D001 High TOC Subcategory defined in 40 Code of Federal Regulations §268.40, Table Treatment Standards for Hazardous Wastes), or reactive (D003) waste, to remove the characteristic before land disposal, the owner/operator must comply with the requirements set out in 40 Code of Federal Regulations §264.17(b);**

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

(e) -(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.

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Subchapter F. Permitting Standards for Owners and Operations of Hazardous Waste Storage, Processing, or Disposal Facilities

• 30 TAC §335.164

The amendment is proposed under the Texas Water Code, §§5.103, 5.105, and 26.11, which provides the commission with authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state; and the Texas Solid Waste Disposal Act, Texas Health and Safety Code, §361.017 and §361.024, which provide the commission authority to regulate industrial solid wastes and hazardous municipal wastes and to adopt and promulgate rules consistent with the general intent and purposes of the Act.

The proposed amendment implements Health and Safety Code, Chapter 361.

§335.164. Detection Monitoring Program. An owner or operator required to establish a detection monitoring program must, at a minimum, discharge the following responsibilities:

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

(7) If the owner or operator determines pursuant to paragraph (6) of this section that there is statistically significant evidence of contamination for chemical parameters or hazardous constituents specified pursuant to paragraph (1) of this section at any monitoring well at the compliance point, he must:

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

(C) For any Appendix IX compounds found in the analysis pursuant to subparagraph (B) of this paragraph, the owner or operator may resample within one month and repeat the analysis for those compounds detected. If the results of the second analysis confirm the initial results, then these constituents will form the basis for compliance monitoring. If the owner or operator does **not** resample for the compounds found pursuant to subparagraph (B) of this paragraph, the hazardous constituents found during this initial Appendix IX analysis will form the basis for compliance monitoring.

(D)-(F) (No change.)

(8) (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.

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Director, Legal Division
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Subchapter H. Standards for the Management of Specific Wastes and Specific Wastes and Specific Types of Facilities

• 30 TAC §335.214

The amendment is proposed under the Texas Water Code, §§5.103, 5.105, and 26.11, which provides the commission with authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state; and the Texas Solid Waste Disposal Act, Texas Health and Safety Code, §361.017 and §361.024, which provide the commission authority to regulate industrial solid wastes and hazardous municipal wastes and to adopt and promulgate rules consistent with the general intent and purposes of the Act.

The proposed amendment implements Health and Safety Code, Chapter 361.

§335.214. Standards Applicable to Users of Materials That Are Used in a Manner That Constitutes Disposal.

(a) Owners or operators of facilities that use recyclable materials in a manner that constitutes disposal are regulated under all applicable provisions of Subchapter A of this chapter (relating to Industrial Solid Waste and Municipal Hazardous Waste Management in General), Subchapter B of this chapter (relating to Hazardous Waste Management-General Provisions), Subchapter E of this chapter (relating to Interim Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities), Subchapter F of this chapter (relating to Permitting Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities), **Subchapter O of this chapter (relating to Land Disposal Restrictions),** Chapter 305 of this title (relating to Consolidated Permits), Chapter 261 of this title (relating to Introductory Provisions), Chapter 263 of this title (relating to General Rules) , Chapter 265 of this title (relating to Procedures Before Public Hearing), Chapter 267 of this title (relating to Procedures During Public Hearing), Chapter 269 of this title (relating to Procedures After Public Hearing Before an Examiner), Chapter 271 of this title (relating to Procedures After Public Hearing Before the Full Commission), Chapter 273 of this title (relating to Procedures After Final Decision), and the notification requirement under §335.6 of this title (relating to Notification Requirements). These requirements do not apply to products which contain these recyclable materials under the provisions of §335.211(b) of this title (relating to Applicability) .

(b) (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.

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Director, Legal Division
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Subchapter H. Hazardous Waste Burned for Energy Recovery

• 30 TAC §335.221

The amendment is proposed under the Texas Water Code, §§5.103, 5.105, and 26.11, which provides the commission with authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state; and the Texas Solid Waste Disposal Act, Texas Health and Safety Code, §361.017 and §361.024, which provide the commission authority to regulate industrial solid wastes and hazardous municipal wastes and to adopt and promulgate rules consistent with the general intent and purposes of the Act.

§335.221. Applicability and Standards.

(a) The following regulations contained in 40 Code of Federal Regulations (CFR) Part 266 (including all appendices to Part 266) are adopted by reference, as amended and adopted in the Code of Federal Regulations through June 1, 1990 (see FedReg 22685) and as published and adopted in the February 21, 1991, July 17, 1991, August 27, 1991, [and] September 5, 1991, **June 22, 1992, August 25, 1992, September 30, 1992, and September 19, 1994** issues of the Federal Register (see 56 FedReg 7239, 32688, 42504, [and] 43874, **57 FedReg 27880, 28558, 44999 and 48042**:

(1)-(23) (No change.)

(b) The following hazardous wastes and facilities are not regulated under §§335.221-335.229 of this title (relating to Hazardous Waste Burned in Boilers and Industrial Furnaces):

(1) (No change.)

(2) hazardous wastes that are exempt from regulation under the provisions of 40 Code of Federal Regulations §261.4 and §335.24(c)(5) -(7)[(9)] of this title (relating to Requirements for Recyclable Materials and Non-Hazardous Recyclable Materials), and hazardous wastes that are subject to the special requirements for conditionally exempt small quantity generators under the provisions of §335.78 of this title (relating to Special Requirements for Hazardous Waste Generated by Conditionally Exempt Small Quantity Generators);

(3)-(4) (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.

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Director, Legal Division
Texas Natural Resource Conservation Commission

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Subchapter J. Hazardous Waste Generation, Facility and Disposal Fee System

• 30 TAC §335.323

The amendment is proposed under the Texas Water Code, §§5.103, 5.105, and 26.11, which provides the commission with authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state; and the Texas Solid Waste Disposal Act, Texas Health and Safety Code, §361.017 and §361.024, which provide the commission authority to regulate industrial solid wastes and hazardous municipal wastes and to adopt and promulgate rules consistent with the general intent and purposes of the Act.

The proposed amendment implements Health and Safety Code, Chapter 361.

§335.323. Generation Fee Assessment.

(a) An annual generation fee is hereby assessed each industrial solid waste generator which has notified under §335.6 of this Chapter (relating to Notification Requirements) and which generates Class 1 [I] industrial solid waste or hazardous waste or whose act first causes such waste to become subject to regulation under Subchapter B of this chapter (relating to Hazardous Waste Managment-General Provisions) on or after September 1, 1985. These fees shall be deposited in the hazardous and solid waste fee fund. The amount of a generation fee is determined by the total amount of Class 1 [I] nonhazardous waste or hazardous waste generated during the previous calendar year. The annual generation fee may not be less than $50. The annual generation fee for hazardous waste shall not be more than $50,000 and for nonhazardous waste not more than $10,000.

(b) Wastewaters are exempt from assessment under the following conditions:

(1) (No change.)

(2) Wastewaters classified as Class 1 [I] industrial solid wastes because they meet the criteria for a Class 1 [I] waste under the provisions of §335.505 of this title (relating to Class 1 [I] Waste Determination) and are treated on-site in totally enclosed treatment facilities or wastewater treatment units for which no permit is required under §335.2 of this title (relating to Permit Required) or §335.41 of this title (relating to Purpose, Scope, and Applicability) and no longer meet the criteria for a Class 1 [I] waste are exempt from the assessment of waste generation fees.

(3)-(4) (No change.)

(c)-(f) (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.

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Subchapter R. Waste Classification

• 30 TAC §335.503

These amendment is proposed under the Texas Water Code, §§5.103, 5.105, and 26.11, which provides the commission with authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state; and the Texas Solid Waste Disposal Act, Texas Health and Safety Code, §361.017 and §361.024, which provide the commission authority to regulate industrial solid wastes and hazardous municipal wastes and to adopt and promulgate rules consistent with the general intent and purposes of the Act.

The proposed amendment implements Health and Safety Code, Chapter 361.

§335.503. Waste Classification and Waste Coding Required.

(a) (No change.)

(b) As required under the schedule provided in §335.501 [§335.502] of this title (relating to Conversion to New Waste Notification and Classification System), all industrial solid waste and municipal hazardous waste generated, stored, processed, transported or disposed of in the state shall be coded with an eight-digit waste code number which shall include a four-digit waste sequence number, a three-digit form code, and a one-character classification (either H, 1, 2, or 3). Form codes are provided in §335.521(c) of this title (relating to Appendix 3). Procedures for assigning waste code numbers and sequence numbers are outlined as follows and available from the commission at the address listed in §335. 521(b) of this title (relating to Appendix 2).

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

(6) **CESQGs or industrial Class 1 non-hazardous waste generators that are exempt from manifesting as specified in §335.10 (relating to Shipping and Reporting Procedures Applicable to Generators of Hazardous Waste or Class 1 Waste and Primary Exporters of Hazardous Waste) who voluntarily manifest their hazardous and or Class 1 nonhazardous waste may** [Municipal Conditionally Exempt Small Quantity Generators (CESQGs), industrial CESQGs, and industrial generators that generate less than 100 kg per month of non-hazardous waste will] use "CESQ" as [in] the first four digits of the waste code.

(7)-(8) (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.

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

XVI. Coastal Coordination Council

Chapter 501.Coastal Management Program

The Coastal Coordination Council (council) proposes new §501.2 (relating to Findings) and §501.15 (relating to Policy for Major Actions), concerning the Texas Coastal Management Program (CMP). These sections were adopted by the council and published in the September 27, 1994 issue of the *Texas Register* (19 TexReg 7606). Subsequent to their adoption, the 74th Legislature, 1995, passed House Bill 3226, which amended Texas Natural Resources Code, §§33.004, 33.051-33.053, 33.055, 33.202, 33.204-33.208. The bill also added §§33.2051-33.2053 and 33.209-33.211 to the Texas Natural Resources Code.

After the passage of House Bill 3226, the council proposed changes to the CMP rules and published the proposed amendments in the July 18, 1995 issue of the *Texas Register* (20 TexReg 5198). In that proposal, §501.2 and §501.15 were proposed for repeal. As the result of public comments received about the proposed repeals, the council decided to adopt the repeals of §501. 2 and §501.15 and also to re-propose the sections with changes. This notice concerns the proposal of new §501.1 and §501.15.

Section 501.2, as proposed, differs from the version adopted on September 27, 1994 in that subsection (a), which was a statement about the value of Texas coastal natural resources and the economic, recreational, cul-

tural and geological benefits and characteristics unique to the coastal zone, is deleted. The council did not want to limit the types of benefits or characteristics which could be considered in any particular matter. Further, this subsection is deleted because the council determined that the descriptions were not legally necessary. Finally, the council did not want to create the impression that the listed uses and their possible adverse affects were limits on the council's ability to evaluate the overall benefits and costs of a proposed action. Previous subsection (b) is now subsection (a) and it lists the council's findings about the use of the coastal zone. Subsection (b) is the same as the original subsection (e) and it states that the uses listed in subsection (a) may adversely affect coastal natural resource areas (CNRAs) and thus the uses require special management.

Section 501.2(c) and (d) is deleted. These subsections had described public benefits from various uses of the coastal zone and the manner in which the uses could, individually and cumulatively, adversely affect CNRAs. These sections were deleted because the council determined that a description of the benefits and possible adverse effects of uses of the coast were not legally necessary. The council did not want to limit the types of benefits or characteristics which could be considered in any particular matter. The council also did not want to create a presumption that the listed description of benefits and possible adverse effects limited the manner or scope of the council's review of a proposed action.

New §501.15 of this chapter (relating to Policy for Major Actions) is proposed with amendments which narrow the scope of this policy. House Bill 3226 listed the elements of the CMP and the council, in response to comments that §501.15 was too broad, decide to propose the new rule to more closely conform to the intent of House Bill 3226, §1. Previously §501.15 required a state agency and subdivision to address all adverse effects of major actions; as proposed herein, §505.15 requires consideration of only the cumulative and adverse secondary effects of major actions. Section 501.15(a) defines a major action as one for which an environmental impact statement, under the National Environmental Policy Act, 42 United States Code Annotated. §§4321 et seq, is required. Agencies and subdivisions with jurisdiction over major actions are required by subsection (b) to coordinate their review of major actions and to consider cumulative and secondary adverse effects. Subsection (c) requires major actions to be consistent with CMP goals and policies and requires agencies and subdivisions to avoid and otherwise minimize cumulative adverse effects.

In response to public comments, July 18, 1995, the proposal to repeal §501.2 (relating to Findings) was adopted. Section 501.2(a), (c) and (d), regarding the benefits and adverse affects of coastal uses, has been deleted. Former §501.2(b), regarding uses to which the coastal zone is subjected, has been rewritten and renumbered as §501.2(a), and is being proposed as part of new rule §501.2.

The council received comments both supporting and opposing the repeal of §501.15 (relating to the Major Action Policy). The council is adopting the proposed repeal. However, the council agrees with those comments stating that the major actions policy is too broad and is therefore proposing new §501.15. A policy for major actions is needed because these actions generally have the greatest impacts on CNRAs. Therefore, the council proposes to narrow the scope of this policy rather than repealing it. Instead of addressing all adverse effects of major actions, new §501.15 requires agencies and subdivisions to assess only the cumulative and secondary adverse effects. Agencies and subdivisions must avoid and otherwise minimize the cumulative and secondary adverse effects of major actions. Specifically, as now proposed, new §501.15 requires that prior to approving a major action, the agencies and subdivisions must meet and coordinate their policies relating to major actions. The agencies and subdivisions shall, to the greatest extent practicable, consider the cumulative and secondary adverse effects of each major action relating to the activity. Section 501.15(c), as proposed, provides that no agency or subdivision shall take a major action that is inconsistent with the goals and policies of this chapter.

Caryn Cosper, Deputy Commissioner of Resource Management, Texas General Land Office, has determined that for each year of the first five years the new sections will be in effect there will be fiscal implications for state and local governments. State and local governments will benefit from the procedural changes, which eliminate unnecessary procedural steps and provide for greater certainty and quicker responses in the consistency review of proposed permits, rules, and rule amendments. Thus, the costs to agencies and subdivisions for complying with the CMP will be reduced. State and local governments will also benefit from the contemporaneous changes made to Chapters 501, 503, and 506 of this title.

Ms. Cosper also has determined that the public benefit for each year of the first five years these new rules is a decrease in regulatory burdens on persons conducting activities in the coastal zone. The public will benefit from procedures that provide for prompt consistency review by the council and immediate applicability of agency thresholds. There will be no costs to small businesses from enforcement or administration of the proposed new rules.

Comments on the proposed new rules may be submitted to Cheli Cook, Texas General Land Office, Legal Services Division, 1700 North Congress Avenue, Room 630, Austin, Texas 78701-1494. Fax: (512) 463-6311. In order to be considered, comments must be received by 5:00 p.m. on Monday, November 6, 1995.

Subchapter A. General Provisions

• 31 TAC §501.2

The new section proposed pursuant to the Coastal Coordination Act, Texas Natural Resources Code, Chapter 33, Subchapters C and F, and are proposed under the council's authority to promulgate rules pursuant to those subchapters.

Texas Natural Resources Code, Chapter 33, Subchapters C and F is affected by this proposed rule.

§501.2. Findings.

(a) The council finds that the coast is subject to the following uses:

(1) residential development, which includes siting, construction, and maintenance of single- and multiple-unit dwellings;

(2) commercial development, which includes siting, construction, and maintenance of warehouses, offices, retail stores, hotels, restaurants, marinas, and recreational facilities;

(3) industrial development, which includes siting, construction, operation, and maintenance of oil and gas exploration and development facilities, manufacturing and petrochemical plants, refineries, processing facilities, and ports;

(4) agricultural development, which includes farming, ranching, silviculture, and aquaculture;

(5) other development, which includes public buildings, parks, and other public purpose development;

(6) development of infrastructure, which includes the siting, construction, operation, and maintenance of roads, causeways and bridges, railroads, transmission and communication lines, water and sewer lines and pump stations, oil and gas transportation pipelines, and other linear facilities; airports; electric generating facilities; flood control structures, dams, and other water control structures; water, sewage, and wastewater treatment facilities; and solid waste facilities;

(7) waterfront construction, which includes erosion response projects and shoreline access structures. Erosion response projects include retaining walls, bulkheads, seawalls, rubble mounds, revetments, breakwaters, and groins. Shoreline access structures include piers, docks, wharves, boat ramps, and other structures. Other structures on state submerged land and private submerged land include artificial reefs and fishing cabins;

(8) dredging, which includes excavation and disposal or placement of material from navigation channels and basins for commercial shipping, recreational boating, and oil and gas exploration and production; excavation for water intake structures, wastewater outfalls, or other structures incidental to shoreline development; and sediment mining on submerged lands; and

(9) hunting, fishing, and other taking of terrestrial and aquatic wildlife.

(b) Because they may adversely affect CNRAs, the council finds that special management of these uses of the coast is necessary for continued balanced development of the coast.

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 October 13, 1995.

TRD-9513135 Garry Mauro
Chairman
Coastal Coordination Council

Earliest possible date of adoption: November 20, 1995

For further information, please call: (512) 305-9129

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Subchapter B. Goals and Policies

• 31 TAC §501.15

The new section is proposed pursuant to the Coastal Coordination Act, Texas Natural Resources Code, Chapter 33, Subchapters C and F, and is proposed under the council's authority to promulgate rules pursuant to those subchapters.

§501.15. Policy for Major Actions.

(a) For purposes of this section, "major action" means an individual agency or subdivision action listed in §505.11 of this title (relating to Actions and Rules Subject to the Coastal Management Program), §506.12 of this title (relating to Federal Actions Subject to the Coastal Management Program), or §505.60 of this title (relating to Local Government Actions Subject to the Coastal Management Program), relating to an activity for which a federal environmental impact statement under the National Environmental Policy Act, 42 United States Code Annotated, §4321, et seq is required.

(b) Prior to taking a major action, the agencies and subdivisions having jurisdiction over the activity shall meet and coordinate their major actions relating to the activity. The agencies and subdivisions shall, to the greatest extent practicable, consider the cumulative and secondary adverse effects, as described in the federal environmental impact assessment process, of each major action relating to the activity.

(c) No agency or subdivision shall take a major action that is inconsistent with the goals and policies of this chapter. In addition, an agency or subdivision shall avoid and otherwise minimize the cumulative adverse effects to coastal natural resource areas of each of its major actions relating to the activity.

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 October 13, 1995.

TRD-9513134 Garry Mauro
Chairman
Coastal Coordination Council

Earliest possible date of adoption: November 20, 1995

For further information, please call: (512) 305-9129

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Subchapter B. Council Review and Certification of Agency Rules

• 31 TAC §§505.23-505.25

The Coastal Coordination Council (council) proposes new §§505.23-505.25, concerning regulations for the Texas Coastal Management Program (CMP). The 74th Legislature, 1995, passed House Bill 3226, which amended Texas Natural Resources Code, §§33.004, 33.051-33.053, 33.055, 33.202, and 33.204-33.208. The bill also added §§33.2051-33.2053 and 33.209-33.211 to the Texas Natural Resources Code. House Bill 3226 addressed many facets of the CMP. House Bill 3226, and the council's deliberations since the bill's passage, necessitate most of the changes requiring the proposal of new §§505.23-505.25. Other changes to §§505.23-505.25 are the result of comments received regarding the proposed repeal of §§505.23-505.25 as published in the July 18, 1995, issue of the *Texas Register* (20 TexReg 5172).

Certain sections of Chapter 505 were proposed for amendment, other sections proposed for repeal, in the July 18, 1995, issue of the *Texas Register* (20 TexReg 5198). In response to comments received, and as a result of the council's deliberations about those comments, the council decided that certain sections proposed for repeal should be amended rather than repealed. Due to the legal requirements for proposal, repeal and adoption of rules, and to make the CMP regulations more accessible, the council is also concurrently repealing §§505.23-505.25, 505.40, 505.41, 505.61, 505.72 and 505.73 of this chapter. Sections 505.23 (relating to Council Certification of Rules and Rule Amendments), 505.24 (relating to Pre-certification Review of Draft Rules or Draft Rule Amendments), and 505.25 (relating to Revocation of Certification) are being reproposed as new rules with described changes. The changes to §§505.23, 505.24, and 505.25 are the result of legislative amendments to the Texas Natural Resources Code and public comment received in response to the July, 1995 proposals.

Chapter 505 governs state and subdivision actions subject to the CMP consistency review process. The chapter lists the actions subject to consistency review in §505.11 and in §505.10 describes the council's philosophy for the implementation of the consistency review process. Section 505.10(b) states that the council intends to achieve consistency with the CMP goals and policies primarily through individual state agency rules. Integral to this intention is the procedure for council review and certification of existing agency rules, described in §505.20. The benefit of state agency rule certification and the effectuation of the council's intent is stated in §505.21 which provides that once an agency's rules are certified and its thresholds approved, an agency determination of consistency is final and not subject to council consistency review. The exceptions to the finality of an agency's consistency determination is described in §505.32 (relating to Requirements for Referral of a Proposed Agency Action). Section 505.32 provides for council review of an agency consistency determination when the agency action was contested by a council member or another state agency that was a party in a hearing or in an alternative dispute resolution process concerning the action or a council member or other person filed written comments regarding the action when the action was not subject to a formal hearing. The council may accept a referral of a state agency action only if three council members agree to he referral according to §505.32(a)(4). In addition, if the state agency has approved thresholds, the council may not review the agency action unless additional requirements of §505.32(b) are met. This section requires rejection of a referral for review unless the action exceeds thresholds or may directly and adversely affects certain coastal natural resource areas (CNRAs) and a state agency contested the consistency determination in a formal hearing.

Section 505.20 applies to certification of existing agency rules, while §505.22 and §505.23 apply to certification of new rules and rule amendments. Rule certification can be obtained prior to a public comment period through the process for pre-certification described in §505.24. Certification can be revoked pursuant to §505.25 only if the council finds that the agency has implemented or amended its rules in a manner inconsistent with CMP goals and policies. Thresholds refer to categories of agency actions that are subject to consistency review. Section 505.26 states that the process for approval of thresholds is the same as the procedure for approval of rules, outlined in §505.20.

State agencies are primarily responsible for ensuring that their actions are consistent with CMP goals and policies. Section 505.30 describes the procedure for agency consistency determination and requires a state agency to provide a written explanation supporting its consistency determination if the proposed action exceeds thresholds. As part of the council's effort to streamline the consistency review process, §505.31 provides a process for preliminary council review of a proposed agency action. The council may review a proposed agency action only when the requirements of §505.32 are met. Three council members must agree that there is a significant unresolved dispute about the consistency of the proposed action before the matter can be placed on the council's agenda. The benefits of adopting thresholds and the council's limited ability to review proposed actions when thresholds are in place

are discussed in §505 31(b).

Procedural rules for referral to the council and review by the council are set out in §§505.33-505 36. Section 505.37 prohibits conducting any activities while council review of the activity is pending. Section 505 38 specifies action that the council may take on review of a proposed agency action The council may affirm or protest the agency's proposed action only on the ground of consistency with the CMP goals and policies. The council must make an affirmative finding of inconsistency or else the proposed action is deemed consistent. When finding that an agency action is inconsistent, the council must issue a written report describing the manner in which the proposed action is inconsistent and specific recommendations to modify the action for consistency according to §505.38(a). If the council determines that the state agency has not modified its proposed action to be consistent with CMP goals and policies, then pursuant to §505.39 the council may refer the matter to the Attorney General for an opinion regarding consistency. If the Attorney General issues an opinion under §505.39 of this title (relating to Agency Action After Council Protest) that a proposed agency or subdivision action is inconsistent with the CMP and the agency or subdivision fails to implement the council's recommendation regarding the action, the Attorney General shall file suit in the district court of Travis County. Notwithstanding the request of an opinion from, or the filing of a suit by, the Attorney General, the council and the agency or subdivision may enter into a settlement agreement with regard to the proposed action. If the council and the agency or subdivision enter into a settlement agreement, the council may rescind its request for an opinion from the Attorney General

Section 505 51 and §505 52 also address general plans and requests for non-binding advisory opinions on the general plans. The procedure for council review of subdivision consistency determinations relating to dune protection permits and beachfront construction certificates is described in §505.62 and a preliminary review of these subdivision actions is provided for by §505.63. Section 505.63 provides for a permitting assistance group to perform these preliminary reviews. Referral of subdivision actions to the council and council procedures for review of these actions are set out in §§505 64-505. 68. Proposed subdivision actions may not proceed pending council review pursuant to §505.69 and §505.70 describes the options for the council's review of subdivision actions After council review, §505.71 governs the subdivision's response to council review and the council's further options in the event that the subdivision does not modify the proposed action, as recommended by the council.

The changes to new §§505.23-505.25 are the result of public comments received and the council's decision to re-propose these rules with changes Section 505.23 (relating to Council Certification of Rules and Rule Amendments) is proposed to conform to House Bill 3226 As proposed herein, §505.23 governs council certification of rules and rule amendments and provides the procedure for an agency to seek certification of a state agency rule or rule amendment. If the council finds that the rule or rule amendment is consistent with the CMP goals and policies, then the council shall certify the rule or rule amendment If the council does not so find, then the council shall issue a written denial of certification with recommendations for changing the rules to comply with CMP goals and policies The section also provides, in subsection (c), for an expedited rule certification process Section 505.23(d) limits council denial of certification of agency rules to issues affecting consistency that were raised in comments to the agency or changes between rule proposal and adoption.

One commenter suggested that §505.23 be amended to allow agency rules to be certified only where the council has followed the procedural requirements of §§505.32-505.42. The council intends consistency with state agency rules to be the primary means of ensuring consistency with CMP goals and policies. Therefore, the certification of agency rules, under proposed §505.23, as consistent with CMP goals and policies, is the most efficient way to effectuate the council's intention to assist state agencies in their efforts to ensure that their rules are consistent with CMP goals and policies.

Section 505 23, as proposed, establishes the procedures for reviewing and certifying new rules and rule amendments as consistent with the CMP goals and policies

Several commenters suggested that §505.23 (relating to Council Certification of Rules and Rule Amendments) be repealed. Section 505.23 is being proposed as a new rule because it establishes the procedures agencies and the council will follow in the review and certification of new rules and rule amendments Thresholds for referral and other limits on the authority to review agency actions are triggered only if the council certifies the agency rules as consistent with the CMP goals and policies pursuant to this section. Section 505 23(a), provides that an agency may seek council certification of rules or rule amendments following adoption. However, if the council acts through the expedited certification provisions of §505.23(c), a request for certification will be taken up at the earliest council meeting at which consideration is practicable, as provided in §505.23(b). Section 505 22 ensures that the council has been afforded the opportunity to comment on the proposed rule or rule amendment and will have adequate time to consider the request for certification.

Section 505.23(a), provides that an agency may seek council certification of rules or rule amendments following adoption. Thresholds for referral and other limits on the council's authority to review agency actions are triggered only if the council certifies the agency rules as consistent with the CMP goals and policies pursuant to this section. However, if the council acts through the expedited certification provisions of §505.23(c), a request for certification will be taken up at the earliest council meeting at which consideration is practicable, as provided in §505.23(b). Section 505.22 ensures that the council has been afforded the opportunity to comment on the proposed rule or rule amendment and will have adequate time to consider the request for certification.

Section 505.24, governing pre-certification of draft rules or draft rule amendments, is proposed as a new rule. Pre-certification allows a state agency to conform its rules to the CMP goals and policies at an early stage and is aimed at eliminating the need for repeated rule proposals to achieve consistency with CMP goals and policies.

Section 505 24 allows the council to act on agency rulemaking actions before the proposed rules are published in the *Texas Register* for public comment. Agencies may seek council input on new rule and rule amendments by requesting a pre-certification review, prior to publishing the proposed rule or rule amendment in the *Texas Register* Although pre-certification review is voluntary, an agency cannot seek expedited certification of a rule or rule amendment unless that rule or rule amendment was submitted for pre-certification review. Section 505.24(c) allows agencies to request a pre-certification work session with the executive committee prior to publication of the rule.

Comments were received suggesting the council repeal §505.24. Section 505. 24 is proposed as a new rule because this section provides a mechanism for early council involvement in agency rulemaking actions. Section 505.24 (relating to Pre-Certification Review of Draft Rules or Draft Rule Amendments) provides a voluntary process by which agencies can seek council input on a new rule or rule amendment, prior to publication of the new rule or rule amendment in the *Texas Register*.

Section 505.25 was previously located in §505.20(e) One sentence was added to §505.25 which clarifies that if certification of agency rules is revoked, then the limits on council review, at §505.21, no longer apply. Thus, §505.25 now establishes the procedures for revocation of agency rule certification, and because of its changed location it clearly distinguishes the revocation of certification provision from §505.20 dealing with council review and certification of agency rules.

Caryn Cosper, Deputy Commissioner of Resource Management, Texas General Land Office, has determined that for each year of the first five years the rules as proposed will be in effect there will be fiscal implications for state and local governments State and local governments will benefit from the procedural changes, which eliminate unnecessary procedural steps and provide for greater certainty and quicker responses in the consistency review of proposed permits, rules, and rule amendments. Thus, the costs to agencies and subdivisions for complying with the CMP will be reduced. State and local governments will also benefit from the contemporaneous changes made to Chapters 501, 503, and 506 of this title

Ms. Cosper also has determined that the public benefit for each year of the first five years these new rules is a decrease in regulatory burdens on persons conducting activities in the coastal zone. The public will benefit from procedures that provide for prompt consistency review by the council and immediate applicability of agency thresholds. There will be no costs to small businesses from enforcement or administration of the proposed new rules.

Comments on the proposed new rules may be submitted to Cheli Cook, Texas General Land Office, Legal Services Division, 1700 North Congress Avenue, Room 630, Austin, Texas 78701-1494. Fax: (512) 463-6311. In order to be considered, comments must be received by 5:00 p.m. on Monday, November 6, 1995.

The new rules are proposed pursuant to the Coastal Coordination Act, Texas Natural Resources Code, Chapter 33, Subchapters C and F, and are proposed under the council's authority to promulgate rules pursuant to those subchapters.

Texas Natural Resources Code, Chapter 33, Subchapters C and F is affected by these proposed rules.

§505.23. Council Certification of Rules and Rule Amendments.

(a) Upon adoption of a rule or rule amendment listed in §505.11(b) of this title (relating to Actions and Rules), the agency may seek certification from the council that the rule or rule amendment is consistent with the CMP goals and policies by filing a written Request for Certification with the council secretary. Along with the request, the agency shall provide a copy of the rule or rule amendment as adopted, copies of all public comments relating to consistency of the proposed rule or rule amendment, and any other information the agency wishes to provide. The council secretary shall distribute copies of the Request for Certification, including all supporting materials, to all council members.

(b) Except as provided in subsection (c) of this section, the council secretary shall place the matter on the agenda of the earliest council meeting at which consideration is practicable. After considering any testimony or other relevant information offered at the meeting, the council shall act on the request for certification:

(1) If it finds that the rule or rule amendment incorporates or otherwise requires the agency to comply with all applicable goals and policies of the program, the council shall issue a written certification that the rule or rule amendment is consistent with the CMP goals and policies.

(2) If it finds that the rule or rule amendment does not incorporate or otherwise require the agency to comply with all applicable goals and policies of the program, the council shall issue a written denial of certification. The denial shall set out the grounds for the denial and recommend rule amendments necessary to obtain certification. The agency may amend the rule and resubmit it for certification.

(c) In accordance with this section, the council shall provide expedited certification of a rule or rule amendment within 26 days of the date the rule or rule amendment was adopted or before the effective date of the rule or rule amendment, whichever is later. An agency may request and the council shall provide expedited certification of an agency's rule or rule amendment only if:

(1) the agency has included in the preamble to the proposed rule or rule amendment published in the *Texas Register* notice that the agency will seek expedited certification upon adoption of the rule;

(2) the agency has filed with the council secretary at the time the rule is proposed a Notice of Intent to Seek Expedited Certification and attached a copy of the proposed rule or rule amendment; and

(3) the agency submitted the draft rule or draft rule amendment to the council for pre-certification review pursuant to §505. 24 of this chapter (relating to Pre-Certification Review of Draft Rules or Draft Rule Amendments).

(d) The council may base a denial of certification only on:

(1) consistency issues raised in comments to the agency by the council, executive committee, or the public during the pre-certification review period or the public comment period, if any; or

(2) substantial changes to the proposed rule or rule amendment made upon final adoption that raise new consistency issues.

(e) Where council certification of a rule or rule amendment takes place after the effective date of a rule or rule amendment, the provisions of §505.32 of this title (relating to Requirements for Referral of a Proposed Agency Action) will be considered to be in effect to limit council review of an agency action listed in 505.11(a) provided:

(1) the agency files a request for certification of the rule or rule amendment within seven days of the date of adoption;

(2) the action is undertaken pursuant to the rule or rule amendment for which certification is sought; and

(3) the action was initiated after the rule or rule amendment was adopted and before the council acted on the request for certification.

§505.24. Pre-Certification Review of Draft Rules or Draft Rule Amendments.

(a) Prior to the publication in the *Texas Register* of a proposed rule or rule amendment listed in §505.11(b) of this title (relating to Actions and Rules), an agency may seek pre-certification review by filing a Request for Pre-certification Review with the council secretary and attaching a copy of the draft rule or draft rule amendment and any information the agency wishes the council to consider. This request shall allow council members a minimum of 30 days to review and comment on the draft rule or rule amendment.

(b) Council members may review and comment in writing within 30 days of the date the request was received by the council secretary, unless a longer time is provided in the agency's request. In their comments, council members should identify applicable goals and policies and potential inconsistencies with such goals and policies in the draft rule or rule amendment. Council members may make recommendations to the agency on how to correct any inconsistencies. The agency shall consider the comments from the council members.

(c) The agency may request a pre-certification work session with the executive committee by placing the matter on the agenda of the earliest meeting of the executive committee at which consideration is practicable.

(d) Agencies are encouraged to seek pre-certification review to maximize opportunities to coordinate agency rules, facilitate effective and efficient implementation of the CMP, and to identify and correct possible inconsistencies in the draft rule or draft rule amendment prior to publication of the proposal in the *Texas Register*.

§505.25. Revocation of Certification. The council may issue a Notice of Program Deficiency if the council finds that the agency has implemented its rules in a manner that is inconsistent with the CMP goals and policies, or has amended certified rules in a manner inconsistent with the CMP goals and policies. The notice shall set forth the specific findings of deficiency, the basis for such findings, and include recommendations to correct the deficiencies within a reasonable period established in the notice. If the agency fails to correct the deficiencies as provided in the notice and within the time allowed, the council may, after notice and opportunity for public comment, revoke certification of the agency's rules. Upon revocation of certification, §505.21 of this title (relating to Effect of Council Certification of Agency Rules and Rule Amendments) shall not apply to limit council review of any agency actions.

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 October 13, 1995.

TRD-9513140 Garry Mauro
Chairman
Coastal Coordination Council

Earliest possible date of adoption: November 20, 1995

For further information, please call: (512) 305-9129

Chapter 506. Council Procedures for Federal Consistency with Coastal Management Program Goals and Policies

• 31 TAC §506.50, §506.52

The Coastal Coordination Council (council) proposes new §506 50, Notice to the Council of Applications for Federal Assistance, and §506 52, Council Hearing to Review Applications for Federal Assistance, of the regulations governing the Texas Coastal Management Program (CMP). Section 506 50 and §506 52 were adopted by the council and published in the September 27, 1994, issue of the *Texas Register* (19 TexReg 7606) Subsequent to their adoption, the 74th Legislature, 1995, passed House Bill 3226, which amended Texas Natural Resources Code, §§33 004, 33.051-33.053, 33.055, 33 202, 33 204-33.208. The bill also added §§33.2051-33 2053 and 33 209-33.211 to the Texas Natural Resources Code

After the passage of House Bill 3226, the council proposed changes to the CMP rules and published the proposed amendments in the July 18, 1995 issue of the *Texas Register* (20 TexReg 5198). In that proposal, §506.50 and §506.52 were proposed for repeal As the result of public comments received about the proposed repeals, the council decided to adopt repeal of §506 50 and §506.52 and also to re-propose the sections with changes. This notice concerns the proposal of new §506.50 and §506 52.

Section 506.50, as proposed, governs notice to the council of applications for federal assistance The recipient of a notice of application for federal assistance, known as the state single point of contact, is required to provide a copy of the application for federal assistance to the council secretary who then distributes the notice to council members.

Section 506.52, as proposed, governs the council's procedures for reviewing applications for federal assistance If the council objects to the application for federal assistance, then pursuant to §506.52(c) the council must describe how the proposed activity is inconsistent with CMP goals and policies; describe alternative measures to make the activity consistent with the CMP goals and policies; and include a statement informing the applicant of his right to appeal the council's determination. Also §506.52(c) requires the council to describe any additional information needed and why the information is needed for a consistency determination if the council has objected on the grounds of insufficient information.

Ms. Caryn Cosper, Deputy Commissioner of Resource Management, Texas General Land Office, has determined that for each year of the first five years the proposed new rules will be in effect there will be fiscal implications for state and local governments State and local governments will benefit from the procedural changes, which eliminate unnecessary procedural steps and provide for greater certainty and quicker responses in the consistency review of proposed permits, rules, and rule amendments. Thus, the costs to agencies and subdivisions for complying with the CMP will be reduced. State and local governments will also benefit from the contemporaneous changes made to Chapters 501, 503, and 506 of this title.

Ms Cosper also has determined that the public benefit for each year of the first five years these proposed new rules is a decrease in regulatory burdens on persons conducting activities in the coastal zone. The public will benefit from procedures that provide for prompt consistency review by the council and immediate applicability of agency thresholds. There will be no costs to small businesses from enforcement or administration of the proposed new rules.

Comments on the proposed new rules may be submitted to Cheli Cook, Texas General Land Office, Legal Services Division, 1700 North Congress Avenue, Room 630, Austin, Texas 78701-1494. Fax: (512) 463-6311. In order to be considered, comments must be received by 5:00 p.m. on Monday, November 6, 1995.

The new sections are proposed pursuant to the Coastal Coordination Act, Texas Natural Resources Code, Chapter 33, Subchapters C and F, and are proposed under the council's authority to promulgate rules pursuant to those subchapters.

Texas Natural Resources Code, Chapter 33, Subchapters C and F is affected by these proposed rules.

§506.50. Notice to the Council of Applications for Federal Assistance.

(a) If the state single point of contact receives an application for federal assistance listed in §506.12 of this title (relating to Federal Actions Subject to the Coastal Management Program), the state single point of contact shall provide a copy of such application to the council secretary.

(b) The council secretary shall distribute copies of the applications to all council members.

§506.52. Council Hearing to Review Applications for Federal Assistance.

(a) Following referral of an application for federal assistance, the council shall review and either concur with or object to the application for federal assistance within the schedule established in the regulations governing the Texas Review and Comment System (1 TAC §§5.191 et seq, relating to Introduction and General Provisions of Texas Review and Comment System).

(b) The council secretary shall, by certified mail or hand delivery, provide notice of the hearing at which the council will review the application for federal assistance to the applicant, the federal agency, and the assistant administrator.

(c) The council's objection shall include:

(1) a description of how the proposed activity is inconsistent with specific CMP goals and policies;

(2) a description of any available alternative measures that would permit the proposed activity to be conducted in a manner consistent with the CMP;

(3) in cases where the council objects on the grounds of insufficient information, a description of the nature of the information requested and the necessity of having such information to determine the consistency of the activity with the CMP; and

(4) a statement informing the applicant of a right of appeal to the secretary of commerce on the grounds that the proposed activity is consistent with the objectives or purposes of the Coastal Zone Management Act or is necessary in the interest of national security as provided in the Code of Federal Regulations, Title 15, Part 930, Subpart H, §§930.120 et seq.

(d) If the council objects to an application for federal assistance, the federal agency shall not approve assistance for the activity, except as provided in the appeals process established in the Code of Federal Regulations, Title 15, Part 930, Subpart H, §§930.120 et seq.

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 October 13, 1995.

TRD-9513150

Garry Mauro
Chairman
Coastal Coordination Council

Earliest possible date of adoption: November 20, 1995

For further information, please call: (512) 305-9129

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• 31 TAC §506.51

The Coastal Coordination Council (council) proposes an amendment to §506.51 of this title (relating to Referral of Applications for Federal Assistance). The amendment reflects statutory changes made by the 74th Legislature, 1995, in House Bill 3226, to be codified at Texas Natural Resources Code, §33.206.

On June 29, 1995, the council voted to suspend implementation of Chapter 506 of this title until further notice. This suspension was necessitated by changes to the coastal management program (CMP) mandated by the legislature under House Bill 3226. Until amendments to Chapter 506 take effect, the council shall not enforce, administer, or attempt to implement the provisions of this chapter. Furthermore, no state or federal

agency or subdivision subject to the requirements of Chapter 506 shall be required to comply with this chapter. Chapter 506 was adopted by the council on September 16, 1994, and published in the September 27, 1994 issue of the *Texas Register* (19 TexReg 7606).

Chapter 506 outlines the procedures for federal consistency with the CMP goals and policies. Section 506.51 describes the procedures for referrals, to the council, of applications for federal assistance.

Section 506.51 is proposed for amendment to conform to House Bill 3226, which provides that any three members of the council may submit a proposed federal action for council review. This proposed change substitutes "any three members" for "the chairman" of the council as the referral mechanism for applications for federal assistance to the council for review.

Caryn K. Cosper, Deputy Commissioner of Resource Management, Texas General Land Office, has determined that for each year of the first five years the section as amended will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing or administering this section. By allowing any three members of the council to refer an application for federal assistance, governmental entities that apply for federal assistance will not face additional costs or funding delays that might otherwise be associated with council review of federal assistance. State and local governments will benefit from this change made to Chapter 506 because this change expands avenues for referrals of applications for federal assistance to increase the volume of applications reviewed by the council.

Ms. Cosper also has determined that the public benefit for each year of the first five years this amended rule is in effect will be a well managed program with decreased costs to businesses and state and local government because more applications for federal assistance will be subject to review by the council.

Comments on the proposed rule may be submitted to Cheli Cook, Texas General Land Office, Legal Services Division, 1700 North Congress Avenue, Room 630, Austin, Texas 78701-1495. Fax: (512) 463-6311. In order to be considered, comments must be received by 5:00 p.m. on Monday, November 6, 1995.

The amendment is proposed under provisions of Texas Natural Resources Code, §33.206, as amended by House Bill 3226, (74th Legislature, 1995).

Texas Natural Resources Code, Chapter 33, Subchapters C and F is affected by the amendment.

§506.51. Referral of Applications for Federal Assistance.

(a) The council shall review any application for federal assistance that any three members of the council refer [the chairman refers] to the council for review.

(b) To refer an application for federal assistance to the council, three members [the chairman] must submit the request for referral to the council secretary in writing.

(c) The council secretary shall add the application to the agenda of the earliest council meeting at which consideration of the action is reasonably practicable.

(d) If three members do [the chairman does] not refer an application to the council within 30 days of the date the council secretary receives a copy of the application, then the application is conclusively presumed to be consistent with the CMP.

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 October 13, 1995.

TRD-9513151 Garry Mauro
Chairman
Coastal Coordination Council

Earliest possible date of adoption: November 20, 1995

For further information, please call: (512) 305-9129

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TITLE 34. PUBLIC FINANCE

Part I. Comptroller of Public Accounts

Chapter 3. Tax Administration

Subchapter O. State Sales and Use Tax

- **34 TAC §3.323**

The Comptroller of Public Accounts proposes an amendment to §3.323, concerning imports and exports. The Tax Code, §151.006 and §151.152, was amended effective September 1, 1995, to exempt sales for resale to Mexico. The amendment provides a reference to 34 TAC §3.285 concerning the acceptance of valid and properly completed resale certificates from Mexican retailers.

Mike Reissig, chief revenue estimator, has determined that for the first five-year period the rule will be in effect there will be no significant revenue impact on the state or local government.

Mr. Reissig also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be in providing new information regarding tax responsibilities. This rule is adopted under the Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to persons who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Karey W. Barton, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

The amendment is proposed under the Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of the Tax Code, Title 2.

The amendment implements Senate Bill 982, 74th Legislature, 1995, amending the Tax Code §151.006 and §151.152, effective September 1, 1995.

§3.323. Imports and Exports.

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

(c) Exports.

(1) (No change.)

(2) The retailer is responsible for obtaining proof of exportation. Only one type of proof relating to a particular piece of property is necessary. For example, a furniture store sells a table and collects sales tax. The purchaser returns to the store a week later with a valid *pedimento de importaciones* showing that the table was imported into Mexico. The retailer may accept the *pedimento*, alone, as proof of export and refund the tax. It is not necessary for the retailer to also obtain an export certification form issued by a licensed customs broker. Except as provided in §3.358 of this title (relating to Maquiladoras), exemption certificates, affidavits, or statements from the purchaser that the property will be or has been exported are not sufficient to exempt the sale as an export. The Texas proof of export form, which differs from the certification form provided by a licensed Texas customs broker as provided in §3.360 of this title (relating to Customs Brokers), is no longer acceptable as proof of export. A passport number taken by a seller from a passport issued by a foreign country is not acceptable as proof of export. **For information concerning resale certificates given by Mexican retailers, see §3.285 of this title (relating to Resale Certificate; Sales for Resale).**

(3)-(4) (No change.)

(5) If a seller delivers property to a purchaser in Texas, the seller must collect tax at the time of sale **unless the sale is exempt for a reason other than export and the seller accepts a properly completed resale or exemption certificate.** Tax may not be refunded until the property has actually been exported from the territorial limits of the United States and the seller has received valid proof of export as described in this subsection. There is a rebuttable presumption that an export certification form issued by a licensed customs broker who complies with §3.360 of this title (relating to Customs Brokers) is valid. Tax not collected will be assessed against the seller. This paragraph does not apply when proof of export is provided to the seller at the time of sale by a

maquiladora according to the terms of paragraph (1)(E) of this subsection.

(d)-(f) (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 October 16, 1995.

TRD-9513225 Martin Cherry
Chief, General Law
Comptroller of Public Accounts

Earliest possible date of adoption: November 20, 1995

For further information, please call: (512) 463-4028

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• 34 TAC §3.362

The Comptroller of Public Accounts proposes new §3.362, concerning labor relating to increasing capacity in a production unit in a petrochemical refinery or chemical plant. The new section implements legislation included in Senate Bill 640, 74th Legislature, 1995. Services that provide increased capacity in the production unit are excluded from real property repair and remodeling services defined under the Tax Code, §151.0047.

Mike Reissig, chief revenue estimator, has determined that for the first five-year period the rule will be in effect there will be no significant revenue impact on state or local government.

Mr. Reissig also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be in providing new information regarding tax responsibilities. This rule is adopted under the Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Karey W. Barton, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

The new section is proposed under the Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of the Tax Code, Title 2.

The new section implements the Tax Code, §151.0047.

§3.362. Labor Relating to Increasing Capacity in a Production Unit in a Petrochemical Refinery or Chemical Plant.

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

(1) Allied chemical product–A consumer or end-user product manufactured from basic or intermediate chemicals. Examples include drugs, soaps, detergents, paints and agricultural chemical formulations.

(2) Basic or intermediate chemical–Basic chemicals are the initial building block or raw materials that are processed and combined to manufacture intermediate chemicals. Intermediate chemicals are products that are manufactured from basic chemicals and other intermediate chemicals and are in turn manufactured into finished chemical products. Examples of basic chemicals include alkalies, chlorine, nitrogen, sulfur, benzene, ethylene, propylene methane, and sodium carbonate. Examples of intermediate chemicals include synthetic fibers, polymers, resins, elastomers, and dyes and pigments.

(3) Chemical plant–

(A) A facility that in a single continuous operation manufactures a basic or an intermediate chemical.

(B) The term does not include:

(i) a facility that manufactures "allied chemical products"; or

(ii) a facility, other than one that produces a basic or intermediate chemical, that generates any chemical as a waste product or a by-product.

(C) A chemical plant may be either a single facility existing by itself or a facility within a chemical plant complex consisting of a number of separate chemical plants each of which produces a single basic or intermediate chemical product. A chemical plant complex may include any combination of distinct facilities that manufacture basic chemicals, intermediate chemicals or allied chemical products. In a chemical plant complex, each facility is considered individually to determine whether it qualifies as a chemical plant.

(4) Crude oil–A mixture of hydrocarbons that exists in liquid phase in underground reservoirs and remains liquid at atmospheric pressure after passing through surface-separating facilities. The term includes liquid condensate and liquid hydrocarbons produced from tar sands, gilsonite, and oil shale. Drip gases are also included, but topped crude oil (residual oil) and other unfinished oils are excluded. Liquids produced at natural gas processing plants and mixed with crude oil are likewise excluded where identifiable.

(5) Increased capacity–

(A) Increasing the capability of the manufacturing or processing production unit to produce:

(i) more of the same product measured by units per hour or units per year; or

(ii) a new product.

(B) Increasing a unit's capability to produce more of an existing product and less of another existing product is not increasing the unit's capacity unless the overall production unit capability is increased. For example, if a production unit that produces 50 units of product X and 50 units of product Y is modified so that it produces 60 units of product X and 40 units of product Y, the production unit's capacity has not been increased.

(6) Manufacturing or processing production unit–A group of manufacturing and processing machines and ancillary equipment that together are necessary to create or produce a physical or chemical change beginning with the first processing of the raw material and ending with a finished product. Examples of such equipment include reactors, distillation columns, catalytic crackers, fractionators or other primary process equipment, and ancillary equipment such as heat exchangers, cooling towers, computer control units, piping, valves, and actuators. The production unit does not include maintenance equipment; research and development equipment; waste handling or treatment equipment; equipment for the storage of feedstock, catalysts, or finished products; loading and unloading equipment; laboratory and quality control equipment or any other equipment that is not used in the actual processing or manufacturing operation.

(7) New product–A product that has different product properties and a different commercial application than the product previously manufactured or processed by that production unit. Examples of new products include chlorine produced from sodium chloride; styrene from benzene; aqueous hydrogen chloride (HCl) from anhydrous HCl; and soft polyethylene from hard polyethylene if the soft polyethylene is used to manufacture different end products than the hard polyethylene. Producing gasoline with a 91-octane rating instead of an 89-octane rating for use in motor vehicle engines is not producing a new product. Changes caused by straining or purifying an existing product or cosmetic changes such as adding or removing color or odor to or from an existing product will not create a new product. For example, the manufacture of a different grade of the same product, such as technical sulfuric acid which is colored and contains impurities and anhydrous 100% sulfuric acid which is colorless and odorless, does not qualify one as a new or

different product from the other.

(8) Petrochemical refinery–A facility that manufactures finished petroleum products from crude oil, unfinished oils, natural gas liquids, other hydrocarbons, and oxygenates. Products of these refineries include gasoline, diesel, kerosene, distillate fuel oils, liquefied petroleum gas (LPG), residual fuel oils, lubricants and other products refined through alkylation, cracking, distillation, polymerization, or other chemical processes. These facilities also produce petrochemical feedstock for use by chemical plants. The term does not include facilities at an oil or gas lease site that remove water or other impurities and merely make the product more marketable.

(b) Tax responsibilities of persons who make improvements to a manufacturing processing production unit of a petrochemical refinery or chemical plant.

(1) Persons who repair, remodel, restore, or modify a manufacturing or processing production unit of a petrochemical refinery or chemical plant to increase the capacity in the production unit are not performing a taxable real property repair and remodeling service. Such persons are governed by the provisions of §3.291 of this title (relating to Contractors).

(A) Contractors performing lump-sum contracts as defined in §3.291 of this title (relating to Contractors) are consumers of all materials, consumable items, and equipment used or incorporated into a customer's property. As a consumer, a contractor must pay tax to on all such all materials, consumable items, and equipment. See §3.291 of this title (relating to Contractors) for more information on lump-sum contracts. Contractors performing lump-sum contracts for persons having direct payment permits may not accept a direct payment exemption certificate from those persons. When performing lump-sum contracts for a direct payment permit holder, the contractor must pay sales tax to the supplier or accrue and remit sales tax on incorporated materials removed from a tax-free inventory for incorporation into the direct payment permit holder's realty. Direct payment permit holders cannot authorize the contractor or any other person to purchase any taxable item using their permit. See §3.288 of this title (relating to Direct Payment Procedures and Qualifications).

(B) Contractors performing separated contracts as defined in §3.291 of this title (relating to Contractors) are considered retailers of all materials physically incorporated into the realty being improved. As a retailer, a contractor must collect tax from the customer based upon the agreed contract price of the incorporated materials. See §3.291 of this title (relating to Contractors) for more information on separated contracts. Contractors performing separated contracts for persons having direct payment permits may accept a direct payment exemption certificate from those persons in lieu of tax for all tangible personal property incorporated into customer's realty. A direct payment exemption certificate may not be accepted for tax liability incurred by the contractor on machinery or equipment rented or leased by the contractor and used in the performance of the contract. See §3. 288 of this title (relating to Direct Payment Procedures and Qualifications).

(2) Repairs, remodeling, restorations, or modifications other than to the processing production unit or that do not increase the capacity of the processing production unit are governed by the provisions of §3.357 of this title (relating to Labor Relating to Nonresidential Real Property Repair, Remodeling Restoration, Maintenance, New Construction, and Residential Property).

(3) Persons who perform repair, remodeling, maintenance, or restoration services on tangible personal property are governed by the provisions of §3.292 of this title (relating to Repair, Remodeling, Maintenance, and Restoration of Tangible Personal Property). These services may be exempt under the Tax Code, §151.3111, that exempts services performed on tangible personal property if the property is exempt because of the nature of the property, its use, or a combination of its nature and its use.

(4) Where increased capacity improvements and taxable services are sold or purchased for a single charge and the portion relating to taxable services represents more than 5.0% of the total charge, the total charge is presumed to be taxable. The presumption may be overcome by the service provider at the time the transaction occurs by separately stating to the customer a reasonable charge for the taxable services. However, if the charge for the taxable portion of the services is not separately stated at the time of the transaction, the service provider or the purchaser may later establish for the comptroller, through documentary evidence, the percentage of the total charge that relates to nontaxable unrelated services. Examples of acceptable documentation include written contracts detailing the scope of work, bid sheets, tally sheets, schedules of values and blueprints.

(5) When both increased capacity improvements and taxable services are being performed under the same contract, the parties to the contract should separately identify taxable from nontaxable labor in a contract and the charges applicable to each or the entire contract will be presumed to be for taxable services. Documentation which clearly defines the work being performed should be retained by both parties to show that had the increased capacity improvements and taxable services been done independently of each other, the cost of each would be reasonably near the allocation of charges. Examples of acceptable documentation include written contracts which detail the scope of work, bid sheets, tally sheets, schedules of values and blueprints. If there is not a written contract signed by both parties clearly showing agreement as to the taxable and nontaxable work being performed, the customer and the service provider must prepare, at the time of the transaction, a written certification verifying the allocation of charges for increased capacity improvements and taxable services. The comptroller may recalculate the charges if the allocation appears unreasonable and either party may be held responsible for the additional tax due.

(6) A service provider's customer must be able to substantiate by way of documentary evidence that repair, remodeling, restoration or modification services performed on a production unit increase the unit's capacity as defined in subsection (a)(5) of this section. If the person performing the service does not have the certification set out in paragraph (5) of this subsection, the service provider must presume that the service is taxable and collect tax. If the service provider's customer has documentation to prove that the labor increases the capacity of a production unit, the customer may issue an exemption certificate in lieu of paying tax to the service provider. The certificate must state that the labor increases the production unit's capacity as defined in subsection (a)(5) of this section, and that the customer will be liable for any additional tax due in the event that it is determined that taxable services were performed. A service provider who accepts such a certificate should follow the guidelines set out in paragraph (1) of this subsection and §3.291 of this title (relating to Contractors).

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 October 11, 1995.

TRD-9513114

Martin Cherry
Chief, General Law
Comptroller of Public Accounts

Earliest possible date of adoption: November 20, 1995

For further information, please call: (512) 463-4028

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Subchapter V. Franchise Tax

• 34 TAC §3.559

The Comptroller of Public Accounts proposes an amendment to §3.559, concerning earned surplus: temporary credit. Subsection (d)(4) was amended to correct an improper rule reference. Subsection (f) was amended to reflect a change in policy.

Mike Reissig, chief revenue estimator, has determined that for the first five-year period the rule will be in effect there will be no significant revenue impact on the state or local government.

Mr. Reissig also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be in the clarification of comptroller policy. This rule is adopted under the Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to persons who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Karey W. Barton, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

The amendment is proposed under the Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of the Tax Code, Title 2.

The amendment implements the Tax Code, §171.111.

§3.559. Earned Surplus: Temporary Credit.

(a)-(c) (No change.)

(d) Electing the credit.

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

(4) The allowable credit on reports due within the limitation period as specified in **the Tax Code, Chapter 111, Subchapter D** [§3.571 concerning Statute of Limitations] is subject to adjustment even if the initial election to take the credit is outside the period of limitations under **the Tax Code, Chapter 111, Subchapter D** [§3.571 of this title (relating to Statute of Limitations)].

(e) (No change.)

(f) Revocation of the election. **Unless otherwise provided in subsection (g) of this section, the** [The] election to claim the credit under the Tax Code, §171.111, is revoked at the earliest of the following occurrences:

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

(g) Correction of error. The election will not be revoked under subsection (f)(1)(B) or (C) of this section if the corporation files, within 60 days from the date of notice of the revocation, an amended report correcting the error which caused the revocation.

(h)[(g)] Changes in accounting methods. A corporation, otherwise precluded from changing accounting methods under the Tax Code, §171.109, may change accounting methods on its first report due on or after January 1, 1992, to the methods used to account for qualifying assets and liabilities on its financial statements for the accounting year ended in 1991, if the timing differences computed under the Tax Code, §171.111(b)(1), are based on the methods used on such 1991 financial statements. A corporation that changes methods under this section is considered to have made a change in accounting methods for purposes of the Tax Code, §171.109. For the purposes of this section, other changes in accounting methods for qualifying assets and liabilities are allowed only with the written consent of the comptroller.

(i) [(h)] Temporary credit. The temporary credit is not available when computing the additional tax under the Tax Code, §171.0011.

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 October 16, 1995.

TRD-9513224 Martin Cherry
Chief, General Law
Comptroller of Public Accounts

Earliest possible date of adoption: November 20, 1995

For further information, please call: (512) 463-4028

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• 34 TAC §3.577

The Comptroller of Public Accounts proposes new §3.577, concerning credit for sales tax paid on property used in manufacturing. The new section is in response to legislation during the 72nd Legislature, 1991, and during the 74th Legislature, 1995, and clarifies that the survivor of a merger may not take credit for tax paid by a non-survivor.

Mike Reissig, chief revenue estimator, has determined that for the first five-year period the rule will be in effect there will be no significant revenue impact on the state or local government beyond that anticipated in the legislations' fiscal notes.

Mr. Reissig also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be in the clarification of comptroller policy. This rule is adopted under the Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to persons who are required to comply with the proposed rule.

Comments on the new section may be submitted to Karey W. Barton, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This new section is proposed under the Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of the Tax Code, Title 2.

The new section implements the Tax Code, §171.0021.

§3.577. Credit for Sales Tax Paid on Property Used in Manufacturing.

(a) Effective date. This section applies beginning with reports originally due after January 1, 1994.

(b) Mergers. The surviving corporation of a merger may not take the credit provided for in Tax Code, §171.0021, for tax paid by a non-surviving entity.

(c) Reports. The credit provided for in Tax Code, §171.0021, may be claimed, until completely used, on any of the first five reports, required by Tax Code, §§171.201, 171.202, and 171.0011, which are originally due on or after January 1, 1994.

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 October 16, 1995.

TRD-9513226 Martin Cherry
Chief, General Law
Comptroller of Public Accounts

Earliest possible date of adoption: November 20, 1995

For further information, please call: (512) 463-4028

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Notification Pursuant to the Insurance Code, Chapter 5, Subchapter L

(Editor's Note. As required by the Insurance Code, Article 5.96 and 5. 97, the Texas Register publishes notice of proposed actions by the Texas Board of Insurance. Notice of action proposed under Article 5.96 must be published in the Texas Register not later than the 30th day before the board adopts the proposal Notice of action proposed under Article 5 97 must be published in the Texas Register not later than the 10th day before the Board of Insurance adopts the proposal. The Administrative Procedure Act, the Government Code, Chapters 2001 and 2002, does not apply to board action under Articles 5 96 and 5 97

The complete text of the proposal summarized here may be examined in the offices of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78714-9104)

The Commissioner of Insurance previously published notice of a hearing on November 9, 1995 for Docket Number 2179. The subject matter of Docket Number 2179 is a filing made by the Texas Workers' Compensation Insurance Fund ("Fund") pertaining to an amendment to Rule VII-Premium Discount in the Texas Basic Manual of Rules, Classifications and Experience Rating Plan for Workers' Compensation and Employers' Liability Insurance ("Manual"). The Fund requested in its original filing that Rule VII be amended to provide that premium discounts do not apply to to risks written through the Fund, and that this amendment be retroactive to January 1, 1994, the date the Fund assumed the role of insurer of last resort.

This notice is being amended by deleting the reference to retroactivity contained in the Fund's original filing. The Fund's amended filing requests that the amendment read, "This rule does not apply to risks written thought the Texas Workers' Compensation Insurance Fund pursuant to Article 5.76-4, Texas Insurance Code."

Notice is further provided that the hearing on Docket Number 2179, originally scheduled for November 9, 1995 at 1:30 p.m., has been rescheduled for November 28, 1995 at 1:30 p.m. The hearing room for Docket Number 2179 remains Room 100 of the Texas Department of Insurance Building, 333 Guadalupe Street in Austin, Texas.

The Commissioner has jurisdiction of this matter pursuant to the Insurance Code, Articles 5.76-3, 5.76-4 and 5.96.

A copy of the petition containing the full text of the proposed changes Rule VII of the manual is available for review in the Office of the Chief Clerk of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78714-9104. For further information or to request copies of the petition, please contact Angie Arizpe at (512) 322-4147, (refer to Reference Number W-0995-30).

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts it from the requirements of the Administrative Procedure Act.

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 October 13, 1995.

TRD-9513186 Alicia M. Fechtel
General Counsel and Chief Clerk
Texas Department of Insurance

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

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The Commissioner of Insurance will hold a public hearing under Docket Number 2185 on November 28, 1995, at 1:30 p.m., in Room 100 of the Texas Department of Insurance Building, 333 Guadalupe Street in Austin, Texas, to consider a petition by the staff of the Texas Department of Insurance proposing amendments to the Dwelling Section and the Farm and Ranch Section of the Texas Personal Lines Manual. The petition requests consideration of a proposal to add a new rule to these two sections to provide optional large deductibles for coverage afforded under a dwelling policy and a farm and ranch policy. The proposed rule (Rule 5 in the Dwelling Section under the General Requirements Section V, Deductibles Subsection D and Rule 6 in the Farm and Ranch Section under General Requirements Section V, Deductibles Subsection D) provides for optional large deductibles of 1 1/2%, 2.0%, 2 1/2%, 3.0%, 4.0% or 5.0% of the limit of liability for each item of insurance shown on the declarations page of Texas Dwelling Policy Forms TDP-1, TDP-2, and TDP-3 and for each item of insurance shown on the declarations page of Texas Farm and Ranch Policy Forms TFR-1, TFR-2, and TFR-3 and on the declarations page of any endorsement attached to Texas Farm and Ranch Policy Forms TFR-1, TFR-2, and TFR-3. The proposed rule provides that the large deductible may be selected at the option of the insured, with an appropriate reduction in premium, subject to certain requirements and conditions: (1) the minimum deductible amount may not be less than $100; (2) the optional large deductible may not be applied to a loss caused by the perils of fire and lightning; (3) the actual deductible amount in dollars must be shown on the declarations page, and the premium credit for the optional large deductible must also be shown on the declarations page of the policy (and of any endorsements attached to Texas Farm and Ranch Policy Forms TFR-1, TFR-2, and TFR-3) after the dollar amount of the deductible; and (4) the option of the large deductibles may only be provided under the policy if the insured is offered, in addition to an optional large deductible, at least one of the other deductible options promulgated by the Department for use in Texas. The proposed rule also references the optional large deductible adjustment chart, which will be included in the Manual, for the appropriate credits.

The staff petition requests that applicable premium credits for the optional large deductibles be determined at the next residential property insurance benchmark rate hearing held pursuant to Articles 5.101 and 1.33B of the Insurance Code. The petition further requests that the effective date of the new rules be the effective date of the residential property insurance benchmark rates determined at such hearing.

The Association of Fire and Casualty Companies (AFACT), a trade association composed of 37 property and casualty insurance companies licensed to do business in Texas, has also petitioned the Commissioner to allow the large deductible endorsements adopted for Homeowners and Farm and Ranch Owners policies to be used for Dwelling and Farm and Ranch policies. Also, National Lloyds Insurance Company has petitioned the Commissioner to permit the use of the optional higher deductibles for Dwelling policies.

Currently, insureds may select varying deductibles of zero, $100, $250, $500, $1,000, or 1.0% of the limit of liability of each item of insurance shown on the declarations page of the policy and of any endorsement attached thereto. The proposed rules are necessary to provide insureds with the option of selecting a larger deductible for their dwelling and farm and ranch coverage for a reduced premium. In addition, the availability of large deductibles may encourage insurers to write dwelling and farm and ranch insurance in areas in which insurers have in the past restricted such writings.

The Commissioner has jurisdiction of this matter pursuant to the Insurance Code, Articles 5.35, 5.101, 5.96, and 5.98.

Copies of the full text of the staff petition and the proposed rules are available for review in the Office of the Chief Clerk of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas, 78714-9104. For further information or to request copies of the petition and proposed amendments, please contact Angie Arizpe at (512) 322-4147 (refer to Reference Number P-1095-38-I).

Comments on the proposed changes must be submitted in writing within 30 days after publication of the proposal in the *Texas Register* to the Office of the Chief Clerk, P.O. Box 149104, MC113-2A, Austin, Texas 78714-9104. An additional copy of the comment should be submitted to Lyndon Anderson, Associate Commissioner for Property and Casualty Division, P.O. Box 149104, MC103-1A, Austin, Texas 78714-9104.

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts it from the requirements of the Administrative Procedure Act.

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 October 16, 1995.

TRD-9513260 Alicia M. Fechtel
General Counsel and Chief Clerk
Texas Department of Insurance

Effective date: November 4, 1995

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

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The Commissioner of Insurance will hold a public hearing under Docket Number 2186 on November 28, 1995, at 1:30 p.m., in Room 100 of the Texas Department of Insurance Building, 333 Guadalupe Street in Austin, Texas, to consider a petition by the staff of the Texas Department of Insurance proposing the adoption of optional endorsements to certain residential property insurance policies; an amendment to Endorsement Number HO-170, which may be attached to a Texas Homeowners Form HO-A; and amendments to the Homeowners, Dwelling, Farm and Ranch, and Farm and Ranch Owners sections of the Texas Personal Lines Manual (Manual) to modify current coverage for tear out and replacement of building and land necessary to access, repair, or replace that part of a plumbing drain system located within or under the slab or foundation of the dwelling in the event of accidental discharge or leakage of water from such plumbing drain system.

The petition requests consideration of six optional endorsements which may be attached to certain residential property insurance policies: (1) Endorsement Number HO-155 which may be attached to a Texas Homeowners Form HO-B, (2) Endorsement Number TDP-054 which may be attached to a Texas Dwelling Form TDP-2, (3) Endorsement Number TDP-055 which may be attached to a Texas Dwelling Form TDP-3, (4) Endorsement Number FRO-455 which may be attached to a Texas Farm and Ranch Owners Form FRO-B, (5) Endorsement Number TFR-054 which may be attached to a Texas Farm and Ranch Form TFR-2, and (6) Endorsement Number TFR-055 which may be attached to a Texas Farm and Ranch Form TFR-3. Staff is also proposing an amendment to Endorsement Number HO-170 (Additional Extended Coverage), which may be attached to a Texas Homeowners Form HO-A.

The petition requests that the proposed endorsements be optional and that with the attachment of such endorsements, there be a reduction in the applicable premium for the residential property insurance policy.

The staff proposal includes four Manual rules: (1) Rule IV-A-20 in the Homeowner's Section, (2) Rule IV-O in the Dwelling Section, (3) Rule IV-A-22 in the Farm and Ranch Owners Section, and (4) Rule IV-S in the Farm and Ranch Section. These rules provide for the limitation in coverage for tear out and replacement of building and land when the proposed endorsements are attached and reference the appropriate rate chart for determining the applicable credit for the limit in coverage.

Staff also proposes that the applicable premium credits for the tear out and replacement limitation in coverage be determined at the next residential property insurance benchmark rate hearing held pursuant to Articles 5.101 and 1.33B of the Insurance Code and that the effective date of the proposed endorsements and Manual rules be the effective date of the residential property insurance benchmark rates determined pursuant to such hearing.

Under the staff proposal, the attachment of the proposed endorsements to Texas Homeowners Form HO-B, Texas Dwelling Form TDP-3, Texas Farm and Ranch Owners Form FRO-B and Texas Farm and Ranch Form TFR-3 would add a new limitation to the Property Coverage, Extensions of Coverage portion of the policy to provide that the during the policy period stated on the declarations page, the insurer will pay no more than a total amount of 5.0% of Coverage A (Dwelling) limit of liability or $2,500, whichever is greater, of the cost of tearing out and replacing any part of the building and land necessary to access, repair, or replace that part of a plumbing drain system located within or under the slab or foundation of the dwelling. This extension of coverage would apply only in the event of accidental discharge or leakage of water from a plumbing drain system located within or under the slab or foundation of the dwelling and would not affect any coverage provided elsewhere in the policy in the event of accidental discharge or leakage of water from a plumbing supply system. The extension of coverage does not include loss to the plumbing drain system or appliance from which water escapes. This coverage is not additional insurance and does not increase the Coverage A (Dwelling) limit of liability. The attachment of these proposed endorsements would also amend item 9 in the Perils Insured Against, Coverage B (Personal Property) portion of these four policies to delete the current language concerning tearing out and replacing any part of the building and would amend the non-applicability of exclusions provision in item 9 to remove the reference to the exclusion on settling, cracking, bulging, shrinkage, or expansion of foundations, walls, floors, and other specified structures. The attachment of these endorsements would also amend the Section I-Exclusions or General Exclusions portions of these four policies to add a provision to provide that the insurer does not cover as part of any loss the cost of tearing out any part of the building and land necessary to access, repair, or replace that part of a plumbing drain system located within or under the slab or foundation of the dwelling, except as provided under the Extensions of Coverage part of the policy.

The attachment of the proposed endorsements to Texas Dwelling Form TDP-2 and Texas Farm and Ranch Form TFR-2 would amend item 8 in the Perils Insured Against portion of the policy to delete the current language concerning tearing out and replacing any part of the building and to provide that the insurer will cover the cost of tearing out and replacing any part of the building and land necessary to repair or replace the heating system, air conditioning system, plumbing supply system, or household appliance. This coverage does not include loss to the heating system, air conditioning system, plumbing supply systems, or household appliance from which the water or steam escaped. The proposed endorsement provides that in the event of accidental discharge or leakage of water from a plumbing drain system located within or under the slab or foundation of the dwelling, the insurer will pay, during the policy period stated on the declarations page, no more than a total amount of 5.0% of Coverage A (Dwelling) limit of liability or $2,500, whichever is greater, of the cost of tearing out and replacing any part of the building and land necessary to access, repair, or replace that part of such plumbing drain system. This coverage does not include loss to the plumbing drain system from which the water or steam escaped. The proposed endorsement retains the provision that Exclusion 1 under the General Exclusions part of the policy does not apply to loss caused by this peril.

The proposed amendment to Endorsement Number HO-170 (Additional Extended Coverage), which may be attached to a Texas Homeowners Form HO-A, amends item 1 in the Perils Insured Against portion of the endorsement to provide the tear-out and replacement coverage provided on the other proposed endorsements.

The 73rd Legislature in 1993 enacted Article 5.35-2 of the Insurance Code to require the Commissioner to adopt endorsements to residential property policies that restricted coverage for damage to foundations or slabs of insured dwellings more than ten years old, including the exclusion of damage caused by leakage from a plumbing system. These endorsements were adopted pursuant to Commissioner's Order Number 94-0840 (August 2, 1994) to be effective for all applicable policies issued on and after the effective date of the 1994 residential property insurance benchmark rate. However, because premium credits were not considered during the 1994 benchmark rate hearing, the endorsements never became effective. The 74th Legislature enacted H.B. 347 (Acts 1995, 74th Legislature, Chapter 413, §1, Page 2987, June 8, 1995) which repealed Article 5.35-2 of the Insurance Code but did not otherwise affect the authority of the Commissioner under other provisions of the Insurance Code to promulgate policy and endorsement provisions regarding the foundation or slab of an insured dwelling. These proposed endorsements were developed by staff in consultation with insurer, consumer, and legislative representatives following this repeal.

These endorsements and Manual rules are necessary to clarify the coverage provided under certain residential property insurance policies (Homeowners Form HO-A with Endorsement Number 170 attached; Homeowners Form HO-B; Dwelling Forms TDP-2 and TDP-3; Farm and Ranch Owners Form FRO-B; and Farm and Ranch Forms TFR-2 and TFR-3) for tear out and replacement of building and land in the event of accidental discharge or leakage of water from a plumbing drain system located within or under the slab or foundation of the insured dwelling. The current policy language contained in these forms is ambiguous and unclear as to coverage for the cost of tear out and replacement of building or land in the event of accidental discharge or leakage of water from a plumbing drain system located within or under the slab or foundation of the insured dwelling. The existence of such ambiguous language has caused a major disruption in the claims paying process leading to excessive payments of claims by some insurers, denial of claims by other insurers, and litigation for the settlement of water damage claims. In addition, the unclear language in the current policy forms has resulted in major restrictions in the writing of residential prop-

erty insurance by licensed property and casualty insurers in certain areas of the state. Thus, insureds in these areas are faced with either purchasing policies issued by unlicensed surplus lines insurers that provide less coverage at a much greater cost or going without coverage.

Staff is requesting that the proposed endorsements be optional to allow more flexibility and competition in the marketplace. Staff is proposing that the attachment of these endorsements require a reduction in the applicable premium for the residential property insurance policy because the endorsements modify or limit current coverage. In addition, staff recommends that insurers be allowed to provide greater premium reductions than those determined pursuant to the benchmark rate hearings. Under this proposal, insurers could make rate filings, with supporting actuarial justification, to the Department indicating the greater premium reductions. Staff recommends that the Commissioner adopt this procedure at the time the premium reduction determined pursuant to the benchmark rate hearing is adopted.

The proposed Manual rules are necessary to explain that the attachment of the proposed endorsements modifies the residential property insurance policy to provide limited tear out and replacement coverage in the event of discharge or leakage of water from a plumbing drain system located within or under the slab or foundation of the insured dwelling. The proposed rules reference the appropriate rate chart for determining the applicable credit for the limit in coverage.

The Commissioner has jurisdiction of this matter pursuant to the Insurance Code, Articles 5.35, 5.101, 5.96, and 5.98.

Copies of the full text of the staff petition and the proposed endorsements and Manual rules are available for review in the Office of the Chief Clerk of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas, 78714-9104. For further information or to request copies of the petition and proposed amendments, please contact Angie Arizpe at (512) 322-4147 (refer to Reference Number P-1095-39-I).

Comments on the proposed changes must be submitted in writing within 30 days after publication of the proposal in the *Texas Register* to the Office of the Chief Clerk, P.O. Box 149104, MC113-2A, Austin, Texas 78714-9104. An additional copy of the comment should be submitted to Lyndon Anderson, Associate Commissioner for Property and Casualty Division, P.O. Box 149104, MC103-1A, Austin, Texas 78714-9104.

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts it from the requirements of the Administrative Procedure Act.

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

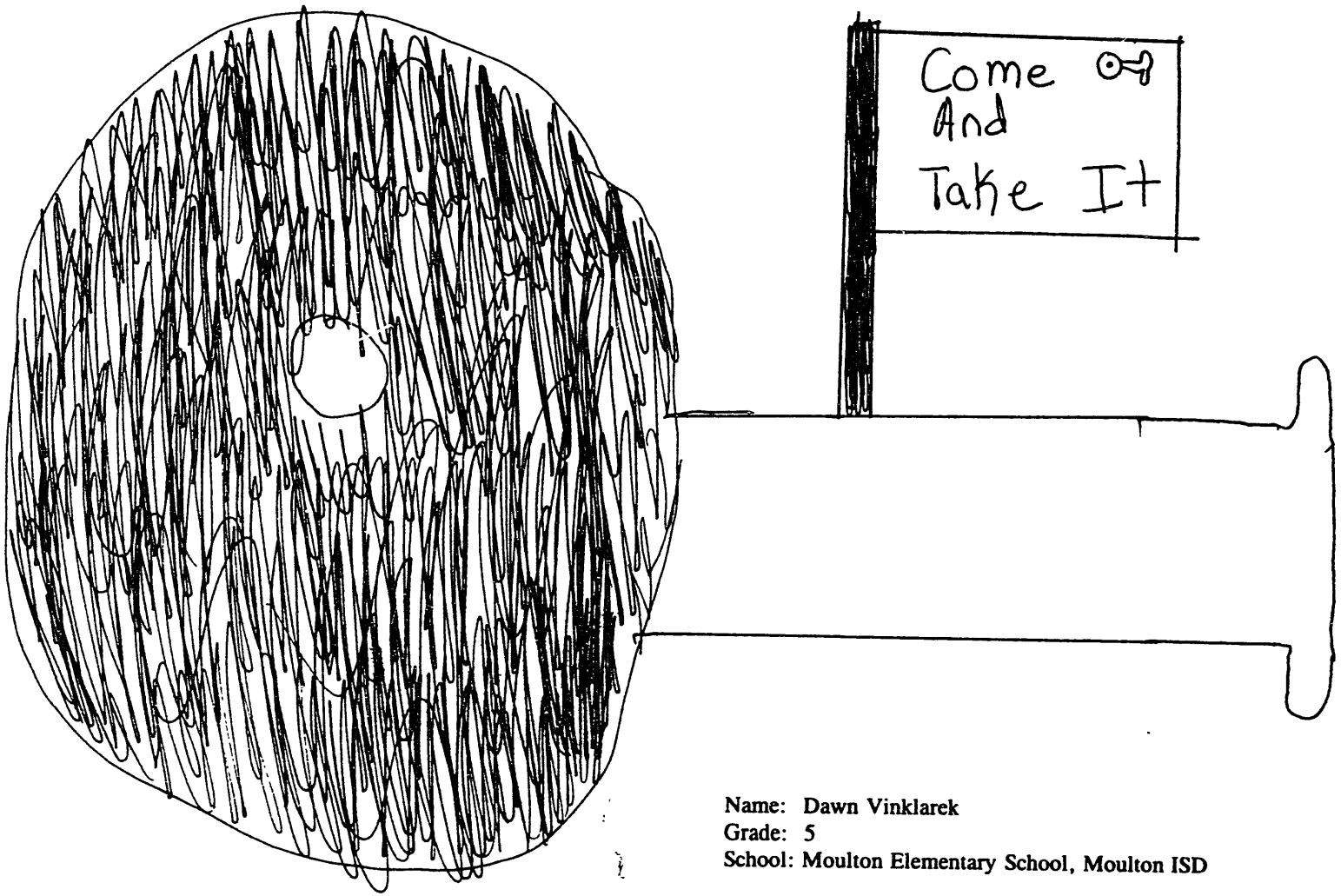
Issued in Austin, Texas, on October 16, 1995.

TRD-9513259

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

Effective date: November 4, 1995

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



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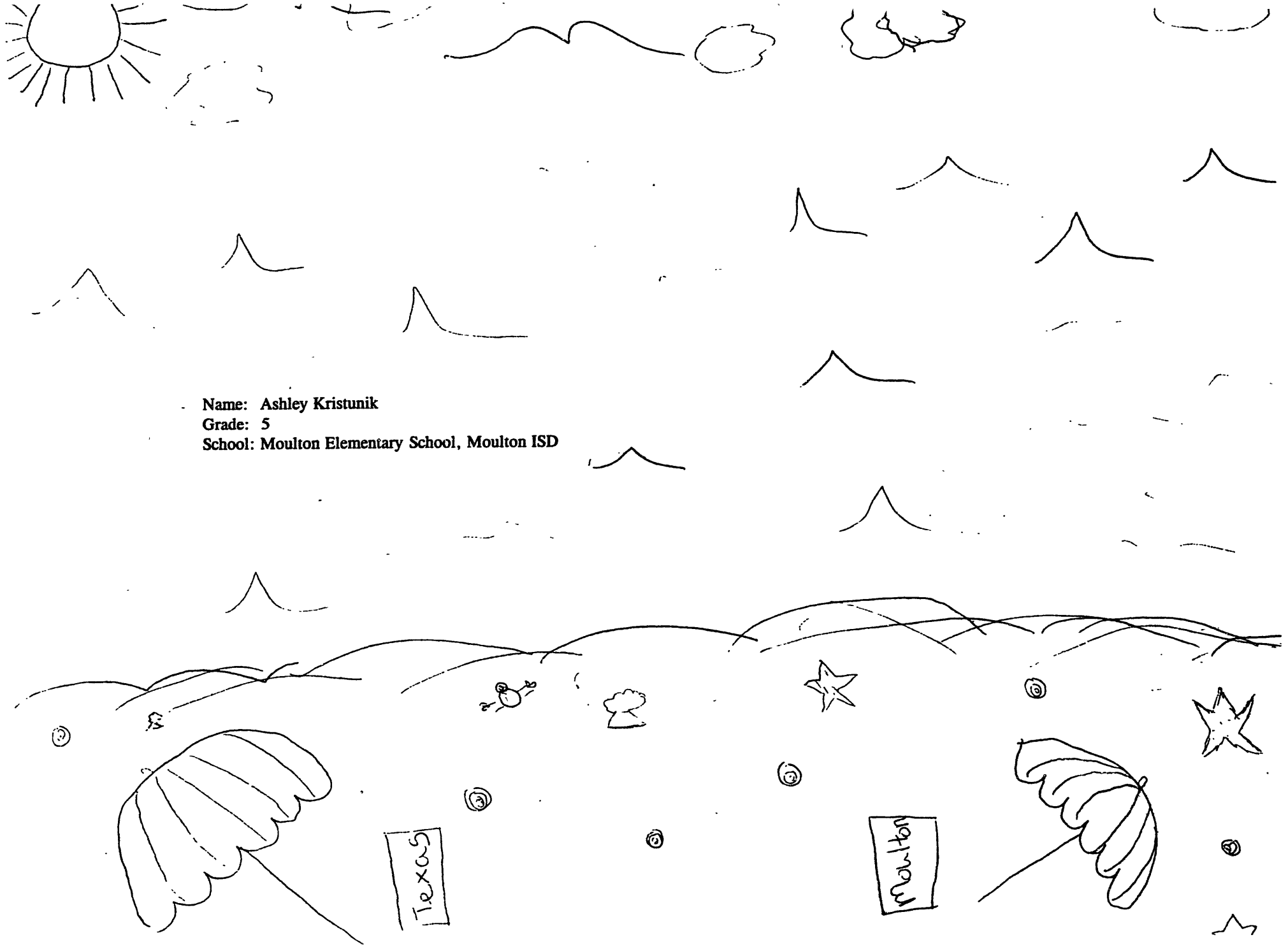
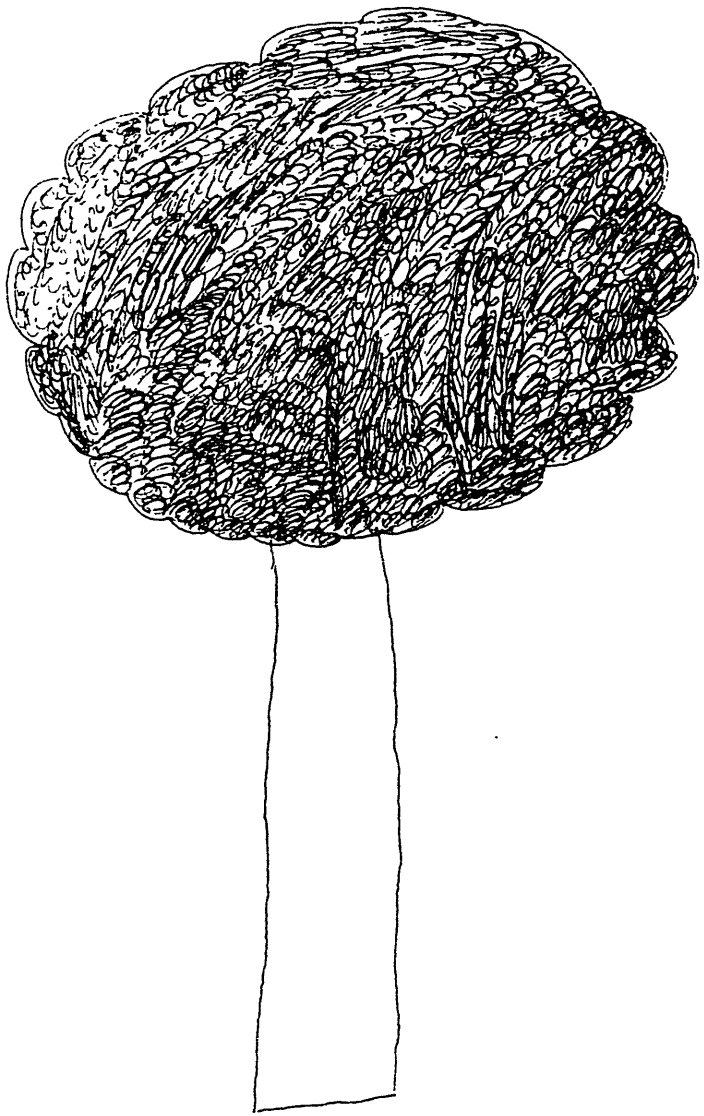
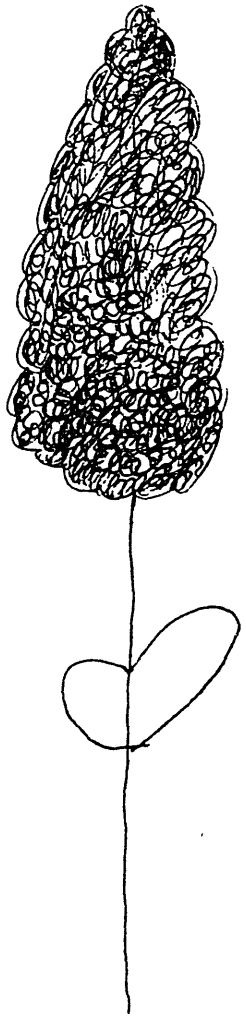
Grade: 5
School: Moulton Elementary School, Moulton ISD

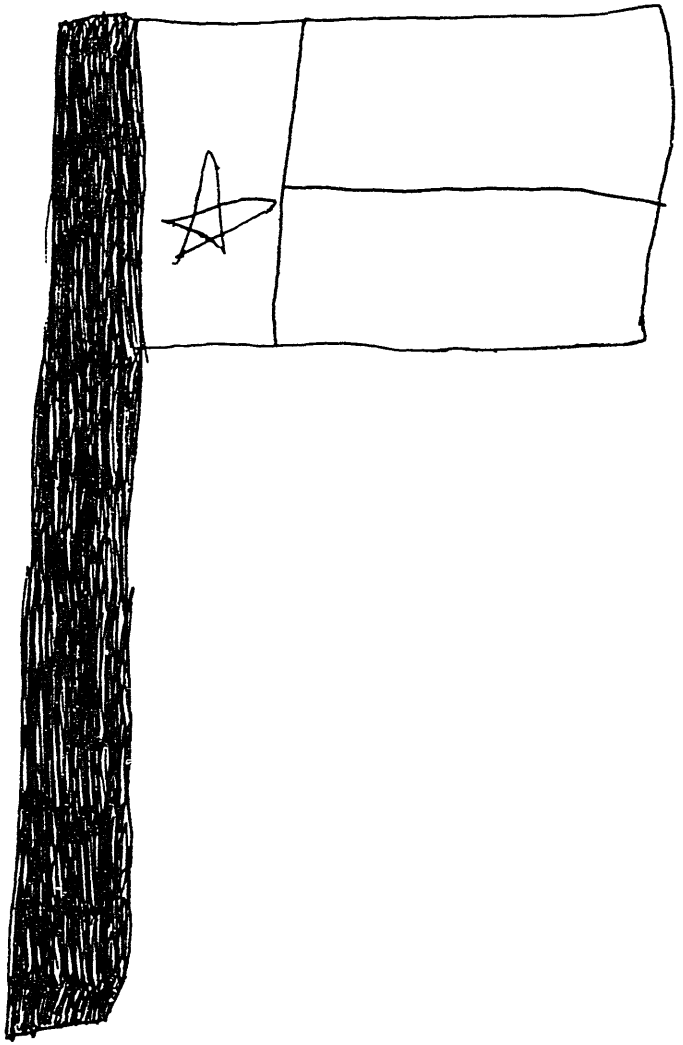


Name: Ashley Kristunik
Grade: 5
School: Moulton Elementary School, Moulton ISD

Name: Kelly Mikulencak
Grade: 5
School: Moulton Elementary School, Moulton 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 filing 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 25. HEALTH SERVICES

Part II. Texas Department of Mental Health and Mental Retardation

Chapter 401. System Administration

Subchapter G. Community Mental Health and Mental Retardation Centers

• 25 TAC §401.462

The Texas Department of Mental Health and Mental Retardation has withdrawn from consideration for permanent adoption a proposed amended §401. 462 which appeared in the October 13, 1995, issue of the *Texas Register* (20 TexReg 7260). The effective date of this withdrawal is October 13, 1995.

Issued in Austin, Texas, on October 13, 1995.

TRD-9513168 Ann Utley
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation

Effective date: October 13, 1995

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

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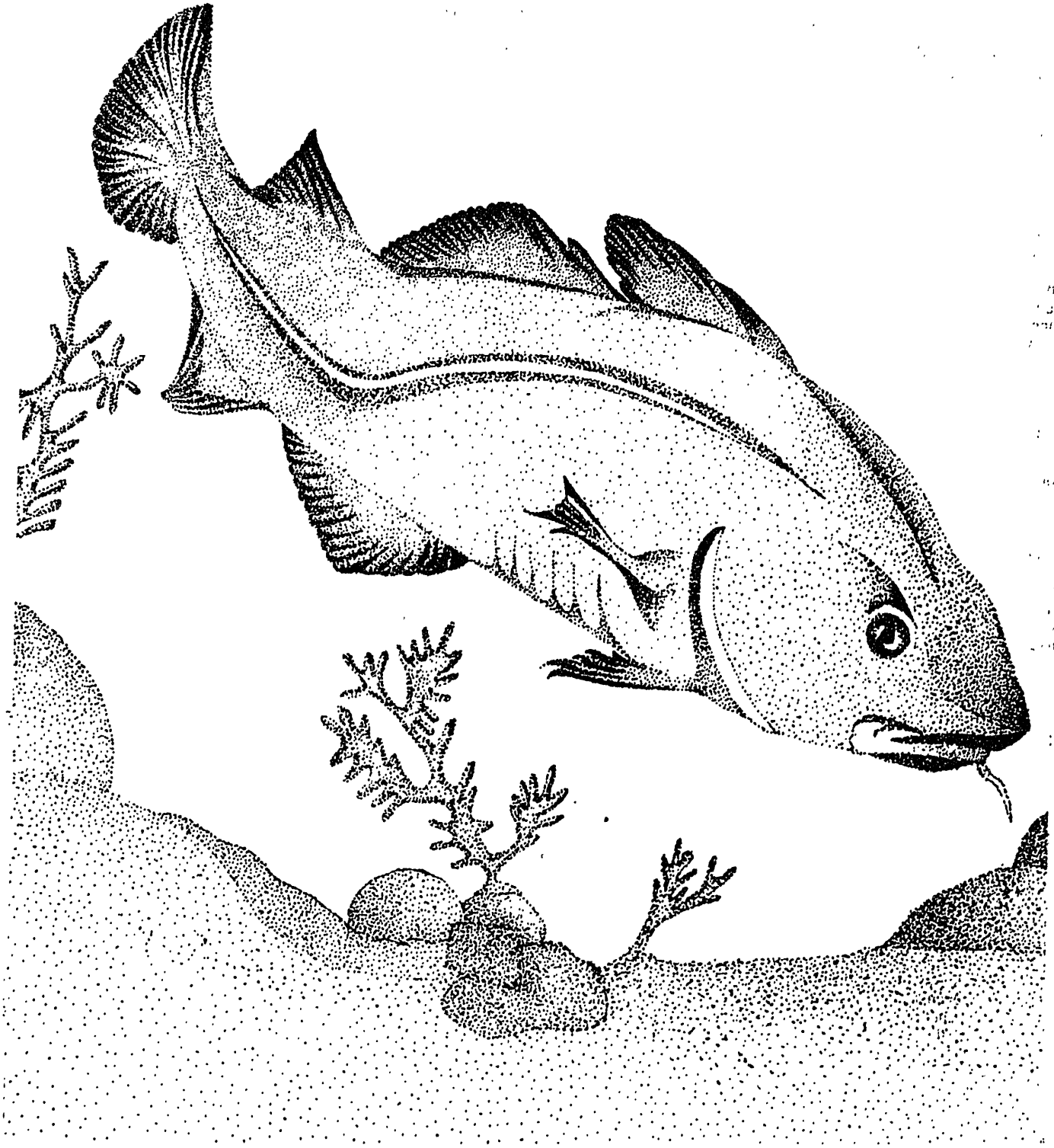
Name: Thuy Nguyen
Grade: 9
School: Northbrook Senior High, SBISD



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 28. INSURANCE

Part II. Texas Workers' Compensation Commission

Chapter 110. Required Notices of Coverage

Subchapter B. Employer Notices

- **28 TAC §110.110**

The Texas Workers' Compensation Commission adopts an amendment to §110. 110, with changes to the proposed text as published in the August 18, 1995 issue of the *Texas Register* (20 TexReg 6296). Changes made to the proposed rule are in response to public comments received and are described in the summary of public comments and responses section of this preamble. Other changes were made for clarification and consistency.

The amendment adds provisions contained in recently enacted House Bill 1089, and Senate Bill 3, 74th Legislature, 1995. House Bill 1089 added Texas Labor Code, §406.097(c) which provides that a sole proprietor or partner of a business entity covered by workers' compensation insurance or a corporate officer with an equity ownership in a covered business entity of at least 25% may be excluded from required workers' compensation coverage under Texas Labor Code, §406.096. Senate Bill 3 added §4(j) to Vernon's Texas Civil Statutes, Article 6675c, Title 116, Chapter 1, entitled "Motor Carrier Registration". Section 4(j) provides that, notwithstanding any contrary provision of law, a motor carrier required to register under this article must obtain either workers' compensation insurance coverage protecting its employees or accidental insurance coverage in an amount fixed by the Texas Department of Transportation.

The amendment to §110.110 adds subsections (h) and (i) which incorporate these exemptions to mandatory workers' compensation insurance coverage for government building or construction projects. An amendment to the definition of "Persons providing services on the project" has been added, to reference the exemptions in (h) and (i). An amendment to subsection (g) has been added to clarify that, with the exceptions already discussed, the statute and the rule apply to all public works construction contracts, including those which are not required to be advertised for bid. This has been an area of some confusion for public entities.

Changes to the proposed text are found in subsection (i) where a sentence was added to clarify the applicability of the rule, and the reference to the Texas Labor Code, §406.097 was clarified by adding a reference to House Bill 1089.

Comments on the proposed amendment were received from Texas Motor Transportation Association and Hammerman & Gainer

Comments generally in support of the proposed amendment were received from the Texas Motor Transportation Association.

Comments generally in opposition to the proposed amendment were received from the Hammerman & Gainer.

Summaries of the comments and commission responses are as follows:

COMMENT: The commenter objected to the changes proposed to subsection (h) and contends that the alternative insurance coverage allowed for motor carriers by Texas Civil Statutes, Article 6675c, as amended by Senate Bill 3, 74th Legislature, 1995, cannot be considered "workers' compensation coverage" as required by Texas Labor Code, §406.096. The commenter reasoned that the alternative coverage will not secure the payment of compensation as defined by the Texas Workers' Compensation Act. The commenter also contended: that §406. 003 requires an employer to obtain workers' compensation insurance coverage through an insurance company authorized to write workers' compensation insurance; that an employer electing to obtain alternative coverage would not be subject to the Texas Workers' Compensation Act; and that per Texas Labor Code, §406.052 alternative coverage would be permitted only if the employer does not represent the insurance to any person as providing workers' compensation insurance coverage authorized under the Texas Workers' Compensation Act. The commenter drew the conclusion that the Texas Workers' Compensation Act does not contemplate alternative coverage and that it would be bad policy for the commission to endorse the use of alternative coverage in this rule. The commenter felt such alternative coverage would leave the impression with the public and with employees that they are fully protected under workers' compensation law and fears that employers who obtain such coverage will be held liable as non-subscribers. The commenter concluded that if the legislature intended that Texas Civil Statutes, Article 6675c could satisfy the workers' compensation coverage requirements of Texas Labor Code, §406.096 it could easily have amended §406.096. The commenter pointed to the case of *Beldon Roofing and Remodeling Co. V. San Antonio Water System*, 898 SW2d 351, to support his views.

RESPONSE: The Commission disagrees. Texas Civil Statutes, Article 6675c, §4(j) states that its provisions apply notwithstanding any contrary provision of any law or regulation. The Commission believes that this language expresses the clear intent of the legislature that motor carriers subject to Article 6675c are not required to purchase workers' compensation insurance coverage in any circumstance. Because the coverage requirements of §406.096 of the Texas Workers' Compensation Act and §110.110 are contrary to the coverage requirements in Texas Civil Statutes, Article 6675c, §4(j), the more permissive requirements of Texas Civil Statutes, Article 6675c apply. This interpretation also gives effect to the general provisions of the Code Construction Act favoring a construction which gives effect to both a special provision and a general provision which conflict or if this is not possible, giving the special provision effect as an exception to the general provision. In addition, when a conflict between statutes is irreconcilable, the Code construction Act states that the statute latest in date of enactment prevails. Under these rules of construction the provisions of Senate Bill 3 will prevail over §406.096 of the Texas Labor Code.

COMMENT: The commenter contended that subsection (i) should be changed to make reference to the requirement in Texas Labor Code, §406.097(c) that corporate officers with an equity ownership in the covered business of less than 25% must be covered under the workers' compensation policy for the corporation to qualify for government construction jobs.

RESPONSE: The Commission disagrees. Subsection (i) exempts "... corporate officers who meet the requirements of the Act, §406.097(c) ..." and who are explicitly excluded from coverage from the coverage requirements of §110.110. Because a corporate officer with equity ownership of less than 25% does not meet the requirements of §406.097(c), it is clear from the current language of the rule such a corporate officer

must be covered by workers' compensation insurance coverage if the corporate officer is going to provide services on a governmental building or construction project.

COMMENT: The commenter pointed out that §1.50 of House Bill 1089 provides that §406.097 "applies only to an insurance policy or certificate of authority to self-insure that is delivered, issued for delivery, or renewed on or after January 1, 1996. A policy or certificate that is delivered, issued for delivery, or renewed before January 1, 1996, is governed by the law as it existed immediately before September 1, 1995, and the law is continued in effect for that purpose" and therefore a provision may need to be added to the rule to clarify the applicability of the rule to a particular insurance policy.

RESPONSE: The Commission agrees. Subsection (i) should be amended by adding a new sentence at the end of the existing language which states: "This subsection applies only to sole proprietors, partners, and corporate executive officers who are excluded from coverage in an insurance policy or certificate of authority to self-insure that is delivered, issued for delivery, or renewed on or after January 1, 1996."

COMMENT: The commenter indicated that his organization had tracked Senate Bill 3 throughout the legislative process and fully agrees that the proposed amendment to §110.110(h) follows the original intent contemplated by the authors of the legislation. The commenter therefore fully supported the proposed amendment as written.

RESPONSE: The Commission agrees.

The amendment is adopted pursuant to the Texas Labor Code, §402.061, which requires the commission to adopt rules necessary for the implementation and enforcement of the Texas Workers Compensation Act; the Texas Labor Code, §406.096, which requires a contractor which enters into a building or construction contract with a governmental entity to provide workers' compensation insurance coverage for its employees; the Texas Labor Code, §406.097, added by House Bill 1089, 74th Legislature, 1995, which allows executive employees of certain businesses to exclude themselves from workers' compensation coverage and to remain in compliance with the requirements of Texas Labor Code, §406.096; and Texas Civil Statutes, Article 6675c, which authorize the purchase of an alternative to workers' compensation insurance coverage by some motor carriers.

§110.110. Reporting Requirements for Building or Construction Projects for Governmental Entities.

(a) The following words and terms, when used in this rule, shall have the following meanings, unless the context clearly indicates otherwise. Terms not defined in this rule shall have the meaning defined in the Texas Labor Code, if so defined.

(1) Certificate of coverage (certificate)–A copy of a certificate of insurance, a certificate of authority to self-insure issued by the commission, or a workers' compensation coverage agreement (TWCC-81, TWCC-82, TWCC-83, or TWCC-84), showing statutory workers' compensation insurance coverage for the person's or entity's employees (including those subject to a coverage agreement) providing services on a project, for the duration of the project.

(2) Building or construction–Has the meaning defined in the Texas Labor Code, §406.096(e)(1).

(3) Contractor–A person bidding for or awarded a building or construction project by a governmental entity.

(4) Coverage–Workers' compensation insurance meeting the statutory requirements of the Texas Labor Code, §401.011(44).

(5) Coverage agreement–A written agreement on form TWCC-81, form TWCC-82, form TWCC-83, or form TWCC-84, filed with the Texas Workers' Compensation Commission which establishes a relationship between the parties for purposes of the Texas Workers' Compensation Act, pursuant to the Texas Labor Code, Chapter 406, Subchapters F and G as one of employer/employee and establishes who will be responsible for providing workers' compensation coverage for persons providing services on the project.

(6) Duration of the project–Includes the time from the beginning of work on the project until the work on the project has been completed and accepted by the governmental entity.

(7) Persons providing services on the project ("subcontractor" in §406.096 of the Act)–With the exception of persons excluded under subsections (h) and (i), includes all persons or entities performing all or part of the services the contractor has undertaken to perform on the project, regardless of whether that person contracted directly with the contractor and regardless of whether that person has employees. This includes but is not limited to independent contractors, subcontractors, leasing companies, motor carriers, owner-operators, employees of any such entity, or employees of any entity furnishing persons to perform services on the project. "Services" includes but is not limited to providing, hauling, or delivering equipment or materials, or providing labor, transportation, or other service related to a project. "Services" does not include activities unrelated to the project, such as food/beverage vendors, office supply deliveries, and delivery of portable toilets.

(8) Project–Includes the provision of all services related to a building or construction contract for a governmental entity.

(b) Providing or causing to be provided a certificate of coverage pursuant to this rule is a representation by the insured that all employees of the insured who are providing services on the project are covered by workers' compensation coverage, that the coverage is based on proper reporting of classification codes and payroll amounts, and that all coverage agreements have been filed with the appropriate insurance carrier or, in the case of a self-insured, with the commission's Division of Self-Insurance Regulation. Providing false or misleading certificates of coverage, or failing to provide or maintain required coverage, or failing to report any change that materially affects the provision of coverage may subject the contractor or other person providing services on the project to administrative penalties, criminal penalties, civil penalties, or other civil actions.

(c) A governmental entity that enters into a building or construction contract on a project shall:

(1) include in the bid specifications, all the provisions of paragraph (7) of this subsection, using the language required by paragraph (7) of this subsection;

(2) as part of the contract, using the language required by paragraph (7) of this subsection, require the contractor to perform as required in subsection (d) of this rule;

(3) obtain from the contractor a certificate of coverage for each person providing services on the project, prior to that person beginning work on the project;

(4) obtain from the contractor a new certificate of coverage showing extension of coverage:

(A) before the end of the current coverage period, if the contractor's current certificate of coverage shows that the coverage period ends during the duration of the project; and

(B) no later than seven days after the expiration of the coverage for each other person providing services on the project whose current certificate shows that the coverage period ends during the duration of the project;

(5) retain certificates of coverage on file for the duration of the project and for three years thereafter;

(6) provide a copy of the certificates of coverage to the commission upon request and to any person entitled to them by law; and

(7) use the language contained in the following Figure 1 for bid specifications and contracts, without any additional words or changes, except those required to

accommodate the specific document in which they are contained or to impose stricter standards of documentation:
Figure 1: 28 TAC §110.110(c)(7)

(d) A contractor shall:

(1) provide coverage for its employees providing services on a project, for the duration of the project based on proper reporting of classification codes and payroll amounts and filing of any coverage agreements;

(2) provide a certificate of coverage showing workers' compensation coverage to the governmental entity prior to beginning work on the project;

(3) provide the governmental entity, prior to the end of the coverage period, a new certificate of coverage showing extension of coverage, if the coverage period shown on the contractor's current certificate of coverage ends during the duration of the project;

(4) obtain from each person providing services on a project, and provide to the governmental entity:

(A) a certificate of coverage, prior to that person beginning work on the project, so the governmental entity will have on file certificates of coverage showing coverage for all persons providing services on the project; and

(B) no later than seven days after receipt by the contractor, a new certificate of coverage showing extension of coverage, if the coverage period shown on the current certificate of coverage ends during the duration of the project;

(5) retain all required certificates of coverage on file for the duration of the project and for one year thereafter;

(6) notify the governmental entity in writing by certified mail or personal delivery, within 10 days after the contractor knew or should have known, of any change that materially affects the provision of coverage of any person providing services on the project;

(7) post a notice on each project site informing all persons providing services on the project that they are required to be covered, and stating how a person may verify current coverage and report failure to provide coverage. This notice does not satisfy other posting requirements imposed by the Act or other commission rules. This notice must be printed with a title in at least 30 point bold type and text in at least 19 point normal type, and shall be in both English and Spanish and any other language common to the worker population. The text for the notices shall be the following text provided by the commission on the sample notice, without any additional words or changes:
Figure 2: 28 TAC §110.110(d)(7)

(8) contractually require each person with whom it contracts to provide services on a project, to:

(A) provide coverage based on proper reporting of classification codes and payroll amounts and filing of any coverage agreements for all of its employees providing services on the project, for the duration of the project;

(B) provide a certificate of coverage to the contractor prior to that person beginning work on the project;

(C) include in all contracts to provide services on the project the language in subsection (e)(3) of this rule;

(D) provide the contractor, prior to the end of the coverage period, a new certificate of coverage showing extension of coverage, if the coverage period shown on the current certificate of coverage ends during the duration of the project;

(E) obtain from each other person with whom it contracts, and provide to the contractor:

(i) a certificate of coverage, prior to the other person beginning work on the project; and

(ii) prior to the end of the coverage period, a new certificate of coverage showing extension of the coverage period, if the coverage period shown on the current certificate of coverage ends during the duration of the project;

(F) retain all required certificates of coverage on file for the duration of the project and for one year thereafter;

(G) notify the governmental entity in writing by certified mail or personal delivery, within 10 days after the person knew or should have known, of any change that materially affects the provision of coverage of any person providing services on the project; and

(H) contractually require each other person with whom it contracts, to perform as required by subparagraphs (A)-(H) of this paragraph, with the certificate of coverage to be provided to the person for whom they are providing services.

(e) A person providing services on a project, other than a contractor, shall:

(1) provide coverage for its employees providing services on a project, for the duration of the project based on proper reporting of classification codes and payroll amounts and filing of any coverage agreements;

(2) provide a certificate of coverage as required by its contract to provide services on the project, prior to beginning work on the project;

(3) have the following language in its contract to provide services on the project: "By signing this contract or providing or causing to be provided a certificate of coverage, the person signing this contract is representing to the governmental entity that all employees of the person signing this contract who will provide services on the project will be covered by workers' compensation coverage for the duration of the project, that the coverage will be based on proper reporting of classification codes and payroll amounts, and that all coverage agreements will be filed with the appropriate insurance carrier or, in the case of a self-insured, with the commission's Division of Self-Insurance Regulation. Providing false or misleading information may subject the contractor to administrative penalties, criminal penalties, civil penalties, or other civil actions."

(4) provide the person for whom it is providing services on the project, prior to the end of the coverage period shown on its current certificate of coverage, a new certificate showing extension of coverage, if the coverage period shown on the certificate of coverage ends during the duration of the project;

(5) obtain from each person providing services on a project under contract to it, and provide as required by its contract:

(A) a certificate of coverage, prior to the other person beginning work on the project; and

(B) prior to the end of the coverage period, a new certificate of coverage showing extension of the coverage period, if the coverage period shown on the current certificate of coverage ends during the duration of the project;

(6) retain all required certificates of coverage on file for the duration of the project and for one year thereafter;

(7) notify the governmental entity in writing by certified mail or personal delivery, of any change that materially affects the provision of coverage of any person providing services on the project and send the notice within 10 days after the person knew or should have known of the change; and

(8) contractually require each other person with whom it contracts to:

(A) provide coverage based on proper reporting of classification codes and payroll amounts and filing of any coverage agreements for all of its employees providing services on the project, for the duration of the project;

(B) provide a certificate of coverage to it prior to that other person beginning work on the project;

(C) include in all contracts to provide services on the project the language in paragraph (3) of this subsection;

(D) provide, prior to the end of the coverage period, a new certificate of coverage showing extension of the coverage period, if the coverage period shown on the current certificate of coverage ends during the duration of the project;

(E) obtain from each other person under contract to it to provide services on the project, and provide as required by its contract:

(i) a certificate of coverage, prior to the other person beginning work on the project; and

(ii) prior to the end of the coverage period, a new certificate of coverage showing extension of the coverage period, if the coverage period shown on the current certificate of coverage ends during the duration of the contract;

(F) retain all required certificates of coverage on file for the duration of the project and for one year thereafter;

(G) notify the governmental entity in writing by certified mail or personal delivery, within 10 days after the person knew or should have known, of any change that materially affects the provision of coverage of any person providing services on the project; and

(H) contractually require each person with whom it contracts, to perform as required by this subparagraph and subparagraphs (A)-(G) of this paragraph, with the certificate of coverage to be provided to the person for whom they are providing services.

(f) If any provision of this rule or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this rule that can be given effect without the invalid provision or application, and to this end the provisions of this rule are declared to be severable.

(g) This rule is applicable for building or construction contracts advertised for bid by a governmental entity on or after September 1, 1994. This rule is also applicable for those building or construction contracts entered into on or after September 1, 1994 which are not required by law to be advertised for bid.

(h) The coverage requirement in this rule does not apply to motor carriers who are required pursuant to Texas Civil Statutes, Article 6675c to register with the Texas Department of Transportation and who provide accidental insurance coverage pursuant to Texas Civil Statutes, Article 6675c, §4(j).

(i) The coverage requirement in this rule does not apply to sole proprietors, partners, and corporate officers who meet the requirements of the Act, §406.097(c) and who are explicitly excluded from coverage in accordance with the Act, §406.097(a) (as added by House Bill 1089, 74th Legislature, 1995, §1.20). This subsection applies only to sole proprietors, partners, and corporate executive officers who are excluded from coverage in an insurance policy or certificate of authority to self-insure that is delivered, issued for delivery, or renewed on or after January 1, 1996.

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 October 13, 1995.

TRD-9513249 Susan Cory
General Counsel
Texas Workers' Compensation Commission

Effective date: November 6, 1995

Proposal publication date: August 18, 1995

For further information, please call: (512) 440-3700

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Chapter 114. Self-Insurance

• 28 TAC §114.2

The Texas Workers' Compensation Commission adopts an amendment to §114. 2, with changes to the proposed text as published in the August 18, 1995 issue of the *Texas Register* (20 TexReg 6297). Changes made to the proposed rule are in response to public comments received and are described in the summary of public comments and responses section of this preamble. Other changes were made for consistency and clarification.

The amendment adds a provision contained in recently enacted House Bill 1089, 74th Legislature, 1995. House Bill 1089 added new §406.097 to the Texas Labor Code, which provides that a sole proprietor, partner, or corporate executive officer of a business entity which elects to provide workers' compensation coverage, is entitled to benefits under that coverage as an employee unless the sole proprietor, partner, or corporate executive officer is specifically excluded from coverage through an endorsement to the policy or certificate of authority to self-insure. The amendment to §114.2 clarifies that this change is applicable to a certificate of authority to self-insure.

Changes in the proposed text are found in subsection (b)(1). When the Texas Labor Code was amended in the 74th Legislature, two different sections were added under the same number (§406.097). One provision was added by House Bill 1089 and the other was added by Senate Bill 413. The reference to Texas Labor Code §406.097 in this rule has been revised to clarify that it refers to Texas Labor Code §406.097 added by House Bill 1089. In addition, a reference to the applicability of the new section of the Labor Code was added to clarify that the exemption applies to certificates of authority to self-insure issued after January 1, 1996.

One comment regarding the proposed amendment to §114.2 was received from Hammerman & Gainer. This comment was neither in support nor opposition to the amendment, but asked for a clarification.

Summaries of the comments and commission responses are as follows:

COMMENT: The commenter pointed out that the reference to the Texas Labor Code, §406.097 in subsection (b)(1) of the rule is unclear because the legislature assigned that section number to two different provisions (House Bill 1089 and Senate Bill 413) and suggested clarifying the reference.

RESPONSE: The commission agrees. The reference is to the amendment to the Texas Labor Code in House Bill 1089, §1.20 which adds §406.097. The last sentence of subsection (b)(1) has been revised by replacing the words "Certain individuals" with the words "a sole proprietor, partner, or corporate executive officer of a business" which is the wording used in §1.20 of House Bill 1089, and by clarifying the reference to §406.097 used in the rule.

The amendment is adopted pursuant to the Texas Labor Code, §402.061 which requires the commission to adopt rules necessary for the implementation and enforcement of the Texas Workers Compensation Act; and §406.097, as added by House Bill 1089, 74th Legislature, 1995, which provides for workers' compensation coverage for executive employees of certain business entities.

§114.2. Definitions.

(a) The following words and terms are defined in the Texas Labor Code, §407.001, and are so used in this chapter.

(1) Association;

(2) Director;

(3) Impaired employer;

(4) Incurred liabilities for compensation; and

(5) Qualified claims servicing contractor.

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

(1) Certificate–A Certificate of authority to self-insure issued by the Commissioners under the Texas Labor Code, §407.042 which entitles an employer to be a self-insurer and is valid only for the persons, firms, or corporations named on the certificate. For a certificate of authority to self-insure delivered, issued for delivery, or renewed on or after January 1, 1996, a sole proprietor, partner, or corporate executive officer of a business may be specifically excluded from coverage pursuant to the Texas Labor Code, §406.097, as added by House Bill 1089, 74th Legislature, 1995, §1.20, (Texas Workers' Compensation Act, 74th Legislature, Regular Session, Chapter 980, §120, 1995 Vernon's Texas Session Law Service, 4912, 4917).

(2) Claims Contractor–Qualified claims servicing contractor.

(3) Division–The division of self-insurance of the Texas Workers' Compensation Commission.

(4) Excess Insurance–Insurance that an employer purchases to pay claim costs that exceed the employer's retention amount up to a specified limit.

(5) Retention–All payments made for claims filed under the Workers' Compensation Act including: indemnity benefits, medical payments, death benefits and all other related claims expenses not otherwise covered by insurance.

(6) Self-insurer–An employer who has been granted and holds a valid certificate.

(7) Trust Fund–The Texas certified self-insurer guaranty trust fund created by the fee assessed by the Association for emergency payment of the compensation liabilities of an impaired employer.

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 October 13, 1995.

TRD-9513250 Susan Cory
General Counsel
Texas Workers' Compensation Commission

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For further information, please call: (512) 440-3700

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Chapter 166. Accident Prevention Services

The Texas Workers' Compensation Commission adopts new §166.8, concerning qualifications for field safety representatives (FSR) providing accident prevention services, with changes to the proposed text as published in the July 18, 1995, issue of the *Texas Register* (20 TexReg 5141). The Commission also simultaneously adopts the repeal of existing §166.109, without changes to the proposed text as published in the April 21, 1995, issue of the *Texas Register* (20 TexReg 2992)).

Changes made to the proposed rule are in response to public comment received, and are described in the summary of comments and responses portion of this preamble

The new rule implements the Texas Labor Code, §411.062, as amended by House Bill 1089, the 74th Texas Legislature, 1995, which mandates that the commission establish qualifications for field safety representatives which include education and experience requirements.

This new rule provides a "grandfathering" provision which allows those currently acting as field safety representatives to continue; maintains designation or certification as a Certified Safety Professional or a Certified Industrial Hygienist as qualification for service as a FSR; maintains ten years active practice in the occupational health and safety profession as a FSR qualification; adds current designation as a TWCC Approved Professional Source as a FSR qualification; provides FSR qualification for an individual with six years experience in occupational health and safety within the last ten years (the recent experience is viewed as equivalent to ten years experience over a longer time span); establishes FSR qualification for a person with at least two years experience in the occupational health and safety profession, or completion of an insurance company internship program in conjunction with academic training and certain professional certifications, and provides FSR qualification for a person with a bachelor's degree or higher in occupational health and safety plus either one year active practice in the occupational health and safety profession or completion of a one-year company internship program. The new rule also defines "active practice in the occupational health and safety profession", and sets out criteria for intern programs by which insurance companies can train and provide experience to new participants in the FSR field. The rule requires the Workers' Health and Safety Division to evaluate any individual acting as a FSR for an insurance company when requested to do so.

Changes in the proposed text are found in subsections (a)(1)(B), (c), (e)(4) , and (e)(5). Subsection (a)(1)(B) has been changed by replacing the word "any" with the word "applicable" to clarify the nature of continuing education requirements. Proof of active practice in the occupational health and safety profession is not required by subsection (c) to be retained by the insurance company in the situation where the FSR's qualifications have already been evaluated and accepted by the Commission. Subsection (e)(4) has been changed to broaden the policyholders that may be serviced by an intern Policyholders with manual premiums less than §100,000, with loss ratios in the previous policy year of less than 70%, and who are not active in the Extra-Hazardous Employer Program may be serviced by interns. Subsection (e)(5) has been changed to eliminate notice to the division of interns in an insurance company intern program and to simply require that such information be kept in intern training records

The new rule provides insurance companies with better criteria to make FSR hiring decisions and obtain qualified individuals for their accident prevention programs. Employers and employees will benefit from better qualified individuals serving the policyholders and workers of Texas; which should result in fewer injuries and deaths and lower costs to the employer and the system as a whole. By increasing the experience requirements and providing additional educational requirements that are more relevant to FSR's, the result should be a higher quality of accident prevention services to policyholders, a safer workplace for employees, and decreased costs to the system.

Public comments were received during two commant periods. In response to a previous proposed version of new §166 8 (published in the April 21, 1995 issue of the *Texas Register* (20 TexReg 2992) and withdrawn in the July 18, 1995 issue (20 TexReg 5231)) public comments were received and responses to those comments are included here with the responses to the proposed version of new §166.8 published in the July 18, 1995 *Texas Register* (20 TexReg 5141). In addition, responses to comments received on this rule during public hearings held on June 14, 1995 and September 28, 1995 are included here

Written comments were received on the pro posed rule published in the April 21, 1995 issue of the *Texas Register* (20 TexReg 2992) from the following individuals and organizations: Austin Community College; CNA Insurance Companies, the American Insurance Association (AIA); ITT Hartford, Liberty Mutual Insurance Company; the Travelers Companies; and CIGNA Property & Casualty.

Representatives from the following organizations gave testimony on the initial proposed draft at the public hearing held on June 14, 1995: CIGNA Property & Casualty, Liberty Mutual Insurance Company, State Farm Insurance; Chubb & Sons, Inc.; American Insurance Association (AIA); and the Alliance of American Insurers.

Written comments were received on the proposed rule published in the July 18, 1995 issue of the *Texas Register* (20 TexReg 5141) from the following organizations: American Insurance Association (AIA); and Texas Workers' Compensation Insurance Fund

At the public hearing held on September 28, 1995, representatives from the following organizations gave testimony on the proposed rule published in the July 18, 1995 issue of the *Texas Register* (20 TexReg 5141): Travelers Insurance, ITT Hartford, Lumberman's Underwriting Alliance, Employers General Insurance Group, the American Insurance As-

sociation, Liberty Mutual, and a field safety representative, representing himself.

All commenters expressed disagreement with portions of the rule, and some commenters were in favor of retaining the current rules, but generally commenters did not oppose the majority of the proposed qualifications for field safety representatives.

Summaries of the comments and commission responses are as follows:

The following general comments were received regarding §166.8

COMMENT: Commenters felt the rule would create a large demand for qualified FSRs, would shrink the pool of available candidates, would be costly, would raise salary levels, could result in decreased service, and would ultimately increase premiums. One commenter stated that Texas requirements were the most stringent in the nation. That commenter, however, also cited numerous examples of success in injury reduction in Texas because of Workers' Compensation Act requirements. The commenters recommended the Commission retain the rules as they are currently written.

RESPONSE: The commission agrees in part. House Bill 1089 deleted qualifications for Field Safety Representatives (FSR) from the Labor Code and required the commission to establish those qualifications by rule. House Bill 1089 also required that the commission include both education and experience requirements in those qualifications. This requirement cannot be met within the existing rule. Written and verbal comments received from some insurers and insurance associations indicate that many insurance companies presently use training programs similar to the intern program and still others, which are usually the smaller insurers, rely upon hiring only experienced loss control personnel and the rule would have no effect on them. The rule is expected to result in highly qualified FSRs serving the policyholders and workers of Texas, which should result in fewer injuries and deaths and should lower costs to the employers in the system. These benefits outweigh any increased salary levels which may result. Savings resulting from decreased injuries and deaths will also be reflected in premiums.

The following comments were received on §166.8(a)(1)(B) regarding FSR continuing education requirements

COMMENT: Commenters stated that certain certifications accepted by the commission as qualification as FSR already have continuing education requirements. One commenter was also concerned that the rule would give the commission carte blanche to adopt continuing education requirements. Another stated that a rule which does not explain its content, or leaves the content to be "filled-in" at a future date is inadvisable. Commenters recommended deleting continuing education requirements.

RESPONSE: The commission agrees in part. Many of the qualification criteria in the rule include continuing education requirements already and the commission does not see a need to impose additional continuing education requirements at this time. As a result, the rule contains no such requirement. However, the commission does require that FSRs comply with all continuing education requisites for maintaining professional certifications which qualify them as a FSR under this rule. The statement in the rule concerning continuing education requirements, which could be adopted by the commission, is taken from House Bill 1089, Section 1.55. The commission agrees, however, that House Bill 1089 refers to "applicable" continuing education and the rule states "any" continuing education, which may be overly broad. Subsection (a)(1)(B) has been changed to read "complies with applicable continuing education requirements adopted by the Texas Workers' Compensation Commission." General Counsel for the Commission has determined that if continuing education requirements are formulated, the amendments to the Texas Labor Code require that they be adopted in rule form.

The following comments were received on §166.8(a)(7) regarding the requirement for two years active practice in the occupational health and safety profession

COMMENT: Commenters disagreed with the need for the two-year experience requirement. Some commenters felt the requirement would preclude insurance companies from hiring "outstanding" and "top talent" graduates from Texas universities. Some commenters also felt the experience requirement would make hiring or training FSRs cumbersome and costly. Another commenter believed the "Texas only" requirements will be cost prohibitive. One commenter felt that qualified FSR's would become scarce and youthful candidates would become discouraged. Another commenter stated that hiring loss control people from industry does not generally give insurance companies loss control personnel with consulting skills, knowledge of a broad range of industries, various loss control disciplines or types of insurance coverage. The commenters suggested that the current rules be retained.

RESPONSE: The commission disagrees. The commission is required by House Bill 1089 to establish experience requirements for FSR qualification. The two year requirement is a significantly lesser amount of experience than many professional certifications, such as Certified Safety Professional, Certified Industrial Hygienist or Occupational Health and Safety Technician, require. Since 1991, commission representatives have received numerous complaints from insurance companies that they can hire graduates just out of college, with no experience, but could not hire experienced safety specialists, because they do not have ten years of experience. The rule is responsive to their concern by accepting six years experience within the last ten as qualification and by affording the insurance companies the option to establish intern programs to train new graduates. The intern programs also provide the insurance companies a means to retain the top talent graduating from Texas universities.

The following comment was received on §166.8(a)(7)(A) regarding types of degrees acceptable for FSR qualification and training programs

COMMENT: A commenter requested that insurance companies be allowed to maintain their own training programs. Other commenters recommended that they be able to train graduates with degrees in fields other than science or engineering, such as business administration.

RESPONSE: The commission disagrees. Section 166.9, adopted on July 6, 1995, grants only accredited educational institutions the authority to conduct occupational health and safety education programs to qualify individuals as FSRs. The exception to this restriction is in the case of commission certified accident prevention services training programs which shall remain valid until the certificate of approval expires. Additionally, restricting acceptable degrees to those in science and engineering is consistent with legislative intent as stated in Senate Bill 1, which established the Workers' Compensation Commission and the original FSR qualifications.

The following comments were received on §166.8(a)(7)(B) regarding completion of an occupational health and safety education program for FSR qualification.

COMMENT: A commenter recommended continuance of any and all current TWCC approved certified accident prevention services training programs for the duration of the certificate (five years).

RESPONSE: The commission agrees. The proposed rule is not meant to invalidate currently certified accident prevention services training programs. Those programs shall retain valid certification until their certificates of approval expire, and may conduct training as specified in their original approval. An organization with a certified accident prevention services training program which wishes to use that approved program as part of an intern program, however, must apply the intern program requirements of proposed Rule 166.8.

The following comments were received on §166.8(a)(7)(C) regarding certifications by professional safety, health or hygiene organizations as a means of FSR qualification..

COMMENT: Commenters suggested that Associate Safety Professional (ASP), Occupational Health and Safety Technician (OHST) and the Associate in Loss Control Management (ALCM) be approved certifications for qualification as a Field Safety Representative.

RESPONSE: The commission agrees in part. The process exists in subsection (a)(7)(C) by which a certifying organization may request approval by the commission's Workers' Health and Safety Division for FSR qualification. The Board of Certified Safety Professionals (BCSP) has requested and the Division has approved the OHST as a qualification for FSR. No request has been made to the division to establish the ASP certification as a means of FSR qualification. The ALCM has been a certification which the commission accepts as qualification to be a FSR for many years and will continue to be so.

The following comments were received on §166.8(b) regarding the definition of active practice in the occupational health and safety profession

COMMENT: A commenter recommended that the definition of active practice be amended to specify that the individual may gain required, active experience through developing health and safety programs for all lines of insurance.

RESPONSE: The commission disagrees that an amendment is necessary. The rule does not restrict the active practice in the occupational health and safety profession to the workers' compensation insurance arena.

The following comments were received on §166.8(c) regarding proof of FSR qualification

COMMENT: A commenter objected to the requirement that insurance companies retain proof of FSR qualification by active practice, stating that it placed an unnecessary burden on insurers because it prescribes a form the insurer would have to maintain.

RESPONSE: The commission agrees. In the case of FSR qualification based on active practice, the commission maintains a data base of all FSRs whose qualifications have been previously evaluated, so there is no need for an insurance company to retain the same information. If, however, the FSR has never had an evaluation of qualifications performed by the commission, the insurance company must provide proof of qualification by experience on the prescribed form. Proof of FSR qualification based on current certification must remain as stated in the rule, because there are ongoing requirements for maintaining certification. The commission has changed subsection (c) to read "Proof of active practice in the occupational health and safety profession shall be retained by the insurance company on a form prescribed by the commission, except when the insurance company has verified with the commission that the field safety representative's qualifications have already been evaluated by the commission and were found to meet established requirements. Proof of current certification being used as a means of qualification shall be retained by the insurance company. Such proof shall be presented to inspectors at the time of inspection."

The following comments were received on §166.8(e) regarding an insurance company intern program.

COMMENT: Commenters stated that the rule is unnecessary, and an intern program should not be addressed and the rule should not tell insurers how to train interns, but should allow individuals, not otherwise qualified, to serve as FSRs if those individuals work under the supervision of a qualified FSR. Some commenters recommended the intern program be deleted from the rule. Another recommended the program be reduced from 24 to six months.

RESPONSE: The commission disagrees. The necessity to include experience requirements in FSR qualification generates concern about how inexperienced individuals may enter the FSR field in Texas. Allowing an intern program is one means the commission feels should be available. Intern programs are not mandatory and need not be used unless an insurance company chooses to do so. If the choice is made to have an intern program, the commission feels the stipulations in the rule are minimum reasonable requirements.

The following comments were received on §166 8(e)(2) regarding a six month period of continuous supervision in the intern program.

COMMENT. Commenters expressed concerned about the length of time an intern must be under continuous supervision in the intern program. Some commenters suggested a time period of three months for everyone, while another recommended three months for interns with occupational health and safety degrees. One commenter stated the supervisory FSR should be involved in all pre-action and post-action phases of a contact, but not accompany the intern. Another commenter felt that the training objective can be met without requiring two individuals to perform on-site visits and stated that time would also be lost since the trainee's mentor must review all documentation. The commenter further felt that it would be to the carrier's detriment for customer relations and safety reasons to require a trainee to service large, complex accounts. A commenter recommended that the six-month period apply only to interns with a degree in occupational health and safety and consist of three months of instruction and three months of accompanied field visits. Another commenter recommended the intern program only require that an intern be accompanied periodically and that the manager be allowed to sign off that an intern has reached a certain skill level and can do a particular level of work without further supervision. One commenter recommended this subparagraph be deleted.

RESPONSE: The commission disagrees The continuous supervision period was reduced from twelve to six months as a result of comments received on the originally proposed rule. Further reduction of this time frame would defeat the intent of the legislature in House Bill 1089, which created the experience requirement. The concern about detriment to customer relations and safety appear to be unfounded. The rule requires that a trainee accompany a qualified FSR on visits and customers would not only benefit from two sets of eyes and ideas, but would also observe the insurers intent to provide highly trained individuals to service their accounts. Additionally, the rule does not specify a curriculum for the six-month period and it is to be expected that this period would be used for both instructional and field training, as well as corporate orientation and office support functions such as gathering loss data for analysis, developing training programs, reviewing account files, developing action plans, conducting field visits in lines other than workers' compensation, if appropriate, etc. The six month requirement was supported by one of the commenters.

The following comments were received on §166 8(e)(3) regarding the requirement to place a recommendation to continue in the intern program after the initial six-month phase in the interns training record.

COMMENT: The commenter felt the requirement that a qualified FSR place a recommendation to continue in the intern program in the intern's training file gives the commission the authority to determine whether the individual has successfully completed the training program and to examine the insurance company's personnel files. The commenter believes that both these functions are inappropriate for the commission. The commenter recommends deleting this requirement.

RESPONSE. The commission disagrees. The requirement for a recommendation exists to ensure responsibility for assessing and confirming that an intern has met mandatory program requirements. It is neither inappropriate for the commission to expect an insurance company to accept this responsibility, nor is it inappropriate for commission inspectors to expect to see this acceptance during inspections. The requirement refers only to a training record. The commission's accident prevention services inspectors have no need to review an insurance company employee's personnel record. Additionally, Rule 166.6(b)(1) (E) states, concerning information to be made available at the inspection, "if continuing education or training are required by the commission, a record of any training received by the field safety representatives since the previous inspection." No reference exists concerning other personnel records.

The following comments were received on §166.8(e)(4) regarding the second phase of supervision following the period of continuous supervision in the intern program.

COMMENT: A commenter recommended that the eighteen month period of reduced supervision in an insurance company intern program be decreased to six months. Another commenter recommended reduction to six months for interns without degrees in occupational health and safety and three months for those with such degrees.

RESPONSE: The commission disagrees. The intern program was made available to allow insurance companies a means of gaining two years experience for prospective FSRs. The total time for the program must equal two years Additionally, the commission has already acknowledged the value of a degree in occupational health and safety by giving interns with that degree credit for one year experience and requiring only six months in the second phase of the intern program. Additional credit is unwarranted.

COMMENT: Commenters recommended that references to loss ratios in subsection (e)(4) be deleted, or, in the alternative, the rule adopt the loss ratios and premium levels established in Rule 166.4. The commenters felt that the rule presumes that interns, even those with occupational health and safety degrees, are incapable of providing anything but the most remedial of services to the least hazardous employers. Another commenter felt that smaller accounts are not necessarily the best learning tools. An additional commenter suggested that clients with little or no loss trends have effective loss reduction efforts and working with them would have minimal advantage and recommended leaving the loss ratio criteria up to the insurance company. Another commenter recommended that the intern be allowed to visit accounts over $50,000 alone, if the accounts are the overall responsibility of a qualified FSR. One commenter recommended reduction of the

first phase from six to three months and a corresponding increase in the second phase to 21 months, with the intern allowed to service accounts with manual premiums below $200,000, loss ratios less than 75% and who are not active in the extra hazardous program. In this recommendation, the intern must be accompanied (by whom is not addressed) at least once monthly for the first three months of the 21-month phase and quarterly thereafter. One commenter agreed with the 18-month phase with quarterly supervision.

RESPONSE: The commission disagrees. The premiums and loss ratios established in the rule were designed to allow trainees to service not only smaller accounts and those with lower loss ratios, but also somewhat more complex accounts (up to $50,000 in premium) and those which have experienced significant losses (70%), but have not yet reached such a alarming loss level as to meet requirements for mandatory service or on-site visits. The commission does not consider a 70% loss ratio as indicating "little or no trends". Allowing trainees to service policyholders with larger premiums or proven difficulties with injuries and losses might prove a detriment to customer relations and safety matters.

The following comments were received on §166.8(e)(4)(B) regarding review, approval and signing of all of an intern's workers' compensation documentation by a qualified FSR

COMMENT: One commenter stated that a qualified FSR should be required to review the documentation of an intern, but should not be required to approve it. The commenter felt that the FSR could not approve the intern's work unless the FSR had accompanied the intern on the visit. One commenter recommended subsection (e)(4)(B) be deleted and another felt the need for documentation be reduced to the first six month phase Another commenter disagreed with the requirement that the supervising FSR sign all intern work during the second phase of the intern program. The commenter felt the requirement would degrade the enabling/empowering process and confidence building in the intern. The commenter recommended that interns be allowed to sign their own work

RESPONSE: The commission agrees in part. Though the qualified FSR may not accompany the intern on a visit, the documentation of that visit will certainly allow that FSR to determine whether proper pre-service research was accomplished, whether the company's inspection methodology was used, whether activities and, possibly, recommendations were relevant to the type of business serviced and whether appropriate follow-up actions and correspondence were provided. Rule 166.4(c)(5) requires "written records, reports and evidence of all accident prevention services provided to each policyholder" be maintained. Thorough review of intern activities and documentation will allow the qualified FSR to determine if the intern's activities were appropriate and to approve of the documentation.

The commission disagrees with the commenter's interpretation of the rule. It was not the intention of subsection (e)(4)(B) to prevent interns from signing their work. The requirement is intended to record the documentation review and approval processes, and, as such, is appropriate to be maintained in the loss control files the intern has worked.

COMMENT: A commenter felt that the requirement that a qualified FSR review all workers' compensation activity produced by an intern would provide difficulty for insurance companies which provide other lines of insurance. The commenter stated that extracting workers' compensation information from a multi-line report would be impossible for the supervising FSR. The commenter recommended this requirement in subsection (e)(4)(B) be deleted.

RESPONSE: The commission disagrees. Commission inspectors are continuously confronted with loss control files which contain loss control activities on numerous lines of insurance. Finding those activities which deal with or could affect the health or safety of policyholders' workers is no more difficult than reviewing the file. Most multi-line files encountered have very specific sections labeled for the different lines and allow suitable review of items which could affect workers' safety or health.

The following comments were received on §166.8(e)(5) regarding notification to the commission of names, qualifications and dates of completion of training of interns entering the program.

COMMENT. The commenter recommended that subsection (e)(5), be deleted because the rule already requires the insurer to retain records of FSR active practice and make them available to the commission at the time of inspection. Furthermore, the rule authorizes the commission to review FSR qualifications, if requested to do so by an insurance company. The commenter felt that because of information on FSR or trainee qualification is already available to the commission the notification is unnecessary.

RESPONSE: The commission agrees in part. The notification could be viewed as duplicative. However, due to the need for inspectors to know when an intern was active in each of the two phases of the intern program, the insurance company must keep that information in the intern's training file. The insurance company may also request the commission review an intern's entrance qualifications in the first six month phase to avoid the possibility of someone not meeting the other qualification requirements being entered into an intern program. The commission has amended subparagraph (e)(5) to read "shall include in the intern training records the name of each intern entered into the program, the qualifications of each intern and the date the intern completed the program."

• 28 TAC §166.8

The new rule is adopted under the Texas Labor Code, §402.061, Adoption of Rules, which requires the commission to adopt rules necessary for the implementation and enforcement of the Texas Workers Compensation Act; the Texas Labor Code, §411.062, Field Safety Representative Qualifications, as amended by House Bill 1089, 74th Texas Legislature, 1995, which mandates the commission to establish qualifications for field safety representatives; the Texas Labor Code, §411.063, Accident Prevention Personnel, which sets out the options for Accident Prevention Services personnel a carrier may utilize; and the Texas Labor Code, §411.067, Commission Personnel, which requires the commission to employ a sufficient number of safety inspectors to enforce the statutory provisions regarding accident prevention services, and requires that those safety inspectors have the qualifications required for a field safety representative as described in the Texas Labor Code, §411.062.

§166.8. Qualification of Field Safety Representatives.

(a) A field safety representative providing accident prevention services on behalf of an insurance company writing workers' compensation insurance in Texas shall meet one of the following qualification requirements:

(1) service as a field safety representative immediately before September 1, 1995, provided the person:

(A) continues to meet the qualification requirements for a field safety representative that were in effect before September 1, 1995; and

(B) complies with applicable continuing education requirements adopted by the Texas Workers' Compensation Commission;

(2) current certification by the Board of Certified Safety Professionals (BCSP) as a Certified Safety Professional (CSP);

(3) current certification by the American Board of Industrial Hygiene (ABIH) as a Certified Industrial Hygienist (CIH);

(4) a TWCC Approved Professional Source on the active professional source list;

(5) a total of ten years active practice in the occupational health and safety profession;

(6) six years active practice in the occupational health and safety profession within the past ten years;

(7) two years active practice in the occupational health and safety profession or satisfactory completion of an insurance company intern program, as specified in subsection (e) of this section, and:

(A) a bachelor's degree, or higher, in science or engineering from an accredited college or university, with a tran-

script provided by the college or university on file with the division;

(B) completion of an occupational health and safety education program which meets the requirements of §166.9 of this title (relating to Approval of Occupational Health and Safety Education Programs), with a transcript provided by the educational institution on file with the division;

(C) current certification, by a professional safety, health or hygiene organization, approved by the division; or

(D) current registration as a Professional Engineer;

(8) a bachelor's degree in occupational health and safety, and either one year active practice in the occupational health and safety profession or satisfactory completion of a one year insurance company intern program, as specified in subsection (e) of this section.

(b) Active practice in the occupational health and safety profession is defined as personal involvement in the development and implementation of health and safety programs where the involvement requires at least 70% of the individual's working time. Participation in an intern program may count as active practice towards the two-year requirement.

(c) Proof of active practice in the occupational health and safety profession shall be retained by the insurance company on a form prescribed by the commission, except when the insurance company has verified with the commission that the field safety representative's qualifications have already been evaluated by the commission and were found to meet established requirements. Proof of current certification being used as a means of qualification shall be retained by the insurance company. Such proof shall be presented to inspectors at the time of inspection.

(d) The division may waive the requirement of proof of qualification during an inspection if the field safety representative has previously met the requirements of subsection (a)(5), (6), (7)(A) and (B) and (8) of this section.

(e) An insurance company intern program:

(1) shall be 24 months in length or in the case of an intern with a degree in occupational health and safety, 12 months in length;

(2) shall include an initial phase of six months of supervision in which a qualified field safety representative must accompany the intern on all field visits;

(3) shall require satisfactory completion of the initial six-month phase and the placement of a recommendation in the intern's training file by a qualified field safety representative as to whether the intern should continue in the program;

(4) shall include an additional 18-month phase or in the case of an intern with a degree in occupational health and safety, an additional six-month phase, during which the intern shall be permitted to service policyholders with manual premiums less than $100,000; with loss ratios in the previous policy year of less than 70%; and who are not active in the Extra-Hazardous Employer Program, with the following requirements:

(A) shall require the intern to be accompanied on field visits at least once quarterly by a qualified field safety representative; and

(B) shall require all workers' compensation documentation produced by the intern to be reviewed, approved and signed by a qualified field safety representative.

(5) shall include in the intern training records the name of each intern entered into the program, the qualifications of each intern and the date the intern completes the program.

(f) Qualification as a field safety representative under this section does not qualify the individual as a professional source approved by the division of workers' health and safety to provide consultations for extra-hazardous employers.

(g) The division shall evaluate the qualifications of any individual acting as a field safety representative for an insurance company writing workers' compensation insurance in Texas when requested to do so by the insurance company.

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 October 13, 1995.

TRD-9513251 Susan Cory
General Counsel
Texas Workers' Compensation Commission

Effective date: November 6, 1995

Proposal publication date: August 18, 1995

For further information, please call: (512) 440-3700

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• 28 TAC §166.109

The repeal is adopted under the Texas Labor Code, §402.061, Adoption of Rules, which requires the commission to adopt rules necessary for the implementation and enforcement of the Texas Workers Compensation Act; the Texas Labor Code, §411.062, Field Safety Representative Qualifications, as amended by House Bill 1089, 74th Texas Legislature, 1995, which mandates the commission to establish qualifications for field safety representatives; the Texas Labor Code, §411.063, Accident Prevention Personnel, which sets out the options for Accident Prevention Services personnel a carrier may utilize; and the Texas Labor Code, §411.067, Commission Personnel, which requires the commission to employ a sufficient number of safety inspectors to enforce the statutory provisions regarding accident prevention services, and requires that those safety inspectors have the qualifications required for a field safety representative as described in the Texas Labor Code, §411.062.

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 October 13, 1995.

TRD-9513252 Susan Cory
General Counsel
Texas Workers' Compensation Commission

Effective date: November 6, 1995

Proposal publication date: April 21, 1995

For further information, please call: (512) 440-3700

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TITLE 30. ENVIRONMENTAL QUALITY

Part I. Texas Natural Resource Conservation Commission

Chapter 101. General Rules

• 30 TAC §101.29

The Texas Natural Resource Conservation Commission (TNRCC) adopts an amendment to §101.29, concerning Emissions Banking, with changes to the proposed text as published in the July 11, 1995, issue of the *Texas Register* (20 TexReg 5013).

The Emissions Banking rule, effective March 15, 1993, provides a mechanism for certifying and recording ownership of emission reduction credits (ERCs) which can be used for offsets and other regulatory requirements for volatile organic compounds (VOC) and nitrogen oxides (NO_x) emissions in the state's ozone nonattainment areas. Separate banks are maintained for ERCs of each pollutant in a given ozone nonattainment area. The adopted amendment adds flexibility to the administrative processing, use, and marketability of ERCs.

The amendments consist of three revisions to §101.29: deletion of the 3. 0% per year depreciation factor for banked ERCs; extension

of the life of banked ERCs from five years from the date of the emission reduction to ten years from the date of the emission reduction; and granting of discretionary authority to the executive director, with commission approval, to suspend the certification process if the New Source Review Division workload requires it.

A public hearing on this proposal was held August 10, 1995, at the TNRCC Austin offices. No oral comments were received at the public hearing, and written comments were received from nine commenters.

The following commenters supported the proposed amendment to delete the 3. 0% per year depreciation factor for banked ERCs: ARCO Chemical Company (ARCO); Baker and Botts, on behalf of the Houston-Galveston Air Emission Reduction Credit Organization; Environmental Defense Fund (EDF); Liddell, Sapp, Zivley, Hill and LaBoon (Liddell et al), on behalf of several commenters; Houston Lighting and Power (HL&P); Texas Chemical Council (TCC); and TU Services (TU).

The staff acknowledges support for the referenced amendment.

The United States Environmental Protection Agency (EPA) expressed disappointment in the proposed deletion of the 3.0% annual depreciation of ERCs, stating that this feature was originally included in the rule to track the state's required 3.0% annual reduction of ozone precursors to make progress toward attainment. The Galveston-Houston Association for Smog Prevention (GHASP) opposed removal of the 3.0% annual depreciation, stating that public health would be endangered.

The 3.0% annual depreciation of banked ERCs was originally included in the rule so that this optional program's requirements would resemble the annual rate-of-progress (ROP) reduction requirements under the State Implementation Plan (SIP). The banking rule was not relied upon to provide a source of reduction credits for the ROP SIP, so the removal of annual depreciation does not impact the SIP. On the other hand, an active bank can further the attainment goals of the SIP. Limited bank activity in the past makes a good case for increasing incentives for its use. Since a source with the potential to emit greater than 250 tons per year of a given pollutant can use its emissions reductions for internal netting purposes for an unlimited duration, there is little incentive to bank these reductions under the current depreciation system. With regard to public health impacts, the use of banked ERCs for offsets requires that an additional amount of credits (20% in the Beaumont/Port Arthur area, and 30% in the Houston/Galveston area) in excess of the proposed net emissions increase be applied. This is a substantial environmental and public health benefit.

The following commenters supported the proposed amendment to extend the life of banked ERCs from five years (former rule) to ten years from the date of the emission reduction: Baker and Botts, EDF, EPA Region 6 Office, Dallas, HL&P, TCC, and TU.

The staff acknowledges support for the referenced amendment.

GHASP opposed the extension of the life of ERCs to ten years, stating that emissions that should have been cleaned up would, under the proposed rule, be around for a longer time.

A successful emissions banking program capitalizes on the economic incentives created by the opportunity to buy and sell credits resulting from emissions reductions. These incentives must be weighed against disincentives which can stifle or halt market activity, particularly if alternatives exist outside the banking system. In developing the proposal to extend the life of banked ERCs to ten years, the TNRCC staff considered such factors as the business planning cycle for capital projects, which may require up to ten years for using reduction credits generated from previous reductions; existing new source review requirements which already allow unlimited life for certain reduction credits used for netting; and the incentives for further emission reductions created by increased flexibility.

The following commenters supported the proposed amendment to grant discretionary authority to the executive director to suspend the certification process if the New Source Review Division workload requires it: EPA, Baker and Botts, EDF, HL&P, TCC, and TU.

The staff acknowledges support for the referenced amendment. At its October 11, 1995 meeting to consider adoption of the Emissions Banking rule, the commission approved revisions to §101.29(e)(3) which require commission approval before the executive director suspends the certification process for ERCs.

The EDF recommended that the TNRCC adopt a two-part banking program that would: establish an emissions cap which decreases over time in order to meet air quality standards; and provide flexibility to industry in its decisions of where and how to reduce emissions, as outlined in the 1993 Marketable Permits Feasibility Study by the TNRCC.

The declining emissions cap, sometimes characterized as a "closed market" system, is probably most well known from its applications in the federal Title IV acid rain program for sulfur dioxide, and the RECLAIM program in the Los Angeles area for VOC and NO_x. These types of programs have advantages as well as drawbacks, and have not been actively considered as the primary models for the Texas market-based incentive program. There are other effective ways, however, to promote emissions trading while making improvements in air quality.

In its 1993 Marketable Permits Feasibility Study, the TNRCC discussed "Level III" programs involving emission credits, rather than ERCs, as the units of trade to meet emissions allocations. In this study, the TNRCC concluded that the need for and appropriateness of a Level III program had yet to be demonstrated, and that further experience with more basic types of programs was advisable before progressing to this level. With regard to providing industry with additional flexibility in meeting clean air goals, the TNRCC agrees with the commenter that increasing the options for industry to achieve required emissions reductions can simultaneously serve economic and environmental interests.

ARCO commented that, although no changes were proposed for §101.29(j)(3) (concerning depreciation of credits as the result of regulatory changes which would have required reductions from the source that created the original credit), it disagrees with the provisions of this rule paragraph. ARCO stated that, due to the significant capital expenditures required for its projects, it must rely on long-term life of ERCs created through these projects to apply to future expansions.

The protection of ERCs from future regulatory requirements, referred to as a "safe harbor" rule, has been advocated by some. As the emissions banking program has developed over time, a distinction has been made between the lifetimes of credits used as offsets, versus lifetimes of credits used to fulfill reasonably available control technology (RACT) and other regulatory requirements.

As adopted, §101.29(d) provides that an ERC withdrawn from the bank prior to the ten-year expiration and submitted with a complete permit application for use as an offset remains usable for the lifetime of the new facility or modification proposed for offset. This provision assures that a permitted new facility or modification is not jeopardized due to uncertainties in the longevity of offset credits. In contrast, any source affected by RACT rules, whether or not it is involved in trading, cannot be guaranteed a permanent "safe harbor" from future regulatory requirements, due to the evolving nature of RACT and other standards. Therefore, it is appropriate to retain the rule provision referenced by the commenter.

Liddell et al expressed support for unlimited ERC life, stating that with a finite credit life, market prices are driven down as the ERC approaches expiration, and unpredictable prices create an unstable market.

The emissions banking program strives to provide a favorable climate for market trading while keeping air quality goals foremost. To optimize market dynamics at the expense of air quality considerations could hinder the primary purpose of the emissions bank, which is to facilitate emissions reductions needed for attainment. Clearly, a balance between these competing needs is important. However, it would be difficult to incorporate an unlimited life for ERCs into the state's long-term air quality planning process, since such an approach could create uncertainties in the ozone control strategy and possibly delay attainment. The staff believes that extending the lifetime of ERCs from five years to ten years will help stimulate market activity, and will continue to look at ways to further encourage use of the emissions banking program.

The amendment is adopted under the Texas Health and Safety Code, the Texas Clean Air Act (TCAA), §382.017, which provides the TNRCC with the authority to adopt rules consistent with the policy and purposes of the TCAA.

§101.29. Emissions Banking.

(a)-(c) (No change.)

(d) Length of time available. A certified Emissions Reduction Credit (ERC), generated by a stationary source, is available for use during the ten-year period after the reduction was actually achieved. The banking applicant shall identify the date the reduction was actually achieved. The ERC certificate shall indicate the expiration date for the certified reduction. If an ERC is withdrawn from the bank prior to the ten-year expiration and submitted with a complete permit application for use as an offset, the ERC remains usable for the lifetime of the new facility or modification proposed for offset. The length of time a certified Mobile Source Emission Reduction Credit (MERC) is available for use is a function of the remaining vehicle miles of the mobile source, as determined in the Accelerated Vehicle Retirement program and Alternative Fuel Requirements for Motor Vehicle Fleets. The Bank expiration date and useful life of the credit is calculated from the date the MERCs are certified.

(e) ERC and MERC certification or registration.

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

(3) The executive director shall have the discretion, subject to commission approval, to temporarily suspend the certification of applications for emission reduction credits if necessary to efficiently manage workloads in accordance with agency priorities. Registered credits need not be certified in order to be transferable.

(4) Emission reduction amounts shall be determined and certified based on actual monitoring results, when available, or otherwise calculated using good engineering practices. The MERCs will be determined and certified using the methodologies provided in the Accelerated Vehicle Retirement program and Alternative Fuel Requirements for Motor Vehicle Fleets. An ERC certificate will be issued by the executive director which indicates the amount of certified emissions reduction which is available for use and the length of time the reduction is eligible for use. A MERC certificate will be issued by the executive director which indicates the total amount of certified emission reduction credits, the quantity available on an annual basis, and the date upon which the last annualized emission reduction expires.

(f)-(i) (No change.)

(j) Depreciation. The executive director is prohibited from depreciating any ERC or MERC, except under the following circumstances:

(1) the ERC or MERC certificate has expired; or

(2) regulatory changes were promulgated after the ERC or MERC certificate has been issued, which would have required reductions from the source that created the qualifying reduction. The credit shall be reduced by the amount affected by the regulatory change.

(k) The ERC and MERC use. The use of ERCs and MERCs will be accomplished either through transfers or withdrawals.

(1) (No change.)

(2) Withdrawal. Only the owner of the certificate is eligible to withdraw deposits from the bank. Once a certificate has been issued, the ERC or MERC shall be valid for the time period indicated on the certificate, unless the certificate has been depreciated in accordance with subsection (j) of this section. Certified emission reduction credits may be withdrawn from the Bank by the original applicant at any time prior to the expiration of the credit and may be held by the original applicant to be used for netting purposes. The ERCs held by the original applicant may not be used for offsets after the expiration of the ten-year period following the date of the emission reduction, but may continue to be used for netting to the extent allowed under applicable state and federal regulations. The ERCs will be depreciated under subsection (j)(2) of this section if applicable.

(l)-(m) (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 October 11, 1995.

TRD-9513220 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Effective date: November 6, 1995

Proposal publication date: July 11, 1995

For further information, please call: (512) 239-1966

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Chapter 116. Control of Air Pollution by Permits for New Construction or Modification

Subchapter B. New Source Review Permits

Nonattainment Review

• 30 TAC §116.150

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts an amendment to §116.150, concerning Nonattainment Review, without changes to the proposed text as published in the September 5, 1995, issue of the *Texas Register* (20 TexReg 6910). The nitrogen oxides (NO_x) requirements of §116.150 were originally adopted in response to a requirement by the United States Environmental Protection Agency (EPA) and the 1990 Federal Clean Air Act (FCAA) Amendments for states to implement nonattainment new source review (NNSR) for NO_x in the following ozone nonattainment areas: Dallas/Fort Worth (Collin, Dallas, Denton, and Tarrant counties), El Paso (El Paso County), Houston/Galveston (Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller counties), and Beaumont/Port Arthur (Hardin, Jefferson, and Orange counties).

The FCAA, §182(f) allows the following federally required NO_x measures to be waived if the state demonstrates through photochemical dispersion modeling that NO_x reductions do not contribute to ozone attainment: reasonably available control technology (RACT), NNSR, vehicle inspection and maintenance, and conformity. Section 182(f) exemptions for the Dallas/Fort Worth (DFW) and El Paso areas were approved by EPA on November 21, 1994. The TNRCC requested a temporary §182(f) exemption for RACT and transportation conformity for Houston/Galveston (HGA) and Beaumont/Port Arthur (BPA) to allow the results of further Urban Airshed Model (UAM) modeling to guide the NO_x reduction strategy. On April 12, 1995, the EPA approved a temporary §182(f) exemption, which expires on December 31, 1996, for all NO_x requirements in HGA and BPA.

Section 116.150 requires, among other things, that NO_x emission increases from any proposed major new or modified facility in an ozone nonattainment area be offset before commencing operation, using the appropriate offset ratio for the area. The major new or modified facility must also comply with the lowest achievable emission rate (LAER). A "netting" procedure, in which creditable emissions increases and decreases over a defined time period (contemporaneous period) are summed, may be required to be performed to determine if NNSR is necessary. If NNSR is not required, the source must still undergo state new source review.

The TNRCC adopts the repeal of NO_x NNSR in the DFW and El Paso ozone nonattainment areas, since UAM modeling predicts that these areas will attain the ozone standard without NO_x reductions. For the HGA and BPA areas, however, further UAM modeling, using data from the Coastal Oxidant Assessment for Southeast Texas (COAST) study, is needed to determine whether NO_x reductions are necessary for ozone attainment. For this reason, the TNRCC is adopting revisions that temporarily suspend, rather than repeal, certain NNSR requirements for the HGA and BPA areas.

Specifically, the NO_x NNSR requirements for LAER, compliance certifications, and alternative site analysis are suspended in HGA and BPA until January 1, 1998. In addition, this adoption temporarily raises the de minimis threshold level for proposed NO_x emissions

increases from 5 to 40 tons per year. Projects with NO_x increases less than 40 tons per year will not be required to submit netting calculations as part of the new source review process during the temporary suspension period. However, these cumulative increases must be considered for future projects requiring netting.

Existing Prevention of Significant Deterioration (PSD) rules already require projects with NO_x increases equal to or greater than 40 tons per year to undergo PSD review. However, for net NO_x emissions increases aggregated over the contemporaneous period which are greater than 25 tons per year (major modification level for sources in HGA or BPA), the offset requirements of §116.150 are in effect in accordance with the existing rule, but will be held in abeyance until January 1, 1998. During the abeyance period, there is no requirement to demonstrate that required offsets have been or will be secured.

The current definitions in §116.12, concerning Nonattainment Review Definitions, continue to apply. In particular, the definition of "major modification" remains at 25 tons per year in the HGA and BPA areas. The suspension of requirements of §116.150 is retroactive to April 12, 1995, the date the EPA approved the state's temporary §182(f) exemption. However, companies would still have the option to be evaluated under the previous rule requirements. The current NNSR requirements for volatile organic compounds (VOC) and other pollutants besides NO_x are not changed by this adopted revision.

Two potential scenarios may influence the agency's future actions with regard to NO_x NNSR for HGA and BPA. If the next round of UAM modeling using COAST data shows ozone benefits from NO_x reductions, the waived NNSR requirements would be reinstated on January 1, 1998. Offsets which had been held in abeyance during the temporary suspension period would then be required, and affected sources would have until January 1, 2000 to obtain them. Required offsets may be obtained through reductions either internal or external to the affected source. In concurrent actions, the TNRCC conducted a hearing on October 2, 1995 to receive public comments on submitting a petition to the EPA, requesting a one-year extension of the temporary §182(f) exemption for HGA and BPA to December 31, 1997. If the UAM results show no ozone benefits from NO_x reductions, then a permanent §182(f) exemption may be requested from EPA, and if granted, followed by the repeal of Chapter 117 NO_x RACT rules and Chapter 116 NO_x NNSR provisions in HGA and BPA. In this instance the NO_x offsets held in abeyance would not be required.

These changes have consequences for NO_x emission reduction credits (ERCs) deposited in the TNRCC emissions bank for the purpose of selling these credits for offsets. Removal of NO_x offset requirements could lead to unmarketable ERCs and, since certified ERCs are currently available for offset credits up to five years after the reduction was achieved, these ERCs could possibly expire before use. In order to help avoid this situation, separate rule amendments have been adopted on October 11, 1995 which revise the Emissions Banking rule (Chapter 101, General Rules, §101.29). These revisions, which apply both to NO_x and VOC ERCs, extend the life of certified credits from five to ten years, eliminate the 3.0% per year depreciation factor for ERCs deposited in the bank, and promote additional flexibility in the use of ERCs.

A public hearing on this proposal was held October 2, 1995 at the TNRCC Austin offices. In addition to the revisions to §116.150, the hearing concerned submittal of a petition to the EPA requesting a one-year extension of the temporary §182(f) exemption to December 31, 1997, and a two-year extension of the Chapter 117 NO_x RACT final compliance date to May 31, 1999, for the HGA and BPA areas. Because the adoption of amendments to §116.150 proceeded on an expedited schedule in order to make the ongoing new source review program consistent with the federal exemption from NO_x NNSR, this notice concerns only those amendments. It is anticipated that the other referenced NO_x items will be considered by the commission later in 1995. Regarding the proposed amendments to §116.150, no oral comments were received at the public hearing, and written comments were received from nine commenters.

Texas Utilities expressed support for the repeal of NO_x NNSR requirements in the DFW ozone nonattainment area. Houston Lighting & Power supported the suspension of NO_x NNSR requirements in the HGA area. Amoco Corporation, Dow Chemical Company, the EPA Region 6 office in Dallas, Mobil Oil Corporation, the Texas Chemical Council, and the Texas Mid-Continent Oil & Gas Association supported the repeal/suspension of NO_x NNSR in the state's ozone nonattainment areas.

The staff acknowledges support for the referenced amendments.

The Galveston-Houston Association for Smog Prevention stated its opposition to the current Chapter 116 proposal.

This adoption provides consistency between state NNSR requirements for NO_x and the corresponding federal requirements which EPA has exempted through the temporary §182(f) exemption for HGA and BPA. By requesting an extension of the §182(f) exemption to December, 1997, the TNRCC aims to base its ozone control strategy on the soundest possible technical foundation, for which the next round of UAM modeling, using COAST data, is essential. As a safeguard against possible excessive NO_x increases during the temporary suspension period, the rule amendments provide that offsets held in abeyance must be obtained if supported by future UAM modeling results.

The amendment is adopted under the Texas Health and Safety Code (Vernon 1992), the Texas Clean Air Act (TCAA), §382.017, which provides the TNRCC with the authority to adopt rules consistent with the policy and purposes of the TCAA.

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 October 12, 1995.

TRD-9513093 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Effective date: November 2, 1995

Proposal publication date: September 5, 1995

For further information, please call: (512) 239-1970

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Chapter 290. Water Hygiene

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts the repeal of 30 TAC §§290.47-290.50, amendments to §§290.38, 290. 39, 290.41-290.46, and new §290.47 and §290.121. Amendments to §§290.38, 290.39, 290.41-290.46 and new §290.47 and §290.121 are adopted with changes to the proposed text as published in the June 13, 1995, issue of the *Texas Register* (20 TexReg 4324). The repeals are adopted without changes and will not be republished.

The purpose of these adopted revisions is to clarify language and to meet the requirements of Senate Bills 812, 813, 815 (enacted during the 73rd Legislative Session) relating to plumbing requirements and the revised federal Surface Water Treatment Rule. This has been accomplished by referencing new state plumbing codes; establishing new exception criteria; strengthening the cross connection control, plumbing inspections, and lead ban provisions; incorporating definitions to define new terms; clarifying separation distances between water supply mains and other utilities; providing greater protection to well sites from potential sources of contamination; and incorporating various policies and rule interpretations which have been established since the last revision.

A public hearing on these proposed rules was conducted on August 8, 1995 in Austin, Texas. Oral and/or written testimony on these rules was provided by 81 commenters. Oral and/or written testimony in support of all or certain sections of the proposed rules was provided by the following groups: American Water Works Association-Texas Section, Association of Water Board Directors-Texas, Austin Lawn Sprinkler Association, Building Officials Association of Texas, Capital Area Builders' Association, City of Balmorhea, City of Marfa, The Town of Van Horn, Texas Ground Water Association, Texas Municipal League, Texas Municipal Utilities Association, Texas Rural Water Association, Texas Turf Irrigation Association, Texas Water Utilities Association, Walker County Rural Water Association, and other interested individuals.

Oral and/or written testimony in support of certain sections but which also questioned and/or opposed other sections of the proposed rules was also provided by the following groups: City of Houston, City of Odessa, City of Plainview, City of Wichita Falls, Turner Collie and Braden Inc., and other interested individuals.

Oral and/or written testimony which requested clarification, questioned certain sections, and/or opposed certain sections of the proposed rules was also provided by the following groups: Akin, Gump, Strauss, Hauer and Feld, L. L.P. on behalf of the Texas Manufactured Housing Association, Almeda Water Well Service, Alexander Engineering, Inc., American Backflow Prevention Association, ARCO Chemical Company, Associated Plumbing-Heating-Cooling Contractors of El Paso, Associated Plumbing-Heating-Cooling Contractors of Texas, Auto Brite Company, A.C.E. Companies, Billy Green Water Service, Brown and Gay Engineers, Central and South West Services, Inc., CH2M HILL, City of Amarillo, City of Austin, City of Coppell, City of Grand Prairie, City of Irving, Consulting Engineers Council of Texas, Dallas Water Utilities, Dixie Chemical Company, Inc., ECO Resources, Inc., Elite Plumbing Corporation, Exxon Company, U.S.A., E.L. Smith Plumbing, Inc., Fort Worth Water Department, Fountainhead Municipal Utility District, Hayter Engineering, Inc., Houston Lighting and Power, Independent Water Service Companies of Texas, Jack's Plumbing of Amarillo, Inc., Lockwood, Andrews and Newnam, Inc., LONZA, Inc., Monroe Plumbing Company, Muniservice Corporation, MTS Utilities Management, Neely Water Well Service, O'Day Drilling Company, Inc., Pickett Plumbing, Inc., Planners Inc., Plumbing Education Council of Texas, Raven Mechanical, Inc., San Antonio Water System, Scanlan and Buckle, P.C., Shell Western E. and P., Inc., Sun Belt Engineers, Inc., Texas State Board of Plumbing Examiners, Texas Water Well Drillers Advisory Council, TNT Associates, Trinity River Authority of Texas, Utility District Advisory Corporation, Vinson and Elkins, and Water, Environmental and Technical Services, Inc., and other interested individuals. The following paragraphs summarize the comments received.

Several commenters noted the effective date of July 1, 1995 for certain provisions of this rule was no longer applicable. Other commenters suggested an effective date of January 1, 1997. The commission has changed the effective date to January 1, 1996 in the following sections: §§290.42(d)(10)(c)(vi) and (D)(v), 290.44(h)(4), and 290.46(j).

One commenter questioned whether the commission had performed cost/benefit analyses for complying with certain sections of the rules. The commission responds that fiscal impacts on the commission, the regulated community, and consumers were considered and were identified in the preamble of the proposal as published in the June 13, 1995, issue of the *Texas Register* (20 TexReg 4324).

Another commenter asked how much time water suppliers, also referred to as water purveyors, would have to fully implement and comply with all the new provisions of this rule. The commission responds that the effective date of many of the new provisions is January 1, 1996. The commission further responds that areas of noncompliance will be identified in the routine sanitary surveys, and noncompliant water suppliers will be provided sufficient time to address the issue.

One commenter requested a definition be provided for the term "high health hazard". The commission notes this definition was already in §290.38, Definitions, of the proposed rule.

Several commenters requested further clarification on the definition of "high health hazard". The commission believes the proposed definition adequately addresses all situations that may result in high health hazards. Therefore, no changes are necessary.

Another commenter also suggested adding a definition for "low health hazard". The commission disagrees because this term is not referenced or used anywhere in the rules, and thus is unnecessary.

Another commenter suggested the definition for "intruder-resistant fence" be revised to require the barb wire to extend inward instead of outward. The commission contends that an outward extension makes the fence more resistant to climbers and has therefore made no changes to this definition.

Another commenter noted the definition for "Water Supply Protection Specialist" was vague and suggested it be divided into categories of specialists. The commission responds that it has adopted the definition as it is set forth by Senate Bill 813 (1993). The commission believes it was not the intent of this Legislation to have categories of specialists.

The commission has revised §290.39(a) to change references from Texas Water Commission to the Texas Natural Resource Conservation Commission. This section had not been proposed for changes, but has been revised to reflect the name changes.

One commenter expressed concern over §290.39(g) which requires that plans and specifications for distribution line extensions be certified by the registered professional engineer to be in compliance with §290.44. This commenter is concerned this provision will stifle variances even when they are cost-effective and/or will subject registered professional engineers to potential liability if a variance that is approved causes damage. The commission clarifies that the intention of the rule is to provide exceptions only for fully compliant installations and to reduce the duplication of effort in these instances. The commission believes no changes are necessary.

With regard to §290.39(d)(4), several commenters questioned the need for completing sanitary control easements when a plan for a well is submitted. The commenters note that in many cases the test hole does not yield an acceptable water supply and the location is not developed into a well. Thus, the easement is not necessary at this point. The commission agrees and has revised §290. 39(d)(4) to indicate that easements must be completed and provided to the commission prior to placing the well into service.

Several commenters noted a portion of the text in §290.41(c)(1)(A) had been omitted. The commission has corrected §290.41(c)(1)(A) to reflect the omitted text. The commission has also revised §290.41(c)(a)(A) to add the term "sanitary" to require that "sanitary" or storm sewers constructed of ductile iron or PVC pipe meet all the specified requirements.

In §290.41(c)(1)(A), relating to the location of ground water sources, one commenter noted that there are existing well sites in certain areas that are in close proximity to oil and gas transmission lines. This commenter suggested these facilities be grandfathered so that they may continue to be available for production. The commission responds that existing sanitary control easements will not have to be modified to include the new potential pollution hazards specified in §290.41(c)(1)(A)-(E), thus grandfathering facilities with existing easements.

One commenter suggested beginning with the words "all known" in §290.41(c) (1)(E) relating to abandoned or inoperative wells located within one quarter mile of a proposed wellsite which must be reported to the commission. The commission agrees and has made the suggested change. The commission also notes that incorporating the phrase "all known" does not relieve the water supplier of the responsibility for identifying abandoned or inoperative wells within one quarter mile of a proposed wellsite. The phrase "all known" means that the water supplier, to the best of his/her ability and judgement, has identified all abandoned or inoperative wells. The commission further notes that without the terms "all known" the provision implies that water suppliers must survey all individual homes and businesses within the one quarter mile area. Additionally, the commission notes that water suppliers do not have the authority to go on private property, therefore, would have to obtain permission prior to entering. This would create an undue burden on the water suppliers.

Another commenter noted that the surveying of potential contamination sources required in §290.41(c)(1)(E) would not result in any tangible benefits because the provision did not provide for action to reduce the potential risk of pollution. The commission agrees and has deleted §290.41(c) (1)(E)(i)-(iii). The commission further notes that this section did not provide for action to be taken because, in effect, it would have resulted in a mandatory wellhead protection program. The commission further notes that the wellhead protection is a federal voluntary program.

Another commenter suggested deleting §290.41(c)(1)(E)(i) because it was redundant and implied that all abandoned wells or inoperative wells are to be inventoried, regardless of the relationship to a proposed well. The commission also agrees with this comment and has deleted §290.41(c)(1)(E)(i)-(iii).

Another commenter suggested the term "abandoned well" as referenced in §290.41(c)(1)(E)(i) be defined. The commission has clarified in §290.41(c) (1)(E) that an abandoned well is unused well that has not been plugged. The commission has also deleted §290.41(c)(1)(E)(i)-(iii).

Another commenter suggested that §290.41(c)(1)(E) be revised to exclude the requirement to report low-pressure natural gas distribution lines. The commission agrees and has revised §290.41(c)(1)(A) and (E),

and 290.47, Appendix C, Sample Sanitary Control Easement, to add the term "liquid" in front of "petroleum and petrochemical production, storage and transmission facilities".

With regard to §290.41(c)(1)(F), one commenter requested clarification on whether existing sanitary control easements would have to be modified to include the new pollution hazards specified in §290.41(c)(1)(A)-(E). The commission clarifies that existing easements do not need to be modified. The commission believes no changes with regard to this comment are necessary.

Another commenter requested clarification on the intent of sanitary control easements. The commission clarifies that the purpose of the easement is to create a legal document which prohibits pollution hazards from being installed within regulated distances after the well is constructed. The commission has also revised §290.41(c)(1)(F) to clearly specify that for the purpose of this easement an improperly constructed water well is one that does not meet the surface and subsurface construction standards for public water supply wells.

Relating to §290.41(c)(3)(A) and the documentation required before final approval is granted for the use of a well, one commenter suggested an interim approval be allowed especially for emergency situations. This commenter noted that Texas Department of Health laboratory testing results, which is one of the required documents, can take up to six months which would then delay the use of the well for six months. The commission responds that interim approval can be granted during the plans review process based on private lab results and that final approval is contingent upon the Texas Department of Health's laboratory results.

With regard to §290.41(c)(3)(F)(i), one commenter questioned whether the commission is developing a policy specifying which well repair activities require three consecutive day bacteriological tests and which require a single test. This commenter also suggested that this policy be included in the rules. The commission responds that this policy is still under review, and if developed, would be included in the next rules revision. The commission further notes that such a policy would provide guidance for allowing variances to the existing §290.41(c)(3)(F)(i). This section requires that before placing a well in service, the water containing the disinfectant shall be flushed from the well and then samples of water shall be collected and submitted for microbiological analysis until three successive daily raw water samples are free of coliform organisms. The analysis of these samples must be conducted by a laboratory approved by the Texas Department of Health. The commission further notes that in the absence of such a policy, the testing of all wells must comply with §290.41(c)(3)(F)(i). Another commenter questioned the inclusion of §290.41(e)(1)(B) relating to the disposal of all liquid or solid wastes and §290.41(e)(1)(E) relating to the use of pesticides and herbicides. The commission responds that these sections are included in the rules to recognize essential public health practices. The commission further clarifies that these sections are intended to serve as information for the water suppliers and the public.

One commenter requested clarification on §290.41(e)(1)(C) relating to sewage disposal requirements and whether such requirements applied to both public and private facilities. The commission clarifies that this requirement applies to all types of facilities. The commission believes no changes to §290.41(e)(1)(C) are necessary because the rule language as proposed states, "shore installations, marinas, boats and all habitations," which refers to all types of facilities.

Another commenter requested clarification on the definition of "watershed" found in §290.41(e)(1)(E) relating to pesticides and herbicides being used within the watershed in accordance with the product label restrictions. The commission clarifies that the term "watershed" refers to the geographic area that contains a common outlet into which water sediments and dissolved materials drain. The commission believes no changes to §290.41(e)(1)(E) are necessary.

One commenter suggested §290.41(e)(2) be revised because it was too vague. The commission agrees and has revised §290.41(e)(2) to incorporate the following language provided by the commenter: "Intakes shall be located and constructed in a manner which will secure raw water with the best quality available from the source".

Another commenter requested clarification on the definitions of "immediate" and "excessive" found in §290.41(e)(2)(A) relating to intake locations. This commenter also questioned the purpose of this section. The commission responds that this section has been in the rules since 1967 and has proven to be effective in securing the best location for raw surface water intakes and in limiting the amount of silt and runoff from wooded sloughs or swamps in raw surface water. The commission further clarifies that intakes must not be directly located in areas subject to "excessive" siltation or large amounts of silt which may affect the water treatment system. The commission further clarifies that the phrase "immediate runoff from wooded sloughs or swamps" means that an intake location must not be right in a wooded slough or swamp or too close to them. The commission further notes that this provision has only been reorganized and renumbered. The commission believes no changes to §290. 41(e)(2)(A) are necessary.

One commenter noted a grammatical problem with §290.41(e)(2)(B). The commission agrees and has revised §290.41(e)(2)(B) to incorporate "which are accessible by the public" in order to clarify that raw water intakes shall not be located within 1,000 feet of boat launching ramps, marinas, docks or floating fishing piers which are accessible by the public.

Another commenter requested to be grandfathered from the provisions in §290.41(e)(2)(B) and §290.41(e)(2)(C). These sections require that raw surface water intakes not be located within 1,000 feet of public boat launching ramps, marinas, docks or floating fishing piers and shall include a restricted zone of 200 feet radius from the raw water intake to prevent public access. The commission responds that these provisions have been in the rules since 1967 and have been effective in securing the best raw surface water intake location. Additionally, the commission notes that affected water suppliers should already be in compliance. The commission further notes that these are not new provisions as they have only been reorganized and renumbered.

The commission believes no changes to §290.41(e)(2)(B) or (C) are necessary with regard to this particular comment.

The commission found an inaccurate reference in §290.42(b)(2)(A) which had not been proposed for changes. The commission has corrected the reference to read §290.42(d)(10) instead of §290.42(c)(10).

With regard to §290.42(d)(2)(E), another commenter noted that retrofitting of filter-to-waste connections to provide air gap connections is an expensive proposition. The commission clarifies that this provision has been in the rules since 1967 and has been effective in achieving safe drinking water treatment levels. The commission believes no changes to §290.42(d)(2)(E) are necessary.

One commenter requested clarification on §290.42(d)(6)(A) as to whether local resupply ability can offset storage requirements and/or inventory of chemicals. The commission clarifies that local supply of chemicals can affect storage and/or inventory requirements. These requirements depend on the proximity of the water supplier to a chemical company. With regard to this comment, the commission believes no changes to §290.42(d)(6)(A) are necessary.

This commenter also questioned whether a separate room for the storage of dry chemicals is really necessary as required by §290.42(d)(6)(C). The commission agrees with this comment and has revised §290.42(d)(6)(C) to no longer require a "separate" room.

One commenter opposed the wording in §290.42(d)(7)(D) which reads "Chemical feeders shall be provided with dissolving tanks when applicable". The commission agrees and has revised §290.42(d)(7)(D) to incorporate the suggested language as follows: "Chemical feeders shall be provided with tanks for chemical dissolution when applicable".

Another commenter suggested an explicit provision for hydraulic or static in-line mixers be incorporated in §290.42(d)(7)(F). The commission believes no changes are necessary to §290.42(d)(7)(F) because hydraulic or static in-line mixers are not excluded.

Another commenter requested clarification on §290.42(d)(7)(H) relating to chemical application points. The commission agrees and has revised §290.42(d) (7)(H) and has added new §290.42(d)(7)(I) to clarify that chemical application points be established at points where needed to adequately treat the water with sufficient opportunity to ensure quality control in the finished water.

One commenter suggested that portable units be allowed in §290.42(d)(9)(A) as facilities for

sludge depth determination. The commission responds that the use of portable units is not prohibited. Therefore, no changes are necessary.

With regard to §290.42(d)(9)(C), this commenter also noted that depths of 16 feet and greater can perform acceptably with the proper length to width ratio. The commission clarifies that deeper basins are not prohibited by this section.

With regard to §290.42(d)(10) one commenter opposed the use of pressure filters being limited to installations with a treatment capacity of less than 0.5 million gallons per day. The commission responds that pressure filters are not easily inspected on a routine basis and thus, this limitation is necessary.

One commenter requested clarification on §290.42(d)(10) as to whether the requirement for gravity or pressure type filters applies to surface water treatment facilities only and not ground water treatment facilities. This commenter also requested clarification on whether this provision applies to treatment facilities constructed prior to the effective date of this rule. The commission clarifies that this requirement applies only to surface water treatment facilities. The commission further responds that §290.42, Water Treatment, contains a subsection which sets forth the requirements for the water treatment of ground water and another subsection which sets forth the requirements for the water treatment of surface water. There is no such reference of the requirement for gravity or pressure type filters in the subsection relating to treatment of ground waters. Additionally, the commission clarifies that this requirement has historically and will continue to apply to new installations of surface water treatment facilities. This requirement only applies to old installations when filters must be replaced. Therefore, the commission believes no changes to §290.42(d)(10) are necessary.

Another commenter suggested the definition for "freeboard" provided in §290.42(d)(10) be revised. The commission notes that technical terms used, other than the ones formally defined in §290.38, shall have the meanings or definitions listed in the latest edition of "Glossary, Water and Wastewater Control Engineering," prepared by a joint editorial board representing the American Public Health Association, American Society of Civil Engineers, American Water Works Association, and the Water Pollution Control Foundation.

Another commenter suggested §290.42(d)(10) be revised to allow for flexibility of operating at higher filtration rates as long as treatment performance is not compromised. The commission notes that §290.39(i) relating to exception criteria provides for flexibility in this area as well as many others. The commission believes no changes with regard to this comment are necessary.

One commenter suggested the effective sizes, media depths, and uniformity coefficients in §290.42(d)(10)(A) be reevaluated in light of new turbidity standards. The commission responds that the current requirements are adequate to reach the new turbidity standards set forth by the federal Surface Water Treatment Rule. The commission further notes that these issues are evaluated in the plans and specifications review process under §290.39.

Another commenter suggested revising §290.42(d)(10)(B) to indicate that support material must be of sufficient quantity and of the appropriate size materials to support the filter media over time in a manner that will provide optimum filtration. The commission notes that it is stated in this section that "other" support material may be approved on an individual basis. Therefore, no changes are necessary with regard to this comment.

Another commenter suggested the wording in §290.42(d)(10)(C)(ii) be revised to indicate that the designer can use a maximum design rate "no greater" than five gallons per minute, leaving the option to use a lesser maximum rate to the registered professional engineer. The commission agrees and has revised §290.42(d)(10)(C)(ii) to reflect this comment.

Also with regard to §290.42(d)(10)(C)(ii), another commenter suggested that rates above five gallons per minute be allowed when engineering data, pilot plant test data, full scale installation data, and other necessary information is provided to the commission. The commission notes that this can be achieved through an exception under §290.39(i).

Another commenter suggested §290.42(d)(10)(D)(i) be revised to read: "Only fully treated water shall be used to backwash conventional media filters." in order to allow for the backwashing of other filters with untreated water. The commission responds that fully treated water is necessary for backwashing all filters. The commission also notes that a water supplier may apply for an exception under §290.39, therefore, no changes are necessary.

Another commenter suggested §290.42(d)(10)(D)(iii) be revised to base the minimum backwash flow rate on the calculation of the minimum fluidization velocity. The commission responds that this can be achieved through an exception under §290.39(i).

One commenter suggested §290.42(d)(13) include a sampling tap for plant discharge water because it is necessary for final trimming of chemical dosages. The commission agrees and has revised §290.42(d)(13) to include that all surface water treatment plants provide sampling taps for raw, settled, filtered, and finished water, and clearwell discharge.

With regard to §290.42(e)(5) relating to a breathing apparatus or air respirator being readily available when testing chlorine leaks, one commenter suggested the term "readily" be defined. The commission responds that this term was not defined in order to provide more flexibility to systems. Therefore, no changes are necessary.

One commenter noted a missing word in §290.42(e)(7). The commission has incorporated the term "level" between the words "floor" and "vent".

Another commenter requested that the minimum acceptable size of fan based on air exchanges for the chlorine room be provided in §290.42(e)(7). The commission responds that this section is intended to provide flexibility to the water supplier.

One commenter opposed §290.42(e)(10) which requires ammonia chemical storage facilities be enclosed and ventilated. This commenter notes that this requirement would necessitate renovation of facilities previously approved by the commission and suggests that if retrofitting is required, a compliance period be specified. The commission responds that this requirement is necessary to ensure the safety of the operators. The commission also notes that noncompliance will be identified in the routine sanitary surveys and that full compliance should be achieved within one year of the effective date of these rules.

With regard to §290.42(e)(10)-(11), one commenter noted that the term "ammonia" should read "anhydrous ammonia" to refer to the gaseous form of the chemical that these sections address. The commission agrees and has made the changes to §290.42(e)(10)-(11).

One commenter questioned the intent of the emergency evacuation plan or procedures as proposed in §290.42(e)(11). The commission clarifies that the plan and procedures apply to both the evacuation of the plant and the surrounding community.

Another commenter noted that an effluent of 0.5 NTU or less in at least 95% of the measurements as required by §290.42(f) does not seem applicable for all kinds of treatment processes and requested clarification. The commission notes this is a prescribed requirement of the federal Surface Water Treatment Rule. The commission must strictly comply with and enforce all federal rules pursuant to the Safe Drinking Water Act in order to maintain primacy status.

One commenter suggested nontransient noncommunity systems be exempt from developing and maintaining plant operations manuals as required by §290.42(j) . This commenter also suggested that all other systems be allowed one year to develop these manuals. The commission disagrees with both suggestions because operations manuals are critical to the operation of a water system especially when new operators join a water system and in the event of an emergency. An operations manual must contain sufficient detail to provide the operator with routine maintenance and repair procedures as well as provide telephone numbers of water system personnel, system officials, and local/state/federal agencies to be contacted in the event of an emergency. Therefore, the commission believes all water systems must have completed operations manuals within six months of the effective date of these rules.

One commenter suggested §290.43(c) be revised to require that no area of the roof have a slope of less than 0.75 inch "per" foot. The commission agrees and has made the suggested change.

Another commenter questions whether §290.43(c)(2) removes the requirement for a 30-inch diameter roof access opening if an

alternate 30-inch opening is provided. The commission responds that this is not a new requirement. Since 1988 the commission has required that the primary roof access opening not be less than 30 inches in diameter if an alternate 30-inch diameter access opening is not provided in the storage tank. The only new provision is that the commission now allows a water supplier to postpone coming into compliance with this 30-inch requirement until any major repair or maintenance is performed on the tank.

With regard to §290.43(c)(5) relating the location of inlet and outlet connections and clearwells used for disinfectant contact time, one commenter requested clarification on the meaning of "appropriately baffled". Another commenter opposed §290.43(c)(5) which requires baffling of clearwells and questioned whether baffling will be beneficial. The commission clarifies that the method of baffling can be designed by the registered professional engineer to meet specific performance standards and that it can be accomplished a number of ways depending on the clearwell configuration. The commission further notes that baffling is an essential part of treatment optimization because it prevents short circuiting of water in the tank and increases chlorine contact time.

Another commenter suggested §290.43(c)(5) be revised to indicate that the inlet should be rotated at least 45 degrees away from the tank outlet to prevent short circuiting. The commission responds that this section is intended to provide flexibility to the water supplier in meeting the performance standards.

One commenter requests clarification on what is required in §290.43(c)(7) relating to the method for removing silt. The commission clarifies that the method for removing silt is to be designed by the engineer.

With regard to §290.43(f), one commenter questioned the need for automatic low water level cutoff devices in larger plants where the storage tanks are large enough to provide ample reaction time and where there is 24-hour, year-round supervision of the water plant by a certified operator. This commenter requested such devices be made optional for plants with round-the-clock certified operators and where the plant supervisor believes the storage capacity is such that the risk of damaging pumps due to a low water level is minimal. The commission responds that such a situation may be grounds for granting an exception under §290.39(i). All applications for exceptions will be reviewed on a case-by-case basis and are based on a number of different factors, including the type of equipment, the level of operator certification, water usage rates, the diversity of demand, and history of water outages. Therefore, no changes are necessary.

Several commenters suggested §290.43(d)(1) relating to the factor of safety requirement of 4 to 1 pressure testing for galvanized 1,000 gallon or less pressure tanks be reduced to 2 to 1. These commenters also suggested the 1/8 inch corrosion allowance be removed because it has resulted in increased costs for pressure tanks with no increase in the level of protection. The commission agrees with this comment and has revised §290.43(d)(1) although this section was not proposed for changes. The commission also disagrees with the comment relating to the factor of safety requirement and is keeping the 4 to 1 factor of safety, which has been in the rules since 1978. The commission believes that a 4 to 1 factor is not unreasonable and provides sufficient protection against tank failure and possible operator injury.

Another commenter suggested that certain systems be exempt from the utilization of service pump low suction cut-off devices as required by §290. 43(f). The commission notes that §290.39(i) relating to exception criteria provides for flexibility in this area as well as many others. Therefore, no changes with regard to this comment are necessary.

Another commenter suggested §290.44(a)(1) be revised to require all newly installed pipes and related products also be inspected by a Water Supply Protection Specialist. The commission disagrees and believes the required certification by an organization accredited by ANSI is adequate. Therefore, no changes are necessary.

Another commenter questioned whether "related products" in §290.44(a)(1) refers to all water distribution products. This commenter also noted that many water distribution products have no "listed" manufacturer which makes it difficult to determine whether the products conform to the required standards. This commenter further requests this section be revised to address these types of situations. The commission clarifies that "related products" includes all water distribution products and notes that this requirement has been in effect since 1991. Therefore, all manufacturers should already be in compliance.

Another commenter suggested the wording in §290.44(a)(2) be revised to read "pressure rating of at least 150 psi or a standard dimension ratio of 26 or less". The commission agrees and has made the suggested change to §290. 44(a)(2).

With regard to §290.44(a)(4), one commenter suggested consideration be given to meter setting depths with change in minimum water line bury from 12 to 24 inches. The commission clarifies that this section is referring to water main burials and not meters and service lines. Therefore, no changes are necessary.

With regard to §290.44(b), one commenter notes that where galvanized pipe or pipe dope has the allowable percent of lead in its manufacture, the water is generating an unacceptable amount of lead. This commenter further notes that pipe, fittings, pipe dope compound, well pumps and other plumbing fixtures should be zero lead. The commission notes that this requirement is the same as the federal requirement. The commission believes these lead requirements are adequate.

One commenter suggested that mobile home parks (manufactured housing communities) be exempt from the minimum line size requirement set forth in §290.44(c). The commission disagrees and believes this rule is appropriate. This rule was initially developed to address such problems with all public water systems, including mobile home parks. The commission believes no changes to §290.44(c) are necessary.

With regard to §290.44(d), another commenter suggested allowances be made for using less than 1.5 gallons per minute per connection for system design where computer modeling is used to simulate system responses to emergency conditions. The commission agrees and notes that such allowances can be provided under §290.39(i). Thus, no changes are necessary with regard to this comment.

One commenter noted some extraneous words in section §290.44(d)(1). The commission has deleted the word "all air" in §290.44(d)(1).

Another commenter questioned whether the requirement in §290.44(d)(1) relating to the installation of air release devices was purely based on topography. The commission responds that this section clearly specifies that air release devices be installed in the distributions system at all points where topography or other factors may create air locks in the lines.

One commenter noted that no other standards other than the standards of the American Society for Testing and Materials (ASTM) are specified in §290.44(e) (1) and questioned whether other acceptable standards, such as standards of the American Water Works Association (AWWA), were allowed. With regard to this comment, the commission has revised §290.44(e)(1) to provide for the use of both AWWA and ASTM approved standards, unless otherwise specified.

Another commenter requested clarification on §290.46(e)(4) with regard to the meaning of "change in responsibilities". The commission clarifies that certified operators must provide to the commission signed notices of the public water system they are employed by and that they must also provide amended notices if their responsibilities change. The commission further clarifies that any change in responsibility requires an amendment to the notice in order to insure that the current certification is adequate.

Another commenter opposed the requirement of 150 psi pressure rated pipe in non-pressure sanitary sewer applications in §290.44(e)(5)(A)-(B). The commission believes this requirement is necessary because it provides maximum protection against leakage.

Another commenter questioned why under §290.44(e)(5)(A)(ii) only a 150 psi pressure rated pipe meeting ASTM specifications was allowed and not a AWWA approved pipe. With regard to this comment, the commission has revised §290. 44(e)(1) to specify that all ratings shall be defined by ASTM or AWWA standards unless otherwise stated. Additionally, the commission has revised §290.44(e)(5)(A)(ii) to delete references to ASTM since it is already referenced in §290.44(e)(1).

One commenter suggested §290.44(e)(5)(A)(i)-(ii) be revised to change the references from "certifying registered professional engineer" to "design engineer" to be consistent

with the terminology used elsewhere in the rules. The commission has revised various sections to change all references from "design engineer" to "registered professional engineer". The commission believes the term "registered professional engineer" is more appropriate and is already defined in §290.38, Definitions.

With regard to §290.44(e)(5)(A)(i) relating to new potable water lines parallel to existing wastewater lines, one commenter suggested the following wording, "...and the design engineer is able to determine that the existing line is not leaking...". The commission has incorporated the suggested wording.

Another commenter suggested that the requirement for the replacing of wastewater lines that show signs of leaking as required by §290.44(e)(5)(B) (i)-(ii) be changed from at least 15 feet in both directions (30 feet total) to at least nine feet in both directions (18 feet total). The commission agrees and has revised those sections to incorporate the suggested changes.

One commenter requested §290.44(e)(5)(B)(i)-(ii) be revised to clarify the definition of "disturbed". The commission clarifies that "disturbed" refers to the moving or dislocating of the wastewater line's support that may result in cracks, leaks, or breaks. The commission believes no changes are necessary.

Another commenter requested §290.44(e)(5)(B)(iii) be revised to allow for the use of equal or better alternatives to cement stabilized backfill. The commission responds that alternatives are evaluated during the plans and specifications review process and may be allowed as an exception under §290. 39. Therefore, no changes are necessary.

Also with regard to §290.44(e)(5)(B)(iii), another commenter questioned whether cement stabilized sand is appropriate because if it is not flexible enough it may crack. The commission responds that this is the best method available to prevent upward migration of wastewater.

With regard to §290.44(e)(5)(B)(iv)(II), one commenter questioned whether it is necessary to have a minimum pipe stiffness for the encasing pipe since the pipe is sealed at each end with water tight non-shrink cement grout. The commission responds that sealing the pipe at both ends is necessary to protect the interior of the pipe from the infiltration of contaminants.

Also with regard to §290.44(e)(5)(B)(iv)(II), another commenter noted that depending on the manufacturer of the spacers and the material type of the carrier pipe, the spacers for the carrier pipe can be up to 10-feet or greater intervals. The commenter suggested revising this provision. The commission responds that exceptions are provided under §290.39(i). This commenter also questioned whether the entire length of the encasing should be filled with washed sand, and if so, the set up time for the non-shrink grout will prevent this from working as an end seal. The commission agrees that the longer the encasement the less likely the washed sand will accomplish its purpose and responds there are other alternatives available for these situations.

Also with regard to §290.44(e)(5)(B)(iv)(II), this commenter further suggested the commission define minimum separation from the encasement to the outside of the manhole and noted that construction constraints or service requirements may preclude encasing the waterline. This commenter also questioned whether the commission had evaluated the use of a water-tight manhole, manhole ring and cover. The commission responds that it has not conducted such an evaluation but that this method can be allowed through the plans and specifications review process under §290.39. Regarding the separation from the encasement to the outside of the manhole, the commission responds that under §290.44(e)(6), a minimum separation distance is defined as nine feet.

This commenter also questioned whether restraint type joints used for ductal iron pipe would be allowed under §290.44(e)(5)(B)(iv)(III). The commission clarifies that these type joints are not excluded in this section. This commenter further questions what procedures are to be used when a wastewater line is removed and replaced. The commission clarifies that removing and replacing a wastewater line would be considered a new wastewater line and would follow procedures for placing a new wastewater line. This commenter further suggested that a six-inch separation space be allowed between water and wastewater lines. The commission agrees that a separation distance be established but believes six inches is not sufficient. The commission has revised §290.44(e)(5)(B)(iv)(III) to require an absolute minimum separation distance of one foot between the water line and the wastewater line and to require that both lines pass a pressure and leakage test as specified in AWWA C600 standards.

The commission has revised §290.44(e)(5)(B)(iv)(II) to move the words "(no longer)" immediately after "18 foot". Additionally, the commission has revised §290.44(e)(5)(B)(vi) to require that cement stabilized sand bedding be a minimum of six inches above and "four inches below" the sewer pipe.

Several commenters disagreed with §290.44(e)(7) that fire hydrants should not be allowed within nine feet of a sanitary sewer line regardless of construction. The commission notes that this is not a new requirement and has not proven to be a problem in the past. Thus, no changes are necessary.

With regard to §290.44(h)(4), another commenter questioned who would determine that a situation or area is a high health hazard. The commission responds that the water supplier is to determine whether a situation is a high health hazard.

Several commenters supported the testing of backflow prevention devices by any qualified tester as set forth in §290.44(h)(4)(A). Some of these commenters also suggested that trained backflow prevention device testers be allowed to repair the devices as well. These commenters also suggested liability insurance be required of all testers if they are allowed to repair. Several other commenters noted that all licensed plumbers are required to have liability insurance in case of property damage during the testing and/or repair of these devices. The commission agrees and has revised §290.44(h)(4) (A)(i) and (ii) to allow testers to also conduct repairs. The commission believes that although liability insurance is a prudent measure, it is appropriate to leave this requirement to the discretion of the water supplier. The commission further notes that it wants to provide maximum flexibility to water suppliers by allowing General Testers to test as well as repair.

Numerous other commenters opposed the testing of backflow prevention devices by any qualified tester as set forth in §290.44(h)(4)(A). These commenters suggested testing and repair of backflow prevention devices be limited to licensed plumbers only. One of these commenters suggested that testing and repair be limited to only licensed plumbers who have completed a commission approved training course and are licensed as Water Supply Protection Specialists. These commenters also noted the Texas Plumbing License Law considers backflow prevention devices as part of a plumbing system and therefore should only be tested and repaired by licensed plumbers. These commenters further noted that non-plumbers do not have sufficient training. The commission disagrees and believes no changes to §290.44(h) are necessary with regard to these comments. The commission believes a backflow prevention device is an appliance and can be tested and repaired by any tester meeting the requirements set forth in §290.44(h)(4)(A). The commission also believes these requirements provide for adequate training.

Also with regard to §290.44(h)(4), another commenter noted that according to the Texas Plumbing License Law, plumbers holding a license issued by the Texas State Board of Plumbing Examiners are the only ones recognized to make repairs to potable water systems, including backflow prevention devices. The commission disagrees. Section 3 of the Plumbing License Law states that "plumbing work done by persons engaged by any public service company in the laying, maintenance and operation of its service mains or lines to the point of measurement and the installation, alteration, adjustment, repair, removal, and renovation of all types of appurtenances, equipment and appliances, including doing all that is necessary to render the appliances usable or serviceable" is permitted without a plumbing license.

One commenter suggested that §290.44(h)(4)(F) list the types of professionals that will be allowed to "repair" backflow prevention devices. This comment has already been addressed since the commission has revised §290.44(h)(4)(A)(i) and (ii) to allow testers to also conduct repairs.

Another commenter opposed the "Fireline Tester" classification in §290. 44(h)(4)(A)(ii). The commission responds that the Fireline Tester is an existing classification of the State Fire Marshall's Office and cannot be deleted. This commenter also suggested breaking the

"General Tester" into two types of testers: a general tester and a limited tester. The commission responds that prior to publication of the proposed rules the following four types of testers were being proposed: Limited Tester, Irrigation Tester, General Tester (plumbers only), and Fireline Tester. However, in response to comments received during the informal comment process, the commission decided that the General Tester and the Fireline Tester were the best choices.

Another commenter questioned whether a Fireline Tester could also test the same type of devices installed in locations other than firelines. The commission responds that a Fireline Tester can also be a General Tester by taking the required course and passing the required examination. This commenter also noted that the commission does not recognize persons certified by other entities. The commission clarifies that it recognizes persons certified by other entities that base their examination on ABPA, as does the commission.

Another commenter suggested the commission maintain a listing of all certified backflow testers and make it available upon request. The commission notes this administrative function will be done, but it will not be added to the rules.

Another commenter suggested that backflow prevention devices installed in irrigation systems be tested at least every three years. Another commenter suggested testing every five years for devices in non-high health hazard situations be required. The commission responds that these additional testing requirements would be reviewed and considered at a later date after the testing of devices in high health hazard situations has been fully implemented.

Several commenters suggested that annual testing of backflow prevention devices in low health hazard situations be required in §290.44(h). One of these commenters noted that there is an inconsistency with the cross-connection conditions of §290.44(h) and the requirements to adopt one of the three nationally recognized codes identified in §290.38, Definitions, and referenced in §290.46(i). The commenter further noted that the Uniform Plumbing Code, which is one of the codes referenced, requires annual testing of all devices. The commission responds that the intent of these rules is to provide the maximum flexibility to public water systems and maximum protection to the public. The commission further notes that under §290.46(i), public water systems are only required to adopt one of the three plumbing codes. The Southern Standard Plumbing Code and the National Standard Plumbing Code do not require annual testing of all backflow prevention devices. Public water systems have the flexibility to adopt these two plumbing ordinances, but they will still be required to test devices in high health hazard situations annually. The commission further notes that public water systems have the flexibility to adopt more stringent plumbing standards, with regard to the testing of backflow prevention devices, by opting to adopt the Uniform Plumbing Code. Thus, with regard to this comment, the commission believes no changes are necessary.

One commenter suggested that municipalities with adequate qualified personnel be designated agents of the commission to teach approved courses and administer approved examinations required by §290.44(h)(4)(A). The commission clarifies that a course outline may be submitted by any interested party to the commission's Occupational Certification Section, Environmental Training Division, for approval of the course.

Another commenter questioned the provision that testers renew their accreditation every three years. The commission has revised §290.44(h)(4)(A) and (B) to remove the requirement that testers renew their accreditation every three years. Additionally, the commission has revised §290.44(h)(4) to require that backflow prevention device testers also certify that the device is operating within specifications.

With regard to §290.44(h)(4)(D), another commenter suggested clarification is needed to allow for the use of forms that contain space for the testing of multiple devices within a facility. The commission clarifies that any facility can develop its own form as long as all the required information is included on the form. Therefore, no changes are necessary.

One commenter suggested the submittal of some sort of plan be required under §290.45(g) when a system's maximum daily capacity increases. The commission responds that water suppliers may develop water conservation plans or other types of plans in addition to the plans and specifications to assist them in maintaining minimum water system capacity requirements. The commission also clarifies that additional supply, storage, service pumping, and pressure maintenance facilities will be required by the commission if normal operating ppressure of 35 psi cannot be maintained throughout the system, or if the system's maximum daily demand exceeds its total production and treatment capacity. Pursuant to §290.39(g), when a change or addition to the existing system is greater than 10% of the existing distribution capacity or 250 connections (whichever is smaller), the water supplier is required to submit a written notification to the commission. The commission will then determine whether engineering plans and specifications are required.

The commission has also revised §290.45(b)(1)(D)(i) to change the word "this" to "which" in the last sentence. Additionally, the commission has revised §290.45(b)(1)(D)(iv) to require that if pressure tanks and a maximum capacity of 30,000 gallons is used, the 30,000 gallons "must be sufficient for up to 2,500 connections". The commission has also provided that alternate methods of pressure maintenance may be proposed, and they will be approved if the criteria contained in §290.45(g)(2) are met. The commission has also removed the provisions relating to systems with more than 50,000 connections which utilize multiple production plants and to pressure tank installations.

With regard to §290.45(b)(1)(D)(v), one commenter suggested that emergency power facilities in systems serving 1,000 connections or greater must be serviced and maintained in accordance with level 2 maintenance requirements contained in the current NFPA 110 standards. The commission agrees and has revised §290.45(b)(1)(D)(v) and (H) to incorporate this comment.

With regard to §290.45(b)(1)(D)(v), another commenter noted that the emergency power requirements would result in significant expenses. The commission notes this is not an entirely new requirement. Only the requirements relating to maintenance are new. With regard to this comment, no changes to §290.45(b)(1)(D)(v) are necessary.

The commission has also revised §290.45(b)(2)(G) to require that if pressure tanks and a maximum capacity of 30,000 gallons are used, the 30,000 gallons "must be sufficient for up to 2,500 connections". The commission has also provided that alternate methods of pressure maintenance may be proposed, and they will be approved if the criteria contained in §290.45(g)(2) are met. The commission has also removed the provisions relating to systems with more than 50,000 connections which utilize multiple production plants and to pressure tank installations.

Several commenters suggested records for all emergency power use be maintained for three years which is consistent with the time requirement for pressure charts. The commission agrees and has revised §290.45(b)(2)(H) to require these records to be maintained for three years instead of five years.

With regard to §290.45(g)(2)(A)(iii), one commenter noted that if the hydraulic analysis of the system shows that adequate pressure can be maintained under emergency power and since the rules require the equipment to be maintained in accordance with NFPA 110 standards, the three years pressure chart recordings should not be required to obtain an exception to the elevated storage requirement. The commission agrees and has revised §290.45(g)(2)(A) (iii) to indicate that these pressure chart recordings be provided "if available".

The commission has further revised §290.45(g)(2)(A)(ii)-(iii) to change a reference from "design engineer" to "registered professional engineer". The commission has revised §290.45(g)(2)(B) to require that facilities be serviced and maintained in accordance with level 2 maintenance requirements. The commission has also revised §290.45(g)(2)(B) to require that records only be kept for three years. Additionally, the commission has removed §290. 45(g)(2)(E). The commission notes that these revisions are in response to comments previously mentioned in this preamble.

This commenter also questioned whether the intent of §290.45(g)(2)(B) was to bring on the emergency power automatically or whether manual transfer is acceptable. The commission clarifies that the intent is to bring on emergency power automatically. Therefore, no changes are necessary.

This commenter further suggests that excep-

tions to §290.45(g)(2)(B)(ii) be allowed for systems which receive natural gas from an independent source. This section requires that fuel adequate for eight hours of power generation be maintained on site. The commission believes that in case of an emergency, the natural gas supply from an external source may be interrupted and therefore some storage must be provided on site. The amount of storage required will be determined during the plan review process.

With regard to §290.45(g)(2)(C), this commenter suggested rewording this paragraph to use "uninterrupted power supply" in lieu of just battery. The commission agrees that uninterrupted power supply (UPS) is the best emergency power equipment and has therefore revised this section to also allow the use UPS.

One commenter suggested nontransient noncommunity water systems be exempt from having to compile and/or submit monthly operation reports as required by §290.46(d). The commission responds that monthly operation reports are essential for determining compliance. The commission also clarifies that under §290.46(d)(2) systems serving fewer than 100 connections which utilize ground water sources only are not required to compile monthly reports. Therefore, some nontransient noncommunity water systems may already be exempt from having to compile and submit monthly operation reports.

Several commenters oppose requirements for certified operators for nontransient noncommunity water systems found in §290.46(e). These commenters suggest that "privately owned" nontransient noncommunity water systems which utilize ground water and regularly serve only the owners' employees be exempt from such requirements. The commission disagrees with this comment. Employees at facilities with nontransient noncommunity water systems spend a significant amount of time at the job site and deserve the same level of protection against waterborne contamination as they receive in their own homes. The nontransient noncommunity category includes schools, colleges, prisons, industries and other similar facilities. The requirement for a certified operator will provide for increased safety of the water produced and delivered to the systems' consumers.

The commission has revised §290.46(e)(1) to replace the phrase "for which any charge is made" with "except these systems indicated in §290.46(e)". The commission has made this revision to clarify that no district, municipality, firm corporation, or individual, except for transient noncommunity systems utilizing groundwater or purchased water , shall furnish to the public any drinking water unless there is direct daily supervision of the system by a certified operator.

Related to §290.46(e)(4), one commenter suggests the commission coordinate the paperwork requirements of the water and wastewater certification programs in order to reduce paperwork burden on operators. The commission responds that it will refer this suggestion to the commission's Occupational Certification Section, Environmental Training Division, for further evaluation and possible implementation.

Another commenter suggested additional testing methods be allowed under §290.46(f)(2) to determine disinfectant residuals. The commission notes this is a prescribed requirement of the federal Surface Water Treatment Rule. The commission must strictly comply with and enforce all federal rules pursuant to the Safe Drinking Water Act in order to maintain primacy status. This commenter also requests that the frequency of testing in §290.46(f)(2)(B) be changed from "once every seven days" to "once per calendar week" because it would allow nontransient noncommunity water systems some flexibility regarding manpower. The commission responds that there is no difference between the two phrases and the impact is the same.

With regard to §290.46(f)(2)(D), one commenter noted that the sentence, "Only residual tests taken at bacteriological sampling sites can be used for compliance monitoring." conflicted with §290.46(f)(1) relating to the requirement to maintain a minimum chlorine residual in the far reaches of the system. The commission agrees and has revised the language in §290.46(f)(2) (D).

Another commenter requested the language in §290.46(f)(2)(D) be clarified to clearly indicate where samples may be collected to fulfill the disinfectant residual monitoring requirements. The commission clarifies that disinfectant residual monitoring locations must include, but are not limited to, the monitoring sites identified in the bacteriological sample siting plan. The commission further clarifies that systems can take additional samples other than just what is required by the bacteriological sample siting plan. However, only those tests specifically required by the plan can be used for compliance monitoring. No changes to §290.46(f)(2)(D) are necessary with regard to this comment.

One commenter suggested nontransient noncommunity water systems be exempt from having to adopt plumbing ordinances or regulations as required by 290. 46(i). The commission responds that this rule was initially developed to address potential plumbing problems with all public water systems. The commission believes no changes to §290.46(i) are necessary.

Numerous comments were received on §290.46(j) relating to customer service inspections. Several commenters expressed support for this proposed section as published in the June 13, 1995, issue of the *Texas Register* (20 TexReg 4324). One commenter noted that customer service inspections are duplicative of municipal building and plumbing inspection programs. The commission responds that customer service inspections are not duplicative, but rather, are supplemental to existing municipal plumbing inspection programs and that there are some towns and cities that do not have such programs in place. The commission further notes that existing city plumbing inspection programs are not public health oriented and appear to focus more on wastewater plumbing practices. On the other hand, customer service inspections require the inspection of all pipes, water tight joints, and other plumbing materials and certify that unacceptable plumbing practices that may result in contamination of drinking water supplied by a public water system do not exist. For instance, these inspections must certify that no pipe or pipe fitting in the plumbing facilities contains more than 8.0% lead and that no solder or flux contains more than 2.0% lead if the site is to receive water service. Thus, for cities with such programs in place, customer service inspections already exist in some form.

Another commenter noted the commission had provided no comments or data on the fiscal impact of customer service requirements. The commission responds that information on fiscal impacts was provided in the preamble of the proposal. The proposal preamble indicated that "the costs to perform service inspections required under these rules is anticipated to be between $25 and $75 in most cases." The proposal preamble also noted that "these costs to system operators can be mitigated by recovery of inspection costs from those customers whose installations are subject to the inspection requirements." The proposal preamble further indicated that "local governments which already implement a local plumbing code will be only minimally impacted."

This commenter also noted the commission had failed to identify specific public health or safety issues that would be alleviated by the customer service inspections. The commission responds that the potential health risks posed by cross-connections and other unacceptable plumbing practices have been widely recognized in recent legislation such as Senate Bill 815, which was enacted in 1993 and became effective on May 7, 1993. Senate Bill 815 sought to eliminate cross-connections and other unacceptable plumbing practices which may result in contamination by limiting the possibility of substandard plumbing. Senate Bill 815 specifically requires the Texas State Board of Plumbing Examiners to adopt the Southern Standard Plumbing Code, the Uniform Plumbing Code and the National Standard Plumbing Code as approved plumbing codes for the State of Texas.

Numerous commenters were unclear about the applicability of customer service inspections. One commenter was confused with the phrase "private plumbing facilities" and questioned whether customer service inspections applied only to commercial/industrial facilities. Several commenters requested clarification as to whether any material improvement, correction or addition to private plumbing facilities would require a customer service inspection. One of these commenters further questioned whether these inspections also applied to changes in ownership. Another commenter was unclear as to whether customer service inspections would apply when plumbing permits are issued. If so, the commenter feels it would be difficult and expensive to comply because of the extensive level of permits issued each year in that particular area of the state.

The commission clarifies that customer service inspections apply to all facilities, public and private. The phrase "private plumbing facilities" refers to the plumbing facilities not owned by the water supplier. The commission

further clarifies that customer service inspections must be conducted before providing continuous water service to new construction. Customer service inspections must also be completed on any existing service when the water purveyor has reason to believe that cross-connections or other unacceptable plumbing practices exist. Additionally, the commission clarifies that customer service inspections must also be conducted after any material improvement, correction or addition to plumbing facilities which requires a plumbing permit.

Another commenter suggested nontransient noncommunity water systems be exempt from the customer service requirements. The commission responds that this rule was initially developed to address potential plumbing problems with all public water systems. The commission believes no changes to §290.46(j) are necessary.

Several other commenters suggest that only plumbing inspectors or Water Supply Protection Specialists be allowed to conduct customer service inspections. Another commenter suggested only plumbing inspectors with a Water Supply Protection Specialist endorsement be allowed to conduct the inspections. The commission responds that all certified waterworks operators and members of other water related professional groups may conduct the inspections only if they have completed the required training course, passed the examination administered by the commission or its designated agent, and must hold an endorsement granted by the commission or its designated agent. The commission believes this training program is sufficient to provide a customer service inspector sufficient knowledge to detect unacceptable plumbing practices. Therefore, no changes are necessary.

Another commenter suggested §290.46(j)(1)(A) be revised to read as follows: "Water Supply Protection Specialist as endorsed by the Texas State Board of Plumbing Examiners and Plumbing Inspectors as licensed by the Texas State Board of Plumbing Examiners." The commission has made the suggested change. This commenter also suggested adding a section to provide for penalties for a water supplier not complying with the cross-connection program, cross connection continuing surveys, and plumbing codes. The commission responds that areas of noncompliance will be identified in the routine sanitary surveys, and noncompliant water suppliers will be provided sufficient time to address the issue.

Another commenter questioned the meaning of "unacceptable plumbing practices" and requested guidance on interpreting the term. The commission clarifies that "unacceptable plumbing practices" refers to practices not accepted by or in violation of the three plumbing codes which are referenced in §290.38. The commission has revised several sections to change the term "undesireable" to "unacceptable".

Several commenters suggested that §290.46(j)(1)(C) be revised to prohibit customer service inspections by licensed plumbers who have a financial interest in the plumbing work being inspected. The commission did not incorporate this suggestion as it wants to provide the maximum flexibility to the water supplier in determining who can do customer service inspections based on local availability of inspectors. The commission also notes that the individual water supplier can choose to be more restrictive.

With regard to §290.46(j)(1)(c), one commenter suggested that licensed plumbers not be allowed to conduct customer service inspections on single-family residential services without additional training. The commission believes that the training program for licensed plumbers provides them sufficient knowledge to detect unacceptable plumbing practices in single-family residential services. The commission further clarifies that licensed plumbers desiring statewide authority to conduct customer service inspections must take the required coursework and must pass the required exam.

Another commenter suggested professional engineers be specifically mentioned as being authorized to perform customer service inspections. The commission clarifies that under §290.46(j)(1)(B) any water professional can perform these inspections as long as they complete the required course work and pass the required exam. Thus, no changes are necessary with regard to this comment.

One commenter questioned how long the inspection certificates were to be kept on file by the water supplier. The commission has revised §290.46(j)(3) to require holding of certificates for ten years. The commission notes that these customer service inspection certificates may be requested by property owners who are interested in the plumbing conditions of individual properties especially when property is transferred to new owners.

Also with regard to §290.46(j)(3), another commenter requested the term "water supplier" be changed to water purveyor for consistency throughout §290.46(j). The commission has made the suggested revision.

With regard to §290.46(j)(3)(B), this commenter also questioned the meaning of "cross-connection between the public drinking water supply and a private water system". The commission agrees this wording is inaccurate and has revised §290.46(j)(3)(B) to replace "private water system" with "private water source".

With regard to §290.46(j)(3)(D)-(E), another commenter questioned whether all plumbing work completed since 1988 needed to be inspected. The commission clarifies that customer service inspections must be conducted before providing continuous water service to new construction. Customer service inspections must also be completed on any existing service when the water purveyor has reason to believe that cross-connections or other unacceptable plumbing practices exist. Additionally, customer service inspections must be conducted after any material improvement, correction or addition to private plumbing facilities occurs which requires a plumbing permit. The inspection certification form completed for these situations must then certify that no pipe or pipe fitting in the plumbing facilities contains more than 8.0% lead and that no solder or flux contains more than 2.0% lead if the site is to receive water service.

One commenter urged the commission to incorporate the intent of House Bill 1541 (1993) relating to the prohibition of the sale or transfer of certain plumbing fixtures including fixtures which allow the backflow of nonpotable substances into the potable water supply. House Bill 1541 only applies to cities with a population over 5,000 and the commenter would like to see wider application of this legislation. The commission has addressed this comment by incorporating §290.46(j)(3)(F) and revising §290.47, Appendix D, Sample Service Inspection Certification, to reflect that no plumbing fixture which is not in compliance with a state approved plumbing code may be installed.

Several commenters misunderstood the intent of §290.46(j). These commenters believed that the customer service inspection requirements in §290.46(j) satisfied the plumbing restrictions and inspections required under §290.115(5). The commission has clarified in the rules that these customer service inspection requirements are not considered acceptable substitutes for, and shall not apply to, the sanitary control requirements stated in §290.115(5) of this chapter. This clarification has resulted in the addition of §290.46(j)(4).

With regard to §290.46(s) relating to boil water notifications, one commenter requested that routine line maintenance situations be exempt from boil water notifications unless there is a public health risk. The commission agrees and has revised §290.46(s) to make this clarification.

Another commenter noted the terms "numerous" and "prolonged" relating to water outages during line repairs in §290.46(s) were too confusing and suggested they be defined. The commission agrees and has revised §290.46(s) to remove the terms numerous and prolonged and to provide additional clarification

With regard to 290.46(x) relating to the inspection of abandoned wells, one commenter questioned whether simply demonstrating operation of the well would be sufficient or whether some down-hole inspection would be required. The commission clarifies that a down-hole inspection method will be necessary to determine non-deterioration of the well. Simply demonstrating the well operates is not sufficient to indicate that the well is not deteriorating.

The commission has also corrected a reference to Texas Water Commission in §290.121(a).

Another commenter suggested the phrase "periodically thereafter" in §290. 47, Appendix B, Service Agreement, be defined. The commission has revised §290.46(e)(1) to delete the phrase "periodically thereafter" and to clarify that inspections shall be conducted by the water supplier or its designated agent prior to initiating new water service; when there is reason to believe that cross connections or other unacceptable plumbing practices exist; or after any major changes to the private plumbing facilities.

One commenter provided a Sample Sanitary Control Easement Document for a Public Water Well form and requested that it replace the proposed form found in §290.47, Appendix C. The commission has replaced the proposed form with the one provided by the commenter because it is shorter, more comprehensible, up-to-date, and accomplishes the same goal as the initially proposed form.

Another commenter provided his proprietary form to replace the proposed Backflow Prevention Assembly Test and Maintenance Report form in §290.47, Appendix F. The commission did not replace the proposed form with the commenter's proprietary form because it may result in increased costs for the water supplier. The commission believes the proposed form is satisfactory.

Another commenter suggested the Backflow Prevention Assembly Test and Maintenance Report form in §290.47, Appendix F be revised to incorporate the test gauge serial number, date of the last gauge calibration, and a statement whereby the tester certifies the accuracy of the test gauge. The commission believes this information is unnecessary. Therefore, no changes have been made.

Rules and Regulations for Public Water Systems

- **30 TAC §§290.38, 290.39, 290.41-290.47**

The Texas Water Code, §5.103, provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state. The Texas Health and Safety Code, Chapter 341, Subchapter C, governs sanitary standards of drinking water, protection of public water supplies, and bodies of water

§290.38. Definitions. The following words and terms, when used in this chapter shall have the following meanings, unless the context clearly indicates otherwise. If a word or term used in this title is not contained in the following list, its definition shall be as shown in Title 40 Code of Federal Regulations §141.2. Other technical terms used shall have the meanings or definitions listed in the latest edition of "Glossary, Water and Wastewater Control Engineering," prepared by a joint editorial board representing the American Public Health Association, American Society of Civil Engineers, American Water Works Association, and the Water Pollution Control Foundation.

ABPA-The American Backflow Prevention Association, P.O. Box 1563, Akron, Ohio 44309-1563.

ASSE-The American Society of Sanitary Engineering, P.O. Box 40362, Bay Village, Ohio 44140.

Commission-The Texas Natural Resource Conservation Commission.

Drinking water standards-The commission rules covering drinking water standards in §290.101-290.121 of this title (relating to Drinking Water Standards Governing Drinking Water Quality and Reporting Requirements for Public Water Supply Systems).

Emergency power-Either mechanical power or electric generators which can enable the system to provide water under pressure to the distribution system in the event of a local power failure. With the approval of the executive director, dual primary electric service may be considered as emergency power in areas which are not subject to large scale power outages due to natural disasters.

High health hazard-A cross-connection, potential cross-connection, or other situation involving any substance that could cause death, illness, spread of disease, or has a high probability of causing such effects if introduced into the potable drinking water supply.

Intruder-resistant fence-A fence six feet or more in height, constructed of wood, concrete, masonry, or metal with three strands of barbed wire extending outward from the top of the fence at a 45 degree angle and have the smooth side of the fence on the outside wall. In lieu of the barbed wire, the fence must be eight feet in height. The fence must be in good repair and close enough to surface grade to prevent intruder passage.

NFPA standards-The standards of the National Fire Protection Association, 1 Batterymarch Park, Quincy, Massachusetts, 02269-9101.

Plumbing inspector-Any person employed by a political subdivision for the purpose of inspecting plumbing work and installations in connection with health and safety laws and ordinances, who has no financial or advisory interest in any plumbing company, and who has successfully fulfilled the examinations and requirements of the Texas State Board of Plumbing Examiners.

Plumbing ordinance-A set of rules governing plumbing practices which are at least as stringent and comprehensive as one of the following nationally recognized codes:

(A) Southern Standard Plumbing Code.

(B) Uniform Plumbing Code.

(C) National Standard Plumbing Code.

Registered Professional Engineer-An engineer who maintains a current license through the Texas State Board of Registration for Professional Engineers in accordance with its requirements for professional practice.

Transient noncommunity water system-A public water system that is not a community water system and serves at least 25 persons at least 60 days out of the year, yet by its characteristics, does not meet the definition of a nontransient noncommunity water system.

Water Supply Protection Specialist-Any person who holds a license endorsement issued by the Texas State Board of Plumbing Examiners to engage in the inspection, in connection with health and safety laws and ordinances, of the plumbing work or installation of a public water system distribution facility or of customer owned plumbing connected to that system's water distribution lines.

§290.39. General Provisions.

(a) Authority for requirements. The Texas Health and Safety Code, Chapter 341, Subchapter C prescribes the duties of the Texas Natural Resource Conservation Commission relating to the regulation and control of public drinking water systems in the State. These statutes require that the commission review completed plans and specifications for all contemplated public water systems, and that the commission be notified of any subsequent material changes, improvements, additions, or alterations in existing systems. In order to properly discharge these duties, the Texas Natural Resource Conservation Commission is authorized to develop rules governing the design of system facilities, as well as minimum acceptable operating practices necessary to protect the public health.

(b)-(c) (No change.)

(d) Submission of planning material. In general, the planning material submitted shall conform to the following requirements.

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

(4) Copies of each fully executed sanitary control easement shall be provided to the Commission prior to placing the well into service. Each original easement document must be recorded in the deed records at the county courthouse. See §290.47(c) of this title (relating to Appendices) for a suggested form.

(e)-(f) (No change.)

(g) Changes in existing systems or supplies. Changes or additions to existing systems which result in an increase in production, treatment, or storage capacity shall require written notification to the executive director. Changes or additions in existing distribution systems shall require written notification to the executive director when the change or addition is greater than 10% of the existing distribution capacity or 250 connections, whichever is smaller. The executive director shall determine whether engineering plans and specifications will be required after initial notification of the extent of the modifications. The owner shall

submit plans and specifications as determined by the executive director in accordance with subsection (c) of this section. The Commission will not require planning material on distribution line extensions from a political entity (county, municipality, district or water authority) when the entity has its own internal engineering review staff or is required, by local ordinance, to submit the material to another political entity for review and approval. The review staff must be separate and apart from the engineering staff or firm charged with the design of the distribution extension under review. The planning material must be reviewed and certified to be in compliance with §290.44 of this title (relating to Water Distribution) by a registered professional engineer in the employ of the review entity. The effect of the distribution system improvements on compliance with §290.45 of this title (relating to Minimum Water System Capacity Requirements) must be evaluated. Should the proposed distribution system improvements result in an exceedance of the capacity requirements, written notice of the extent of the proposed improvements must be submitted to the executive director.

(h)-(i) (No change.)

(j) Notification of system startup or reactivation. The owner or responsible official must provide written notification to the commission of the startup of a new public water supply system or reactivation of an existing public water supply system. This notification must be made immediately upon meeting the definition of a public water system as defined in §290.38 of this title (relating to Definitions).

§290.41. Water Sources.

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

(c) Ground water sources and development.

(1) Ground water sources shall be located so that there will be no danger of pollution from flooding or from insanitary surroundings, such as privies, sewage, sewage treatment plants, livestock and animal pens, solid waste disposal sites or underground petroleum and chemical storage tanks and liquid transmission pipelines, or abandoned and improperly sealed wells.

(A) No well site which is within 50 feet of a tile or concrete sanitary sewer, sewerage appurtenance, septic tank, storm sewer, or cemetery; or which is within 150 feet of a septic tank perforated drainfield, areas irrigated by low dosage, low angle spray on-site sewage facilities, absorption bed, evapotranspiration bed, improperly constructed water well or underground petroleum and chemical storage tank or liquid transmission pipeline will be acceptable for use as a public drinking water supply. Sanitary or storm sewers constructed of ductile iron or PVC pipe meeting AWWA standards, having a minimum working pressure of 150 psi or greater, and equipped with pressure type joints may be located at distances of less than 50 feet from a proposed well site but in no case shall the distance be less than ten feet.

(B)-(D) (No change.)

(E) All known abandoned or inoperative wells (unused wells that have not been plugged) within one quarter mile of a proposed wellsite shall be reported to the Commission along with existing or potential pollution hazards. These reports are required for community and nontransient, noncommunity ground water sources. Examples of existing or potential pollution hazards which may affect ground water quality include, but are not limited to: landfill and dump sites, animal feedlots, military facilities, industrial facilities, wood-treatment facilities, liquid petroleum and petrochemical production, storage, and transmission facilities, Class 1, 2, 3, and 4 injection wells, and pesticide storage and mixing facilities. This information must be submitted prior to construction or as required by the executive director.

(F) A sanitary control easement covering that portion of the land within 150 feet of the well location shall be secured from all such property owners and recorded in the deed records at the county courthouse. The easement shall provide that none of the pollution hazards covered in subparagraphs (A)-(E) of this paragraph, or any facilities that might create a danger of pollution to the water to be produced from the well will be located thereon. For the purpose of this easement, an improperly constructed water well is one which fails to meet the surface and subsurface construction standards for public water supply wells. Residential type wells within the easement must be constructed to public water well standards. Copies of the recorded easements shall be included with plans and specifications submitted for review.

(2) (No change.)

(3) Special attention must be given to the construction, disinfection, protection, and testing of a well to be used as a public water supply source.

(A) Before placing the well into service, the Commission's Water Utilities Division shall be furnished a copy of the well completion data, which includes the following items: the Driller's Log (geological log and material setting report); a cementing certificate; the results of a 36-hour pump test; the results of the microbiological and chemical analyses required by subparagraphs (F) and (G) of this paragraph; a copy of the Sanitary Control Easement; and an original or legible copy of a United States Geological Survey 7.5-minute topographic quadrangle showing the accurate well location. All the documents listed in this paragraph must be approved by the executive director before final approval is granted for the use of the well.

(B) (No change.)

(C) The space between the casing and drill hole shall be sealed by using enough cement under pressure to completely fill and seal the annular space between the casing and the drill hole. The well casing shall be cemented in this manner from the top of the shallowest formation to be developed to the earth's surface. The driller will utilize the following pressure cementation methods in accordance with the AWWA Standard for Water Wells (A100-90), Appendix B: Section B.3 (Positive displacement-exterior method); Section B.4 (Interior method-without a plug); Section B.5 (Positive placement-interior method-drillable plug); or Section B.6 (Placement through float shoe attached to the bottom of the casing). Cementation methods other than those listed in this subparagraph must be approved by the executive director prior to the construction of the well. A cement bonding log, as well as any other documentation deemed necessary, may be required by the executive director to assure complete sealing of the annular space.

(D)-(F) (No change.)

(G) A complete physical and chemical analysis of the water produced from a new well shall be made after 36 hours of continuous pumping at the design withdrawal rate. Shorter pump test periods can be accepted for large capacity wells producing from areas of known groundwater production and quality so as to prevent wasting of water. Samples must be submitted to the Texas Department of Health approved laboratory for chemical analyses. Tentative approval may be given on the basis of tests performed by in-plant or private laboratories but final acceptance by the Commission shall be on the basis of results from the Texas Department of Health laboratory. Appropriate treatment shall be provided if the analyses reveal that the water from the well fails to meet the water quality criteria as prescribed by the drinking water standards. These criteria include turbidity, color and threshold odor limitations, and excessive hydrogen sulfide, carbon dioxide or other constituents or minerals which make the water undesirable or unsuited for

domestic use. Additional chemical and microbiological tests may be required after the Commission's Water Utilities Division conducts a vulnerability assessment of the well.

(H)-(P) (No change.)

(Q) If an air release device is provided on the discharge piping, it shall be installed in such a manner as to preclude the possibility of submergence or possible entrance of contaminants. In this respect, all openings to the atmosphere shall be covered with 16-mesh or finer, corrosion-resistant screening material or an acceptable equivalent.

(4) (No change.)

(d) (No change.)

(e) Surface water sources and development.

(1) To determine the degree of pollution from all sources within the watershed, an evaluation shall be made of the proposed surface water impoundment or flowing supply in the area of diversion and its tributary streams.

(A) Where surface water sources are subject to continuous or intermittent contamination by municipal, agricultural, or industrial wastes and/or treated effluent, the adverse effects of the contamination on the quality of the raw water reaching the treatment plant shall be determined by site evaluations and laboratory procedures.

(B) The disposal of all liquid or solid wastes from any source on the watershed must be in conformity with applicable regulations and state statutes.

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

(E) Pesticides or herbicides which are used within the watershed shall be applied in strict accordance with the product label restrictions.

(2) Intakes shall be located and constructed in a manner which will secure raw water of the best quality available from the source.

(A) Intakes shall not be located in areas subject to excessive siltation or in areas subject to receiving immediate runoff from wooded sloughs or swamps.

(B) Raw water intakes shall not be located within 1,000 feet of boat launching ramps, marinas, docks or floating fishing piers which are accessible by the public.

(C) A restricted zone of 200 feet radius from the raw water intake works shall be established and all recreational activities and trespassing shall be prohibited in this area. Regulations governing this zone shall be in the city ordinances or the rules and regulations promulgated by a water district or similar regulatory agency. The restricted zone shall be designated with signs recounting these restrictions. The signs shall be maintained in plain view of the public and shall be visible from all parts of the restricted area. In addition, special buoys may be required as deemed necessary by the executive director. Provisions shall be made for the strict enforcement of such ordinances or regulations.

(D) Commission staff shall make an on-site evaluation of any proposed raw water intake location. The evaluation must be requested prior to final design and must be supported by preliminary design drawings. Once the final intake location has been selected, the commission's Water Utilities Division shall be furnished with an original or legible copy of a United States Geological Survey 7.5-minute topographic quadrangle showing the accurate intake location.

(E) Intakes shall be located and constructed in a manner which will allow raw water to be taken from a variety of depths and which will permit withdrawal of water when reservoir levels are very low. Fixed level intakes are acceptable if water quality data is available to establish that the effect on raw water quality will be minimal.

(F) Water intake works shall be provided with screens or grates to minimize the amount of debris entering the plant.

(3) The water treatment plant and all pumping units shall be located in well-drained areas not subject to flooding and away from seepage areas or where the underground water table is near the surface.

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

§290.42. Water Treatment.

(a) (No change.)

(b) Ground waters.

(1) (No change.)

(2) Treatment facilities shall be provided for ground water if the water does not meet the drinking water standards. The facilities provided shall be in conformance with established and proven methods.

(A) Filters provided for turbidity and microbiological quality control shall be preceded by coagulant addition and shall conform to the requirements of subsection (d)(10)of this section. Filtration rates for iron and manganese removal, regardless of the media or type of filter, shall be based on a maximum rate of five gallons per square foot per minute.

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

(3)-(4) (No change.)

(c) (No change.)

(d) Surface water.

(1) All water secured from surface sources shall be given complete treatment at a plant which provides facilities for pretreatment disinfection, taste and odor control, continuous coagulation, sedimentation, filtration, covered clearwell storage and terminal disinfection of the water with chlorine or suitable chlorine compounds. In all cases, the treatment process must achieve at least a 3-log removal or inactivation of Giardia cysts and a 4-log removal or inactivation of viruses before the water is supplied to any consumer.

(2) No cross-connection or interconnection shall be permitted to exist in a filtration plant between a conduit carrying filtered or post-chlorinated water and another conduit carrying raw water or water in any prior stage of treatment.

(A) Vacuum breakers must be provided on each hose bibb within the plant facility.

(B) No conduit or basin containing raw water or any water in a prior stage of treatment shall be located directly above, or be permitted to have a single common partition wall with another conduit or basin containing finished water.

(C) Make-up water supply lines to chemical feeder solution mixing chambers shall be provided with an air gap or other acceptable backflow prevention device.

(D) Filters shall be located so that common walls will not exist between them and aerators, mixing and sedimentation basins or clear wells. This rule is not strictly applicable, however, to partitions open to view and readily accessible for inspection and repair.

(E) Filter-to-waste connections, if included, shall be provided with an air gap connection to waste.

(3) All drainage conduits shall be constructed so as to be thoroughly tight against leakage. Return of the decanted water and/or sludge to the raw water shall be adequately controlled so that there will be a minimum of interference with the treatment process. Any discharge of wastewater shall be in accordance with the appropriate statutes and regulations.

(4) Reservoirs for pretreatment and/or selective quality control shall be provided where complete treatment facilities fail to operate satisfactorily at times of maximum turbidities or other abnormal raw water quality conditions exist. Recreational activities at such reservoirs shall be prohibited.

(5) Flow measuring devices shall be provided to measure the raw water supplied to the plant and to measure the treated water discharged from the plant. These devices shall be located to facilitate use and to assist in the determination of chemical dosages, the accumulation of water production data, and the operation of plant facilities.

(6) Chemical storage facilities shall be located so as to help in the handling of bulk chemicals by operators and the transfer of chemicals to day tanks and chemical feeders. Also, the movement of chemicals from storage to feed machines shall be done in a manner that facilitates good housekeeping.

(A) Bulk storage facilities at the plant shall be adequate to store at least one month's supply of chemicals. However, local resupply ability may dictate the requirements for plant inventories.

(B) All chemical bulk and day tanks shall be clearly labeled to indicate the tank's contents.

(C) Dry chemicals shall be stored off the floor in a dry, above ground level room and protected against flooding or wetting from floors, walls, and ceilings.

(D) Day tanks shall be provided to minimize the possibility of severely overfeeding liquid chemicals. Day tanks will not be required if adequate process control instrumentation and procedures are employed to prevent chemical overfeed incidents.

(E) When liquid chemicals are to be used, special precautions must be taken and the following concerns must be addressed both during the plan review and approval process for new facilities and during the operation of existing plants:

(i) issues involving bulk storage tank design such as the materials of construction, capacity, overflow, and containment;

(ii) issues involving transfer pump design including the bulk storage tank design, day tank capacity, type, materials of construction, and controls;

(iii) issues involving the day tanks such as the materials of construction, overflow, containment, capacity, and controls;

(iv) issues involving metering pump design such as the materials of construction, calibration, controls, capacity, and anti-siphon protection; and

(v) issues involving piping and valves including their compatibility with solutions.

(7) Treatment plants shall be provided with efficient devices for measuring and applying chemicals to the water being treated.

(A) Each chemical feeder shall have a standby or reserve unit. Common standby feeders are permissible, but, generally, more than one standby feeder must be provided due to the incompatibility of chemicals or the state in which they are being fed (solid, liquid or gas).

(B) All chemical feed equipment shall be capable of easily adjusting to variations in the flow of water being treated.

(C) Dry chemical feeders shall be in a separate room and be provided with facilities for dust control.

(D) Chemical feeders shall be provided with tanks for chemical dissolution when applicable.

(E) Where practical, the transport of chemical solutions between the feeder and the application point should be accomplished through open channels. If enclosed feed lines must be used, they shall be designed and installed so as to prevent clogging and facilitate cleaning.

(F) Coagulants shall be applied to the water in the mixing basins or chambers so as to permit their complete mixing with the water. Coagulants shall be applied continuously during treatment plant operation.

(G) Chlorine feed units, ammonia feed units, and storage facilities shall be separated by solid, sealed walls.

(H) Chemical application points shall be provided to achieve adequate taste and odor control, corrosion control and disinfection.

(I) Chemicals shall be applied in a manner which will ensure optimal finished water quality.

(8) Flash mixing and flocculation equipment shall be provided. This equipment must be capable of adequate flexibility or adjustment to provide optimum flocculation under varying raw water characteristics and rates of raw water treatment.

(A)-(C) (No change.)

(D) Coagulated water or water from flocculators shall be transported to sedimentation basins in such a manner as to prevent destruction of floc. Piping, flumes and troughs shall be designed to provide a flow velocity of 0.5 to 1.5 feet per second. Gates, ports and valves shall be designed at a maximum flow velocity of four feet per second in the transfer of water between units.

(9) Basins for straight-flow sedimentation of coagulated waters shall provide a theoretical detention time of at least six hours for clarification plants and 4.5 hours for softening plants. The settling chamber of a solids contact clarification unit shall provide a theoretical detention time of at least two hours. Where shorter detention times are desired; engineering data, pilot plant test data, full scale installation data and other information as required by the commission shall be submitted to the executive director for review and approval of the alternate process.

(A) (No change.)

(B) Basins shall be designed to prevent the short-circuiting of flow or the destruction of floc.

(C) Sedimentation basins may be square, rectangular, round or other shapes approved by the executive director. The length of rectangular settling basins shall preferably be at least twice their width with a side wall water depth of ten feet to 12 feet in nonsoftening water treatment. Square and round sedimentation basins may also be used for clarification and softening plants; however, the detention time must comply with the requirements of this paragraph.

(D)-(E) (No change.)

(10) Gravity or pressure type filters shall be provided. However, the use of pressure filters shall be limited to installations with a treatment capacity of less than 0.50 million gallons per day.

(A) The depth of filter sand, anthracite or other filtering materials shall be 24 inches or greater. This filtering material shall be free from clay, dirt, organic matter and other impurities. Its effective size shall range from 0.35 to 0.45 mm for fine sand, 0.45 to 0.55 mm for medium sand and 0.55 to 0.65 mm for coarse sand. Its uniformity coefficient shall not exceed 1.7. The grain size distribution shall also be as prescribed by AWWA standards. Material for dual or mixed media filters shall conform to AWWA standards.

(B) Under the filtering material, at least 12 inches of gravel shall be placed varying in size from 1/16 inch to 2.5 inches. The gravel may be arranged in three to five layers such that each layer contains material about twice the size of the material above it. Other support material may be approved on an individual basis.

(C) The filter shall be provided with facilities to regulate the filtration rate and monitor the performance of the filter.

(i) The design of gravity rapid sand filters shall be based on a maximum design filtration rate of two gallons per square foot per minute. At the beginning of filter runs for declining rate filters, a maximum filtration rate of three gallons per square foot per minute is allowed. The filter discharge piping shall be designed with an orifice or other permanently installed flow limiting device to ensure that the maximum filter rate cannot be exceeded.

(ii) Where high-rate dual or multiple media gravity filters are used, a maximum design filtration rate no greater than five gallons per square foot per minute must be used. At the beginning of filter runs for declining rate filters, a maximum filtration rate of 6.5 gallons per square foot per minute is allowed. The filter discharge piping shall be designed with an orifice or other permanently installed limiting device to ensure that the maximum filter rate cannot be exceeded.

(iii) The design of pressure filters shall be based on a maximum filtration rate of two gallons per square foot per minute. When used, the pressure filters shall be installed such that duplicate capacity is available to furnish the design capacity with one filter out of service.

(iv) With the exception of declining rate filters, each filter unit shall be equipped with a manually adjustable rate-of-flow controller with rate-of-flow indication or control valves with indicators.

(v) Each filter unit shall be equipped with a device to indicate loss of head through the filter. In lieu of loss-of-head indicators, declining rate filter units may be equipped with rate-of-flow indicators to monitor filter condition.

(vi) The effluent line of each filter installed after January 1, 1996, must be equipped with a slow opening valve or another means of automatically preventing flow surges when the filter begins operation.

(vii) Filters shall be equipped with sampling taps so that the effluent turbidity of each filter can be individually monitored.

(D) Filters shall be designed to ensure adequate cleaning during the backwash cycle.

(i) Only fully treated water shall be used to backwash the filters. This water may be supplied by elevated wash water tanks or by pumps which take suction from the clearwell and are provided for backwashing filters only. For installations having a treatment capacity no greater than 150,000 gallons per day, water for backwashing may be secured directly from the distribution system if proper controls and rate-of-flow limiters are provided.

(ii) The rate of filter backwashing shall be regulated by rate-of-flow controllers.

(iii) The rate of flow of backwash water shall not be less than 20 inches vertical rise per minute (12.5 gpm/sq. ft.) and usually not more than 30 inches vertical rise per minute (18.7 gpm/sq. ft.). This shall expand the filtering bed 30 to 50%. The freeboard in inches shall exceed the wash rate in inches of vertical rise per minute.

(iv) When used, surface filter wash systems shall be installed with an atmospheric vacuum breaker or a reduced pressure principle backflow preventer in the supply line. If an atmospheric vacuum breaker is used it shall be installed in a section of the supply line through which all the water passes and which is located above the overflow level of the filter.

(v) Gravity filters installed after January 1, 1996, shall be equipped with air scour backwash or surface wash facilities.

(11) (No change.)

(12) The identification of influent, effluent, waste backwash, and chemical feed lines shall be accomplished by the use of labels or various colors of paint. Where labels are used, they shall be placed along the pipe at no greater than five foot intervals. Where colors are used they shall follow the color code prescribed below. Color coding must be by solid color or banding. If bands are used, they shall be placed along the pipe at no greater than five foot intervals. The color code is as follows:
Figure 1: §290.42(d)(12)

(13) An adequately equipped laboratory must be available locally where daily microbiological and chemical tests can be made on water supplied by all plants serving 25,000 persons or more. For plants serving populations of less than 25,000, the facilities for making microbiological tests may be omitted and the required microbiological samples submitted to one of the Texas Department of Health's approved laboratories. All surface water treatment plants shall be provided with equipment for making at least the following determinations: pH, temperature, disinfectant residual, alkalinity, turbidity, "Jar" tests and other tests deemed necessary to monitor specific water quality problems or to evaluate specific water treatment processes. All surface water treatment plants shall provide sampling taps for raw, settled, filtered water and clearwell discharge.

(e) Disinfection.

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

(5) A full-face self-contained breathing apparatus or supplied air respirator that meets Occupational Safety and Health Administration (OSHA) standards for construction and operation, and a small bottle of fresh ammonia solution (or approved equal) for testing for chlorine leakage shall be readily accessible outside the chlorinator room when chlorine gas is used.

(6) (No change.)

(7) Adequate ventilation which includes both high level and floor level screened vents shall be provided for all enclosures in which gas chlorine is being stored or fed. Enclosures containing more than one open 150 pound cylinder of chlorine shall also provide forced air ventilation which includes screened and louvered floor level and high level vents, a fan which is located at and draws air in through the top vent and discharges to the outside atmosphere through the floor level vent, and a fan switch located outside the enclosure. Systems may install negative pressure ventilation in lieu of the above as long as the facilities also have gas containment and treatment as prescribed by the current Uniform Fire Code (UFC).

(8)-(9) (No change.)

(10) Where anhydrous ammonia feed equipment is utilized, it must be housed in a separate enclosure equipped

with both high and low level ventilation to the outside atmosphere. The enclosure must be provided with forced air ventilation which includes screened and louvered floor level and high level vents, a fan which is located at and draws air in through the floor vent and discharges through the top vent, and a fan switch located outside the enclosure. Systems may install negative pressure ventilation in lieu of the above as long as the facilities also have gas containment and treatment as prescribed by the current Uniform Fire Code (UFC).

(11) Emergency evacuation procedures must be established where one ton or larger chlorine or anhydrous ammonia cylinders are located within 1/4 mile of residential or other high density developments.

(f) Other treatment processes. The adjustment of fluoride ion content, special treatment for iron and manganese reduction, special methods for taste and odor control, demineralization, and other proposals covering other treatment processes will be considered on an individual basis, pursuant to §290.39(g) of this title (relating to General Provisions). Package-type treatment systems and their components shall be subject to all applicable design criteria in this section. Where innovative/alternate treatment systems are proposed, the registered professional engineer must provide pilot test data, data collected at similar full-scale operations, and proof of a one year manufacturers performance warrantee/guarantee assuring that the plant will produce an effluent of 0.5 NTU or less in at least 95% of the measurements taken each month. Pilot test data must be representative of the actual operating conditions which can be expected over the course of the year.

(g)-(h) (No change.)

(i) Treatment chemicals and media. All chemicals and any additional or replacement process media used in treatment of water supplied by public water systems must conform to American National Standards Institute/National Sanitation Foundation (ANSI/NSF) Standard 60 for direct additives and ANSI/NSF Standard 61 for indirect additives. Conformance with these standards must be obtained by certification of the product by an organization accredited by ANSI.

(j) Plant operations manual. A thorough plant operations manual must be compiled and kept up to date for operator review and reference. This manual should be of sufficient detail to provide the operator with routine maintenance and repair procedures as well as provide telephone numbers of water system personnel, system officials, and local/state/federal agencies to be contacted in the event of an emergency.

§290.43. Water Storage.

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

(c) Design and construction of clear wells, standpipes, ground storage tanks, and elevated tanks. All facilities for potable water storage shall be covered and designed, fabricated, erected, tested and disinfected in strict accordance with current American Water Works Association (AWWA) standards and shall be provided with the minimum number, size and type of roof vents, manways, drains, sample connections, access ladders, overflows, liquid level indicators and other appurtenances as specified in these rules. Bolted tanks shall be designed, fabricated, erected and tested in strict accordance with current AWWA Standard D103. The roof of all tanks shall be designed and erected so that no water ponds at any point on the roof and, in addition, no area of the roof shall have a slope of less than 0.75 inch per foot.

(1) (No change.)

(2) All roof openings shall be designed in accordance with current AWWA standards. If an alternate 30 inch diameter access opening is not provided in a storage tank, the primary roof access opening shall not be less than 30 inches in diameter. Other roof openings required only for ventilating purposes during cleaning, repairing or painting operations shall be not less than 24 inches in diameter or as specified by the registered professional engineer. An existing tank without a 30-inch in diameter access opening must be modified to meet this requirement when major repair or maintenance is performed on the tank. Each access opening shall have a raised curbing at least four inches in height with a lockable cover that overlaps the curbing at least two inches in a downward direction. Where necessary, a gasket shall be used to make a positive seal when the hatch is closed. All hatches shall remain locked except during inspections and maintenance.

(3)-(4) (No change.)

(5) Inlet and outlet connections shall be located so as to prevent short circuiting or stagnation of water. Clearwells used for disinfectant contact time shall be appropriately baffled.

(6)-(7) (No change.)

(8) All clear wells, ground storage tanks, standpipes, and elevated tanks shall be painted, disinfected, and maintained in strict accordance with current AWWA standards. However, no temporary coatings, wax grease coatings, or coating materials containing lead will be allowed. No other coatings will be allowed which are not approved for use (as a contact surface with potable water) by the United States Public Health Service (USPHS), the United States Environmental Protection Agency (EPA), National Sanitation Foundation (NSF), or the United States Food and Drug Administration (FDA). All newly installed coatings must conform to ANSI/NSF Standard 61 and must be certified by an organization accredited by ANSI.

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

(d) Design and construction of pressure (hydropneumatic) tanks. All hydropneumatic tanks must be located wholly above grade and must be of steel construction with welded seams except as provided in paragraph (8) of this subsection.

(1) Metal thickness for pressure tanks shall be sufficient to withstand the highest expected working pressures with a four to one factor of safety. Tanks of 1,000 gallons capacity or larger must meet the standards of the American Society of Mechanical Engineers (ASME) Section VIII, Division 1 Codes and Construction Regulations and must have an access port for periodic inspections. An ASME name plate must be permanently attached to those tanks. Tanks installed before July 1, 1988, are exempt from the ASME coding requirement, but all new installations must meet this regulation. Exempt tanks can be relocated within a system but cannot be relocated to another system.

(2)-(7) (No change.)

(8) Where seamless fiberglass tanks are utilized, they shall not exceed 300 gallons in capacity.

(9) No more than three pressure tanks shall be installed at any one site without the prior approval of the executive director.

(e) Facility fencing. All potable water storage tanks and pressure maintenance facilities must be enclosed by an intruder resistant fence with lockable gates. Pedestal-type elevated storage tanks with lockable doors and without external ladders are exempt from this requirement. The gates and doors must be kept locked whenever the facility is unattended.

(f) Service pumps. Service pump installations taking suction from storage tanks shall provide automatic low water level cutoff devices to prevent damage to the pumps. The service pump circuitry shall also resume pumping automatically once the minimum water level is reached in the tank.

§290.44. Water Distribution.

(a) Design and standards. All potable water distribution systems including pump stations, mains, and both ground and elevated storage tanks, shall be designed, installed and constructed in accordance with current American Water Works Association (AWWA) standards with reference to mate-

rials to be used and construction procedures to be followed. In the absence of AWWA standards, commission review may be based upon the standards of the American Society for Testing and Materials (ASTM), commercial and other recognized standards utilized by registered professional engineers.

(1) All newly installed pipes and related products must conform to American National Standards Institute/National Sanitation Foundation (ANSI/NSF) Standard 61 and must be certified by an organization accredited by ANSI.

(2) All plastic pipe for use in public water systems must also bear the National Sanitation Foundation Seal of Approval (NSF-pw) and have an ASTM design pressure rating of at least 150 psi or a standard dimension ratio of 26 or less.

(3) (No change.)

(4) Water transmission and distribution lines must be installed in accordance with the manufacturer's instructions. However, the top of the water line must be located below the frost line and in no case shall the top of the water line be less than 24 inches below ground surface.

(5) (No change.)

(b) (No change.)

(c) Minimum water line sizes. These are minimum requirements for domestic flows only and do not consider fire flows. These requirements should be exceeded when the registered professional engineer deems it necessary. It should be noted that the required sizes are based strictly on the number of customers to be served and not on the distances between connections or differences in elevation or the type of pipe. No new water line under two inches in diameter will be allowed to be installed in a public water system distribution system. These minimum line sizes do not apply to individual customer service lines.

Figure 1: §290.44(c)

(d) Minimum pressure requirement. The system must be designed to maintain a minimum pressure of 35 psi at all points within the distribution network at flow rates of at least 1.5 gallons per minute per connection. When the system is intended to provide fire fighting capability, it must also be designed to maintain a minimum pressure of 20 psi under combined fire and drinking water flow conditions.

(1) Air release devices shall be installed in the distribution system at all points where topography or other factors may create air locks in the lines. Air release devices shall be installed in such a manner as to preclude the possibility of submergence or possible entrance of contaminants. In this respect, all openings to the atmosphere shall be covered with 16-mesh or finer, corrosion-resistant screening material or an acceptable equivalent.

(2) -(6) (No change.)

(e) Location of waterlines.

(1) The following rules apply to installations of potable water distribution lines and wastewater collection lines, wastewater force mains and other conveyances/appurtenances identified as potential sources of contamination. Furthermore, all ratings specified shall be defined by ASTM or AWWA standards unless stated otherwise.

(2) When new potable water distribution lines are constructed, they shall be installed no closer than nine feet in all directions to wastewater collection facilities. All separation distances shall be measured from the outside surface of each of the respective pieces.

(3) Potable water distribution lines and wastewater collection lines or force mains that form parallel utility lines shall be installed in separate trenches.

(4) No physical connection shall be made between a drinking water supply and a sewer line. Any appurtenance shall be designed and constructed so as to prevent any possibility of sewage entering the drinking water system.

(5) Where the nine foot separation distance cannot be achieved, the following criteria shall apply:

(A) New Waterline Installation-Parallel Lines

(i) Where a new potable waterline parallels an existing, non-pressure or pressure rated wastewater line/force main and the registered professional engineer is able to determine that the existing line is not leaking, the new potable waterline shall be located at least two feet above the existing line, measured vertically, and at least four feet away, measured horizontally, from the existing line. Every effort shall be exerted not to disturb the bedding and backfill of the existing wastewater line.

(ii) Where a new potable waterline parallels an existing pressure rated wastewater line and it cannot be determined by the registered professional engineer if the existing line is leaking, the existing wastewater line shall be replaced with a 150 psi pressure rated pipe. The new potable waterline shall be located at least two feet above the new wastewater line, measured vertically, and at least four feet away, measured horizontally, from the replaced wastewater line.

(iii) Where a new potable waterline parallels a new wastewater line/force main, the wastewater line shall be constructed of 150 psi pressure rated pipe. The new potable waterline shall located at least two feet above the wastewater line, measured vertically, and at least four feet away, measured horizontally, from the wastewater line.

(B) New Waterline Installation-Crossing Lines

(i) Where a new potable waterline crosses an existing, non-pressure rated wastewater line, one segment of the waterline pipe shall be centered over the wastewater line such that the joints of the waterline pipe are equidistant and at least nine feet horizontally from the centerline of the wastewater line. The potable waterline shall be at least two feet above the wastewater line. Whenever possible, the crossing shall be centered between the joints of the wastewater line. If the existing wastewater line is disturbed or shows signs of leaking, it shall be replaced for at least nine feet in both directions (18 feet total) with 150 psi pressure rated pipe.

(ii) Where a new potable waterline crosses an existing, pressure rated wastewater line, one segment of the waterline pipe shall be centered over the wastewater line such that the joints of the waterline pipe are equidistant and at least nine feet horizontally from the centerline of the wastewater line. The potable waterline shall be at least six inches above the wastewater line. Whenever possible, the crossing shall be centered between the joints of the wastewater line. If the existing wastewater line shows signs of leaking, it shall be replaced for at least nine feet in both directions (18 feet total) with 150 psi pressure rated pipe.

(iii) Where a new potable waterline crosses a new, non-pressure rated wastewater line and the standard pipe segment length of the wastewater line is at least 18 feet, one segment of the waterline pipe shall be centered over the wastewater line such that the joints of the waterline pipe are equidistant and at least nine feet horizontally from the centerline of the wastewater line. The potable waterline shall be at least two feet above the wastewater line. Whenever possible, the crossing shall be centered between the joints of the wastewater line. The wastewater pipe shall have a minimum pipe stiffness of 115 psi at 5.0% deflection. The wastewater line shall be embedded in cement stabilized sand (see clause (vi) of this subparagraph) for the total length of one pipe segment plus 12 inches beyond the joint on each end.

(iv) Where a new potable waterline crosses a new, non-pressure rated wastewater line and a standard length of the wastewater pipe is less than 18 feet in

length, the potable water pipe segment shall be centered over the wastewater line. The materials and method of installation shall conform with one of the following options:

(I) Within nine feet horizontally of either side of the waterline, the wastewater pipe and joints shall be constructed with pipe material having a minimum pressure rating of 150 psi. An absolute minimum vertical separation distance of two feet shall be provided. The wastewater line shall be located below the waterline.

(II) All sections of wastewater line within nine feet horizontally of the waterline shall be encased in an 18 foot (or longer) section of pipe. Flexible encasing pipe shall have a minimum pipe stiffness of 115 psi at 5.0% deflection. The encasing pipe shall be centered on the waterline and shall be at least two nominal pipe diameters larger than the wastewater line. The space around the carrier pipe shall be supported at five foot (or less) intervals with spacers or be filled to the springline with washed sand. Each end of the casing shall be sealed with water tight non-shrink cement grout or a manufactured water tight seal. An absolute minimum separation distance of six inches between the encasement pipe and the waterline shall be provided. The wastewater line shall be located below the waterline.

(III) When a new waterline crosses under a wastewater line, the waterline will be encased as described for wastewater lines in section (II) above or constructed of ductile iron or steel pipe with mechanical or welded joints as appropriate. An absolute minimum separation distance of one foot between the water line and the wastewater line shall be provided. Both the waterline and wastewater line, must pass a pressure and leakage test as specified in AWWA C600 standards.

(v) Where a new potable waterline crosses a new, pressure rated wastewater line, one segment of the waterline pipe shall be centered over the wastewater line such that the joints of the waterline pipe are equidistant and at least nine feet horizontally from the centerline of the wastewater line. The potable waterline shall be at least six inches above the wastewater line. Whenever possible, the crossing should be centered between the joints of the wastewater line. The wastewater pipe shall have a minimum pressure rating of 150 psi. The wastewater line shall be embedded in cement stabilized sand for the total length of one pipe segment plus 12 inches beyond the joint on each end.

(vi) Where cement stabilized sand bedding is required, the cement stabilized sand shall have a minimum of 10% cement per cubic yard of cement stabilized sand mixture, based on loose dry weight volume (at least 2.5 bags of cement per cubic yard of mixture). The cement stabilized sand bedding shall be a minimum of six inches above and four inches below the sewer pipe. The use of brown coloring in cement stabilized sand for wastewater line bedding is recommended for the identification of wastewater force mains during future construction.

(6) Waterline and Manhole Separation. The separation distance from a potable waterline to a manhole shall be a minimum of nine feet. Where the nine foot separation distance cannot be achieved, the potable waterline shall be encased in a joint of 150 psi pressure class pipe at least 18 feet long and two nominal sizes larger than the new conveyance. The space around the carrier pipe shall be supported at five feet intervals with spacers or be filled to the spring line with washed sand. The encasement pipe shall be centered on the crossing and both ends sealed with cement grout or manufactured seal.

(7) Location of Fire hydrants. Fire hydrants shall not be installed within nine feet vertically or horizontally of any sanitary sewer line regardless of construction.

(8) Location of Supply/Suction Lines. Suction mains to pumping equipment shall not cross wastewater lines carrying domestic or industrial wastes. Raw water supply lines shall not be installed within five feet of any tile or concrete wastewater line.

(9) Proximity of Septic Tank Drainfields. Waterlines shall not be installed closer than ten feet to septic tank drainfields.

(f)-(g) (No change.)

(h) Backflow, siphonage.

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

(4) Effective January 1, 1996, all backflow prevention assemblies shall be tested upon installation by a recognized backflow prevention assembly tester and certified to be operating within specifications. Backflow prevention assemblies which are installed to provide protection against high health hazards must also be tested and certified to be operating within specifications at least annually by a recognized backflow prevention device tester.

(A) Recognized testers shall have completed a Commission approved course on cross connection control and backflow prevention and pass an examination administered by the TNRCC or its designated agent. The accredited tester classification shall be broken down into two categories:

(i) The "General Tester" is qualified to test and repair backflow prevention assemblies on any domestic, commercial, industrial or irrigation service. (Exception-Firelines-See "Fireline Tester" in §290. 44(h)(A)(ii)).

(ii) The "Fireline Tester" is qualified to test and repair backflow prevention assemblies on firelines only. The State Fire Marshall's office requires that a person performing maintenance on firelines must be employed by an Approved Fireline Contractor.

(B) Individuals that can show proof of completion of a course and passage of an exam based on the ABPA or ASSE National exam, prior to the effective date of these regulations, may be recognized as accredited for the term of their current certification (not to exceed three years).

(C) Gauges used in the testing of backflow prevention assemblies shall be tested for accuracy annually in accordance with the University of Southern California's Foundation of Cross Connection Control and Hydraulic Research and/or the American Water Works Association Manual of Cross Connection Control (Manual M-14). Public water systems shall require testers to include test gauge serial numbers on "Test and Maintenance" report forms and ensure testers have gauges tested for accuracy.

(D) A Test Report must be completed by the recognized backflow prevention Assembly Tester for each assembly tested. The signed and dated original must be submitted to the public water supplier for record keeping purposes. Should the tester choose to use a report format which differs from that found in Appendix F of this title, it must minimally contain all information required by the report form.

(E) Test and maintenance reports shall be retained for a minimum of three years. The public water supplier must provide these records to commission staff for inspection upon request.

(5) (No change.)

(i) Water hauling. When drinking water is distributed by tank truck or trailer, it must be accomplished in the following manner:

(1) (No change.)

(2) The equipment used to haul the water must be approved by the executive director and must be constructed as follows:

(A)-(K) (No change.)

(L) Operational records detailing the amount of water hauled, purchases, microbiological sampling results, chlorine residual readings, dates of disinfection and source of water shall be maintained.

§290.45. Minimum Water System Capacity Requirements.

(a) General Provisions. The following requirements are to be used in evaluating both the total capacities for public water systems and the capacities at individual pump stations and pressure planes. The capacities listed below are minimum requirements only. Additional supply, storage, service pumping, and pressure maintenance facilities will be required by the commission if a normal operating pressure of 35 psi cannot be maintained throughout the system, or if the system's maximum daily demand exceeds its total production and treatment capacity. Additional capacities will also be required if the system is unable to maintain a minimum pressure of 20 psi during fire fighting, line flushing and other unusual conditions. In all sections governing quantity requirements, total storage capacity does not include pressure tank capacity.

(b) Community Water Systems.

(1) Ground water supply requirements are as follows:

(A) (No change.)

(B) If fewer than 50 connections with ground storage, the system must have the following:

(i)-(ii) (No change.)

(iii) two or more service pumps having a total capacity of 2.0 gallons per minute per connection; and

(iv) (No change.)

(C) (No change.)

(D) For more than 250 connections, the system must meet the following requirements:

(i)-(iii) (No change.)

(iv) An elevated storage capacity of 100 gallons per connection or a pressure tank capacity of 20 gallons per connection must be provided. If pressure tanks are used, a maximum capacity of 30,000 gallons is sufficient for up to 2,500 connections. An elevated storage capacity of 100 gallons per connection is required for systems with more than 2,500 connections. Alternate methods of pressure maintenance may be proposed and will be approved if the criteria contained in §290.45(g)(2) of this chapter are met.

(v) Emergency power is required for systems which serve more than 250 connections and do not meet the elevated storage requirement. Sufficient emergency power must be provided to deliver a minimum of 0.35 gallons per minute per connection to the distribution system in the event of the loss of normal power supply. Alternately, an emergency interconnection can be provided with another public water system that has emergency power and is able to supply at least 0.35 gallons per minute for each connection in the combined system. Emergency power facilities in systems serving 1,000 connections or greater must be serviced and maintained in accordance with level 2 maintenance requirements contained in the current NFPA 110 standards. Although not required, compliance with NFPA 110 standards is highly recommended for systems serving less than 1,000 connections. Logs of all emergency power use and maintenance must be maintained and kept on file for a period of not less than three years. These records must be made available, upon request, for commission review.

(E)-(F) (No change.)

(2) All surface water supplies must provide the following:

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

(G) An elevated storage capacity of 100 gallons per connection or a pressure tank capacity of 20 gallons per connection must be provided. If pressure tanks are used, a maximum capacity of 30,000 gallons is sufficient for systems of up to 2,500 connections. An elevated storage capacity of 100 gallons per connection is required for systems with more than 2,500 connections. Alternate methods of pressure maintenance may be proposed and will be approved if the criteria contained in §290.45(g)(2) of this chapter are met.

(H) Emergency power is required for systems which serve more than 250 connections and do not meet the elevated storage requirement. Sufficient emergency power must be provided to deliver a minimum of 0.35 gallons per minute per connection to the distribution system in the event of the loss of normal power supply. Alternately, an emergency interconnection can be provided with another public water system that has emergency power and is able to supply at least 0.35 gallons per minute for each connection in the combined system. Emergency power facilities in systems serving 1,000 connections or greater must be serviced and maintained in accordance with level 2 maintenance requirements contained in the current NFPA 110 standards. Although not required, compliance with NFPA 110 standards is highly recommended for systems serving less than 1,000 connections. Logs of all emergency power use and maintenance must be maintained and kept on file for a period of not less than three years. These records must be made available, upon request, for commission review.

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

(e) Water wholesalers. The following additional requirements apply to systems which supply wholesale treated water to other public water supplies.

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

(3) Emergency power is required for each portion of the system which supplies more than 250 connections under direct pressure and does not provide an elevated storage capacity of at least 100 gallons per connection. If emergency power is required, it must be sufficient to deliver 20% of the minimum required service pump capacity in the event of the loss of normal power supply. When the wholesaler provides water through an air gap into the purchaser's storage facilities it will be the purchaser's responsibility to meet all minimum water system capacity requirements including emergency power.

(f) (No change.)

(g) Exceptions. Requests for exceptions to one or more of these Minimum Water System Capacity Requirements shall be considered on an individual basis. Any water system which requests an exception must demonstrate to the satisfaction of the executive director that the exception will not compromise the public health or result in a degradation of service or water quality as specified in §290. 39(i) of this title (relating to General Provisions).

(1) (No change.)

(2) Although elevated storage is the preferred method of pressure maintenance for systems of over 2,500 connections, it is recognized that local conditions may dictate the use of alternate methods utilizing hydropneumatic tanks and on-site emergency power equipment. Exceptions to the elevated storage requirements may be obtained based on application to and approval of the executive director. Special conditions apply to systems qualifying for an elevated storage exception.

(A) The system must submit documentation sufficient to assure that the alternate method of pressure maintenance is capable of providing a safe and uninterrupted supply of water under pressure to the distribution system during all demand conditions.

(i) A signed and sealed statement by a registered professional engineer must be provided which certifies that the pressure maintenance facilities are sized, designed and capable of providing a minimum pressure of at least 35 psi at all points within the distribution network at flow rates of 1.5 gpm per connection or greater. In addition, the engineer must certify that the emergency power facilities are capable of providing the greater of the average daily demand or 0.35 gpm per connection while maintaining distribution pressures of at least 35 psi, and that emergency power facilities powering production and treatment facilities are capable of supplying at least 0.35 gpm per connection to storage.

(ii) The system's registered professional engineer must conduct a hydraulic analysis of the system under peak conditions. This must include an analysis of the time lag between the loss of the normal power supply and the commencement of emergency power as well as the minimum pressure that will be maintained within the distribution system during this time lag. In no case shall this minimum pressure within the distribution system be less than 20 psi. The results of this analysis must be submitted to the commission for review.

(iii) For existing systems, the system's registered professional engineer must provide continuous 24 hour pressure chart recordings of distribution pressures maintained during past power failures, if available. The period reviewed should not be less than three years.

(B) Emergency power facilities must be maintained and provided with necessary appurtenances to assure immediate and dependable operation in case of normal power interruption.

(i) The facilities must be serviced and maintained in accordance with level two maintenance requirements contained in the current NFPA 110 standards and the manufacturers recommendations.

(ii) The switching gear must be capable of bringing the emergency power generating equipment on line during a power interruption such that the pressure in the distribution network does not fall below 20 psi at any time.

(iii) The minimum on-site fuel storage capacity shall be determined by the fuel demand of the emergency power facilities and the frequency of fuel delivery. An amount of fuel equal to that required to operate the facilities under-load for a period of at least eight hours must always be maintained on site.

(iv) Residential rated mufflers or other means of effective noise suppression must be provided on each emergency power motor.

(C) Battery powered or uninterrupted power supply pressure monitors and chart recorders which are configured to activate immediately upon loss of normal power must be provided for pressure maintenance facilities. These records must be kept for a minimum of three years and made available for review by the commission. Records must include chart recordings of all power interruptions including interruptions due to periodic emergency power "under-load" testing and maintenance.

(D) An emergency response plan must be submitted detailing procedures to be followed and individuals to be contacted in the event of loss of normal power supply.

(3) Any exception granted pursuant to these requirements shall be subject to review at the time of each routine sanitary survey of the system. Failure to demonstrate satisfactory survey findings may result in revocation of the exception.

§290.46. Minimum Acceptable Operating Practices for Public Drinking Water Systems.

(a) (No change.)

(b) Microbiological. Submission of samples for microbiological analysis shall be as required by §§290.101-290.121 of this title (relating to Drinking Water Standards Governing Drinking Water Quality and Reporting Requirements for Public Water Supply Systems). Microbiological samples may be required by the commission for monitoring purposes in addition to the routine samples required by the drinking water standards. These samples shall be submitted to the Texas Department of Health Bureau of Laboratories or one of its approved laboratories. (A list of the approved laboratories can be obtained by contacting the Texas Department of Health Bureau of Laboratories).

(c) (No change.)

(d) Monthly operation reports. A monthly report of water works operation must be compiled. The report shall show the amounts of various chemicals, daily distribution system pumpages, dates of dead-end main flushes, cleanings of storage tanks, results of microbiological and chemical tests performed, and other pertinent data. Systems using surface water sources must also report raw and treated water analyses and daily turbidity analyses. A copy must be kept on file for review and made available during inspections.

(1) A copy of the monthly report must be submitted to the Texas Natural Resource Conservation Commission, Water Utilities Division, P.O. Box 13087, MC 155, Capitol Station, Austin, Texas 78711-3087 by the 15th day of the following month. The copy submitted to the commission must contain all the information required by the drinking water standards and the results of any special monitoring tests which have been required.

(2) Systems serving fewer than 100 connections which utilize ground water sources only are not required to compile monthly reports.

(e) Operation by certified personnel. All systems, except transient noncommunity systems which utilize ground or purchased water, must be under the direct supervision of a certified water works operator. The operator shall ensure that the water system complies with the requirements of this section.

(1) No district, municipality, firm, corporation, or individual, except transient noncommunity systems noted in §290.46(e), shall furnish to the public any drinking water, unless the production, processing, treatment, and distribution is at all times under the direct daily supervision of a competent water works operator holding a valid certificate of competency issued under the direction of the commission. A Grade "D" certificate is valid for systems with 250 or fewer connections. Systems serving in excess of 250 connections must employ an operator with a Grade "C" or higher certificate. Systems serving in excess of 1,000 connections must employ at least two Grade "C" certified operators. For all systems which treat surface water, at least one of the required operators must hold at least a grade "B" or higher surface water certificate or hold a grade "C" surface water certificate and have completed a commission recognized 20-hour Water Laboratory Course.

(2) (No change.)

(3) Systems which have sources which are classified as groundwater under the influence of surface water must be under the supervision of either an operator who has at least a Grade C Groundwater certificate and has completed additional training or an operator who has at least a Grade C surface water certificate.

(A) Those systems which utilize cartridge filters must be under the

supervision of at least a Grade C Groundwater operator who has completed a commission recognized 8-hour training course on monitoring and reporting requirements.

(B) Those systems which utilize coagulant addition and direct filtration must be under the supervision of at least a Grade C Groundwater operator who has completed a commission recognized 20-hour Surface Water Production course and a commission recognized 8-hour training course on monitoring and reporting requirements.

(C) Those systems which utilize complete surface water treatment must comply with the requirements of 30 TAC §290.46(e)(2).

(4) Certified operators must provide the commission with written, dated and signed notice of the public water systems which they operate or are employed by when applying for, renewing, or upgrading their certification. This notice must be amended in writing within ten days of any change in responsibility.

(f) Disinfectant residual and monitoring. Facilities shall be provided to maintain an adequate disinfectant residual throughout the distribution system and equipment shall be available for monitoring the concentration of the disinfectant.

(1) (No change.)

(2) The disinfectant residual in the distribution system must be tested periodically using a test kit which employs a diethyl-p-phenylenediamine (DPD) indicator. The record of these test results shall be maintained for at least three years.

(A) Public water systems must conduct daily disinfectant residual tests at representative locations in the distribution system unless they utilize ground water or purchased water sources only and serve fewer than 250 connections or 750 persons daily.

(B) Systems which utilize ground water or purchased water sources only and serve fewer than 250 connections or 750 persons daily must test the disinfectant residual at representative locations in the distribution system at least once every seven days.

(C) (No change.)

(D) Representative disinfectant residual monitoring locations shall include, but are not limited to, those identified in the bacteriological sample siting plan and those in the far reaches of the distribution system. Only residual tests taken at bacteriological sampling sites can be used for compliance monitoring.

(g)-(h) (No change.)

(i) Plumbing ordinance. Public water systems must adopt an adequate plumbing ordinance, regulations, or service agreement with provisions for proper enforcement to insure that neither cross-connections nor other unacceptable plumbing practices are permitted. See §290.47(b) of this title (relating to Appendices). Should sanitary control of the distribution system not reside with the purveyor, the entity retaining sanitary control shall be responsible for establishing and enforcing adequate regulations in this regard. The use of pipes and pipe fittings that contain more than 8.0% lead or solders and flux that contain more than 0.2% lead is prohibited for installation or repair of any public water supply and for installation or repair of any plumbing in a residential or nonresidential facility providing water for human consumption and connected to a public drinking water supply system. This requirement may be waived for lead joints that are necessary for repairs to cast iron pipe.

(j) Customer Service Inspections. Effective January 1, 1996, a customer service inspection certification shall be completed prior to providing continuous water service to new construction, on any existing service when the water purveyor has reason to believe that cross-connections or other unacceptable plumbing practices exist, or after any material improvement, correction, or addition to the private plumbing facilities. See §290.47(d) of this title (relating to Appendices).

(1) Individuals with the following credentials shall be recognized as capable of conducting a customer service inspection certification.

(A) Plumbing Inspectors and Water Supply Protection Specialists licensed by the Texas State Board of Plumbing Examiners.

(B) Certified Waterworks Operators and members of other water related professional groups who have completed a training course, passed an examination administered by the commission or its designated agent, and hold an endorsement granted by the commission or its designated agent.

(C) Licensed Plumbers, at the discretion of the water purveyor, may perform customer service inspections on single-family residential services.

(2) As unacceptable plumbing practices are discovered, they shall be promptly eliminated to prevent possible contamination of the water supplied by the public water system. The existence of a serious threat to the integrity of the public water supply shall be considered sufficient grounds for immediate termination of water service. Service can be restored only when the source of potential contamination no longer exists, or until sufficient additional safeguards have been taken.

(3) Copies of properly completed inspection certifications must be kept on file by the water purveyor and made available, upon request, for commission review. These certifications shall be retained for a minimum of ten years. If the suggested certification form (see Appendix D, §290.47 of this title) is not used, the Inspection Certifications must minimally include the name and registration number of the inspector, the type of registration (Plumbing Inspectors, Water Supply Protection Specialists, Certified Operator, etc.), and be dated and signed. It must also certify that:

(A) No direct connection between the public drinking water supply and a potential source of contamination exists. Potential sources of contamination are isolated from the public water system by an air-gap or an appropriate backflow prevention assembly in accordance with state plumbing regulation. Additionally, all pressure relief valves and thermal expansion devices are in compliance with state plumbing codes.

(B) No cross-connection between the public drinking water supply and a private water source exists. Where an actual air gap is not maintained between the public water supply and a private water supply, an approved reduced pressure-zone backflow prevention assembly is properly installed and a service agreement exists for annual inspection and testing by a recognized backflow prevention assembly tester. See §290.44(h)(4)of this title (relating to recognized backflow prevention assembly testers).

(C) No connection exists which would allow the return of water used for condensing, cooling or industrial processes back to the public water supply.

(D) No pipe or pipe fitting which contains more than 8.0% lead exists in private plumbing facilities installed on or after July 1, 1988.

(E) No solder or flux which contains more than 0.2% lead exists in private plumbing facilities installed on or after July 1, 1988.

(F) No plumbing fixture is installed which is not in compliance with a state-approved plumbing code.

(4) These customer service inspection requirements are not considered acceptable substitutes for and shall not apply to the sanitary control requirements stated in §290.115(5) of this title (relating to Exceptions to these standards).

(k)-(q) (No change.)

(r) Data on water system ownership and management. The commission shall be provided with information regarding water system ownership and management.

(1) (No change.)

(2) On an annual basis, each certified operator who supervises more than one water system shall provide the executive director written notices containing their certificate number, address and telephone number, and the name and identification number of each public water system which they supervise. Each operating company shall provide this information for itself and for each of its operators. See §290.47 of this title (relating to Appendices).

(s) Boil water notification. In the event of low distribution pressures (below 20 psi), water outages, repeated unacceptable microbiological samples or failure to maintain adequate chlorine residuals, a boil water notification must be instituted by the water system owner or responsible official. The system must notify its customers within 24 hours using the prescribed notification format as specified in §290.47(e) of this title (relating to Appendices). Bilingual notification may be appropriate based upon local demographics. Boil water notices shall remain in effect until water distribution pressures in excess of 20 psi can consistently be maintained, a minimum of 0.2 mg/l free chlorine residual or 0.5 mg/l chloramine residual (measured as total chlorine) is present throughout the system and water samples collected for microbiological analysis are found negative for coliform organisms. Once the above conditions are met, the customers must be notified in a manner similar to the original notice. A copy of this notice shall be provided to the executive director. Other protective measures may be required at the discretion of the executive director. Line maintenance situations which effect only limited and localized segments of the distribution system are exempt from system-wide notification unless a significant public health risk is involved.

(t)-(w) (No change.)

(x) Abandoned wells. Abandoned public water supply wells owned by the system must be plugged with cement according to the Water Well Drillers Rules Chapter 338 of this title. Wells that are not in use and are non-deteriorated (as defined in 30 TAC 338) must be tested every five years or as required by the executive director to prove that they are in a non-deteriorated condition. The test results shall be sent to the commission's Water Utilities Division for review and approval. Deteriorated wells must be either plugged with cement or repaired to a non-deteriorated condition.

(y) Electrical wiring. All water system electrical wiring must be installed in a securely mounted conduit in compliance with a local or national electrical code.

§290.47. Appendices.

(a) Appendix A. Recognition as a Superior or Approved Public Water System.
Figure 1: 30 TAC §290.47(a)

(b) Appendix B. Sample Service Agreement.
Figure 2: 30 TAC §290.47(b)

(c) Appendix C. Sample Sanitary Control Easement Document for a Public Water Well.
Figure 3: 30 TAC §290.47(c)

(d) Appendix D. Sample Service Inspection Certification.
Figure 4: 30 TAC §290.47(d)

(e) Appendix E. Boil Water Notification.
Figure 5: 30 TAC §290.47(e)

(f) Appendix F. Sample Backflow Prevention Assembly Test and Maintenance Report.
Figure 6: 30 TAC §290.47(f)

(g) Appendix G. Operator and/or Employment Notice.
Figure 7: 30 TAC §290.47(g)

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 October 6, 1995.

TRD-9512899 Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission

Effective date: November 3, 1995

Proposal publication date: June 13, 1995

For further information, please call: (512) 239-4640

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• 30 TAC §§290.47-290.50

The repeals are adopted under Texas Water Code, §5,103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state and the Texas Health and Safety Code, Chapter 341, Subchapter C, which governs sanitary standards of drinking water, protection of public water supplies, and bodies of water.

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 October 6, 1995.

TRD-9512900 Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission

Effective date: November 3, 1995

Proposal publication date: June 13, 1995

For further information, please call: (512) 239-4640

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Drinking Water Standards Governing Drinking Water Quality and Reporting Requirements for Public Water Supply Systems

• 30 TAC §290.121

The new section is proposed under Texas Water Code, §5,103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state and the Texas Health and Safety Code, Chapter 341, Subchapter C, which governs sanitary standards of drinking water, protection of public water supplies, and bodies of water.

§290.121. Laboratory Analyses.

(a) All samples used to determine compliance with the rules of the commission for chemical, radiological, or bacteriological analyses must be submitted to a laboratory approved by the Texas Department of Health. Non-compliance tests, such as control tests taken to operate the system, may be run in the plant or local laboratory.

(b) Methods of analysis shall be as specified in 40 Code of Federal Regulations §141.21(f) (microbiological), §141.22(a) (turbidity) , §141.23(f) (inorganics), §141.24(e), (f) and (g) (organics) and §141. 25 (radionuclides) of the National Primary Drinking Water Regulations, or by any alternative analytical technique as specified by the Department and approved by the Administrator under 40 Code of Federal Regulations §141.27.

(c) The commission adopts by reference the Federal Regulations referred to in subsection (b) of this section.

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 October 6, 1995.

TRD-9512901 Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission

Effective date: November 3, 1995

Proposal publication date: June 13, 1995

For further information, please call: (512) 239-4640

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Chapter 330. Municipal Solid Waste

The Texas Natural Resource Conservation Commission (TNRCC) adopts an amendment to §330.4 and new §330.66, concerning municipal solid waste management facilities used in the transfer of grease trap waste, grit trap waste, septage, and other similar liquid waste. Transfer facilities meeting certain capacity requirements will be exempt from permit requirements and will be required to give notice of operation to the TNRCC and will be required to design and operate the facility in accordance with a new section. Section 330. 66 is adopted with changes to the proposed text as published in the July 11, 1995, issue of the *Texas Register* (20 TexReg 5049). Section 330.4 is adopted without changes to the proposed text as published in the July 11, 1995, issue of the *Texas Register* (20 TexReg 5049), and will not be republished.

The amended and new sections are intended to encourage the development of certain liquid waste transfer stations, thereby reducing transportation costs for liquid waste. Due to federal requirements of Subtitle D of the Resource Conservation and Recovery Act, many landfills in Texas have ceased accepting certain types of liquid waste, and the costs associated with transporting such waste to an approved disposal or processing facility can cause a serious economic transportation burden.

The changes are consistent with Senate Bill 963, 73rd Legislature (1993) which amended the Texas Solid Waste Disposal Act, Texas Health and Safety Code, §361.111. The bill exempts certain municipal solid waste management facilities involved in the transfer of municipal solid waste from the TNRCC municipal solid waste permit requirements. In order to qualify for permit exemption, the facility must comply with certain design and operational requirements, and must meet certain capacity limits.

Comments were received from Waste Technologies, Inc., Scientific Consulting Laboratories, Inc., and American WasteWater Ltd. All three commenters expressed their support of the proposed rule. The TNRCC acknowledges their supportive comments. One commenter requested the financial assurance requirements be eliminated or amended because of the administrative costs associated with the maintenance of a financial assurance instrument. The TNRCC believes that there are means to keep financial assurance administrative costs minimized.

TNRCC has added clarified language to §330.66(a)(2), (3), and (c)(6). The phrase "prior to operation" has been added to the end of §330.66(a)(2) and (3) to clarify the timing required for the specified action. In regard to §330.66(c)(6), reference numbers have been changed to be more specific, the phrase "upon approval of the executive director" has been added to clarify when financial assurance instrument will be released, and the sentence "No post-closure care for financial assurance is required" has been deleted because this concept is covered in Subchapter K of this title (relating to Financial Assurance).

Subchapter A. General Information

• 30 TAC §330.4

The amendment is adopted under the authority of the Texas Water Code, §5.103, which provides the TNRCC with the authority to adopt any rules necessary to carry out the powers and duties under the provisions of the Texas Water Code and other laws of this state, and under Senate Bill 963, as passed by the 73rd Legislature; and pursuant to the Texas Solid Waste Disposal Act, Texas Health and Safety Code, §361.024, which provides the TNRCC with the authority to regulate municipal solid waste and adopt rules as necessary to regulate the operation, management, and control of solid waste under its jurisdiction.

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 October 16, 1995.

TRD-9513229 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Effective date: November 6, 1995

Proposal publication date: July 11, 1995

For further information, please call: (512) 239-6087

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Subchapter E. Permit Procedures

• 30 TAC §330.66

The new section is adopted under the authority of the Texas Water Code, §5.103, which provides the Texas Natural Resource Conservation Commission (TNRCC) with the authority to adopt any rules necessary to carry out the powers and duties under the provisions of the Texas Water Code, the Texas Solid Waste Disposal Act, Texas Health and Safety Code, §361.024 and §361. 061, which provides the TNRCC with the authority to regulate municipal solid waste and adopt rules as necessary to regulate the operation, management and control of solid waste under its jurisdiction.

§330.66. Liquid Waste Transfer Facility Design and Operation.

(a) Applicability.

(1) This section shall apply to a municipal solid waste management facility that handles only liquid waste and which is exempt from permit requirements under §330.4(r) of this title (relating to Permit Required).

(2) New liquid waste transfer facilities with permanent holding vessels (fixed facilities) must comply with all requirements of this section prior to operation.

(3) New liquid waste transfer facilities that only transfer from vehicle to vehicle must comply with applicable requirements of this section prior to operation.

(4) Existing liquid waste transfer facilities must comply with applicable requirements of this section and must notify the Texas Natural Resource Conservation Commission (TNRCC) of their operation within 30 days of the effective date of these regulations.

(5) Temporary storage facilities as defined in §312.147 of this title (relating to Temporary Storage) that store 8,000 gallons or less for a period of four days or less in mobile containers are not required to follow the liquid waste transfer station rules in this section. Owners and operators of temporary storage facilities that store 8,000 gallons or less for a period of four days or less must follow the notification rules in this section.

(6) Secondary transporters of liquid wastes as defined in §312.148 of this title (relating to Secondary Transportation of Waste) are subject to all applicable requirements in this section.

(7) This section is applicable to liquid waste transfer facilities located on or at other TNRCC authorized facilities.

(b) Public meeting. The owner or operator of each liquid waste transfer facility shall conduct a public meeting in the local area within 30 days of facility operation, or as determined by the executive director, to describe the proposed action to the general public. A one time notice of the public meeting shall be provided by the facility owner or operator two weeks prior to the meeting in the format prescribed in the Health and Safety Code, §361. 0791(d) and (e) (relating to Public Meeting and Notice Requirements). Evidence that the meeting was held shall be submitted to the TNRCC in the form of a copy of the meeting notice as published and a notarized statement from the facility owner or operator stating that the meeting was held and stating the meeting date and location. This meeting requirement is applicable to all liquid waste transfer facilities.

(c) Notification. The owner or operator shall notify the executive director in writing of the intent to operate a liquid waste transfer facility 30 days prior to the

operation of the facility by completing a TNRCC Form entitled "Notice of Intent to Operate a Liquid Waste Transfer Facility," available from the TNRCC. The facility will be issued a registration number by the TNRCC upon receipt of the Form. Documentation of the facility design and operation shall be maintained as follows.

(1) Waste data. For all liquid waste transfer facilities, documentation of the incoming and outgoing liquid waste rate shall be maintained at the facility or at the facility headquarters, as applicable. The incoming liquid waste rate shall be supported by trip ticket receipts and annual reports. Random sampling and analysis of the incoming waste should be conducted and records maintained.

(2) Site plan. For fixed facilities only, a site layout plan, signed and sealed by a registered professional engineer, and a location map must be maintained at the facility.

(3) Land-use. For all liquid waste transfer facilities, the owner or operator shall maintain documentation at the facility of local government approval/acceptance of the site location, e.g., conformity with local zoning restrictions, a building permit, license, nonconforming use authorization, deed restrictions, etc. These regulations do not grant authorization for any activities of the facility that are not in compliance with local government ordinances and regulations.

(4) Site operating plan.

(A) A site operating plan shall be maintained at the facility or at the facility headquarters for all liquid waste transfer facilities. The site operating plan shall include, at a minimum, a description of the general liquid waste data, the facility operation, facility maintenance, safety provisions, emergency procedures, fire protection, operating hours, spill control procedures, and vector control procedures.

(B) For each facility, the plan shall also address alternate procedures in the event that the facility becomes inoperable for periods longer than 24 hours.

(C) For all liquid waste transfer facilities, the liquid waste data shall be maintained to include an estimate of the amount of liquid waste to be received daily, the maximum amount of liquid waste to be stored, the maximum and average lengths of time that liquid waste is to remain on the site, and the intended destination of the liquid waste received. The data shall be maintained either at the facility or at the facility headquarters.

(D) The plan shall address emergency procedures for catastrophic vessel failure, for accidental discharges, and for spills of liquid waste. For fixed storage facilities, a plan shall be maintained on site that addresses yearly vessel inspection and procedures to repair leaks, if found. In the event of a discharge or spill of waste at the transfer facility the owner or operator of the facility must take appropriate action to protect human health and the environment, e.g., notify local law enforcement and health authorities; dike the discharge area; clean up any waste discharge that occurs; or take such action as may be required or approved by federal, state, or local officials having jurisdiction so that the waste discharge no longer presents a public health or environmental problem.

(5) Legal description. For all liquid waste transfer facilities, a legal description of the property, including the book and page number of the county deed records of the current property owner, shall be maintained at the site or at the facility headquarters. If the property is platted, the book and page number of the final plat record and a copy of the final plat shall be maintained on site or at the facility headquarters.

(6) Evidence of financial assurance. For fixed facilities only, evidence of financial assurance shall be submitted to the TNRCC in accordance with §§330.9, 330.282, 330.285, and 330.286 of this title, (relating to Financial Assurance). A cost estimate of the cost to close the facility shall be submitted with the notice. The financial assurance document shall be submitted prior to facility operation. The financial assurance instrument will be released upon approval of the executive director.

(7) Statement of owner or operator. The following document shall be signed, notarized, and submitted with the notification form:

(A) I, _____, state that I have knowledge of the facts set forth in the plans and that these facts are true and correct, to the best of my knowledge and belief. I further state that, to my knowledge and belief, the project does not in any way violate any law, rule, ordinance, or decree of the duly authorized governmental entity having jurisdiction. I further state that I am the facility owner or operator or am authorized to act for the owner or operator.

_____ (Signature)

_____ (Type Name and Title)

_____ (Date)

(B) Notary public's certificate: Subscribed and sworn to before me, by the said _____, this _____ day of _____ 19___, to certify which witness my hand and seal of office. _____ Notary Public in and for _____ County, Texas. My commission expires on _____.

(d) Design criteria.

(1) Facility design. The facility shall be designed in accordance with all local building codes, land development code requirements, and deed restrictions, if applicable. Building setback lines shall be followed, if applicable Vehicle parking shall be provided on-site for equipment and employees. Necessary water connections for facility cleaning shall be provided.

(2) Water pollution control. Lagoons, opentop storage facilities, and open vessels are prohibited. Underground storage facilities are prohibited. Provisions for the handling of spilled liquids and any washdown waters from the facility shall be provided. Normally, at fixed facilities, concrete pads with raised curbs around the perimeter, asphalt-paved areas with berms, or the equivalent containment facilities should be utilized to control spills of waste and any other contaminated water. Other spill control methods are acceptable.

(3) Odor control. All liquid waste transfer facilities shall be designed to transfer liquids with a minimal time exposure of liquid waste to the air. The owner or operator shall consider all necessary measures to prevent or eliminate nuisance odors. All liquid waste shall be stored in odor retaining containers and vessels. The applicant should consider additional on-site buffer zones for odor control. The facility shall be designed and operated to prevent nuisance odors from leaving the property boundary of the facility. If nuisance odors are found to be passing the facility property boundary, the facility owner or operator may be required to suspend operations until the nuisance is abated.

(4) Visual screening. Screening or other measures to minimize adverse visual impacts should be considered where appropriate.

(5) Site drainage. For fixed facilities only, drainage provisions for controlling surface water on or near the site shall be provided. The locations of any proposed dikes, berms, storm sewers, levees, detention ponds, and the outfall point shall be identified in the site plan.

(6) 100-year flood. If the fixed facility is located in a 100-year floodplain, the facility shall be designed to prevent washout of contaminants. Such designs normally include levees and other flood control structures.

(7) Site access. The site access road from a publicly-owned roadway to each facility shall be at least a two-lane gravel or paved road, designed for the expected traffic flow. Safe on-site access for waste transporter vehicles shall be provided. The access road design shall include adequate turning radii according to the vehicles that will utilize the site and shall avoid disruption of normal traffic patterns. A positive means to control dust and mud shall be provided.

(8) Access control. Access to each site should be controlled by a perimeter fence, four-foot barbed wire or six-foot chain-link, or equivalent, with lockable gates. A sign shall be provided that gives the site name, owner or operator's name, facility registration number, operating hours, telephone number, and site rules.

(e) General prohibitions. A person may not cause, suffer, allow, or permit the collection, storage, transportation, processing, or disposal of liquid waste, or the use or operation of a liquid waste facility to store, process, or dispose of liquid waste, in violation of the Texas Solid Waste Disposal Act, or any regulations, rules, permit, license, order of the commission or in such a manner so as to cause:

(1) the discharge or imminent threat of discharge of liquid waste into or adjacent to the waters in the state without obtaining specific authorization for such discharge from the commission;

(2) the creation and maintenance of a nuisance; or

(3) the endangerment of the human health and welfare or the environment.

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 October 16, 1995.

TRD-9513230 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Effective date: November 6, 1995

Proposal publication date: July 11, 1995

For further information, please call: (512) 239-6087

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Chapter 335. Industrial Solid Waste and Hazardous Waste

Subchapter K. Hazardous Substance Facilities Assessment and Remediation

- **30 TAC §335.352**

The Texas Natural Resource Conservation Commission (Commission or TNRCC) adopts an amendment to §335.352, concerning hazardous substance facilities assessment and remediation. Section 335.352, is adopted without changes to the proposed text as published in the June 13, 1995, issue of the *Texas Register* (20 TexReg 4340) and will not be republished.

The adopted amendment replaces the 1982 Federal Hazard Ranking System (HRS) with the 40 Code of Federal Regulations (CFR), Part 300, adopted by reference. The rule will go into effect on December 1, 1995 to allow sites being assessed under the old HRS to be completed. The replacement of the 1982 Federal HRS with the 40 CFR, Part 300 avoids duplication of effort by eliminating utilization of two versions of the HRS.

No comments were received regarding this adoption.

The amended section is adopted under the Texas Water Code, §§5.102, 5. 103, 5.105, and 26.011, which provides the Texas Natural Resource Conservation Commission with the authority to adopt any rules necessary to carry out its powers and duties under the code and other laws of the State of Texas, and to establish and approve all general policy of the commission; under the Texas Solid Waste Disposal Act, Texas Health and Safety Code, §§361.017, 361.024, and §361.002, which gives the Texas Natural Resource Conservation Commission the authority to regulate solid and hazardous wastes and to adopt rules and promulgate rules consistent with the general intent and purposes of the Act.

The amended section affects the Health and Safety Code, Chapter 361.

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 October 11, 1995.

TRD-9513218 Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission

Effective date: December 1, 1995

Proposal publication date: June 13, 1995

For further information, please call: (512) 239-4640

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

Part XVI. Coastal Coordination Council

Chapter 501. Coastal Management Program

The Coastal Coordination Council (council) adopts amendments to §§501.1, 501.3 and 501.4, 501.10-501.14 of this title, concerning the Texas Coastal Management Program (CMP) general provisions and goals and policies. Sections 501.1, 501.3, 501.4, 501.13, and 501.14 are adopted with changes to the proposed text as published in the July 18, 1995, issue of the *Texas Register* (20 TexReg 5172). Sections 501.10-501.12 are adopted without changes and will not be republished.

The following provisions shall be implemented and become enforceable at a date to be established by the council in the future: 31 TAC Chapter 505, Subchapter C (relating to Consistency and Council Review of Proposed State Agency Actions), Subchapter D (relating to Council Advisory Opinions on General Plans), and Subchapter E (relating to Consistency and Council Review of Local Government Actions) and 31 TAC Chapter 506 (relating to Council Procedures for Federal Consistency with Coastal Management Program Goals and Policies). The council shall publish notice of the implementation date(s) of these provisions in the *Texas Register* at least 30 days prior to such implementation date(s). Individual federal, state, and local subdivision actions need not comply with the CMP goals and Policies as set forth in Chapter 501 of this title (relating to Coastal Management Program) prior to the implementation of council review of such actions under Chapters 505 (relating to Council Procedures for State Consistency with Coastal Management Program Goals and Policies) and 506 (relating to Council Procedures for Federal Consistency with Coastal Management Program Goals and Policies. The council will implement the following provisions beginning February 1, 1996: Chapters 501 and 503, and Chapter 505, Subchapters A and B (relating to Purpose and Policy and State Agency Actions Subject to the Coastal Management Program and Council Review and Certification of Agency Rules).

These amendments reflect statutory changes made by the 74th Legislature, 1995, in House Bill 3226, to be codified at Texas Natural Resources Code, Chapter 33.

This preamble addresses changes adopted as the result of comments received on the July 18, 1995 proposals. To fully explain the adopted rules, this preamble also addresses changes to the September 27, 1994 rules made as the result of House Bill 3226.

Chapter 501 of this title describes the council's coordinated approach to managing coastal resources and establishing the CMP goals and policies. The chapter is designed to coordinate efforts by agencies and subdivisions as they exercise their current authority within the framework of the CMP goals and policies.

A commenter discussed the proposal to replace the phrase "greatest extent practicable" with "extent practicable" throughout Chapter 501 of this title. The proposed change was not made. The change was originally proposed to ensure internal consistency within the CMP rules, and not to reduce the degree of protection for coastal natural resource areas (CNRAs), nor was a lower standard intended. However, to avoid any ambiguity and to respond to public comments, the council decided not to make the change and has substituted the phrase to "the greatest extent practicable" throughout the rules. The council expects that the protective measures called for under these rules will be exercised to the fullest degree possible.

Five commenters supported the proposed amendment of §501.1. Section 501.1 has been changed to conform to Texas Natural Resources Code, §33.204, to provide for a council report on January 15 of each odd-numbered year. In addition, §501.1 has been changed to conform to Texas Natural Resources Code, §33.209, which prohibits the adoption of special area management plans (SAMPS), by removing all references to Chapter 504 (relating to Special Area Management Planning), which has been repealed. Furthermore, §501.1 has been changed to delete provisions which indicated that the council will set standards for agency and subdivision actions. Texas Natural Resources Code, §33.205(a), now provides that the CMP will set standards to determine whether agency actions are consistent with the CMP goals and policies. This amendment clarifies that, under the CMP, the council will not directly set standards for activities conducted or regulated by agencies or subdivisions.

One commenter proposed changing §501.1(a) to state that the purpose of the CMP is to more effectively and efficiently manage only those activities that may directly and significantly affect CNRAs. This change was not adopted. Instead, references to both "direct and significant" and "adverse" in this provision were deleted. Section 505.30, (relating to Agency Consistency Determination) allows an agency to find that an action is subject to the CMP, but that the action does not have a direct and significant impact on CNRAs. The terms "direct" and "significant" are defined in that section.

Section 501.1(b) of this title has been changed to provide that the actions subject to review by the council are limited to those actions set forth in Texas Natural Resources Code, §33.2051 and §33.2053.

Section 501.3, relating to Definitions, has been changed to conform to Texas Natural Resources Code, §§33.203-33.208, which amended the definitions of "coastal natural resource area", "council", and "agency or subdivision", and changes "Coastal Management Plan" to "Coastal Management Program".

Section 501.3 has also been amended to conform to Texas Natural Resources Code, §§33.2051-33.2053 and §§33.209-33 211, which added definitions of "coastal barrier", "coastal historic area", "coastal preserve", "coastal shore area", "coastal waters", "coastal wetlands", "coastal zone," "critical area", "critical dune area", "critical erosion area", "Gulf beach", "hard substrate reef", "oyster reef", "proposed action", "special hazard area", "submerged land", "submerged aquatic vegetation", "tidal sand or mud flat", "water of the open Gulf of Mexico", "water under tidal influence".

Pursuant to public comment, the proposal to change the definition of "adverse effects" or "adversely affect" in §501.3 to refer only to effects that are direct and significant has not been adopted. The rules apply to any action within the CMP boundary that may "adversely affect" a CNRA. In lieu of adopting this change to the definition of "adversely affect," the council has instead amended §505.30 of this title (relating to Agency Consistency Determination) to incorporate the concept of "direct and significant adverse effects." As amended, §505.30 now provides that if an adverse effect is not direct or significant, the agency may issue a finding of no direct and significant adverse effect and avoid imposition of the consistency requirement of the CMP pursuant to §505.30. "Direct" refers to impacts that are causally linked to the activity and "significant" refers to appreciable impacts on a CNRA.

Ten commenters opposed the amendment of the definition of "practicable" in §501.3(a)(11). Six commenters supported the change. One commenter supported the change, but stated that the rules should include a provision that would give the state the legal ability to require incremental costs to be incurred if proportionate benefits would be realized by use of dredged material. The council has adopted the amendment of the definition as proposed. The definition of "practicable" in has been changed to conform to the established definition in the federal 404(b)(1) guidelines, published at 40 Code of Federal Regulations, §230.3(p). As the commenter suggested, the council has amended policies on shoreline erosion and beneficial use of dredged material to include specific and enforceable provisions designed to address the issue of incremental costs. These policies now require that incremental costs be expended to mitigate shoreline erosion from structures or to beneficially use dredged material from commercially navigable waterways, unless the resulting benefits do not justify the costs. In conjunction with the amendment of the definition of practicable, §501.14(i)(1)(Q) and (j)(4) have been revised to require beneficial use of dredge material and to require mitigation of erosion impacts unless the costs are not demonstrated to be reasonably proportionate to the benefits. The amendment to "practicable" coupled with changes to the substantive policies in §501.14(i) and (j), provide a clear and understandable standard for the beneficial use of dredged material and the mitigation of erosion impacts that will be required to protect Texas beaches.

In response to public comments and to conform to the federal 404(b)(1) guidelines (40 Code of Federal Regulations, 230), the definition of "water-dependent use or facility" has been amended by deleting the last sentence of the definition.

The definition of "coastal wetlands" in §501.3 has been changed to describe the inland extent of tidal influence as shown on the Texas Natural Resource Conservation Commission's (TNRCC's) stream segment maps and described under 30 TAC §307.10, Appendix C. This change was required by Texas Natural Resources Code, Chapter 33, as amended by House Bill 3226.

Twelve commenters opposed deleting the word "greatest" from the term "greatest extent practicable" in §501.3(a)(2) and several other places in §501.14. Three commenters supported the change. This change was proposed to ensure internal consistency within the CMP rules, not to reduce the degree of protection for CNRAs, nor was a lower standard intended. However, to avoid any ambiguity and to respond to public comment, the council has substituted the phrase as "the greatest extent practicable" throughout the rules. The council expects that the protective measures called for under these rules will be exercised to the fullest degree possible. Therefore, the council did not adopt the proposed amendment.

One commenter requested that §501.3(a)(6) be changed to incorporate the definition of "coastal waters" in §19.2 of this title (relating to Definitions). Incorporating the definition as suggested would conflict with House Bill 3226. Therefore, no change was made based on this comment.

Fourteen commenters opposed the repeal of the definitions of "cumulative adverse effects" and "secondary adverse effects" in §501.3(a)(9) and (13). Two commenters supported the change. In conjunction with this amendment, one commenter supported the addition of a provision in §501.14(i) and (j) requiring consideration of cumulative and secondary impacts in the manner provided in the 404(b)(1) guidelines. The proposed repeal of the definitions resulted from the council's concern that the definitions were too ambiguous. The council has determined the definitions should be changed instead of either repealing them or keeping them as proposed. Modified definitions are therefore adopted. Accordingly, §501.14(i) and (j) have not been deleted. Changes were made however, to simplify those subsections.

Five commenters requested changes to the definition of "water dependent use or facility" in §501.3(a)(14). Based on these comments, the last sentence of this definition has been deleted

One commenter supported the proposed amendment to §501.3(b) to conform the definitions of CNRAs to statutory definitions. This amendment is required by House Bill 3226 and is adopted.

One commenter opposed substituting the word "other" for "otherwise" in §501.3(b)(1). The council did not make the suggested change as it would conflict with the language in House Bill 3226.

One commenter requested that the definition of "coastal historic area" in §501.3(b)(2) be amended to include sites eligible for listing on the National Register of Historic Areas. The council did not make the suggested change because it would conflict with House Bill 3226. Another commenter requested that language that conflicts with the statutory definition of the term be deleted. The adopted amendments conform to House Bill 3226.

Two commenters opposed the deletion of language in §501.3(b)(4) limiting the scope of the "coastal shore areas." The council did not make the suggested change as it would conflict with the language in House Bill 3226, as codified by Texas Natural Resources Code, Chapter 33.

One commenter requested that the phrase "as the line existed on June 8, 1995" be added to §501.3(b)(5)(A). Another commenter supported the proposed amendment to §501.3(b)(5)(A) with no changes. The council adopted the amendment with no

changes. The language of the amendment is based on the coastal facility designation line as it existed on June 8, 1995.

One commenter opposed amending the definition of "Gulf beach" in §501.3(b) (8). The amended definition is required by House Bill 3226, therefore no change was made based on this comment.

One commenter requested that §501.3(b)(16) be amended to delete the phrase "the term includes coastal wetlands." The council has adopted the amendment without the requested change as the change would conflict with the language in House Bill 3226.

Three commenters opposed the amendment to §501.4 to require a two-thirds vote for council actions to protest the consistency of a proposed state action listed in §505.11(a) of this title (relating to Actions and Rules Subject to the Coastal Management Program), a federal action listed in §506.12 of this title (relating to Federal Actions Subject to the Coastal Management Program), or a subdivision action listed in §505.60 of this title (relating to Local Government Actions Subject to the Coastal Management Program). Two commenters supported the change. One commenter requested clarifying language. Section 501. 4 has been amended to conform to Texas Natural Resources Code, §33.204 and §33.206, relating to general council operating procedures, and to conform to Texas Natural Resources Code, §33.205, concerning unresolved consistency disputes. Because of the statutory changes, §501.4(f) has been amended to clarify that a vote of two-thirds of the council members is required to protest any state or subdivision license or permit or federal action, not a state rulemaking action.

One commenter supported establishing the executive committee. No comments were received in opposition to this change. Section 501.4(c) has been changed to restore the provision for an executive committee. The executive committee consists of a representative of each council member. The executive committee shall assist the council by coordinating implementation of council directives. The executive committee shall also review policies, issues, and other matters within the jurisdiction of the council.

Section 501.10(b) has been amended by deleting language that referred to "agencies, municipalities, counties, and activities." This deletion is made to conform to Texas Natural Resources Code, §33.205, as amended by House Bill 3226.

Section 501.11 has been reorganized and amended to conform to House Bill 3226. One commenter opposed amending §501.11. Section 501.11(a) is amended to provide that a goal or policy may not require an agency or subdivision to perform an action that would exceed its constitutional or statutory authority. Section 501.11(b) is amended to provide that this chapter may not be applied in a manner that would result in the taking, damage, or destruction of property without compensation. Also, §501.11(c) is amended to clarify that there is no authority for the development of a SAMP. SAMPs are specifically prohibited by Texas Natural Resources Code, §33.209; therefore, §501.11(d) and (e) have been deleted.

Section 501.12 and §501.14 of this chapter, concerning goals and policies, are amended to substitute the term "coastal zone" for the term "coastal area, " to conform with House Bill 3226.

Seventeen commenters opposed the proposed amendment to replace the word "shall" with "should" in §501.13(a). One commenter supported the change, unless it raised a question regarding federal approval of the CMP. The proposed amendment has not been adopted because the council agrees it may not be consistent with federal standards for approval.

One commenter requested that the amendment to §501.13(b) establishing a standard for consistency review of thresholds be changed to add the phrase "unique and significant." The council accepts the suggested language because it more accurately describes the standard the council believes is appropriate and the change has been made. The suggested language revises this provision to require that agency thresholds be set at levels reasonably calculated to ensure that actions that may have unique and significant adverse effects on CNRAs fall above applicable thresholds. This provision establishes criteria for judging the consistency of thresholds for referral with the CMP goals and policies.

One commenter requested that §501.14(a) be amended to clarify the distinction between electric generating facilities and electric transmission lines. Section 501.14(a)(1)(B) and (C) are revised to reflect this change. The council accepts the requested language and has amended the section to eliminate the ambiguity.

Section 501.14(c) is changed to conform to Texas Natural Resources Code, §33.203, which specifically defines various CNRAs. The council sought comment on repealing or revising the current specific policies on CNRAs in §501.14 because they might be interpreted to exceed current law or violate the prohibition on SAMPs that the legislature added to the Coastal Coordination Act in House Bill 3226. Thirty-eight commenters opposed either a repeal or a revision of the policies in §501.14. Three commenters supported such a repeal or revision. The council will not change or rewrite the policies as described.

Section 501.14(c)(1)(B) requires relocation or discontinuance of certain wastewater discharges within "two years" of the effective date of this section. The original effective date of this section was June 15, 1995. However, the council has deferred implementation of the CMP. Therefore for purposes of §501.14(c)(2)(B), the council regards the effective date of Chapter 501 as the effective date of these amendments.

Section 501.14(d)(1)(G) is changed to use "practicable" in the place of "practical, economic, and feasible." Under the provisions of this chapter, "practicable" is a defined term which incorporates consideration of a project's economic feasibility. This change was made to ensure consistent language is used throughout the rule.

One commenter asked that §501.14(d)(1)(I), regarding interpretation of §501.14(d), be deleted. This change was made to eliminate confusion regarding the interpretation of these rules.

Section 501.14(g)(2) is changed to clarify that nonpoint source pollution water quality management plans developed, maintained, and implemented by the Texas State Soil and Water Conservation Board are not subject to water quality standards. It is the discharges under such plans that may be reviewed for impacts to water quality.

One commenter supported the inclusion of clarifying language in §501.14(g) dealing with water quality standards. Based on this comment, this language was clarified.

The council proposed amendments to the provisions of §501.14(h) and (j) requiring consideration of cumulative and secondary effects from development in critical areas and dredging and dredged material disposal and placement. One commenter stated the TNRCC and the Railroad Commission (RRC) lack the statutory authority to implement the policies on critical areas in §501.14(h) and also lack authority to implement the policies on dredging and dredged material disposal and placement in §501.14(j) through water quality certification under the Clean Water Act, §401. Another commenter expressed concern that state-level application of these policies would be redundant and be detrimental to both state and federal programs in the future. The Texas Legislature reviewed the CMP and in House Bill 3226 expressly required the TNRCC and the RRC to comply with the CMP goals and policies when issuing 401 certifications. In addition, the TNRCC and RRC certified that they have the legal authority to implement these critical area and dredged material policies when they originally adopted rules to regulate these areas. The council agrees that these agencies have the statutory authority to apply the critical areas and dredging policies, which are the equivalent of the 404(b)(1) guidelines, through 401 certifications. Moreover, the council disagrees that application of these policies is redundant or problematic. The TNRCC and RRC are legally responsible for managing wetlands and other critical areas at the state level by issuing 401 certifications. The Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (COE) are legally responsible for managing wetlands and other critical areas at the federal level through administration of the 404 permitting program. As with the retention of the term "greatest" and the amendment of the definition of "practicable" discussed previously, the council wants to avoid conflicting state and federal standards unless there is a compelling reason and a clear purpose for the state's policy to vary from the federal government's. These policies simply ensure that state and federal agencies will apply the same policies when managing activities affecting wetlands and other critical areas.

In a related comment, one commenter requested a clear statement that the critical areas policy, dredging and dredged material disposal and placement policies be made consistent with federal §404(b)(1) guidelines.

The foregoing response, in combination with the responses to similar comments set forth in 19 TexReg 7606, 7612-13, 7631, and 7636 (September 27, 1994), which continue to be appropriate, responds to this commenter's concerns.

The council's proposal to delete §501.14(h)(4) is not adopted because the major actions policy has been retained, with amendments described below. However, §501.14(h)(4) has been changed to conform to §501.15 of this title (relating to Major Actions Policy).

One commenter supported the proposed amendment to the term "avoid and otherwise minimizes" in §501.14(i). This amendment has been adopted.

Section 501.14(i)(1)(F)(iii) has been modified to conform to the definition of "avoid and otherwise minimize" to ensure the program rules are consistent.

As stated previously, several commenters objected to changing the definition of "practicable" as proposed. The council amended §501.14(i)(1)(Q) to more clearly define the circumstances under which erosion mitigation would be required. Mitigation is required in instances where erosion is caused by construction or modification of jetties, breakwaters, groins, or shore stabilization projects. Mitigation is required to the extent the costs of mitigation are reasonably proportionate to the benefits of mitigation. Factors that shall be considered in determining whether the costs of mitigation are reasonably proportionate to the benefits include, but are not limited to, environmental benefits, recreational benefits, flood or storm protection benefits, erosion prevention benefits, and economic development benefits. The policy is not intended to include normal maintenance and rehabilitation of existing structures.

References to the Code of Federal Regulations in §§501.14(h)(1) and (j)(1) regarding consideration of cumulative and secondary impacts have been deleted because the CMP now defines "cumulative adverse affects" and "secondary adverse affects" in a manner which is no longer based upon the 404(b)(1) guidelines. These changes were made in response to public comment.

One commenter supported the deletion of §501.14(j)(2)(H)(iv) in conjunction with the repeal §501.15, (relating to Policy for Major Actions). The council is repealing the Major Actions Policy; but is also reproposing it with amendments.

In response to public comment, §501.14(j)(4) has been changed to require beneficial use of dredged material taken from commercially navigable waterways. Section 501.14(j)(4), relating to beneficial use of dredged material, has been revised to require beneficial use of dredged material unless the costs of the beneficial use are substantially greater than non-beneficial use alternatives and unless incremental costs are not reasonably proportionate to the costs of the project and benefits that will result. Section 501.14(j)(4)(A) has also been revised by listing the factors to be considered in determining whether the costs of the beneficial use are not reasonably proportionate to the benefits. These factors include, but are not limited to, environmental benefits, recreational benefits, flood or storm protection benefits, erosion prevention benefits, and economic development benefits, the proximity of the beneficial use site to the dredge site, and the quantity and quality of the dredged material and its suitability for beneficial use. Application of this policy to maintenance dredging activities will take place through implementation of the Memorandum of Agreement (MOA) Between the Council and the COE (Regarding Review of Coastal Maintenance Dredging Activities, dated October 27, 1994). Because this MOA is crucial to the application of this policy to maintenance dredging through federal consistency review, §506.24(c) of this title (relating to Consistency Determinations for Federal Agency Activities Initiated Prior to Federal Approval of the Coastal Management Program) has been amended to specifically reference the MOA. The council and the COE recognize that review of dredged material disposal and placement practices should be phased in so that the COE's and local sponsors' existing planning and budgeting cycles for maintenance dredging activities may programmatically address these practices. The MOA phases in application of §501.14(j) in several ways. First, maintenance dredging projects in commercially navigable waterways in the coastal zone will be reviewed over the first three to five years after federal approval of the CMP. Second, if the council finds a maintenance dredging project inconsistent, the MOA requires the council and the COE to engage in an alternative dispute resolution process for a period of up to two years. Third, the final consistency determination for the project may include a schedule for implementing changes to current maintenance dredging practices required for a project to be consistent with the CMP. These three provisions are designed to mitigate situations where changes to current maintenance dredging practices will be required and funds are not immediately available to implement the changes. They are intended to provide flexibility for the COE and local sponsors to plan, budget for, and seek the necessary funding for the incremental costs of a beneficial use project, as compared to the cost of disposal in a non-beneficial manner, or any other funding needed under §501.14(j)(4)(B) or other provisions of the dredging and dredged material disposal and placement policy.

One commenter stated that application of the 404(b)(1) guidelines to structures on pilings is not appropriate because these requirements do not apply to structures under federal law, only to discharge of dredged and fill material. While the commenter's analysis of the federal law is correct, the council believes that the 404(b)(1) guidelines can and should be applied to structures such as piers and docks through current state law authorities because structures on pilings can have the same impacts on wetlands and other critical areas as dredging and filling. Compliance with CMP policies which are based upon the 404(b)(1) guidelines is not beyond the statutory authority of any affected agency.

One commenter opposed the provision in §501.14(j) requiring persons placing dredged material on the mean high tide line boundary between state submerged lands and uplands to secure a boundary agreement from the uplands owner so that title to state submerged lands dedicated to the Permanent School Fund is preserved. The commenter stated that "the CMP should be used to protect environmental concerns, not to shield the State from losing title to submerged lands and the minerals underlying said lands." The commenter suggested that the legislature should resolve this issue by constitutional amendment if necessary. The council's authority under the Coastal Coordination Act is not limited to environmental concerns, but rather encompasses a broad array of natural resource management issues. One of the State's most valuable natural resources is its submerged lands. Sound management of these lands is important for the coast and the State. It is both appropriate and within the council's statutory authority to establish policies regarding an activity that can result in the loss of state ownership of submerged lands.

To be consistent with other changes made pursuant to public comment, commercially navigable waterways, as used in §501.14(j)(4), is intended to include waterways and associated facilities, developed, constructed or maintained pursuant to congressional authorization.

One commenter requested that the term "local government" be replaced with "subdivision" in §501.14(k) because the term "subdivision" is used in Texas Natural Resources Code §33.2053. This subsection has been amended as requested.

One commenter requested that §501.14(n) be revised to conform to House Bill 3226. The council has adopted this provision with changes to conform to House Bill 3226.

Section 501.14(n) has been changed to require that development in coastal preserves by a person, other than the Parks and Wildlife Department, that involves the use or taking of any public land must comply with Texas Parks and Wildlife Code, Chapter 26. This amendment has been made to conform to the provisions of Texas Natural Resources Code, §33.2053(h).

Section 501.14(p), relating to Transportation Projects, has been amended to conform to the provisions of Texas Natural Resources Code, §33.2053(d), by deleting references to the planning and design of such projects. Fourteen commenters opposed the amendment to §501.14(p), concerning transportation projects, on the grounds that the amendment exempted transportation projects from compliance with the CMP goals and policies. Two commenters supported the proposed amendment. The council has adopted the amendment as proposed because it conforms to House Bill 3226. The amendment is a technical change and does not exempt transportation projects from CMP compliance.

An editorial change to the title of §501.14(r) has been made. The new title, "Appropriations of Water", more accurately describes the subject of the subsection. One commenter supported changing the title of §501.14(r).

The council sought public comment on several areas which were not addressed in the proposed amendments. The council asked for input on whether the current specific policies which address CNRAs rather than specific actions should be retained in the rules, or whether the specific policies constitute a violation of House Bill 3226's prohibition on SAMPs. Specifically, comment was sought with respect to: §501.14(h), Development in critical areas; §501.14(i), Construction of waterfront facilities and other structures on state submerged lands and private submerged lands; §501.14(k), Construction in the beach/dune system; §501.14(l) Development in coastal hazard areas; and §501.14(n) Development in coastal preserves. Public comment did not support deletion or revision of these policies; therefore, no changes were made.

General Comments

One-hundred fifty-one commenters expressed concern with some or all portions of the proposed amendments. A number of these commenters opposed the proposed amendments; a number opposed changes that threatened federal approval; a number opposed changes not mandated by House Bill 3226; and a number were concerned about delaying the implementation of the CMP. Thirty-one commenters generally supported the proposed amendments. The council believes that the adopted rules agree with the letter of intent of House Bill 3226 and satisfy the approval requirements of the Federal Coastal Zone Management Act.

Four commenters supported Texas' participation in the federal coastal zone management program and requested that the council evaluate the proposed amendments' effect on federal approval of the Texas CMP. Twenty-three commenters stated that they opposed the proposed amendments because they jeopardized federal approval of the CMP. The council believes the adopted rules now meet the approval requirements for CMP approval under the federal Coastal Zone Management Act. No change was made based on these comments.

One commenter requested the council establish a schedule for implementation of the various provisions of the rules. This useful suggestion has been adopted and each preamble now contains implementation dates.

One commenter opposed the expansion of a hazardous waste site in San Leon, Texas. The adopted rules will not apply to this site because the application for the facility was filed before the effective date of the rules. No change was made based on this comment.

One commenter interpreted the information on fiscal impacts of the proposed amendments to constitute a five-year moratorium on implementation of the CMP. The fiscal impacts of the rules are estimated for a five-year period. This does not affect the effective date of the rules. The rules will go into effect as stated above and stay in effect until the council repeals or amends them. No change was made based on this comment.

One commenter expressed interest in the CMP. The council welcomes interest by the public in conserving the coastal natural resources of the state. No change was made based on this comment.

The following organizations generally supported the proposed amendments to the CMP rules: E Cross Cattle Co., Inc.; Texas Cattle Feeders Association; The Fordyce Company; Texas Mid-Continent Oil and Gas Association; County of Kenedy; City of Lake Jackson; City of Corpus Christi; Texas Independent Producers and Royalty Owners Association; Lavaca-Navidad River Authority; TriTech Regional Council; Iberia Petroleum Company; Mitchell Energy & Development Corporation; Railroad Commission of Texas; Everest Minerals Corporation; U.S. Department of the Army, Corps of Engineers; Coastal Bend Geological Library, Inc.; Port of Houston Authority; Trinity Improvement Association; Kling, Inc.; Briggs Ranches; Society of Independent Professional Earth Scientists; Texas Water Conservation Association; Mueller Engineering Corp., Petroleum Consultants; American Shoreline, Inc.; Texas and Southwestern Cattle Raisers Association; Southstar Corporation; South Texas Cotton and Grain Association, Inc.; Greater Corpus Christi Business Alliance Chamber of Commerce; King Ranch, Inc.; and Wilson Plaza North.

The following organizations generally opposed the proposed amendments to the CMP rules: Texas Shrimp Association; National Oceanic and Atmospheric Administration; Blackburn & Carter; Arnold Construction Company, Inc.; City of Galveston; McFarlane & Associates; Steinhagen Oil Company, Inc.; U.S. Department of Interior; ABC Used Auto Parts; Gulf Coast Rod, Reel and Gun Club, Inc.; Crady, Jewett & McCulley, L.L.P.; General Land Office; Henry, Lowerre, Johnson, Hess and Frederick; Environmental Defense Fund; U.S. Environmental Protection Agency; Wells, Peyton, Beard, Greenberg, Hunt and Crawford, L.L.P.; The Benton Company; Boyt Properties; Ekistics Corporation, Environmental Impact Assessment and Socioeconomic Analysis; Lone Star Chapter Sierra Club; R. C. Deal & Associates; Port of Houston; League of Women Voters of Texas; League of Women Voters of Houston; Groves Brothers Machinery, Inc.; Corpus Christi Caller-Times; Mabry, Herbeck & Chilton, P.C.; United States Department of the Interior, Fish and Wildlife Service, Division of Ecological Services; Lower Laguna Madre Foundation; County of Jefferson; United States Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, Southeast Regional Office; Fort Bend Medical Clinic; Entrix, Inc.; Galveston Bay Conservation and Preservation Association; County of Jim Wells; The Shaddock Companies; Galveston Bay Foundation; Department of Planning & Transportation; Coastal Bend, Sierra Club; East Matagorda Bay Foundation; Greater Corpus Christi Business Alliance Chamber of Commerce; Whittington & Ewing Design Associates; Scenic Galveston; Houston Audubon Society; Audubon Council of Texas; Frontera Audubon Society; and Sea Pals'.

The following organizations made specific written comments but did not express general support for or opposition to the proposed CMP rules: Liberty County; Port of Houston Authority; U.S. Department of Agriculture, Natural Resources Conservation Services; Houston-Galveston Area Council; Browning-Ferris Industries; Texas Historical Commission; Texas Water Development Board; Houston Lighting and Power; Texas Chemical Council; Texas Beach Advocate; Texas Water Conservation Association; UTMB-Galveston Department of OB/GYN; and the Department of the Navy, Naval Station Ingleside.

The following organizations expressed general support for House Bill 3226 and an approvable CMP: South East Texas Regional Planning Commission; County of Hidalgo; Benckenstein & Oxford, L.L.P.; and Burrus Lumber Company.

In addition to the many comments received during the comment period, some comments were received after the expiration of the comment period. While these comments have not been, for the most part, responded to individually as were comments received earlier, concerns expressed in those comments have been addressed in responses to many earlier comments. The council staff gratefully acknowledges the involvement of so many individuals, businesses, trade association, non-government organizations and public officials whose thoughtful comments we have read. Chapters 501, 503, 504, 505, and 506 have been revised and improved in light of these comments, reflecting as they do a broad spectrum of economic, ecological, and other concerns held by Texans throughout the state.

Subchapter A. General Provisions

• 31 TAC §§501.1, 501.3, 501.4

The amendments are adopted pursuant to the authority provided in Texas Natural Resources Code, Chapter 33, Subchapter C, and Texas Natural Resources Code, Chapter 33, Subchapter F, §33.204(a), as amended by House Bill 3226, 74th Legislature, 1995, which require the council to promulgate rules adopting the CMP goals and policies.

§501.1. Program for Special Management of Coastal Natural Resource Areas.

(a) The purpose of the Texas Coastal Management Program (CMP) is to make more effective and efficient use of public funds and to more effectively and efficiently manage coastal natural resource areas (CNRAs) and the activities that may affect them. The program is based on goals and policies that guide the use and development of CNRAs, preserve and protect CNRAs, and improve government processes. The Coastal Coordination Council (council) will adopt rules promulgating the goals and policies. The Coastal Coordination Act requires agency or subdivision actions to comply with these goals and policies.

(b) The council will exercise authority pursuant to the Coastal Coordination Act in the following ways.

(1) The council will study and review the principal coastal problems of state concern. This review will include examination of the current status and future trends of CNRAs; examination of conflicts between competing uses of CNRAs; and examination of policy issues with respect to local, state, or national interests and concerns related to CNRAs. The council will examine alternative regulatory and other management approaches to these problems, identify data collection and research needs, and foster public education and participation.

(2) The council will coordinate the performance of agencies, subdivisions, and programs by promulgating goals and policies to guide and serve as the basis for consistency review of agency and subdivision actions. The council will examine the goals and policies in this chapter annually to review the effectiveness of the program and will propose revisions to the goals and policies, as necessary.

(3) The council will coordinate the measures required to resolve identified coastal problems and make coastal management processes more visible, accessible, coherent, consistent, and accountable by reviewing agency and subdivision actions for consistency with the goals and policies in this chapter. Actions subject to review are those set forth in Natural Resources Code, §33.2051 and §33.2053. The council shall employ consistency review of agency and subdivision rules and policies as the primary technique for ensuring that agency and subdivision actions are consistent with the goals and policies in this chapter.

(c) As directed in the Coastal Coordination Act, the General Land Office (GLO) will assist the council in implementing a program for coastal management, which shall be entitled the Texas CMP. The council may on occasion request or receive assistance from additional agencies or subdivisions that have authority over or expertise relevant to a particular coastal problem that is before the council. The GLO, in coordination with other agencies and subdivisions, shall prepare an annual report reviewing the effectiveness of the program as required by Texas Natural Resources Code, §33.204(f). The GLO shall submit the report to the council for approval. On or before January 15 of each odd-numbered year, the GLO shall send to the legislature each of the previous two annual reports.

(d) The Texas CMP will help local governments improve their ability to manage CNRAs and human activities affecting those resources.

§501.3. Definitions and Abbreviations.

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

(1) Adverse effects or adversely affect-Effects that result in the physical destruction or detrimental alteration of a CNRA. Such detrimental alterations are:

(A) construction in critical dune areas and coastal hazard areas that increase risks to human safety or the potential for damage to property or CNRAs from floods, hurricanes, or other storms;

(B) alterations that interfere with public use and enjoyment of, or access to and from, those CNRAs to which the public has a right of use, enjoyment, or access;

(C) alterations that damage or destroy coastal historic areas;

(D) alterations that harm the functions and values of CNRAs as habitat for terrestrial and aquatic wildlife;

(E) alterations that disrupt wildlife corridors or fish or bird migratory routes;

(F) discharges of pathogens, radioactive materials, dissolved minerals or solids, toxic substances, or suspended solids at levels harmful to humans or terrestrial or aquatic life or that significantly impair the aesthetic qualities of CNRAs;

(G) alterations of salinity regimes, nutrient supply, oxygen concentration, or temperature regimes in coastal waters that are harmful to terrestrial or aquatic life;

(H) alterations of hydrology, water flow, circulation patterns, water level, or surface drainage that are harmful to humans or terrestrial or aquatic life, impair the aesthetic qualities of CNRAs, or exacerbate erosion of shorelines or river deltas;

(I) alterations of littoral and sediment transport processes that reduce the supply of sediments available to those processes or would otherwise exacerbate erosion of shorelines or river deltas;

(J) alterations that increase losses of shore areas or other CNRAs from a rise in sea level with respect to the surface of the land, whether caused by actual sea-level rise or land surface subsidence; and

(K) emission of air pollutants at levels that are harmful to humans or terrestrial or aquatic life or that significantly impair the aesthetic qualities of CNRAs.

(2) Avoid and otherwise minimize-To avoid adverse effects to the greatest extent practicable. Adverse effects that cannot be avoided must then be minimized to the greatest extent practicable.

(3) Coastal zone-The area within the boundary established in §503.1 of this title (relating to Coastal Management Program Boundary).

(4) Coastal hazard areas-Special hazard areas and critical erosion areas.

(5) Coastal natural resource area (CNRA)-Any area defined in Texas Natural Resources Code, §33.203(1) that is located within the coastal zone.

(6) Coastal waters-Waters under tidal influence and waters in the open Gulf of Mexico.

(7) Council-The Coastal Coordination Council.

(8) Critical areas-A coastal wetland, an oyster reef, a hard substrate reef, submerged aquatic vegetation, or a tidal sand or mud flat.

(9) Cumulative adverse effects-Adverse effects increasing in significance due to the collective effects of a number of actions.

(10) Pollutant-Any constituent that contaminates or alters the physical, thermal, chemical, or biological quality of any CNRA so as to be harmful, detrimental, or injurious to humans, animal life, vegetation, or property or to the public health, safety, or welfare or that impairs the usefulness or the public enjoyment of CNRAs for any lawful purpose.

(11) Practicable-Available and capable of being done after taking into consideration existing technology, cost, and logistics in light of the overall purpose of the activity.

(12) Public beach-Any public beach as defined in the Texas Natural Resources Code, §61.013(c).

(13) Secondary adverse effects-Adverse effects which would result from a proposed action and cause significant modifications or alterations to the physical or chemical characteristics of coastal natural resource areas beyond the limit of the immediate project area.

(14) Water-dependent use or facility-An activity or facility that must be located in coastal waters or on submerged lands or that must have direct access to coastal waters in order to serve its basic purpose and function. Facilities that are water-dependent include, but are not limited to, public beach use and access facilities, boat slips, docks, breakwaters, marinas, wharves and other vessel loading or off-

loading facilities, utility easements, boat ramps, navigation channels and basins, bridges and bridge approaches, revetments, shoreline protection structures, culverts, groins, saltwater barriers, navigational aids, mooring pilings, simple access channels, fish processing plants, boat construction and repair facilities, offshore pipelines and constructed wetlands below mean high water. Activities that are water-dependent include, but are not limited to, marine recreation (fishing, swimming, boating, wildlife viewing), industrial uses dependent on marine transportation or requiring large volumes of water that cannot be obtained at inland sites, mariculture, exploration for and production of oil and gas under coastal waters or submerged lands, and certain meteorological and oceanographic activities.

(b) The following words, terms, and phrases, when used in this chapter, shall have the following meanings, with respect to CNRAs.

(1) Coastal barrier-An undeveloped area on a barrier island, peninsula, or other protected area, as designated by United States Fish and Wildlife Service maps.

(2) Coastal historic area-A site that is specially identified in rules adopted by the Texas Historical Commission as being coastal in character and that is:

(A) a site on the National Register of Historic Places, designated under 16 United States Code, §470a and 36 Code of Federal Regulations, Part 63, Chapter, 1; or

(B) a state archaeological landmark, as defined by Texas Natural Resources Code, Subchapter D, Chapter 191.

(3) Coastal preserve-Any land, including a park or wildlife management area, that is owned by the state and that is subject to Chapter 26, Parks and Wildlife Code, because it is a park, recreation area, scientific area, wildlife refuge, or historic site; and designated by the Texas Parks and Wildlife Commission as being coastal in character.

(4) Coastal shore area-An area within 100 feet landward of the high water mark on submerged land.

(5) Coastal wetlands-Wetlands, as the term is defined by Texas Water Code, §11.052, located:

(A) seaward of the Coastal Facility Designation Line, established by rules adopted under Texas Natural Resources Code, Chapter 40;

(B) within rivers and streams to the extent of tidal influence, as shown on the Texas Natural Resource Conservation Commission's stream segment maps and described as follows:

(i) Arroyo Colorado from FM Road 1847 to a point 100 meters (110 yards) downstream of Cemetery Road south of the Port of Harlingen in Cameron County;

(ii) Nueces River from US Highway 77 to the Calallen Dam 1.7 kilometers (1.1 miles) upstream of U.S. Highway 77 in Nueces/San Patricio County;

(iii) Guadalupe River from State Highway 35 to the Guadalupe-Blanco River Authority Salt Water Barrier at 0.7 kilometers (0.4 miles) downstream of the confluence with the San Antonio River in Calhoun/Refugio County;

(iv) Lavaca River from FM Road 616 to a point 8.6 kilometers (5.3 miles) downstream of US Highway 59 in Jackson County;

(v) Navidad River from FM Road 616 to Palmetto Bend Dam in Jackson County;

(vi) Tres Palacios Creek from FM Road 521 to a point 0.6 kilometer (0.4 mile) upstream of the confluence with Wilson Creek in Matagorda County;

(vii) Colorado River from FM Road 521 to a point 2.1 kilometers (1. 3 miles) downstream of the Missouri-Pacific Railroad in Matagorda County;

(viii) San Bernard River from FM Road 521 to a point 3.2 kilometers (2.0 miles) upstream of State Highway 35 in Brazoria County;

(ix) Chocolate Bayou from FM Road 2004 to a point 4.2 kilometers (2. 6 miles) downstream of State Highway 35 in Brazoria County;

(x) Clear Creek from Interstate Highway 45 to a point 100 meters (110 yards) upstream of FM Road 528 in Galveston/Harris County;

(xi) Buffalo Bayou (Houston Ship Channel) from Interstate Highway 610 to a point 400 meters (440 yards) upstream of Shepherd Drive in Harris County;

(xii) San Jacinto River from Interstate Highway 10 upstream to the Lake Houston dam in Harris County;

(xiii) Cedar Bayou from Interstate Highway 10 to a point 2.2 kilometers (1.4 miles) upstream of Interstate Highway 10 in Chambers/Harris County;

(xiv) Trinity River from Interstate Highway 10 to a point 3.1 kilometers (1.9 miles) downstream of US 90 in Liberty County;

(xv) Neches River from Interstate Highway 10 to a point 11.3 kilometers (7.0 miles) upstream of Interstate Highway 10 in Orange County;

(xvi) Sabine River from Interstate Highway 10 upstream to Morgan Bluff in Orange County; or

(C) within one mile of the mean high tide line of the portion of rivers and streams described by subparagraph (B) of this paragraph, except for the Trinity and Neches rivers.

(i) For the portion of the Trinity River described by subparagraph (B) of this paragraph, coastal wetlands include those wetlands located between the mean high tide line on the western shoreline of that portion of the river and FM Road 565 and FM Road 1409 or located between the mean high tide line on the eastern shoreline of that portion of the river and FM Road 563.

(ii) For the portion of the Neches River described by subparagraph (B) of this paragraph, coastal wetlands include those wetlands located within one mile of the mean high tide line of the western shoreline of that portion of the river or located between the mean high tide line on the eastern shoreline of that portion of the river and FM Road 105.

(6) Critical dune area-A protected sand dune complex on the Gulf shoreline within 1,000 feet of mean high tide designated by the land commissioner under Texas Natural Resource Code, §63.121.

(7) Critical erosion area-An area designated by the land commissioner under Texas Natural Resources Code, §33.601(b).

(8) Gulf beach-A beach bordering the Gulf of Mexico that is:

(A) located inland from the mean low tide line to the natural line of vegetation bordering the seaward shore of the Gulf of Mexico; or

(B) part of a contiguous beach area to which the public has a right of use or easement:

(i) continuously held by the public; or

(ii) acquired by the public by prescription, dedication, or estoppel.

(9) Hard substrate reef-A naturally occurring hard substrate formation, including a rock outcrop or serpulid worm reef, living or dead, in an intertidal or subtidal area.

(10) Oyster reef-A natural or artificial formation that is:

(A) composed of oyster shell, live oysters, and other living or dead organisms;

(B) discrete, contiguous, and clearly distinguishable from scattered oyster shell or oysters; and

(C) located in an intertidal or subtidal area.

(11) Special hazard area-An area designated under 42 United States Code Annotated, §4001 et seq, as having special flood, mudslide or mudflow, or flood-related erosion hazards and shown on a Flood Hazard Boundary Map or Flood Insurance Rate Map as Zone A, AO, A1-30, AE, A99, AH, VO, V1-30, VE, V, M, or E.

(12) Submerged land-Land located under waters under tidal influence or under waters of the open Gulf of Mexico, without regard to whether the land is owned by the state or a person other than the state.

(13) Submerged aquatic vegetation-Rooted aquatic vegetation growing in permanently inundated areas in estuarine and marine systems.

(14) Tidal sand or mud flat-A silt, clay, or sand substrate, without regard to whether it is vegetated by algal mats, that occur in intertidal areas and that are regularly or intermittently exposed and flooded by tides, including tides induced by weather.

(15) Water of the open Gulf of Mexico-Water in this state, as defined by Texas Water Code, §26.001(5), that is part of the open water of the Gulf of Mexico and that is within the territorial limits of the state.

(16) Water under tidal influence-Water in this state, as defined by Texas Water Code, §26.001(5), that is subject to tidal influence according to the Texas Natural Resource Conservation Commission's stream segment map. The term includes coastal wetlands.

(c) The following abbreviations, when used in this chapter, shall have the following meanings.

(1) GLO-General Land Office;

(2) PUC-Public Utility Commission;

(3) RRC-Railroad Commission of Texas;

(4) SLB-School Land Board;

(5) THC-Texas Historical Commission;

(6) TNRCC-Texas Natural Resource Conservation Commission;

(7) TPWD-Texas Parks and Wildlife Department;

(8) TSSWCB-Texas State Soil and Water Conservation Board;

(9) TWDB-Texas Water Development Board; and

(10) TxDOT-Texas Department of Transportation.

(d) To the extent that reference is made to statutory or regulatory terms or phrases which are not defined in this chapter, such terms and phrases retain the meaning provided in the pertinent agency or political subdivision policies or regulations.

§501.4. General Procedures.

(a) The commissioner of the GLO chairs the council and conducts all meetings. The council may select a vice chair who shall serve in the chair's absence.

(b) The council shall meet at least four times a year, once in each calendar quarter. Council meetings shall be scheduled for February, May, August, and November. The chair or any three members of the council may call special meetings by sending a written request to the council secretary to post notice in accordance with the Texas Open Meetings Act, Texas Government Code, Title 5, Subtitle A, Chapter 551, and sending a copy of the request to all council members.

(c) Each council member shall appoint a person to represent the member on an executive committee. The executive committee shall meet regularly in the interim between regular council meetings to coordinate implementation of council directives and review of policies, issues, or other matters that will or may be subject to council deliberation. The representative of the commissioner chairs the committee. The executive committee shall consider any matter a committee member refers to the committee.

(d) The chair shall appoint a council secretary. The secretary shall record the minutes of the meetings and perform other duties required by the council or this chapter.

(e) Council members may set items for the agenda by submitting them in writing to the secretary at least 14 days before a meeting, except that proposed actions that are the subject of a significant unresolved consistency dispute shall be placed on the agenda as provided in §505.34 and §505.66 of this title (relating to Referral of a Proposed Individual Agency Action to the Council for Consistency Review and Referral of Subdivision Actions to the Council for Consistency Review). The secretary shall notify all council members of the agenda by certified or overnight mail, hand-delivery, or telefax at least ten days before each meeting. The secretary shall notify the public of meetings as required by the Texas Open Meetings Act, Texas Government Code, Title 5, Subtitle A, Chapter 551.

(f) A majority of the council members eligible to vote shall constitute a quorum and must be present for council action. To protest the consistency of a proposed state action listed in §505.11(a) of this title (relating to actions subject to the coastal management program), a federal action listed in §506.12 of this title (relating to federal actions subject to the coastal management program), or a subdivision action listed in §505.60 of this title (relating to review of local actions) shall require an affirmative vote of two-thirds of all council members. For all other actions, the council may act if a majority of a quorum agrees to the action.

(g) Time periods in this chapter do not include the day of the act or event that activates the time period. If the last day of the time period is a Saturday, Sunday, or legal holiday, the time period is considered to end the next day subsequent that is not a Saturday, Sunday, or legal holiday.

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 authority.

Issued in Austin, Texas, on October 13, 1995.

TRD-9513133 Garry Mauro
Chairman
Coastal Coordination Council

Effective date: November 3, 1995

Proposal publication date: July 18, 1995

For further information, please call: (512) 305-9129

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Subchapter B. Goals and Policies

• 31 TAC §§501.10-501.14

The amendments are adopted pursuant to the authority provided in Texas Natural Resources Code, Chapter 33, Subchapter C, and Texas Natural Resources Code, Chapter 33, Subchapter F, §33.204(a), as amended by House Bill 3226, 74th Legislature, 1995, which require the council to promulgate rules adopting the CMP goals and policies. Chapter 501. Coastal Management Program. Subchapter B. Goals and Policies.

§501.13. Administrative Policies.

(a) Agency and subdivision rules and ordinances subject to §501.10 of this title (relating to Compliance with Goals and Policies) shall:

(1) require applicants to provide information necessary for an agency or subdivision to make an informed decision on a proposed action listed in §505.11 of this title (relating to Actions and Rules Subject to the Coastal Management Program) or §505.60 of this title (relating to Local Government Actions Subject to the Coastal Management Program);

(2) identify the monitoring established to ensure that activities authorized by actions listed in §505.11 of this title (relating to Actions and Rules Subject to the Coastal Management Program) or §505.60 of this title (relating to Local Government Actions Subject to the Coastal Management Program) comply with all applicable requirements;

(3) identify circumstances in which agencies and subdivisions have the authority to issue variances from standards or requirements for the protection of CNRAs, including the grounds for granting variances; and

(4) take into account the national interest as defined in the Texas CMP Document, Chapter XX.

(b) A threshold for referral adopted by an agency under the provisions of Chapter 505 (relating to council procedures for consistency reviews) of this title shall be set at a level that is reasonably calculated to ensure that actions that may have unique and significant adverse effects on coastal natural resource areas are above the threshold for referral.

§501.14. Policies for Specific Activities and Coastal Natural Resource Areas.

(a) Construction of Electric Generating and Transmission Facilities.

(1) Construction of electric generating facilities and electric transmission lines in the coastal zone shall comply with the policies in this subsection.

(A) New electric generating facilities shall, where practicable, be located at previously developed sites. New electric generating facilities at undeveloped sites shall be located so that future expansion will avoid construction in critical areas, Gulf beaches, critical dunes, and washovers to the greatest extent practicable. To the extent applicable to the public beach, the policies in this subsection are supplemental to any further restrictions or requirements relating to the beach access and use rights of the public.

(B) Electric generating facilities using once-through cooling systems shall be located and designed to have the least adverse effects practicable, including impingement or entrainment of estuarine organisms.

(C) Electric generating facilities shall be constructed at sites selected to have the least adverse effects practicable on recreational uses of CNRAs and on areas used for spawning, nesting, and seasonal migrations of terrestrial and aquatic fish and wildlife species.

(D) Electric transmission lines to or on Coastal Barrier Resource System Units and Otherwise Protected Areas designated on maps dated October 24, 1990, under the Coastal Barrier Resources Act, 16 United States Code Annotated, §3503, on coastal barriers shall:

(i) be located, where practicable, in existing rights-of-way or previously disturbed areas if necessary to avoid or minimize adverse effects; and

(ii) be located at sites at which future expansion shall avoid construction in critical areas, Gulf beaches, critical dunes, and washovers to the greatest extent practicable.

(2) The PUC shall comply with the policies in this subsection when issuing certificates of convenience and necessity and adopting rules under Texas Civil Statutes, Public Utility Regulatory Act, Article 1446c, governing construction of electric generating facilities, electric transmission lines, and associated facilities in the coastal zone.

(b) Construction, Operation, and Maintenance of Oil and Gas Exploration and Production Facilities.

(1) Oil and gas exploration and production on submerged lands shall comply with the policies in this subsection.

(A) In or near critical areas, facilities shall be located and operated and geophysical and other operations shall be located and conducted in such a manner as to avoid and otherwise minimize adverse effects, including those from the disposal of solid waste and disturbance resulting from the operation of vessels and wheeled or tracked vehicles, whether on areas under lease, easement, or permit or on or across access routes thereto. Where practicable, buffer zones for critical areas shall be established and directional drilling or other methods to avoid disturbance, such as pooling or unitization, shall be employed.

(B) Lessees, easement holders, and permittees shall construct facilities in a manner that avoids impoundment or draining of coastal wetlands, if practicable, and shall mitigate any adverse effects on coastal wetlands impounded or drained in accordance with the sequencing requirements in this subsection.

(C) Upon completion or cessation of operations, lessees, easement holders, and permittees shall remove facilities and restore any significantly degraded areas to pre-project conditions as closely as practicable, unless facilities can be used for maintenance or enhancement of CNRAs or unless restoration activities would further degrade CNRAs.

(2) To the extent applicable to the public beach, the policies in this subsection are supplemental to any further restrictions or requirements relating to the beach access and use rights of the public.

(3) The GLO and SLB shall comply with the policies in this subsection when approving oil, gas, and other mineral lease plans of operation and granting surface leases, easements, and permits and adopting rules under the Texas Natural Resources Code, Chapters 32, 33 and 51-53, governing oil and gas exploration and production on submerged lands.

(c) Discharges of Wastewater and Disposal of Waste from Oil and Gas Exploration and Production Activities.

(1) Disposal of oil and gas waste in the coastal zone shall comply with the policies in this subsection.

(A) No new commercial oil and gas waste disposal pit shall be located in any CNRA.

(B) Oil and gas waste disposal pits shall be designed to prevent releases of pollutants that adversely affect coastal waters or critical areas.

(2) Discharge of oil and gas exploration and production wastewater in the coastal zone shall comply with the following policies.

(A) All discharges shall comply with all provisions of surface water quality standards established by the TNRCC under subsection (f) of this section.

(B) To the greatest extent practicable, new wastewater outfalls shall be located where the discharge will not adversely affect critical areas. Existing wastewater outfalls that adversely affect critical areas shall be either discontinued or relocated so as not to adversely affect critical areas within two years of the effective date of this section.

(C) The RRC shall notify the

TNRCC and the TPWD upon receipt of an application for a new permit to discharge produced waters to waters under tidal influence. In determining compliance with the policies in this subsection, the RRC shall consider the effects of salinity from the discharge.

(3) The RRC shall comply with the policies in this subsection when issuing permits and adopting rules under the Texas Natural Resources Code, Chapter 91, for oil and gas waste, and under Texas Water Code, Chapter 26, and the Texas Natural Resources Code, Chapter 91, for oil and gas wastewater discharges.

(d) Construction and Operation of Solid Waste Treatment, Storage, and Disposal Facilities.

(1) Construction and operation of solid waste facilities in the coastal zone shall comply with the policies in this subsection. This subsection applies to both new facilities and areal expansion of existing facilities.

(A) A landfill at which hazardous waste is received for a fee shall not be located in a critical area, critical dune area, critical erosion area, or a 100-year floodplain of a perennial stream, delineated on a flood map adopted by the Federal Emergency Management Agency after September 1, 1985, as zone A1-99, VO, or V1-30. This provision shall not apply to any facility for which a notice of intent to file an application, or an application, has been filed with the TNRCC as of September 1, 1985.

(B) Except as provided in clauses (i) and (ii) of this subparagraph, a hazardous waste landfill shall not be located in a special hazard area existing before site development except in an area with a flood depth of less than three feet. Any hazardous waste landfill within a special hazard area must be designed, constructed, operated, and maintained to prevent washout of any hazardous waste by a 100-year flood.

(i) The areal expansion of a landfill in a special hazard area may be allowed if the applicant demonstrates that the facility design will prevent the physical transport of any hazardous waste by a 100-year flood event.

(ii) A new commercial hazardous waste management facility landfill unit may not be located in a special hazard area, unless the applicant demonstrates that the facility design will prevent the physical transport of any hazardous waste by a 100-year flood event.

(C) Hazardous waste storage or processing facilities, land treatment facilities, waste piles, and storage surface impoundments shall not be located in special hazard areas unless they are designed, constructed, operated, and maintained to prevent washout of any hazardous waste by a 100-year flood.

(D) Hazardous waste land treatment facilities, waste piles, storage surface impoundments, and landfills shall not be located within 1,000 feet of an area subject to active coastal shoreline erosion, if the area is protected by a barrier island or peninsula, unless the design, construction, and operational features of the facility will prevent adverse effects resulting from storm surge and erosion or scouring by water. On coastal shorelines which are subject to active shoreline erosion and which are unprotected by a barrier island or peninsula, a separation distance from the shoreline to the facility must be at least 5,000 feet, unless the design, construction, and operational features of the facility will prevent adverse effects resulting from storm surge and erosion or scouring by water.

(E) Hazardous waste storage or processing facilities, land treatment facilities, waste piles, storage surface impoundments, and landfills shall not be located in coastal wetlands, or in any CNRA that is the critical habitat of an endangered species of plant or animal unless the design, construction, and operation features of the facility will prevent adverse effects on the critical habitat of the endangered species.

(F) Hazardous waste land treatment facilities, waste piles, storage surface impoundments, and landfills shall not be located on coastal barriers.

(G) Hazardous waste landfills are prohibited if there is a practicable alternative to such a landfill that is reasonably available to manage the types and classes of hazardous waste which might be disposed at the landfill.

(H) The TNRCC shall not issue a permit for a new hazardous waste management facility or the areal expansion of an existing hazardous waste facility unless it finds that the proposed site, when evaluated in light of proposed design, construction, and operational features, reasonably minimizes possible contamination of coastal waters.

(I) New solid waste facilities and areal expansion of existing solid waste facilities shall be sited, designed, constructed, and operated to prevent releases of pollutants that may adversely affect CNRAs and, at a minimum, comply with standards established under the Solid Waste Disposal Act, 42 United States Code Annotated, §§6901, et seq.

(2) The TNRCC shall comply with the policies in this subsection when issuing permits and adopting rules under Texas Health and Safety Code, Chapter 361.

(e) Prevention, Response and Remediation of Oil Spills.

(1) The GLO regulations governing prevention of, response to and remediation of coastal oil spills shall provide for measures to prevent coastal oil spills and to ensure adequate response and removal actions. The GLO regulations for certification of vessels and facilities that handle oil shall be designed to ensure that vessels and facilities are capable of prompt response and adequate removal of unauthorized discharges of oil. The GLO regulations adopted pursuant to the Oil Spill Prevention and Response Act (OSPRA), Texas Natural Resources Code, Chapter 40, shall be consistent with the State Coastal Discharge Contingency Plan adopted pursuant to OSPRA; and the National Contingency Plan adopted pursuant to the Federal Water Pollution Control Act, 33 United States Code Annotated, Chapter 26.

(2) Natural Resource Damage Assessment. GLO rules under OSPRA governing the assessment of damages to natural resources injured as the result of an unauthorized discharge of oil into coastal waters shall provide for reasonable and rational procedures for assessing damages and shall take into account the unique circumstances of the spill incident. The costs of assessing the damages shall not be disproportionate to the value of the injured resources. Plans for the restoration, rehabilitation, replacement or acquisition of equivalent resources shall provide for participation by the public and shall be designed to promote the restoration of the injured resources with all deliberate speed. The GLO rules shall be consistent with other state rules and policies and with the CMP goals and policies.

(f) Discharge of Municipal and Industrial Wastewater to Coastal Waters.

(1) TNRCC rules shall:

(A) comply with the requirements of the Clean Water Act, 33 United States Code Annotated, §1251, et seq, and implementing regulations at Code of Federal Regulations, Title 40, which include establishing surface water quality standards in order to protect designated uses of coastal waters, including the protection of uses for water supply, recreational purposes, and propagation and protection of terrestrial and aquatic life, and establishing water-quality-based effluent limits, including toxicity

monitoring and specific toxicity or chemical limits as necessary to protect designated uses of coastal waters;

(B) provide for the assessment of water quality on a coastal watershed basis once every two years, as required by the Texas Water Code, §26.0135(d);

(C) to the greatest extent practicable, provide that all permits for the discharge of wastewater within a given watershed or region of a single watershed contain the same expiration date in order to evaluate the combined effects of permitted discharges on water quality within that watershed or region;

(D) identify and rank waters that are not attaining designated uses and establish total maximum daily pollutant loads in accordance with those rankings; and

(E) require that increases in pollutant loads to coastal waters shall not:

(i) impair designated uses of coastal waters; or

(ii) result in degradation of coastal waters that exceed fishable/swimmable quality except in cases where lowering coastal water quality is necessary for important economic or social development.

(2) Discharge of municipal and industrial wastewater in the coastal zone shall comply with the following policies.

(A) Discharges shall comply with water-quality-based effluent limits.

(B) Discharges that increase pollutant loadings to coastal waters shall not impair designated uses of coastal waters and shall not significantly degrade coastal water quality unless necessary for important economic or social development.

(C) To the greatest extent practicable, new wastewater outfalls shall be located where they will not adversely affect critical areas.

(3) The TNRCC shall comply with the policies in this subsection when adopting rules and authorizing wastewater discharges under Texas Water Code, Chapter 26.

(4) The TNRCC shall consult with the Texas Department of Health when reviewing permit applications for wastewater discharges that may significantly adversely affect oyster reefs.

(g) Nonpoint Source (NPS) Water Pollution.

(1) State agencies and subdivisions with authority to manage NPS pollution shall cooperate in the development and implementation of a coordinated program to reduce NPS pollution in order to restore and protect coastal waters.

(2) In an area that the TSSWCB identifies as having or having the potential to develop agricultural or silvicultural NPS water quality problems or an area within the coastal zone, the TSSWCB shall establish a water quality management plan certification program that provides, through the local soil and water conservation district, for the development, supervision, and monitoring of voluntary individual water quality management plans for agricultural and silvicultural lands. Each plan must be developed, maintained, and implemented under rules and criteria adopted by the TSSWCB and discharges under such a plan may not cause a violation of state water quality standards established by the TNRCC. The TSSWCB's rules shall certify a plan that satisfies the TSSWCB rules and criteria and discharges which do not cause a violation of state water quality standards established by the TNRCC. This policy is not intended, nor shall it be interpreted, to require the TSSWCB to establish non-voluntary requirements for the development, maintenance, or implementation of individual water quality management plans.

(3) TNRCC rules under Texas Health and Safety Code, Chapter 366, governing on-site sewage disposal systems, and TNRCC rules under Texas Water Code, Chapter 26, Subchapter I, governing underground storage tanks, shall require that on-site disposal systems and underground storage tanks be located, designed, operated, inspected, and maintained so as to prevent releases of pollutants that may adversely affect coastal waters.

(4) This policy shall not be interpreted or applied so as to require that either a National Pollution Discharge Elimination System (NPDES) permit for stormwater discharges issued under the Clean Water Act, §402(p), or an NPDES permit for a concentrated animal feeding operation, requiring no discharge up to and including a 25-year, 24-hour frequency storm, provide additional NPS pollution control measures in addition to those required in the permit.

(h) Development in Critical Areas.

(1) Dredging and construction of structures in, or the discharge of dredged or fill material into, critical areas shall comply with the policies in this subsection. In implementing this subsection, cumulative and secondary adverse effects of these activities will be considered.

(A) The policies in this subsection shall be applied in a manner consistent with the goal of achieving no net loss of critical area functions and values.

(B) Persons proposing development in critical areas shall demonstrate that no practicable alternative with fewer adverse effects is available.

(C) In evaluating practicable alternatives, the following sequence shall be applied:

(i) Adverse effects on critical areas shall be avoided to the greatest extent practicable.

(ii) Unavoidable adverse effects shall be minimized to the greatest extent practicable by limiting the degree or magnitude of the activity and its implementation.

(iii) Appropriate and practicable compensatory mitigation shall be required to the greatest extent practicable for all adverse effects that cannot be avoided or minimized.

(D) Compensatory mitigation includes restoring adversely affected critical areas or replacing adversely affected critical areas by creating new critical areas. Compensatory mitigation should be undertaken, when practicable, in areas adjacent or contiguous to the affected critical areas (on-site). If on-site compensatory mitigation is not practicable, compensatory mitigation should be undertaken in close physical proximity to the affected critical areas if practicable and in the same watershed if possible (off-site). Compensatory mitigation should also attempt to replace affected critical areas with critical areas with characteristics identical to or closely approximating those of the affected critical areas (in-kind). The preferred order of compensatory mitigation is:

(i) on-site, in-kind;

(ii) off-site, in-kind;

(iii) on-site, out-of-kind; and

(iv) off-site, out-of-kind.

(E) Mitigation banking is acceptable compensatory mitigation if use of the mitigation bank has been approved by the agency authorizing the development and mitigation credits are available for withdrawal. Preservation through acquisition for public ownership of unique critical areas or other ecologically important areas may be acceptable compensatory mitigation in exceptional circumstances. Examples of this include areas of high priority for preserva-

tion or restoration, areas whose functions and values are difficult to replicate, or areas not adequately protected by regulatory programs. Acquisition will normally be allowed only in conjunction with preferred forms of compensatory mitigation.

(F) In determining compensatory mitigation requirements, the impaired functions and values of the affected critical area shall be replaced on a one-to-one ratio. Replacement of functions and values on a one-to-one ratio may require restoration or replacement of the physical area affected on a ratio higher than one-to-one. While no net loss of critical area functions and values is the goal, it is not required in individual cases where mitigation is not practicable or would result in only inconsequential environmental benefits. It is also important to recognize that there are circumstances where the adverse effects of the activity are so significant that, even if alternatives are not available, the activity may not be permitted regardless of the compensatory mitigation proposed.

(G) Development in critical areas shall not be authorized if significant degradation of critical areas will occur. Significant degradation occurs if:

(i) the activity will jeopardize the continued existence of species listed as endangered or threatened, or will result in likelihood of the destruction or adverse modification of a habitat determined to be a critical habitat under the Endangered Species Act, 16 United States Code Annotated, §§1531-1544;

(ii) the activity will cause or contribute, after consideration of dilution and dispersion, to violation of any applicable surface water quality standards established under subsection (f) of this section;

(iii) the activity violates any applicable toxic effluent standard or prohibition established under subsection (f) of this section;

(iv) the activity violates any requirement imposed to protect a marine sanctuary designated under the Marine Protection, Research, and Sanctuaries Act of 1972, 33 United States Code Annotated, Chapter 27; or

(v) taking into account the nature and degree of all identifiable adverse effects, including their persistence, permanence, areal extent, and the degree to which these effects will have been mitigated pursuant to subparagraphs (C) and (D) of this paragraph, the activity will, individually or collectively, cause or contribute to significant adverse effects on:

(I) human health and welfare, including effects on water supplies, plankton, benthos, fish, shellfish, wildlife, and consumption of fish and wildlife;

(II) the life stages of aquatic life and other wildlife dependent on aquatic ecosystems, including the transfer, concentration, or spread of pollutants or their byproducts beyond the site, or their introduction into an ecosystem, through biological, physical, or chemical processes;

(III) ecosystem diversity, productivity, and stability, including loss of fish and wildlife habitat or loss of the capacity of a coastal wetland to assimilate nutrients, purify water, or reduce wave energy; or

(IV) generally accepted recreational, aesthetic or economic values of the critical area which are of exceptional character and importance.

(2) The TNRCC and the RRC shall comply with the policies in this subsection when issuing certifications and adopting rules under Texas Water Code, Chapter 26, and the Texas Natural Resources Code, Chapter 91, governing certification of compliance with surface water quality standards for federal actions and permits authorizing development affecting critical areas; provided that activities exempted from the requirement for a permit for the discharge of dredged or fill material, described in Code of Federal Regulations, Title 33, §323.4 and/or Code of Federal Regulations, Title 40, §232.3, including but not limited to normal farming, silviculture, and ranching activities, such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices, shall not be considered activities for which a certification is required. The GLO and the SLB shall comply with the policies in this subsection when approving oil, gas, or other mineral lease plans of operation or granting surface leases, easements, and permits and adopting rules under the Texas Natural Resources Code, Chapters 32, 33 and 51-53, and Texas Water Code, Chapter 61, governing development affecting critical areas on state submerged lands and private submerged lands, and when issuing approvals and adopting rules under Texas Civil Statutes, Article 5421u, for mitigation banks operated by subdivisions of the state.

(3) Agencies required to comply with this subsection will coordinate with one another and with federal agencies when evaluating alternatives, determining appropriate and practicable mitigation, and assessing significant degradation. Those agencies' rules governing authorizations for development in critical areas shall require a demonstration that the requirements of paragraph (1)(A)-(G) of this subsection have been satisfied.

(4) For any dredging or construction of structures in, or discharge of dredged or fill material into, critical areas that is subject to the requirements of §501.15 of this title (relating to Policy for Major Actions), data and information on the cumulative and secondary adverse affects of the project need not be produced or evaluated to comply with this subsection if such data and information is produced and evaluated in compliance with §501. 15(b)-(c) of this title (relating to Policy for Major Actions).

(i) Construction of Waterfront Facilities and Other Structures on Submerged Lands.

(1) Development on submerged lands shall comply with the policies in this subsection.

(A) Marinas shall be designed and, to the greatest extent practicable, sited so that tides and currents will aid in flushing of the site or renew its water regularly.

(B) Marinas designed for anchorage of private vessels shall provide facilities for the collection of waste, refuse, trash, and debris.

(C) Marinas with the capacity for long-term anchorage of more than ten vessels shall provide pump-out facilities for marine toilets, or other such measures or facilities that provide an equal or better level of water quality protection.

(D) Marinas, docks, piers, wharves and other structures shall be designed and, to the greatest extent practicable, sited to avoid and otherwise minimize adverse effects on critical areas from boat traffic to and from those structures.

(E) Construction of docks, piers, wharves, and other structures shall be preferred instead of authorizing dredging of channels or basins or filling of submerged lands to provide access to coastal waters if such construction is practicable, environmentally preferable, and will not interfere with commercial navigation.

(F) Piers, docks, wharves, bulkheads, jetties, groins, fishing cabins, and artificial reefs (including artificial reefs for compensatory mitigation) shall be limited to the minimum necessary to serve the

project purpose and shall be constructed in a manner that:

(i) does not significantly interfere with public navigation;

(ii) does not significantly interfere with the natural coastal processes which supply sediments to shore areas or otherwise exacerbate erosion of shore areas; and

(iii) avoids and otherwise minimizes shading of critical areas and other adverse effects.

(G) Facilities shall be located at sites or designed and constructed to the greatest extent practicable to avoid and otherwise minimize the potential for adverse effects from:

(i) construction and maintenance of other development associated with the facility;

(ii) direct release to coastal waters and critical areas of pollutants from oil or hazardous substance spills or stormwater runoff; and

(iii) deposition of airborne pollutants in coastal waters and critical areas.

(H) Where practicable, pipelines, transmission lines, cables, roads, causeways, and bridges shall be located in existing rights-of-way or previously disturbed areas if necessary to avoid or minimize adverse effects and if it does not result in unreasonable risks to human health, safety, and welfare.

(I) To the greatest extent practicable, construction of facilities shall occur at sites and times selected to have the least adverse effects on recreational uses of CNRAs and on spawning or nesting seasons or seasonal migrations of terrestrial and aquatic wildlife.

(J) Facilities shall be located at sites which avoid the impoundment and draining of coastal wetlands. If impoundment or draining cannot be avoided, adverse effects to the impounded or drained wetlands shall be mitigated in accordance with the sequencing requirements of subsection (h) of this section. To the greatest extent practicable, facilities shall be located at sites at which expansion will not result in development in critical areas.

(K) Where practicable, piers, docks, wharves, bulkheads, jetties, groins, fishing cabins, and artificial reefs shall be constructed with materials that will not cause any adverse effects on coastal waters or critical areas.

(L) Developed sites shall be returned as closely as practicable to preproject conditions upon completion or cessation of operations by the removal of facilities and restoration of any significantly degraded areas, unless:

(i) the facilities can be used for public purposes or contribute to the maintenance or enhancement of coastal water quality, critical areas, beaches, submerged lands, or shore areas; or

(ii) restoration activities would further degrade CNRAs.

(M) Water-dependent uses and facilities shall receive preference over those uses and facilities that are not water-dependent.

(N) Nonstructural erosion response methods such as beach nourishment, sediment bypassing, nearshore sediment berms, and planting of vegetation shall be preferred instead of structural erosion response methods.

(O) Major residential and recreational waterfront facilities shall to the greatest extent practicable accommodate public access to coastal waters and preserve the public's ability to enjoy the natural aesthetic values of coastal submerged lands.

(P) Activities on submerged land shall avoid and otherwise minimize any significant interference with the public's use of and access to such lands.

(Q) Erosion of Gulf beaches and coastal shore areas caused by construction or modification of jetties, breakwaters, groins, or shore stabilization projects shall be mitigated to the extent the costs of mitigation are reasonably proportionate to the benefits of mitigation. Factors that shall be considered in determining whether the costs of mitigation are reasonably proportionate to the cost of the construction or modification and benefits include, but are not limited to, environmental benefits, recreational benefits, flood or storm protection benefits, erosion prevention benefits, and economic development benefits.

(2) To the extent applicable to the public beach, the policies in this subsection are supplemental to any further restrictions or requirements relating to the beach access and use rights of the public.

(3) The GLO and the SLB, in governing development on state submerged lands, shall comply with the policies in this subsection when approving oil, gas, and other mineral lease plans of operation and granting surface leases, easements, and permits and adopting rules under the Texas Natural Resources Code, Chapters 32, 33 and 51-53, and Texas Water Code, Chapter 61.

(j) Dredging and Dredged Material Disposal and Placement.

(1) Dredging and the disposal and placement of dredged material shall avoid and otherwise minimize adverse effects to coastal waters, submerged lands, critical areas, coastal shore areas, and Gulf beaches to the greatest extent practicable. The policies of this subsection are supplemental to any further restrictions or requirements relating to the beach access and use rights of the public. In implementing this subsection, cumulative and secondary adverse effects of dredging and the disposal and placement of dredged material and the unique characteristics of affected sites shall be considered.

(A) Dredging and dredged material disposal and placement shall not cause or contribute, after consideration of dilution and dispersion, to violation of any applicable surface water quality standards established under subsection (f) of this section.

(B) Except as otherwise provided in subparagraph (D) of this paragraph, adverse effects on critical areas from dredging and dredged material disposal or placement shall be avoided and otherwise minimized, and appropriate and practicable compensatory mitigation shall be required, in accordance with subsection (h) of this section.

(C) Except as provided in subparagraph (D) of this paragraph, dredging and the disposal and placement of dredged material shall not be authorized if:

(i) there is a practicable alternative that would have fewer adverse effects on coastal waters, submerged lands, critical areas, coastal shore areas, and Gulf beaches, so long as that alternative does not have other significant adverse effects;

(ii) all appropriate and practicable steps have not been taken to minimize adverse effects on coastal waters, submerged lands, critical areas, coastal shore areas, and Gulf beaches; or

(iii) significant degradation of critical areas under subsection (h)(1)(G)(v) of this section would result.

(D) A dredging or dredged material disposal or placement project that would be prohibited solely by application of subparagraph (C) of this paragraph may be

allowed if it is determined to be of overriding importance to the public and national interest in light of economic impacts on navigation and maintenance of commercially navigable waterways.

(2) Adverse effects from dredging and dredged material disposal and placement shall be minimized as required in paragraph (1) of this subsection. Adverse effects can be minimized by employing the techniques in this paragraph where appropriate and practicable.

(A) Adverse effects from dredging and dredged material disposal and placement can be minimized by controlling the location and dimensions of the activity. Some of the ways to accomplish this include:

(i) locating and confining discharges to minimize smothering of organisms;

(ii) locating and designing projects to avoid adverse disruption of water inundation patterns, water circulation, erosion and accretion processes, and other hydrodynamic processes;

(iii) using existing or natural channels and basins instead of dredging new channels or basins, and discharging materials in areas that have been previously disturbed or used for disposal or placement of dredged material;

(iv) limiting the dimensions of channels, basins, and disposal and placement sites to the minimum reasonably required to serve the project purpose, including allowing for reasonable overdredging of channels and basins, and taking into account the need for capacity to accommodate future expansion without causing additional adverse effects;

(v) discharging materials at sites where the substrate is composed of material similar to that being discharged;

(vi) locating and designing discharges to minimize the extent of any plume and otherwise control dispersion of material; and

(vii) avoiding the impoundment or drainage of critical areas.

(B) Dredging and disposal and placement of material to be dredged shall comply with applicable standards for sediment toxicity. Adverse effects from constituents contained in materials discharged can be minimized by treatment of or limitations on the material itself. Some ways to accomplish this include:

(i) disposal or placement of dredged material in a manner that maintains physiochemical conditions at discharge sites and limits or reduces the potency and availability of pollutants;

(ii) limiting the solid, liquid, and gaseous components of material discharged;

(iii) adding treatment substances to the discharged material; and

(iv) adding chemical flocculants to enhance the deposition of suspended particulates in confined disposal areas.

(C) Adverse effects from dredging and dredged material disposal or placement can be minimized through control of the materials discharged. Some ways of accomplishing this include:

(i) use of containment levees and sediment basins designed, constructed, and maintained to resist breaches, erosion, slumping, or leaching;

(ii) use of lined containment areas to reduce leaching where leaching of chemical constituents from the material is expected to be a problem;

(iii) capping in-place contaminated material or, selectively discharging the most contaminated material first and then capping it with the remaining material;

(iv) properly containing discharged material and maintaining discharge sites to prevent point and nonpoint pollution; and

(v) timing the discharge to minimize adverse effects from unusually high water flows, wind, wave, and tidal actions.

(D) Adverse effects from dredging and dredged material disposal or placement can be minimized by controlling the manner in which material is dispersed. Some ways of accomplishing this include:

(i) where environmentally desirable, distributing the material in a thin layer;

(ii) orienting material to minimize undesirable obstruction of the water current or circulation patterns;

(iii) using silt screens or other appropriate methods to confine suspended particulates or turbidity to a small area where settling or removal can occur;

(iv) using currents and circulation patterns to mix, disperse, dilute, or otherwise control the discharge;

(v) minimizing turbidity by using a diffuser system or releasing material near the bottom;

(vi) selecting sites or managing discharges to confine and minimize the release of suspended particulates and turbidity and maintain light penetration for organisms; and

(vii) setting limits on the amount of material to be discharged per unit of time or volume of receiving waters.

(E) Adverse effects from dredging and dredged material disposal or placement operations can be minimized by adapting technology to the needs of each site. Some ways of accomplishing this include:

(i) using appropriate equipment, machinery, and operating techniques for access to sites and transport of material, including those designed to reduce damage to critical areas;

(ii) having personnel on site adequately trained in avoidance and minimization techniques and requirements; and

(iii) designing temporary and permanent access roads and channel spanning structures using culverts, open channels, and diversions that will pass both low and high water flows, accommodate fluctuating water levels, and maintain circulation and faunal movement.

(F) Adverse effects on plant and animal populations from dredging and dredged material disposal or placement can be minimized by:

(i) avoiding changes in water current and circulation patterns that would interfere with the movement of animals;

(ii) selecting sites or managing discharges to prevent or avoid creating habitat conducive to the development of undesirable predators or species that have a competitive edge ecologically over indigenous plants or animals;

(iii) avoiding sites having unique habitat or other value, including habitat of endangered species;

(iv) using planning and construction practices to institute habitat development and restoration to produce a new or modified environmental state of higher ecological value by displacement of some or all of the existing environmental characteristics;

(v) using techniques that have been demonstrated to be effective in circumstances similar to those under consideration whenever possible and, when proposed development and restoration techniques have not yet advanced to the pilot demonstration stage, initiating their use on a small scale to allow corrective action if unanticipated adverse effects occur;

(vi) timing dredging and dredged material disposal or placement activities to avoid spawning or migration seasons and other biologically critical time periods; and

(vii) avoiding the destruction of remnant natural sites within areas already affected by development.

(G) Adverse effects on human use potential from dredging and dredged material disposal or placement can be minimized by:

(i) selecting sites and following procedures to prevent or minimize any potential damage to the aesthetically pleasing features of the site, particularly with respect to water quality;

(ii) selecting sites which are not valuable as natural aquatic areas;

(iii) timing dredging and dredged material disposal or placement activities to avoid the seasons or periods when human recreational activity associated with the site is most important; and

(iv) selecting sites that will not increase incompatible human activity or require frequent dredge or fill maintenance activity in remote fish and wildlife areas.

(H) Adverse effects from new channels and basins can be minimized by locating them at sites:

(i) that ensure adequate flushing and avoid stagnant pockets; or

(ii) that will create the fewest practicable adverse effects on CNRAs from additional infrastructure such as roads, bridges, causeways, piers, docks, wharves, transmission line crossings, and ancillary channels reasonably likely to be constructed as a result of the project; or

(iii) with the least practicable risk that increased vessel traffic could result in navigation hazards, spills, or other forms of contamination which could adversely affect CNRAs;

(iv) provided that, for any dredging of new channels or basins subject to the requirements of §501.15 of this title (relating to Policy for Major Actions), data and information on minimization of secondary adverse effects need not be produced or evaluated to comply with this subparagraph if such data and information is produced and evaluated in compliance with §501. 15(b)(1) of this title (relating to Policy for Major Actions).

(3) Disposal or placement of dredged material in existing contained dredge disposal sites identified and actively used as described in an environmental assessment or environmental impact statement issued prior to the effective date of this chapter shall be presumed to comply with the requirements of paragraph (1) of this subsection unless modified in design, size, use, or function.

(4) Dredged material from dredging projects in commercially navigable waterways is a potentially reusable resource and must be used beneficially in accordance with this policy.

(A) If the costs of the beneficial use of dredged material are reasonably comparable to the costs of disposal in a non- beneficial manner, the material shall be used beneficially.

(B) If the costs of the beneficial use of dredged material are significantly greater than the costs of disposal in a non- beneficial manner, the material shall be used beneficially unless it is demonstrated that the costs of using the material beneficially are not reasonably proportionate to the costs of the project and benefits that will result. Factors that shall be considered in determining whether the costs of the beneficial use are not reasonably proportionate to the benefits include, but are not limited to:

(i) environmental benefits, recreational benefits, flood or storm protection benefits, erosion prevention benefits, and economic development benefits;

(ii) the proximity of the beneficial use site to the dredge site; and

(iii) the quantity and quality of the dredged material and its suitability for beneficial use.

(C) Examples of the beneficial use of dredged material include, but are not limited to:

(i) projects designed to reduce or minimize erosion or provide shoreline protection;

(ii) projects designed to create or enhance public beaches or recreational areas;

(iii) projects designed to benefit the sediment budget or littoral system;

(iv) projects designed to improve or maintain terrestrial or aquatic wildlife habitat;

(v) projects designed to create new terrestrial or aquatic wildlife habitat, including the construction of marshlands, coastal wetlands, or other critical areas;

(vi) projects designed and demonstrated to benefit benthic communities or aquatic vegetation;

(vii) projects designed to create wildlife management areas, parks, airports, or other public facilities;

(viii) projects designed to cap landfills or other waste disposal areas;

(ix) projects designed to fill private property or upgrade agricultural land, if cost-effective public beneficial uses are not available; and

(x) projects designed to remediate past adverse impacts on the coastal zone.

(5) If dredged material cannot be used beneficially as provided in paragraph (4)(B) of this subsection, to avoid and otherwise minimize adverse effects as required in paragraph (1) of this subsection, preference will be given to the greatest extent practicable to disposal in:

(A) contained upland sites;

(B) other contained sites; and

(C) open water areas of relatively low productivity or low biological value.

(6) For new sites, dredged materials shall not be disposed of or placed directly on the boundaries of submerged lands or at such location so as to slump or migrate across the boundaries of submerged lands in the absence of an agreement between the affected public owner and the adjoining private owner or owners that defines the location of the boundary or boundaries affected by the deposition of the dredged material.

(7) Emergency dredging shall be allowed without a prior consistency determination as required in the applicable consistency rule when:

(A) there is an unacceptable hazard to life or navigation;

(B) there is an immediate threat of significant loss of property; or

(C) an immediate and unforeseen significant economic hardship is likely if corrective action is not taken within a time period less than the normal time needed under standard procedures. The council secretary shall be notified at least 24 hours prior to commencement of any emergency dredging operation by the agency or entity responding to the emergency. The notice shall include a statement demonstrating the need for emergency action. Prior to initiation of the dredging operations the project sponsor or permit-issuing agency shall, if possible, make all reason-

able efforts to meet with council's designated representatives to ensure consideration of and consistency with applicable policies in this section. Compliance with all applicable policies in this section shall be required at the earliest possible date. The permit-issuing agency and the applicant shall submit a consistency determination within 60 days after the emergency operation is complete.

(8) Mining of sand, shell, marl, gravel, and mudshell on submerged lands shall be prohibited unless there is an affirmative showing of no significant impact on erosion within the coastal zone and no significant adverse effect on coastal water quality or terrestrial and aquatic wildlife habitat within any CNRA.

(9) The GLO and the SLB shall comply with the policies in this subsection when approving oil, gas, and other mineral lease plans of operation and granting surface leases, easements, and permits and adopting rules under the Texas Natural Resources Code, Chapters 32, 33, and 51-53, and Texas Water Code, Chapter 61, for dredging and dredged material disposal and placement. TxDOT shall comply with the policies in this section when adopting rules and taking actions as local sponsor of the Gulf Intracoastal Waterway under Texas Civil Statutes, Article 5415e-2. The TNRCC and the RRC shall comply with the policies in this subsection when issuing certifications and adopting rules under Texas Water Code, Chapter 26, and the Texas Natural Resources Code, Chapter 91, governing certification of compliance with surface water quality standards for federal actions and permits authorizing dredging or the discharge or placement of dredged material. The TPWD shall comply with the policies in this subsection when adopting rules at Chapter 57 of this title (relating to Fisheries) governing dredging and dredged material disposal and placement. The TPWD shall comply with the policies in paragraph (8) of this subsection when adopting rules and issuing permits under Texas Parks and Wildlife Code, Chapter 86, governing the mining of sand, shell, marl, gravel, and mudshell.

(k) Construction in the Beach/Dune System.

(1) Construction in critical dune areas and adjacent to Gulf beaches shall comply with the policies in this subsection.

(A) Construction within a critical dune area that results in the material weakening of dunes and material damage to dune vegetation shall be prohibited.

(B) Construction within critical dune areas that does not materially weaken dunes or materially damage dune vegetation shall be sited, designed, constructed, maintained, and operated so that adverse "effects" (as defined in §15.2 of this title, relating to Coastal Area Planning) on the sediment budget and critical dune areas are avoided to the greatest extent practicable. For purposes of this subsection, practicability shall be determined by considering the effectiveness, scientific feasibility, and commercial availability of the technology or technique. Cost of the technology or technique shall also be considered. Adverse effects (as defined in Chapter 15 of this title, relating to Coastal Area Planning) that cannot be avoided shall be:

(i) minimized by limiting the degree or magnitude of the activity and its implementation;

(ii) rectified by repairing, rehabilitating, or restoring the adversely affected dunes and dune vegetation; and

(iii) compensated for on-site or off-site by replacing the resources lost or damaged seaward of the dune protection line.

(C) Rectification and compensation for adverse effects that cannot be avoided or minimized shall provide at least a one-to-one replacement of the dune volume and vegetative cover, and preference shall be given to stabilization of blowouts and breaches and on-site compensation.

(D) The ability of the public, individually and collectively, to exercise its rights of use of and access to and from public beaches shall be preserved and enhanced.

(E) Non-structural erosion response methods such as beach nourishment, sediment bypassing, nearshore sediment berms, and planting of vegetation shall be preferred instead of structural erosion response methods. Subdivisions shall not authorize the construction of a new erosion response structure within the beach/dune system, except for a retaining wall located more than 200 feet landward of the line of vegetation. Subdivisions shall not authorize the enlargement, improvement, repair or maintenance of existing erosion response structures on the public beach. Subdivisions shall not authorize the repair or maintenance of existing erosion response structures within 200 feet landward of the line of vegetation except as provided in 15.6(d) of this title (relating to Concurrent Dune Protection and Beachfront Construction Standards).

(2) The GLO shall comply with the policies in this subsection when certifying local government dune protection and beach access plans and adopting rules under the Texas Natural Resources Code, Chapters 61 and 63. Local governments required by the Texas Natural Resources Code, Chapters 61 and 63, and Chapter 15 of this title (relating to Coastal Area Planning) to adopt dune protection and beach access plans shall comply with the applicable policies in this subsection when issuing beachfront construction certificates and dune protection permits.

(l) Development in Coastal Hazard Areas.

(1) Subdivisions participating in the National Flood Insurance Program shall adopt ordinances or orders governing development in special hazard areas under Texas Water Code, Chapter 16, Subchapter I, and Texas Local Government Code, Chapter 240, Subchapter Z, that comply with construction standards in regulations at Code of Federal Regulations, Title 44, Parts 59-60, adopted pursuant to the National Flood Insurance Act, 42 United States Code Annotated, §§4001, et seq.

(2) Pursuant to the standards and procedures under the Texas Natural Resources Code, Chapter 33, Subchapter H, the GLO shall adopt or issue rules, recommendations, standards, and guidelines for erosion avoidance and remediation and for prioritizing critical erosion areas.

(m) Development Within Coastal Barrier Resource System Units and Otherwise Protected Areas on Coastal Barriers.

(1) Development of new infrastructure or major repair of existing infrastructure within or supporting development within Coastal Barrier Resource System Units and Otherwise Protected Areas designated on maps dated October 24, 1990, under the Coastal Barrier Resources Act, 16 United States Code Annotated, §3503(a), shall comply with the policies in this subsection.

(A) Development of publicly funded infrastructure shall be authorized only if it is essential for public health, safety, and welfare, enhances public use, or is required by law.

(B) Infrastructure shall be located at sites at which reasonably foreseeable future expansion will not require development in critical areas, critical dunes, Gulf beaches, and washover areas within Coastal Barrier Resource System Units or Otherwise Protected Areas.

(C) Infrastructure shall be located at sites that to the greatest extent practicable avoid and otherwise minimize the potential for adverse effects on critical areas, critical dunes, Gulf beaches, and washover areas within Coastal Barrier Re-

source System Units or Otherwise Protected Areas from:

(i) construction and maintenance of roads, bridges, and causeways; and

(ii) direct release to coastal waters, critical areas, critical dunes, Gulf beaches, and washover areas within Coastal Barrier Resource System Units or Otherwise Protected Areas of oil, hazardous substances, or stormwater runoff.

(D) Where practicable, infrastructure shall be located in existing rights-of-way or previously disturbed areas to avoid or minimize adverse effects within Coastal Barrier Resource System Units or Otherwise Protected Areas.

(E) Development of infrastructure shall occur at sites and times selected to have the least adverse effects practicable within Coastal Barrier Resource System Units or Otherwise Protected Areas on critical areas, critical dunes, Gulf beaches, and washover areas and on spawning or nesting areas or seasonal migrations of commercial, recreational, threatened, or endangered terrestrial or aquatic wildlife.

(2) TNRCC rules and approvals for the creation of special districts and for infrastructure projects funded by issuance of bonds by water, sanitary sewer, and wastewater drainage districts under Texas Water Code, Chapter 50; water control and improvement districts under Texas Water Code, Chapter 50; municipal utility districts under Texas Water Code, Chapter 54; regional plan implementation agencies under Texas Water Code, Chapter 54; special utility districts under Texas Water Code, Chapter 65; stormwater control districts under Texas Water Code, Chapter 66; and all other general and special law districts subject to and within the jurisdiction of the TNRCC, shall comply with the policies in this subsection. TxDOT rules and approvals under Texas Civil Statutes, Article 6663 et seq, governing planning, design, construction, and maintenance of transportation projects, shall comply with the policies in this subsection.

(n) Development in State Parks, Wildlife management Areas or Preserves. Development by a person other than the Parks and Wildlife Department that requires the use or taking of any public land in such areas shall comply with Texas Parks and Wildlife Code, Chapter 26.

(o) Alteration of Coastal Historic Areas.

(1) Development affecting a coastal historic area shall avoid and otherwise minimize alteration or disturbance of the site unless the site's excavation will promote historical, archaeological, educational, or scientific understanding.

(2) The THC shall comply with the policies in this subsection when adopting rules and issuing permits under the Texas Natural Resources Code, Chapter 191, governing alteration of coastal historic areas. The THC shall comply with the policies in this subsection when issuing reviews under the National Historic Preservation Act, §106 (16 United States Code Annotated, §470f), and the regulations enacted pursuant thereto, Code of Federal Regulations, Title 36, Chapter 1, Part 63.

(p) Transportation Projects.

(1) Transportation construction projects and maintenance programs within the coastal zone shall comply with the policies in this subsection.

(A) Pollution prevention procedures shall be incorporated into the construction and maintenance of transportation projects to minimize pollutant loading to coastal waters from erosion and sedimentation, use of pesticides and herbicides for maintenance of rights-of-way, and other pollutants from stormwater runoff.

(B) Transportation projects shall be located at sites that to the greatest extent practicable avoid and otherwise minimize the potential for adverse effects from construction and maintenance of additional roads, bridges, causeways, and other development associated with the project; and direct release to CNRAs of pollutants from oil or hazardous substance spills, contaminated sediments or stormwater runoff.

(C) Where practicable, transportation projects shall be located in existing rights-of-way or previously disturbed areas if necessary to avoid or minimize adverse effects.

(D) Where practicable, transportation projects shall be located at sites at which future expansion will not require development in coastal wetlands except where such construction is determined to be essential for evacuation in the case of a natural disaster.

(E) Construction and maintenance of transportation projects shall avoid the impoundment and draining of coastal wetlands. If impoundment or draining cannot be avoided, adverse effects to the impounded or drained wetlands shall be mitigated in accordance with the sequencing requirements of subsection (h) of this section.

(F) Construction of transportation projects shall occur at sites and times selected to have the least adverse effects practicable on recreational uses of CNRAs and on spawning or nesting seasons or seasonal migrations of terrestrial or aquatic species.

(G) Beach-quality sand from maintenance of roadways adjacent to Gulf beaches shall be beneficially used by placement on Gulf beaches where practicable. Where placement on Gulf beaches is not practicable, the material shall be placed in critical dune areas.

(2) TxDOT rules and project approvals under Texas Civil Statutes, Article 6663b and 6663c, and Texas Civil Statutes, Article 6674a et seq, governing transportation projects within the coastal zone, shall comply with the policies in this subsection.

(q) Emission of Air Pollutants. TNRCC rules under Texas Health and Safety Code, Chapter 382, governing emissions of air pollutants, shall comply with regulations at Code of Federal Regulations, Title 40, adopted pursuant to the Clean Air Act, 42 United States Code Annotated, §7401, et seq, to protect and enhance air quality in the coastal area so as to protect CNRAs and promote the public health, safety, and welfare.

(r) Appropriations of Water.

(1) Impoundments and diversion of state water within 200 stream miles of the coast, to commence from the mouth of the river thence inland, shall comply with the policies in this subsection.

(A) The TNRCC shall 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. It is the public policy of the state to provide for the conservation and development of the state's natural resources, including:

(i) the control, storage, preservation, and distribution of the state's storm and floodwaters and the waters of its rivers and streams for irrigation, power, and other useful purposes;

(ii) the reclamation and irrigation of the state's arid, semiarid, and other land needing irrigation;

(iii) the reclamation and drainage of the state's overflowed land and other land needing drainage;

(iv) the conservation and development of its forest, water, and hydroelectric power;

(v) the navigation of the state's inland and coastal waters; and

(vi) the maintenance of a proper ecological environment of the bays and estuaries of Texas and the health of related living marine resources.

(B) In this subsection, "beneficial inflows" means a salinity, nutrient, and sediment loading regime adequate to maintain an ecologically sound environment in the receiving bay and estuary system that is necessary for the maintenance of productivity of economically important and ecologically characteristic sport or commercial fish and shellfish species and estuarine life upon which such fish and shellfish are dependent.

(C) In its consideration of an application for a permit to store, take, or divert water, the TNRCC shall assess the effects, if any, of the issuance of the permit on the bays and estuaries of Texas. For permits issued within an area that is 200 river miles of the coast, to commence from the mouth of the river thence inland, the TNRCC shall include in the permit, to the greatest extent practicable when considering all public interests, those conditions considered necessary to maintain beneficial inflows to any affected bay and estuary system.

(D) For the purposes of making a determination under subparagraph (C) of this paragraph, the TNRCC shall consider among other factors:

(i) the need for periodic freshwater inflows to supply nutrients and modify salinity to preserve the sound environment of the bay or estuary, using any available information, including studies and plans specified in and other studies considered by the TNRCC to be reliable; together with existing circumstances, natural or otherwise, that might prevent the conditions imposed from producing benefits;

(ii) the ecology and productivity of the affected bay and estuary system;

(iii) the expected effects on the public welfare of not including in the permit some or all of the conditions considered necessary to maintain the beneficial inflows to the affected bay or estuary;

(iv) the quantity of water requested and the proposed use of water by the applicant, as well as the needs of those who would be served by the applicant;

(v) the expected effects on the public welfare of the failure to issue all or part of the permit being considered; and

(vi) for the purposes of this subsection, the declarations as to preferences for competing uses of water as found in Texas Water Code, §11. 024 and §11.033, as well as the public policy statement in subparagraph (A) of this paragraph.

(E) In its consideration of an application to store, take, or divert water, the TNRCC shall consider the effect, if any, of the issuance of the permit on existing instream uses and water quality of the stream or river to which the application applies. The TNRCC shall also consider the effect, if any, of the issuance of the permit on fish and wildlife habitats.

(F) On receipt of an application for a permit to store, take, or divert water, the TNRCC shall send a copy of the permit application and any subsequent amendments to the TPWD. In making a final decision on any application for a permit, the TNRCC, in addition to other information, evidence, and testimony presented, shall consider all information, evidence, or testimony presented by the TPWD and the TWDB.

(G) Permit conditions relating to beneficial inflows to affected bays and estuaries and instream uses may be suspended by the TNRCC if the TNRCC finds that an emergency exists and cannot practically be resolved in other ways. Before the TNRCC suspends a permit under this subparagraph, it must give written notice to the TPWD of the proposed suspension. The TNRCC shall give the TPWD an opportunity to submit comments on the proposed suspension within 72 hours from such time and the TNRCC shall consider those comments before issuing its order imposing the suspension.

(H) In its consideration of an application for a permit under this section, the TNRCC shall assess the effects, if any, of the issuance of the permit on water quality in coastal waters. In its consideration of an application for a permit to store, take, or divert water in excess of 5,000 acre feet per year, the commission shall assess the effects, if any, on the issuance of the permit on fish and wildlife habitats and may require the applicant to take reasonable actions to mitigate adverse effects on such habitat. In determining whether to require an applicant to mitigate adverse effects on a habitat, the TNRCC may consider any net benefit to habitat produced by the project. The TNRCC shall offset against any mitigation required by the United States Fish and Wildlife Service pursuant to Code of Federal Regulations, Title 33, §§320-330, any mitigation authorized by this section.

(I) Unappropriated water and other water of the state stored in any facility acquired by and under the control of the TWDB may be released without charge to relieve any emergency condition arising from drought, severe water shortage, or other calamity, if the TNRCC first determines the existence of the emergency and requests the TWDB to release the water.

(J) Five percent of the annual firm yield of water in any reservoir and associated works constructed with state financial participation within 200 river miles of the coast, to commence from the mouth of the river thence inland, is appropriated to the TPWD for use to make releases to bays and estuaries and for instream uses, and the TNRCC shall issue permits for this water to the TPWD under procedures adopted by the TNRCC. This subparagraph applies only to reservoirs and associated works on which construction begins on or after September 1, 1985. This subsection does not limit or repeal any other authority of or law relating to the TPWD or the TNRCC.

(K) The TWDB, in coordination with the TNRCC and TPWD, shall identify ways to assist in providing flows to meet instream needs, including protection of water quality, protection of terrestrial or aquatic wildlife habitat, and bay and estuary inflow needs, in the implementation of the Texas Water Bank, Texas Water Code, Chapter 15, Subchapter K. This may include, but not be limited to, the purchase by the TPWD and/or the TWDB of water rights deposited in the Texas Water Bank in order to provide for existing instream uses and beneficial inflows to bays and estuaries if funds are available and such purchase is not prohibited by law. The TNRCC shall facilitate the approval of any necessary permit amendments to achieve this purpose.

(L) An applicant for a new or amended water right permit shall submit a water conservation plan in accordance with 30 TAC §295.9 (relating to Conservation Plan). The TNRCC shall consider the information contained in the conservation plan in determining whether any feasible alternative to the proposed appropriation exists, whether the proposed amount to be appropriated as measured at the point of diversion is reasonable and necessary for the proposed use, the term and other conditions of the water right and to ensure that reasonable diligence will be used to avoid waste and achieve water conservation. Based upon its review, the TNRCC may deny or grant, in whole or in part, the requested appropriation.

(2) The TNRCC rules and authorizations under Texas Water Code, Chapter 11, governing review and action on

applications for new permits or amendments proposing changes to existing permits for diversions or impoundments of state water within 200 stream miles of the coast, and TNRCC rules and approvals governing creation of districts and issuance of district bonds for levee and flood control projects within the coastal zone, shall comply with the policies in this subsection.

(s) Levee and Flood Control Projects.

(1) Drainage, reclamation, channelization, levee construction or modification, or flood- or floodwater-control infrastructure projects shall be designed, constructed, and maintained to avoid the impoundment and draining of coastal wetlands to the greatest extent practicable. If impoundment or draining of coastal wetlands cannot be avoided, adverse effects to the wetlands shall be mitigated in accordance with the sequencing requirements in subsection (h) of this section.

(2) TNRCC rules and approvals for the levee construction, modification, drainage, reclamation, channelization, or flood- or floodwater-control projects, pursuant to the Texas Water Code, §16.236, shall comply with the policies in this subsection.

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 authority.

Issued in Austin, Texas, on October 13, 1995.

TRD-9513132 Garry Mauro
Chairman
Coastal Coordination Council

Effective date: November 3, 1995

Proposal publication date: July 18, 1995

For further information, please call: (512) 305-9129

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• 31 TAC §501.2

The Coastal Coordination Council (council) adopts the repeal of §501.2, concerning the Texas Coastal Management Program (CMP), related to Findings. The council is adopting the repeal of §501.2 because there will be new language proposed for this section. As a result, the former section is procedurally repealed and new language is concurrently proposed to address public and council concerns that the detailed list of benefits and adverse impacts on coastal natural resource areas described in §501.2 might inadvertently be read to create a legal presumption that the council, when evaluating an action for consistency with the CMP goals and policies, may only consider the benefits and adverse impacts listed in such section. Such a presumption would limit the council's flexibility to evaluate actions in light of overall costs and benefits of an activity. These changes are made to conform to amendments to the Coastal Coordination Act also made by the 74th Legislature, 1995, in House Bill 3226, to be codified at Texas Natural Resources Code, Chapter 33.

No comments were received regarding the repeal of §501.2.

The repeal is adopted pursuant to the council's authority in Texas Natural Resources Code, §§33.051-33.054, 33.202, 33.204, 33.205, 33.2051-33.2053, as amended by House Bill 3226, 74th Legislature, 1995.

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 authority.

Issued in Austin, Texas, on October 13, 1995.

TRD-9513136 Garry Mauro
Chairman
Coastal Coordination Council

Effective date: November 3, 1995

Proposal publication date: July 18, 1995

For further information, please call: (512) 305-9129

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• 31 TAC §501.15

The Coastal Coordination Council (council) adopts the repeal of §501.15, concerning the Texas Coastal Management Program (CMP), Policy for Major Actions. The council is adopting the repeal of §501.15 because the subsection is concurrently reproposed with language procedurally added to the subsection to address the concern that the section imposed additional requirements on activities for which a federal environmental impact statement is required. Texas Natural Resources Code, §33.053, as amended by the 74th Legislature, 1995, in House Bill 3226, specifies the elements of the CMP. In general, the elements of the CMP are limited to the minimum required for federal approval.

Thirteen commenters opposed the repeal of §501.15. Five commenters supported the change. Because repeal of the section could affect federal approval of the CMP, the council has adopted the proposed repeal of the major actions policy and is proposing new language, narrowing the scope of the policy. List of Commenters: Railroad Commission; Environmental Defense Fund; Mitchell Energy; United States Department of Commerce, National Oceanic and Atmospheric Administration, Habitat Conservation Division; Steinhagen Oil Company, Inc.; Texas Cattle Feeders Association; Port of Houston; Baker and Botts, L.L.P.; and Henry, Lowerre, Johnson, Hess and Frederick. The repeal is adopted pursuant to the council's authority in Texas Natural Resources Code, §§33.051-33.054, 33.202, 33.204, 33.205, 33.2052-2053, and 33.206-33.208, as amended by House Bill 3226, 74th Legislature, 1995, as codified in Texas Natural Resources Code, Chapter 33.

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 authority.

Issued in Austin, Texas, on October 13, 1995.

TRD-9513137 Garry Mauro
Chairman
Coastal Coordination Council

Effective date: November 3, 1995

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For further information, please call: (512) 305-9129

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Chapter 503. Coastal Management Program Boundary

• 31 TAC §503.1

The Coastal Coordination Council (council) adopts an amendment to §503. 1, concerning the Coastal Management Program (CMP) Boundary, with changes to the proposed text as published in the July 18, 1995, issue of the *Texas Register* (20 TexReg 5181).

The amendment to §503.1 is required to conform the CMP rules to statutory changes made by the 74th Legislature, 1995, in House Bill 3226, to be codified at Texas Natural Resource Code, §33.2053(k).

The following provisions shall be implemented and become enforceable at a date to be established by the council in the future: 31 TAC Chapter 505, Subchapter C (relating to Consistency and Council Review of Proposed State Agency Actions), Subchapter D (relating to Council Advisory Opinions on General Plans), and Subchapter E (relating to Consistency and Council Review of Local Government Actions) and 31 TAC Chapter 506 (relating to Council Procedures for Federal Consistency with Coastal Management Program Goals and Policies). The council shall publish notice of the implementation date(s) of these provisions in the *Texas Register* at least 30 days prior to such implementation date(s). Individual federal, state, and local subdivision actions need not comply with the CMP goals and Policies as set forth in Chapter 501 of this title (relating to Coastal Management Program) prior to the implementation of council review of such actions under Chapters 505 (relating to Council Procedures for State Consistency with Coastal Management Program Goals and Policies) and 506 (relating to Council Procedures for Federal Consistency with Coastal Management Program Goals and Policies). The council will implement the following provisions beginning February 1, 1996: Chapters 501 and 503, and Chapter 505, Subchapters A and B (relating to Purpose and Policy and State Agency Actions Subject to the Coastal Management Program and Council Review and Certification of Agency Rules).

This preamble addresses changes adopted as the result of comments received on the July 18, 1995 proposals. To fully explain the adopted rules, this preamble also addresses changes to the September 27, 1994 rules made as the result of House Bill 3226.

The CMP boundary delineates the coastal zone. Under House Bill 3226, the Legislature

provided that the inland boundary for the CMP follow a modification of the coastal facility designation line, which is the line adopted under the Oil Spill Prevention and Response Act of 1991, Texas Natural Resources Code, Chapter 40 (OSPRA). The facility designation line generally delineates the area within which facilities must apply for certification under OSPRA. Generally, the CMP boundary encompasses the area within Texas lying seaward of the coastal facility designation line. The CMP boundary is established to delineate regulatory jurisdiction. It does not demark for title purposes, the boundary between public and private land. The CMP boundary also includes coastal wetlands landward of the coastal facility designation line. The boundary encompasses areas within the following Texas counties: Cameron, Willacy, Kenedy, Kleberg, Nueces, San Patricio, Aransas, Refugio, Calhoun, Victoria, Jackson, Matagorda, Brazoria, Galveston, Harris, Chambers, Liberty, Jefferson, and Orange. The seaward limit of the CMP boundary extends into the Gulf of Mexico to the limit of state title and ownership under the Submerged Lands Management Act (43 United States Code, §§1301 et seq), i.e. three marine leagues.

The boundary may be described as consisting of: the inland boundary, the boundary with the State of Louisiana, the seaward boundary, the boundary with the Republic of Mexico, and the excluded federal lands.

The inland boundary is described in three portions: the roadway portion of boundary as described in §503.1(b)(1)(A), a tidal portion of boundary as described in §503.1(b)(1)(B), and a wetlands portion of the boundary as described in §503.1(b)(1)(C).

The roadway portion of boundary, in §503.1(b)(1)(A) is based upon the coastal facility designation line.

The tidal portion of boundary, in §503.1(b)(1)(B), is based upon the stream segment maps maintained by the Texas Natural Resource Conservation Commission and further described under 30 TAC §307.10, Appendix C.

The boundary also includes coastal wetlands, which generally are within one mile of the mean high tide line of the tidal river and stream segments described in §503.1(b)(1)(B). Along the Trinity and Neches rivers, certain wetlands located greater than one mile from the mean high tide line are also coastal natural resource areas (CNRAs). The wetlands included are those defined under Texas Water Code, §11.502, as meaning "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."

One commenter requested that the title of the chapter be changed to read "Coastal Management Program Boundary" to avoid confusion between Chapters 503 and 501. This change was made to clarify the chapter's contents.

Twenty commenters opposed the amendments to the CMP boundary in §503.1. Most of these commenters stated that the amendment made the boundary confusing and raised questions regarding federal approval of the CMP because it excluded areas of tidal waters from the coastal zone. One commenter supported the proposed amendments. The council has not adopted the amendment as proposed, but has adopted amendments described previously. The changes conform the boundary to House Bill 3226. The boundary now includes all tidal waters and is drawn and described in a simpler and less confusing manner.

Seventeen commenters requested that oil and gas exploration and production activities "be exempt from the rules of the CMP inland of a line 100 yards from coastal waters." One commenter requested that oil and gas exploration and production activities be exempt landward of the OSPRA's coastal facility designation line. One commenter requested the boundary in Brazoria County be modified to follow Farm to Market Road 2004 to County Road 227, County Road 227 to Farm to Market Road 523 to County Road 690 (levee road), County Road 690 and the hurricane levee to the Brazos River diversion, the Brazos River diversion and the hurricane protection levee to State Highway 36, State Highway 36 to Farm to Market Road 2611, and Farm to Market Road 2611 to the Matagorda County line. Three commenters requested that the boundary be modified to exclude Liberty County. One commenter stated that if Liberty County was excluded, other areas should be excluded also. The council has not adopted these requested changes because they would conflict with House Bill 3226, which specifically delineates the boundary, and these suggested changes are not authorized by the statute.

One commenter requested the council establish a schedule for implementation of the various provisions of the rules. This useful suggestion has been adopted and each preamble now contains implementation dates.

Minor editorial changes have been made to §503 1(a) and §503.1(b)(1)(B) (iii) to clarify these subsections.

One commenter requested that a map of the boundary be included in the rule. Detailed maps are included in the adopted rule.

The following organizations generally supported the proposed amendments to the CMP rules: E Cross Cattle Co., Inc.; Texas Cattle Feeders Association; The Fordyce Company; Texas Mid-Continent Oil and Gas Association; County of Kenedy; City of Lake Jackson; City of Corpus Christi; Texas Independent Producers and Royalty Owners Association; Lavaca-Navidad River Authority; TriTech Regional Council; Iberia Petroleum Company; Mitchell Energy & Development Corporation; Railroad Commission of Texas; Everest Minerals Corporation; U. S. Department of the Army, Corps of Engineers; Coastal Bend Geological Library, Inc.; Port of Houston Authority; Trinity Improvement Association; Kling, Inc.; Briggs Ranches; Society of Independent Professional Earth Scientists; Texas Water Conservation Association; Mueller Engineering Corp., Petroleum Consultants; American Shoreline, Inc.; Texas and Southwestern Cattle Raisers Association; Southstar Corporation; South Texas Cotton and Grain Association, Inc.; Greater Corpus Christi Business Alliance Chamber of Commerce; King Ranch, Inc.; and Wilson Plaza North.

The following organizations generally opposed the proposed amendments to the CMP rules: Texas Shrimp Association; National Oceanic and Atmospheric Administration; Blackburn & Carter; Arnold Construction Company, Inc.; City of Galveston; McFarlane & Associates, Steinhagen Oil Company, Inc., U. S. Department of Interior; ABC Used Auto Parts; Gulf Coast Rod, Reel and Gun Club, Inc.; Crady, Jewett & McCulley, L.L.P.; General Land Office; Henry, Lowerre, Johnson, Hess and Frederick; Environmental Defense Fund; U. S. Environmental Protection Agency; Wells, Peyton, Beard, Greenberg, Hunt and Crawford, L.L.P.; The Benton Company; Boyt Properties; Ekistics Corporation, Environmental Impact Assessment and Socioeconomic Analysis; Lone Star Chapter Sierra Club; R. C. Deal & Associates; Port of Houston; League of Women Voters of Texas; League of Women Voters of Houston; Groves Brothers Machinery, Inc.; Corpus Christi Caller-Times; Mabry, Herbeck & Chilton, P.C.; United States Department of the Interior, Fish and Wildlife Service, Division of Ecological Services; Lower Laguna Madre Foundation; County of Jefferson; United States Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, Southeast Regional Office; Fort Bend Medical Clinic; Entrix, Inc.; Galveston Bay Conservation and Preservation Association; County of Jim Wells; The Shaddock Companies; Galveston Bay Foundation; Department of Planning & Transportation; Coastal Bend, Sierra Club, East Matagorda Bay Foundation; Greater Corpus Christi Business Alliance Chamber of Commerce; Whittington & Ewing Design Associates; Scenic Galveston; Houston Audubon Society, Audubon Council of Texas; Frontera Audubon Society; and Sea Pals'

The following organizations made specific written comments but did not express general support for or opposition to the proposed CMP rules: Liberty County; Port of Houston Authority; U. S. Department of Agriculture, Natural Resources Conservation Services; Houston-Galveston Area Council; Browning-Ferris Industries; Texas Historical Commission; Texas Water Development Board, Houston Lighting and Power; Texas Chemical Council; Texas Beach Advocate; Texas Water Conservation Association, UTMB-Galveston Department of OB/GYN; and the Department of the Navy, Naval Station Ingleside.

The following organizations expressed general support for House Bill 3226 and an approvable CMP: South East Texas Regional Planning Commission, County of Hidalgo; Benckenstein & Oxford, L.L.P., and Burrus Lumber Company.

In addition to the many comments received during the comment period, some comments were received after the expiration of the comment period While these comments have not been, for the most part, responded to individ-

ually as were comments received earlier, concerns expres[illegible] in those comments have been addressed in responses to many earlier comments. The council staff gratefully acknowledges the involvement of so many individuals, businesses, trade association, nongovernment organizations and public officials whose thoughtful comments we have read. Chapters 501, 503, 504, 505, and 506 have been revised and improved in light of these comments, reflecting as they do a broad spectrum of economic, ecological, and other concerns held by Texans throughout the state.

The amendment is adopted under Texas Natural Resources Code, §33.204(a), as amended by House Bill 3226, 74th Legislature, 1995, which provides the council with the authority to promulgate rules adopting the CMP goals and policies.

§503.1. Coastal Management Program Boundary.

(a) General Description of the Coastal Management Program Boundary. The coastal management program boundary delineates the coastal zone. The inland part of the boundary is a modification of the coastal facility designation line, which is the line the State of Texas adopted under the Oil Spill Prevention and Response Act of 1991 (Texas Natural Resources Code, Chapter 40) to describe areas where oil spills are likely to enter coastal waters. Generally, the boundary encompasses the area within Texas lying seaward of the coastal facility designation line. It also includes coastal wetlands landward of the coastal facility designation line. The boundary includes areas within the following Texas counties: Cameron, Willacy, Kenedy, Kleberg, Nueces, San Patricio, Aransas, Refugio, Calhoun, Victoria, Jackson, Matagorda, Brazoria, Galveston, Harris, Chambers, Liberty, Jefferson, and Orange. The seaward reach of the boundary extends into the Gulf of Mexico to the limit of state title and ownership under the Submerged Lands Management Act (43 United States Code, §§1301 et seq), that is, three marine leagues. The following maps outline the coastal management program boundary. Figure: 31 TAC §503.1(a).

(b) Particular Description of the Coastal Management Program Boundary. The boundary is more particularly described in terms of the inland boundary, the boundary with the State of Louisiana, the seaward boundary, the boundary with the Republic of Mexico, and the excluded federal lands.

(1) The inland boundary. The inland boundary encompasses the following areas:

(A) Roadway portion of boundary. The boundary begins at the International Toll Bridge in Brownsville, thence northward along U.S. Highway 77 to the junction of Paredes Lines Road (FM Road 1847) in Brownsville, thence northward along FM Road 1847 to the junction of FM Road 106 east of Rio Hondo, thence westward along FM Road 106 to the junction of FM Road 508 in Rio Hondo, thence northward along FM Road 508 to the junction of FM Road 1420, thence northward along FM Road 1420 to the junction of State Highway 186 east of Raymondville, thence westward along State Highway 186 to the junction of U.S. Highway 77 near Raymondville, thence northward along U.S. Highway 77 to the junction of FM Road 774 in Refugio, thence eastward along FM Road 774 to the junction of State Highway 35 south of Tivoli, thence northward along State Highway 35 to the junction of State Highway 185 between Bloomington and Seadrift, thence northwestward along State Highway 185 to the junction of FM Road 616 in Bloomington, thence northeastward along FM Road 616 to the junction of State Highway 35 east of Blessing, thence southward along the State Highway 35 to the junction of FM Road 521 north of Palacios, thence northeastward along FM Road 521 to the junction of State Highway 36 south of Brazoria, thence northward along State Highway 36 to the junction of State Highway 332 in Brazoria, thence eastward along State Highway 332 to the junction of FM Road 2004 in Lake Jackson, thence northeastward along FM Road 2004 to the junction of Interstate Highway 45 between Dickinson and La Marque, thence northwestward along Interstate Highway 45 to the junction of Interstate Highway 610 in Houston, thence east and northward along Interstate Highway 610 to the junction of Interstate Highway 10 in Houston, thence eastward along Interstate Highway 10 to the Louisiana State line.

(B) Tidal portion of boundary. The boundary runs at a distance of 100 yards inland from the mean high tide lines along each of the following tidal river and stream segments from the points where they intersect the roadway boundary described in subparagraph (A) of this paragraph:

(i) on the Arroyo Colorado, to a point 100 meters (110 yards) downstream of Cemetery Road south of Port Harlingen in Cameron County;

(ii) on the Nueces River, to Calallen Dam 1.7 kilometers (1.1 miles) upstream of U.S. Highway 77 in Nueces/San Patricio County;

(iii) on the Guadalupe River, to the Guadalupe-Blanco River Authority Salt Water Barrier 0.7 kilometers (0.4 mile) downstream of the confluence of the San Antonio River in Calhoun and Refugio Counties;

(iv) on the Lavaca River, to a point 8.6 kilometers (5.3 miles) downstream of U.S. Highway 59 in Jackson County;

(v) on the Navidad River, to Palmetto Bend Dam in Jackson County;

(vi) on Tres Palacios Creek, to a point 0.6 kilometer (1.0 mile) upstream of the confluence of Wilson Creek in Matagorda County;

(vii) on the Colorado River, to a point 2.1 kilometers (1.3 miles) downstream of the Missouri-Pacific Railroad in Matagorda County;

(viii) on the San Bernard River, to a point 3.2 kilometers (2.0 miles) upstream of State Highway 35 in Brazoria County;

(ix) on Chocolate Bayou, to a point 4.2 kilometers (2.6 miles) downstream of State Highway 35 in Brazoria County;

(x) on Clear Creek, to a point 100 meters (110 yards) upstream of FM Road 528 in Galveston/Harris County;

(xi) on Buffalo Bayou, to a point 400 meters (440 yards) upstream of Shepherd Drive in Harris County;

(xii) on the San Jacinto River, to Lake Houston Dam in Harris County;

(xiii) on Cedar Bayou, to a point 2.2 kilometers (1.4 miles) upstream of Interstate Highway 10 in Chambers/Harris County;

(xiv) on the Trinity River, to a point 3.1 kilometers (1.9 miles) downstream of U.S. Highway 90 in Liberty County;

(xv) on the Neches River, to a point 11.3 kilometers (7.0 miles) upstream of Interstate Highway 10 in Orange County; and

(xvi) on the Sabine River, to Morgan Bluff in Orange County.

(C) Wetlands portion of boundary. Except for the part of the boundary adjacent to the Trinity and Neches rivers, the boundary includes wetlands lying within one mile inland of the mean high tide lines of the tidal river and stream segments identified in subparagraph (B) of this paragraph.

(i) Adjacent to the Trinity River, the boundary includes wetlands within the area located between the mean high tide line on the western shoreline of the river and Farm-to-Market Road 565 and Farm-to-Market Road 1409, and wetlands within the area located between the mean high tide line on the eastern shoreline of that portion of the river and Farm-to-Market Road 563.

(ii) Adjacent to the Neches River, the boundary includes wetlands

within one mile of the mean high tide line on the western shoreline of the river, and wetlands within the area located between the mean high tide line on the eastern shoreline of that portion of the river and Farm-to-Market Road 105.

(2) The boundary with the State of Louisiana. The boundary with the State of Louisiana begins in Orange County at Morgans Bluff, the northernmost extent of tidal influence, along the adjudicated boundary between the State of Texas and the State of Louisiana, as established by the United States Supreme Court in *Texas v. Louisiana*, 410 U.S. 702 (1973); thence it continues in a southerly direction along the adjudicated boundary out into the Gulf of Mexico until it intersects the seaward boundary.

(3) The seaward boundary. The seaward boundary is that line marking the seaward limit of Texas title and ownership under the Submerged Lands Act (43 United States Code, §1301 et seq), as recognized by the United States Supreme Court in *United States v. Louisiana et al.*, 364 U.S. 502 (1960)

(4) The boundary with the Republic of Mexico. The boundary with the Republic of Mexico begins at a point three marine leagues into the Gulf of Mexico where the line marking the seaward limit of Texas title and ownership under the Submerged Lands Act (43 United States Code, §§1301 et seq) intersects the international boundary between the United States and the Republic of Mexico, as established pursuant to the Treaty of Guadalupe-Hildago (February 2, 1848) between the United States and the Republic of Mexico; thence it continues in a westerly direction along the international border with the Republic of Mexico until it meets the International Toll Bridge in Brownsville.

(5) The excluded federal lands. The excluded federal lands are those lands owned, leased, held in trust by, or whose use is otherwise by law subject solely to the discretion of the federal government, its officers or agents.

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 authority.

Issued in Austin, Texas, on October 13, 1995.

TRD-9513131 Garry Mauro
Chairman
Coastal Coordination Council

Effective date: November 3, 1995

Proposal publication date: July 18, 1995

For further information, please call: (512) 305-9129

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Chapter 504. Special Area Management Planning

• 31 TAC §§504.1-504.8

The Coastal Coordination Council (council) adopts the repeal of Chapter 504, §§504.1-504.8, concerning the establishment of procedural requirements for the development of special area management plans (SAMPs) for the Texas Coastal Management Program (CMP). The council is repealing §§504.1-504.8 because House Bill 3226, §4 (74th Legislature, 1995), to be codified at Texas Natural Resources Code Annotated, §33.209, prohibits the council from developing or approving SAMPs.

One commenter expressed concern that SAMPs be left to the local governments to adopt The commenter stated that regulation at the local level was more effective. Chapter 504 is being repealed from the Coastal Management Program under a statutory directive from the legislature. No change was made based on this comment.

One commenter believed that repealing Chapter 504 would weaken the CMP and impact the state's ability to protect coastal resources because areas of particular concern would not be adequately addressed. Continued revisions to the CMP, statutorily mandated and added by the council, have maintained the ability of the state to protect the coastal resources. No change was made based on this comment.

The United States Department of Commerce and the National Oceanic and Atmospheric Administration submitted comments regarding the repeal of Chapter 504.

The repeals are adopted under the Texas Natural Resources Code Annotated, §33.209, which prohibits the council from developing or approving SAMPs.

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 authority.

Issued in Austin, Texas, on October 13, 1995.

TRD-9513138 Garry Mauro
Chairman
Coastal Coordination Council

Effective date: November 3, 1995

Proposal publication date: July 18, 1995

For further information, please call: (512) 305-9129

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Chapter 505. Council Procedures for State Consistency with Coastal Management Program Goals and Policies

The Coastal Coordination Council (council) adopts amendments to §§505. 10, 505.11, 505.20-505.22, 505.26, 505.30-505.39, 505.42, 505.51, 505.52, 505. 60, 505.62-505.71, and 505.74, concerning council procedures for state and local government consistency with Coastal Management Program (CMP) goals and policies, Sections 505.10, 505.11, 505.20-505.22, 505.26, 505.30-505.33, 505. 35-505.39, 505.42, 505.51, 505.52, 505.60, 505.63-505.65, 505.68, 505.71 and 505.74 with changes to the proposed text as published in the July 18, 1995, issue of the *Texas Register* (20 TexReg 5198). Sections 505.34, 505.62, 505.66, 505.67, 505.69 and 505 70 are adopted without changes and will not be republished.

These amendments are adopted pursuant to the Texas Natural Resources Code, §§33 205, 33.2051-33.2053, 33.206 and 33.208, as amended to reflect statutory changes made by the 74th Legislature, 1995, in House Bill 3226

The following provisions shall be implemented and become enforceable at a date to be established by the council in the future: 31 TAC Chapter 505, Subchapter C (relating to Consistency and Council Review of Proposed State Agency Actions), Subchapter D (relating to Council Advisory Opinions on General Plans), and Subchapter E (relating to Consistency and Council Review of Local Government Actions) and 31 TAC Chapter 506 (relating to Council Procedures for Federal Consistency with Coastal Management Program Goals and Policies). The council shall publish notice of the implementation date(s) of these provisions in the *Texas Register* at least 30 days prior to such implementation date(s). Individual federal, state, and local subdivision actions need not comply with the CMP goals and Policies as set forth in Chapter 501 of this title (relating to Coastal Management Program) prior to the implementation of council review of such actions under Chapters 505 (relating to Council Procedures for State Consistency with Coastal Management Program Goals and Policies) and 506 (relating to Council Procedures for Federal Consistency with Coastal Management Program Goals and Policies. The council will implement the following provisions beginning February 1, 1996: Chapters 501 and 503, and Chapter 505, Subchapters A and B (relating to Purpose and Policy and State Agency Actions Subject to the Coastal Management Program and Council Review and Certification of Agency Rules).

This preamble addresses changes adopted as the result of comments received on the July 18, 1995 proposals. To fully explain the adopted rules, this preamble also addresses changes to the September 27, 1994 rules made as the result of House Bill 3226.

Chapter 505 describes the council's procedures for ensuring that actions by state agencies and political subdivisions are consistent with the CMP goals and policies. This chapter also establishes a voluntary process whereby state agencies and local governments can seek council input on and review of long-term "general plans" which contemplate actions affecting the coastal zone.

To conform to House Bill 3226, a change is made to limit the number of actions referred to the council for consistency review to a manageable level and to ensure that council

review is reserved for those actions presenting unique and significant unresolved consistency issues. This change will streamline the review process and response to public comments

To conform to House Bill 3226, the following changes are made to Chapter 505: "action" is changed to "proposed action," "local government" is changed to "subdivision," "public beach" is changed to "Gulf beach," and "Consistency Review Group" is changed to "Permitting Assistance Group."

One commenter supported the proposed changes to §505.11(a) Section 505 11(a), concerning actions and rules subject to the CMP, is changed to conform to House Bill 3226, which contains the exclusive list of proposed actions that may adversely affect coastal natural resource areas (CNRAs). Section §505. 11(b) is now §505.11(c) and a new subsection (b) has been added to provide the exclusive list of proposed agency rulemaking actions that must be consistent with the CMP goals and policies. Under Texas Natural Resources Code, §33 203(23), as amended by House Bill 3226, an "agency or subdivision action" means an action described in Texas Natural Resources Code, §33.2051 or §33.2053. The actions listed in Texas Natural Resources Code, §33.2053, are proposed agency or subdivision permitting actions that are subject to the provisions of the CMP. These actions are listed in §505 11(a) of the CMP rules. The actions listed in Texas Natural Resources Code, §33.2051, are agency rulemaking actions that are subject to the provisions of the CMP. These actions are listed in §505.11(b) and (c) of the CMP rules. These rulemaking actions include any rulemaking related to the specific permitting actions listed in Texas Natural Resources Code, §33 2053, including thresholds for referral adopted under Texas Natural Resources Code, §33.2052(b). Therefore, §505.11(b)(4) is changed to clarify that the agency rules governing proposed actions described under §505.11(a), and thresholds for referral of such actions, are included in the exclusive list of proposed agency rulemaking actions that must be consistent with the CMP goals and policies.

Some commenters voiced concern about the timely coordination of the numerous approval and reviews involved when proposing major construction projects. Section 505.11(a)(4) is changed to provide that preparation of an environmental document for a transportation construction project or maintenance program is an action by the Texas Department of Transportation (TxDOT) that is subject to the CMP. This change will help streamline the numerous reviews and approvals that may be required between the time a transportation improvement project is identified and the construction is initiated by ensuring that a consistency review is conducted during the public involvement and environmental approval phase of a project. Section 505.11(c) is now redesignated §505.11(d) and has been edited to conform to House Bill 3226 and to permit descriptions in §505.11(a).

Section 505 11(d) is now §505 11(e) and §505.11(e)(4) is amended to conform to Texas Natural Resources Code, §33.206(h), which provides that the council may not protest a proposed action pertaining to an application filed prior to the implementation date of Subchapter C of this chapter (relating to Consistency and Council Review of Proposed State Agency Actions).

Three comments opposed the proposed amendments One commenter suggested changing §505.11(e)(5) to prohibit the review of actions taken pursuant to an enforcement order. In response to these comments, and because actions taken pursuant to an enforcement order issued prior to the implementation date of Subchapter C are not subject to the CMP, no change has been made

To clarify the contents of these sections, the following titles were changed.

1. §505 21 is now "Effect of Council Certification of Agency Rules and Rule Amendments."

2 §505 22 is now "Consistency Required for New Rules and Rule Amendments Subject to the Coastal Management Program."

3. §505 26 is now "Approval of Thresholds for Referral."

Several commenters objected to the proposed amendments to Chapter 505, Subchapter B, relating to Council Certification of Agency Rules and Approval of Thresholds for Referral In response to these comments, Subchapter B, as adopted, differs from the proposed rule, as described below. Certification of agency rules and approval of thresholds will be accomplished using a procedure set forth in Subchapter B of this chapter. The proposal to rely on the procedures set forth in Subchapter C of this chapter for council review of agency permits and actions was not changed.

In response to comments requesting clarification of the subject matter of Subchapter B, the title of Subchapter B is changed to "Council Review and Certification of Agency Rules."

The following changes are made to Subchapter B for clarification· §505. 20(e) (relating to council denial of certification of agency rules) is moved to §505.25 (related to Revocation of Certification); and §505.22 (relating to Consistency Required for New Rules and Rule Amendments Subject to the Coastal Management Program) is changed to establish the procedures agencies will follow when proposing a new rule or rule amendment that is subject to the consistency requirements of the CMP.

Chapter 505, Subchapter B, was changed in response to public comments. The comments were that the process for certification of agency rules must provide: (1) an opportunity for early council and public involvement in review of agency rules prior to adoption; (2) for certification of agency rules by a majority vote of the council, rather than a two-third vote of the council for finding the rules inconsistent, (3) for affirmative action by the council to certify agency rules subject to the CMP; and (4) standards for certification of agency rules. Section 505.20 and §505.22 were changed in response to these comments.

Section 505.20, concerning Council Review and Certification of Existing Agency Rules, is changed to conform to Texas Natural Resources Code, §33. 2052 Section 505.20(a) is amended to require the agency submitting its rules for certification to submit a reasoned statement supporting the agency's determination that the rule is consistent with the CMP goals and policies. The language regarding grounds for decertification, formerly in §505.20(e), is now in §505 25. Changes in response to comments and for editorial purposes have been made to §505.20(b) and (c). Section 505.20(b) discusses the procedure for council review of agency rules and §505 20(c) contains the standard for determining whether existing agency rules are consistent with the CMP goals and policies.

Section 505 21, concerning the effect of council certification of agency rules, is changed to conform to Texas Natural Resources Code, §33.2052(b). The change provides that after an agency's rules are certified and its thresholds approved, the agency's consistency determination is final and not subject to review except as set out in §505.32.

Section 501.21 is also changed to reference certification of new rules pursuant to §505 23 (relating to Council Certification of Rules or Rule Amendments), and certifications of existing rules pursuant to §505.20 (relating to Council review and Certification of Existing Agency Rules).

Editorial changes are also made to §505.22 (relating to Consistency Required for New Rules and Rule Amendments Subject to the Coastal Management Program). Section 505 22 is similar to the section as published in the September 27, 1994, issue of the *Texas Register* (19 TexReg 7687). This section establishes procedures agencies must follow to ensure that new rules and rule amendments are consistent with the CMP goals and policies. Section 505.22(a) requires an agency to include in the preamble published in the *Texas Register* notice that a proposed rule or rule amendment is subject to the CMP and must be consistent with the CMP, a reasoned justification explaining the basis upon which the agency concluded the rule was consistent, and requesting public comment on the consistency of the rule. Section 505.22(b) requires the agency to submit a copy of the proposed rule or rule amendment to the council secretary at the time it is filed with the *Texas Register*. The secretary will distribute the rule and all supporting materials to the council members, who should file comments on the matter with the agency during the comment period. Section 505.22(c) suggests that council members comment, through the Texas Administrative Procedure Act, on an agency's proposed rules. Section 505.22(d) allows agencies to seek clarification of a council-member comment or question by placing the rules on the agenda of the council or executive committee. Finally, §505.22(e) requires agencies to affirm that the rule or rule amendment is consistent with the CMP goals and policies upon adoption of the rule.

Section 505.26 (relating to Approval of Thresholds for Referral) establishes the procedures the council will follow for review and approval of agency thresholds. The procedures for rule certification in §505.20 and

§505.23 will be used for approving thresholds.

Section 505.26 (relating to Approval of Thresholds for Referral) establishes the procedures the council will follow for review and approval of agency thresholds. The council will rely on the procedures for rule certification set forth the §505.20 and §505.23. Section 505.26 also requires that thresholds for referral be set at the appropriate level above the threshold that present unique and significant consistency issues, as provided in §505.13(b).

In response to comments requesting clarification of the subject matter of Subchapter C, the title to Subchapter C is changed to "Consistency and Council Review of Proposed State Agency Actions."

To clarify Subchapter C, the following headings are changed:

1. §505.32 is changed to "Requirements for Referral of a Proposed Agency Action";

2. §505.34 is changed to "Referral of a Proposed Agency Action to the Council for Consistency Review";

3. §505.35 is changed to "Council Procedures for Review of a Proposed Agency Action";

4. §505.36 is changed to "Standard for Council Review of a Proposed Agency Action"; and

5. §505.37 is changed to "Activities Pending Council Review of a Proposed Agency."

To conform with Texas Natural Resources Code, §33.205(b), §505.30, concerning Agency Consistency Determination, is changed to provide that an agency shall prepare a consistency determination when proposing a permitting action listed under §505.11(a). Such a consistency determination must either affirm that the agency has taken into account the CMP goals and policies and that the proposed action is consistent with the CMP goals and policies or that the agency has determined the proposed action will not have a direct and significant adverse effect on CNRAs. Section 505.30(b) also discusses "direct" and "significant" impacts. "Direct" refers to impacts that are causally linked to an activity; "significant" refers to appreciable impacts on CNRAs.

Section 505.30(c) is changed to conform to the changes made in §505.30(a) and (b).

In response to comments suggesting that the council enhance public participation, the following subsections of Chapter 505 are changed to provide greater opportunity for public comment on, and participation in, the preliminary review process:

1. §505.31(b) and §505.63(b) are changed to require the council secretary to publish in the *Texas Register* notice that a request for preliminary consistency review has been filed and to request public comment on the request for 30 days;

2. §505.31(c) and §505.63(c) are changed to require the permitting assistance group to consider the public comments before issuing a preliminary determination of consistency; and

3. A change is made to §505.31(d)(6), regarding preliminary consistency determinations in assisting individuals or small businesses with proposed applications, requiring the permitting assistance group to consider all public comments before issuing a preliminary consistency finding.

One commenter expressed several objections to the preliminary review process in §505.31. Since the preliminary review process is prescribed by House Bill 3226, the council has not adopted the requested changes. The permitting assistance group's structure, responsibilities, and procedures are delineated in Texas Natural Resource Code, §33.205(f) and (g). Section 505.31, concerning preliminary review of proposed agency actions by the council is changed to extend its provisions to state agency and subdivision permitting actions, is amended to incorporate these changes by extending its provisions to state agency and subdivision permitting actions. The permitting assistance group's responsibilities also include assistance to individuals or small businesses. References to memoranda of agreement are deleted.

To conform to Texas Natural Resources Code, §33.205(h), a new §505.31(e) is added. This subsection provides that if the council has made a preliminary finding of consistency, the council may only accept referral of the action if the agency or subdivision has substantially changed the permit or proposed action since the preliminary finding was issued.

To conform to Texas Natural Resources Code, §33.205, §505.32, concerning requirements for referral of a proposed agency action, is changed to establish which items may be referred to the council, to clarify the effect of thresholds, and to establish new time schedules for council review. References to memoranda of agreement are deleted because the statutory changes made by House Bill 3226 do not provide for establishing memoranda of agreement.

To conform to Texas Natural Resources Code, §33.205, and to reflect the changes to §505.11 and §505.32 of these rules, editorial changes are made to §505.33.

To conform to Texas Natural Resources Code, §33.205, which streamlined the council review process, §505.34, concerning referral of proposed agency action to the council for consistency review, is changed to limit the council's time to act on a referral and to provide that any three council members must agree there is a significant unresolved consistency issue in order for the council to accept a request for referral.

To conform to Texas Natural Resources Code, §33.204, §505.35, concerning Council Procedures for Review of a Proposed Agency Action, is changed, to ensure that the council considers applicable laws and rules, and limit the council's time to act on a referral.

Several commenters proposed deleting the requirement in §505.36(b)(1), for documentation in the agency record to support a council presumption that the agency's consistency determination is valid. One commenter suggested alternative language. The council has not made this change because it may not conform to the requirements imposed by federal law. However, §505.36, concerning the standard of council review for a proposed agency action, is changed to reflect changes to other sections in this chapter, and §505.36(b) (1) is changed to provide that the council will presume the agency's consistency determination is valid if documented by the agency's findings of fact and conclusions of law.

To conform to Texas Natural Resources Code, §33.206, the remand process in § 505.38, concerning council action on review of a proposed agency action, is replaced with procedures by which the council may affirm or protest an agency's proposed action and report those findings to the agency. A proposed action is deemed consistent with the CMP goals and policies unless protested by a two-thirds vote of the entire council. Section 505.38(b) is changed to clarify that the council cannot require an agency to perform an action that would exceed the agency's constitutional or statutory authority.

To conform with Texas Natural Resources Code, §33.206, and to respond to public comment, §505.39, concerning agency action after council protest, is changed to make the procedures for council referral of a matter to the attorney general more specific and to provide additional time for the council to act. Section 505.39(a) provides that in response to a protest by the council, an agency must respond to the council secretary within 20 days. The secretary is then to distribute the agency's response to the council members by hand-delivery, facsimile, or overnight mail. Section 505.39(b) is changed to allow any three council members to call a special meeting to consider requesting the attorney general's opinion on the consistency of the proposed action with the CMP goals and policies. A council member's request for a special meeting must be submitted in writing to the council secretary within ten days of the date the agency notifies the council of its decision. A special meeting to consider whether to request an opinion from the attorney general must be held within 20 days of the date the third request for a special meeting was received by the council secretary.

Subsection 505.39(c) is changed to provide that if the council finds that the agency did not amend or modify the proposed action either to conform substantially with the council's recommendations or to achieve the same results as the council's recommendations, the council shall refer the matter to the attorney general for a legal opinion on consistency of the proposed action with the CMP goals and policies. Referral to the attorney general requires a majority vote of a quorum of the council. As provided in §505. 39(c), the agency is stayed from taking the proposed action until the attorney general issues the opinion. Section 505.39(c) is also changed to set out the information the attorney general must use as a basis for his opinion. In determining whether the proposed action is inconsistent, the attorney general shall consider the council's findings and recommendations and the agency's response to the recommendations. §To conform to Texas Natural Resources Code, §33.208, §505.42, concerning

enforcement, is changed to provide that an agency or subdivision with jurisdiction over a proposed action shall enforce the CMP provisions. Section 505 42(b) is changed to clarify that if the attorney general determines that an agency's proposed action is inconsistent with CMP goals and policies, the attorney general will file suit to enforce the CMP rules, unless the council directs the attorney general to postpone filing a lawsuit until such time as negotiations are complete or exhausted. Section 505.42(c) is also changed to provide for settlement agreements between the council and the agency or subdivision prior to issuance of the attorney general's opinion. If the dispute between the council and the agency is settled, the council may withdraw the request for an opinion If the opinion has been requested and issued, the council may direct the attorney general to postpone filing a lawsuit until such time as negotiations are complete or exhausted.

One commenter opposed the proposed amendments to Subchapter D of this chapter, concerning council advisory opinions on general plans. One commenter supported the proposed amendments. Another commenter requested repeal of §§505.50-505.53. The council has revised the proposed amendments. In response to these comments, §505.50 and §505.52 are changed to provide that the council may consider a general plan only at the request of the agency responsible for the general plan Other minor changes to clarify this subchapter were made. The provision for the issuance of an advisory opinion by the council regarding a general plan is deleted from §505.52 as §505.51 already provides that an agency may request that the council issue an advisory opinion regarding a general plan. In §505 51(d), the deadline for council action on a request for an advisory opinion is changed from 60 to 90 days

In response to comments requesting enhanced public participation in the CMP program, Subchapter E, Consistency and Council Review of Subdivision Actions, is changed to provide notice and opportunity for public comment in the preliminary consistency review process Subchapter E is also changed to conform to changes in §505 39 and §505.42 regarding referral of state agency actions to the attorney general. The council also changed §505.64 and §505.68 to make the process for council review of local government actions the same as the process for council review of state agency actions.

To conform to Texas Natural Resources Code, §33 2051, and in response to public comment suggesting the council clarify that the project size descriptions in §505.60(1)-(4) apply to both dune protection permits and certain beachfront construction certificates, §505.60, concerning subdivision actions subject to the CMP, is change to specify that dune protection permits and certain beachfront construction certificates are the only subdivision actions that are subject to council review.

Texas Natural Resources Code, §33 205(b), requires that a subdivision affirm that it took into account the CMP goals and policies by issuing a written consistency determination. Section 505 62, concerning subdivision consistency determinations, is changed to conform to the new statute

In response to comments requesting the council enhance public participation in the CMP program, §505 63(b) is changed to require public notice and comment of a request for preliminary consistency review from a political subdivision Section 505 63(c) is changed to require the permitting assistance group to consider the public comments received before issuing a preliminary consistency determination As proposed, §505 63(d) is deleted because the statutory changes made by House Bill 3226 did not provide for establishing memoranda of agreement

Section 505.64(3), proposed for deletion, is now retained and changed because this section sets out the requirements for referral of a subdivision action. A subdivision action may be referred to the council only if the action for which referral is sought was authorized, the consistency determination for the proposed action was contested in writing by a council member or other person, a request for referral has been filed within ten days of the date the action was proposed, at least three council members agree within 13 days of the date the action was proposed that there is a significant unresolved dispute regarding the proposed action's consistency with the CMP goals and policies, and the matter is placed on the council agenda.

Section 505.65, concerning filing of request for referral, is changed to apply to subdivision actions, the same procedures described under §505 33 for state agency actions

To conform to Texas Natural Resource Code, §33.205, as amended by House Bill 3226, and §505.34, the procedures described for referral of a state action, §505.66(c) and (d), concerning referral of subdivision actions to the council for consistency review, are changed The changes expedite the process by which a matter is referred to the council by establishing shorter time schedules for council review.

Section 505.67, concerning council procedures for review of subdivision actions, is changed to conform to the procedures described for review of state actions under §505.35. The change reflect modifications in time schedules by limiting the length and format of testimony which the council may receive.

Section 505.68 is changed to conform to the changes made in §505.64. Section 505.68(b)(2) is also changed to retain the council presumption that a subdivision action is consistent with the CMP if the determination is documented by the underlying record.

To conform to Texas Natural Resources Code, §33.206, §505.70, concerning council action on review of subdivision action, is changed to replace the remand process with procedures by which the council may affirm or protest an agency's proposed action and report those findings to the agency. A proposed action is consistent with the CMP goals and policies unless protested by a two-thirds vote of the council as a whole.

Pursuant to Texas Natural Resources Code, §33 206, and to conform to §505 39, §505.71, concerning subdivision action after council protest, is changed to ensure that the attorney general will base its opinion on the findings and recommendations of the council.

Section 505.74, concerning enforcement, is changed to provide that an agency or subdivision with jurisdiction over a proposed action shall enforce the CMP provisions. The section is also changed to conform to §505 42.

One commenter requested the council establish a schedule for implementation of the various provisions of the rules. This useful suggestion has been adopted and each preamble now contains implementation dates

The following organizations generally supported the proposed amendments to the CMP rules: E Cross Cattle Co., Inc.; Texas Cattle Feeders Association; The Fordyce Company; Texas Mid-Continent Oil and Gas Association; County of Kenedy; City of Lake Jackson; City of Corpus Christi; Texas Independent Producers and Royalty Owners Association; Lavaca-Navidad River Authority; TriTech Regional Council; Iberia Petroleum Company; Mitchell Energy & Development Corporation, Railroad Commission of Texas; Everest Minerals Corporation, U. S. Department of the Army, Corps of Engineers; Coastal Bend Geological Library, Inc.; Port of Houston Authority, Trinity Improvement Association, Kling, Inc.; Briggs Ranches, Society of Independent Professional Earth Scientists; Texas Water Conservation Association; Petroleum Geologist; Mueller Engineering Corp., Petroleum Consultants; American Shoreline, Inc.; Texas and Southwestern Cattle Raisers Association; Southstar Corporation; South Texas Cotton and Grain Association, Inc.; Greater Corpus Christi Business Alliance Chamber of Commerce; King Ranch, Inc.; and Wilson Plaza North

The following organizations generally opposed the proposed amendments to the CMP rules. Texas Shrimp Association; National Oceanic and Atmospheric Administration; Blackburn & Carter; Arnold Construction Company, Inc.; City of Galveston; McFarlane & Associates; Steinhagen Oil Company, Inc.; U. S. Department of Interior; ABC Used Auto Parts; Gulf Coast Rod, Reel and Gun Club, Inc.; Crady, Jewett & McCulley, L.L.P.; General Land Office; Henry, Lowerre, Johnson, Hess and Frederick; Environmental Defense Fund, U. S. Environmental Protection Agency; Wells, Peyton, Beard, Greenberg, Hunt and Crawford, L.L.P.; The Benton Company; Boyt Properties; Ekistics Corporation, Environmental Impact Assessment and Socioeconomic Analysis; Lone Star Chapter Sierra Club; R C. Deal & Associates; Port of Houston; League of Women Voters of Texas; League of Women Voters of Houston; Groves Brothers Machinery, Inc.; Corpus Christi Caller-Times; Mabry, Herbeck & Chilton, P.C.; United States Department of the Interior, Fish and Wildlife Service, Division of Ecological Services; Lower Laguna Madre Foundation; County of Jefferson; United States Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, Southeast Regional Office; Fort Bend Medical Clinic; Entrix, Inc.; Galveston Bay Conservation and Preservation Association; County of Jim

Wells; The Shaddock Companies; Galveston Bay Foundation; Department of Planning & Transportation; Coastal Bend, Sierra Club; East Matagorda Bay Foundation; Greater Corpus Christi Business Alliance Chamber of Commerce; Whittington & Ewing Design Associates; Scenic Galveston; Houston Audubon Society; Audubon Council of Texas; Frontera Audubon Society; and Sea Pals'.

The following organizations made specific written comments but did not express general support for or opposition to the proposed CMP rules: Liberty County; Port of Houston Authority; U. S. Department of Agriculture, Natural Resources Conservation Services; Houston-Galveston Area Council; Browning-Ferris Industries; Texas Historical Commission; Texas Water Development Board; Houston Lighting and Power; Texas Chemical Council; Texas Beach Advocate; Texas Water Conservation Association; UTMB-Galveston Department of OB/GYN; and the Department of the Navy, Naval Station Ingleside.

The following organizations expressed general support for House Bill 3226 and an approvable CMP: South East Texas Regional Planning Commission; County of Hidalgo; Benckenstein & Oxford, L.L.P.; and Burrus Lumber Company.

In addition to the many comments received during the comment period, some comments were received after the expiration of the comment period. While these comments have not been, for the most part, responded to individually as were comments received earlier, concerns expressed in those comments have been addressed in responses to many earlier comments. The council staff gratefully acknowledges the involvement of so many individuals, businesses, trade association, non-government organizations and public officials whose thoughtful comments we have read. Chapters 501, 503, 504, 505, and 506 have been revised and improved in light of these comments, reflecting as they do a broad spectrum of economic, ecological, and other concerns held by Texans throughout the state.

The amendments are adopted under the Texas Natural Resources Code, §33. 204(a), as amended by House Bill 3226, 74th Legislature, 1995, which provides the council with the authority to promulgate rules adopting the CMP goals and policies and pursuant to the Texas APA, Subchapter A, §2001.004, which requires the council to adopt rules of practice setting forth the nature and requirements of all formal and informal procedures

Subchapter A. Purpose and Policy and State Agency Actions Subject to the Coastal Management Program.

- **31 TAC §505.10, §505.11**

§505.10. Purpose and Policy.

(a) The purpose of this chapter is to ensure that state actions, subdivision actions and general plans subject to the Texas Coastal Management Program (CMP) are consistent with the CMP goals and policies. The Coastal Coordination Council (council) intends to use the consistency process to:

(1) adequately identify, address, and resolve consistency issues to the maximum extent practicable prior to final agency action;

(2) minimize the number of actions referred to the council for review or study by ensuring adequate review at the agency level and by referring to the council only those actions that present unique or significant consistency issues;

(3) avoid the creation of an additional layer of bureaucracy;

(4) avoid subjecting to regulation actions not currently subject to regulation; and

(5) provide procedural safeguards to ensure proper notice, opportunity for hearing, and fairness in decision-making.

(b) Accordingly, it is the intent of the council that consistency be achieved primarily through individual agency rules that will reflect the CMP goals and policies.

§505.11. Actions and Rules Subject to the Coastal Management Program.

(a) For purposes of this chapter and Chapter 501 of this title (relating to Coastal Management Program), the following is an exclusive list of proposed individual agency actions that may adversely affect a coastal natural resource area (CNRA) and that therefore must be consistent with the CMP goals and policies:

(1) for the land office, the School Land Board, or a board for lease of state-owned lands when issuing or approving:

(A) a mineral lease plan of operations;

(B) a geophysical or geochemical permit;

(C) a miscellaneous easement;

(D) a surface lease;

(E) a structure registration;

(F) a coastal easement;

(G) a coastal lease;

(H) a cabin permit;

(I) a navigation district lease;

(J) certification of a subdivision beach access or dune protection plan; or

(K) an agency or subdivision wetlands mitigation bank.

(2) for the Public Utility Commission of Texas (PUC) when issuing a certificate of convenience and necessity.

(3) for the Railroad Commission of Texas (RRC) when issuing:

(A) a wastewater discharge permit;

(B) a waste disposal or storage pit permit; or

(C) a certification of a federal permit for the discharge of dredge or fill material.

(4) for the Texas Transportation Commission when approving:

(A) an acquisition of a site for the placement or disposal of dredge material from, or the expansion, relocation, or alteration of, the Gulf Intracoastal Waterway; or

(B) an environmental document for a transportation construction project or maintenance program.

(5) for the Texas Historical Commission (THC) when issuing:

(A) a permit for destruction, alteration, or taking of a coastal historic area; or

(B) a review of a federal undertaking affecting a coastal historic area.

(6) for the Texas Natural Resource Conservation Commission (TNRCC) when issuing or approving:

(A) a wastewater discharge permit;

(B) a permit for a new concentrated animal feeding operation located one mile or less from a critical area or coastal waters;

(C) a permit for solid or hazardous waste treatment, storage, or disposal;

(D) creation of a special purpose district or approval of bonds to construct infrastructure on coastal barriers;

(E) levee improvement or flood control projects;

(F) a certification of a federal permit for the discharge of dredge or fill material;

(G) a declaration of an emergency and request for an emergency release of water;

(H) a new permit for an annual appropriation of:

(i) 5,000 or more acre-feet of water within the program boundary; or

(ii) 10,000 or more acre-feet of water outside the program boundary but within 200 stream miles of the coast;

(I) an amendment to a water permit for an increase in the annual appropriation of:

(i) 5,000 or more acre-feet of water within the program boundary; or

(ii) 10,000 or more acre-feet of water outside the program boundary but within 200 stream miles of the coast;

(J) a change in the purpose of use of an annual appropriation of water to a more consumptive use of:

(i) 5,000 or more acre-feet of water within the program boundary; or

(ii) 10,000 or more acre-feet of water outside the program boundary but within 200 stream miles of the coast.

(K) The council may not review an action of the TNRCC described by subparagraphs (H)-(J) of this paragraph taken to implement a part of the Trans-Texas Water Program that the Trans-Texas Water Program Policy Management Committee has found to be consistent with the CMP goals and policies. To find that the program is consistent with the CMP goals and policies, the Trans-Texas Water Program Policy Committee must:

(i) include at least three members of the council, or representatives of those members, as voting members of the committee; and

(ii) make the finding by a majority vote of those members or their representatives.

(7) for the Texas Parks and Wildlife Department (TPWD) when issuing or approving:

(A) an oyster lease;

(B) a permit for taking, transporting, or possessing threatened or endangered species;

(C) a permit for disturbing marl, sand, shell, or gravel on state-owned land; or

(D) development by a person other than the TPWD that requires the use or taking of any public land in a state park, wildlife management area or preserve.

(b) For purposes of this chapter and chapter 501 of this title (relating to the Coastal Management Program), the following is an exclusive list of proposed agency rulemaking actions that must be consistent with the CMP goals and policies:

(1) a land office rule governing the prevention of, response to, or remediation of a coastal oil spill;

(2) TNRCC rules governing air pollutant emissions, on-site sewage disposal systems, or underground storage tanks;

(3) a State Soil and Water Conservation Board rule governing agricultural or silvicultural nonpoint source pollution;

(4) any rule governing an individual action described in subsection (a) of this section, including thresholds for referral.

(c) An agency's promulgation of rules governing or authorizing actions listed in subsection (a) or (b) of this section constitutes an action subject to the CMP as provided in Subchapter B of this chapter (relating to Council Certification of State Agency Rules and Approval of Thresholds for Referral).

(d) An action to renew, amend, or modify an existing permit, certificate, lease, easement, approval or other action is not an action under this section if the action is taken pursuant to rules that the council has certified as consistent under Subchapter B of this title (relating to Council Certification of State Agency Rules and Approval of Thresholds for Referral) and:

(1) for a wastewater discharge permit, if the action is not a major permit modification that would increase pollutant loads to coastal waters or would result in relocation of an outfall to a critical area;

(2) for solid and hazardous waste permits, if the action is not a Class III modification as defined in TNRCC rules; or

(3) for any other action, if the action only extends the time period of the existing authorization without authorizing new or additional work or activities or is not directly relevant to the CMP goals and policies.

(e) Whenever more than one state agency is involved in issuing a consistency determination for a single project, consideration should be given to the preparation of one consistency determination for all state agencies involved.

(1) Where multiple state consistency determinations are required, state agencies should consider coordinated preparation of the consistency determinations or designation of a lead agency for development of a single consistency determination. In the case where a single consistency determination will be prepared, such determination must be completed before final action is taken on any permit or authorization listed in subsection (a) of this section and required for the project. The single consistency determination must indicate whether each of the proposed actions listed in subsection (a) of this section and required for the project is consistent with the CMP goals and policies and must include information on each proposed action sufficient to support the consistency determination.

(2) An applicant, project sponsor, or other entity undertaking a project which requires more than one action listed in subsection (a) of this section may request in writing from the council either coordinated preparation of the consistency determinations or designation of a lead agency for development of a single consistency determination.

(3) To avoid duplication and time delays, it is the intent of the council, whenever possible, to provide for coordinated consistency determinations where multiple determinations are required. The council may direct the Permitting Assistance Group (as identified in §505.31(c) of this title (relating to Preliminary Review of Proposed Agency Actions by the Coastal Coordination Council)) to respond to the request and facilitate coordinated consistency determinations or preparation of a single determination by a lead agency, under guidance issued by the council.

(4) The council may not protest a proposed action by an agency or subdivision pertaining to an application filed with that agency or subdivision prior to the effective date of Subchapter C of this title (relating to Consistency and Council Review of Proposed State Agency Actions).

(5) The council shall not review actions listed in this subsection if such actions are taken pursuant to an enforcement order issued prior to the effective date of Subchapter C of this title (relating to Consistency and Council Review of Proposed State Agency Actions).

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 authority.

Issued in Austin, Texas, on October 13, 1995

TRD-9513142 Garry Mauro
Chairman
Coastal Coordination Council

Effective date: November 3, 1995

Proposal publication date: July 18, 1995

For further information, please call: (512) 305-9129

Subchapter B. Council Review and Certification of Agency Rules

• 31 TAC §§505.20-505.22, 505.26

The amendments are adopted under the Texas Natural Resources Code, §33. 204(a), as amended by House Bill 3226, 74th Legislature, 1995, which provides the council with the authority to promulgate rules adopting the CMP goals and policies and pursuant to the Texas APA, Subchapter A, §2001.004, which requires the council to adopt rules of practice setting forth the nature and requirements of all formal and informal procedures.

§505.20. Council Review and Certification of Existing Agency Rules.

(a) An agency may seek council certification of any rule governing or authorizing actions listed in §505.11(a) of this title (relating to Actions and Rules Subject to the Coastal Management Program) that was proposed prior to the effective date of this section by filing a Request for Certification with the council secretary. The request shall include a copy of the rule for which the agency seeks council certification and a reasoned statement supporting the agency's determination that the rule is consistent with the CMP goals and policies.

(b) The council secretary shall distribute copies of the Request for Certification, including all supporting information, to all council members and shall place the matter on the agenda of the earliest council meeting at which consideration is practicable. Prior to the council meeting, the secretary shall publish in the *Texas Register* a notice of availability and request public comment on the Request for Certification.

(c) The council shall make a determination as to whether the rule should be certified as consistent with the CMP goals and policies on or before the 120th day after the secretary received the Request for Certification.

(d) If the council finds that the rule incorporates or otherwise requires the agency to comply with all applicable goals and policies of the program, the council shall issue a written certification of the rule.

(e) If the council finds that the rule does not incorporate or otherwise require the agency to comply with all applicable goals and policies of the program, the council shall issue a written statement denying certification of the rule, explaining the basis for such denial, and recommending rule amendments necessary to obtain certification.

§505.21. Effect of Council Certification of Agency Rules and Rule Amendments. Upon the council's certification of an agency's rules pursuant to §505.20 of this title (relating to Council Review and Certification of Existing Agency Rules) or §505.23 of this title (relating to Certification of Proposed New Rules and Rule Amendments), the agency's rules are incorporated into the CMP goals and policies, and any threshold for referral approved pursuant to §505.26 of this title (relating to Council Review and Approval of Thresholds for Referral) relating to actions under those rules shall become operative and limit the council's authority to review individual actions of the agency, as provided in §505.32 of this title (relating to Requirements for Referral of a Proposed Agency Action). After an agency's rules are certified and an agency's thresholds are approved, the agency's consistency determination for an action is final and is not subject to referral and review, except as provided by §505.32 of this title (relating to Requirements for Referral of a Proposed Agency Action).

§505.22. Consistency Required for New Rules and Rule Amendments Subject to the Coastal Management Program.

(a) When proposing to adopt or amend a rule listed in 505.11(b) after the effective date of this section, an agency shall include in the preamble to the proposed rule as published in the *Texas Register* the following:

(1) A statement that the proposed rule or rule amendment is subject to the Coastal Management Program and must be consistent with all applicable CMP policies;

(2) a reasoned justification explaining the basis upon which the agency concluded the proposed rule is consistent with each applicable CMP policy; and

(3) a request for public comment on the consistency of the proposed rule or rule amendment.

(b) Simultaneously with the filing of a proposed rule or rule amendment with the *Texas Register*, the agency shall submit a copy of the proposed rule or rule amendment to the council secretary who shall distribute it to all council members.

(c) During the comment period provided by the agency, council members should comment on the consistency of the proposed rule or rule amendment. As provided in the Administrative Procedure Act, the agency shall consider and respond to the comments of the public and the council on the consistency of the proposed rule or rule amendment.

(d) In addition to pre-certification review pursuant to §505.24 of this title (relating to Pre-Certification Review of Draft Rule or Rule Amendments), an agency may seek clarification or resolution of consistency issues regarding the proposed rule or rule amendment by placing the matter on the agenda of the council or executive committee.

(e) Upon adoption of the rule or rule amendment, an agency shall affirm that it has taken into account the goals and policies of the CMP by issuing a reasoned determination that the rule or rule amendment is consistent with the CMP goals and policies.

§505.26. Approval of Thresholds for Referral. As applicable, the provisions of or §505.20 of this title (relating to Council Review and Certification of Existing Agency Rules) or §505.23 of this title (relating to Council Certification of Rule and Rule Amendments) shall be applied in requesting and responding to a request for approval of thresholds. Notwithstanding any other provision of this section to the contrary, when applying §505.20 or §505.23 to thresholds, the term "threshold" or "thresholds" shall be substituted for the term "rule" or "rules" and the term "approval" shall be substituted for the term "certified" or "certification." Thresholds for referral shall be set a level consistent with the standard in §501.13(b) of this title (relating to Administrative Policies).

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 authority.

Issued in Austin, Texas, on October 13, 1995.

TRD-9513145 Garry Mauro
Chairman
Coastal Coordination Council

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Proposal publication date: July 18, 1995

For further information, please call: (512) 305-9129

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Subchapter C. Consistency and Council Review of Proposed State Agency Actions

• 31 TAC §§505.30-505.39, 505.42

The amendments are adopted under the Texas Natural Resources Code, §33. 204(a), as amended by House Bill 3226, 74th Legislature, 1995, which provides the council with the authority to promulgate rules adopting the CMP goals and policies and pursuant to the Texas APA, Subchapter A, §2001.004, which requires the council to adopt rules of practice setting forth the nature and requirements of all formal and informal procedures.

§505.30. Agency Consistency Determination.

(a) An agency, when proposing an action listed in §505.11(a) of this title (relating to Actions and Rules Subject to the Coastal Management Program) that may adversely affect a coastal natural resource area, shall comply with the CMP goals and policies.

(b) An agency subject to subsection (a) of this section shall affirm that it has taken into account the CMP goals and policies by issuing a written determination that a proposed action is consistent with the program goals and policies or will not have any direct and significant impacts on applicable CNRAs. For purposes of these determinations, "direct" refers to impacts that are causally linked to an activity; "significant" refers to appreciable impacts on CNRAs. The agency shall include in its written determination one of the following statements:

(1) Consistency Determination. The (State Agency Name) has reviewed this proposed action for consistency with the Texas Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council, and has determined that the proposed action is consistent with the applicable CMP goals and policies.

(2) Determination of No Direct and Significant Adverse Effect. The (State Agency Name) has reviewed this proposed action for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council, and has determined that the proposed action will not have a direct and significant adverse effect on the coastal natural resource areas (CNRAs) identified in the applicable policies.

(c) For actions that exceed the thresholds for referral, the agency shall provide a written explanation supporting the determination made under subsection (b) of this section. The explanation shall describe the basis for the agency's determination, include a description of the proposed action and its probable impacts on CNRAs, identify the CMP goals and policies applied to the proposed action, and explain how the proposed action is consistent with the applicable goals and policies or why the proposed action does not adversely affect any CNRAs.

(d) When publishing notice of receipt of an application or request for agency proposed action, the agency shall include a statement that the application or requested action is subject to the CMP and must be consistent with the CMP goals and policies. The agency shall include the council secretary on any public notice list maintained by the agency for proposed actions subject to the CMP. Upon proposal of an action listed on §505.11(a) of this title (relating to Actions and Rules Subject to the Coastal Management Program), the agency shall provide to the council secretary a one-page notice that an action subject to the CMP has been proposed.

(e) Agencies shall maintain a record of all proposed actions that are subject to the CMP and provide such record to the council on a quarterly basis.

§505.31. Preliminary Review of Proposed Agency Actions by the Coastal Coordination Council.

(a) An agency, subdivision, or applicant for a permit may request and receive a preliminary consistency review of any action listed in §505.11(a) of this title (relating to Actions and Rules Subject to the Coastal Management Program) or §505.60 of this title (relating to Subdivision Actions Subject to the Coastal Management Program) prior to the agency's proposed action.

(b) A request for preliminary consistency review or a request for permitting assistance pursuant to subsection (d) of this section, shall be submitted in writing to the council secretary, the chair of the Permitting Assistance Group (as identified in subsection (c) of this section), and the agency, subdivision, or applicant, as appropriate. Upon receipt of either type of request, the council secretary shall publish in the *Texas Register* notice of the request including a brief explanation of the matter and the consistency issues presented, if any, and request public comment on the consistency of the matter. Public comments shall be accepted for 30 days and be directed to the secretary who shall, upon close of the comment period, immediately distribute them to all members of the Permitting Assistance Group. A request for preliminary consistency review should identify all other local, state, and federal permits or authorizations subject to the program associated with the application.

(c) The council shall create a Permitting Assistance Group. The Permitting Assistance Group shall be composed of representatives of council member agencies and other interested council members.

(1) The Permitting Assistance Group shall be convened as directed by the council or as necessary to respond to a request for preliminary consistency review.

(2) After considering the public comments received and within 45 days of receipt of a request for preliminary consistency review, the Permitting Assistance Group shall require that the following written information be produced:

(A) a statement from each agency or subdivision required to permit or approve the project as to whether the agency or subdivision anticipates approving or denying the application;

(B) if an agency or subdivision intends to deny an application, the agency's or subdivision's explanation of the grounds for denial and recommendations for resolving the grounds in a way that would allow the application to be approved;

(C) if enough information is already available, a preliminary finding as to whether the project is likely to be found consistent with the CMP goals and policies; and

(D) if the project is likely to be found inconsistent with the CMP goals and policies, an explanation and recommendation for resolving the inconsistency in a way that would allow the project to be found consistent.

(d) An individual or small business may request and receive assistance with filing applications for permits or other proposed actions described by §505.11(a) of this title (relating to Actions and Rules Subject to the Coastal Management Program). The Permitting Assistance Group shall coordinate preapplication assistance and shall provide to an individual or a small business, on request:

(1) a list of the permits or other approvals necessary for the project;

(2) a simple, understandable statement of all permit requirements;

(3) a coordinated schedule for each agency's or subdivision's decision on the action;

(4) a list of all the information the agencies or subdivisions need to declare an application for a permit or other approval administratively complete;

(5) assistance in completing the applications as needed; and

(6) if enough information is already available, and after considering all public comments, a preliminary finding as to whether the project is likely to be found consistent with the CMP goals and policies.

(e) If an agency, subdivision, or applicant has received a preliminary finding of consistency under subsection (c)(2)(C) or (d)(6) of this section and a request for referral was filed on that action alleging a significant unresolved dispute regarding the proposed action's consistency, the council may accept the request for referral only if the agency or subdivision has substantially changed the permit or proposed action since the preliminary finding was issued.

§505.32. Requirements for Referral of a Proposed Agency Action.

(a) A proposed action of an agency listed in §505.11(a) of this title (relating to Actions and Rules Subject to the Coastal Management Program) may be referred to the council for review to determine consistency with the CMP goals and policies only if:

(1) the agency has proposed the action for which referral is sought;

(2) the consistency determination for the proposed action was contested by:

(A) a council member or an agency that was a party in a formal hearing under Government Code, Chapter 2001, or in an alternative dispute resolution process; or

(B) a council member or other person by the filing of written comments with the agency before the action was proposed if the proposed action is one for which a formal hearing under Government Code, Chapter 2001, is not available;

(3) a person described by subsection (a)(2) of this section files a request for referral within ten days of the date the action is proposed alleging a significant unresolved dispute regarding the proposed action's consistency with the CMP goals and policies; and

(4) any three council members agree within 13 days of the date the action is proposed that there is a significant unresolved dispute regarding the proposed action's consistency with the CMP goals and policies and the matter is placed on the agenda for a council meeting.

(b) If consistency review thresholds are in effect under §505.26 of this title (relating to Council Review and Approval of Thresholds for Referral) , the council may not review a proposed action for consistency with the CMP goals and policies unless the requirements of subsection (a) of this section are satisfied and:

(1) if the proposed action is one for which a formal hearing under Government Code, Title 10, Subtitle A, Chapter 2001, is available:

(A) the action exceeds the applicable thresholds and the agency's consistency determination was contested in a formal hearing or an alternative dispute resolution process; or

(B) the action does not exceed the applicable thresholds but may directly and adversely affect a critical area, critical dune area, coastal park, wildlife management area or preserve, or Gulf beach and a state agency contested the agency's consistency determination in a formal hearing; or

(2) if the proposed action is one for which a formal hearing under Government Code, Chapter 2001, is not available to contest the agency's determination, the action exceeds the applicable thresholds.

(c) For purposes of this subchapter, an action subject to the contested case provisions of Government Code, Chapter 2001, is proposed when a notice of a decision or order is issued under Government Code, §2001.142.

(d) The council must consider and act on a matter referred under this section before the 26th day after the date the agency or subdivision proposed the action.

§505.33. Filing of Request for Referral. To seek council review of a proposed action under §505.32 of this title (relating to Requirements for Referral of a Proposed Agency Action), a person described in §505.32(a)(2) of this title (relating Requirements for Referral of a Proposed Agency Action) may file a Request for Referral of an agency action listed in §505.11

(a) of this title (relating to Actions and Rules Subject to the Coastal Management Program) with the council secretary. The request must be filed no later than ten days after the agency has proposed the action for which consistency review is sought. The Request for Referral shall include:

(1) the names, addresses, and signatures of all persons joining in the request;

(2) a certificate of service indicating that copies of the request have been provided by hand delivery or certified mail to:

(A) the agency proposing the action for which review is sought;

(B) the applicant, if any, before the agency; and

(C) if the proposed action was the subject of a formal hearing under Government Code, Chapter 2001, all persons who were named as parties to the proceeding or their representatives;

(3) a description of the proposed action for which review is sought indicating the date of the agency's proposed action and a copy of the proposed order, permit, or other official agency decision document;

(4) a statement demonstrating, by reference to the requirements of §505.32 of this title (relating to Requirements for Referral of a Proposed Agency Action), that the proposed action is subject to referral; and

(5) a clear and concise statement of the significant unresolved dispute regarding the proposed action's consistency with the CMP goals and policies, including specific reference to the applicable goals and policies and to the applicable facts in the agency's decision record.

§505.35. Council Procedures for Review of a Proposed Agency Action.

(a) The council secretary shall, by certified mail or hand delivery, provide notice of the hearing at which the council will review a proposed action to:

(1) the agency proposing the action under review;

(2) the applicant, if any, before the agency;

(3) the person(s) filing the Request for Referral;

(4) if the action was the subject of a formal hearing under Government Code, Chapter 2001, before the agency, all persons who were named as parties to the proceeding or their representatives; and

(5) the governor, for the purpose of designating a local elected official to the council pursuant to the Texas Natural Resources Code, §33. 204(d).

(b) The notice to the applicant and the agency shall include a statement that no person may conduct activities authorized by the proposed agency action that would irreparably alter or damage the CNRA identified in the applicable policy.

(c) In conducting reviews, the council shall consider only:

(1) the record before the agency proposing the action under review;

(2) the agency's findings;

(3) applicable laws and rules;

(4) any additional information provided by that agency; and

(5) the oral or written testimony of any person regarding the CMP as the testimony relates to the agency's proposed action under review.

(d) If the agency did not hold a hearing, make a record, or make findings, the council may hold a hearing and make findings necessary for a complete and thorough review.

(e) The council must consider and act on a matter referred before the 26th day after the date the agency proposed the action.

§505.36. Standard of Council Review of a Proposed Agency Action.

(a) The only basis on which the council may protest a proposed agency action is that the proposed action is inconsistent with the CMP goals and policies.

(b) Following certification of an agency's rules as consistent with the CMP goals and policies pursuant to Subchapter B of this chapter:

(1) the council shall presume that the agency's consistency determination is valid if it is supported by the agency's findings of fact and conclusions of law;

(2) the burden shall be on the person filing the request for referral to demonstrate that the agency's proposed action is inconsistent with the CMP goals and policies; and

(3) any thresholds for referral approved pursuant to §505.26 of this title (relating to Council Review and Approval of Thresholds for Referral) shall become operative and limit the council's authority to review individual proposed actions of an agency as provided in §505.32 of this title (relating to Requirements for Referral of a Proposed Agency Action).

§505.37. Activities Pending Council Review of a Proposed Agency Action. Pending council review of an individual agency proposed action, no person may conduct activities authorized by the agency action that would irreparably alter or damage the CNRA identified in the applicable policy, except as otherwise provided by the Texas Administrative Procedure Act, §2001.054.

§505.38. Council Action on Review of a Proposed Agency Action.

(a) The council may affirm or protest an agency's proposed action. A proposed action is consistent with the CMP goals and policies and approved by the council unless the council determines the proposed action to be inconsistent with the CMP and protests the proposed action. If the council protests the proposed action, the council shall report its findings in writing to the agency or subdivision. The report shall:

(1) specify how the proposed action is inconsistent with the CMP goals and policies; and

(2) include specific recommendations of the council regarding how the proposed action may be modified or amended to make it consistent with the CMP goals and policies.

(b) The council may recommend that an agency undertake only such actions as are within the authority of the agency. A goal or policy may not require an agency to perform an action that would exceed the constitutional or statutory authority of the agency to which the goal or policy applies.

(c) To protest an agency's consistency determination requires an affirmative vote of at least two-thirds of all council members.

§505.39. Agency Action After Council Protest.

(a) After the council has protested a proposed action and reported its findings to the agency, the agency shall review the findings and recommendations and determine whether to modify or amend the proposed action to make it consistent with the CMP goals and policies. The agency shall notify the council secretary of its decision within 20 days of the date the agency receives the council's written protest. The secretary shall provide a copy of the notification to each council member by hand-delivery, facsimile, or overnight mail.

(b) Any three regular members of the council may call a special meeting to consider requesting the attorney general to issue an opinion on the consistency of the proposed action with the CMP goals and policies. A council member's request for a special meeting shall be submitted in writing to the council secretary within ten days of the date the agency notifies the council of its decision. A special meeting to consider whether to request an opinion from the attorney general shall be held within 20 days of the date the third request for a special meeting was received by the Council secretary.

(c) If the council finds that the agency did not amend or modify the proposed action either to conform substantially with the council's recommendations or to achieve the same results as the council's recommendations, the council shall refer the matter to the attorney general for a legal opinion on consistency of the proposed action with the CMP goals and policies. The agency is stayed from taking the proposed action until the attorney general issues the opinion. The attorney general shall issue an opinion before the 26th day after the date the council requests the opinion. The attorney general shall base the opinion on the record before the agency and the council. In determining whether the proposed action is inconsistent, the attorney general shall consider the council's findings and recommendations and the agency's response to the recommendations.

§505.42. Enforcement.

(a) The agency or subdivision with jurisdiction over a proposed action shall enforce provisions of the CMP.

(b) If the attorney general issues an opinion under §505.39 of this title (relating to Agency Action After Council Protest) that a proposed agency or subdivision action is inconsistent with the CMP the attorney general shall file suit in a district court of Travis County unless otherwise directed by the council.

(c) Notwithstanding the request for an opinion or the filing of a suit, the council, the agency and if a suit is filed, the attorney general, may enter into a settlement agreement with regard to the proposed action.

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 authority.

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TRD-9513146 Garry Mauro
Chairman
Coastal Coordination Council

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For further information, please call: (512) 305-9129

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Subchapter D. Council Advisory Opinions on General Plans

• 31 TAC §505.51, §505.52

The amendments are adopted under the Texas Natural Resources Code, §33. 204(a), as amended by House Bill 3226, 74th Legislature, 1995, which provides the council with the authority to promulgate rules adopting the CMP goals and policies and pursuant to the Texas APA, Subchapter A, §2001.004, which requires the council to adopt rules of practice setting forth the nature and requirements of all formal and informal procedures.

§505.51. Request for a Non-Binding Advisory Opinion and Council Action.

(a) An agency or subdivision which has produced a general plan described or listed in §505.50 of this title (relating to General Plans) may request a non-binding advisory opinion on the consistency of its general plan.

(b) The request for an advisory opinion shall be submitted in writing to the council secretary. The council secretary shall forward copies of the request to all council members. The council shall consider the general plan at the first reasonable opportunity.

(c) Prior to council issuance of an advisory opinion, the chair of the council may direct the executive committee to review the general plan and make a recommendation to the council regarding the consistency of the plan.

(d) The council shall issue the advisory opinion within 90 days of receiving the request from the agency or subdivision.

(e) The advisory opinion shall indicate whether actions taken pursuant to the plan are likely to be consistent or inconsistent with the Texas Coastal Management Program (CMP) goals and policies. The advisory opinion shall also:

(1) identify all goals and policies that apply to the general plan;

(2) identify any consistency issues of concern to the council;

(3) identify portions or provisions of the plan that are likely to lead to future inconsistent actions; and

(4) include recommendations for the resolution of consistency issues identified in paragraphs (2) and (3) of this subsection.

§505.52. Request for Council Participation in the Development of General Plans.

(a) An agency or subdivision which is producing a general plan described or listed in §505.50 of this title (relating to General Plans) may request council participation in the development of a plan by submitting a written request to the council secretary. The council shall participate in the plan development according to the schedule of the agency developing the plan.

(b) The council may direct the executive committee, or a subcommittee of the group, to participate in the development of the plan and make regular reports to the council.

(c) At the request of an agency or subdivision which is producing a general plan described or listed in §505.50 of this title (relating to General Plans), the council may enter into a memorandum of agreement establishing the manner of council participation in plan development, the criteria to be used in evaluating the plan, criteria to determine the adequacy of alternatives for resolving potential inconsistencies in the plan with the CMP goals and policies, and such other matters as are deemed appropriate by the parties to the agreement.

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 authority.

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Subchapter E. Consistency and Council Review of Local Government Actions

• 31 TAC §§505.60, 505.62-505.71, 505.74

The amendments are adopted under the Texas Natural Resources Code, §33. 204(a), as amended by House Bill 3226, 74th Legislature, 1995, which provides the council with the authority to promulgate rules adopting the CMP goals and policies and pursuant to the Texas APA, Subchapter A, §2001.004, which requires the council to adopt rules of practice setting forth the nature and requirements of all formal and informal procedures.

§505.60. Subdivision Actions Subject to the Coastal Management Program. For purposes of this chapter and Chapter 501 of this title (relating to Coastal Management Program), issuance of a dune protection permit or beachfront construction certificate are the only proposed actions by a subdivision that may adversely affect a coastal natural resource area and that therefore must be consistent with the CMP goals and policies provided such actions authorize:

(1) construction activity that is located 200 feet or less landward of the line of vegetation and that results in the disturbance of more than 7,000 square feet of dunes or dune vegetation;

(2) construction activity that results in the disturbance of more than 7,500 cubic yards of dunes;

(3) a coastal shore protection project undertaken on a Gulf beach or 200 feet or less landward of the line of vegetation and that affects more than 500 linear feet of Gulf beach; or

(4) a closure, relocation, or reduction in existing public beach access or public beach access designated in an approved local government beach access plan, other than for a short term.

§505.63. Preliminary Review of a Subdivision Action by the Coastal Coordination Council.

(a) Prior to taking final action, a subdivision may request preliminary consistency review for any proposed action listed in §505.60 of this title (relating to Subdivision Actions Subject to the Coastal Management Program).

(b) A request for preliminary consistency review shall be submitted in writing to the council secretary, the chair of the Permitting Assistance Group (as identified in §505.31(c) of this title (relating to Preliminary Review of Proposed Agency Actions by the Coastal Coordination Council), and the applicant. Upon receipt of such request, the council secretary shall publish in the *Texas Register* notice of the request including a brief explanation of the matter and the consistency issues presented, if any, and request public comment on the consistency of the matter. Public comments shall be accepted for 30 days and be directed to the secretary who shall, upon close of the comment period, immediately distribute them to all members of the Permitting Assistance Group.

(c) The Permitting Assistance Group shall convene and, after considering the public comment received, respond to a request for preliminary consistency review in accordance with the pertinent provisions of §505.31 of this title (relating to Preliminary Review of Proposed Agency Actions by the Coastal Coordination Council).

§505.64. Requirements for Referral of Subdivision Actions. A proposed subdivision action listed in §505.60 of this title (relating to Subdivision Actions Subject to the Coastal Management Program) may be referred to the council for review to determine consistency with the CMP goals and policies only when:

(1) the subdivision proposed the action for which referral is sought;

(2) the consistency determination for the proposed action was contested by a council member or other person by the filing of written comments with the subdivision;

(3) a person described in paragraph (2) of this section files a request for referral within ten days of the date the action was proposed alleging a significant unresolved dispute regarding the proposed action's consistency with the CMP goals and policies; and

(4) any three council members agree within 13 days of the date the action

was proposed that there is a significant unresolved dispute regarding the proposed action's consistency with the CMP goals and policies and the matter is placed on the agenda for a council meeting.

§505.65. Filing of Request for Referral.

(a) To seek council review of an action identified in §505.60 of this title (relating to Subdivision Actions Subject to the Coastal Management Program), a council member or other person must contest the consistency determination for the proposed action in accordance with §505.32 of this title (relating to Requirements for Referral of a Proposed Agency Action).

(b) The Request for Referral shall:

(1) contain the names, addresses, and signatures of all persons joining in the request;

(2) contain a certificate of service indicating that requestor has provided copies of the request by personal delivery or certified service to:

(A) the subdivision proposing the action for which review is sought; and

(B) the applicant, if other than the subdivision;

(3) describe the proposed action for which review is sought, indicate the date of the proposed subdivision action, and include a copy of the order, permit, or other official subdivision proposal;

(4) demonstrate, by reference to the requirements of §505.64 of this title (relating to Requirements for Referral of Subdivision Actions), that the action is one subject to referral;

(5) include a clear and concise statement of the claimed inconsistencies with the CMP goals and policies, including specific reference to the applicable goals and policies and to the applicable facts in the subdivision's proposal; or

(6) include a clear and concise statement of the significant unresolved dispute regarding the proposed action's consistency with the CMP goals and policies.

(c) The Request for Referral must be filed with the council secretary no later than ten days after the subdivision has proposed the action for which referral is sought.

§505.68. Standard of Council Review for Subdivision Actions.

(a) The only basis on which the council may protest a proposed subdivision action is that the proposed action is inconsistent with the CMP goals and policies.

(b) Following the land office's certification of a subdivision's dune protection and beach access plan under §15.3(o) of this title (relating to Administration) as consistent with the CMP goals and policies:

(1) the subdivision's consistency determination is final and is not subject to referral and review, except as provided in §505.64 of this title (relating to Requirements for Referral of Subdivision Actions); and

(2) the council shall presume that the subdivision's consistency determination is valid, if such determination is documented by the underlying record, and the burden shall be on the person filing the Request for Referral to demonstrate that the subdivision's proposed action is inconsistent with the CMP goals and policies.

§505.71. Subdivision Action After Council Protest.

(a) After the council has protested a proposed subdivision action and reported its findings to the subdivision, the subdivision shall review the findings and recommendations and determine whether to modify or amend the proposed action to make it consistent with the CMP goals and policies. The subdivision shall notify the council secretary of its decision within 20 days of the date the subdivision receives the council's written protest. The secretary shall provide a copy of the notification to each council member by hand-delivery, facsimile, or overnight mail.

(b) Any three regular members of the council may call a special meeting to consider requesting the attorney general to issue an opinion on the consistency of the proposed action with the CMP goals and policies. A council member's request for a special meeting shall be submitted in writing to the council secretary within ten days of the date the subdivision notifies the council of its decision. A special meeting to consider whether to request an opinion from the attorney general shall be held within 20 days of the date the third request for a special meeting was received by the council secretary.

(c) If the council finds that the subdivision did not amend or modify the proposed action either to conform substantially with the council's recommendations or to achieve the same results as the council's recommendations, the council shall refer the matter to the attorney general for a legal opinion on consistency of the proposed action with the CMP goals and policies.

(d) The subdivision is stayed from taking the proposed action until the attorney general issues the opinion. The attorney general shall issue an opinion before the 26th day after the date the council requests the opinion. The attorney general shall base the opinion on the record before the subdivision and the council. In determining whether the proposed action is inconsistent, the attorney general shall consider the council's findings and recommendations and the subdivision's response to the recommendations.

§505.74. Enforcement.

(a) The agency or subdivision with jurisdiction over a proposed action shall enforce the CMP provisions.

(b) If the attorney general issues an opinion pursuant to §505.71 of this title (relating to Subdivision Action After Council Protest) finding that a proposed subdivision action is inconsistent with the CMP and the agency or subdivision fails to implement the council's recommendation, the attorney general shall file suit in a district court of Travis County unless otherwise directed by the council.

(c) Notwithstanding the request for an opinion or the filing of a suit, the council, the subdivision and, if a suit is filed, the attorney general, may enter into a settlement agreement with regard to the proposed action.

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 authority.

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Chairman
Coastal Coordination Council

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For further information, please call: (512) 305-9129

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Subchapter B. Council Certification of State Agency Rules and Approval of Thresholds for Referral

• 31 TAC §§505.23-505.25

The Coastal Coordination Council (council) adopts the repeal of §§505. 23-505.25, concerning the Texas Coastal Management Program (CMP), related to council procedures. These sections are repealed because new language is concurrently proposed to address the concern that the former section conflicted with proposed amendments to other sections of Chapter 505 that are published contemporaneously herewith and to address provisions of House Bill 3226, enacted by the 74th Legislature, 1995, to be codified at Texas Natural Resources Code, Chapter 33.

Several commenters supported the repeal of §505.23 (relating to Effect of Council Certifi-

cation of Proposed New Rules and Rule Amendments); one commenter supported the repeal of §505.24 (relating to Basis for Council Certification of Agency Rules); and one commenter supported the repeal of §505.25 (relating to Preliminary Council Review of Draft Rules or Rule Amendments).

The repeals are adopted under the Texas Natural Resources Code, §§33.053, 33.204(a), 33.205, 33.2051-33.2053, and 33.206-33.208, which provides the council 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 authority.

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Chairman
Coastal Coordination Council

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Subchapter C. Consistency and Council Review of Individual State Agency Actions

• 31 TAC §505.40, §505.41

The Coastal Coordination Council (council) adopts the repeal of §505.40 of this title (relating to Council Review of an Agency Action on Remand) and §505.41 of this title (relating to Judicial Review), concerning the Texas Coastal Management Program (CMP). The sections are repealed because they conflict with proposed amendments to other sections of Chapter 505 that are published contemporaneously herewith and to address provisions of House Bill 3226, made by the 74th Legislature, 1995, in House Bill 3226, to be codified at Texas Natural Resources Code, Chapter 33.

No comments were received regarding the adoption of the repeals.

The repeals are adopted under the Texas Natural Resources Code, §§33.053, 33.204(a), 33.205, 33.2051-33.2053, and 33.206-33.208, which provides the council 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 authority.

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• 31 TAC §§505.61, 505.72, 505.73

The Coastal Coordination Council (council) adopts repeals of §§505.61, 505.72 and 505.73, concerning the Texas Coastal Management Program (CMP), related council procedures. These sections are repealed because they conflict with proposed amendments to other sections of Chapter 505 that are published contemporaneously herewith and to address provisions of House Bill 3226, 74th Legislature, 1995, to be codified at Texas Natural Resources Code, Chapter 33.

No comments were received regarding the adoption of the repeals.

The repeals are adopted under the Texas Natural Resources Code, §§33.053, 33.204(a), 33.205, 33.2051-33.2053, and 33.206-33.208, which provides the council 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 authority.

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Chapter 506. Council Procedures for Federal Consistency with Coastal Management Program Goals and Policies

• 31 TAC §§506.11, 506.12, 506.20-506.22, 506.24-506.28, 506.30, 506.32-506.34, 506.40-506.44

The Coastal Coordination Council (council) adopts amendments to §§506. 11, 506.12, 506.20-506.22, 506.24-506.28, 506.30, 506.32-506.34, and 506. 40-506.44, concerning council procedures to ensure that actions taken or authorized by federal agencies are consistent with the Texas Coastal Management Program (CMP) goals and policies. Sections 506.11, 506.12, 506.20, 506.21, 506.24-506.28, 506.30, 506.32-506.34 and 506.40-506.44 are adopted with changes to the proposed text as published in the July 18, 1995, issue of the *Texas Register* (20 TexReg 5198). Section 506.22 is adopted without changes and will not be republished.

These amendments are adopted pursuant to Texas Natural Resources Code, Chapter 33, Subchapters C and F (Coastal Coordination Act) as amended to reflect statutory changes made by the 74th Legislature, 1995, in House Bill 3226.

The following provisions shall be implemented and become enforceable at a date to be established by the council in the future: 31 TAC Chapter 505, Subchapter C (relating to Consistency and Council Review of Proposed State Agency Actions), Subchapter D (relating to Council Advisory Opinions on General Plans), and Subchapter E (relating to Consistency and Council Review of Local Government Actions) and 31 TAC Chapter 506 (relating to Council Procedures for Federal Consistency with Coastal Management Program Goals and Policies). The council shall publish notice of the implementation date(s) of these provisions in the *Texas Register* at least 30 days prior to such implementation date(s). Individual federal, state, and local subdivision actions need not comply with the CMP goals and Policies as set forth in Chapter 501 of this title (relating to Coastal Management Program) prior to the implementation of council review of such actions under Chapters 505 (relating to Council Procedures for State Consistency with Coastal Management Program Goals and Policies) and 506 (relating to Council Procedures for Federal Consistency with Coastal Management Program Goals and Policies). The council will implement the following provisions beginning February 1, 1996: Chapters 501 and 503, and Chapter 505, Subchapters A and B (relating to Purpose and Policy and State Agency Actions Subject to the Coastal Management Program and Council Review and Certification of Agency Rules).

This preamble addresses changes adopted as the result of comments received on the July 18, 1995 proposals. To fully explain the adopted rules, this preamble also addresses changes to the September 27, 1994 rules made as the result of House Bill 3226.

House Bill 3226 amended Texas Natural Resources Code, §§33.004, 33.051-33. 053, 33.055, 33.202(a), 33.204-33.208, and added §§33.2051-33.2053 and §§33.209-33.211, requiring several changes to this chapter. First, new terms, "federal agency action" and "federal agency activity," are added to the law and define the federal matters subject to the CMP. These new terms are inserted at §§506.20-506.22, 506.25-506.30, 506.34, 506.40, 506.43, and 506. 44 of this chapter to conform to the new law. Second, Texas Natural Resources Code, §33.206(d), requires the council to adopt procedural rules for the review of federal actions, activities, and outer continental shelf plans that incorporate the provisions of federal regulations governing those reviews. Section 33.206(d) also requires that those rules provide that the chair or three members of the council may request additional time or information necessary to review these federal agency decisions. The adopted rule reflects these statutory requirements.

This chapter identifies the federal actions which may be reviewed by the council to determine consistency with the CMP goals and policies, requires applicants and federal agencies to prepare consistency certifications and determinations, establishes council procedures for review and action on consistency certifications and determinations, and identifies information necessary for the state to evaluate the certifications and determinations. This chapter establishes the parameters of the council's jurisdiction and its

procedures for reviewing federal actions which may adversely affect coastal natural resource areas (CNRAs), including procedures for public input and participation in the decisions of the council.

One commenter proposed to change the definition of "federal agency action" in §506.11 to exempt from the CMP renewals and amendments to federal licenses or permits. This term is defined in House Bill 3226 and cannot be changed by rule. However, the provision governing renewal and amendment of state-issued permits was changed to limit and clarify when renewals or amendments of federal agency action are subject to the CMP. The council may review any permit or license renewal or amendment that results in increased impacts to CNRAs.

The definitions of federal agency activity and federal license or permit in §506.11 are amended to reference the specific activities, licenses, and permits listed under §506.12 of this chapter. These amendments provide public notice of the activities, licenses, and permits that may be subject to council review excepting those in §506.12(f).

Some commenters objected to the proposed amendment to §506.11 deleting the definition of "federal assistance." Because this amendment would have exempted all federal financial assistance decisions from council review and because of House Bill 3226, this proposed change is not adopted. Implementation of federal consistency by state coastal management programs and federal agencies is important for federal approval of Texas CMP Federal activities subject to consistency must, pursuant to 15 Code of Federal Regulations, Part 930, include those supported by federal financial assistance. Furthermore, Texas Natural Resources Code, §33.203(24), defines "federal agency activity" to include financial assistance. Therefore, the amendment is not adopted.

Some commenters proposed adding a definition of "federal license or permit described in OCS plan." No change was made based on this comment because amendments to provisions that apply to the consistency review of OCS plans define federal activities, which includes but are not limited to federal licenses or permits. In the plan, the applicant must describe the proposed federal activity subject to federal consistency review and certify that such activities comply with the Texas CMP.

Section 506.12(a), relating to Federal Actions, Federal Agency Activities and Development Projects, and Outer Continental Shelf Plans Subject to the Coastal Management Program, lists the federal actions within the coastal zone which may adversely affect a CNRA. Section 506 12(b) lists the federal actions outside the coastal zone, but within outer continental shelf (OCS) waters, or on excluded federal land within the coastal zone which may adversely affect a CNRA. Except as provided in §506.12(f), the federal actions listed in §506. 12(a)(2), (a)(3), (b)(2) and (b)(3) are exclusive lists of federal actions subject to the CMP. Section 506.12(a)(1) and (b)(1), relating to federal agency activities and development projects, includes activities and development projects subject to the CMP, but are not the only activities and projects the council may review.

Some commenters proposed deleting federal activities or federal agency actions from the lists in §506.12(a) and (b) of this chapter. Another commenter proposed removing applications for federal financial assistance under §506.12(a)(3) from the CMP. These changes were not made because deletion of these federal actions from §506.12 might have constrained the state's ability to review federal actions subject to the CMP, unless the rules were amended to add items to the list. The council determined that it would be prudent to retain all items on the list and determine the applicable CMP policies in the context of reviewing the actual federal project or authorization subject to the CMP.

With respect to applications for federal financial assistance in §506. 12(a)(3), the two specific assistance programs previously listed have been deleted and replaced with a general categorical description of federal assistance for state and local government activities that may adversely affect CNRAs. In addition, it is the council's intent to limit review of federal assistance to the programmatic requirements of the grants and operating agreements between the federal agency and the state applicant as they relate to matters covered by the CMP policies. The council will not review decisions such as selection of priorities among competing projects and allocation of funds among different regions of the state. Such discretionary decisions are specifically excluded from council review. Also, the council has changed §506.12(a)(3) to clarify that the term "federal assistance" does not include administration of federal funds after the state applicant has received them, such as the Texas Water Development Board's administration of the State Revolving Fund and the Colonias Wastewater Treatment Assistance Program. Finally, the council recognizes that the reproposed §501.15, Major Action Policy, does not apply to federal financial assistance for the Colonia Wastewater Treatment Assistance Program or the State Revolving Fund because federal assistance to these programs does not require an environmental impact statement.

Some commenters, concerned about duplicative review, proposed that the procedure for council review be streamlined. Therefore, §506.12(g) was added to ensure that once the council reviews a complete application for federal agency action or federal assistance and finds it consistent, the council will not review subsequent actions by state agencies, subdivisions or federal agencies which implement the activity described in the application. This change will prevent duplicative council review for actions previously considered in a §506.12(a)(3) review.

One commenter asked that §506.21(b), relating to Notifications of Negative Determinations, be clarified. This subsection is edited to clarify the language.

To conform with a Memorandum of Agreement (MOA) executed between the council and the United States Army Corps of Engineers, §506.24(c), relating to Consistency Determinations for Federal Agency Activities, is changed. This subsection makes specific reference to the MOA as executed.

Some commenters proposed certain changes to achieve consistency with applicable federal guidelines. Section 506.28, relating to General Consistency Agreements, has been modified by deleting a general reference to "agency activities" and by adding "activity other than a development project." This change will enhance consistency with applicable federal regulations and better define the circumstances under which general consistency agreements are appropriately issued.

In response to comments received suggesting that the council enhance public participation in implementing the Texas CMP, §§506.25(a), 506.32(a), and 506. 41(a) have been changed to require the council secretary to publish notice in the *Texas Register* announcing the availability for inspection of consistency determinations and certifications, and to request comment on referral of federal action to the council for a determination of consistency with the CMP goals and policies. These changes require the submission of comments to the council secretary within 30 days of publication of the notice in the *Texas Register*.

In response to comments received suggesting the council enhance public participation, §§506.27(a), 506.28(a), 506.34(a), 506.41(d) and 506.43(a) have been amended to require the council to consider public comments received prior to determining whether to accept referral of a matter and whether to concur with the consistency certification or determination. These changes ensure that the public will have full input into the council's deliberations regarding the consistency of federal actions subject to the CMP.

To conform to a new standard for council review, imposed by House Bill 3226 for referral of federal agency actions, federal agency activities, and outer continental shelf plans, §§506.25(d), 506.26(a), 506.32(d), 506.33(a), 506. 41(d) and 506.42(a) are changed. The actions, activities, and plans will be referred to the council only when any three members of the council agree that a significant unresolved issue is presented regarding consistency with the CMP goals and policies.

To conform with House Bill 3226, changes have been made to §§506.25(c), 506.32(c), and 506.41(c). These changes allow the chair or any three council members to extend the public comment period or to convene a public hearing to accept testimony on a federal consistency determination or certification. Editorial changes were also made to these sections.

To conform with House Bill 3226, changes have been made to §§506.27(c), 506.34(c), and 506.43(c). These modifications establish the voting requirements applicable to council action on federal agency actions. A vote of two-thirds of the council is required to find a federal action inconsistent with the CMP goals and policies.

The council modified §§506.33(d), 506 34(a), 506.42(e), and 506.43(a) to compress the time schedule for council review of and action on federal licenses, permits, and activities described in detail in OCS plans. Technical corrections to the deadlines for council action in §505.26(e) and §506. 33(d) were necessary to conform to the time schedules in the rule. As a result of these changes, such federal actions must be referred to the council for

review within 45 days of receipt of a consistency determination. Any objection to a consistency determination must be made within 90 days of the date the consistency determination is provided to the council secretary, or the action is deemed consistent. These changes are made to implement the time schedules in House Bill 3226.

One commenter proposed deleting the requirement in §506.40(b)(4) that the council consider its advisory policies when conducting consistency reviews for certifications for outer continental shelf plans This change has not been made because the council must use its advisory policies when evaluating OCS plans for consistency in order to conform to federal coastal zone regulations.

The council requested comment on what policies under Chapter 501, Subchapter B, of this title (relating to Goals and Policies), if any, might apply to any of the federal activities or federal agency actions that have been proposed for deletion under §506.12 of this chapter (relating to Federal Agency Actions, Federal Agency Activities and Development Projects, and Outer Continental Shelf Plans Subject to the Coastal Management Program). No comments were received on this matter and no changes were made in response to this request for comments.

The council also requested comment on what policies, if any, should be added to Chapter 501, Subchapter B, of this title to provide standards for consistency review of federal activities, licenses, or permits. Some of the policies were proposed for deletion from the list in §506.12. The council has determined that the CMP includes policies which may be applicable to these listed items, depending on the particular facts and circumstances of the project authorized or undertaken pursuant to the federal activity, license or permit. For example, the selection of remedial actions by the United States Environmental Protection Agency (EPA) was retained because, depending on the design and location of the remedial action, the CMP policies governing waste disposal treatment, storage and disposal found in §501.14(d) of this title (relating to Policies for Specific Activities and Coastal Natural Resource Areas) or development in critical areas found in §501.14(h) of this title (relating to Policies for Specific Activities and Coastal Natural Resource Areas) could apply to this listed federal action. Therefore, no change was made to the list of policies applicable to consistency review of §506.12 actions.

One commenter supported the proposed repeal of §§506.50-506.52 of this chapter, relating to notice, referral and council review of applications for federal financial assistance. As discussed above, §506.12(a)(3), regarding applications for federal financial assistance, was not deleted from the CMP. Therefore, in response to this and other comments, §506.50 and §506.52 are repealed but are also being reproposed with changes.

To conform to statutory procedures for referral of federal agency activities to the council defined in House Bill 3226, §506.51(a) and (b) are changed. A written referral by three council members is now required. Previously, the council chair, acting alone, could refer such applications to the council.

Twenty-one commenters objected to and one commenter supported the proposal to limit federal actions subject to the CMP. Specifically, these commenters objected to the deletion of items from the list in §506.12; language in the definitions and other provisions making that list exclusive; and eliminating state review of federal agency financial assistance through the repeal of §506.50 (relating to Notice to the Council of Applications for Federal Assistance) and §506.52 (relating to Council Hearing to Review Applications for Federal Assistance). In response to these comments, and to ensure comprehensive coverage of federal actions subject to the CMP, the proposed changes were not made. However, the council added new §506.12(i), which provides certainty and predictability to individual permittees and licensees about unlisted licenses and permits subject to review.

Five commenters objected to shortened time schedules in §§506.33, 506.34, 506.42, and 506.43, for state review of federal actions subject to the CMP. One commenter supported the changes. The time schedules are shortened as proposed to streamline the review process, while providing adequate time for the council to review federal actions.

Two commenters opposed exempting renewal or amendment of existing federal permits from CMP review in §505.11. One commenter supported the change. Section 506.11, relating to Definitions, is changed to allow the council to review amendments. The standard for review of federal permit changes is the same as the standard for reviewing state permit changes in §505.24 of this title (relating to Pre-Certification Review of Draft Rules or Draft Rule Amendments).

Three commenters objected to the proposed federal consistency review procedures stating that they fail to provide adequate opportunity for public participation in the state's review and concurrence decision. Changes were made to §§506.25(b), 506.32(b), and 506.41(b) to preserve adequate opportunity for public participation.

One commenter requested that the title of §506.34, be changed from "Council Hearing to Review Federal License or Permit" to "Council Hearing to Review a Federal Agency Action" to reflect the contents of the chapter. This change has been made.

One commenter requested that §§506.40-506.44, relating to review of OCS plans, be revised to conform to federal law. These sections are changed to conform to federal coastal zone management regulations. The changes provide that the chair or any three members of the council may take action; the council will review all federal licenses and permits at the same time it reviews the OCS plan; and the public comment period can be extended by the council. The requested changes were made and these sections were revised accordingly.

One commenter requested the council establish a schedule for implementation of the various provisions of the rules. This useful suggestion has been adopted and each preamble now contains implementation dates.

The following organizations generally supported the proposed amendments to the CMP rules: E Cross Cattle Co., Inc.; Texas Cattle Feeders Association, The Fordyce Company; Texas Mid-Continent Oil and Gas Association; County of Kenedy; City of Lake Jackson; City of Corpus Christi; Texas Independent Producers and Royalty Owners Association; Lavaca-Navidad River Authority; TriTech Regional Council; Iberia Petroleum Company; Mitchell Energy & Development Corporation; Railroad Commission of Texas; Everest Minerals Corporation; U. S. Department of the Army, Corps of Engineers; Coastal Bend Geological Library, Inc.; Port of Houston Authority; Trinity Improvement Association; Kling, Inc.; Briggs Ranches; Society of Independent Professional Earth Scientists; Texas Water Conservation Association; Mueller Engineering Corp., Petroleum Consultants; American Shoreline, Inc.; Texas and Southwestern Cattle Raisers Association; Southstar Corporation; South Texas Cotton and Grain Association, Inc.; Greater Corpus Christi Business Alliance Chamber of Commerce; King Ranch, Inc.; and Wilson Plaza North.

The following organizations generally opposed the proposed amendments to the CMP rules: Texas Shrimp Association; National Oceanic and Atmospheric Administration; Blackburn & Carter; Arnold Construction Company, Inc.; City of Galveston; McFarlane & Associates; Steinhagen Oil Company, Inc.; U. S. Department of Interior; ABC Used Auto Parts; Gulf Coast Rod, Reel and Gun Club, Inc.; Crady, Jewett & McCulley, L.L.P.; General Land Office; Henry, Lowerre, Johnson, Hess and Frederick; Environmental Defense Fund; U. S. Environmental Protection Agency; Wells, Peyton, Beard, Greenberg, Hunt and Crawford, L.L.P.; The Benton Company; Boyt Properties; Ekistics Corporation, Environmental Impact Assessment and Socioeconomic Analysis; Lone Star Chapter Sierra Club; R. C. Deal & Associates; Port of Houston; League of Women Voters of Texas; League of Women Voters of Houston; Groves Brothers Machinery, Inc.; Corpus Christi Caller-Times; Mabry, Herbeck & Chilton, P.C.; United States Department of the Interior, Fish and Wildlife Service, Division of Ecological Services; Lower Laguna Madre Foundation; County of Jefferson; United States Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, Southeast Regional Office; Fort Bend Medical Clinic; Entrix, Inc.; Galveston Bay Conservation and Preservation Association; County of Jim Wells; The Shaddock Companies; Galveston Bay Foundation; Department of Planning & Transportation; Coastal Bend, Sierra Club; East Matagorda Bay Foundation; Greater Corpus Christi Business Alliance Chamber of Commerce; Whittington & Ewing Design Associates; Scenic Galveston; Houston Audubon Society; Audubon Council of Texas; Frontera Audubon Society; and Sea Pal's.

The following organizations made specific written comments but did not express general support for or opposition to the proposed CMP rules: Liberty County; Port of Houston Authority; U. S. Department of Agriculture, Natural Resources Conservation Services; Houston-Galveston Area Council; Browning-

Ferris Industries; Texas Historical Commission, Texas Water Development Board; Houston Lighting and Power, Texas Chemical Council, Texas Beach Advocate; Texas Water Conservation Association; UTMB-Galveston Dept. of OB/GYN; and the Department of the Navy, Naval Station Ingleside.

The following organizations expressed general support for House Bill 3226 and an approvable CMP: South East Texas Regional Planning Commission; County of Hidalgo, Benckenstein & Oxford, L.L.P., and Burrus Lumber Company.

In addition to the many comments received during the comment period, some comments were received after the expiration of the comment period. While these comments have not been, for the most part, responded to individually as were comments received earlier, concerns expressed in those comments have been addressed in responses to many earlier comments. The council staff gratefully acknowledges the involvement of so many individuals, businesses, trade association, nongovernment organizations and public officials whose thoughtful comments we have read. Chapters 501, 503, 504, 505, and 506 have been revised and improved in light of these comments, reflecting as they do a broad spectrum of economic, ecological, and other concerns held by Texans throughout the state.

The amendments are adopted pursuant to the Texas Natural Resource Code, §33.204(a), as amended by House Bill 3226, 74th Legislature, 1995, which provides the council with the authority to promulgate rules that adopt the CMP goals and policies and pursuant to Texas APA, Subchapter A, §2001.004, which requires the council to adopt rules of practice setting forth the nature and requirements of all formal and informal procedures.

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

Applicant–Any individual, public or private corporation, partnership, association, or other entity organized or existing under the laws of any state, or any state, regional, or local government that, following management program approval, files an application for a federal agency action to conduct an activity affecting the coastal zone.

Applicant agency–Any agency or subdivision or any related public entity such as a special purpose district, which, following federal CMP approval, submits an application for federal assistance.

Coastal zone–The portion of the coastal area located within the boundaries established by the CMP under Texas Natural Resources Code, §33.2053(k), and described in Chapter 503 of this title (relating to Coastal Management Program Boundary).

Consistency certification–The statement submitted by an applicant for a federal agency action subject to federal consistency review certifying that the proposed activity requiring the federal agency action is consistent with the CMP goals and policies

Consistency determination–The statement and supporting documentation submitted by a federal agency undertaking or planning a federal agency activity subject to federal consistency review certifying that the federal agency activity is consistent with the CMP goals and policies to the maximum extent practicable.

Federal agency action–A federal license or permit that a federal agency may issue that represents the proposed federal authorization, approval, or certification needed by the applicant to begin an activity. An action to renew, amend, or modify an existing license or permit shall not be considered an action subject to the CMP if the action only extends the time period of the existing authorization without authorizing new or additional work or activities, would not increase pollutant loads to coastal waters or result in relocation of a wastewater outfall to a critical area, or is not otherwise directly relevant to the policies in §501.14 of this title (relating to Policies for Specific Activities and Coastal Natural Resource Areas).

Federal agency activity–A function that is performed by or for a federal agency in the exercise of its statutory responsibility, including financial assistance, the planning, construction, modification, or removal or a public work, facility, or any other structure, and the acquisition, use, or disposal of land or water resources. The term does not include the issuance of a federal license or permit.

Federal assistance–Assistance provided under a federal program to an applicant agency through grant or contractual arrangements, loans, subsidies, guarantees, insurance, or other forms of financial aid. Except as otherwise requested by the applicant agency, council review of federal assistance for consistency with the CMP goals and policies is limited to federal programmatic requirements for project level funding. Agency management decisions such as funding priorities and allocation of funds among various projects are not subject to review. For purposes of the review procedures in this chapter, the term includes only the transfer or commitment of funds from the federal agency directly to an applicant agency.

Federal license or permit–Any authorization, certification, approval, or other form of permission which any federal agency is empowered to issue to an applicant

Outer continental shelf (OCS) plan–A plan for the exploration or development of, or production from, an area leased under the Outer Continental Shelf Lands Act (43 United States Code Annotated, §§1331-1356) and the rules adopted under that Act that is submitted to the secretary of the United States Department of the Interior after federal approval of the CMP.

§506.12. Federal Agency Actions, Federal Agency Activities and Development Projects, and Outer Continental Shelf Plans Subject to the Coastal Management Program.

(a) For purposes of this section, the following federal actions within the CMP boundary may adversely affect coastal natural resource areas (CNRAs):

(1) Federal Agency Activities and Development Projects:

(A) United States Department of the Interior. Modifications to the boundaries of the Coastal Barrier Resource System under 16 United States Code Annotated, §3503(c);

(B) United States Environmental Protection Agency. Selection of remedial actions under 42 United States Code Annotated, §9604(c);

(C) United States Army Corps of Engineers:

(i) small river and harbor improvement projects under 33 United States Code Annotated, §577;

(ii) water resources development projects under 42 United States Code Annotated, §1962d-5;

(iii) small flood control projects under 33 United States Code Annotated, §701s;

(iv) small beach erosion control projects under 33 United States Code Annotated, §426g;

(v) operation and maintenance of civil works projects under the Code of Federal Regulations, Title 33, Parts 335 and 338;

(vi) dredging projects under the Code of Federal Regulations, Title 33, Part 336;

(vii) approval for projects for the prevention or mitigation of damages to shore areas attributable to federal navigation projects pursuant to 33 United States Code Annotated, §426i; and

(viii) approval for projects for the placement on state beaches of beach-quality sand dredged from federal navigation projects pursuant to 33 United States Code Annotated, §426j;

(D) Federal Emergency Management Agency:

(i) model floodplain ordinances; and

(ii) approval or suspension of a community's eligibility to sell flood insurance under the Code of Federal Regulations, Title 44, Part 59, Subpart B;

(E) General Services Administration:

(i) acquisitions under 40 United States Code Annotated, §602 and §603; and

(ii) construction under 40 United States Code Annotated, §605;

(F) All federal agencies. All other development projects.

(2) Federal Agency Actions:

(A) Environmental Protection Agency:

(i) National Pollution Discharge Elimination System (NPDES) permits under 33 United States Code Annotated, §1342;

(ii) ocean dumping permits under 33 United States Code Annotated, §1412;

(iii) approvals under 42 United States Code Annotated, §6924(d); and

(iv) approvals of National Estuary Program Comprehensive Conservation Management Plans under 33 United States Code Annotated, §1330f;

(B) United States Army Corps of Engineers:

(i) ocean dumping permits under 33 United States Code Annotated, §1413;

(ii) dredge and fill permits under 33 United States Code Annotated, §1344;

(iii) permits under 33 United States Code Annotated, §401;

(iv) permits under 33 United States Code Annotated, §403; and

(v) Memoranda of Agreement for mitigation banking;

(C) United States Department of Transportation:

(i) approvals under 23 United States Code Annotated, §106; and

(ii) approvals under 33 United States Code Annotated, §525;

(D) Federal Aviation Administration. Certificates under 49 United States Code Annotated, §1432;

(E) Federal Energy Regulatory Commission:

(i) certificates under 15 United States Code Annotated, §717f;

(ii) licenses under 16 United States Code Annotated, §797(e); and

(iii) exemptions under 16 United States Code Annotated, §2705(d);

(F) Nuclear Regulatory Commission. Licenses under 42 United States Code Annotated, §2133.

(3) State and Local Government Applications for Federal Assistance. Federal assistance for state and local government activities that may adversely affect CNRAs. Federal assistance does not include applications from local governments and subdivisions to the Texas Water Development Board for financial assistance through the State Water Pollution Control Revolving Fund or the Colonia Wastewater Treatment Assistance Program.

(b) For purposes of this section, the following are federal actions outside the CMP boundary but within OCS waters, or on excluded federal land located within the coastal zone, that may adversely affect CNRAs.

(1) Federal Activities and Development Projects: All federal agencies. Activities in OCS waters or within the coastal zone occurring within federal lands excluded from the CMP boundary but which may adversely affect CNRAs.

(2) Federal Agency Actions:

(A) United States Department of the Interior:

(i) permits under 43 United States Code Annotated, §1340, in OCS waters; and

(ii) rights-of-way under 43 United States Code Annotated, §1334(e) , in OCS waters;

(B) Environmental Protection Agency:

(i) NPDES permits under 33 United States Code Annotated, §1342, in OCS waters;

(ii) ocean dumping permits under 33 United States Code Annotated, §1412, in OCS waters;

(C) United States Army Corps of Engineers. Ocean dumping permits under 33 United States Code Annotated, §1413, in OCS waters;

(D) United States Department of Transportation: Deep water port licenses under 33 United States Code Annotated, §1503, in OCS waters.

(3) OCS Exploration, Development, and Production Activities. United States Department of the Interior:

(A) Federal agency actions described in detail in OCS plans, including pipeline activities, that may adversely affect CNRAs;

(B) OCS lease sales within the western and central Gulf of Mexico under 43 United States Code Annotated, §1337.

(c) In the event that a proposed activity requiring a state agency or subdivision action that falls below thresholds for referral approved under Chapter 505, Subchapter B of this title (relating to Council Certification of State Agency Rules and Approval of Thresholds for Referral) requires an equivalent federal permit or license under this chapter, the council may only determine the state agency or subdivision action's consistency by using the process provided in Chapter 505 of this title (relating to Council Procedure for State Consistency with Coastal Management Program Goals and Policies). The council's determination regarding the consistency of an action under this subsection constitutes the state's determination regarding consistency of the equivalent federal action.

(d) If an activity requiring a state agency or subdivision action above thresholds requires an equivalent federal permit or license, the council may determine the consistency of the state agency or subdivision action or the federal license or permit, but not both.

(e) The determinations regarding the consistency of an action made by the council under subsections (c) and (d) of this section constitute the state's determination regarding consistency of the equivalent agency or subdivision action or federal action.

(f) On a one-time basis, and subject to the provisions of paragraph (1) of this subsection and federal law, the council may elect to review a proposed federal license or permit action of a type that is not listed in §506.12(a) (2) of this title or a state or local government application for federal assistance of a type that is not listed in §506.12(a)(3) of this title.

(1) Once the council has reviewed a proposed federal license or permit

action of a type that is not listed in §506.12(a)(2) of this title, the council may not review any other proposed federal license or permit action of that type unless the council amends §506.12(a)(2) of this title to add the federal license or permit action to the list of such actions in §506.12(a)(2) of this title. Once the council has reviewed a state or local government application for federal assistance of a type that is not specifically listed in §506.12(a)(3) of this title, the council may not review any other state or local government application for federal assistance of that type unless the council amends §506.12(a)(3) of this title to add that specific type of action to the list of actions in §506.12(a)(3) of this title.

(2) Except as provided in this subsection, the list of federal actions described in §506.12(a)(2) and (3) of this title is an exclusive list of federal licenses and permits and state and local government applications for federal assistance that are subject to council review. The council may amend the list of actions described in §506.12(a)(2) and (3) of this title from time to time, and any federal actions described in such amended lists shall be subject to council review.

(g) If the council determines a federal agency action or application for federal assistance to be consistent with the CMP goals and policies, subsequent actions taken by state agencies or subdivisions or federal agencies to implement the activity described in the application shall not be subject to review by the council if the application for the federal agency action or federal assistance describes the activity in sufficient detail to determine consistency of the completed activity.

§506.20. Consistency Determinations for Federal Agency Activities and Development Projects.

(a) At the earliest practicable time, but in no event later than 90 days prior to final approval, a federal agency considering the approval of a federal agency activity or development project listed in §506.12 of this title (relating to Federal Agency Actions, Federal Agency Activities, Outer Continental Shelf Plans and Development Plans Subject to the Coastal Management Program) shall provide the council secretary with a consistency determination that includes the following information:

(1) a brief statement, based upon an evaluation of the relevant CMP provisions, indicating whether or not the proposed activity or development project will be undertaken in a manner consistent with the CMP, to the maximum extent practicable; and

(2) a detailed description of the proposed activity or development project and its associated facilities which is adequate to permit an assessment of their probable effects on CNRAs, and comprehensive data and information sufficient to support the federal agency's consistency statement. The amount of detail in the statement evaluation, activity description, and supporting information shall be commensurate with the expected effects of the activity or development project on CNRAs. While federal agencies must be consistent to the maximum extent practicable with the enforceable, mandatory policies of the CMP, the agencies need only demonstrate adequate consideration of policies which are in the nature of recommendations. Federal agencies need not evaluate effects for which the CMP does not contain mandatory or recommended policies.

(b) The chair or any three members of the council may request the federal agency to provide additional information as provided by federal regulations.

§506.21. Notification of Negative Determinations.

(a) If a federal agency determines that a proposed activity or development project listed in §506.12 of this title (relating to Federal Actions Subject to the Coastal Management Program) will not adversely affect any CNRA, the federal agency shall at the earliest practicable time, but in no event later than 90 days prior to final approval, provide the chair of the council with a notification briefly providing the reasons for the federal agency's negative determination.

(b) If the council disagrees with the negative determination and the federal agency does not modify the activity or the development project to achieve consistency with the program, the governor, with the assistance of the chair of the council, may seek mediation of the matter in accordance with federal law (as provided in the Code of Federal Regulations, Title 15, Part 930, Subpart G, §§930.110 et seq).

§506.24. Consistency Determinations for Federal Agency Activities Initiated Prior to Federal Approval of the Coastal Management Program.

(a) Federal agencies shall provide a consistency determination for ongoing activities listed in §506.12 of this title (relating to Federal Actions Subject to the Coastal Management Program), other than development projects, initiated prior to federal approval of the CMP where the agency retains discretion to reassess and modify the activity. In accordance with the Code of Federal Regulations, Title 15, Part 930, Subpart C, §930.38(a), federal agencies shall provide the council with a consistency determination for such ongoing activities no later than 120 days after program approval.

(b) Federal agencies shall provide a consistency determination, in accordance with the Code of Federal Regulations, Title 15, Part 930, Subpart C, §930.38(b), for phased development projects described in §506.23(b) of this title (relating to Consistency Determinations for Development Projects) and initiated prior to federal approval of the CMP, for those phases of the project for which the agency retains discretion to reassess and modify the activity following CMP approval.

(c) The council shall review consistency determinations for the United States Army Corps of Engineers' ongoing maintenance of commercially navigable waterways as provided in the Memorandum of Agreement Between the Texas Coastal Coordination Council and the United States Army Corps of Engineers (Review of Coastal Maintenance Dredging Activities for Consistency with the Goals and Policies of the Texas Coastal Management Program, dated October 27, 1994).

§506.25. Public Notice and Comment.

(a) Upon receipt of a consistency determination for a federal agency activity, the council secretary shall publish public notice of the consistency determination in the *Texas Register*.

(b) The public notice shall provide a summary of the proposed federal agency activity, announce the availability of the consistency determination for inspection, and request comment on whether the federal agency activity should be referred to the council for review and whether the activity is or is not consistent with the CMP goals and policies. Comments shall be submitted to the council secretary within 30 days of publication of the notice in the *Texas Register*.

(c) When appropriate, the chair or any three members of the council may extend the public comment period or schedule a public hearing on:

(1) the consistency determination; and

(2) whether referral to the council is appropriate.

(d) After the close of the public comment period, the council members shall consider any comments received in response to the public notice and determine whether the federal activity should be placed on the agenda for review because it presents a significant unresolved dispute regarding consistency with the CMP goals and policies. Upon the council members' decision, the council secretary shall imme-

diately notify all council members, applicant, federal agency, and other affected parties, if any.

§506.26. Referral of Federal Agency Activities

(a) The council shall review any federal agency activity that any three members of the council agree presents a significant unresolved issue regarding consistency with the CMP goals and policies and place the matter on the agenda of a meeting of the council for review.

(b) To refer a federal activity to the council, any three members of the council must submit the action to the council secretary in writing.

(c) The council secretary shall place the action on the agenda of the earliest council meeting at which consideration of the federal agency activity is reasonably practicable. If no regularly scheduled council meeting will allow the council to complete a review of the action within 45 days of receipt of the consistency certification, the council secretary shall notify the chair, who shall schedule a special meeting.

(d) If the council does not place the federal agency activity on the agenda of a council meeting for review, within 45 days of the date the council secretary receives a consistency determination with all required information, then the chair shall notify the federal agency of the status of the review and the basis for further delay and request an extension of time to review the matter.

(e) The federal agency may presume council agreement with the federal agency's consistency determination 45 days after the date the council secretary receives a consistency determination with all required information, unless the chair or any three members of the council request an extension of time to review the matter. Federal agencies shall approve the first request for an extension of 15 days or less. In considering whether a longer or additional extension period is appropriate, federal agencies should consider the magnitude and complexity of, or the information contained in, the consistency determination.

(f) A federal agency shall not grant final approval for an federal agency activity identified in §506.12 of this title (relating to Federal Agency Actions, Federal Agency Activities, Outer Continental Shelf Plans Subject to the Coastal Management Program) until after the expiration of 90 days from the date the federal agency provides the council secretary with its consistency determination, unless the federal agency and the council agree to an alternative period of time.

§506.27. Council Hearing to Review Federal Agency Activities.

(a) Following referral of a federal agency activity, the council shall consider the public comments received, the relevant CMP goals and policies, information submitted by the federal agency, and other relevant information and determine whether the activity is consistent with the CMP goals and policies within 90 days of the date the council secretary received the consistency determination.

(b) The council secretary shall, by certified mail or hand delivery, provide notice of the hearing at which the council will review the federal agency activity to the federal agency.

(c) If the council decides to disagree with a consistency determination, the council shall notify the federal agency and the assistant administrator of its decision to disagree with the consistency determination. An affirmative vote of two-thirds of the council members is required for the council to disagree with a consistency determination.

(d) The council's finding that a proposed activity is inconsistent with the CMP goals and policies shall include:

(1) a description of how the proposed activity is inconsistent with specific CMP goals and policies;

(2) a description of any available alternative measures that would permit the proposed activity to be conducted in a manner consistent to the maximum extent practicable with the CMP; and

(3) in cases where the council's finding is based upon the federal agency's failure to supply sufficient information, the council shall include a description of the nature of the information requested and the necessity of having such information to determine the consistency of the federal activity with the CMP.

(e) If the council finds that a proposed activity is inconsistent with the CMP goals and policies and the federal agency does not modify the activity to achieve consistency with the program, the governor, with the assistance of the chair of the council, may seek secretarial mediation (as provided in Code of Federal Regulations, Title 15, Part 930, Subpart G, §§930.110 et seq).

§506.28. General Consistency Agreements for Federal Activities; Interagency Coordination Groups for Federal Development Projects.

(a) The council may issue a general consistency agreement with respect to a federal activity other than a development project. Prior to issuance of a general consistency agreement, the council shall request and consider public comments on the matter. If the conditions of a general consistency agreement are satisfied, the federal activity is deemed consistent, to the maximum extent practicable, with the CMP goals and policies and will not be subject to council review under §505.26 of this title (relating to Referral of Federal Activities and Development Projects).

(b) The council shall issue a consistency agreement for a federal development project for which:

(1) the federal agency has elected to establish an interagency coordination group whose duties include advising the federal agency on the consistency of the project;

(2) the interagency coordination group includes among its voting members a minimum of three council members from natural resource agencies or their representatives;

(3) the interagency coordination group, including a majority of the council members or their representatives on the interagency coordination group, finds that the federal development project is consistent, to the maximum extent practicable, with the CMP goals and policies; and

(4) the federal agency adopts the finding of the interagency coordination group and submits it to the council as its consistency determination for the project.

(c) Disposal or placement of dredged material in existing dredge disposal sites identified and actively used as described in an environmental assessment or environmental impact statement issued prior to the effective date of this chapter shall be presumed consistent with §501.14(j)

(1) of this title (relating to Policies for Specific Activities and Coastal Natural Resource Areas), unless such existing disposal or placement is modified in design, size, use, or function, provided that the material is generated by maintenance dredging of commercially navigable waterways for which a federal development project undergoes evaluation pursuant to the interagency coordination group process under subsection (b) of this section and such process was initiated prior to the adoption of this chapter, and provided further, if the interagency coordination group approves the project that requires disposal or placement in confined sites and/or beneficial use of the dredged material from those waterways and results in cessation of open water disposal of dredged material and such project is authorized in a final supplemental environmental impact statement.

§506.30. Consistency Certifications for Federal Agency Actions.

(a) Upon filing an application for a federal agency action listed under §506.12 of this title (relating to Federal Actions Subject to the Coastal Management Program), the applicant shall provide to the council secretary a consistency certification that reads as follows: The proposed activity complies with Texas' approved coastal management program and will be conducted in a manner consistent with such program.

(b) The applicant shall include with the consistency certification all of the following information:

(1) a detailed description of the proposed activity and its associated facilities which is adequate to permit an assessment of their probable effects on CNRAs. Maps, diagrams, technical data, and other relevant material must be submitted when a written description will not adequately describe the proposed activity. The applicant may submit the federal application and all supporting material provided to the federal agency to meet the requirements of this paragraph, if the application and supporting material contain the required material;

(2) a list identifying all federal, state, and local permits or authorizations subject to the CMP and required for the proposed activity and its associated facilities;

(3) a brief assessment relating to the relevant elements of the CMP and the probable effects of the proposed activity and its associated facilities on CNRAs; and

(4) a brief set of findings, derived from the assessment, indicating that the proposed activity, its associated facilities, and their effects are all consistent with the CMP goals and policies.

(c) Applicants shall, to the extent practicable, consolidate related federal agency actions identified in §506.12 of this title (relating to Federal Actions Subject to the Coastal Management Program) to assist the council in minimizing duplication of effort and unnecessary delays by reviewing all federal agency actions relating to a project at the same time.

(d) The chair or any three members of the council may request the applicant to submit additional information as provided by federal regulations. If the chair or three members of the council have not notified the applicant within 15 days that additional information is required, the certification shall be considered complete for purposes of activating the time periods within which the council must act on the certification.

§506.32. Public Notice and Comment.

(a) Upon receipt of a consistency certification for a proposed federal agency action, the council secretary shall publish public notice of the consistency certification in the *Texas Register*.

(b) The public notice shall provide a summary of the proposed activity, announce the availability of the consistency certification for inspection, and request comment on whether the federal agency action should be referred to the council for review and whether the action is or is not consistent with the CMP goals and policies. Comments shall be submitted to the council secretary within 30 days of publication of the notice in the *Texas Register*.

(c) When appropriate, the chair or any three members of the council may extend the public comment period or schedule a public hearing on:

(1) the consistency certification; and

(2) whether referral to the council is appropriate.

(d) After the close of the public comment period, the council members shall consider any comments received in response to the public notice and determine whether the proposed federal agency action presents a significant unresolved dispute regarding consistency with the CMP goals and policies and should be placed on the agenda of the council for review. Upon council members' decision, the council secretary shall immediately notify all council members, applicant, federal agency, and other affected parties, if any.

§506.33. Referral of Federal Agency Action.

(a) The council shall review any federal agency action that any three members agree presents a significant unresolved dispute regarding consistency with the CMP goals and policies.

(b) To refer a federal agency action, any three members must submit the request for referral to the council secretary in writing within 45 days of receipt of the consistency certification.

(c) The council secretary shall add the action to the agenda of the earliest council meeting at which consideration of the action is reasonably practicable. If no regularly scheduled council meeting will allow the council to complete a review of the action within 90 days of receipt of the consistency certification, the council secretary shall notify the chair, who shall schedule a special meeting.

(d) If the council has not issued a decision with respect to a proposed federal agency action within 45 days of the date when the council secretary receives a consistency certification with all required information, then the chair shall notify the applicant and the federal agency of the status of the review and the basis for further delay.

(e) If any three members of the council do not refer a proposed federal agency action to the council within 45 days of the date when the council secretary receives a consistency certification with all required information, then that proposed federal agency action is conclusively presumed to be consistent with the CMP.

§506.34. Council Hearing to Review a Federal Agency Action.

(a) Following referral of a proposed federal agency action, the council shall consider the public comments received, the relevant CMP goals and policies, information submitted by the federal agency or applicant, and other relevant information and determine whether the proposed action is consistent with the CMP goals and policies within 90 days of the date the council secretary received the consistency certification.

(b) The council secretary shall, by certified mail or hand delivery, provide notice of the hearing at which the council will review the proposed federal action to the federal agency and the applicant.

(c) If the council decides to object to a consistency certification, the council shall notify the applicant, the federal agency, and the assistant administrator. The affirmative vote of two-thirds of the council members shall be required to object to a consistency determination.

(d) The council's objection shall include:

(1) a description of how the proposed federal agency activity is inconsistent with specific CMP goals and policies;

(2) a description of any available alternative measures that would permit the proposed activity to be conducted in a manner consistent with the CMP;

(3) in cases where the council objects on the grounds of insufficient information, a description of the nature of the information requested and the necessity of having such information to determine the consistency of the activity with the CMP; and

(4) a statement informing the applicant of a right of appeal to the secretary of commerce on the grounds that the proposed activity is consistent with the objectives or purposes of the federal Coastal Zone Management Act (CZMA), 16 United States Code Annotated, §§1451-1464, or is necessary in the interest of national security as provided in the Code of Federal Regulations, Title 15, Part 930, Subpart H, §§930.120 et seq.

(e) If the council finds that the proposed federal action is inconsistent with the CMP goals and policies, the federal agency shall not proceed with the federal action, except as provided in the appeals process established in the Code of Federal Regulations, Title 15, Part 930, Subpart H, §§930.120 et seq.

§506.40. Consistency Certifications for Outer Continental Shelf Plans.

(a) Upon submission to the secretary of the interior or designee of an OCS plan, which must include a detailed description of the proposed activities which will require federal actions subject to federal consistency review, the person submitting the plan shall provide the council secretary with a copy of the plan along with a consistency certification that reads as follows: The proposed activities described in detail in this plan comply with Texas' approved coastal management program and will be conducted in a manner consistent with such program.

(b) The person submitting the OCS plan shall include all of the following information in support of the consistency certification:

(1) a detailed description of the proposed activities and their associated facilities which is adequate to permit an assessment of their probable effects on CNRAs. Maps, diagrams, technical data, and other relevant material must be submitted when a written description will not adequately describe the proposed activities;

(2) a list identifying all federal, state, and local actions subject to the CMP and required for the proposed activities and their associated facilities;

(3) a brief assessment relating the probable effects of the activities and their associated facilities on CNRAs to the relevant elements of the CMP; and

(4) a brief set of findings, derived from the assessment, indicating that federal actions authorizing each of the proposed activities will be consistent with the CMP goals and policies. In considering whether such federal actions will be consistent with the CMP, associated facilities authorized under such actions and the effects of such associated facilities shall be considered.

(c) The council strongly encourages persons submitting OCS plans to consolidate related federal licenses and permits that are not required to be described in detail in the plan but which are subject to council review. This consolidation will minimize duplication of effort and unnecessary delays by providing for council review of all licenses and permits relating to an OCS plan at the same time.

(d) The chair or any three members of the council may request the person submitting the plan to submit additional information as provided in federal regulations. The chair or three members of the council have not notified the person submitting the plan within 15 days that additional information is required, the certification shall be considered complete for purposes of activating the time periods within which the council must act on the certification.

§506.41. Public Notice and Comment.

(a) Upon receipt of a consistency certification for an OCS plan, the council secretary shall publish public notice of the consistency certification in the *Texas Register*.

(b) The public notice shall provide a summary of the OCS plan, announce the availability of the consistency certification for inspection, and request comment on whether any part of the OCS plan relating to federal agency actions required to authorize proposed activities described in detail in the OCS plan should be referred to the council for review and whether any part is or is not consistent with the CMP goals and policies. Comments shall be submitted to the council secretary within 30 days of publication of the notice in the *Texas Register*.

(c) When appropriate, the chair or any three members of the council may extend the public comment period or schedule a public hearing on.

(1) the consistency certification; and

(2) whether referral to the council is appropriate.

(d) After the close of the public comment period on the OCS plan, the council shall consider any comments received in response to the public notice and determine whether any part of the OCS plan relating to federal agency actions required to authorize proposed activities described in detail in the OCS plan presents significant unresolved issues regarding consistency with the CMP goals and policies and should be placed on the agenda of a meeting of the council for review. Upon the council's decision, the council secretary shall immediately notify the council members, applicant, federal agency, and other affected parties, if any.

§506.42. Referral of an Outer Continental Shelf Plan.

(a) The council shall review any part of an OCS plan relating to federal agency actions required to authorize proposed activities described in detail in the OCS plan which any three members agree presents a significant unresolved dispute regarding consistency with the CMP goals and policies.

(b) To refer part of an OCS plan, three members of the council must submit the request for referral to the council secretary in writing within 45 days of receipt of the consistency certification.

(c) The council secretary shall place the action on the agenda of the earliest council meeting at which consideration of the action is reasonably practicable. If no regularly scheduled council meeting will allow the council to act on the action within 90 days of receipt of the consistency certification, the council secretary shall notify the chair, who shall schedule a special meeting.

(d) If the council has not issued a decision with respect to a matter referred under the provisions of this section within 45 days of the date the council secretary received the consistency certification with all required information, then the chair shall notify the person submitting the plan, the secretary of the interior, and the assistant administrator of the status of the review and the basis for further delay.

(e) If any three members of the council do not refer any federal actions that will be required to authorize an activity described in detail in an OCS plan to the council within 45 days of the date the council secretary receives a consistency certification with all required information, then the council's concurrence with the consistency certification shall be conclusively presumed.

§506.43. Council Hearing to Review Outer Continental Shelf Plan.

(a) Following referral of part of an OCS plan, the council shall consider the public comments received, the relevant CMP goals and policies, information submitted by the federal agency or applicant, and other relevant information and determine whether any part of the OCS plan relating to federal agency actions required to authorize proposed activities described in detail in the OCS plan is consistent with the CMP goals and policies within 90 days of the date the council secretary received the consistency certification.

(b) The council secretary shall, by certified mail or hand delivery, provide notice of the hearing at which the council will review a part of the OCS plan to the person submitting the OCS plan, the secretary of the interior, and the assistant administrator.

(c) If the council decides to object to a consistency certification, the council shall notify the person submitting the plan, the secretary of the interior, and the assistant administrator. The affirmative vote of two-thirds of the council members is required to object to a consistency certification.

(d) The council's objection shall include:

(1) a description of how the activity requiring the federal action described in the OCS plan will be inconsistent with the CMP goals and policies;

(2) a description of any available alternative measures that would permit the activity requiring the federal action to be conducted in a manner consistent with the CMP;

(3) in cases where the council objects on the grounds of insufficient information, a description of the nature of the information requested and the necessity of having such information to determine the consistency with the CMP of the federal action authorizing the activity described in the OCS plan; and

(4) a statement informing the person submitting the plan of a right of appeal to the secretary of commerce on the grounds that the federal action authorizing the activity described in the OCS plan will be consistent with the objectives or purposes of the CZMA or is necessary in the interest of national security as provided in the Code of Federal Regulations, Title 15, Part 930, Subpart H, §§930.120 et seq.

(e) If the council objects to a consistency certification related to a federal action authorizing an activity described in detail in an OCS plan , the federal agency shall not take the federal action when it is proposed, except as provided in the appeals process established in the Code of Federal Regulations, Title 15, Part 930, Subpart H, §§930.120 et seq.

§506.44. Effect of Council Concurrence.

(a) If the council either issues a concurrence or is conclusively presumed to concur with the consistency certification of a person submitting an OCS plan, then the person submitting the plan shall not be required to submit additional consistency certifications to the council secretary for the individual federal actions that will be required to authorize the activities described in detail in the OCS plan.

(b) To allow the council to monitor those federal actions that relate to activities described in detail in an OCS plan whose consistency certification has received council concurrence, the person submitting the OCS plan shall provide the council secretary with copies of applications for those federal actions when they are filed.

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 authority.

Issued in Austin, Texas, on October 13, 1995.

TRD-9513148 Garry Mauro
Chairman
Coastal Coordination Council

Effective date: November 3, 1995

Proposal publication date: July 18, 1995

For further information, please call: (512) 305-9129

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• 31 TAC §506.50, §506.52

The Coastal Coordination Council (council) adopts the repeal of §506.50 and §506.52, concerning consistency review of federal assistance. The council repeals §505.50 and §505.52 because of the concern that there do not appear to be any policies in §501.14 of this title (relating to Policies for Specific Activities and Coastal Natural Resource Areas) against which to judge the consistency of provision of federal assistance with the goals and policies of the CMP. New language is concurrently proposed regarding these sections.

Further, subjecting federal assistance to consistency review would result in multiple consistency reviews relating to the same activity. In virtually every situation, a license or permit will be required to conduct the activity for which assistance is provided. Therefore, eliminating the potential for consistency review of federal assistance eliminates the possibility for duplicative consistency reviews relating to the same activity.

No comments were received regarding the repeal of this chapter.

The repeals are adopted pursuant to Texas Natural Resources Code, §33. 206(d), which authorizes the council to develop procedures for review of federal actions.

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 authority.

Issued in Austin, Texas, on October 13, 1995.

TRD-9513149 Garry Mauro
Chairman
Coastal Coordination Council

Effective date: November 3, 1995

Proposal publication date: July 18, 1995

For further information, please call: (512) 305-9129

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

Part XI. Texas Juvenile Probation Commission

Chapter 347. Title IV-E Federal Foster Care Program

• 37 TAC §§347.1, 347.3, 347.5, 347.7, 347.9, 347.11, 347.13, 347.15, 347.17, 347.19, 347.21

The Texas Juvenile Probation Commission (TJPC) adopts amendments to §§§§347.1, 347.3, 347.5, 347.7, 347.9, 347.11, 347.13, 347.15, 347.17, 347. 19, and 347.21, concerning Title IV-E of the Social Security Act in which the federal government reimburses the Texas Department of Protective and Regulatory Services (TDPRS) for part of the foster care costs of eligible children. TJPC has contracted with TDPRS to make these federal funds available to eligible children in the juvenile justice system. These amendments are adopted without changes to the proposed text as published in the June 9, 1995, issue of the *Texas Register* (20 TexReg 4203).

This rule is being amended to allow TJPC to monitor departments bi-annually instead of quarterly.

No comments were received regarding adoption of the amendments.

The amendments are adopted under the Texas Human Resources Code, §§141. 001, 141.041, and 141.042, which provides the Texas Juvenile Probation Commission with the authority to improve the effectiveness of juvenile probation services and provide alternatives to commitment of juveniles by providing financial aid to juvenile boards to establish and improve the probation services, and to adopt rules for these purposes.

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 October 11, 1995.

TRD-9513009 Rosa Tapia
Administrative Technician IV
Texas Juvenile Probation Commission

Effective date: November 1, 1995

Proposal publication date: June 9, 1995

For further information, please call: (512) 443-2001

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Notification Pursuant to the Insurance Code, Chapter 5, Subchapter L

(Editor's Note. As required by the Insurance Code, Article 5.96 and 5 97, the Texas Register publishes notices of actions taken by the Department of Insurance pursuant to Chapter 5, Subchapter L, of the Code. Board action taken under these articles is not subject to the Administrative Procedure Act

These actions become effective 15 days after the date of publication or on a later specified date

The text of the material being adopted will not be published, but may be examined in the offices of the Department of Insurance, 333 Guadalupe, Austin.)

The Commissioner of Insurance at a hearing scheduled under Docket Number 2171 on October 6, 1995, at 9:00 a.m in Room 100 of the Texas Department of Insurance Building, 333 Guadalupe Street in Austin, Texas, adopted the amendments proposed by the National Council on Compensation Insurance ("NCCI") pertaining to the standard workers' compensation and employers' liability insurance policy ("the policy"). The ten changes made to the current policy are set forth as follows In addition, the endorsements listed in #10 are amended to allow coverages excluded by the policy language to be included on the policy, if requested. Three endorsements are withdrawn as the language for these endorsements is included in the amended policy language. Notice of the public hearing was published in the September 1, 1995, issue of the *Texas Register* (20 TexReg 6818).

1. General Section C. Workers' Compensation Law is amended by adding language to clarify the exclusion of any federal workers or workmen's compensation law and any federal occupational disease law under the policy. The purpose of this language is to exclude Federal coverages, such as. Longshore and Harbor Workers' Compensation Act; Defense Base Act; Nonappropriated Fund Instrumentalities Act; Outer Continental Shelf Lands Act; Federal Coal Mine Health and Safety Act of 1969; and any other federal compensation obligation. The coverage provided by the policy is not changed as a result of this revision.

2. Part Two-Employers Liability Insurance, C. Exclusions, 7. is amended to list the employer conduct toward employees that will not be covered by the policy as they fall outside common law negligence, which is the principal risk covered by employers' liability.

3. Part Two-Employers Liability Insurance, C. Exclusions, 8. is amended to exclude coverage under the Longshore and Harbor Workers' Compensation Act, the Nonappropriated Fund.

Instrumentalities Act, the Outer Continental Shelf Lands Act, the Defense Base Act, the Federal Coal Mine Health and Safety Act of 1969, any other federal workers' or workmen's compensation law or other federal occupational disease law, or any amendment to these laws.

4 Part Two-Employers Liability Insurance, C. Exclusions, 9. is amended to exclude coverage for work subject to the Federal Employers' Liability Act, any other federal laws obligating an employer to pay damages to an employee due to bodily injury arising out of or in the course of employment, or any amendments to those laws.

5. Part Two-Employers Liability Insurance, C Exclusions, 10. excludes bodily injury to a master or member of the crew of any vessel. The exclusionary language of the Maritime Exclusion Endorsement WC000202 becomes part of the policy language, which clarifies that damages under the Jones Act are excluded.

6. Part 2 Employers Liability Insurance, C. Exclusions, 11. excludes fines and penalties imposed for violation of federal or state law. This section provides clear notice that fines or penalties imposed for violation of federal or state law are not covered.

7. Part Two-Employers Liability Insurance, C. Exclusions, 12. excludes damages under the Migrant and Seasonal Agricultural Worker Protection Act and under any other federal law awarding damages for violation of those laws or regulations issued thereunder, and any amendments to those laws.

8. Part Two, Employers Liability Insurance, I. Actions Against Us includes a provision that the insurer is not relieved of an obligation to pay due to the bankruptcy or insolvency of the insured

9. Part Three-Other States Insurance, A. 2. is amended to read "If you begin work in any one of those states after the effective date of this policy and are not insured or are not self-insured for such work, all provisions of the policy will apply as though that state were listed in Item 3.A. of the Information Page."

10. Part Three-Other States Insurance, A. 4. adds this language to the policy· "If you have work on the effective date of this policy in any state not listed in Item 3.A. of the Information Page, coverage will not be afforded for that state unless we are notified within thirty days."

In conjunction with the adopted changes outlined above, the following endorsements are revised to allow federal coverages that are excluded by the changes to the policy to be included on the policy, if requested: Defense Base Act Coverage Endorsement-WC000101; Longshore and Harbor Workers' Compensation Act Coverage Endorsement-WC000106; Nonappropriated Fund Instrumentalities Act Coverage Endorsement-WC000108; Outer Continental Shelf Lands Act Coverage Endorsement-WC000109; and Maritime Coverage Endorsement-WC000201.

In addition, the following endorsements are withdrawn for use with Texas workers' compensation and employers' liability insurance policies: Federal Employers' Liability Act Exclusion Endorsement-WC000105; Longshore and Harbor Workers' Compensation Act Exclusion Endorsement-WC000107; and Maritime Exclusion Endorsement-WC000202 as the exclusion of these coverages is now part of the amended policy language.

The Commissioner of Insurance adopted this matter pursuant to the Insurance Code, Articles 5.56, 5.57 and 5.96.

The Commissioner of Insurance amended the policy language for workers' compensation and employers' liability policies and endorsements by adopting the changes set forth above and attached hereto and incorporated by reference, by Commissioner's Order Number 95-1066.

A copy of the petition containing the full text of the proposed changes to the workers' compensation and employers liability insurance policy and the proposed changes to endorsements is available for review in the Office of the Chief Clerk of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78714-9104. For further information or to request copies of the petition, please contact Angie Arizpe at (512) 322-4147, (refer to Reference Number W-0695-14).

IT IS THEREFORE THE ORDER of the Commissioner of Insurance that the standard policy language for the Texas workers' compensation and employers' liability insurance policy, the amended endorsements and the deleted endorsements are hereby adopted to be applicable to new and renewal workers' compensation insurance policies with an effective date on or after 12:01 a.m November 4, 1995, which is the 15th day after notice of this action is published in the *Texas Register*. For new and renewal workers' compensation insurance policies with an effective date on or after 12.01 a.m. November 4, 1995 and prior to 12:01 a.m. April 1, 1996, either the current policy language and endorsements or the amended policy language and endorsements adopted under this order may be used. However, it is further ordered that all new and renewal workers' compensation insurance policies with an effective date on or after 12:01 a.m. April 1, 1996, shall be issued with the amended policy language and endorsements attached hereto and made a part of this Order

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts it from the requirements of the Administrative Procedure Act.

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 October 13, 1995.

TRD-9513187

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

Effective date· November 4, 1995

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

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