TEXAS REGISTER

Volume 21, Number 20 March 19, 1996 *Page 2069-2223*

Part I - Volume 21, Number 20

This month's front cover artwork:

Artist: Lakeisha R. Hines

11th grade

Sulphur Springs High School, Sulphur Springs ISD

School children's artwork has decorated the blank filler pages of the *Texas Register* since 1987. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

Starting with the February 27, 1996 issue, we will display artwork on the cover of each *Texas Register*. The artwork featured on the front cover is chosen at random.

The artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*. The artwork does not add additional pages to each issue and does not increase the cost of the *Texas Register*.

For more information about the student art project, please call (800) 226-7199.

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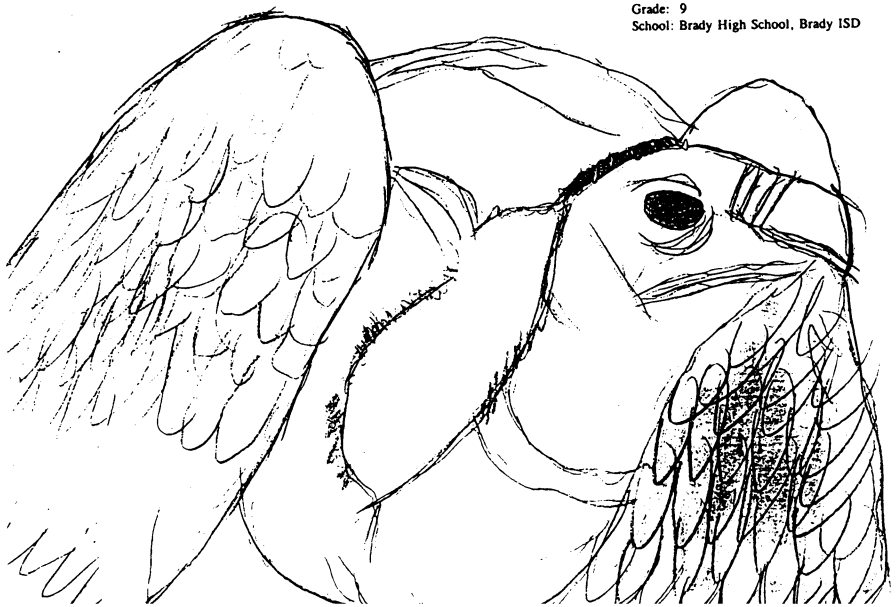
Mocking bird

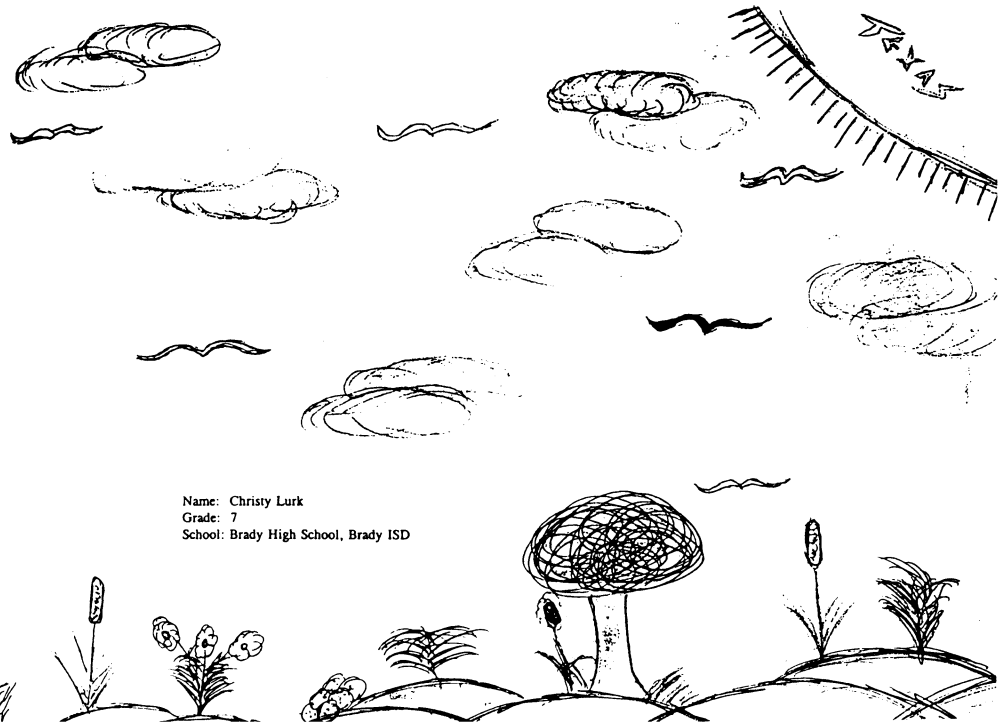
Name: Eric Garcia
Grade: 9
School: Brady High School, Brady ISD

Name: Mac Ray
Grade: 12
School: Brady High School, Brady ISD

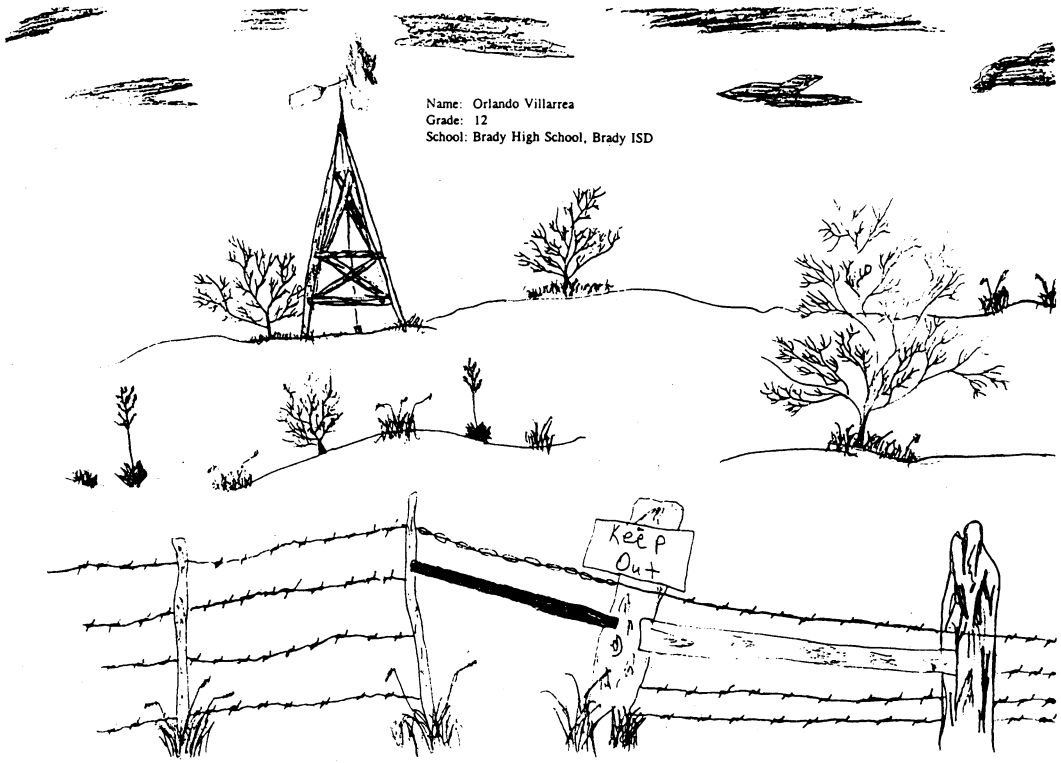
TEXAS



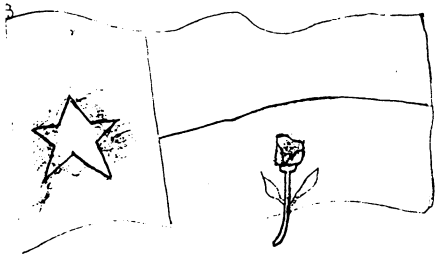
Name: Andy Barton
Grade: 9
School: Brady High School, Brady ISD



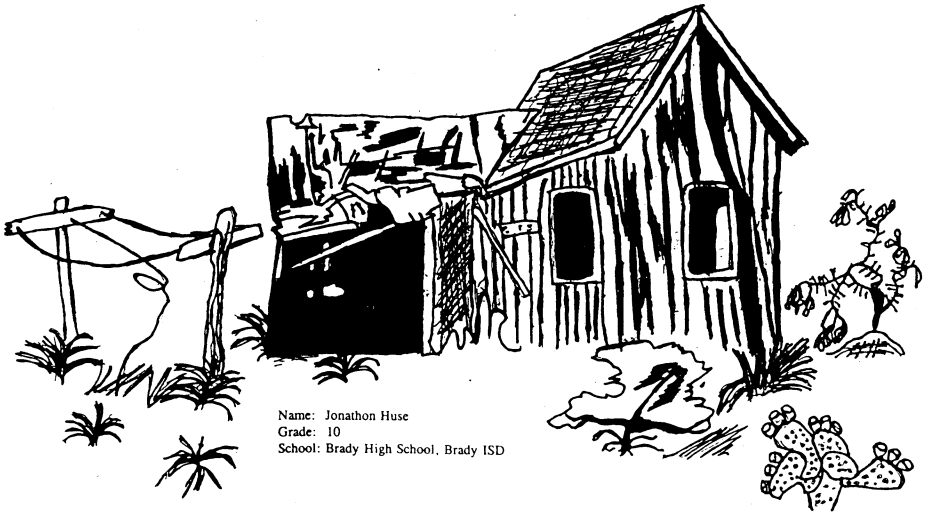
Name: Christy Lurk
Grade: 7
School: Brady High School, Brady ISD



Name: Orlando Villarrea
Grade: 12
School: Brady High School, Brady ISD

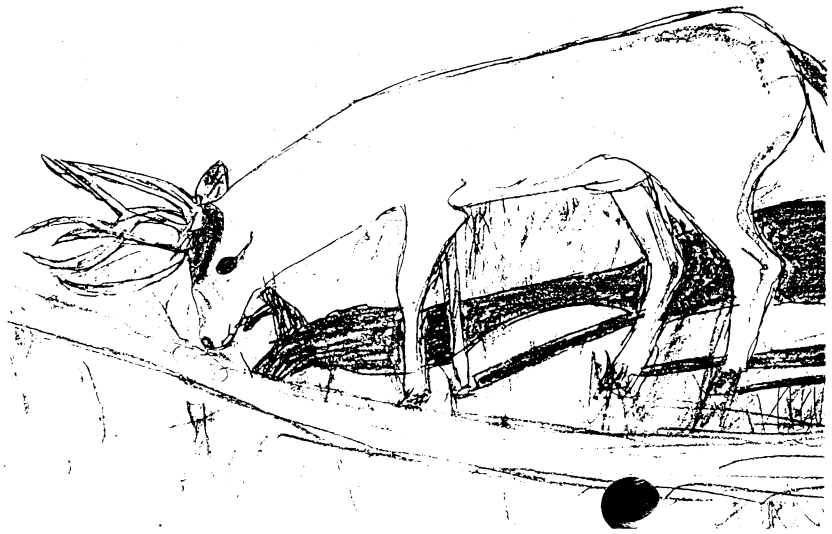


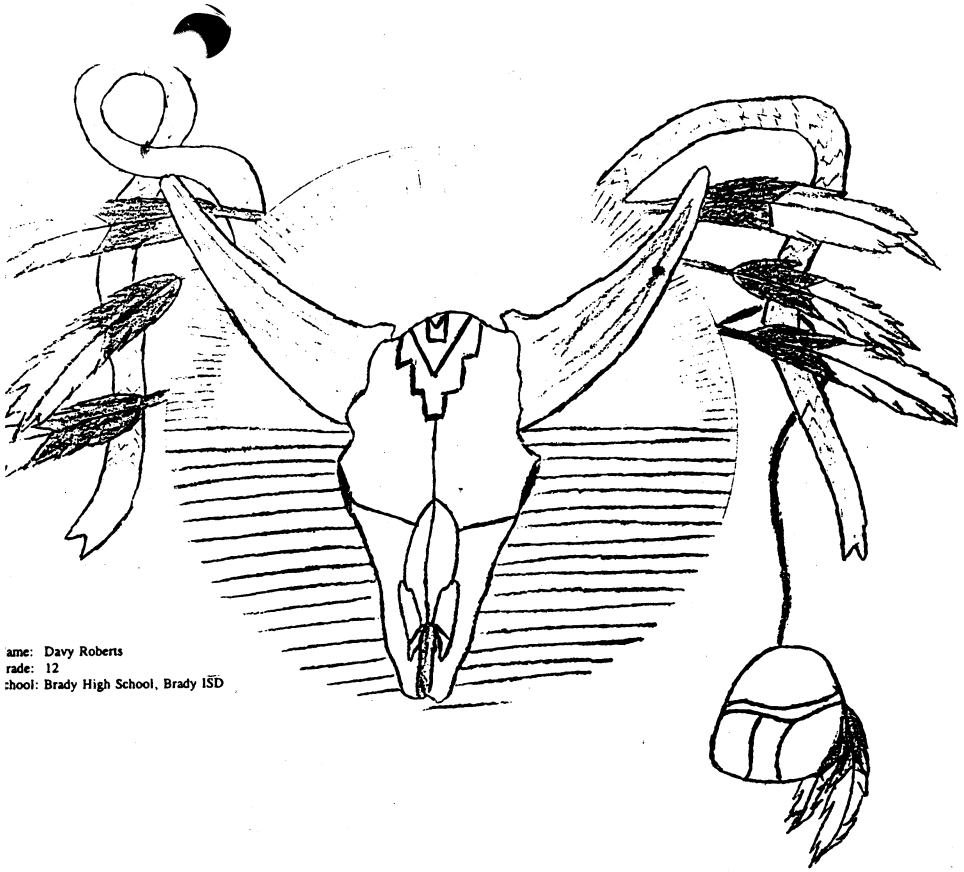
Name: Karl Blackwell
Grade: 9
School: Brady High School, Brady ISD



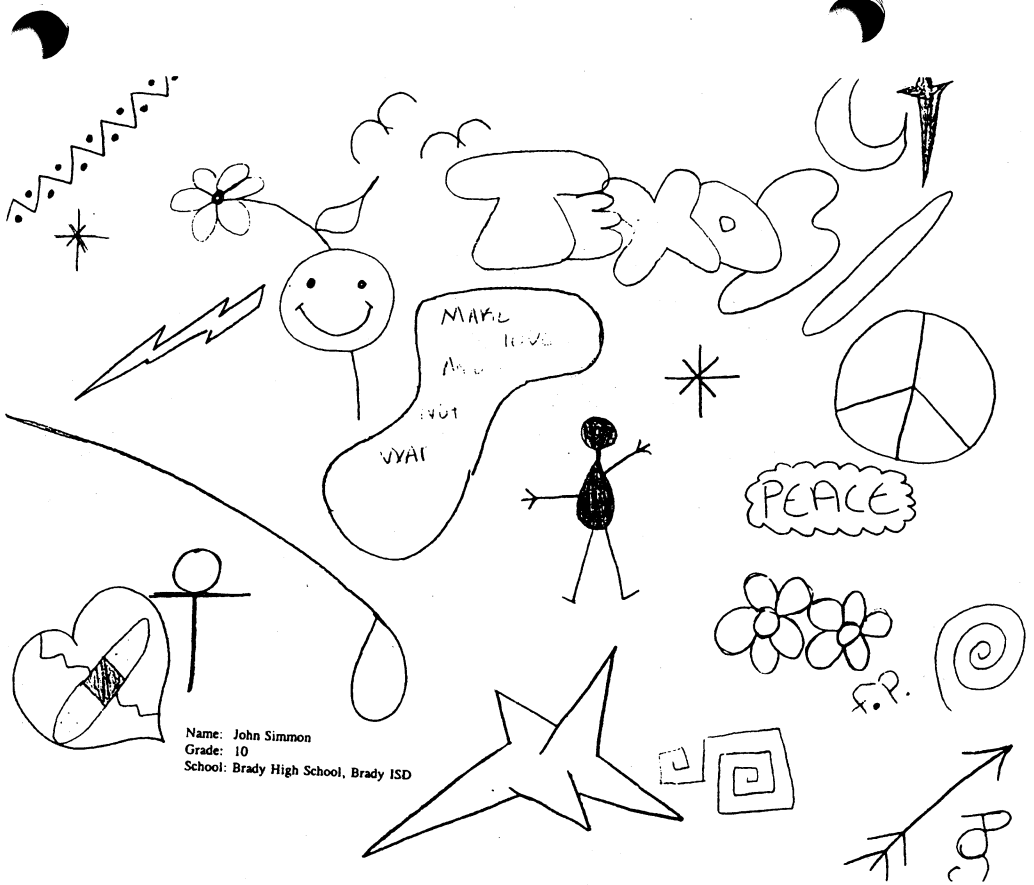
Name: Jonathon Huse
Grade: 10
School: Brady High School, Brady ISD

Name: Dana Whisenhunt
Grade: 12
School: Brady High School, Brady ISD



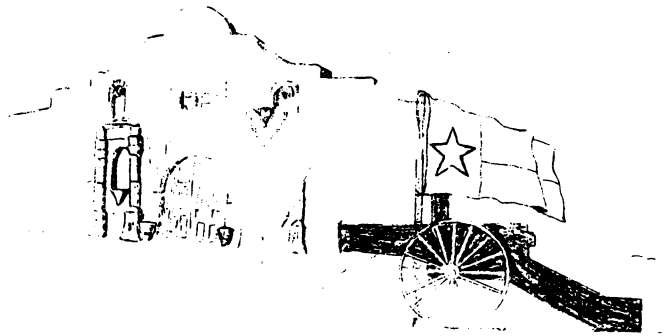


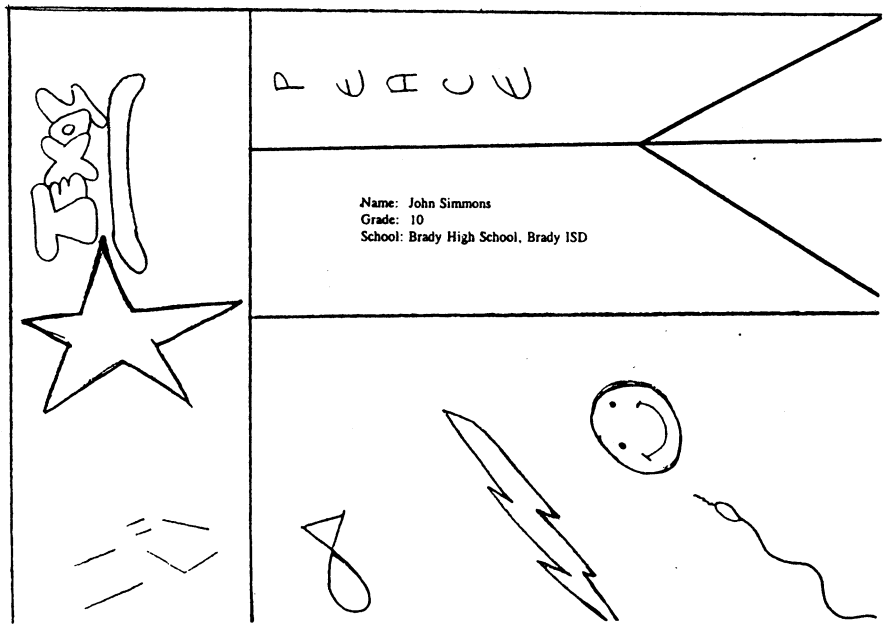
ame: Davy Roberts
rade: 12
:hool: Brady High School, Brady ISD



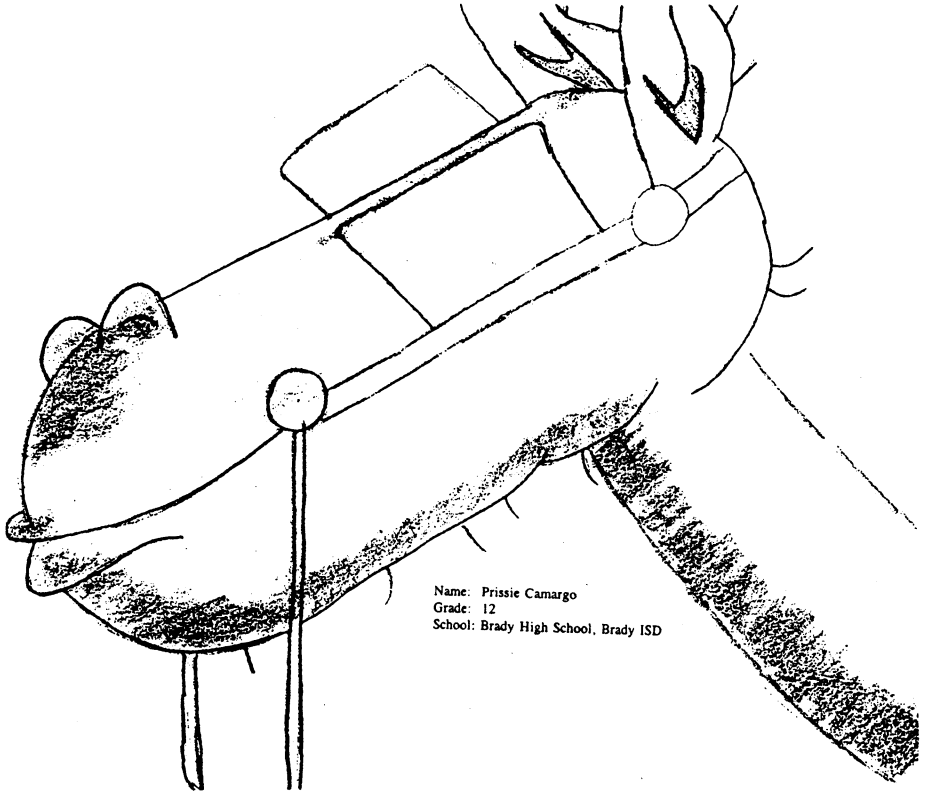
Name: John Simmon
Grade: 10
School: Brady High School, Brady ISD

Name: Juan Hernandez
Grade: 11
School: Brady High School, Brady ISD

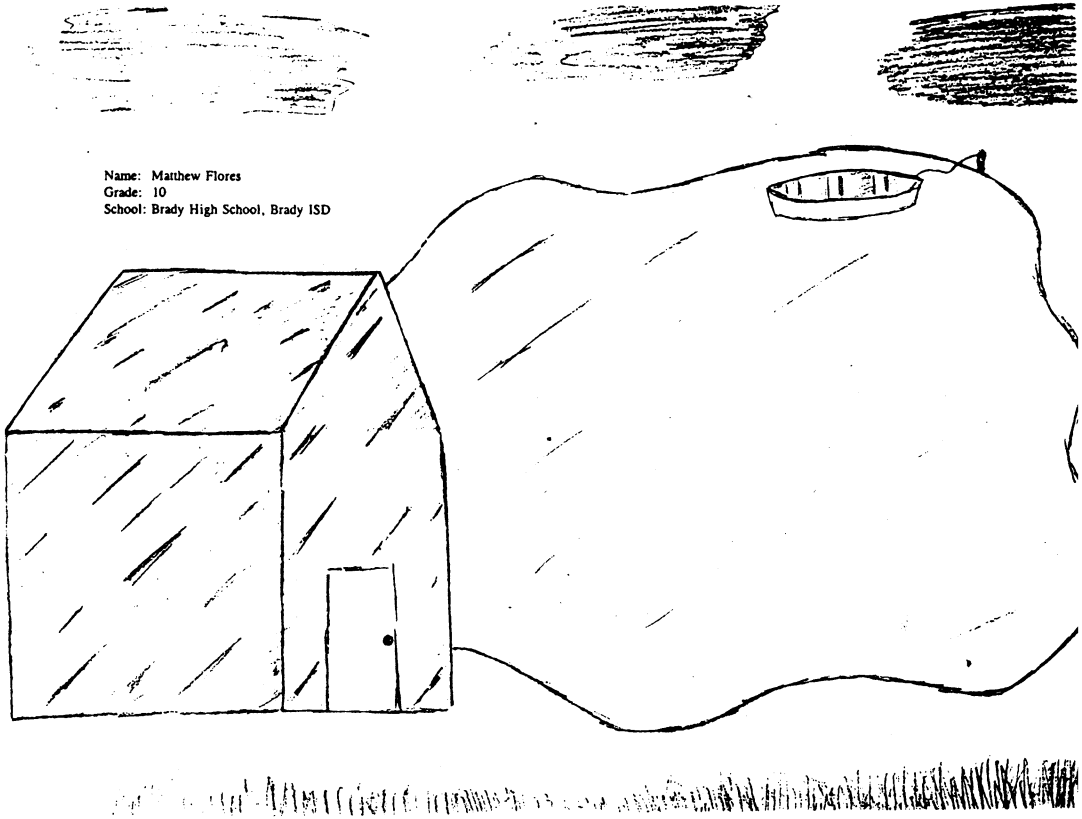




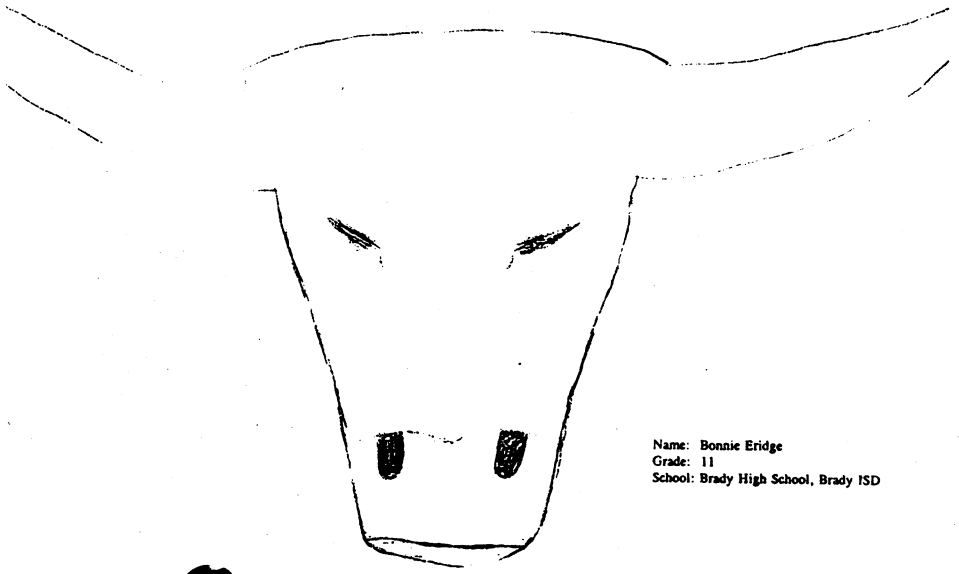
Name: John Simmons
Grade: 10
School: Brady High School, Brady ISD



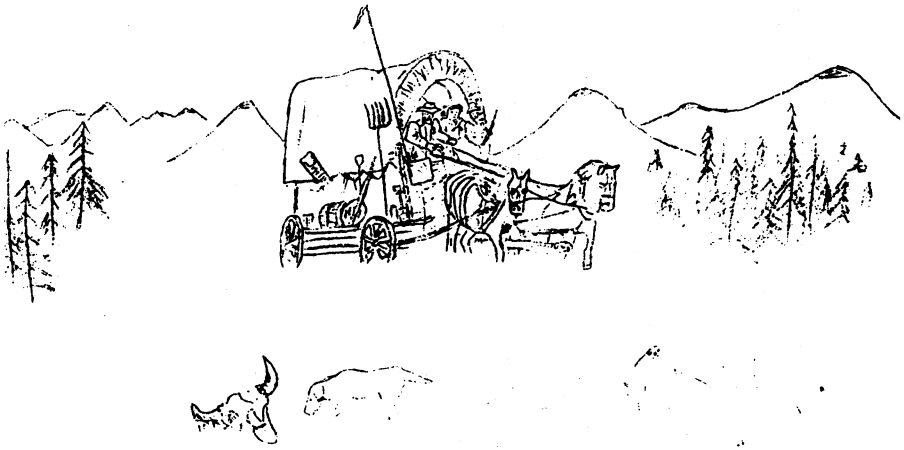
Name: Prissie Camargo
Grade: 12
School: Brady High School, Brady ISD



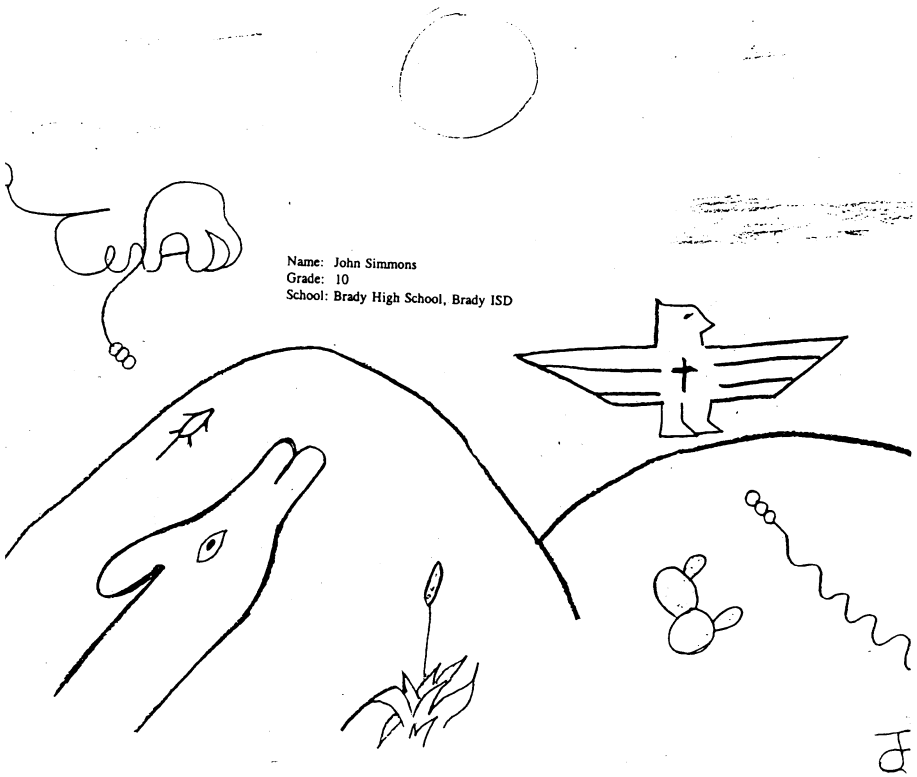
Name: Matthew Flores
Grade: 10
School: Brady High School, Brady ISD



Name: Bonnie Eridge
Grade: 11
School: Brady High School, Brady ISD



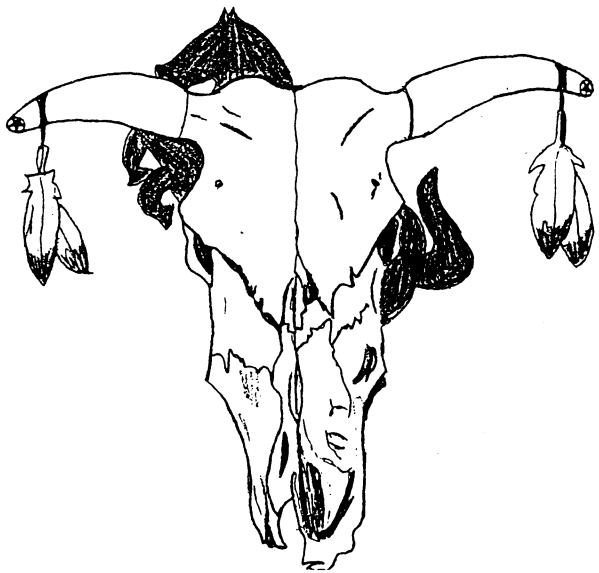
Name: Michael Estes
Grade: 10
School: Brady High School, Brady ISD

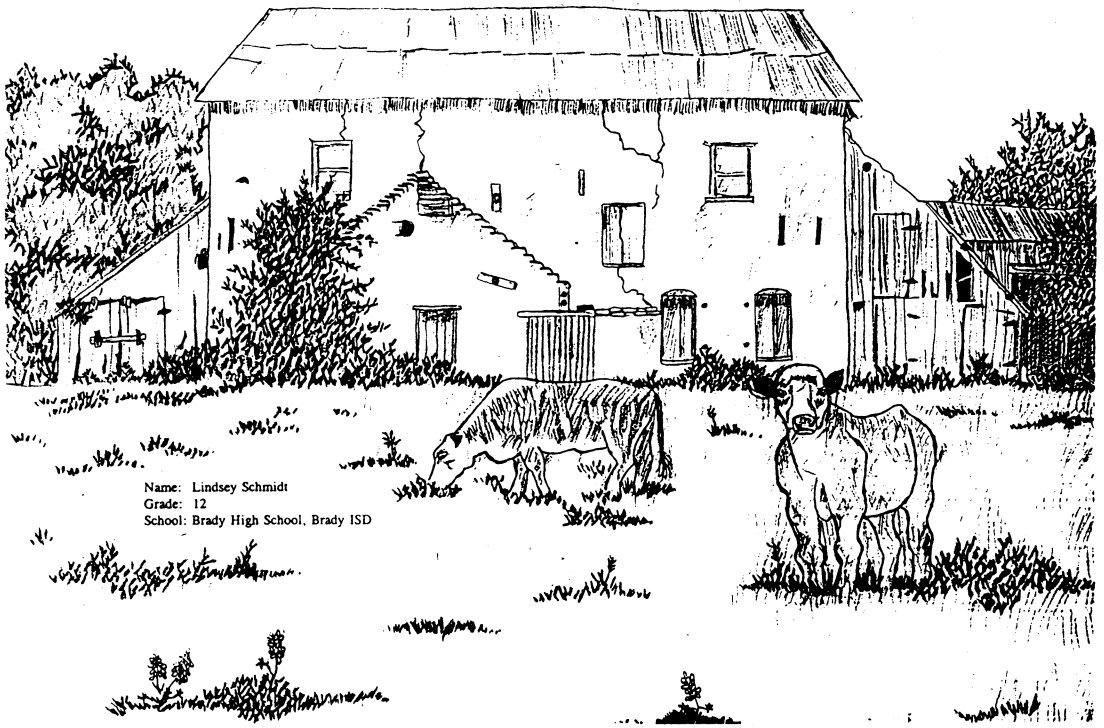


Name: John Simmons
Grade: 10
School: Brady High School, Brady ISD

Name: Tammy Busby
Grade: 11
School: Brady High School, Brady ISD

Name: Nathan Simmons
Grade: 10
School: Brady High School, Brady ISD





Name: Lindsey Schmidt
Grade: 12
School: Brady High School, Brady ISD

ATTORNEY GENERAL

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

Letter Opinions

LO-96-003 (ID# 33340). Request from Honorable John D. Kimbrough, Orange County Attorney, Orange County Courthouse, Orange, Texas 77630, concerning whether the Orange County Commissioners Court must order payment in accordance with a district court order adjusting salaries of court administration personnel within the amount approved and budgeted.

Summary of Opinion. The district judges in Orange County have no statutory authority to change the salaries of the court administration personnel set in the budget adopted by the Orange County Commissioners Court by transferring funds from one budget item to another.

TRD-9603141

LO-96-004 (ID# 314141). Honorable J. Collier Adams, Jr., Cochran County Attorney, 109 West Washington, Morton, Texas 79346-2537, concerning whether Article XVI, section 40 of the Texas Constitution excepts a county commissioner from the common-law doctrine of incompatibility (request for reconsideration of Attorney General Opinion DM-311 (1994)).

Summary of Opinion. Article XVI, section 40 excepts the offices of justice of the peace, county commissioner, notary public, and other specifically named offices from its restriction on holding two civil offices of emolument, but it does not except those offices from restrictions on dual-office-holding based on the common-law doctrine of incompatibility.

TRD-9603142

LO-96-005 (ID# 35318). Antonio O. Garza, Jr., Secretary of State, Elections Division, P.O. Box 12060, Austin, Texas 78711-2060, Constitutionality, as applied to independent and major party candidates, of the provisions of Election Code §141.063(2)(B), which require that a petition filed in connection with a candidate's application for a place on the ballot contain each petition signer's voter registration number.

Summary of Opinion. Whether the Election Code requirement that petitions of major party candidates' and independent candidates' petitions submitted in connection with their applications for places on the ballot include petition signers' voter registration numbers is unconstitutional involves fact questions which cannot be resolved in the opinion process.

TRD-9603143

LO-96-006 (ID# 33955). Request from Honorable James L. Anderson, Jr., Aransas County Attorney, 301 North Live Oak Street, Rockport, Texas 78382, concerning whether, and if so, under what procedures, the Aransas County Navigation District Number 1 may be dissolved.

Summary of Opinion. The provisions of subchapter G, Chapter 50, Water Code, for the dissolution of a district by the Texas Natural Resource Conservation Commission are the only ones under which the Aransas County Navigation District may be dissolved.

TRD-9603144

LO-96-007 (ID# 36648). Request from the Honorable Guy James Gray, Criminal District Attorney, Jasper County Courthouse, P.O. Box 1329, Jasper, Texas 75951, concerning whether Jasper County may provide longevity pay to county employees.

Summary of Opinion. Local Government Code, §152.011 of the authorizes the Commissioners Court of Jasper County to provide longevity pay to county employees. Texas Constitution, Article III, §53 of the does not prohibit Jasper County from implementing a prospective longevity pay policy that bases the amount of longevity pay on the employee's total service, including service before the policy was adopted.

TRD-9603145

LO-96-008 (ID# 38134). The Honorable Garry Mauro, Commissioner, Texas General Land Office, 1700 North Congress Avenue, Austin, Texas 78701-1495, concerning whether the Houston Metropolitan Transit Authority may provide buses for use during the 1996 Olympic Games in Atlanta.

Summary of Opinion. The governing board of the Houston Metropolitan Transit Authority ("METRO") may, without contravening Article III, §52, Texas Constitution, furnish buses to the Atlanta Committee for the Olympic Games for use during the 1996 Olympic Games, provided the governing board of METRO determines that the transaction will serve one or more public purposes of METRO, as articulated by the board, and that METRO will receive thereby an adequate quid pro quo. The governing board must also make certain that, during the period of the transaction, it maintains controls sufficient to ensure that such public purposes will be accomplished.

TRD-9603146

LO-96-009 (ID# 36491). The Honorable Irma Rangel, Chair, Committee on Higher Education, Texas House of Representatives, P.O. Box 2910, Austin, Texas 78768-2910, concerning whether Penal Code section 46.035 prohibits carrying a licensed handgun on the premises of a public school or university where a school- or university-sponsored sporting or interscholastic event is taking place.

Summary of Opinion. A person would violate both §46.03 and §46. 035 of the Penal Code if the person carried a licensed concealed handgun on the "premises" (as that word is defined in section 46.035) of a school or educational institution where a high school or collegiate sporting or interscholastic event was occurring.

The word premises as used in §46.03(a)(1) means those portions of a structure, and of the land, including appurtenances, on which the structure is situated, of which a school or educational institution has ownership or control.

TRD-9603147

LO-96-010 (ID# 36802). Request from the Honorable Kim Brimer, Chair, Committee on Business and Industry, Texas House of Representatives, P. O. Box 2910, Austin, Texas 78768, concerning whether a city council may appoint the former brother-in-law of one of its members to the board of directors of an industrial development corporation established by the city.

Summary of Opinion. Because a member of the board of directors of an industrial development corporation, established under the Development Corporation Act of 1979, Texas Civil Statutes, Article 5190.6, receives only reimbursement for the member's expenses, the member is not "directly or indirectly compensated from public funds or fees of office." Thus, Government Code,, §573.041 of the which generally prohibits nepotistic appointments, is inapplicable.

We find no statute that precludes one member of a city council from voting on removal of a member of the board of directors of an industrial development corporation, even where the city council member and director of the industrial development corporation are related within the second degree by affinity.

TRD-9603148

LO-96-011 (ID# 35324). Request from the Honorable Kenneth Armbrister, Chair, State Affairs Committee, Texas State Senate, P.O. Box 12068, Austin, Texas 78711, concerning whether the filing of an application for school board trustee results in an automatic resignation from the office of criminal district attorney under Article XVI, §65 of the Texas Constitution.

Summary of Opinion. The Jackson County Criminal District Attorney filed a formal application to run for trustee of the Edna Independent School District in March 1995, at a time when he had more than one year remaining to serve as criminal district attorney. His application for the school board position constituted an automatic resignation pursuant to Article XVI, §65 of the Texas Constitution from the Office of Criminal District Attorney. Article XVI, §65 provides that the vacancy created by the automatic resignation shall be filled in the same way that other vacancies in that office are filled.

TRD-9603149

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Requests for Opinions

(ID# 36623). Request from Major General Sam C. Turk, Adjutant General, Texas Army National Guard, P.O. Box 5218, Austin, Texas 78763-5218, concerning whether the adjutant general may contract with the federal government to provide environmental testing and monitoring, remediation, and underground storage tank removal.

(ID# 37861). Requested from the Honorable Ken Armbrister, Chair, Committee on State Affairs, Texas State Senate, P.O. Box 12068, Austin, Texas 78711, concerning whether the federal government may convert patented state lands to another purpose, and related questions.

(ID# 37938). Request from the Honorable James M. Kuboviak, Brazos County Attorney, 300 East 26th Street, Suite 325, Bryan, Texas 77803, concerning whether a misdemeanor case assigned for trial to a district court may be filed with the county clerk.

(ID# 38005). Request from the Honorable Richard J. Miller, Bell County Attorney, P.O. Box 1127, Belton, Texas 76513, concerning whether section 42.06, Penal Code, which makes it an offense to place a false alarm, creates a crime of "moral turpitude".

(ID# 38145). Request from the Honorable Senfronia Thompson, Chair, Committee on Judicial Affairs, Texas House of Representatives, P.O. Box 2910, Austin, Texas 78768-2910, concerning whether a member of the board of directors of a municipal utility district vacates that position when he ceases being a registered voter in and owning property in the district.

(ID# 38147). Request from the Honorable Fred Hill, Chair, Committee on Urban Affairs, Texas House of Representatives, P. O. Box 2910, Austin, Texas 78768-2910, concerning whether a city council member is prohibited from voting on a matter concerning a planned development in which he resides.

(ID# 38322). Request from the Honorable Irma Rangel, Chair, Committee on Higher Education, Texas House of Representatives, P.O. Box 2910, Austin, Texas 78768-2910, concerning whether a junior college or community college district may use the procedure established by subchapter C, Chapter 2, title I, Election Code when a candidate for its board of trustees is unopposed for election.

(ID# 38543). Request from the Honorable Toby Goodman, Chair, Committee on Juvenile Justice and Family Issues, Texas House of Representatives, P.O. Box 2910, Austin, Texas 78768-2910, status of the mayor and a council member of the city of Forth Worth who have resigned to run for another office.

TRD-9603334

♦ ♦ ♦

(RQ-870). Request from the Honorable Ken Armbrister, Chair, Senate State Affairs, Texas State Senate, P.O. Box 12068, Austin, Texas 78711, The Honorable Bill Ratliff, Chair, Senate Education Committee, Texas State Senate, P.O. Box 12068, Austin, Texas 78711, school district purchasing and construction contracts in light of recent amendments to the Texas Education Code.

TRD-9603333

♦ ♦ ♦

TEXAS ETHICS COMMISSION

The Texas Ethics Commission is authorized by Government Code, §571.091, to issue advisory opinions in regard to the following statutes: the Government Code, Chapter 302; the Government Code, Chapter 305; the Government Code, Chapter 572; the Election Code, Title 15; the Penal Code, Chapter 36; and the Penal Code, Chapter 39.

Requests for copies of the full text of opinions or questions on particular submissions should be addressed to the Office of the Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711-2070, (512) 463-5800.

Advisory Opinion Requests

AOR-340 The Texas Ethics Commission has been asked to consider how long a local filing authority must preserve reports filed under title 15 of the Election Code.

AOR-341 The Texas Ethics Commission has been asked to consider a question about a district judge who began raising funds in June 1995 to run for a position on a higher court in 1996. In October 1995 the district judge decided not to run in the 1996 election. The question is whether the judge may use the funds raised for officeholder expenditures.

AOR-342 The Texas Ethics Commission has been asked to consider whether records maintained by an individual in accordance with §254.001 of the Election Code are public records.

AOR-343 The Texas Ethics Commission has been asked to consider whether the members of the Crime Victims' Institute Advisory Council are required to comply with the requirements of subchapter B of Chapter 572 of the Government Code.

AOR-344 The Texas Ethics Commission has been asked to consider whether an officeholder may use political contributions to pay legal expenses incurred in connection with a federal investigation and trial of the officeholder for public corruption.

AOR-345 The Texas Ethics Commission has been asked to consider the following questions: May a Board member of the Texas Structural Pest Control Board, appointed as a licensed industry member pursuant to Section 3(a) of Article 135b-6, Texas Civil Statutes: a) Teach re-certification courses required of all licensed certified applicators which must be approved by the Board? b) Consult with licensed structural pest control businesses regarding problems with service which may or may not result in litigation and/or complaints to the Structural Pest Control Board? c) Teach a Board-approved technician training course which has been approved under the provisions of Section 4A of the Structural Pest Control Board and 22 TAC 593.21? d) Teach general technician training courses which assist persons in complying with 22 TAC 593.21, but are not specifically approved or reviewed by the Agency?

AOR-346 The Texas Ethics Commission has been asked to consider whether a city police officer in Texas may accept a fee for performing services as an expert fingerprint examiner in a criminal case in Louisiana.

AOR-347 The Texas Ethics Commission has been asked to consider the following situation: A judicial candidate has filed a campaign treasurer appointment and a judicial declaration of intent to comply with expenditure limits. The candidate's opponent has not filed a judicial declaration of intent. The candidate asks whether his opponent is a "noncomplying candidate" for purposes of the act. The candidates also asks whether he is required to comply with all of the restrictions in the Judicial Campaign Fairness Act.

AOR-348 The Texas Ethics Commission has been asked to consider whether an officeholder may use campaign funds to pay for the damages an individual suffered in an accident in which the officeholder was involved official duties. Neither the officeholder nor the political subdivision the officeholder represents has a legal obligation to pay for such damages.

AOR-349 The Texas Ethics Commission has been asked to consider whether a judicial candidate may spend political contributions to hold a victory party in conjunction with a charity golf tournament.

AOR-350 The Texas Ethics Commission has been asked to consider whether a legislator may use political contributions to pay rent and maintenance fees for a condominium in Travis County that the officeholder's wife owns as separate property.

AOR-351 The Texas Ethics Commission has been asked to determine who is liable for a fine imposed for late filing of a general-purpose political committee's report of contributions and expenditures.

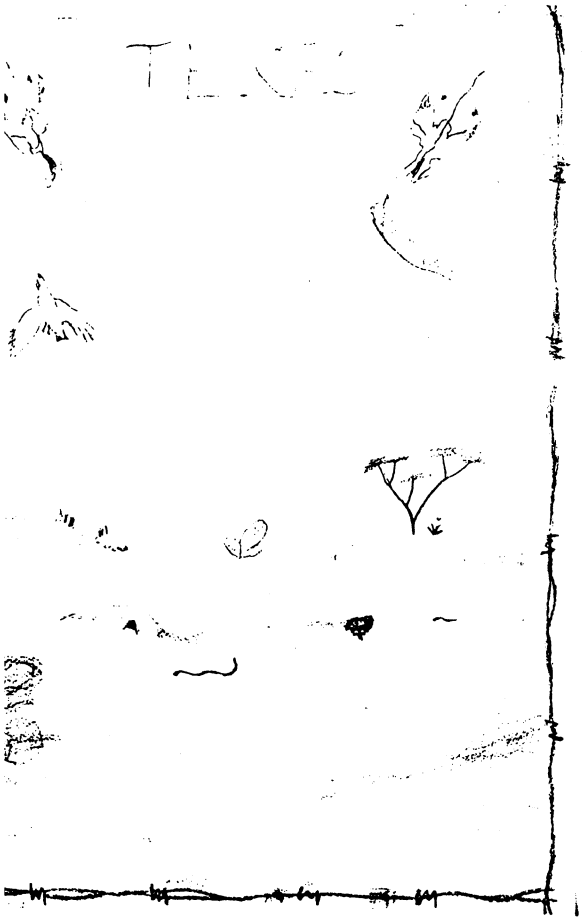
AOR-352 The Texas Ethics Commission has been asked whether a member of a state board, who is an "equity member" of a law firm operated as a professional corporation, may act upon a matter coming before the commission involving the financial interests of a client of the law firm.

Issued in Austin, Texas, February 9, 1996.

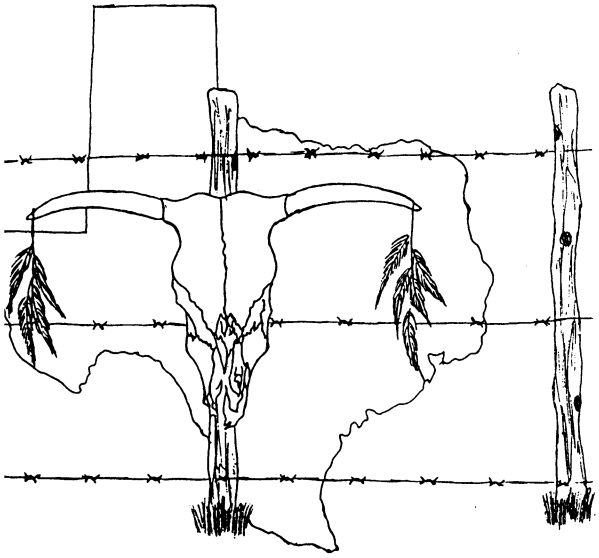
TRD-9603434 Tom Harrison
Executive Director
Texas Ethics Commission

Filed: March 11, 1996

Name: Robin Brown
Grade: 11
School: Brady High School, Brady ISD



Name: Riley King
Grade: 10
School: Brady High School, Brady ISD



PROPOSED RULES

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

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

TITLE 1. ADMINISTRATION
Part V. General Services Commission
Chapter 123. Facilities Planning and Construction Division
Building Construction Administration
• 1 TAC §123.15

The General Services Commission proposes an amendment to §123.15, concerning selection of architects/engineers for professional services. The amendments change the statutory cite in §123.15(a) and the term "architect/engineer" to "design professional". These changes are in accordance with the Texas Government Code, Title 10, Subtitle D, §2166.202 (formerly known as Texas Civil Statutes, Article 601b, §5.22).

The amendment also establishes an executive selection committee to select design professionals for construction projects.

Tom Treadway, 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.

Mr. Treadway 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 there will be improved selection of design professionals for construction projects. 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 David Brown, Assistant General Counsel, General Services Commission, P.O. Box 13047, Austin, Texas 78711-3047. Comments must be received no later than 30 days from the date of publication of the proposal to the *Texas Register*.

The amendment is proposed under the Government Code, Title 10, Subtitle D, Chapter 2166, which provides the General Services Commission with the authority to promulgate rules consistent with the Code.

The following statutes and codes are affected by this amendment: Government Code, Title 10, Subtitle D, Chapter 2166.

§123.15. Selection of ***a Design Professional*** *[Architect/Engineer] for Professional Services.*

(a) Selection of **a design professional** [an architect/engineer] for professional services shall be in accordance with **Texas Government Code, Title 10, Subtitle D, §2166.202** [Texas Civil Statutes, Article 601b, §5.22].

(b) If a using agency chooses to recommend **a design professional** [an architect/engineer] for a project, the recommendation should accompany the project request.

(c) The following procedures shall be used for the **design professional** [architect/engineer] selection.

(1) **A preliminary technical review** [selection] committee will be formed consisting of at least three commission staff architects or engineers who are knowledgeable about the nature, scope, and location of the project.

(2) An executive selection committee will be formed consisting of the executive director, a member of the preliminary technical review committee, and a representative from the Office of Executive Administration.

(3)[(2)] The commission recognizes that professional services required for each project will differ. Criteria developed from the project description will be used by the **preliminary technical review** committee to formulate the list of **design professionals** [architect/engineers] for **preliminary evaluation** [the comparative selection based ranking of the architect/engineers]. Such criteria include, but are not necessarily limited to, considerations such as project type, size, complexity, the ability and capacity of the **design professional** [architect/engineer] for timeliness, skill, creative ability, technical and professional knowledge, and history of previous work on comparable construction projects. The project description will provide a basis for the list of minimum qualifications that a prospective **design professional** [architect/engineer] should possess in order to provide professional services on the project.

(4)[(3)] The **preliminary technical review** [selection] committee **with the approval of the executive director, will** where possible, [will] compile a list of [at least] ten firms that meet or exceed the minimum qualifications for further consideration. At least 50% of the selected firms will be drawn from the historically underutilized businesses (HUBs) Architects/Engineers directory maintained by the **facilities construction division** [Facilities Construction and Space Management Division] unless a notation, approved by the commission HUB certification office, explains circumstances resulting in less than 50% HUBs being listed for further consideration. It is recognized by the commission that ten firms is an optimum number of firms that could effectively be considered without causing undue administrative delay in the project. More than ten firms may actually meet the minimum requirements established for the project, but no additional firms will be considered unless the **preliminary technical review** [selection] committee decides it can do so without undue administrative delay in the project.

(A) Upon determination by the commission that a project for repair, rehabilitation, or renovation is of limited scope for professional services, the commission may consider a lesser number of **design professional** [architect/engineer] firms for selection consideration.

(B) Selection of **a design professional** [an architect/engineer] firm for providing emergency services will be made

following a determination by the **executive director** [commission] that [an emergency] project warrants professional services, and that professional services are required in an urgent time frame which does not permit normal selection committee procedures to occur.

(5)[(4)] The list will be drawn from a file of **design professional** [architect/engineer] firms that have expressed an interest in work supervised by the commission by having responded to a standard questionnaire or by submitting adequate data on experience and capability in other formats, or by having submitted an application for HUB certification.

(6)[(5)] Firms selected for consideration will be notified and given a brief description of the project and those interested in further consideration will be scheduled for an interview with the **preliminary technical review** [selection] committee. Individuals or firms shall be allowed a 30-day response time period for preparation and submission of information which presents specific project experiences and qualifications to the **preliminary technical selection committee except in the event of an emergency as provided in the Texas Government Code, §2166.203(b)** [commission].

[(6) Each firm interviewed will be rated individually by each committee member on a scale of one to 10. The firm receiving the highest total rating from the combined members of the committee will be considered the preferred firm for the project.

[(7) In case of identical scores for the top two or three firms, additional qualifications of the firms will be considered and rated individually until ties are resolved.]

(7) Each firm interviewed by the preliminary technical review committee will be evaluated for technical qualifications according to the criteria set forth in subsection (c)(11). The preliminary technical review committee will evaluate each interviewed design professional as exceeding, meeting, or not meeting technical qualifications for the project. The preliminary technical review committee will refer all design professionals meeting or exceeding technical qualifications to the executive selection committee together with its findings regarding such design professionals. In addition, the preliminary technical review committee will report to the executive selection committee its findings concerning any design professional evaluated as not meeting technical qualifications.

(8) The executive selection committee will score the design professionals referred to it by the preliminary technical review committee according to the criteria set forth in subsection (c)(12). In the case of identical scores for those design professionals scored the highest, additional qualifications of the firms will be scored until ties are resolved.

[(8) The firm rated highest by the committee will then be offered the project and an agreement negotiated for the work included. Should this firm and the commission fail to arrive at a mutually acceptable agreement, the project will then be offered to the firm rated second highest. In the unlikely event that an agreement cannot be reached with the second choice, a similar procedure will be followed with the third highest rated firm. In no event will an agreement be offered to a firm which the committee determines fails to satisfy the minimum determinates for selection considerations].

(9) The commission will attempt to negotiate an agreement with the design professional scored the highest by the executive selection committee. Negotiations by the commission will be under the direction of the executive director. Should the commission be unable to reach an agreement with the design professional scored the highest by the executive selection committee, the commission will attempt to negotiate an agreement with the design professional scored the next highest by the executive selection committee. Should the commission be unable to reach an agreement with such firm, a similar procedure will be followed until an agreement is reached or until the executive selection committee requests that the preliminary technical review committee produce another pool of qualified design professionals for the project, or until the commission decides to terminate selection proceedings for the project.

(10)[(9)] After **a design professional** [an architect/engineer] selection is completed, the firms interviewed but not selected will be advised of the selection [committee determination].

(11)[(10)] Items of consideration in making the initial **evaluation by the preliminary technical review committee** [selection] will include, but not necessarily be limited to, the following:

(A) **design professional's** [architect/engineer's] experience with projects similar in character and or scope for which the **design professional** [architect/engineer] is being considered;

[(B) location of architect/engineer's principal business office relative to the project site;]

(B)[(C)] compatibility between the number **and qualifications** of employees of the **design professional** [architect/engineer] firm and size and complexity of the project;

(C) quality of previous work done for the commission;

[(D) quality and amount of previous work done for the commission. In the interest of giving as many eligible and qualified firms as possible a fair chance to obtain commission work, prior state work may be the basis for rejection;

[(E) current professional service work load and capability of the architect/engineer to commence proceeding with the project at reasonable speed;]

(D) current professional service work load and capability of the design professional to perform the work in the required timeframe;

(E)[(F)] experience with control of budget and **schedule** [cooperation with owner];

(F)[(G)] registration status of persons engaged in the practice of professional architectural or engineering services ; and

(G) qualifications of the design professional team, including subconsultants and HUBs.

[(H) compliance with and contribution to the commission's achieving its HUB contracting goals.]

(12) The executive selection committee will score the design professionals referred to it by the preliminary technical review committee. Criteria used by the executive selection committee will include:

(A) Commitment to HUB participation, including the number of HUBs the design professional proposes to use.

(B) Volume of work previously awarded to the design professional by the commission. In the interest of giving as many eligible and qualified firms as possible a fair chance to obtain commission work, prior work for the commission may be the basis for awarding to a different design professional.

(C) Ability of the design professional to perform work under the project in the time required. Such determination will be based on criteria including:

(i) **work load and capacity;**

(ii) **cooperation with the commission on prior work; and**

(iii) **performance history under prior agreements with other clients of the design professional.**

(D) Technical qualifications as provided by the preliminary technical review 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 March 8, 1996.

TRD-9603401 David Ross Brown
Assistant General Counsel
General Services Commission

Earliest possible date of adoption: April 19, 1996

For further information, please call: (512) 463-3960

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Chapter 125. Travel Management Division

Travel and Transportation Services

• 1 TAC §125.27

The General Services Commission proposes an amendment to §125.27, concerning travel agency contracting requirements as part of the State Travel Management Program. The amendments will correct the acronym "ARC" under §125. 27(b)(3) and (c)(2) to correctly refer to "ARC/IATAN" (Airline Reporting Corporation and/or International Airline Travel Agent Network).

Michael Powers, Director of Support Services, 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.

Mr. Powers 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 clearer understanding of the accreditation requirements needed to provide contract travel agency services to state agencies. 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 David Ross Brown, Assistant General Counsel, General Services Commission, P.O. Box 13047, Austin, Texas 78711-3047. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

The amendment is proposed pursuant to Act of September 1, 1995, Senate Bill 1295, §1, 74th Legislature, 1995 Texas Session Law Service 13 (Vernon) (to be codified at Texas Government Code Annotated, §2171.002), which provides the General Services Commission with the authority to promulgate rules necessary to implement the sections.

The following code is affected by this amendment: Government Code, §§2171. 002 et seq.

§125.27. Travel Agent Services Contracts.

(a) (No change.)

(b) An application must include, but is not limited to, the following:

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

(3) verifying documentation that the vendor has been in business as a travel agency, under the same **ARC/IATAN** [ARC] number, for a minimum of five years, and has been in business as a travel agency providing services using a Computer Reservation System (CRS) for a minimum of five years;

(4)-(5) (No change.)

(c) Vendors seeking to qualify for a Travel Agent Services Contract to provide travel services to state agencies shall:

(1) (No change.)

(2) at the time of application, be in business as a travel agency under the same **ARC/IATAN** [ARC] number for a minimum of five years, and as a travel agency providing services using a Computer Reservation System (CRS) for a minimum of five years;

(3)-(13) (No change.)

(d)-(l) (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 March 8, 1996.

TRD-9603402 David Ross Brown
Assistant General Counsel
General Services Commission

Earliest possible date of adoption: April 19, 1996

For further information, please call: (512) 463-3960

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Part XII. Advisory Commission on State Emergency Communications

Chapter 251. Regional Plans-Standards

• 1 TAC §251.6

The Advisory Commission on State Emergency Communications (ACSEC) proposes an amendment to §251.6 in accordance with Chapter 771 of the Texas Health and Safety Code, establishes guidelines for strategic plans, amendments and equalization surcharge allocation for 9-1-1 emergency service fees and equalization surcharges to support the planning, development, and provision of 9-1-1 service throughout the State of Texas.

Mary Boyd, executive director for ACSEC, has determined that for each year of the first five years the sections are in effect, there will be no fiscal impact on state or local government as a result of enforcing or administering the section. Ms. Boyd has also determined that there will be no fiscal effect on local employment or the local economy.

Ms. Boyd 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 administration and enforcement of the section will be the more efficient administrative regulation of strategic plans, amendments and equalization surcharge allocation. There is no anticipated economic cost to persons required to comply with the rule as proposed.

Comments on the proposal must be submitted in writing within 30 days after publication of the proposal in the *Texas Register* to Ms. Mary Boyd, Executive Director, ACSEC, 333 Guadalupe Street, Suite 2-212, Austin, Texas 78701.

The amendment is proposed pursuant to the Health and Safety Code, Chapter 771, and the Texas Administrative Code, Part XII, Chapter 251, Regional Plans and Standards.

The proposed rule affects the Health and Safety Code, Chapter 771, and the Texas Administrative Code, Part XII, Chapter 251, Regional Plans and Standards.

§251.6. Guidelines for Strategic Plans, Amendments, and Equalization Surcharge Allocation.

(a) (No change.)

(b) Strategic Plan Levels. Regional plans developed in accordance with Chapter 771, along with the commensurate allocation

of the above described funds shall reflect implementation consistent with the following three major strategic plan levels (in order of priority):

(1) Level I: 9-1-1 service generally associated with Automatic Number Identification (ANI), to include the following components and associated costs:

(A) **ANI (equipment and network)** [Central office modification];

(B) **Public Safety Answering Point (PSAP) room preparation** [9-1-1 trunks];

(C) **Language line** [Alternative networks];

(D) **PSAP supplies** [Public Safety Answering Point (PSAP) equipment room preparation];

(E) **Telecommunications Device for the Deaf (TDD)** [PSAP/ANI displays, etc.];

(F) **Maintenance and repair (ANI/TDD); and** [Telephone equipment;]

(G) **Capital Recovery (ANI/TDD).** [Language line;] [(H)Maintenance and repair of Customer Premises Equipment (CPE); and [(I)Capital recovery of the above equipment.]

(2) Level II: 9-1-1 service generally associated with **ANI,** Selective Routing (SR) and Automatic Location Identification (ALI), to include the following components and associated costs:

(A) **ANI/ALI/SR (equipment and network)** [Master Street Assignment Guide (MSAG)];

(B) **PSAP room preparation** [SR/ALI/PSAP room preparation];

(C) **Addressing** [Data links];

(D) **Addressing maintenance** [ALI displays, etc.];

(E) **PSAP training** [Maintenance and repair of CPE];

(F) **Maintenance (CPE)** [Addressing]; and

(G) **Capital recovery (addressing and telephone equipment)** [Capital recovery of the above equipment].

(3) Level III: Other 9-1-1 equipment, services and enhancements to same, to include, but not limited to the following components and associated costs:

(A) **Additional trunk diversity** [Network improvements like additional trunk diversity, other redundancy, and cellular access];

(B) **Other redundancy** [Other enhancements like emergency power, recorders, pagers, detectors/diverters, external ringers];

(C) **Wireless access** [Maintenance and repair of the above equipment; and]

(D) **Training positions;** [Other]

(E) **Emergency power;**

(F) **Recorders;**

(G) **Pagers;**

(H) **Detectors/Diverters;**

(I) **External Ringers;**

(J) **Mapped ALI;**

(K) **Capital Recovery (Emergency power, recorders, training positions); and**

(L) **Maintenance (recorders, ancillary equipment)**

(c) Strategic Plans. Regional plans developed in compliance with Chapter 771 shall include a strategic plan that projects regional 9-1-1 service costs, and service fee and other non-equalization surcharge revenues at least three years into the future[, beginning September 1, 1994]. Within the context of Section 771.056(d), the ACSEC shall consider any revenue insufficiencies to represent need for equalization surcharge funding support.

(1) (No change.)

(2) Strategic plans shall be reviewed and amended, as [necessary, six months following initial adoption and approval by the ACSEC, or no later than March 1, 1995. Following that initial review, said plans shall be reviewed and amended, as] appropriate, on an annual basis [beginning September 1, 1995].

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

(d) Amendments to Regional Plans.

(1) A regional planning commission may make changes to its approved regional plan to accommodate unanticipated requirements and/or to prevent disruption of its implementation schedule, contingent upon **compliance with all ACSEC policies and procedures** [the following]:

(A) The changes do not require additional equalization surcharge funds; **and**

[(B) The annual effect of such changes of strategic plan components within strategic plan levels do not exceed 5.0% of the total strategic plan budget; and]

(B)[(C)] The changes are consistent with all ACSEC policies and procedures.

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

(e)-(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 March 8, 1996.

TRD-9603397 Mary A. Boyd
Executive Director
Advisory Commission on State Emergency Communications

Earliest possible date of adoption: April 19, 1996

For further information, please call: (512) 305-6911

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TITLE 7. BANKING AND SECURITIES

Part VII. State Securities Board

Chapter 129. Administrative Guidelines for Registration of Asset-Backed Securities

• 7 TAC §§129.1-129.9

The State Securities Board proposes new §§129.1-129.9, concerning administrative guidelines for registration of asset-backed securities.

The new provisions would reflect the current asset-backed securities guidelines adopted by the North American Securities Administrators Association, Inc. (NASAA), with one exception. Section 129.6(d)(5) has been rewritten to remove certain items from the list of representations prohibited in the subscription agreement. The items removed from the list are representations that: (a) the security holder understands or comprehends the risks associated with an investment in the asset-backed securities; (b) the security holder has read the prospectus; and (c) in deciding to invest in the asset-backed securities, the security holder has relied solely on the prospectus, and not on any other information or representations from other persons or sources.

Micheal Northcutt, Director, Securities Registration Division, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Northcutt also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be a substantial degree of consistency with uniform guidelines for the registration of asset-backed securities. 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 Denise Voigt Crawford, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167.

The new sections are proposed under Texas Civil Statutes, Article 581, §28-1. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of The Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

The new sections affect Texas Civil Statutes, Article 581-7.

§129.1. Introduction.

(a) Application.

(1) These guidelines apply to the registration of asset-backed securities, as defined in subsection (b)(7) of this section, and will be applied by analogy to similar securities issued by issuers that are not required to register as an investment company under the Investment Company Act of 1940.

(2) While applications not conforming to the standards contained in this chapter shall be looked upon with disfavor, where good cause is shown, certain guidelines may be modified or waived by the Securities Commissioner.

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

(1) Acquisition cost-The cost of an eligible asset as reflected on the issuer's balance sheet, net of applicable acquisition expenses and origination fees.

(2) Acquisition criteria-The specified characteristics an eligible asset is required to possess in order for it to be sufficiently similar to other eligible assets to make possible a reliable prediction of the cash flows associated with the eligible assets when pooled in large numbers.

(3) Acquisition expenses-All direct and indirect expenses incurred by the issuer in connection with the selection and acquisition of eligible assets, whether or not acquired, other than origination fees.

(4) Administrator-Referred to as "Securities Commissioner" throughout these guidelines.

(5) Affiliate-With respect to another person, any of the following:

(A) any person directly or indirectly owning, controlling, or holding, with power to vote, 10% or more of the outstanding voting securities of such other person;

(B) any person 10% or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held, with power to vote, by such other person;

(C) any person directly or indirectly controlling, controlled by, or under common control with such other person;

(D) any executive officer, director, trustee, or partner of such other person; or

(E) any legal entity for which such person acts as an executive officer, director, trustee, or partner.

(6) Allowed expenses-Trustee fees, ongoing fees paid to rating agencies, servicing fees, origination fees, acquisition expenses, liquidation expenses, bank service charges, taxes, attorneys' fees, audit fees, and other direct charges incurred by the issuer in the ordinary course of the issuer's business, exclusive of organizational and offering expenses, conversion expenses, and extraordinary expenses.

(7) Asset-Backed securities-Securities that provide a stated rate of return to security holders and that are primarily serviced as to both return of investment and return on investment by the cash flow from designated eligible assets, excluding:

(A) the securities of an investment company subject to the Investment Company Act of 1940; and

(B) equity interests in limited partnerships or other direct investment vehicles subject to other applicable registration guidelines.

(8) Cash flow-The amount of cash generated from operations, calculated in compliance with Financial Accounting Standard 95, plus receipts from the disposition or liquidation of eligible assets.

(9) Collections account-The bank account created to receive cash flow generated by the eligible assets and to maintain the segregation of such cash from other assets of the servicer.

(10) Conversion expenses-The expenses associated with changing from one servicer to another servicer or one trustee to another trustee.

(11) Credit enhancement-Insurance, letters of credit, lines of credit, over collateralization, seller recourse, reserve accounts, senior claim, guarantees, and other arrangements intended to decrease the likelihood of default on the asset-backed securities.

(12) Eligible assets-Financial or commercial assets, either fixed or revolving, which are:

(A) generally homogenous in nature;

(B) subject to reasonably objective valuation;

(C) for other than asset-backed securities with an investment grade rating, self-liquidating or easily liquidated; and

(D) for other than asset-backed securities with an investment grade rating, capable of generating a predictable cash flow.

(13) Investment grade-A rating that is in one of the four highest rating categories as determined by a rating agency.

(14) Issuer-The entity formed to issue the asset-backed securities and to hold ownership of, or a security interest in, the eligible assets.

(15) Liquidation expenses-The expenditures necessary to convert residual or non-performing eligible assets, or any underlying collateral, into cash, including expenditures necessary to collect on insurance or other credit enhancements.

(16) Net worth-The excess of total assets over total liabilities as determined by generally accepted accounting principles.

(17) Obligor-A person obligated to make the payments on or under an eligible asset.

(18) Operating account-The bank account created to receive offering proceeds and revenues from the collections account which are not required to be transferred to the trust account, and from which payments are made for additional eligible assets and allowed expenses.

(19) Organizational and offering expenses-All expenses incurred in connection with and in preparing the asset-backed securities for registration and subsequently offering and distributing the asset-backed securities to the public. Organizational and offering expenses include, but are not limited to, total underwriting and brokerage discounts and commissions (including fees of the underwriters' attorneys), initial fees paid to rating agencies, expenses for printing, engraving, mailing, salaries of employees while engaged in sales activity, charges of transfer agents, registrars, trustees, escrow holders, depositaries, experts, expenses of qualification of the sale of the securities under federal and state laws, including taxes and fees, and accountants' and attorneys' fees.

(20) Origination fees-All fees, commissions, or other consideration, other than the purchase price of the eligible assets, paid by any party to any party in connection with the origination and sale of eligible assets to the issuer. Origination fees does not include professional fees paid to attorneys, accountants, appraisers, initial fees paid to rating agencies, and similar professionals for providing routine professional services, which fees shall be deemed acquisition expenses.

(21) Originator-An entity, which may or may not be the sponsor, that creates or originates, directly or indirectly, eligible assets to be sold or pledged, to the issuer.

(22) Paying agent-The trustee or other entity responsible for disbursing funds from the trust account to the security holders in satisfaction of the issuer's obligation for payments on the asset-backed securities.

(23) Person-Any natural person, partnership, corporation, association, trust, or other legal entity.

(24) Prospectus-The primary disclosure document(s), by whatever name known, utilized for the purpose of offering and selling asset-backed securities to the public.

(25) Rating agency-Standard and Poor's Ratings Group, a division of McGraw Hill Company; Moody's Investors Service, Inc.; Fitch Investors Service, Inc.; Duff and Phelps Credit Rating Co.; or a successor to any of the foregoing.

(26) Security holders-The persons in whose names the issuer's asset-backed securities are held and to whom payments pursuant to the terms of the trust agreement are entitled to be made.

(27) Servicer-The entity responsible for the management of the issuer's assets and the conversion of such assets into the cash flow necessary to make stated payments on the asset-backed securities.

(28) Servicing agreement-The contract that establishes the responsibilities and compensation of the servicer.

(29) Servicing fees-Compensation paid to the servicer pursuant to the terms of the servicing agreement.

(30) Special purpose entity-A trust, corporation, partnership, limited liability company, or other legal entity formed for the purpose of making one or more offerings of asset-backed securities, holding an ownership interest or a security interest in the eligible assets, and forwarding the cash flows from the eligible assets to the security holders.

(31) Sponsor-Any person directly or indirectly instrumental in organizing, wholly or in part, an issuer or any person, other than the trustee, who will control, manage, or participate in the management of an issuer or its assets. Not included is any person whose only relationship with the issuer is that of an independent servicer of the issuer's eligible assets, and whose only compensation is as such. "Sponsor" does not include wholly independent third parties such as attorneys, accountants, rating agencies, and underwriters whose only compensation is for professional services rendered in connection with the offering of asset-backed securities.

(32) Stated rate of return-A return where the security holder is entitled to receive either:

(A) a stated principal amount;

(B) interest on the principal amount (which may be a notional principal amount) calculated by reference to:

(i) a fixed rate, or

(ii) a standard or formula which does not reference any change in the market value or fair value of eligible assets;

(C) interest on a principal amount (which may be a notional principal amount) calculated by reference to:

(i) auctions among security holders and prospective security holders, or

(ii) a periodic remarketing of the asset-backed security;

(D) an amount representing specified fixed or variable portions of the interest generated by the underlying eligible assets; or

(E) any combination of subparagraphs (A)-(D) of this paragraph.

(33) Trust account–The bank account created to receive funds from the collections account and the operating account and from which payments are made on the asset-backed securities of the issuer.

(34) Trust agreement–The governing document(s), by whatever name, which defines the pooling arrangements and which establishes the rights, privileges, duties, and responsibilities of the trustee, the issuer, the security holders, and, in some cases, the servicer in connection with the issuance of the asset-backed securities. The trust established by the trust agreement may or may not be a taxable entity and it may or may not serve as the issuer of the asset-backed securities. The trust agreement may include the servicing agreement.

(35) Trustee–The financial institution meeting the requirements under §129.5 of this title (relating to Requirements of Trustees) which is party to the trust agreement and which has the primary responsibility of representing the interests of the security holders by assuring the terms of the trust agreement are enforced.

(36) Trustee fees–The fees and other consideration paid to the trustee for performing services under the trust agreement.

§129.2. Requirements of Sponsor.

(a) Experience. For other than asset-backed securities with an investment grade rating, the sponsor or its management shall be able to demonstrate the knowledge and expertise necessary to supervise the origination, pooling, and servicing of the type of eligible assets being securitized.

(b) Financial condition.

(1) The sponsor shall generally be required to demonstrate that it is solvent and will, with reasonable certainty, be able to meet any financial obligations to the issuer.

(2) If the Securities Commissioner deems it relevant, the sponsor shall provide, supplementally, complete audited financial statements for its most recent fiscal year and, if necessary, unaudited financial statements prepared within 135 days of the date that the application for registration of the asset-backed securities is made effective by the Securities Commissioner.

(c) Credit enhancements.

(1) The sponsor will be required to make or cause to be made an equity contribution to the issuer or provide or cause to be provided other substantial credit enhancements to help establish a reasonable likelihood that the stated rate of return will be realized, unless:

(A) the asset-backed securities have an investment grade rating; or

(B) the Securities Commissioner waives this requirement.

(2) The sponsor shall describe the credit enhancement in the prospectus. If the credit enhancement is provided by third parties, the description of the credit enhancement shall include summary information about the entity providing the credit enhancement.

(d) Portfolio characteristics.

(1) For other than asset-backed securities with an investment grade rating, the sponsor must be able to demonstrate, based on designated acquisition criteria or specifically identified eligible assets, that the eligible assets being pooled will generate sufficient cash flow to make all scheduled payments on the asset-backed securities after taking allowed expenses into consideration.

(2) For other than asset-backed securities with an investment grade rating, if a significant portion of the cash flow is anticipated to come from the liquidation of tangible assets underlying the eligible assets, additional evidence should be provided establishing the issuer's or servicer's ability to reliably predict the value of such tangible assets.

(3) For other than asset-backed securities with an investment grade rating, if the cash flow is primarily based upon the credit quality of the obligors, evidence should be provided demonstrating that adequate measures are taken to qualify obligors.

(4) The sponsor shall disclose, in the prospectus, certain information regarding the identified eligible assets, including:

(A) the outstanding principal balance of the eligible assets;

(B) the outstanding principal balance of the eligible assets as a percentage of the total amount of asset-backed securities being offered;

(C) the cash flow currently being generated by the eligible assets as a percentage of the total amount of asset-backed securities being offered;

(D) a description of what constitutes a default;

(E) the amount of eligible assets in default;

(F) the amount of eligible assets in default as a percentage of the total amount of asset-backed securities being offered; and

(G) the amount of eligible assets in default as a percentage of the credit enhancement.

(e) Stated rate of return. Asset-Backed securities must have a stated rate of return.

(f) Asset selection.

(1) Acquisition criteria for the eligible assets or the relevant characteristics of any specified pool of eligible assets must be set forth in the prospectus and the trust agreement.

(2) If eligible assets are selected from a larger pool of eligible assets owned or controlled by the sponsor, the selection process must be random, unless a reasonable basis exists for selecting eligible assets on a non-random basis. Any selection method used must be fair and must be fully disclosed in the prospectus.

(g) Asset repurchases and substitutions.

(1) The sponsor may repurchase an eligible asset or may substitute one or more eligible assets which are part of the collateral underlying the asset-backed securities with new eligible assets if:

(A) the eligible assets which are to be repurchased or replaced are found not to meet the acquisition criteria or are otherwise found not to comply with the requirements set forth in the trust agreement; and

(B) the repurchase or substitution is not made for the purpose of recognizing gains or decreasing losses resulting from market value changes in the issuer's portfolio of eligible assets.

(2) The sponsor or another person may repurchase the eligible assets when the pool of eligible assets has been reduced to 15% or less of the original eligible assets.

(3) A repurchase must be made at a price determined by a fair and reasonable formula set forth in the original prospectus.

(4) If a substitution takes place, the new eligible asset must have equal or greater scheduled cash flow, approximately the same term and, if appropriate, equal or greater liquidation value than the eligible asset to be replaced. Compliance with this requirement must be verified by a certified public accountant, or if the eligible asset is readily marketable, by documentation of the current market value of the eligible asset.

(5) If any repurchases or substitutions take place and the asset-backed securities are rated at the time of the initial offering, then the initial rating must be maintained.

(6) The sponsor shall provide a report representing compliance with these requirements to the trustee simultaneously with consummating the repurchase or substitution.

(7) The sponsor shall disclose, in the prospectus, any obligation it has to repurchase eligible assets.

(h) Reinvestment of excess cash flow. Cash flow not needed for stated payments on the asset-backed securities, reserve deposits, or other designated purposes, may be reinvested in additional eligible assets which meet acquisition criteria.

(i) Distributions to sponsor and residual owners.

(1) Distributions of excess cash flow or eligible assets to the sponsor, or other residual owners of the issuer, while the asset-backed securities are outstanding will be allowed, provided that:

(A) the specific circumstances permitting such distributions are fully disclosed in the prospectus; and

(B) the ability of the issuer to make all subsequent stated payments on the asset-backed securities, as determined on the date of such distributions, is not materially diminished as a result of such distributions.

(2) For other than asset-backed securities with an investment grade rating, the issuer must provide reasonable evidence that such distribution rights will not impact the credit quality of the asset-backed securities at the time the asset-backed securities are registered.

§129.3. Requirements of Issuer.

(a) Must be a special purpose entity.

(1) The issuer must be a special purpose entity and, therefore, will generally not be permitted to:

(A) have employees, other than non-compensated officers; or

(B) incur obligations other than allowed expenses, conversion expenses, organizational and offering expenses, and other extraordinary expenses arising from a change of servicers or similar extraordinary event.

(2) The issuer may make more than one offering, if the asset-backed securities have an investment grade rating or if each offering is secured by a distinct pool of assets, with cross-defaults and cross-collateralization prohibited by contract or otherwise.

(3) If the issuer is not a trust, there must be a supplemental trust agreement administered by a trustee.

(b) Interest in eligible assets.

(1) For other than asset-backed securities with an investment grade rating, the issuer's interest in the eligible assets must be an ownership interest or a security interest.

(2) The eligible assets may be held by a special purpose entity other than the issuer if the issuer's ownership interest or security interest in the eligible assets is supported by an opinion of counsel as required by subsection (c)(2) of this section.

(c) Opinion of counsel. For offerings where the issuer acquires ownership of the eligible assets, the Securities Commissioner may require the issuer to provide an opinion of qualified counsel to the effect that, in the event of a bankruptcy by the sponsor or an originator or other seller of eligible assets to the issuer, the transfer of eligible assets would be treated as a true sale.

(1) For offerings where the issuer acquires a security interest in the eligible assets an opinion may be required indicating:

(A) that the security interest will be perfected based on procedures set forth in the trust agreement; and

(B) whether financing statements under the Uniform Commercial Code are necessary to perfect security interests in the eligible assets.

(2) If a special purpose entity, other than the issuer, is established to hold the eligible assets that are pledged to the issuer, an opinion may be required indicating that, in the event of a bankruptcy by the sponsor or an originator or other seller of eligible assets to the special purpose entity, the transfer of eligible assets would be treated as a true sale.

(d) Minimum offering. For other than asset-backed securities with an investment grade rating, the minimum amount of proceeds required to close the offering shall be sufficient to allow the issuer to acquire all specified eligible assets or a sufficient amount of unspecified eligible assets to diversify the pool of eligible assets to the extent necessary to achieve a high level of confidence with respect to the statistical characteristics of the portfolio.

(e) Proceeds escrow. All funds received prior to achieving the minimum offering size must be deposited in an interest bearing account with an independent escrow agent whose name and address shall be disclosed in the prospectus. Provision must be made for the return to the investors of 100% of paid subscriptions, plus interest earned, in the event that the established minimum size is not reached.

(f) Offering and investment period.

(1) The offering period may not exceed one year from the date of effectiveness unless permitted by the Securities Commissioner.

(2) The Securities Commissioner may require the available proceeds from offerings that do not have an investment grade rating to be fully invested in eligible assets within two months from the date such proceeds are released from escrow.

(g) Investments other than in eligible assets. For other than asset-backed securities with an investment grade rating, cash held in collections accounts, operating accounts, trust accounts or reserve accounts, cash held pending investment in eligible assets, cash held pending distribution to security holders, and other temporary cash balances may be invested, either directly or through money market funds, in securities that are direct obligations of, or fully guaranteed by, the U.S. government or a U.S. government agency or instrumentality, certificates of deposit, demand or time deposits, and bankers acceptances from any state or federally chartered depository institution having an investment grade rating.

(h) Monitoring by rating agency. If the asset-backed securities are rated at the time of the initial offering the issuer must agree to pay to have that rating monitored at least annually.

(i) Issuer reports. The trust agreement shall provide that the issuer or trustee shall cause to be prepared and distributed to the security holders the following reports:

(1) concurrently with distributions to security holders, a report containing relevant information regarding the performance of the issuer's portfolio of eligible assets, including cash flows, delinquency rates, gross and net loss rates, substitution, and changes in the outstanding principal balance of eligible assets, if applicable;

(2) where forecasts have been provided to security holders, at least annually, a table comparing the forecasts previously provided with the actual results during the period covered by the report; and

(3) an annual audited financial statement of the issuer.

§129.4. Requirements of Servicer.

(a) Experience.

(1) For other than asset-backed securities with an investment grade rating, the servicer or its management must have at least three years experience servicing eligible assets similar to those to be acquired by the issuer.

(2) With respect to portfolios of eligible assets that require intensive levels of servicing, a greater amount of experience may be required.

(3) The servicer may be required to provide, supplementally, summary information regarding the performance of prior pools of similar eligible assets which it has serviced.

(b) Financial condition.

(1) For other than asset-backed securities with an investment grade rating, the servicer must be able to demonstrate that it is solvent and possesses the financial resources necessary to perform under the servicing agreement and/or trust agreement.

(2) For other than asset-backed securities with an investment grade rating, if the servicer is to provide any financial guarantees or advances in connection with the issuance of the asset-backed securities it must demonstrate its ability to perform on such guarantees or advances under a default.

(3) For other than asset-backed securities with an investment grade rating, if the Securities Commissioner deems it relevant, the servicer shall provide, supplementally, complete audited financial statements for its most recent fiscal year end and, if necessary, unaudited financial statements prepared within 135 days of the date that the application for registration of the asset-backed securities is made effective by the Securities Commissioner.

(c) Independence. The servicer may not be affiliated with the trustee. For other than asset-backed securities with an investment grade rating, the servicer may not be affiliated with any obligor under any eligible asset. Provided however, the trustee may serve as successor servicer if it is otherwise qualified to perform the servicing function.

(d) Servicer reports. The servicing agreement shall require that the servicer prepare and deliver to the trustee the following reports, if applicable.

(1) On a monthly basis or similar time interval that coincides with the timing of cash flows from the eligible assets:

(A) for other than asset-backed securities with an investment grade rating, a report containing relevant information regarding the performance of the portfolio of eligible assets, including cash flows, delinquency rates, gross and net loss rates, substitution, and changes in the outstanding principal balance of eligible assets;

(B) information regarding the status of credit enhancements, including the extent to which any such credit enhancements have been utilized by the servicer to supplement the cash flow associated with the eligible assets; and

(C) for other than asset-backed securities with an investment grade rating, notification of any default in the payment of principal and interest on any other asset-backed securities issued by a special purpose entity with the same sponsor, servicer, and business plan.

(2) On a quarterly basis:

(A) information regarding the identity of each originator or seller of eligible assets to the issuer, and if the originator or seller has guaranteed any aspect of performance of any eligible assets, complete financial statements of the originator or seller as of the most recent date available together with specific information regarding the historical performance of the originator's or seller's portfolio of eligible assets;

(B) information regarding the percentage of eligible assets acquired from each originator or seller; and

(C) information regarding the diversification of each originator's or seller's portfolio of eligible assets with respect to underlying obligors, if applicable.

(e) Termination and replacement.

(1) The servicer may not voluntarily withdraw as servicer, except as may be required by law, or upon at least 30 days' prior notice to the trustee, provided that a qualified successor servicer has been retained, effective as of the resignation date of its predecessor.

(2) In the event that the trustee, sponsor, or security holders terminate the servicer, the servicing agreement shall designate a qualified successor servicer, or the servicing agreement shall specify the criteria for selecting a qualified successor servicer. The successor servicer must be approved by the trustee and must be capable of commencing the servicing of the eligible assets within a commercially reasonable period of time.

§129.5. Requirements of Trustee.

(a) General requirements.

(1) There shall at all times be one or more trustees under the trust agreement.

(2) At least one trustee shall at all times be a corporation organized and doing business under the laws of the United States or of any state or territory thereof or of the District of Columbia which:

(A) is authorized under such laws to exercise corporate trust powers;

(B) is subject to supervision or examination by federal, state, territorial, or District of Columbia authority; and

(C) has a rating, or is a subsidiary of an institution having a rating, issued by a nationally recognized bank or financial institution rating organization, in one of the four highest categories.

(b) Experience.

(1) The trustee or one or more of its corporate trust officers must have at least three years' relevant experience.

(2) The trustee in its commercial capacity must have origination or servicing experience with respect to similar eligible assets.

(c) Independence.

(1) The trustee may not be affiliated with the servicer, the sponsor, or the issuer. Provided however, the trustee may serve as successor servicer if it is otherwise qualified to perform the servicing function.

(2) The trustee may not have received within the last five years and may not receive during the term of the trust agreement more than 5.0% of its total revenue from all sources, including trustee's fees, from the sponsor and the servicer on a combined basis.

(3) The trust agreement shall provide that no more than 5.0% of the loan portfolio of the trustee or its affiliates may be loans to either the issuer, the sponsor, or the servicer.

(d) Withdrawal or termination.

(1) If the trustee voluntarily withdraws as trustee, the issuer or sponsor shall designate a successor trustee. The withdrawing trustee may petition a court to appoint a successor trustee. The withdrawing or resigning trustee must continue to perform under the trust agreement until the successor trustee is designated by the issuer, the sponsor, or the court.

(2) If the trust agreement allows the trustee to be terminated by the security holders or by the issuer, there must be a reasonable procedure set forth in the trust agreement for replacing the trustee.

(e) Duties. At a minimum, the trust agreement shall provide that it shall be the responsibility of the trustee to perform the following duties:

(1) maintain the custodianship of the documentation delivered to it evidencing title or perfected security interest in the issuer's eligible assets;

(2) verify all funds deposited in the trust account for the benefit of the security holders and use its best efforts to verify all payments called for under the terms of the trust agreement;

(3) verify the delivery of all reports and other instruments required pursuant to the terms of the trust agreement and the Securities Exchange Act of 1934;

(4) examine all reports or other instruments furnished to the trustee pursuant to the terms of the trust agreement and determine, based on the information provided, whether there is a violation of any of the terms and conditions set forth in the trust agreement;

(5) in the event that the trustee determines there has been a default under the terms of the trust agreement, the trustee shall be responsible for the timely notification of security holders and the implementation of appropriate remedial actions, and may not first seek additional indemnification other than that provided in the trust agreement from the security holders before taking such actions. The trustee shall be entitled to reimbursement for all costs relating to a default, but the trustee shall not be indemnified for its breach of contract, misconduct, or gross negligence; and

(6) upon notification of a default under §129.4(d) (1)(C) of this title (relating to Requirements of Servicer) the trustee may, if it deems it appropriate, replace the servicer and take any other steps necessary for the protection of security holders.

(f) Trustee report. Annually, the trustee shall provide a report to the security holders which indicates whether the trustee has fulfilled its obligations under the trust agreement and whether there have been any known uncured defaults under the trust agreement.

§129.6. Suitability of Security Holders.

(a) General policy.

(1) The provisions of this section shall not apply to asset-backed securities:

(A) which have an investment grade rating;

(B) which are firmly underwritten; or

(C) for which the sponsor is able to demonstrate that there will be a substantial and active secondary market.

(2) The sponsor shall propose minimum income and net worth standards which are reasonable given the risks associated with the purchase of the asset-backed securities. Offerings with greater investor risk shall have minimum standards with a greater income and net worth requirements. The Securities Commissioner shall evaluate the standards proposed by the sponsor when the issuer's application for registration is reviewed. In evaluating the proposed standards, the Securities Commissioner may consider the following:

(A) potential for variances in cash flows;

(B) intensity of the servicing function;

(C) potential security holders;

(D) relationships among potential security holders and the sponsor;

(E) liquidity of the asset-backed securities;

(F) prior performance of similar pools formed by the sponsor;

(G) financial condition of the sponsor;

(H) credit enhancements;

(I) transactions between the issuer and the sponsor; and

(J) any other relevant factors.

(b) Income and net worth standards.

(1) Unless the Securities Commissioner determines that the risks associated with particular asset-backed securities would require lower or higher standards, security holders shall generally be required to have:

(A) a minimum annual gross income of $45,000 and a minimum net worth of $45,000; or

(B) a minimum net worth of $150,000.

(2) Net worth shall be determined exclusive of home, furnishings, and automobiles.

(3) In the case of sales to fiduciary accounts, these minimum standards shall be met by the beneficiary, the fiduciary account, or by the donor or grantor who directly or indirectly supplies the funds to purchase the asset-backed securities if the donor or grantor is the fiduciary.

(4) The sponsor shall set forth in the final prospectus:

(A) a description of the type of person who might benefit from an investment in the asset-backed securities; and

(B) the minimum standards imposed on security holders.

(c) Determination that sale to security holder is suitable and appropriate.

(1) The sponsor and each person selling asset-backed securities on behalf of the sponsor or issuer shall make every reasonable effort to determine that the purchase of asset-backed securities is a suitable and appropriate investment for each security holder.

(2) In making this determination, the sponsor and/or each person selling shares on behalf of the sponsor shall ascertain that the prospective security holder:

(A) meets the minimum income and net worth standards established for the issuer;

(B) can reasonably benefit from the asset-backed securities based on the prospective security holder's overall investment objectives and portfolio structure;

(C) is able to bear the economic risk of the investment based on the prospective security holder's overall financial situation; and

(D) has apparent understanding of:

(i) the fundamental risks of the investment;

(ii) the lack of liquidity of the asset-backed securities; and

(iii) the background and qualifications of the sponsor.

(3) Each person selling asset-backed securities on behalf of the sponsor or issuer shall make the suitability determination on the basis of information it has obtained from a prospective security holder. Relevant information for this purpose will include at least the age, investment objectives, investment experience, income, net worth, financial situation, and other investments of the prospective security holder, as well as any other pertinent factors.

(4) Each person selling asset-backed securities on behalf of the sponsor or issuer shall maintain records of the information used to determine that an investment in asset-backed securities is suitable and appropriate for a security holder. These records shall be maintained for at least six years.

(5) The issuer shall disclose in the final prospectus the responsibility of each person selling asset-backed securities on behalf of the sponsor or issuer to make every reasonable effort to determine that the purchase of asset-backed securities is a suitable and appropriate investment for each security holder, based on information provided by the security holder regarding the security holder's financial situation and investment objectives.

(d) Subscription agreements.

(1) The Securities Commissioner may require that security holders complete and sign a written subscription agreement.

(2) The sponsor may require that security holders make certain factual representations in the subscription agreement, including the following.

(A) The security holder meets the minimum income and net worth standards established for the issuer.

(B) The security holder is purchasing the asset-backed securities for his or her own account.

(C) The security holder has received a copy of the prospectus.

(D) The security holder acknowledges that the asset-backed securities will not be readily marketable.

(3) The security holders must separately sign or initial each representation made in the subscription agreement. Except in the case of fiduciary accounts, the security holders may not grant any person a power of attorney to make such representations on their behalf.

(4) The sponsor and/or each person selling asset-backed securities on behalf of the sponsor or issuer shall not require security holders to make representations in the subscription agreement which are subjective or unreasonable and which:

(A) might cause the security holder to believe that he or she has surrendered rights to which he or she is entitled under federal or state law; or

(B) would have the effect of shifting the duties regarding suitability, imposed by law on broker-dealers, to the security holders.

(5) Prohibited representations include, but are not limited to, a representation that the investment is a suitable one for the shareholder.

(6) The sponsor may place the content of the prohibited representations in the subscription agreement in the form of advisory disclosures to security holders. The sponsor may not place these disclosures in the security holder representation section of the subscription agreement.

(e) Confirmation. The sponsor or persons selling the asset-backed securities shall send all security holders a confirmation of their purchase.

§129.7. Fees, Compensation, and Expenses.

(a) Disclosure of consideration.

(1) For other than asset-backed securities with an investment grade rating, the sponsor will be required to demonstrate that the total amount of consideration of all kinds which may be paid, directly or indirectly, to all parties is fair, competitive, commercially reasonable, and not less favorable to the issuer than fees or expenses between unrelated third parties. In general, the sponsor is expected to subordinate its interest in the cash flow and liquidation value of eligible assets and the underlying collateral, if any, to that of the security holders.

(2) The prospectus must fully disclose and itemize all consideration which may be received in connection with issuer's activities directly or indirectly by the sponsor, the servicer, and the selling agents, what the consideration is for and how and when it will be paid. This shall be set forth in one location in tabular form.

(b) Organizational and offering expenses. All items of compensation to underwriters or selling agents, including, but not limited to, selling commissions, expenses, rights of first refusal, consulting fees, finders' fees and all other items of compensation of any kind or

description paid by the issuer, directly or indirectly, shall be taken into consideration in computing the amount of allowable organizational and offering expenses. Generally, organizational and offering expenses will not be permitted to exceed 15% of gross proceeds.

(c) Origination fees and acquisition expenses. For other than asset-backed securities with an investment grade rating, origination fees and acquisition expenses paid or to be paid by the issuer, sponsor, or their affiliates must be fully justified based on actual services provided and expenses incurred in connection with acquiring the eligible assets.

(d) Permitted expenses.

(1) Other than allowed expenses, organizational and offering expenses, and conversion expenses, the issuer may only be charged for the actual cost of goods and services used or incurred for or by the issuer and obtained from persons other than the sponsor, servicer, or their affiliates. No reimbursement shall be permitted for goods or services for which the sponsor or servicer are entitled to compensation by way of separate fees. Items excluded from permitted expenses include, but are not limited to, the following:

(A) rent or depreciation, utilities, capital equipment, other administrative items of the sponsor or servicer; and

(B) salaries, fringe benefits, travel expenses, and other administrative items incurred or allocated to any controlling person of the sponsor or servicer.

(2) For other than asset-backed securities with an investment grade rating, the prospectus shall contain a table showing an itemized listing of the fees and expenses expected to be incurred by the issuer annually. The amounts should be expressed in dollars and as a percentage of the gross proceeds of the offering. A fee table similar to the following is recommended:
Figure: 7 TAC §129.7(d)(2)

(e) Servicing fees. For other than asset-backed securities with an investment grade rating, servicing fees must be demonstrated to be fair and reasonable based on the actual services performed.

§129.8. Conflicts of Interest.

(a) Sales of eligible assets to issuer.

(1) For other than asset-backed securities with an investment grade rating, the issuer will not be permitted to acquire an interest in eligible assets in which the sponsor or servicer has an interest unless the following conditions are met:

(A) the transaction occurs at the closing of the offering and is fully disclosed in the prospectus or in the case of revolving and substituted eligible assets the terms and conditions of all transfers are fully disclosed in the prospectus; and

(B) the eligible assets are acquired upon terms fair to the issuer and at a price not to exceed fair market value, inclusive of origination fees and acquisition expenses.

(2) Notwithstanding the requirements of paragraph

(1) of this subsection, the sponsor or servicer may purchase or generate eligible assets in its own name or the name of a nominee and temporarily hold title thereto, for the purpose of facilitating the acquisition of the eligible assets by the issuer. If the offering does not have an investment grade rating, the following additional conditions must be met:

(A) the eligible assets must be purchased by the issuer for a price no greater than the cost of the eligible assets to the sponsor or servicer, adjusted for intervening cash flow and expenses; and

(B) there may be no other benefits arising out of such transaction to the sponsor or servicer apart from compensation otherwise permitted by this chapter and disclosed in the prospectus.

(b) Sales of eligible assets to sponsor or servicer. For other than asset-backed securities with an investment grade rating, a sponsor or servicer shall not be permitted to acquire eligible assets from the issuer, except for:

(1) repurchases or substitutions permitted under §129.2(g) of this title (relating to Requirements of Sponsor);

(2) repurchases where there has been a breach of a representation or warranty pursuant to the trust agreement with respect to eligible assets; and

(3) circumstances where the proceeds are used to redeem 100% of the outstanding principal amount of asset-backed securities, together with interest accrued to the date of redemption, without any penalty to the issuer.

(c) Commingling.

(1) Except as provided in paragraph (2) of this subsection, the assets of the issuer shall not be commingled with the assets of any other person.

(2) For other than asset-backed securities with an investment grade rating, all cash flows generated by the eligible assets shall be deposited, daily, into a segregated collections account.

(3) For other than asset-backed securities with an investment grade rating, in no event shall the servicer hold cash flow in its own account for more than 48 hours, unless such amounts are guaranteed by a letter of credit, a segregated reserve account, or other arrangement acceptable to the Securities Commissioner. Amounts in the collections account may be transferred to an operating account for reinvestment and the payment of allowed expenses or directly to a trust account for distribution to security holders.

(d) Multiple offerings. For other than asset-backed securities with an investment grade rating, if the Securities Commissioner deems it appropriate, the Securities Commissioner may delay the registration of asset-backed securities of another special purpose entity formed by the sponsor to purchase similar eligible assets until:

(1) the offering of the asset-backed securities is completed; and

(2) 75% of the proceeds of the offering have been invested, or committed to investment, in eligible assets.

(e) Other affiliated transactions. For other than asset-backed securities with an investment grade rating, the trust agreement shall provide that all transactions between the issuer and the sponsor or the servicer or their affiliates will be on terms no less favorable to the issuer than could be obtained from a non-affiliated entity in an arms length transaction.

§129.9. Disclosure and Marketing.

(a) Sales material. Sales material, including without limitation, books, pamphlets, movies, slides, article reprints, television and radio commercials, materials prepared for broker-dealer use only, sales presentations (including prepared presentations to prospective security holders at group meetings) and all other advertising used in the offer or sale of asset-backed securities shall conform to filing, disclosure, and adequacy requirements under all applicable Board rules. Statements made in sales material communicated directly or

indirectly to the public may not conflict with, or modify risk factors or other statements made in the prospectus.

(b) Prospectus and its contents.

(1) Prohibited representations.

(A) In connection with the offering and sale of asset-backed securities, neither the sponsor(s) nor the underwriter(s) may, in writing or otherwise, directly or indirectly, represent or imply that the Securities Commissioner has approved the merits of the investment or any aspects thereof.

(B) Any reference to compliance with this chapter or any provisions herein which connotes or implies compliance shall not be allowed.

(C) The title of the issuer may not include the words "mutual fund" or "fund."

(2) Forecasts. A forecast of the issuer's economic performance may be included in the prospectus and in the sales material for the offering if it complies with all of the following requirements.

(A) The forecast is realistic in its predictions and shall clearly identify the assumptions made with respect to all material features of the presentation.

(B) The forecast is examined by an independent certified public accountant in accordance with the Guide for Prospective Financial Statements and the Statement on Standards for Accountant's Services on Prospective Financial Information as promulgated by the American Institute of Certified Public Accountants. The report of the independent certified public accountant is included in the prospectus.

(C) If any part of the forecast appears in the sales material, the entire forecast, including notes, must be presented.

(D) The forecast is for a period equal to the term of the asset-backed securities.

(E) If supplemental projections are included in the prospectus or the sales material, they must be accompanied by the complete forecast.

(3) Prior portfolio performance. For other than asset-backed securities with an investment grade rating, for previous offerings, by the sponsor, the prospectus shall disclose relevant facts and performance information for each such offering made within ten years of the date the registration application is filed with the Securities Commissioner; provided however, information regarding offerings made within six months of the date the registration application is filed with the Securities Commissioner need not be included in the disclosure. The Securities Commissioner may allow the disclosure to be limited to offerings of asset-backed securities supported by eligible assets similar to those identified for the current offering unless it is determined that information about other offerings is also relevant. The disclosure should generally include the following:

(A) the acquisition criteria defining the eligible assets;

(B) information indicating whether all stated payments have been made as scheduled;

(C) the structure and key features of the previous offering, if applicable;

(D) the size of the portfolio;

(E) statistical data on losses, delinquencies, recoveries, turnover, and diversification; and

(F) types and amounts of credit enhancements.

(c) Amendments and supplements. A marked copy of all amendments and supplements to an application shall be filed with the Securities Commissioner as soon as the amendment or supplement is available.

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 March 6, 1996.

TRD-9603175 Denise Voight Crawford
Securities Commissioner
State Securities Board

Earliest possible date of adoption: April 19, 1996

For further information, please call: (512) 305-8300

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TITLE 10. COMMUNITY DEVELOPMENT

Part IV. Texas Department of Housing and Community Affairs

Chapter 49. Low Income Housing Tax Credit Rules

- **10 TAC §§49.1-49.15**

(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 Housing and Community Affairs or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Housing and Community Affairs (the Department) proposes the repeal of §§49.1-49.15, concerning the Low-Income Housing Tax Credit Rules. The sections are proposed for repeal in order to enact new sections conforming to the requirements of new regulations enacted under the Internal Revenue Code of 1986, §42 as amended, which provides for credits against federal income taxes for owners of qualified low-income rental housing.

Daisy Stiner, Director of Housing Programs, 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. Stiner 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 to permit the adoption of new rules for the allocation of low-income housing tax credit authority within the State of Texas, thereby enhancing the State's ability to provide safe and sanitary housing for Texans through the tax credit program administered by the Department. 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 Mr. Cherno Njie, Manager, Low Income Housing Tax Credit Program, Texas Department of Housing and Community Affairs, 507 Sabine, Suite 400, Austin, Texas 78701.

The repeals are proposed pursuant to the authority of the Texas Government Code, Chapter 2306; Acts of the 73rd Legislature, Regular Senate Bill 45, Chapter 141, effective May 16, 1993; and Acts of the 73rd Legislature, Senate Bill 1356, Chapter 725, effective September 1, 1993; and the Internal Revenue Code of 1986, §42 as amended, which

provides the Department with the authority to adopt rules governing the administration of the Department and its programs and Executive Order AWR-91-4 (June 17, 1991), which provides this Department with the authority to make housing credit allocations in the State of Texas.

The Texas Government Code, Chapter 2306, is affected by these repeals.

§49.1. Scope.

§49.2. Definitions.

§49.3. State Housing Credit Ceiling.

§49.4. Applications; Environmental Assessments; Market Study; Reservations; Notification; Commitments; Extensions; Carryover Allocations; Agreements and Elections; Extended Commitments.

§49.5. Set-Asides, Reservations and Preferences.

§49.6. Threshold Criteria; Evaluation Factors; Selection Criteria; Final Ranking; Credit Amount; Tax Exempt Bond Financed Projects.

§49.7. Compliance Monitoring.

§49.8. Housing Credit Allocations.

§49.9. Department Records; Certain Required Filings.

§49.10. Department Responsibilities.

§49.11. Program Fees.

§49.12. Manner and Place of Filing Applications.

§49.13. Withdrawals, Amendments, Cancellations.

§49.14. Waiver and Amendment of Rules.

§49.15. Forward Reservations; Binding Commitments.

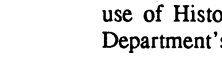
This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on March 11, 1996.

TRD-9603427 Larry Paul Manley
Executive Director
Texas Department of Housing and Community Affairs

Earliest possible of adoption: April 19, 1996

For further information, please call: (512) 475-3916



Chapter 49. Low Income Housing Tax Credit Qualified Allocation Plan and Rules–1996

• 10 TAC §§49.1-49.15

The Texas Department of Housing and Community Affairs (the Department) proposes new §§49.1-49.15, concerning the Low Income Housing Tax Credit Qualified Allocation Plan and Rules–1996. The new sections are necessary to provide procedures for the allocation by the Department of certain low-income housing tax credits available under federal income tax laws to owners of qualified low-income rental housing projects.

Daisy Stiner, Director of Housing Programs, 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. Stiner 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 enhancement of the state's ability to provide safe and sanitary housing for Texans through the efficient and coordinated allocation of federal income tax credit authority available to the state for administration of state housing agencies. 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 Cherno Njie, Manager, Low Income Housing Tax Credit Program, Texas Department of Housing and Community Affairs, 507 Sabine, Suite 400, Austin, Texas 78701.

The new sections are proposed under the Texas Government Code, Chapter 2306; Acts of the 73rd Legislature, Regular Senate Bill 45, Chapter 141, effective May 16, 1993; and Acts of the 73rd Legislature, Senate Bill 1356, Chapter 725, effective September 1, 1993; and the Internal Revenue Code of 1986, §42 as amended, which provides the Department with the authority to adopt rules governing the administration of the Department and its programs and Executive Order AWR-91-4 (June 17, 1991), which provides this Department with the authority to make housing credit allocations in the State of Texas.

The Texas Government Code, Chapter 2306, is affected by these new sections.

§49.1. Scope. The Rules in this chapter apply to the allocation by the Texas Department of Housing and Community Affairs (the Department) of certain low-income housing tax credits authorized by applicable federal income tax laws. The Internal Revenue Code of 1986, §42, as amended, provides for credits against federal income taxes for owners of qualified low-income rental housing Projects. That section provides for the allocation of the available tax credit amount by state housing credit agencies. Pursuant to Executive Order AWR-91-4 (June 17, 1991), the Department was authorized to make housing credit allocations for the State of Texas. As required by the Internal Revenue Code, §42(m)(1), the Department developed a Qualified Allocation Plan (QAP) which is set forth in §49.6 and §49.7 of this title (relating to Threshold Criteria; Evaluation Factors; Selection Criteria; Final Ranking; Credit Amount; Tax Exempt Bond Financed Projects; and Compliance Monitoring). Such QAP has not been signed by the Governor. Sections in this chapter establish procedures for applying for and obtaining an allocation of the low-income housing tax credit, along with insuring that the proper Threshold Criteria, Selection Criteria, priorities and preferences are followed in making such allocations. It is a goal of this Department, through these provisions, to encourage diversity through broad geographic allocation of tax credits within the state and to promote maximum utilization of the available tax credit amount, consistent with ensuring that the tax credits are allocated to owners of Projects that will serve the Department's public policy objectives and federal requirements to provide housing to persons and families of very low and low income. It is the policy of the Department to encourage the use of Historically Underutilized Businesses (HUBs) in all of the Department's programs. In response to this policy, the Department has established a minimum goal of 30% participation of HUBs in the low income housing tax credit program. Project Owners are encouraged to achieve these minimum goals.

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

Ad Hoc Tax Credit Committee-That Committee comprised of members of the Board of the Department charged with the direct

oversight of the Low Income Housing Tax Credit Program, also referred to as the "Committee. "

Affiliate-An individual, corporation, partnership, joint venture, limited liability company, trust, estate, association, cooperative or other organization or entity of any nature whatsoever that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with any other Person, and specifically shall include parents or subsidiaries.

Agreement and Election Statement-A document in which the Project Owner elects, irrevocably, to fix the applicable credit percentage with respect to a building or buildings, as that in effect for the month in which the Department and the Project Owner enter into a binding agreement as to the housing credit dollar amount to be allocated to such building or buildings, which Agreement and Election Statement shall be executed by the Project Owner no later than five days after the end of the month of execution of the agreement as to housing credit dollar amount.

Applicable Fraction-The fraction used to determine the Qualified Basis of the qualified low-income building, which is the smaller of the Unit fraction or the floor space fraction, as defined more fully in the Code, §42(c)(1).

Applicable Percentage-The percentage used to determine the amount of the low-income housing tax credit, as defined more fully in the Code, §42(b).

Applicant-Any Person and any Affiliate of such Person, corporation, a partnership, joint venture, association, or other that submits an Application to the Department requesting a tax credit allocation pursuant to the Rules and the QAP. The Applicant is also the Project Owner unless the Applicant transfers or assigns its interest in the Project; nevertheless, a Project Owner, or the Project Owner's successor in interest, shall be obligated to carry out the commitments made to the Department by the Applicant.

Application-An Application in the form prescribed by the Department, including any required exhibits or other supporting materials, filed with the Department by a Project Owner requesting a low income housing tax credit allocation.

Application Acceptance Period-That period of time as published in the Texas Register during which Applications for tax credits may be submitted to the Department.

Application Round-The period beginning with the start of the Application Acceptance Period and lasting until such time as all available credits (as stipulated by the Department) are allocated, provided that the Application Round not extend beyond the last day of the calendar year.

Application Submission Procedures Manual-That certain manual produced by the Department which sets forth procedures, forms, and guidelines for the filing of Applications for low income housing tax credits, which manual may be amended from time to time by the Department.

Beneficial Owner-A "Beneficial Owner" means:

(A) Any Person who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise has or shares:

(i) voting power which includes the power to vote, or to direct the voting as any other Person or the securities thereof, and/or

(ii) investment power which includes the power to dispose, or direct the disposition of, any Person or the securities thereof;

(B) Any Person who, directly or indirectly, creates or uses a trust, proxy, power of attorney, pooling arrangement or any other contract, arrangement or device with the purpose or effect of divesting such Person of Beneficial Ownership (as defined herein) of a security or preventing the vesting of such Beneficial Ownership as part of a plan or scheme to evade inclusion within the definitional terms contained herein; and

(C) Any Person who has the right to acquire Beneficial Ownership during the Compliance Period, including but not limited to any right to acquire any such Beneficial Ownership:

(i) through the exercise of any option warrant or right,

(ii) through the conversion of a security,

(iii) pursuant to the power to revoke a trust, discretionary account or similar arrangement, or

(iv) pursuant to the automatic termination of a trust, discretionary account, or similar arrangement. Provided, however, that any Person who acquires a security or power specified in clauses (i), (ii) or (iii) of this subparagraph, with the purpose or effect or changing or influencing the control of any other Person, or in connection with or as a participant in any transaction having such purpose or effect, immediately upon such acquisition is deemed to be the Beneficial Owner of the securities which may be acquired through the exercise or conversion of such security or power. Any securities not outstanding which are subject to options, warrants, rights or conversion privileges as deemed to be outstanding for the purpose of computing the percentage of outstanding securities of the class owned by such Person but are not deemed to be outstanding for the purpose of computing the percentage of the class by any other Person.

Board-The governing Board of Directors of the Department and may also denote as used in this chapter, the Committee.

Carryover Allocation-An allocation of current year tax credit authority by the Department pursuant to the provisions of the Code, §42(h)(1)(E) and Treasury Regulations, §1.42-6.

Carryover Allocation Document-A Carryover Allocation Document issued by the Department to a Project Owner pursuant to §49.4(k) of this title (relating to Applications; Environmental Assessments; Market Study; Reservations; Notification; Commitments; Extensions; Carryover Allocations; Agreements and Elections; Extended Commitments).

Carryover Allocation Procedures Manual-That certain manual produced by the Department which sets forth procedures, forms, and guidelines for the filing of request for Carryover Allocations for low income housing tax credits, which said manual may be amended from time to time by the Department.

Code-The Internal Revenue Code of 1986, as the same may be amended from time to time, together with any applicable regulations, rules, rulings, revenue procedures, information statements or other official pronouncements issued thereunder by the United States Department of the Treasury or the Internal Revenue Service relating to the Low Income Housing Tax Credit Program authorized by the Code, §42, and as may be amended from time to time.

Commitment Notice-A Commitment Notice issued by the Department to a Project Owner pursuant to §49.4(h) of this title (relating to Applications; Environmental Assessments; Market Study; Commitments; Extensions; Carryover Allocations; Agreements and Elections; Extended Commitments) and also referred to as the "commitment".

Compliance Period-With respect to a building, the period of 15 taxable years, beginning with the first taxable year of the Credit Period during which the Project Owner is required to maintain a building as a qualified low-income building pursuant to the Code, §42(c)(2).

Contractor-One who contracts for the construction, or rehabilitation of an entire building or Project, rather than a portion of the work. The Contractor hires subcontractors, such as plumbing contractors, electrical contractors, etc., coordinates all work, and is responsible for payment to the said subcontractors. This party may also be referred to as the "general contractor".

Control-(including the terms "controlling," "controlled by, and/or "under common control with") the possession, directly or indirectly, of the power to direct or cause the direction of the

management and policies of any Person, whether through the ownership of voting securities, by contract or otherwise.

Cost Certification Procedures Manual-That certain manual produced by the Department which sets forth procedures, forms, and guidelines for the filing of requests for IRS Forms 8609 for Projects placed into service under the Low Income Housing Tax Credit Program, which said manual may be amended from time to time by the Department.

Credit Period-With respect to a building within a Project, the period of ten taxable years beginning with the taxable year the building is placed in service or, at the election of the Project Owner, the succeeding taxable year, as more fully defined in the Code, §42(f)(1).

Declaration of Land Use Restrictive Covenants (LURA)-An agreement between the Department, the Project Owner and all successors in interest in the Project Owner which encumbers the Project with respect to provisions stipulated in the Code, §42, §§49.1-49.15 of this title (relating to Low Income Housing Tax Credit Qualified Allocation Plan and Rules) , and the Texas Government Code, Chapter 2306 as may be amended from time to time. The LURA includes an Extended Low-Income Housing Commitment Agreement.

Department-The Texas Department of Housing and Community Affairs, a public and official governmental Department of the State of Texas created and organized under the Texas Department of Housing and Community Affairs Act, Texas Government Code, Chapter 2306 and Texas Civil Statutes, Article 4413(501) as amended by the 73rd Legislature, Chapter 725 and 141.

Development Team-All Persons or Affiliates thereof involved in the development, construction, rehabilitation, management and/or continuing operation of the subject Property, which may include any consultant(s) hired by the Applicant for the purpose of the filing of an Application for low income housing tax credits with the Department.

Difficult Development Area-Any area designated by the Secretary of the United States Department of Housing and Urban Development (HUD) as an area which has high construction, land, and utility costs relative to area median gross income.

Eligible Basis-With respect to a building within a Project, the building's Eligible Basis as defined in the Code, §42(d).

Equity Gap-The difference between the total sources of financing for the Project and the total Project costs that is to be filled with the proceeds of the credit

Extended Low-Income Housing Commitment Agreement-An agreement between the Department, the project owner and all successors in interest to the project owner concerning the extended low-income housing use of buildings within the project throughout the extended use period as provided in the Code, §42(h)(6).

Financial Statement-Document(s) which provides information about the Applicant's economic resources, claims against those resources, and the interests of owners at specific dates as more fully defined in subparagraphs (A)-(D) of this definition:

(A) Statement of Financial Position/Balance Sheet-a listing, as of a particular date, of all assets and claims against those assets (liabilities). The difference is equity.

(B) Income Statement-a listing that relates to a specific period of time, presenting an entity's results of operations.

(C) Statement of Retained Earnings-reports all changes in retained earnings during the accounting period, reconciles beginning and ending retained earning balances and provides a connecting link between the income statement and the balance sheet.

(D) Cash Flow Statement-a report listing the changes in an entity's cash and cash equivalents, classified by principal sources and uses, for a given period.

General Projects-Any project which would not be considered a Rural Project as such term is defined by the Department

Governmental Entity-Includes federal or state agencies, departments, boards, bureaus, commissions, authorities, and political subdivisions, special districts and other similar entities.

Historically Underutilized Businesses-Pursuant to Texas Civil Statutes, Article 601b, §§1.02, 1.03, and 1.04, entitled State Purchasing and General Services Act which is codified at Chapter 2161, Texas Government Code, entitled Historically Underutilized Businesses, a business in the form of a corporation, partnership or joint venture which is at least 51% owned, or a sole proprietorship which is 100% is owned by a person or persons who have been historically underutilized due to their identification as a member of a certain group. These individuals must have a proportionate interest and demonstrate regular, continuous, and substantial participation in the Control, operation, and management activities of the entity. The following are the groups which will be considered pursuant to this definition:

(A) African Americans-persons having origins in any of the Black racial groups of Africa;

(B) Hispanic Americans-persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

(C) Asian-Pacific Americans-persons whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, Philippines, Samoa, Guam, U.S. Trust Territories of the Pacific and the Northern Marianas;

(D) Native Americans-persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians; or

(E) Women-includes all women of any ethnicity.

Homeless Person-An individual or family that lacks a fixed, regular, and adequate nighttime residence as more fully defined in 24 Code of Federal Regulations, §841.1, and as may be amended from time to time.

Housing Credit Agency-A governmental entity charged with the responsibility of allocating low income housing tax credits pursuant to the Code, §42. For the proposes of these Rules, the Department is the sole Housing Credit Agency.

Housing Credit Allocation-An allocation by the Department to a Project Owner of low-income housing tax credit in accordance with §49.8 of this title (relating to Housing Credit Allocations).

Housing Credit Allocation Amount-With respect to a Project or a building within a Project, that amount the Department determines to be necessary for the financial feasibility of the Project and its viability as a qualified low income housing Project throughout the Compliance Period and allocated to the Project.

HUD-The United States Department of Housing and Urban Development, or its successor.

Intermediary Costs-Costs associated with the sale or use of tax credits to raise equity capital. Such costs include but are not limited to syndication and partnership organization costs and fees, filing fees, broker commissions, related attorney and accounting fees, appraisal, engineering, environmental site assessment, etc.

IRS-The Internal Revenue Service, or its successor.

Local Tax-Exempt Organization-A Project Owner which is described in the Code, §501(c)(3) or (4), as these cited provisions may be amended from time to time, and which is registered or qualified to conduct business in the State of Texas and/or the governmental unit wherein the Project will be situated.

Person-Means, without limitation, any natural person, corporation, partnership, limited partnership, joint venture, limited liability company, trust, estate, association, cooperative, government, politi-

cal subdivision, agency or instrumentality or other organization of any nature whatsoever and shall include any group of Persons acting in concert toward a common goal.

Physically Challenged Person-A person having a physical or mental impairment that is expected to be of long, continued and indefinite duration, is a substantial impediment to his or her ability to live independently, and is of a nature that the ability to live independently could be improved by a stable residential situation, as more fully defined in 24 Code of Federal Regulations, §841.1, and as may be amended from time to time.

Prison Community-A city or town which is located outside of major Metropolitan Statistical Area (MSA) or Primary Metropolitan Statistical Area (PMSA) and was recently awarded a state prison as set forth in the Reference Manual.

Project-A low-income rental housing Property the owner of which represents it to be a qualified low-income housing Project within the meaning of the Code, §42(g). With regards to this definition, the "Project" is that Property which is the basis for the Application for low income housing tax credits. May also be referred to as the subject "property".

Property-The real estate and all improvements thereon which are the subject of the Application (including all items of personal property affixed or related thereto), whether currently existing or proposed to be built thereon in connection with the Application.

Project Owner-Any Person or Affiliate thereof that owns the Project or expects to acquire Control of the Project pursuant to a purchase contract satisfactory to the Department.

Qualified Allocation Plan-An allocation plan executed by the Governor of the State of Texas which sets forth the Threshold Criteria, Selection Criteria, priorities, preferences, and compliance and monitoring as provided in the Code, §42(m)(1) and as further provided in §49.6 and §49. 7 of this title (relating to Threshold Criteria; Evaluation Factors; Selection Criteria; Final Ranking; Credit Amount; Tax Exempt Bond Financed Projects; and Compliance Monitoring).

Qualified Basis-With respect to a building within a Project, the building's Eligible Basis multiplied by the Applicable Fraction, as more fully defined in the Code, §42(c)(1).

Qualified Census Tract-Any census tract which is designated by the Secretary of HUD and, for the most recent year for which census data are available on household income in such tract, in which 50% or more of the households have an income which is less than 60% of the area median gross income for such year.

Qualified Market Analyst-Certified General Real Estate Appraiser (Texas) who is also designated as MAI, SRPA, RM, SREA or SRA and is independent of any member of the Development Team. The Qualified Market Analyst must also show proof of having taken and passed Parts A and B of the Standards of Professional Practice course within the last five years or is otherwise approved to conduct a market study by the Departments. The Qualified Market Analyst must not be related to or Affiliated with the Project consultant, or the independent CPA employed for certifying the 10% test and/or the final Project cost certification.

Qualified Nonprofit Organization-An organization that is described in the Code, §501(c)(3) or (4), as these cited provisions may be amended from time to time, that is exempt from federal income taxation under the Code, §501(a), that is not Affiliated with or Controlled by a for profit organization, and includes as one of its exempt purposes the fostering of low-income housing, as more fully defined in the Code, §42(h)(5)(C), and Temporary Treasury Regulation, §1.42-1T(c)(5)(ii).

Qualified Nonprofit Project-A Project in which a Qualified Nonprofit Organization has Control (directly or through a partnership) and materially participates (within the meaning of the Code, §469(h), as may be amended from time to time) in its development and operation throughout the Compliance Period.

RECDS-Rural Economic and Community Development Services (RECDS).

Real Estate Owned (REO) Projects-Any existing residential development that is owned or that is being sold by an insured depository institution in default, or by receiver or conservator of such an institution, or is a property held by, HUD, Fannie Mae, Freddie Mac, federally chartered bank, savings and loan association or a federally approved mortgage company or any other federal agency and which qualifies for a waiver of the ten year rule under the Code, §42(d)(6)(A).

Reference Manual-That certain manual, and any amendments thereto, produced by the Department which sets forth reference material pertaining to the Low Income Housing Tax Credit Program.

Rehabilitation Expenditure-Amounts incurred in connection with the rehabilitation which the Project Owner represents to be "Rehabilitation Expenditures" within the meaning of the Code, §42(e)(2).

Residential Development-Any Project that is comprised of at least one "Unit" as such term is defined in this title.

Rules-The Department's low income housing tax credit Rules, §§49.1-49.15 of this title (relating to Low Income Housing Tax Credit Qualified Allocation Plan and Rules) excluding §49.6 and §49.7 of this title (relating to Threshold Criteria; Evaluation Factors; Selection Criteria; Final Ranking; Credit Amount; Tax Exempt Bond Financed Projects; and Compliance Monitoring).

Rural Project-A Project located within an area which:

(A) is situated outside the boundaries of a PMSA or MSA; or

(B) is situated within the boundaries of a PMSA or MSA if it has a population of not more than 20,000 and does not share boundaries with an urbanized area; or

(C) that has received financing or has received a commitment for financing from RECD.

Scattered Site Project-A group of buildings, excluding apartments, triplexes, fourplexes, and townhomes, which would (but for their lack of proximity) qualify as a Project for purposes of the Code and which are all rent restricted, owned by the same Project Owner and financed under a common plan. This shall include all single family detached housing proposed as rental housing.

Selection Criteria-Criteria used to determine housing priorities of the State under the Low Income Housing Tax Credit Program.

Small Development-A Project consisting of not more than ten single-family detached Units or 35 multifamily Units, which is not a part of, or contiguous to, a larger Project which has or will apply to the Department for a tax credit allocation.

Special Housing Project-Any Project developed specifically For Special Housing Need Groups, including mental health/mental retardation Projects, group homes, housing for the homeless, transitional housing, elderly Projects, congregate care facilities, persons with HIV/AIDS, housing in the colonias, migrant farmworkers or as defined in the State Consolidated Plan.

State Housing Credit Ceiling-The limitation imposed by the Code, §42(h), on the aggregate amount of housing credit allocations that may be made by the Department during any calendar year, as determined from time to time by the Department in accordance with the Code, §42(h)(3).

Sustaining Occupancy-The figure at which occupancy income is equal to all operating expenses and mandatory debt service requirements for a Project.

Threshold Criteria-Criteria used to determine the Project's qualifications which are the minimum level of acceptability for consideration under the Low Income Housing Tax Credit Program.

Total Housing Development Cost-The total of all costs incurred by the Project Owner in acquiring, constructing, rehabilitating and financing a Project, as determined by the Department based on the information contained in the Project Owner's Application. Such costs include Intermediary Costs, reserves and any expenses attribut-

able to commercial areas. Projects which include commercial space must allocate the relative portion of all applicable expenses to the commercial space and exclude the same from Total Development Costs. In determining the Equity Gap calculation, the Department will not deduct from the Project's sources of funds the amount of financing associated with the commercial use, unless such financing specifically identifies in its terms that it is being provided for the commercial use.

Unit-Any residential rental unit in a Project consisting of an accommodation containing separate and complete physical facilities and fixtures for living, sleeping, eating, cooking and sanitation. The term "Unit" includes a single room occupancy housing unit used on a non-transient basis.

§49.3. State Housing Credit Ceiling.

(a) The Department shall determine the State Housing Credit Ceiling for each calendar year as provided in the Code, §42(h)(3)(C).

(b) The Department shall publish each such determination in the *Texas Register* within 30 days after notification by the Internal Revenue Service.

(c) The aggregate amount of Housing Credit Allocations made by the Department during any calendar year shall not exceed the State Housing Credit Ceiling for such year as provided in the Code, §42.

§49.4. Applications; Environmental Assessments; Market Study; Commitments; Extensions; Carryover Allocations; Agreements and Elections; Extended Commitments.

(a) Any Project Owner requesting a Housing Credit Allocation for a Project must submit an Application to the Department which Application shall be originally executed by the Project Owner. This Application shall contain full and complete information as to each item specified in the Application Submission Procedures Manual, as amended. When any item is marked "not applicable," the Project Owner shall provide a written explanation why such item is "not applicable." Failure to provide a detailed written explanation will result in the Application being deemed incomplete and not accepted for filing. The Department is also authorized to request the Project Owner to provide any additional information it deems relevant as clarification to the Application. The Department will require, as a part of a completed Application, information to be submitted by the Project Owner which identifies the number of HUBs to be used in the development and/or continuous operation of the Project, in a form specified within the Application Submission Procedures Manual. Further, the Department will require the Project Owner to supply sufficient documentation which will represent the means by which these HUBs were or are to be selected. The Project Owner is also advised that the Department will be requesting information pertaining to the use of HUBs in the actual development of the Project at the time of final allocation of tax credits, pursuant to §49.8(c) of this title (relating to Housing Credit Allocations).

(b) As part of the complete Application the Applicant must submit the most current Phase I Environmental Assessment of the Subject Property, dated not more than 12 months from the date of Application to the Department. In the event that a Phase I Environmental Assessment on the Project is older than 12 months, the Project Owner may supply the Department with an update letter from the Person or organization which prepared the initial assessment; provided, however, that the Department will not accept any Phase I Environmental Assessment which is more than 24 months old. This environmental assessment should be conducted and reported in conformity with the standards of the American Society for Testing and Materials (ASTM) and such other recognized industry standards as a reasonable Person would deem relevant in view of the Property's anticipated use for human habitation. The report must include, but is not limited to, a review of records, interviews with people knowledgeable about the Property, a certification that the environmental engineer has conducted an inspection of the Property, the building(s), and adjoining Properties, as well as any other industry standards concerning the preparation of this type of environmental assessment. If the report recommends further studies or establishes that environmental hazards currently exist on the Property, or are originating off-site but would nonetheless affect the Property, the Project Owner must act on such a recommendation or provide either a plan for the abatement or elimination of the hazard. The environmental assessment shall be conducted by an environmental or professional engineer and be prepared at the expense of the Project Owner. For Projects which have had a Phase II Environmental Assessment performed and hazards identified, the Project Owner is required to maintain a copy of said assessment on site available for review by all persons which either occupy the Property or are applying for tenancy. Properties financed through the RECDS or Properties with four Units or fewer will not be required to supply this information; however, the Project Owners of such Projects are hereby notified that it is their responsibility to ensure that the Property is maintained in compliance with all state and federal environmental hazard requirements. Those Projects which have or are to receive first lien financing from HUD may submit HUD's environmental assessment report, provided that it conforms with the requirements of this subsection. An environmental report that is not submitted with the Application will result in the Application being deemed incomplete and not accepted for filing.

(c) The Market Study required by the Department shall comply with the Uniform Standards of Professional Appraisal Practice and with paragraphs (1)-(2) of this subsection and other guidelines provided for the Reference Manual.

(1) A Market Study (prepared by a Qualified Market Analyst acceptable to the Department who is independent of the Development Team), which is not dated more than six months prior to the date of Application, is required as part of the complete Application. Projects which are comprised of 12 Units or fewer or whose funds have been obligated by RECDS are not required to provide the Department with a market study; provided that the Department may request information with respect to the operating expenses, proposed new construction or rehabilitation cost or other information. In the event that a Market Study on a Project is older than six months, a Project Owner may supply the Department with an updated Market Study from the entity or organization which prepared the initial report; provided, however, that the Department will not accept as having satisfied the condition of this subsection any Market Study which is more than 12 months old. The Market Study shall be prepared for the Department at the expense of the Project Owner and shall include, at a minimum, the following information:

(A) an evaluation of the existing occupancy rates in comparable multifamily rental Residential Developments in the same market and submarket area as the proposed Project with special emphasis given to available low income rental housing;

(B) Project absorption rates for the three years prior to the date of the study for Units in comparable multifamily rental Residential Developments in the same market area as the Project. Further, provide a projection of the time necessary for the Project to achieve Sustaining Occupancy;

(C) an evaluation of the current physical condition of existing rental housing Units in the market area, with special emphasis given to available low income rental housing;

(D) an evaluation of the need for affordable housing within the Project market area, which includes an analysis of any

existing federal, state and/or locally subsidized rental housing Units in the market area;

(E) an evaluation of the appropriateness of the Unit-mix and size in terms of market demand and low income housing demographics;

(F) an evaluation of the appropriateness of the location and total development cost of the Project from a market feasibility standpoint;

(G) an evaluation of the appropriateness of the anticipated operating costs of the Project for the housing market in which the Project is located, generally, and specifically for low income housing;

(H) an evaluation of the appropriateness of the existing or proposed physical amenities and appliance packages at the Project for the low income target population;

(I) a summary of qualifications of the individuals who participated in the development of the Market Study;

(J) a statement from the Qualified Market Analyst certifying that she/he is not a part of the Development Team, nor Affiliated with any member of the Development Team engaged in the development of the Property; and

(K) such other matters as the Department, in its discretion, may determine from time to time to be relevant to the Department's evaluation of the need for the Project and the allocation of the requested Housing Credit Allocation Amount.

(2) a written opinion is required, from the Qualified Market Analyst who prepared the Market Study required under paragraph (1) of this subsection, stating that:

(A) the projected Total Housing Development Costs of the proposed Project do or do not appear to be reasonable. The Qualified Market Analyst must provide the Department with sufficient documentation to support his/her conclusion with regards to the reasonableness of the projected development costs;

(B) the projected Total Operating Costs of the proposed Project do or do not appear to be reasonable. The Qualified Market Analyst must provide the Department with sufficient documentation to support his/her conclusions with regards to the reasonableness of the projected operating costs;

(C) the proposed Project, in light of the vacancy and absorption rates for the applicable market area and/or any applicable submarket area, is or is not likely to result in an unreasonably high vacancy rate for comparable Units within the market area and/or any applicable submarket area (i.e., standard, well maintained Units within such market area that are reserved for occupancy by low and very low income tenants). The Qualified Market Analyst must provide the Department with sufficient documentation to support his/her conclusion with regard to the effects of the Project's development on the vacancy rates for comparable Units within the market area and/or any applicable submarket area;

(D) the projected initial rents for the Project are or are not below the rental range for comparable Projects within the market area. The Qualified Market Analyst must provide the Department with sufficient documentation to support his/her conclusion with respect to the data on comparable rents in the Project's market area;

(E) Project reserves are/are not adequate to cover operating shortfalls until the Project achieves Sustaining Occupancy. The Qualified Market Analyst must provide the Department with sufficient documentation to support his/her conclusions with regards to the adequacy of the Project reserves; and

(F) all Applicants shall acknowledge by virtue of filing an Application that the Department shall not be bound by any such opinion or the Market Study itself, and may substitute its own analysis and underwriting conclusions for those submitted by the Qualified Market Analyst.

(d) A Project Owner may file an Application at any time during the Application Acceptance Period(s), as published from time to time by the Department in the *Texas Register*.

(e) An Application that is incomplete or that is not filed in accordance with the Application Submission Procedures Manual, as amended will be deemed not to have been timely filed, will be deemed terminated and will be returned to the Applicant. Failure to return the Application shall not affect its status and the Department shall not be deemed to have accepted any such incomplete Application.

(f) The Department will not recommend an Application for funding if it includes a member of the Development Team who has been, or is:

(1) barred, suspended, or terminated from procurement in a state or federal program or whose is listed in the List of Parties Excluded from Federal Procurement or Nonprocurement Programs, whether in the hardcopy or electronic form;

(2) convicted within the past five years of, is under indictment for or is on probation for a state or federal crime involving fraud, bribery, theft, misrepresentations of materials facts, misappropriation of funds, or other similar criminal offenses;

(3) subject to enforcement action under state or federal securities law, or is the subject of an enforcement proceeding with a state or federal agency or another governmental entity; or

(4) active in the ownership or management of any other low income housing tax credit Property (or any Property pursuant to an affordable housing program administered by a local, state or federal entity) that is or was materially out of compliance with the rules or regulation of the appropriate regulatory authority.

(g) After eligible Applications have been evaluated, ranked and underwritten in accordance with the QAP and the Rules the Department shall make its recommendations to the Committee and the Board at their next meeting for the issuance of Commitment Notices.

(h) The Board's decisions shall be based upon its evaluation of the Project's consistency with the criteria and requirements set forth in the QAP and the Rules. In making a determination to allocate tax credits, the Department and Board may not rely solely on the number of points scored by an Applicant. They shall in addition, also take into account such factors as Project feasibility, underwriting, concentration of low income Projects within specific markets or submarkets, geographic dispersion of multifamily housing in any particular market or submarket, as well as dispersion of the credits on a state-wide basis, site conditions, the experience of the Development Team. the type of housing being proposed and/or the Project's impact on the Low Income Housing Tax credit Program's goals and objectives as stated in the QAP and the Rules and as otherwise provided under this chapter.

(1) If the Board approves the Application, the Department will issue a Commitment Notice to the Project Owner which Commitment Notice:

(A) shall confirm that the Board has approved the Application; and

(B) shall state the Department's commitment to make a Housing Credit Allocation to the Project Owner in a specified amount, subject to the feasibility determination described at §49.8(a) of this title (relating to Housing Credit Allocations), compliance by the Project Owner with the remaining requirements of this chapter, and any other conditions set forth therein by the Department. This Commitment Notice shall expire on the date specified therein, unless the commitment has been accepted and the conditions to receipt of an allocation set forth therein shall have been met.

(C) The Department shall notify, in writing, the mayor or other equivalent chief executive officer of the municipality in which the Property is located informing him/her of the Boards issuance of a Commitment Notice.

(2) If the Board disapproves or fails to act upon the Application, the Department shall issue to the Project Owner a written notice stating the reasons for the Board's disapproval or failure to act.

(i) A Project Owner may request that the Department extend the expiration date of a Commitment Notice which has not expired by submitting a written request for such action, accompanied by the extension fee specified in §49.11 of this title (relating to Program Fees). The request shall specify the term of the extension requested and the reason or reasons why the Project Owner has been unable to satisfy the requirements of this chapter prior to the original expiration date. The Department, in its sole discretion, may consider and grant such extension requests; provided, however, that in no event shall the expiration date of a Commitment Notice be extended beyond the last business day of the applicable calendar year.

(j) A Project Owner must indicate acceptance of the Department's offer of a commitment of tax credit authority by executing the Commitment Notice and paying the commitment fee specified in §49.11 of this title (relating to Program Fees) prior to the expiration date set forth in the notice. Together with or following the Project Owner's acceptance of the commitment, the owner may request the Department to execute an Agreement and Election Statement, in the form prescribed by the Department, for the purpose of fixing the applicable credit percentage for the Project as that for the month in which the commitment was accepted, as provided in the Code, §42(b)(2). Upon receipt of a duly dated and executed Agreement and Election Statement and the accepted Commitment Notice, if the Project Owner is in compliance with the Rules of this chapter, the Department shall execute the Agreement and Election Statement and return a copy to the Project Owner. The Agreement and Election Statement shall be executed by the Project Owner no later than five days after the end of the month in which the offer of commitment was accepted.

(k) Prior to the expiration of the Commitment Notice a Project Owner who has been issued a Commitment Notice may request the Department to execute a Carryover Allocation Document. The Carryover Allocation must be properly completed, signed, dated and notarized by the Project Owner and delivered to the Department along with any and all other documentation prescribed in the Carryover Allocation Procedures Manual, as amended. The commitment fee as specified in §49.11 of this title (relating to Program Fees) must be received by the Department prior to the processing of any Carryover Allocation Documentation.

(l) If the entire State Housing Credit Ceiling for the applicable calendar year has been, committed or allocated in accordance with this chapter, the Department shall place all remaining Applications which have satisfied all Threshold Criteria on a waiting list. All such waiting list Applications will be weighed one against the other and a priority list shall be developed by the Department and approved by the Committee. If at any time prior to the end of the Application Round, one or more Commitment Notices expire and a sufficient amount of the State Housing Credit Ceiling becomes available, the Department shall issue a Commitment Notice to the Project Owner. In the event that the Department makes a Commitment Notice or offers a commitment within the last month of the calendar year, it will require immediate action by the Applicant to assure that an allocation or Carryover Allocation can be issued before the end of that same calendar year.

(m) Within 15 business days of the date an Application is received, the Department shall notify in writing the mayor or other equivalent chief executive officer of the municipality, if the Project or a part thereof is located in a municipality; otherwise the Department shall notify the chief executive officer of the county in which the Project or a part thereof is located, to advise such individual that the Project or a part thereof will be located in his/her jurisdiction and request any comments which such individual may have concerning such Project. Such comments shall be part of the documents required to be reviewed by the Board under this subsection if received by the Department within 30 days after receipt of such certified mail notification to said individual; otherwise, if comments are received by the Department after 30 days, same may be reviewed at the discretion of the Board under this subsection. If the local municipal authority expresses opposition to the Project, the Department will give consideration to the objections raised and will visit the proposed site or Project within 30 days of notification.

(n) Prior to the issuance of the IRS Form 8609 declaring that the Project has been placed in service for purposes of the Code, §42, Project Owners must date, sign and acknowledge before a notary public a LURA and send the original to the Department for execution. The Project Owner shall then record said LURA, along with any and all exhibits attached thereto, in the real Property records of the county where the Project is located and return the original document, duly certified as to recordation by the appropriate county official, to the Department. Receipt of such certified recorded original LURA by the Department is required prior to issuance of Form 8609. A representative of the Department shall physically inspect the Property for compliance with the Application and the representatives, warranties, covenants, agreements and undertakings contained therein before the IRS Form 8609 is issued.

§49.5. Set-Asides, Commitments and Preferences.

(a) At least 10% of the State Housing Credit Ceiling for each calendar year shall be allocated to Qualified Nonprofit Organizations which meet the requirements of the Code, §42(h)(5). Such organizations may compete in one of the following set-asides: Non Profit-10%, Rural Projects/Prison Communities-15%, General Projects-75%.

(b) The Department may redistribute the credits depending on the level of demand exhibited during the Allocation Round. Information concerning the appropriate set-aside for each Application Round will be published in the *Texas Register*. Applicants may submit only one Application for each site.

(c) No Commitment Notice shall be issued with respect to any Project, the total development cost of which, as determined by the Department, or the acquisition, construction or rehabilitation cost of which exceed the limitations established from time to time by the Department and the Board as more specifically provided for within the Reference Manual. The Department will reduce the Applicant's estimate of developer's and/or Contractor fees in instances where

these fees are considered excessive, as more specifically provided for within the Application Submission Procedures Manual, as amended. In the instance where the Contractor is an Affiliate of the Project Owner and both parties are claiming fees Contractors overhead, profit, and general requirements the Department will reduce the total fees estimated to a level that it deems appropriate. Further, the Department shall deny or reduce the amount of low income housing tax credits on any portion of costs which it deems excessive or unreasonable. The Department also may require bids in support of the costs proposed by any Applicant.

§49.6. Threshold Criteria; Evaluation Factors; Selection Criteria; Final Ranking; Credit Amount; Tax Exempt Bond Financed Projects.

(a) Threshold Criteria. To have an Application considered for Selection Criteria, a Project Owner must first supply all required information and demonstrate that the Project meets all of the requirements of the Threshold Criteria set forth as follows and as more specifically provided for in the Application Submission Procedures Manual, as amended. Applications not meeting Threshold Criteria may be terminated as otherwise provided under this chapter. No Scattered Site Project will be considered for allocation of tax credits under this QAP and the Rules, and thus Scattered Site Projects do not satisfy Threshold Criteria. Project Owners whose Applications do not meet Threshold Criteria will be so informed in writing. The following are the Threshold criteria that are mandatory requirements at the time of Application:

(1) EXHIBIT 101: Label as EXHIBIT 101, the following documents:

(A) a letter from the design architect specifying the type of amenities proposed at the development;

(B) original photographs of the signage, existing buildings, and interior photographs; and

(C) original photographs of development site and surrounding area. The Department will consider requests for waiver of the following requirement pertaining to amenities which must be provided at the development site. All waiver requests must be submitted in writing at the time of Application submission, detailing reasons for the waiver request. Small Developments (35 Units or less or Special Housing Developments are the only development types which will be considered for a waiver. All other Property Owners must provide at least four of the following amenities:

(i) limited access security fence;

(ii) designated playground and equipment;

(iii) community laundry room/laundry hook-up in Units;

(iv) furnished community room;

(v) recreation facilities;

(vi) public telephone(s);

(vii) on-site day care, Senior Center, or Community meals room;

(viii) storage areas; or

(ix) covered parking. All Projects must adhere to the Texas Property Code statute relating to Security Devices and other applicable requirements for Residential Tenancies.

(2) EXHIBIT 102: Label as EXHIBIT 102(A) or (B), according to the development type, provide construction costs breakdown associated with the proposed new construction or rehabilitation. Additionally, all rehabilitation Projects must provide a detailed work write-up/physical assessment report with estimated cost which is prepared by a registered architect, professional engineer or bonded general Contractor detailing the scope of work to be performed throughout the rehabilitation process.

(3) EXHIBIT 103: There shall exist evidence of readiness to proceed in one of the following items under each subparagraphs (A)-(E) of this paragraph:

(A) Label as EXHIBIT 103(A), evidence of site control through one of the following:

(i) A recorded warranty deed in the name of the ownership entity, or entities which comprise the Applicant;

(ii) A contract for sale or lease (the minimum term of the lease must be at least 45 years) in the name of the ownership entity, or entities which comprise the Applicant which is valid for the entire period the development is under consideration for tax credits or at least 90 days; whichever is greater; or

(iii) An exclusive option to purchase in the name of the ownership entity, or entities which comprise the Applicant which is valid for the entire period the development is under consideration for tax credits or at least 90 days, which ever is greater.

(B) Label as EXHIBIT 103(B), evidence of current and appropriate zoning in the form of a letter from the appropriate municipal authority. If zoning is not required, the Applicant must submit a letter from the local municipal/county authority so stating. If the Property is currently a non-conforming use as presently zoned, provide the following:

(i) a detailed narrative of the nature of non-conformance;

(ii) the applicable destruction threshold;

(iii) owners rights to reconstruct in the event of damage; and

(iv) penalties of noncompliance.

(C) Label as EXHIBIT 103(C), evidence of the availability of all necessary utilities/services to the development site. Exhibits must be in the form of a letter from the appropriate municipal provider/local service provider, or in the form or the last monthly bill which must clearly identify the development by name and address. Necessary utilities are GAS/ELECTRIC; TRASH; WATER, and SEWER.

(D) Label as EXHIBIT 103(D), evidence of permanent financing in only one of the following forms:

(i) Bona Fide permanent financing in place as evidenced by a valid and binding loan agreement and a deed(s) of trust in an amount not less than the projected liens to be placed upon the Project upon completion of construction in the name of the ownership entity which identifies the mortgagor as the Applicant or entities which comprise the general partner;

(ii) Bona Fide commitment or term sheet issued by a lending institution or mortgage company that is actively and regularly engaged in the business of lending money which is addressed to the ownership entity, or entities which comprise the Applicant and which has been executed and accepted by both parties (the term of the loan must be for a minimum of 15 years with a 25-year amortization); or

(iii) if the development will be financed through owner contributions, provide a letter from independent CPA verify-

ing the capacity of the Applicant to provide the proposed financing and that funds are committed solely for such purpose with a letter from Applicant's bank or banks confirming that such funds have been provided for or deposited in a separate account at said bank(s).

(E) Label as EXHIBIT 103(E), a copy of the current title policy which shows that the ownership of the land/Project is vested in the exact name of the Applicant, or entities which comprise the Applicant (purchaser) or the entity/Person (seller) with which the Applicant or entities which comprise the Applicant has executed an option to purchase, a purchase and sale agreement, a long-term lease or option to lease.

(4) EXHIBIT 104: Label as EXHIBIT 104, evidence of pre-Application notification by the Applicant to the local chief executive officer(s) (i.e., mayor and county judge) of the locality of the development. Such evidence must be in the form of a copy of the certified mail receipt, overnight mail receipt, or confirmation letter from said official.

(5) EXHIBIT 105: Provide Applicant's Financial Statements for the current year (as well as the most current) of all Applicants, corporation or general partner(s) and its principal(s) which are not more than 12 months old prepared and submitted on EXHIBIT 105, which is provided as part of this Application Submission Procedures Manual. Audited Financial Statements not more than 12 month old for the general partner(s), or unaudited Financial Statement not more than 90 days old prepared by an independent CPA, may be accepted in lieu of EXHIBIT 105.

(6) EXHIBIT 106: must be the original copy of the completed and executed Previous Participation and Background Certification Form (EXHIBIT 106) which is provided as part of the Application Submission Procedures Manual.

(7) EXHIBIT 107: Label as EXHIBIT 107, a current rent roll for occupied Projects undergoing rehabilitation. The rent roll must disclose terms and rate of the lease, "street" rents, Unit mix, tenant names or vacancy, dates of first occupancy and expiration of lease. Vacant and proposed new construction Projects will, of course, be exempt from this requirement.

(8) EXHIBIT 108: Label as EXHIBIT 108, for rehabilitation developments, historical monthly operating statements of the subject development to date for the past three full calendar years and for the current year to date as of the end of the month occurring not more than 45 days prior to the date of initial Application, or since the date of acquisition of the development and for new construction, submit 15-year proforma estimates of operating expenses and all supporting documentation to support projections. Rehabilitation Projects must also submit a 15-year proforma of operating expenses with appropriate supporting documentation.

(9) EXHIBIT 109: Label as EXHIBIT 109 on the cover page only, a Market Study addressing all items listed in §49.4(c) of this title (relating to Applications; Environmental Assessments; Market Study; Commitments; Extensions; Carryover Allocations; Agreements and Elections; Extended Commitments) and/or required by the Reference Manual.

(10) EXHIBIT 110: Label as EXHIBIT 110 on the cover page only, a Phase I Environmental Study prepared in accordance with §49.4(c) of this title (relating to Applications; Environmental Assessments; Market Study; Commitments; Extensions; Carryover Allocations; Agreements and Elections; Extended Commitments).

(11) EXHIBIT 111: Label as EXHIBIT 111, documentation, as applicable, that the Applicant is a Qualified Nonprofit Organization pursuant to the Code, §42(h)(5)(C), as evidenced by:

(A) an IRS determination letters,

(B) partnership agreement which shows that the nonprofit Controls the Project (directly or indirectly) and will materially participate (within the meaning of the Code §469(h)) in the development and operation of the Project throughout the Compliance Period, and

(C) a current list of all directors and officers of the nonprofit organization, along with information pertaining to their primary occupations and disclosing any relationship; as an Affiliate or otherwise, with other members of the Applicant and/or any members or Affiliate of the Development Team, including any market analyst, CPA, appraiser, or other professional performing any services with respect to the Project and/or the subject Property.

(12) EXHIBIT 112: Label as EXHIBIT 112, an appraisal of the Property apportioning the value of the land and the improvements where applicable, a valuation report from the local tax appraisal district and a bona fide valid contract verifying the acquisition cost which clearly identifies the selling Persons or entities, and details any relationship with the Applicant or any Affiliation with the Development Team, any Qualified Market Analyst and any other professional or consulting performing services with respond to the Project and/or subject Property.

(13) EXHIBIT 113: Label as EXHIBIT 113, a copy of the public notice published in a widely circulated newspaper in the area in which the proposed development will be located. Such notice must run for at least twice within a two week period, except on holidays, prior to the submission of the Application to the Department. The notice must be prepared in accordance with the guidelines established in the Application Submission Procedures Manual.

(b) Evaluation factors. The Department will consider Applications for a housing credit allocation using the evaluation and point system described herein and in the Application Submission Procedures Manual:

(1) Applications will be initially evaluated against the Threshold Criteria as they are accepted for filing in the Department during any Application Acceptance Period. Applications not meeting the Threshold Criteria may be terminated and may, at the Department's discretion, be returned to the Applicant without further review. The Department shall not be responsible for Applicants failure to meet Threshold Criteria and any oversight or failure of the Department's staff to notify Applicant of such inability to satisfy Threshold Criteria shall not confer upon Applicant any rights to which it would not otherwise be entitled. All Applicants may withdraw and subsequently refile an Application, as well as file a new Application before filing deadline.

(2) Applications will then be ranked according to the points scored under the Selection Criteria in accordance with the Rules and the Application Submission Procedures Manual. Applications not scored by Department staff be deemed to have the points allocated through self-scoring, by Applicants until actually scored. This shall apply only for ranking purposes.

(3) Applications which receive the highest number of points, in each set-aside category during the applicable round, and if a sufficient amount of state housing tax credits are available, will be eligible for an evaluation by an Underwriter. As detailed in §49.4(j) of this title (relating to Applications; Environmental Assessments; Market Study; Commitments; Extensions; Carryover Allocations; Agreements and Elections; Extended Commitments) the Departments, the Committee and the Board shall evaluate an Application on the basis of additional factors beyond scoring criteria such as underwriting analysis, geographic dispersion of multi-family housing as well as tax credit allocation, site conditions, impact on the Low Income Housing Tax Credit program's goals and objectives as stated in the QAP and the Rules and as otherwise provided under this

chapter. If such evaluation warrants, the Application will be forwarded to the Committee and to the Board for approval. The Department may have an outside third party perform the underwriting evaluation to the extent it determines appropriate. The expense of any third party underwriting evaluation shall be paid by the Applicant prior to the commencement of the aforementioned evaluation.

(4) Applications which have not received a Commitment Notice at the end of the Application Round may be placed on a waiting list to be established by the Department and approved by the Committee. At such time that a substantial portion of all credits have been exhausted, the Committee shall deem all remaining Applications as terminated. The Applicant may re-apply to the Department during the next Application Acceptance Period.

(c) Selection Criteria -- Pursuant to subsection (b)(1)-(4) of this section, Applications receiving the highest number of points in each set aside category, in each Application Acceptance Period, if a sufficient amount of State Housing Credit ceiling is available, will be eligible for an evaluation by an Underwriter. All Applications will be ranked according to the Selection Criteria listed in subsection (a)(1)-(9) of this section. If no additional set-aside credits are available, the Application shall be scored and evaluated in the general pool using the criteria to which such general pool Applications or subject, without special set-aside scoring points being considered.

(1) DEVELOPMENT LOCATION.

(A) EXHIBIT 201: Label as EXHIBIT 201, a copy of the census map (may be obtained from HUD or the local planning department) if the subject Property is located within a Qualified Census Tract as defined by the Secretary of HUD and qualifies for the 130% increase in Eligible Basis, pursuant to the Code, §42(d)(5)(C). The census map must clearly identify the proposed development to be located within a Qualified Census Tract. Census tract numbers must be clearly marked on the map, and must be identical to the Qualified Census Tract number stated in the Department's Reference Manual. Applicants for Projects in Difficult Development Areas or a targeted Texas county must indicate this designation in the space provided in the Application Submission Procedures Manual. (10 points) OR

(B) EXHIBIT 202: Label as EXHIBIT 202, evidence that the proposed development is located within a city-sponsored neighborhood preservation/redevelopment area or a designated state or federal empowerment/enterprise zone. Such evidence must be in the form of a letter and a map from a city/county official verifying the proposed development to be located within a preservation/redevelopment area or empowerment/enterprise zone. In order to qualify for these points, an Applicant whose Project is located within a city-sponsored redevelopment area must submit a certified letter from the mayor, local city council, county judge, county commissions court in support of the Project stating that the designated area was:

(i) created by the local city council/county commission;

(ii) targets a specific geographic area; and

(iii) offers tangible and significant area-specific incentives or benefit over and above those normally provided by the city or county. Public Improvement Districts (PIDs), Tax Increment Financing Zones (TIFs), or similar districts organized under the Texas Local Government Code are prime examples of such redevelopment efforts. (10 points)

(2) HOUSING NEEDS CHARACTERISTICS. The proposed development is located in a county in which 10% or more of the households are below the poverty level as set forth in the Department's "County Data Elements Guide" incorporated into the Reference Manual. Utilize the percentages below to assess the appropriate score.

(A) 10% to 20% of households are below the poverty level (3 points)

(B) 21% to 31% of households are below the poverty level (5 points)

(C) 32% to 42% of households are below the poverty level (7 points)

(D) 42% + of households are below the poverty level (9 points)

(E) The proposed development is located in a county in which 20% or more of the rental units have a cost burden as set forth in the County Data Elements guide. Utilize the following percentages to assess the appropriate score:

(i) 20% to 30% of rental units have a cost burden (4 points)

(ii) 31% to 41% of rental units have a cost burden (6 points)

(iii) 42% + of rental units have a cost burden (8 points)

(3) PROJECT CHARACTERISTICS.

(A) EXHIBIT 203: Label as Exhibit 203, evidence that the proposed development to be purchased qualifies as a federally assisted building within the meaning of the Code, §42(d)(6)(B), and is in danger of having the mortgage assigned to HUD, RECDS, or a federal mortgage insurance fund. Such evidence must be a letter from the institution to which the development is in danger of being assigned. (5 points)

(B) EXHIBIT 204: Label as EXHIBIT 204, evidence that the proposed development is a low-income building with mortgage prepayment eligibility as provided for in the Code, §42(d)(6)(C). Such evidence must be a copy of the HUD regulatory agreement which evidences the prepayment clause. (5 points)

(C) EXHIBIT 205: Label as EXHIBIT 205, evidence that the Applicant is purchasing(ed) a Property (no earlier than 1995) owned by HUD, an insured depository institution in default, or a receiver or conservator of such an institution, or is an REO Property. Such evidence must be in the form of a binding contract to purchase from such federal or other entity as described above, closing statements, or recorded warranty deed. (5 points)

(D) The proposed development's composition offers a Unit mix which is conducive to housing large families. To qualify for these points, these Units must have at least 1000 square feet of living space for three bedrooms or 1200 square feet for four bedrooms. Five points will be awarded for the first 15% of the Units in the development that are three or larger. An additional point will be awarded in 5% increments for every 5%, up to 30% of Units which are three bedrooms or larger, up to a maximum of three points. In computing qualified Units for this selection item where the Unit Project is a mixed-income development, only tax credit Units should be included.

(i) 15% of the Units in the development are three or four bedrooms. (5 points)

(ii) An additional point will be awarded for every 5% of Units that are three or four bedrooms up to a maximum of three points. (3 points)

(E) EXHIBIT 206: Label as Exhibit 206A, for new Construction, a letter from the architect which certifies that at least three of the following energy saving devices will be utilized in the construction of each tax credit Unit. The devices selected must be certified as included in each tax credit Unit of the Project upon placement in service.

(i) Ceiling Fans

(ii) Low-Emittance-Windows

(iii) Insulation which exceeds code for walls and ceilings

(iv) Solar Screens (maximum of 3 points) Label as Exhibit 206B for rehabilitation, an energy audit of 10% of the tax credit Units and common areas, conducted by a local utility servicer or a registered architect. Upon placement in service, another audit will be required of the same Units to certify that the design features and/or construction components installed in each tax credit Unit exceeds local/regional building code with respect to energy efficiency. In the event that an energy audit is unobtainable because the Units are currently vacant and uninhabitable, a certification from a registered architect will suffice. (3 points)

(F) EXHIBIT 207: Label as EXHIBIT 207, evidence that the proposed development's financing involves leveraging of resources from a nonprofit private foundation (which is not related to the lender, developer, sponsor, or syndicator) federal, state and/or local governmental entity(s) (that is deducted from Eligible Basis or is substantially below the Applicable Federal Rate). Such evidence must be a letter of commitment from the entity which states the terms of the permanent loan or grant and all other conditions. The donation of land, waiver of fees and/or tax abatement(s) will also be considered under this criterion provided that the value of the contribution is quantified and verifiable.

(i) 5% of total residential costs are funded by private nonprofit foundation or government resources. (3 points)

(ii) One additional point will be awarded for every two percent of total residential costs funded from such contributions up to a maximum of three points. (3 points)

(G) The proposed development provides low density housing of less than 10 Units per acre or as follows:

(i) 10 Units or less per acre (6 points)

(ii) 11 to 15 Units per acre (4 points)

(H) The subject Project is an existing Residential Development without maximum rent limitations or set-asides for affordable housing seeking rehabilitation credits. (8 points)

(I) Project is a mixed-income development comprised of both market rate Units and qualified tax credit Units. Project's Applicable Fraction is no greater than 75%. (6 points) Project's Applicable Fraction is no greater than 60%. (10 points)

(J) EXHIBIT 208: Label as EXHIBIT 208, evidence that the proposed historic residential development has received an historic property designation by a federal, state or local governmental entity. Such evidence must be in the form of a letter from the designating entity identifying the development by name and address and stating that the project is:

(i) listed in the National Register of Historic Places under the U.S. Department of the Interior in accordance with the National Historic Preservation Act of 1966;

(ii) located in a registered historic district and certified by the U.S. Department of the Interior as being of historic significance to that district;

(iii) identified in a city, county, or state historic preservation list; or

(iv) designated as a state landmark. (6 points)

(K) Property Owner will set-aside Units for households with incomes at 50% or less of Area Median Gross Income (AMGI) for occupancy of the tax credit Units (TCU's) in the development. The rents for these Units must not be higher than the allowable tax credit rents at the 50% AMGI level. Utilize the percentages below to assess the appropriate score:

(i) Four points will be awarded for the first 10% of the Units in the development that are set-aside for tenants with incomes at 50% or less of AMGI. (4 points)

(ii) An additional point will be awarded for every 5% of additional Units set-aside for tenants with incomes at 50% or less of AMGI up to a maximum of four points. (4 points)

(L) Proposed development is comprised of triplexes, fourplexes or townhomes. To qualify for these points, the development(s) must have a density of not more than 15 units per acre. (5 points)

(M) EXHIBIT 209: Label as EXHIBIT 209, for rehabilitation evidence that a majority of the development's residential Units, as of the end of the Application Acceptance Period, are vacant and uninhabitable. Such evidence must be in the form of a letter and report from the local municipal authority citing substantial code violations. To qualify for these points, the Applicant must not have owned a significant interest in, or its Affiliates must not have had Control of the Project during the period in which the such Units were rendered uninhabitable. (4 points)

(N) EXHIBIT 210: Label as EXHIBIT 210, evidence from the local municipal authority stating that the proposed development fulfills a need for additional affordable rental housing as evidenced in a local Consolidated Plan and is supported by the local municipal authority. (5 points)

(O) The Project is a Small Development. A Small Development is defined as a Project consisting of not more than 35 multifamily Units, which is not a part of, or contiguous to, a larger Project. This definition excludes those Projects which would otherwise qualify as a Rural Project. (5 points)

(4) SPONSOR CHARACTERISTICS

(A) EXHIBIT 211: Label as EXHIBIT 211, evidence that the ownership entity, general partner, or its principals have a record in successfully developing and operating affordable rental housing under a program operated by HUD, RECDS, RTC, HOME, LIHTC or any other verifiable source which provides affordable housing. With respect to the Properties listed as developed and operated, such ownership entity, principals or general partner must be the Project Owner and have the Control of the Project Owner. The term "successful" is defined as developing, operating, and maintaining current Control of at least 100 Units under the tax credit program, or at least 100 Units under all other affordable housing programs except RECDS and Rural Projects. For such Projects, a

minimum of 35 Units are required. For the tax credit program, evidence in the form of a copy of the IRS Form 8609 for the first building and a copy of the partnership agreement must be submitted. For HUD subsidized properties, the evidence must include the most recent Housing Quality Standards inspection and the Annual Performance Review (HUD Form 9822). For other affordable housing programs, documentation (including development and partnership agreements) evidencing current ownership and operation of the Project is required. Applicants whose experience in affordable housing was through mortgage revenue bonds, must submit documentation which shows that the ownership entity/general partner and its principals have developed and had or currently maintain Control in the Project Owner. Such evidence should include a copy of the financing and/or regulatory agreements, warranty deed which shows the ownership entity as the grantee, the partnership and development agreements, the name, address and contact Person of the bond trustee, issuer, and compliance agent. Additional information to be provided shall include a schedule of Properties owned, years of ownership, addresses of properties, number of Units in the Properties, and the percentage of direct or indirect ownership of each Property. Property Owners in noncompliance with any of the aforementioned programs or which have had a continuing pattern of defaults and foreclosures are ineligible to claim the points for this item.

(i) Project Owner or general partner has developed and currently maintains Control of at least 100 affordable housing Units under the tax credit or other affordable housing programs. (8 points)

(ii) Project Owner or general partner has developed and had Control of at least 100 affordable housing Units under the tax credit or other affordable housing program for a period of not less than five years. (4 points)

(iii) Project Owner or general partner has developed and had or currently maintains Control of at least 100 market-rate Units for a period of not less than five years. (4 points)

(B) EXHIBIT 212: Label as EXHIBIT 212, evidence that a HUB, which has conducted business as such, has existed for at least one year and has been certified by the General Services Commission, is the Project Owner and Controls the Project Owner. (5 points)

(5) PARTICIPATION OF LOCAL TAX EXEMPT ORGANIZATIONS. EXHIBIT 213: Label as EXHIBIT 213, evidence that Property owner has an executed agreement with a Local Tax Exempt Organization for the provision of special supportive services that would not otherwise be available to the tenants. The supportive services will be evaluated based upon the following:

(A) the duration of the service agreement,

(B) the accessibility and appropriateness of the service to the tenants,

(C) the experience of the service provider, and

(D) the importance of the service in enhancing the tenants standard of living. The supportive service will be included in the LURA. (Up to 5 points)

(6) TENANT POPULATIONS WITH SPECIAL HOUSING NEEDS

(A) This criterion applies to elderly Projects which must provide significant facilities and services specifically designed to meet the physical and social needs of the residents. Significant services may include congregate dining facilities, social and recreation programs, continuing education, welfare information and counseling, referral services, transportation and recreation. Other attributes of such Projects include providing hand rails along steps and interior hallways, grab bars in bathrooms, routes that allow for physical handicap accessibility, lever type doorknobs and single lever faucets as well as elevators for Projects of over two stories. Such a Project must conform to the Fair Housing Act of 1988 and must be a Project in which:

(i) is intended for, and solely occupied by Persons 62 years of age or older; or

(ii) intended and operated for occupancy by at least one Person 55 years of age or older per Unit, where at least 80% of the total housing Units are occupied by at least one Person who is 55 years of age or older, and

(iii) adheres to policies and procedures which demonstrate an intent by the owner and manager to provide housing for Persons 55 years of age or older. (10 points)

(B) EXHIBIT 214: Label as EXHIBIT 214, evidence verifying that the subject development provides Units specifically equipped for persons with physical or mental disabilities. Such evidence must be in the form of a certification from an accredited architect stating the number of Units which are/will be designed to meet American National Standards for buildings and facilities providing accessibility and usability for Physically Challenged Persons (ANSI A117.1) and will conform to the Fair Housing Act of 1988. "Equipped" means that features that make the Units fully usable to such persons are installed in the Units at the time of construction or provisions have been included in construction for easy modification to meet the ANSI A117.1 standards.

(i) 6% to 10% of Units are equipped for persons with physical/mental disabilities. (4 points)

(ii) 11% to 15% of Units are equipped for persons with physical/mental disabilities. (6 points)

(iii) 16% + of Units are equipped for persons with physical/mental disabilities. (8 points)

(C) EXHIBIT 215: Label as EXHIBIT 215, evidence that the Project is designed solely for transitional housing for homeless persons on a non-transient basis, with supportive services designed to assist tenants in locating and retaining permanent housing. Such evidence must include a detailed narrative describing the type of proposed housing; a referral agreement with an established organization which provides services to the homeless; and a marketing plan designed to attract qualified tenants and housing providers, as well as a list of supportive services. (15 points)

(7) PUBLIC HOUSING WAITING LISTS. EXHIBIT 216: Label as EXHIBIT 216, evidence that the Property owner has committed in writing to the local public housing authority (PHA), the availability of Units which also states that the Property owner agrees to consider as potential tenants, those households on the PHA's waiting list. Property owner's letter to the PHA must be accompanied by a marketing plan outlining how these Units will be marketed to individuals on the waiting list. If no PHA is within the locality of the development PHA, Property owner must utilize the nearest authority or office responsible for administering Section 8 programs. Such evidence must include a copy of Property owner's letter to the local PHA; a copy of the marketing plan submitted with letter to the local PHA; verification of receipt by the PHA in the form of certified return receipt or overnight mail receipt; and a letter received from an appropriate municipal authority, or local PHA stating the need for additional affordable housing Units within it's jurisdiction. (3 points)

(8) SUBSTANTIAL READINESS TO PROCEED. EXHIBIT 217: Label as EXHIBIT 217, evidence of substantial readiness to proceed. Such evidence must be in the form of building permits and construction contracts with the general Contractor for the construction or rehabilitation of the Project (4 points); or if Property is Rural and financed by RECDS, a copy of the "Obligation of Funds" report issued by the RECDS. (4 points)

(9) BONUS POINTS: Application is received within the first ten days of the Application Acceptance Period. (2 points)

(d) Final Ranking. The Department will evaluate Projects according to the strength of the Project in meeting the Threshold and Selection Criteria. In the event that two or more Applications receive the same number of points in any given set-aside category, the Department will utilize the following factors in the order presented in paragraphs (1)-(6) of this subsection in making a determination as to which Project will receive a preference in consideration for a tax credit commitment:

(1) which demonstrates the highest substantial readiness to proceed as evidenced by the Selection Criteria, more specifically provided for in subsection (c)(8) of this section;

(2) which provide for the most efficient usage of the low income housing tax credit on a per Unit basis;

(3) which have substantial community support as evidenced by the commitment of local public funds toward the construction, rehabilitation and acquisition and subsequent rehabilitation of the Project;

(4) Project which is a Special Housing Project as defined in §49.2 of this title (relating to Definitions);

(5) which serve the lowest income tenants; and

(6) whose Unit composition provides the highest percentage of three bedrooms or greater sized Units.

(e) In reaching the final ranking of an Application, the Department will take into consideration the Project Owner's history in the tax credit program and other affordable housing programs. The Department may disqualify from this allocation round, any Applicant, Project Owner, developer and its partners, principals, and/or Affiliates who have received an allocation of credits in the 1994 or 1995A rounds and who have not yet commenced construction or finalized the closing of the construction loan, respectively, as of the start of this Application Acceptance Period. The Department may deduct up to ten points from the final score of any Applicant which, in the past, has not placed developments into service for which the Department has made an allocation, OR if a Property Owner has failed to perform under the obligations of any previous Commitment Notice. The Department may, at its sole discretion disqualify or impose limitation or disabilities upon an Applicant, Project Owner, developer, and its partners, principals and/or Affiliates with respect to the competition for allocations of tax credits as a consequence of material misstatement or omission, noncompliance with any Code requirements, or any of the terms, conditions or obligations of the program for any Project that has received a commitment or allocation, or for failure to place in service buildings for which credits were allocated. The Department will disqualify an Applicant who has been convicted of fraud, theft, misappropriation of funds; who has made misrepresentations to the Department; who is in noncompliance with the LURA or other similar agreement for any other Project monitored by the Department, or who is in noncompliance under this program or another program administered by this Department or other governmental entities. Additionally, Applicants are advised that the Department reserves the right to reject Applications which include principals who have been:

(1) Excluded from federal and non federal procurement programs (either debarment or suspension);

(2) Convicted of a felony offense;

(3) Indicted or subject to enforcement action under state of federal securities law; and

(4) Negligent in the physical upkeep of subject Property, or negligent in the operation of the subject Property, as deemed so by another federal or state authority. All such rejections of Applications shall be at the sole discretion of the Department.

(f) Credit Amount. The Department shall issue tax credits only in the amount needed for the financial feasibility and viability of a Project throughout the Compliance Period. The issuance of tax credits or the determination of any allocation amount in no way represents or purports to warrant the feasibility or viability of the Project by the Department. The Department will limit the allocation of tax credits to no more than $1.2 million per Project or 2.4 million per Applicant. For these purposes this limitation will apply to all Affiliates of any Applicant, developer, Project Owner, general partner, sponsor or their Affiliates or related entities unless otherwise provided for by the Department. In making determinations under the preceding sentence, the Department may take into account such factors as the percentage of interest held by a particular individual or any Affiliate thereof in a Project, the amount of fees or other compensations paid to a particular individual or any Affiliate thereof with respect to a Project, any other financial benefits, either directly or indirectly through Beneficial Ownership received by a particular individual or any Affiliate thereof with respect to a Project. The Committee, in its sole discretion, may allocate credits to a Project Owner in addition to those awarded at the time of the initial Carryover Allocation in instances where there is bona fide substantiation of cost overruns and the Department has made a determination that the allocation is needed to maintain the Project's financial viability as a qualified low income Project.

(g) Limitations on the Size of Projects. Rural Projects involving new construction must not exceed 150 Units. Non-rural Projects involving new construction will be limited to 250 Units.

(h) Tax Exempt Bond Financed Projects. Applications for Projects which receive at least 50% of their financing from the proceeds of tax-exempt bonds which are subject to the state volume cap as described in the Code, §42(h)(4) (B) are also subject to evaluation under the QAP and Rules. Such Projects must meet all the Threshold Requirements stipulated in the QAP and demonstrate consistency with the Issurer's local Consolidated Plan. The issuer, at its discretion, may enter into a contractual agreement to allow the Department to underwrite the Project.

§49.7. Compliance Monitoring.

(a) The Code, §42(m)(1)(B) (iii), requires each State Allocating Agency to include in its "Qualified Allocation Plan" a procedure that the agency (or an agent or other private Contractor of such agency) will follow in monitoring Projects for noncompliance with the provisions of the Code, §42 and in notifying the Internal Revenue Service (the "Service"), or its successor, of such noncompliance of which such agency becomes aware. This procedure does not address forms and other records that may be required by the Service on examination or audit.

(b) The Department will also monitor compliance with any additional covenants made by the Project Owner in the extended low-income housing commitment agreement.

(c) The owner of a low-income housing Project must keep records for each qualified low-income building in the Project showing:

(1) the total number of residential rental Units in the building (including the number of bedrooms and the size in square feet of each residential rental Unit);

(2) the percentage of residential rental Units in the building that are low income Units;

(3) the rent charged on each residential rental Unit in the building including documentation to support the utility allowance;

(4) the number of occupants in each low-income Unit;

(5) the low-income Unit vacancies in the building and information that shows when, and to whom, the next available Units were rented;

(6) the annual income certification of each low-income tenant per Unit, in the form designated by the Department in the Compliance Reference Guide, as may be amended;

(7) documentation to support each low-income tenant's income certification, consistent with the verification procedures required by HUD under §8 of the United States Housing Act of 1937 (§8). In the case of a tenant receiving housing assistance payments under §8, the documentation requirement is satisfied if the public housing authority provides a statement to the Project Owner declaring that the tenant's income does not exceed the applicable income limit under the Code, §42(g) as described in the Compliance Reference Guide;

(8) the Eligible Basis and Qualified Basis of the building at the end of the first year of the Credit Period;

(9) the character and use of the nonresidential portion of the building included in the building's Eligible Basis under the Code, §42(d), (e.g. tenant facilities that are available on a comparable basis to all tenants and for which no separate fee is charged for use of the facilities, or facilities reasonably required by the Project); and

(10) additional information as required by the Department.

(d) Record retention provision. The owner of a low-income housing Project is required to retain the records described in subsection (c) of this section for at least six years after the due date (with extensions) for filing the federal income tax return for that year; however, the records for the first year of the tax Credit Period must be retained for at least six years beyond the due date (with extensions) for filing the federal income tax return for the last year of the Compliance Period of the building.

(e) Certification and Review.

(1) On or before February 1st of each year, the Department will send each Project Owner of a low income Project an Owner's Certification of Program Compliance to be completed by the Owner and returned to the Department on or before the first day of March of each year in the Compliance Period. Any Project for which the certification is not received by the Department, or is received but is past due, incomplete, improperly completed or not signed by the Project Owner, will be considered not in compliance with the provisions of the Code. The Owner Certification of Program Compliance shall cover the proceeding calendar year and shall include the following statements of the Owner:

(A) the Project met the minimum set-aside test which was applicable to the Project;

(B) there was no change in the Applicable Fraction of any building in the Project, or that there was a change, and a description of the change;

(C) the owner has received an annual income certification from each low-income tenant and documentation to support that certification;

(D) each low-income Unit in the Project was rent-restricted under the Code, §42(g)(2) and Internal Revenue Service Final Regulation TD 8520 §1.42(1) regarding utility allowance;

(E) all Units in the Project were for use by the general public and used on a non-transient basis (except for transitional housing for the homeless provided under the Code, §42(i)(3)(B)(iii));

(F) each building in the Project was suitable for occupancy, taking into account local health, safety, and building codes;

(G) either there was no change in the Eligible Basis (as defined in the Code, §42(d)) of any building in the Project, or that there has been a change, and the nature of the change;

(H) all tenant facilities included in the Eligible Basis under the Code, §42(d), of any building in the Project, such as swimming pools, other recreational facilities, and parking areas, were provided on a comparable basis without charge to all tenants in the building;

(I) if a low-income Unit in the Project became vacant during the year, reasonable attempts were, or are being, made to rent that Unit or the next available Unit of comparable or smaller size to tenants having a qualifying income before any other Units in the Project were, or will be, rented to tenants not having a qualifying income;

(J) if the income of tenants of a low-income Unit in the Project increased above the limit allowed in the Code, §42(g)(2)(D) (ii), the next available Unit of comparable or smaller size in the Project was, or will be, rented to tenants having a qualifying income;

(K) a LURA including an extended low-income housing commitment agreement as described in the Code, §42(h)(6)(B), was in effect for buildings subject to the Revenue Reconciliation Act of 1989, §7106(c)(1) (generally any building receiving an allocation after 1989);

(L) no change in the ownership of a Project has occurred during the reporting period;

(M) the Project Owner has not been notified by the Internal Revenue Service that the Project is no longer "a qualified low income housing project" within the meaning of the Code, §42; and

(N) the Project met all terms and conditions which were recorded in the LURA, or if no LURA was required to be recorded, the Project met all representations of the Project Owner in the Application for credits.

(2) Review.

(A) The Department will review each Owner's Certification of Program Compliance for compliance with the requirements of the Code, §42.

(B) Each year, the Department will perform monitoring reviews of at least 20% of the low income housing Projects. A

monitoring review will include an inspection of the income certification, the documentation the owner has received to support that certification, the rent record for each low income tenant, and any additional information that the Department deems necessary, for at least 20% of the low income Units in those Projects. The Department shall give reasonable notice to the Owner that an inspection will occur; however, the Projects and records to be reviewed will be selected by the Department in its discretion. Monitoring reviews will be performed at the location of the Project, unless the Project is required to have fewer than ten low income Units.

(C) The Department may, at the time and in the form designated by the Department, require the owners of low-income housing Projects to submit for compliance review, information on tenant income and rent for each low-income Unit, and may require an owner to submit for compliance review a copy of the income certification, the documentation the owner has received to support that certification and the rent record for any low-income tenant.

(3) Exception. The Department may, at its discretion, enter into a Memorandum of Understanding with the RECDS, whereby the RECDS agrees to provide to the Department information concerning the income and rent of the tenants in buildings financed by the RECDS under its §515 program. Owners of such buildings may be excepted from the review procedures of paragraph (2)(B) or (C) of this subsection or both; however, if the information provided by RECDS is not sufficient for the Department to make a determination that the income limitation and rent restrictions of the Code, §42(g)(1) and (2), are met, the owner must provide the Department with additional information.

(f) Inspection provision. The Department retains the right to perform an on site inspection of any low-income housing Project including all books and record pertaining thereto through either the end of the Compliance Period or the end of the period covered by any extended low-income housing commitment agreement, whichever is later. An inspection under this subsection may be in addition to any review under subsection (e)(2) of this section.

(g) Notices to Owner. The Department will provide prompt written notice to the owner of a low-income housing Project if the Department does not receive the certification described in subsection (e)(1) of this section or discovers through audit, inspection, review or any other manner, that the Project is not in compliance with the provisions of the Code, §42. The notice will specify a correction period which will not exceed 90 days, during which the owner may respond to the Department's findings, bring the Property into compliance, or supply any missing certifications. The Department may extend the correction period for up to six months if it determines there is good cause for granting an extension. If any communication to the Project Owner under this section is returned to the Department as unclaimed or undeliverable, the Project may be considered not in compliance without further notice to the Project Owner.

(h) Notice to the Internal Revenue Service.

(1) Regardless of whether the noncompliance is corrected, the Department is required to file IRS Form 8823, Low Income Housing Credit Agencies Report of Noncompliance, with the Internal Revenue Service. IRS Form 8823 will be filed not later than 45 days after the end of the correction period specified in the Notice to Owner, but will not be filed before the end of the correction period. The Department will explain on IRS Form 8823 the nature of the noncompliance and will indicate whether the owner has corrected the noncompliance or has otherwise responded to the Department's findings.

(2) The Department will retain records of noncompliance or failure to certify for six years beyond the Department's filing of the respective IRS Form 8823. In all other cases, the Department will retain the certification and records described in this section for three years from the end of the calendar year the Department receives the certifications and records.

(i) Notices to the Department.

(1) An owner of a low-income housing Project must notify the Department in writing prior to any sale, transfer, exchange, or renaming of the Project or any portion of the Project, and this notification requirement shall be included in a LURA with respect to each Project.

(2) An owner of a low-income housing Project must notify the Department in writing of any change of address to which subsequent notices or communications shall be sent.

(j) Liability. Compliance with the requirements of the Code, §42 is the sole responsibility of the owner of the building for which the credit is allowable. By monitoring for compliance, the Department in no way assumes any liability whatsoever for any action or failure to act by the owner including the owner's noncompliance with the Code, §42.

(k) These provisions apply to all buildings for which a low-income housing credit is, or has been, allowable at any time. The Department is not required to monitor whether a building or Project was in compliance with the requirements of the Code, §42, prior to January 1, 1992. However, if the Department becomes aware of noncompliance that occurred prior to January 1, 1992, the Department is required to notify the Service in a manner consistent with subsection (g) of this section.

§49.8. Housing Credit Allocations.

(a) The Housing Credit Allocation Amount shall not exceed the dollar amount the Department determines is necessary for the financial feasibility and the long term viability of the Project throughout the Compliance Period. Such determination shall be made by the Department at the time of issuance of the Commitment Notice; at the time the Department makes a housing credit allocation; and/or the date the building is placed in service. Any housing credit allocation amount specified in a Commitment Notice, allocation and/or Carryover Allocation Document is subject to change by the Department dependent upon such determination. Such a determination shall be made by the Department based on its evaluation and procedures, considering the items specified in the Code, §42(m)(2)(B), AND THE DEPARTMENT IN NO WAY OR MANNER REPRESENTS OR WARRANTS TO ANY PROJECT OWNER, SPONSOR, INVESTOR, LENDER OR OTHER ENTITY THAT THE PROJECT IS, IN FACT, FEASIBLE OR VIABLE.

(b) When the Project Owner is in full compliance with the QAP and the Rules in this chapter, the Commitment Notice, the Carryover Allocation Procedures Manual and all fees as specified within §49. 11 of this title (relating to Program Fees) have been received by the Department, the Department, if requested, shall execute a Carryover Allocation Document which has been properly completed, executed and notarized by the Project Owner. The Department shall return one executed copy to the Project Owner.

(c) All Carryover Allocations will be contingent upon the following:

(1) The Project Owner's closing of the construction loan shall occur within 120 days from the date of the execution of the Carryover Allocation document. All requests for extensions by Applicants shall be submitted to the Committee for approval, and the Committee may grant extensions, in its sole discretion, on a case-by-case basis. The Committee, at its sole discretion, may also waive fees. Copies of the closing documents must be submitted to the Department within two weeks after the closing. The Carryover Allocation will automatically be revoked if the Project Owner fails to meet the aforementioned closing deadline, and all credits previously allocated to that Project will be returned to the general pool for reallocation.

(2) The Project Owner must commence and continue substantial construction activities within a year of the execution of the Carryover Allocation document and evidence such activity in a format prescribed by the Department, (as more fully defined in the Carryover Allocation Procedures Manual), outlining progress towards placing the Project in service in an expeditious manner. All requests for extensions by Applicants shall be submitted to the Committee for approval, and the Committee may grant extensions, in its sole discretion, on a case-by-case basis. All requests for extensions by Applicants shall be submitted to the Committee for approval, and the Committee may grant extensions, in its sole discretion, on a case-by-case basis. The Department shall not allocate additional credits to a developer/Project Owner that is unable to provide evidence, satisfactory to the Department, of progress towards placements in service for a Project(s) that is in carryover. An allocation will be made in the name of the Applicant identified in the related Commitment Notice. If an allocation is made in the name of the party expected to be the general partner in an eventual owner partnership, the Department may, upon request, approve one transfer of allocation to such owner partnership in which such party is the sole general partner. Any other transfer of an allocation will be subject to review and approval by the Department does not constitute a representation to the effect that such transfer is permissible under the Code or without adverse consequences thereunder, and the Department may condition its approval upon receipt and approval of complete documentation regarding the new owner including all the criteria for scoring, evaluation and underwriting, among others, which was applicable to the original Applicant.

(d) The Department shall make a housing credit allocation to any Project Owner who holds a Commitment Notice which has not expired, and for which all fees as specified in §49.11 of this title (relating to Program Fees), have been received by the Department. Satisfactory evidence must be received by the Department that one or more buildings within the Project is completed and has been placed in service in accordance with the provisions of the Department's Cost Certification Procedures Manual. The Department shall make each such housing credit allocation by mailing or delivering IRS Form 8609 (or any successor form adopted by the Internal Revenue Service) to the Project Owner, with Part I thereof completed in all respects and signed by an authorized official of the Department. The delivery of the IRS Form 8609 will only occur only after the Project Owner has complied with all procedures and requirements listed within the Cost Certification Procedures Manual. Regardless of the year of Application to the Department for low income housing tax credits, the current year's Cost Certification Procedures Manual must be utilized when filing all cost certification requests. A separate housing credit allocation shall be made with respect to each building within a Project which is eligible for a housing credit.

(e) In making a housing credit allocation, the Department shall specify a maximum Applicable Percentage, not to exceed the Applicable Percentage for the building permitted by the Code, §42(b), and a maximum Qualified Basis amount. In specifying the maximum applicable percentage and the maximum Qualified Basis amount, the Department shall disregard the first-year conventions described in the Code, §42(f)(2)(A) and §42(f)(3)(B). The housing credit allocation made by the Department shall not exceed the amount necessary to support the extended low-income housing commitment as required by the Code, §42(h)(6)(C)(i).

(f) Project inspections shall be required to show that the Project is built or rehabilitated according to required plans and specifications. Subject to the following requirement contained in this subsection a copy of all Project inspections required and accepted by the lender financing the Project shall be acceptable to the Department as a certification that the Project is built to plans and specifications if such inspections are required by the lender during the construction of the Project. At a minimum, all Project inspections must include an inspection at the start-up phase and the interim phase, and a final inspection at the time the Project is placed in service. If no Project inspections are required by the lender financing the Project, the Department will require inspections to be made of the Project from time to time as determined at the sole discretion the Department. All such Project inspections shall be performed by an independent, third party inspector acceptable to the Department. The Project Owner shall pay all fees and costs of said inspections.

(g) At the time each building in the Project is placed in service, the Project Owner shall be responsible for furnishing the Department with documentation which satisfies the requirements as set forth in the Cost Certification Procedures Manual. The Department may require copies of invoices and receipts and statements for materials and labor utilized for the new construction or rehabilitation and, if applicable, a closing statement for the acquisition of the Project as well as for the closing of all interim and permanent financing for the Project.

§49.9. Department Records; Certain Required Filings.

(a) At all times during each calendar year the Department shall maintain a record of the following:

(1) the cumulative amount of the State Housing Credit Ceiling that has been reserved pursuant to reservation notices during such calendar year;

(2) the cumulative amount of the State Housing Credit Ceiling that has been committed pursuant to Commitment Notices during such calendar year;

(3) the cumulative amount of the State Housing Credit Ceiling that has been committed pursuant to Carryover Allocation Documents during such calendar year;

(4) the cumulative amount of housing credit allocations made during such calendar year; and

(5) the remaining unused portion of the State Housing Credit Ceiling for such calendar year.

(b) Not less frequently than quarterly during each calendar year, the Department shall publish in the *Texas Register* each of the items of information referred to in subsection (a) of this section.

(c) The Department shall mail to the Internal Revenue Service, not later than the 28th day of the second calendar month after the close of each calendar year during which the Department makes housing credit allocations, the original of each completed (as to Part I) IRS Form 8609, a copy of which was mailed or delivered by the Department to a Project Owner during such calendar year, along with a single completed IRS Form 8610, Annual Low-Income Housing Credit Agencies Report. When a Carryover Allocation is made by the Department, a copy of IRS Form 8609 will be mailed or delivered to the Project Owner by the Department in the year in which the building(s) is placed in service, and thereafter the original will be mailed to the Internal Revenue Service in the time sequence above mentioned. The original of the Carryover Allocation Document will be filed by the Department with IRS Form 8610 for the year in which the allocation is made. The original of all executed Agreement and Election Statements shall be filed by the Department with the Department's IRS Form 8610 for the year a housing credit allocation is made as provided in this section.

§49.10. Department Responsibilities. In making a housing credit allocation under this chapter, the Department shall rely upon information contained in the Project Owner's Application to determine whether a building is eligible for the credit under the Code, §42. The Project Owner shall bear full responsibility for claiming the credit and assuring that the Project complies with the requirements of the Code, §42. The Department shall have no responsibility for ensuring that a Project Owner who receives a housing credit allocation from

the Department will qualify for the housing credit. The Department will reject, and consider barring the Project Owner from future participation in the Department's tax credit program as a consequence thereof, any Application in which fraudulent information, knowingly false documentation or other misrepresentation has been provided. The aforementioned policy will apply at any stage of the evaluation or approval process.

§49.11. Program Fees.

(a) Each Project Owner that submits an Application shall submit to the Department, along with such Application, a non refundable Application fee, as set forth in the Application Submission Procedures Manual .

(b) For each Project which is to be evaluated by an independent third party underwriter in accordance with §49.6(b)(3) of this title (relating to Threshold Criteria; Evaluation Factors; Selection Criteria; Final Ranking; Credit Amount; Tax Exempt Bond Financed Projects), the Project Owner will be so informed in writing prior to the commencement of any reviews by said underwriter. The cost for the third party underwriting will be set forth in the Application Submission Procedures Manual, and must be received by the Department prior to the engagement of the underwriter. The fees paid by the Project Owner to the Department for the third party underwriting will be credited against the commitment fee established in subsection (c) of this section, in the event that a Commitment Notice is issued by the Department to the Project Owner.

(c) Each Project Owner that receives a Commitment Notice shall submit to the Department, not later than the expiration date on the commitment billing notice, a non refundable commitment fee, as set forth in the Application Submission Procedures Manual. The commitment fee shall be paid by cashier's check. Projects located within one of the targeted Texas counties, as indicated in the Reference Manual, will be exempt from the requirement to pay a commitment fee, in the event that Commitment Notice is issued.

(d) Each Project Owner that requests an extension of the expiration date of a Commitment Notice, shall submit to the Department, along with such request, a non refundable extension fee, as set forth in the Application Submission Procedures Manual and shall be paid by cashier's check. Such extension shall be granted at the discretion of the Department.

(e) Upon the Project being placed in service, the Project Owner will pay a compliance monitoring fee in the form of a cashier's check, as set forth in the Application Submission Procedures Manual. The compliance monitoring fee must be received by the Department prior to the release of the IRS Form 8609 on the Project.

(f) Public information requests are processed by the Department in accordance with the provisions of Texas Civil Statutes, Article 6252-17a, codified as Government Code, Chapter 552, and as amended by the Acts during the 73rd Legislature, and as may be amended from time to time. The General Services Commission and the Department determine the cost of copying, and other costs of production.

(g) The amounts of the Application fee, commitment fee, compliance monitoring fee, administrative fees, extension fee, and other applicable fees as specified in the Application Submission Procedures Manual will be revised by the Department from time to time as necessary to ensure that such fees compensate the Department for its administrative costs and expenses.

§49.12. Manner and Place of Filing Applications.

(a) All Applications, letters, documents, or other papers filed with the Department will be received only between the hours of 8:00 a.m. and 5:00 p.m. on any day which is not a Saturday, Sunday or a holiday established by law for state employees.

(b) All Applications and related documents submitted to the Department shall be mailed or delivered to Low Income Housing Tax Credit Program, Texas Department of Housing and Community Affairs, 507 Sabine, Suite 400, Austin, Texas 78701.

§49.13. Withdrawals, Cancellations, Amendments.

(a) A Project Owner may withdraw an Application prior to receiving a commitment, Carryover Allocation Document or Housing Credit Allocation, or may cancel a Commitment Notice by submitting to the Department a notice, as applicable, of withdrawal or cancellation.

(b) The Department may consider an amendment to a Project if the revisions:

(1) are consistent with the Code and the tax credit program;

(2) do not occur while the Project is under consideration for tax credits;

(3) do not involve a change in the number of points scored;

(4) do not involve a change in the Project's site; or

(5) do not involve a change in the set-aside election.

§49.14. Waiver and Amendment of Rules.

(a) The Board, in its discretion, may waive any one or more of these Rules in cases of natural disasters such as fires, hurricanes, tornadoes, earthquakes, or other acts of nature as declared by Federal or State authorities.

(b) The Department may amend this chapter and the Rules contained herein at any time in accordance with the provisions of Texas Civil Statutes, Article 6252-13a, codified as Government Code, Chapter 2001, and as amended by the Acts of the 73rd Legislature, and as may be amended from time to time.

§49.15. Forward Reservations; Binding Commitments.

(a) Anything in §49.4 of this title (relating to Applications; Environmental Assessments; Market Study; Commitments; Extensions; Carryover Allocations; Agreements and Elections; Extended Commitments) or elsewhere in this chapter to the contrary notwithstanding, the Department with approval of the Board may determine to issue commitments of tax credit authority with respect to Projects from the State Housing Credit Ceiling for the calendar year following the year of issuance (each a "forward commitment"). The Department may make such forward commitments:

(1) with respect to Projects placed on a waiting list in any previous Application Round during the year; or

(2) pursuant to an additional Application Round.

(b) If the Department determines to make forward commitments pursuant to a new Application Round, it shall provide information concerning such round in the Texas Register. In inviting and evaluating Applications pursuant to an additional Allocation Round, the Department may waive or modify any of the set-asides set forth in §49.5(a) and (b) of this title (relating to Set-Asides, Commitments and Preferences) and make such modifications as it determines appropriate in the Threshold Criteria, evaluation factors and Selection Criteria set forth in §49.6 of this title (relating to Threshold Criteria, Evaluation Factors; Selection Criteria; Final Ranking; Credit Amount; Tax Exempt Bond Financed Projects) and in the dates and times by which actions are required to be performed under this chapter. The Department may also, in an additional Application Round, include Projects previously evaluated within the calendar

year and rank such Projects together with those for which Applications are newly received.

(c) Unless otherwise provided in the Commitment Notice with respect to a Project selected to receive a forward commitment or in the announcement of an Application Round for Projects seeking a forward commitment, actions which are required to be performed under this chapter by a particular date within a calendar year shall be performed by such date in the calendar year of the anticipated allocation rather than in the calendar year of the forward commitment.

(d) Any forward commitment made pursuant to this section shall be made subject to the availability of State Housing Credit Ceiling in the calendar year with respect to which the forward commitment is made. No more than 15% of the per capita component of State Housing Credit Ceiling anticipated to be available in the State of Texas in a particular year shall be allocated pursuant to forward commitments to Project Applications carried forward without being ranked in the new Application Round pursuant to subsection (f) of this section. If a forward commitment shall be made with respect to a Project placed in service in the year of such commitment, the forward commitment shall be a "binding commitment" to allocate the applicable credit dollar amount within the meaning of the Code, §42(h)(1)(C).

(e) If tax credit authority shall become available to the Department later in a calendar year in which forward commitments have been awarded, the Department may allocate such tax credit authority to any eligible Project which received a forward commitment, in which event the forward commitment shall be canceled with respect to such Project.

(f) In addition to or in lieu of making forward commitments pursuant to subsection (a) of this section, the Department may determine to carry forward Project Applications on a waiting list or otherwise received and ranked in any Application Round within a calendar year to the subsequent calendar year, requiring such additional information, Applications and/or fees, if any, as it determines appropriate. Project Applications carried forward may, within the discretion of the Department, either be awarded credits in a separate allocation round on the basis of rankings previously assigned or may be ranked together with Project Applications invited and received in a new Application Round. The Department may determine in a particular calendar year to carry forward some Project Applications under the authority provided in this subsection, while issuing forward commitments pursuant to subsection (a) of this section with respect to others.

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 March 11, 1996.

TRD-9603426 Larry Paul Manley
Executive Director
Texas Department of Housing and Community Affairs

Earliest possible of adoption: April 19, 1996

For further information, please call: (512) 475-3916

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TITLE 13. CULTURAL RESOURCES

Part I. Texas State Library and Archives Commission

Chapter 1. Library Development

Grants: Electronic Access

- **13 TAC §1.101**

The Texas State Library and Archives Commission proposes an amendment to §1.101, concerning grants and training for public library connections to the Internet. The proposed amendments set aside a portion of the grants awarded to public libraries for single-facility libraries serving under 25,000 population, and make permanent the acceptance of prior expenditures for certain items as matching funds.

Lisa deGruyter, Manager, Electronic Library Services, has determined that for each year of the first five years the rule is in effect there will be a fiscal implication for local and state governments as a result of enforcing or administering the amended section. In State Fiscal Year 1997, local governments will be awarded approximately $800,000. Subsequent impact will depend on legislative appropriations in succeeding years. The cost to state government of administering the rule will be approximately $89,000 per year.

Ms. deGruyter 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 as amended will be the provision of electronic library services to users of small public libraries statewide. There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Comments may be submitted to Lisa deGruyter, Manager, Electronic Library Services, Texas State Library and Archives Commission, P.O. Box 12927, Austin, Texas 78711.

The amendment is proposed under Government Code, Chapter 441, Subchapter A, §441.0091 which provides the Commission the authority to provide grants to meet specific needs of local libraries that are not adequately addressed under other law.

The Government Code, Chapter 441, Subchapter A, §441.006, is affected by the proposed amended section.

§1.101. Internet Assistance Grants.

(a)-(g) (No change.)

(h) Prior expenditures. Expenditures by local applicants for consultant fees and preliminary planning costs of an approved project, made prior to the date of State Library approval, are eligible as matching funds, but only if made within the year prior to the date of the grant award contract. [In the first year grants are awarded (State Fiscal Year 1996),] **The** [the] following costs are eligible as matching costs, if made after October 1 **of the State Fiscal Year preceding the year for which the award is made**[, 1994:] central processing units (CPUs) and associated peripherals, storage devices, and telecommunications devices necessary to support dialup access, user interfaces, file searching, and TCP/IP telecommunications services such as electronic mail, telnet, and file transfer; purchase of software necessary to support dialup access, user interfaces, file searching, and TCP/IP telecommunications services such as electronic mail, telnet, and file transfer; telecommunications equipment leasing or purchase to enable a direct permanent connection to the most appropriate Internet point-of-presence; and equipment installation, software development and installation, and telecommunications installation.

(i) (No change.)

(j) Maximum award. The maximum grant award will be no more than half of the available funding in any given award period **in the grant category**.

(k) Application, grant review and award process. A prospective applicant must submit an application to the State Library and Archives Commission on the forms and at the time specified by the commission.

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

(4) Funding recommendations to the State Library and Archives Commission will consist of the highest ranked applications, up to the limit of available funds, **in two categories. Category 1 will include all applications from libraries serving under 25,000 assigned population for the State Fiscal Year in which the grant is awarded that are not applying in a group. Ten percent (10%) of the available funds will be allocated to Category 1**

applications. Category 2 will consist of all other applications. If applications are insufficient in either category to grant all funds, the balance will be awarded to applicants in the other category. Libraries may apply in only one category. If available funds are insufficient to fully fund a proposal after the higher ranking proposals have been fully funded, staff will negotiate with the applicant to determine if a lesser amount would be acceptable. If the applicant does not agree to the lesser amount, the staff will negotiate with the next applicant on the ranked list. The process will be continued until all grant funds are awarded.

(5)-(6) (No change.)

(l) (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 March 8, 1996.

TRD-9603346 Raymond Hitt
Assistant State Librarian
Texas State Library and Archives Commission

Earliest possible date of adoption: April 19, 1996

For further information, please call: (512) 463-5460

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TITLE 16. ECONOMIC REGULATION

Part II. Public Utility Commission

Chapter 23. Substantive Rules

The Public Utility Commission of Texas proposes an amendment to §23.3 relating to definitions, and §23.21 relating to cost of service. The rules are authorized by the Public Utility Regulatory Act of 1995, §1.101 which requires the Public Utility Commission of Texas to promulgate and enforce rules reasonably required in the exercise of its powers and jurisdiction.

The amendment to §23.3 provides definition for the term rate year. The amendment to §23.21 delineates the requirements for post test year adjustments related to capital investments.

Charles E. Johnson, Assistant General Counsel, Office of Regulatory Affairs, has determined that for the first five-year period the amendments are in effect, there will be no cost to the commission to implement the post test year adjustment requirements or other amendments. There will be no other fiscal implications for state or local governments as a result of enforcing or administering the amendments.

Mr. Johnson also has determined that for each year of the first five years the amendments are in effect, the public benefits anticipated as a result of enforcing the rule as amended is a reduction of issues for resolution in rates proceedings, which in turn should result in reduced rate case expenses, leading to a reduction in rates. There are no anticipated economic costs to persons who are required to comply with the proposed amendments because the amendments ensure the recovery of appropriate costs.

Mr. Johnson also has determined that for each of the first five years the section is in effect, there will be no impact on employment in the geographical areas affected by implementing the requirements of the section.

The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section. The commission will consider the costs and benefits in deciding whether to adopt the section.

Comments on the proposal (15 copies) may be submitted to Paula Mueller, Secretary of the Commission, 7800 Shoal Creek Boulevard, Austin, Texas 78757, within 30 days after publication. All comments should refer to Project Number 14613. A public hearing on this matter will be held at 9:00 a.m. on April 24, 1996, at the commission's offices at 7800 Shoal Creek Boulevard, Austin, Texas.

• 16 TAC §23.3,

General Rules

The amendment ia proposed under the Public Utility Regulatory Act of 1995, §1.101, 74th Legislature, Regulation Session 1995, as amended by House Bill 2128, 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, §1.101 74th Legislature, Regular Session 1995, as amended by House Bill 2128.

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

Rate Year-Except as utilized in §23.23(b) herein, relating to fuel matters, rate year shall be the 12 month period beginning with the first date that rates related to the current proceeding become effective. The first date that rates become effective includes, but is not limited to, the effective date rates are bonded, the date interim or temporary rates are effective in proceedings initiated pursuant to PURA §2.211 or §2. 212, the beginning date for which a PURA §2.211 refund is measured or as otherwise ordered by the commission.

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 March 4, 1996.

TRD-9603079 Paula Mueller
Secretary of the Commission
Public Utility Commission

Earliest possible date of adoption: April 19, 1996

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

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• 16 TAC §23.21

The amendment is proposed under the Public Utility Regulatory Act of 1995, §1.101, 74th Legislature, Regulation Session 1995, as amended by House Bill 2128, 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, §1.101 74th Legislature, Regular Session 1995, as amended by House Bill 2128.

Rates

§23.21. Cost of Service.

(a) (No change.)

(b) Components of cost of service and post test year adjustments. Except as provided for in **subsection (c)(2) of this section, relating to invested capital and §23.23(b), relating to** [the Public Utility Regulatory Act of 1995, subtitles H and I of Title III, or in any section of these rules dealing with] fuel expenses, rates are to be based upon a utility's cost of rendering service to the public during a historical test year, adjusted for known and measurable changes. Post test year adjustments for known and measurable changes to historical test year data (including, but not limited to revenue, expenses, and invested capital) will be considered only where the attendant impacts on all aspects of a utility's operations can be with reasonable certainty identified, quantified, and matched. The two components of cost of service are allowable expenses and return on invested capital.

(c) (No change.)

(d) Return on invested capital. The return on invested capital is the rate of return times invested capital.

(1) (No change.)

(2) Invested capital; rate base. The rate of return is applied to the rate base. The rate base, sometimes referred to as invested capital, includes as a major component the original cost of plant, property, and equipment, less accumulated depreciation, used and useful in rendering service to the public. Components to be included in determining the overall rate base are as follows:

(A)-(F) (No change.)

(G) Requirements for post test year adjustments. Post test year adjustments for known and measurable rate base additions (increases) to historical test year data will be considered only where:

(i) **the addition represents plant which would appropriately be recorded in FERC accounts 101 or 102,**

(ii) **each addition must comprise at least 10% of the utility's requested rate base exclusive of post test year adjustments and construction work in progress (CWIP),**

(iii) **the plant addition is deemed by this commission to be in-service before the rate year begins, and**

(iv) **the post test year adjustment criteria of subsection (a) of this section is satisfied.**

(H) Each post test year plant adjustment will be included in rate base at:

(i) the reasonable test year end CWIP balance if the addition is constructed by the utility, or

(ii) **the reasonable purchase price if the addition represents a purchase, subject to original cost requirements, as specified in §2.206 and §3.206 of the Act.**

(I) Post test year adjustments for known and measurable rate base decreases to historical test year data will be allowed only when:

(i) **the decrease represents plant which was appropriately recorded in FERC accounts 101 or 102, plant held for future use, CWIP (mirror CWIP is not considered CWIP) or an attendant impact of another post test year adjustment;**

(ii) **the plant is removed from service, mothballed, sold or removed from the utility's books prior to the rate year, and**

(iii) **the post test year adjustment criteria of subsection (a) of this section is satisfied.**

(e)-(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 March 4, 1996.

TRD-9603080 Paula Mueller
Secretary of the Commission
Public Utility Commission

Earliest possible date of adoption: April 19, 1996

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

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TITLE 22. EXAMINING BOARDS

Part XXIV. Texas Board of Veterinary Medical Examiners

Chapter 571. Licensing

Examinations

• 22 TAC §571.19

The Texas Board of Veterinary Medical Examiners proposes new §571.19, concerning Temporary License for Texas Racing Commission Veterinarians. The Texas Racing Commission is experiencing difficulty securing Texas licensed veterinarians to work at the horse and greyhound race tracks since the positions require full licensure. The Commission requested the Board to adopt a rule under the Veterinary Licensing Act, Article 8890, §10B, which provides the Board with authority to issue temporary licenses.

This new rule will grant temporary licensure to applicants identified by the Commission as being necessary for the regulation of para-mutual horse and greyhound racing. Applicants will be required to successfully complete the State Board Jurisprudence Examination, and their authority is limited to those responsibilities certified by the Texas Racing Commission. Any practice outside the special duties assigned by the Texas Racing Commission will constitute a violation of the Veterinary Licensing Act and/or Rules of Professional Conduct and result in disciplinary action. Temporary licenses are issued for one year and not renewable, but the Board may issue successive licenses. All temporary licenses will expire September 1, 1997.

Ron Allen, Executive Director of the Board, 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.

Mr. Allen 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 the health and safety of the animals racing through examinations and testing for drugs.

The economic costs to persons required to comply with this section will be $100 which represents the examination fee for a temporary license.

Comments concerning this rule may be addressed to the Texas Board of Veterinary Medical Examiners, 333 Guadalupe, Suite 2-330, Austin, Texas 78701-3998, (512) 305-7555, and must be received by April 22, 1996.

The new section is proposed under the authority the Veterinary Licensing Act, Texas Civil Statutes, Article 8890, §7(a), which states "The Board may make, alter, or amend such rules and regulations as may be necessary or desirable to carry into effect the provisions of this Act."

The new section affects the Veterinary Licensing Act, Texas Civil Statutes, Article 8890, §10B(a), which provides the Board with the authority to provide for the issuance of a temporary license.

§571.19. Temporary License for Texas Racing Commission Veterinarians.

(a) Certification of need. As authorized by the Act, §10B(a), the Board may issue temporary licenses to veterinarians certified by the Texas Racing Commission, provided the applicants comply with the following conditions.

(1) Applicants for temporary licensure must be identified to the board, in writing, by the Texas Racing Commission as being necessary for the regulation of para-mutual horse and greyhound racing in Texas. The notification letter to the Board must contain the applicant's name, mailing address, and identify the special duties that require a temporary license.

(2) Applicants must take and pass the Texas Jurisprudence Examination prior to licensure. A grade of 75% has been established as the minimum passing grade. Each applicant will receive a letter form the Board notifying him/her of the results of the examination. Notification of a passing score on the Texas Jurispru-

dence Examination constitutes limited authority to practice veterinary medicine in Texas in accordance with the responsibilities certified by the Texas Racing Commission. Failure of the Texas Jurisprudence Examination requires reapplication for a temporary license.

(3) A completed application, on the form designated by the Board, including payment of any relevant examination fees and written certification of employment duties by the Texas Racing Commission, shall be submitted no less than 45 days prior to the date of the next available Texas Jurisprudence Examination.

(b) Applicant criteria. Applicants for a temporary license under §10B(a) cannot be otherwise licensed under §10A and must meet the following minimum criteria:

(1) proof of graduation from an American Veterinary Medical Association (AVMA) accredited college of veterinary medicine or an Educational Commission for Foreign Veterinary Graduates (ECFVG) Certificate issued by the AVMA;

(2) proof of licensure in another state or jurisdiction of the United States;

(3) certification and sponsorship by the Texas Racing Commission;

(4) determination of competence in the field of paramutual horse or greyhound racing, as provided in subsection (c) of this section; and

(5) passing grades on the Texas Jurisprudence Examination.

(c) Competency criteria. In determining competency, the Board may consider one or more of the following:

(1) certification of special competency issued by a specialty board recognized by the AVMA;

(2) commission as an officer of the United States armed services, either active or retired status;

(3) proof of certification in good standing as "racing veterinarian", as certified by the American Racing Commission International, in the state of primary licensure; and

(4) other criteria necessary to ensure the safety of paramutual horse and greyhound racing in Texas.

(d) Term of temporary license. A temporary license issued under this rule shall expire on the earlier of one year from the date of issuance; or on September 1, 1997. Temporary licenses are not renewable The Board may issue successive temporary licenses to the same applicant in which case it may waive the Texas Jurisprudence Examination Requirement.

(e) Disciplinary action. Any practice of veterinary medicine by a temporary licensee outside of the special duties identified by the Texas Racing Commission shall constitute a violation of the Act and the rules of Professional Conduct and shall result in disciplinary action.

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 March 6, 1996.

TRD-9603289 Ron Allen
Executive Director
Texas Board of Veterinary Medical Examiners

Proposed date of adoption: June 13, 1996

For further information, please call: (512) 305-7555

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Chapter 573. Rules of Professional Conduct

General Professional Ethics

• 22 TAC §573.9

The Texas Board of Veterinary Medical Examiners proposes an amendment to §573.9, concerning Non-Resident Consultants, to include the definition currently contained in §573.65 to clarify its application to non-resident consultants as authorized by the Veterinary Licensing Act, Texas Civil Statutes, Article 8890, §3(e). The amendment defines consultation as the act of rendering professional advice, limited to diagnosis and prognosis, and prohibits consultants from rendering treatment or performing surgery. A non-substantive amendment is made to correct grammatical errors.

Ron Allen, Executive Director of the Board, 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.

Mr. Allen 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 derived from the amendment which serves to clarify a rule already in effect. 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 the Texas Board of Veterinary Medical Examiners, 333 Guadalupe, Suite 2-330, Austin, Texas 78701-3998, (512) 305-7555, and must be received by April 22, 1996.

The amendment is proposed under the authority of the Veterinary Licensing Act, Texas Civil Statutes, Article 8890, §7(a), which states "The Board may make, alter, or amend such rules and regulations as may be necessary or desirable to carry into effect the provisions of this Act."

The amendment affects the Veterinary Licensing Act, Article 8890, §3(e) addressing consultations by veterinarians residing in other states.

§573.9. Nonresident Consultants. **Pursuant to the Act, §3(e) consultation is defined as the act of rendering professional advice about a specific case. Consultations are limited to diagnosis and prognosis, and do not include treatment or surgery.** Licensed veterinary practitioners from other states may enter the State of Texas for purposes of consultation[,] on an individual case basis[, and] for a specific purpose.[; not on] **Nonresident consultants may not establish** a routine visit schedule **of consults in Texas.** Consultants must, at all times, practice under the direct supervision of a veterinarian licensed in this state.

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 March 6, 1996.

TRD-9603290 Ron Allen
Executive Director
Texas Board of Veterinary Medical Examiners

Proposed date of adoption: June 13, 1996

For further information, please call: (512) 305-7555

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Responsibility to Clients

• 22 TAC §573.29

The Texas Board of Veterinary Medical Examiners proposes an amendment to §573.29, concerning Complaint Information, to expand the title and provide the new address and phone number of the Board Offices. The amendment will also include a toll-free number for consumers' use in securing complaint forms and other enforcement information as provided in the Government Code, Article 4252p mandating the creation of the Health Professions Council, and charging it with the creation of a toll-free complaint information line.

Ron Allen, Executive Director of the Board, has determined that for the first five-year period the section is in effect there will be fiscal implications for state or local government as a result of enforcing or administering the section. The fiscal implications for state or local government will be a cost of approximately $3,000 annually for the toll-free hotline. The cost to the Veterinary Board will be about $200 annually.

Mr. Allen 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 information concerning how to file a complaint will be more readily available. 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 the Texas Board of Veterinary Medical Examiners, 333 Guadalupe, Suite 2-330, Austin, Texas 78701-3998, (512) 305-7555, and must be received by April 22, 1996.

The amendment is proposed under the authority of the Veterinary Licensing Act, Texas Civil Statutes, Article 8890, §7(a), which states "The Board may make, alter, or amend such rules and regulations as may be necessary or desirable to carry into effect the provisions of this Act."

The amendment affects the Veterinary Licensing Act, Article 8890, §18B(d), which states the Board shall provide reasonable assistance to a person who wishes to file a complaint with the Board.

§573.29. Complaint Information ***and Notice to Clients.***

(a) A licensee shall provide an effective way to inform his/her consumers and recipients of services about how to file complaints with the Board about his/her services. The notification must contain:

(1) the following specific address: Texas State Board of Veterinary Medical Examiners, **333 Guadalupe, Suite 2-330**, [1946 South IH-35, Suite 306] Austin, Texas **78701-1998** [78704];

(2) the Board's telephone numbers: (512) **305-7555**, [447-1183] fax: (512) **305-7556** [442-3443];

(3) Toll-free Complaint Information Number: 1-800-821-3205.

(b)-(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 March 6, 1996.

TRD-9603288 Ron Allen
Executive Director
Texas Board of Veterinary Medical Examiners

Proposed date of adoption: June 13, 1996

For further information, please call: (512) 305-7555

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Other Provisions

• 22 TAC §573.64

The Texas Board of Veterinary Medical Examiners proposes an amendment to §573.64, concerning Continuing Education Requirements, to allow the Board President to designate the Board member authorized to approve continuing education programs.

Ron Allen, Executive Director of the Board, 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.

Mr. Allen 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 no benefit from this amendment because the change only affects internal administrative procedures. 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 the Texas Board of Veterinary Medical Examiners, 333 Guadalupe, Suite 2-330, Austin, Texas 78701-3998, (512) 305-7555, and must be received by April 22, 1996.

The amendment is proposed under the authority of the Veterinary Licensing Act, Texas Civil Statutes, Article 8890, §7(a), which states "The Board may make, alter, or amend such rules and regulations as may be necessary or desirable to carry into effect the provisions of this Act."

The amendment affects the Veterinary Licensing Act, Article 8890, §13(g), which requires the Board to establish a minimum number of continuing education hours prior to license renewal.

§573.64. Continuing Education Requirements.

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

(c) Acceptable Continuing Education. Acceptable continuing education hours will be considered by the Board to be hours earned by participation in meetings sponsored by the American Veterinary Medical Association (AVMA), AVMAs affiliated state veterinary medical associations and/or their continuing education organizations, AVMA recognized specialty groups, regional veterinary medical associations, local veterinary medical associations, and veterinary medical colleges. Other offerings of continuing education hours may be approved by the [Board Secretary and] Executive Director **and a Board member who is a veterinarian designated by the Board President.**

(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 March 6, 1996.

TRD-9603287 Ron Allen
Executive Director
Texas Board of Veterinary Medical Examiners

Proposed date of adoption: June 13, 1996

For further information, please call: (512) 305-7555

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• 22 TAC §573.65

The Texas Board of Veterinary Medical Examiners proposes an amendment to §573.65, concerning Definitions, by deleting the reference to the Veterinary Licensing Act, Article 8890, §3(e). This clarifies that the definition of "consultation" applies to all Texas licensed veterinarians. The amendment requires Texas licensed veterinarians to establish a veterinarian-client-patient relationship prior to performing any service other than that of a consultant in compliance with the Veterinary Licensing Act and other Rules of Professional Conduct.

Ron Allen, Executive Director of the Board, 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.

Mr. Allen 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 that there will not be any discernable public benefit derived from the adoption of this section since the definition will also be included in §573.9 relating to Non-resident Consultants. 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 the Texas Board of Veterinary Medical Examiners, 333 Guadalupe, Suite 2-330, Austin, Texas 78701-3998, (512) 305-7555, and must be received by April 22, 1996.

The amendment is proposed under the authority of the Veterinary Licensing Act, Texas Civil Statutes, Article 8890, §7(a), which states "The Board may make, alter, or amend such rules and regulations as

may be necessary or desirable to carry into effect the provisions of this Act."

The amendment affects the Veterinary Licensing Act, Article 8890, §2(2), which defines the practice of veterinary medicine.

§573.65. Definitions.

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

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

(3) Consultation [(Article 8890, §3(e))]-The act of rendering professional advice about a specific case. Consultations are limited to diagnosis and prognosis, and does not include treatment or surgery.

(4)-(6) (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 March 6, 1996.

TRD-9603291 Ron Allen
Executive Director
Texas Board of Veterinary Medical Examiners

Proposed date of adoption: June 13, 1996

For further information, please call: (512) 305-7555

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Chapter 575. Practice and Procedure

Practice and Procedure

• 22 TAC §575.26

The Texas Board of Veterinary Medical Examiners proposes an amendment to §575.26, concerning Complaint Form, to provide the new address for the Board offices. The complaint form is further amended to move the signature line and date to the first page for administrative convenience. The certification statement appearing before the signature line has been amended to include attachments.

Ron Allen, Executive Director of the Board, 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.

Mr. Allen 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 new address to which to return their complaint forms. 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 the Texas Board of Veterinary Medical Examiners, 333 Guadalupe, Suite 2-330, Austin, Texas 78701-3998, (512) 305-7555, and must be received by April 22, 1996.

The amendment is proposed under the authority of the Veterinary Licensing Act, Texas Civil Statutes, Article 8890, §7(a), which states "The Board may make, alter, or amend such rules and regulations as may be necessary or desirable to carry into effect the provisions of this Act."

The amendment affects the Veterinary Licensing Act, Article 8890, §18B(c) requiring the Board to adopt a standardized form for complaints.

§575.26. Complaint Form. The Board shall adopt the following form as its official complaint form. The form, along with a "Consumer Information" pamphlet, explaining the Board functions and complaint process, will be furnished to any person who wishes to file a complaint with the Board.

Figure 1: 22 TAC §575.26

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 March 6, 1996.

TRD-9603292 Ron Allen
Executive Director
Texas Board of Veterinary Medical Examiners

Proposed date of adoption: June 13, 1996

For further information, please call: (512) 305-7555

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Chapter 577. General Administrative Duties

Board Members and Meetings Duties

• 22 TAC §577.2

The Texas Board of Veterinary Medical Examiners proposes an amendment to §577.2, concerning Meetings. The amendment incorporates the use of telephone conferences for special called meetings when convening a quorum of the Board is difficult or impossible.

Ron Allen, Executive Director of the Board, 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. The fiscal implications for state or local government of utilizing this rule will be reduced travel expenses for the Board.

Mr. Allen 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 derived from the adoption of this amendment which will be to allow the Board to take immediate action on urgent items in an efficient and economical 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.

Comments on the proposal may be submitted to the Texas Board of Veterinary Medical Examiners, 333 Guadalupe, Suite 2-330, Austin, Texas 78701-3998, (512) 305-7555, and must be received by April 22, 1996.

The amendment is proposed under the authority of the Veterinary Licensing Act, Texas Civil Statutes, Article 8890, §7(a), which states "The Board may make, alter, or amend such rules and regulations as may be necessary or desirable to carry into effect the provisions of this Act."

The amendment affects the Veterinary Licensing Act, Article 8890, §5(j), which states that the Board is subject to the Open Meetings Act.

§577.2. Meetings.

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

(c) The President may call a special meeting of the Board at any time to meet at any place in Texas at which meeting the Board may [hold hearings and] transact any and all business. **Specially called meetings to conduct urgent business may be held by telephone conference if convening a quorum of the Board at one location is difficult or impossible. Notice of specially called meetings will be provided in accordance with The Open Meetings Act, Texas Government Code, §§55.001 et seq.** The Board or any of its members or staff may attend meetings outside the State where such is deemed to be to the best interest of the public and the Board.

(d) (No change.)

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

Issued in Austin, Texas, on March 6, 1996.

TRD-9603286 Ron Allen
Executive Director
Texas Board of Veterinary Medical Examiners

Proposed date of adoption: June 13, 1996

For further information, please call: (512) 305-7555

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• 22 TAC §577.3

The Texas Board of Veterinary Medical Examiners proposes an amendment to §577.3, concerning Compensation, to conform with the statutory requirements outlined in the General Appropriations Act.

Ron Allen, Executive Director of the Board, 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 because the reimbursement rate remained the same as prior fiscal years.

Mr. Allen 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 no discernable public benefit derived from the adoption of this amendment because reimbursement of travel expenses incurred by Board members does not impact the public. 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 the Texas Board of Veterinary Medical Examiners, 333 Guadalupe, Suite 2-330, Austin, Texas 78701-3998, (512) 305-7555, and must be received by April 22, 1996.

The amendment is proposed under the authority of the Veterinary Licensing Act, Texas Civil Statutes, Article 8890, §7(a), which states "The Board may make, alter, or amend such rules and regulations as may be necessary or desirable to carry into effect the provisions of this Act."

The amendment affects the Veterinary Licensing Act, Article 8890, §5(h), which entitles members of the Board to received a per diem as set by legislative appropriation.

§577.3. Compensation. Board members shall receive **reimbursement** [compensation] at the statutory **per diem** rate [of per diem] for each day [he is] actually engaged in **official Board** duties[, of his office, together with the actual necessary expenses incurred in the performance of such duties]. **Reimbursement for travel expenses shall be made in accordance with amounts established by state law.** Official duties include preparation **and review of** examinations, attendance at official Board meetings, [or] **other meetings** [for performing duties] as directed by the President of the Board, **or meetings required by statute or Board rule. Official duties also include** [and] the time spent in direct travel to and from the **location of Board duties** [the place of meeting or on the business directed].

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 March 6, 1996.

TRD-9603284 Ron Allen
Executive Director
Texas Board of Veterinary Medical Examiners

Proposed date of adoption: June 13, 1996

For further information, please call: (512) 305-7555

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Staff and Miscellaneous

• 22 TAC §577.12

The Texas Board of Veterinary Medical Examiners proposes an amendment to §577.12, concerning Professional Directory. The General Appropriations Act, House Bill 1, 74th Legislative Session, did not provide the Board with funding to print a directory of currently licensed veterinarians. The amendment to this rule removes the stipulation that the directory will be furnished to licensees at no charge and provides that it will be furnished upon request at a charge dictated by the General Services Commission's rules. The directory of all currently licensed veterinarians, or a select listing, will be made available upon request in printed and electronic formats. Costs charged will be in accordance with the General Services Commission's §§111.61-111.71. The amendment also changes the title of the rule to more accurately reflect the document addressed in the rule.

Ron Allen, Executive Director of the Board, 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. He states this amendment will not have fiscal implications to local government, but will reduce direct costs to the Board because it will not be responsible for providing directories at no charge. The change may also impact licensing fees because costs for providing the directory will no longer be recovered through fees. The estimated savings to the Board, and subsequently to licensees, will be approximately $13,000 every other year, or $2.50 per licensee.

Mr. Allen 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 there will be no public benefit derived from the adoption of this amendment since directories and select listings of licensees have always been available to the public at a charge. 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 the Texas Board of Veterinary Medical Examiners, 333 Guadalupe, Suite 2-330, Austin, Texas 78701-3998, (512) 305-7555, and must be received by April 22, 1996.

The amendment is proposed under the authority of the Veterinary Licensing Act, Texas Civil Statutes, Article 8890, §7(a), which states "The Board may make, alter, or amend such rules and regulations as may be necessary or desirable to carry into effect the provisions of this Act."

The amendment affects the Veterinary Licensing Act, Article 8890, §19(a), which mandates that the Board, by rule, establish reasonable and necessary fees to produce sufficient revenue to cover the costs of administering the Act.

*§577.12. **Directory of Licensees** [Professional Directory].* **Upon request the** [The] Board will furnish [without charge] a **complete or partial listing of currently licensed veterinarians in printed or electronic format.** [professional directory to any currently licensed veterinarian on date of publication. Any veterinarian requesting a second copy of the professional directory published by the Board shall be required to pay the regular charge established by the Board for such directory.] **Costs for the directory will vary depending on the information requested and will be in accordance with the General Services Commission guidelines and rules.**

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 March 6, 1996.

TRD-9603285 Ron Allen
Executive Director
Texas Board of Veterinary Medical Examiners

Proposed date of adoption: June 13, 1996

For further information, please call: (512) 305-7555

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• 22 TAC §577.15

The Texas Board of Veterinary Medical Examiners proposes an amendment to §577.15, concerning Fee Schedule. This amendment corrects an error to the previously adopted rule. The amendment removes the reference to the professional fee from the charge for a Provisional License. The Veterinary Licensing Act, Article 8890, §25 does not mandate collection of a $200 professional fee on Provisional Licenses issued by the Board. The total fee for a Provisional License will remain at $400.

Ron Allen, Executive Director of the Board, 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 because it does not change the current fee or its distribution among funds.

Mr. Allen 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 there will be no public benefit derived from the adoption of this amendment because it does not change the current fee or its distribution among funds. 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 the Texas Board of Veterinary Medical Examiners, 333 Guadalupe, Suite 2-330, Austin, Texas 78701-3998, (512) 305-7555, and must be received by April 22, 1996.

The amendment is proposed under the authority of the Veterinary Licensing Act, Texas Civil Statutes, Article 8890, §7(a), which states "The Board may make, alter, or amend such rules and regulations as may be necessary or desirable to carry into effect the provisions of this Act."

The amendment affects the Veterinary Licensing Act, Article 8890, §19(a), which mandates that the Board, by rule, establish reasonable and necessary fees to produce sufficient revenue to cover the costs of administering the Act.

§577.15. Fee Schedule. The Board shall establish fee amounts in accordance with the Veterinary Licensing Act, Texas Civil Statutes, Article 8890, §19(a)-(c).
Figure 1: 22 TAC §577.15

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 March 6, 1996.

TRD-9603283 Ron Allen
Executive Director
Texas Board of Veterinary Medical Examiners

Proposed date of adoption: June 13, 1996

For further information, please call: (512) 305-7555

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TITLE 25. HEALTH SERVICES
Part I. Texas Department of Health
Chapter 38. Chronically Ill and Disabled Children's Services Program

• 25 TAC §38.13

The Texas Department of Health (department) proposes an amendment to §38.13 relating to payment of services in the Chronically Ill and Disabled Children's Services Program (CIDC). Increasing service costs, without significant increases in general revenue funding, have necessitated review of all aspects of CIDC service delivery and client eligibility. The proposed amendment would authorize CIDC to reimburse providers for hemophilia factor based on the United States Public Health Service (USPHS) price plus a supplemental dispensing fee in the actual amount of the cost of shipping. The USPHS price, authorized by the Veterans Health Care Act of 1992 (P.L. 102-585, November 4, 1992), is defined as "the average manufacturer price (AMP) for the drug under Title XIX of the Social Security Act in the preceding calendar quarter, reduced by the rebate percentage." The supplemental dispensing fee shall be compatible with the supplemental dispensing fee developed by the Texas Medicaid program under §35.611(c)(2)(A) of this title (relating to Dispensing Fee) for dispensing a hemophilia-related product that is subject to USPHS pricing under Public Law 102-585. This reimbursement methodology would allow CIDC to reduce its reimbursement costs for hemophilia factor and services while maintaining access to the factor for clients with hemophilia.

Debra Stabeno, Associate Commissioner for Health Care Delivery, has determined that for the first five-year period the section as proposed is in effect, there will be fiscal implications as a result of enforcing or administering the section. The effect on state government is estimated to be a reduction in cost in the range of $0.52 million to $1.26 million per fiscal year (FY) for FY 1996 through FY 2000, depending on the amount of hemophilia factor purchased for program recipients, and/or any changes in USPHS pricing. There are no fiscal implications for local governments.

Ms. Stabeno also has determined that for each year of the first five years the section is in effect, the public benefit anticipated will be to reduce costs to CIDC for hemophilia factor purchased for clients. There will be no effect on small businesses or persons who are required to comply with the section as proposed. There is no anticipated impact on local employment.

Comments on the proposed amendment may be submitted to Susan C. Penfield, M. D., Director, Children's Health Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3179, (512) 458-7111, Extension 3104. Public comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The amendment is proposed under Health and Safety Code, §35.009, which allows the Board of Health (board) to adopt reasonable procedures and standards for the determination of fees and charges for program services; and under Health and Safety Code, §12.001(b), which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The amendment will affect Health and Safety Code, Chapter 35.

§38.13. Payment of Services. The Chronically Ill and Disabled Children's Services (CIDC) Program reimburses for covered services for CIDC Program eligible clients. Payment may be made only after the delivery of the service. The client or client's family must not be billed for the service or be required to make a preadmission or pretreatment payment or deposit. Providers and facilities must agree to accept established fees as payment in full.

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

(4) Reimbursement methodology for hemophilia factor. The provisions of paragraph (3) of this subsection notwithstanding, CIDC will reimburse CIDC providers for hemophilia factor provided to eligible CIDC clients based on the lower of either the billed price or the United States Public Health Service (USPHS) price in effect on the date of service plus a supplemental dispensing fee in the amount of the actual cost of shipping. The USPHS price, authorized by the Veterans Health Care Act of 1992 (P.L. 102-585, November 4, 1992), is defined as "the average manufacturer price (AMP) for the drug under Title XIX of the Social Security Act in the preceding calendar quarter, reduced by the rebate percentage." The supplemental dispensing fee shall be compatible with the supplemental dispensing fee developed by the Texas Medicaid program under §35.611(c)(2)(A) of this title (relating to Dispensing Fee) for dispensing a hemophilia-related product that is subject to USPHS pricing under Public Law 102-585, November 4, 1992.

(5)[(4)] Required documentation. The CIDC Program may require documentation of the delivery of goods and services from the provider.

(6)[(5)] Overpayments.

(A) Overpayments are payments made by the CIDC Program due to the following:

(i) duplicated billings;

(ii) services paid by public or private insurance or other resources;

(iii) payments made for services not delivered;

(iv) services disallowed by the CIDC Program; and

(v) subrogation.

(B) Overpayments made in behalf of clients to providers must be reimbursed to the Texas Department of Health (department) by lump sum payment or, at the department's discretion, out of the current claims due to be paid the provider in behalf of clients. This will also apply to any person or persons who have a legal obligation to support the client and have received payments from a payor or other benefits. The opportunity for an appeal is available to providers and to the client or person(s) responsible for the client, as provided in §38.16 of this title (relating to Right of Appeal).

(7)[(6)] Linkage with Medically Needy Program. Services rendered for clients eligible for both the CIDC Program and the Medically Needy Program (MNP) through the Texas Department of Human Services (DHS) may be considered for reimbursement by the CIDC Program. The client must first submit the unpaid claims to the MNP in order for these claims to be used to meet the MNP spend-down provision. The CIDC Program will consider reimbursement of only those claims which have been processed by DHS, applied to the client's spend-down, and currently are unpaid.

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 March 6, 1996.

TRD-9603297 Susan K. Steeg
General Counsel
Texas Department of Health

Earliest possible date of adoption: April 19, 1996

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

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TITLE 28. INSURANCE

Part I. Texas Department of Insurance

Chapter 1. General Administration

Subchapter A. Rules of Practice and Procedure

• 28 TAC §§1.88, 1.89, 1.90

(Editor's Note: The following proposed rule was inadvertently omitted from the March 12, 1996, issue of the Texas Register. The Texas Department of Insurance submitted the rule on March 1, 1996.)

The Commissioner of Insurance proposes new §1.88 and §1.89, relating to the filing of a written response to the notice of hearing in a contested case, and to default provisions and remedies in the event of default, respectively; and amendments to §1.90, concerning the rules of practice and procedure for contested cases before the State Office of Administrative Hearings (SOAH) and the Commissioner of Insurance. Provisions addressing the filing of a written response to the notice of hearing and sanctions for failure to file a written response or to appear at hearing are necessary and essential for the orderly and efficient disposition of matters before the Commissioner. The proposed new sections will permit the elimination of unnecessary administrative expense for both the department and SOAH, so that resources may be shifted to necessary and more essential functions. Simultaneous to this notice of proposed new §§1.88 and 1.89, and amendment to §1.90, the commissioner is proposing repeal of existing §§1.88 and 1. 89. Proposed notice of that repeal is published elsewhere in this issue of the Texas Register. Proposed new §1.88 provides a requirement for filing a written response to the notice of hearing in contested cases, as well as procedural details necessary to comply with the requirement. It provides a definition for contested case, addresses notice provisions, sets out in detail a required disclosure to the respondent regarding the necessity to provide a written response and the consequences for failure to provide such response, as well as setting out that certain remedies are available to the department staff in the event a written response is not timely filed. Proposed new §1. 89 sets out provisions defining default and the remedies available in the event of default, including informal disposition by default. It also defines "informal disposition by default," and provides a procedure by which a respondent may set aside a default order and reopen the contested case. Proposed amendments to §1.90 make conforming changes to the memorandum of understanding between the department and the State Office of Administrative Hearings necessarily resulting from proposed new §§1.88 and 1.89. In addition, proposed amendments to the hearings provisions of §1.90 add timetable information to the procedure by which matters are to be withdrawn from the SOAH docket following informal disposition.

Mary Keller, senior associate commissioner for the legal and compliance activity of the Texas Department of Insurance, has determined that for each year of the first five years the sections are in effect, there will be no fiscal impact on state or local government as a result of enforcing or administering the sections. Ms. Keller also has determined that there will be no effect on local employment or the local economy.

Mary Keller, senior associate commissioner for the legal and compliance activity of the Texas Department of Insurance, has determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of administration and enforcement of the sections will be the more efficient administrative regulation of insurance licensees or prospective licensees, and the more effective utilization of public resources. There is no anticipated difference in cost of compliance between small and large businesses, or between business entities and natural persons resulting from the sections as amended. There is no anticipated economic cost resulting from the proposed amendments to persons who are required to comply with the proposed amended sections.

Comments on the proposal must be submitted in writing within 30 days after publication of the proposal in the Texas Register to Alicia M. Fechtel, General Counsel and Chief Clerk, P.O. Box 149104, MC 113-2A, Austin, Texas 78714-9104. An additional copy of the comment should be submitted to Mary Keller, Senior Associate Commissioner for Legal and Compliance, P.O. Box 149104, MC 110-1A, 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 new sections are proposed pursuant to the Insurance Code, Articles 1.10 and 1.03A, and the Government Code, §2001.056 and §2001.004. Article 1.10, §7(d) provides that the commissioner may dispose of items addressed in §7 by consent order, agreed settlement, stipulations or default. 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 Government Code, §2001.056 provides that unless precluded by law, an informal disposition may be made of a contested case by stipulation, agreed settlement, consent order, or default. The Government Code, §2001.004 authorizes and requires each state agency to adopt rules of practice setting forth the nature and requirements of available procedures, and prescribe the procedure for adoption of rules by a state administrative agency.

The proposed new sections affect regulation pursuant to the following statutes: Insurance Code, Articles 1.10 and 1.10A, Government Code, Chapter 2001.

§1.88 Written Response to Notice of Hearing.

(a) Requirement.When a contested case has been instituted, the respondent shall, within 20 days of the date on which the notice of hearing is provided to the respondent, file a written answer or other responsive pleading. Such response shall be filed in accordance with §1.90(e) of this title (relating to the Joint Memorandum of Understanding (MOU) between Texas Department of Insurance (TDI) and State Office of Administrative Hearings (SOAH) concerning procedures for contested cases before SOAH and responsibilities of each agency) , and in accordance with 1 TAC §155.22 (relating to Filings).

(b) Contested case.For purposes of this section, a contested

case shall mean any action that is referred by the Texas Department of Insurance to the State Office of Administrative Hearings other than a rate promulgation or rate approval proceeding.

(c) Notice; when provided; required disclosure. For purposes of this section, notice of hearing is provided to a respondent on the date of deposit in the United States mails of a registered or certified letter, return receipt requested, containing a notice of hearing, in accordance with provisions of §1.28 of this title (relating to Notice and Service). The notice of hearing for a contested case which is provided to a respondent in a contested case as defined in this section shall include the required disclosure language set forth as follows in capital letters and 12-point boldface type: IF YOU DO NOT FILE A WRITTEN RESPONSE TO THIS NOTICE WITHIN 20 DAYS OF THE DATE THIS NOTICE WAS MAILED, OR IF YOU FAIL TO ATTEND THE HEARING, THE COMMISSIONER OF INSURANCE MAY GRANT THE RELIEF SET OUT IN THIS NOTICE OF HEARING, INCLUDING REVOCATION OF YOUR LICENSE, IF APPROPRIATE, OR OTHERWISE INFORMALLY DISPOSE OF THIS CONTESTED CASE.

(d) Remedies for failure to file a written response. The failure of a respondent to timely file a written response as provided in this section shall entitle TDI to the remedies outlined in §1.89 of this title (relating to Default: What Constitutes Default; Remedies).

§1.89. Default: What Constitutes Default; Remedies.

(a) What constitutes default. For purposes of this subchapter, events described in paragraphs (1) or (2) of this subsection constitute a default on the part of a respondent in a contested case:

(1) Failure of the respondent to file a written response as provided in §1.88 of this title (relating to Written Response to Notice of Hearing); or

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

(b) Remedies available upon default. The remedies described in paragraphs (1) through (3) of this subsection are available to TDI as appropriate, in the event a respondent is in default as provided in this section.

(1) The failure to file a written response within 20 days of the mailing of the notice of hearing shall entitle TDI to seek informal disposition by default from the commissioner as provided in the Insurance Code, Article 1.10, Sec. 7(d).

(2) The failure to file a written response within 20 days of the mailing of the notice of hearing in instances where an informal disposition has not occurred prior to the date and time of the hearing, and both TDI and the respondent appear in person or by legal representative, shall entitle TDI to a continuance at the time of the hearing for such reasonable period of time as determined by the administrative law judge.

(3) The failure to appear in person or by legal representative on the day and at the time set or hearing in a contested case as defined in §1.88 of this title (relating to Written Response to Notice of Hearing), regardless of whether a written response has been filed, shall entitle TDI to seek informal disposition by default from the commissioner as provided in the Insurance Code, Article 1.10, Sec. 7(d). The administrative law judge shall grant any motion by TDI to seek informal disposition by the commissioner of the case by default.

(c) Meaning of disposition by default. For purposes of this subchapter, "disposition by default" shall mean the issuance of an order against the respondent in which the allegations against the respondent in the notice of public hearing are deemed admitted as true, upon the offer of proof that proper notice was provided to the defaulting party opponent. For purposes of this section, proper notice means notice sufficient to meet the provisions of the Government Code, §§2001. 051, 2001.052 and 2001.054, and §1.28 of this title (relating to Notice and Service). Such notice also shall include the required disclosure language set forth in §1.88(c) of this title (relating to Notice; when provided; required disclosure).

(d) Motion to set aside and reopen. After informal disposition of a contested case by default, a motion by the respondent to set aside the default order and reopen the record shall be granted if the respondent establishes that the failure to file a written response or to attend the hearing was neither intentional nor the result of conscious indifference, and that such failure was due to a mistake or accident.

(1) A motion to set aside the default order and reopen the record shall be filed with the commissioner prior to the time that the order of the commissioner becomes final pursuant to the provisions of the Government Code, Chapter 2001.

(2) A motion to set aside the default order and reopen the record is not a motion for rehearing and is not to be considered a substitute for a motion for rehearing. The filing of a motion to set aside the default order and reopen has no effect on either the statutory time periods for the filing of a motion for rehearing or on the time period for ruling on a motion for rehearing, as provided in the Insurance Code and the Government Code.

§1.90. Joint Memorandum of Understanding (MOU) between Texas Department of Insurance (TDI) and State Office of Administrative Hearings J(SOAH) Concerning Procedures for Contested Cases before SOAH and Responsibilities of Each Agency.

(a)-(e) (No change.)

(f) Hearings

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

(5) The respondent in any non-rate promulgation or non-rate approval proceeding shall **file a written response** [enter an appearance] with the ALJ in accordance with §1.88 of this title (relating to **Written Response to Notice of Hearing**[Entry of Appearance; Continuance]) and the SOAH rules of procedure.

(6)-(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.

Issued in Austin, Texas on March 1, 1996.

TRD-9602961 Alicia M. Fetchel
General Counsel and Chief Clerk
Texas Department of Insurance

Earliest possible date of adoption: April 19, 1996

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

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TITLE 30. ENVIRONMENTAL QUALITY

Part I. Texas Natural Resource Conservation Commission

Chapter 20. Rulemaking

- **30 TAC §§20.1-20.3, 20.5, 20.7, 20.9, 20.11, 20.13, 20.15, 20.17, 20.19**

The Texas Natural Resource Conservation Commission (commission) proposes new §§20.1-20.3, 20.5, 20.7, 20.9, 20.11, 20.13, 20.15, 20.17, and 20.19, concerning the commission's procedural rules.

This proposal is the second phase (Phase II) of an ongoing project to reorganize, clarify, and consolidate the procedural rules of the commission. The first phase of the project (Phase I) was intended to implement

recent legislation and was completed in the summer of 1995. Phase I made limited substantive changes to the commission's rules and began limited reorganization. Phase II is a more ambitious attempt to reorganize and consolidate the commission's procedural rules, and to eliminate conflicting procedural requirements based solely on media or type of hearing. By consolidating these rules, the commission seeks to cut back on the duplication of requirements and definitions that might create unwarranted non-statutory differences in the treatment of persons working with the commission. As part of this ongoing project, the commission is continuing to examine program and media specific rules for inconsistency with the general rules of the agency. It is anticipated that any further consolidation will be proposed as amendments to specific programs or chapters and not as a further major revision to these procedural rules.

Proposed numbering changes attempt to impose a more logical organization upon the most widely applicable rules of the commission by taking advantage of newly available chapters in Title 30. Chapters 1-99 will be reserved for the procedural rules and broadly applicable substantive rules of the commission. By locating generally applicable rules at the beginning of Title 30, commission rules should be organized in a more logical and user-friendly format. The proposed new format consists of the following reservation of chapters: Chapters 1-10-general rules of the commission; Chapters 11-19-miscellaneous provisions not specific to any media; Chapters 20-29-rulemaking; Chapters 30-49-application procedures; Chapters 50-69-processing of applications; Chapters 70-79-enforcement; and Chapters 80-89-hearings-contested/other. The current proposal conforms to this new format.

Media specific substantive rules, and limited procedural rules will continue to be found in Chapters 100-399 of Title 30.

Proposed new Chapters 1, 3, 5, 10, and 70 were published in the February 20, 1996, issue of the *Texas Register* (21 TexReg 1349). Proposed new Chapters 1 and 10 replace and make limited changes to existing Chapter 261. Chapter 1 sets forth the general rules of the agency. Chapter 10 governs the conduct of commission meetings.

Proposed new Chapter 3 is intended to consolidate the definitions broadly applicable across chapters. Definitions within specific chapters that conflict with definitions in Chapter 3 will continue to apply to the particular chapter within which they are found. Long-term plans call for consolidating these definitions as much as possible, but any further consolidation beyond this proposal will be undertaken as changes to specific chapters.

Proposed new Chapter 5 replaces existing Chapter 345 and sets forth the rules governing the composition of advisory groups to the commission, without substantive changes from the existing rules.

Proposed new Chapter 20 contains the rules governing agency rulemaking from Chapter 275 without substantive changes.

A planned new Chapter 39 contains requirements for notices of public hearings moved, duplicated, or cross-referenced from other chapters. The commission anticipates that this chapter will be proposed later this year.

Proposed Chapter 40 replaces Chapter 264, relating to Alternative Dispute Resolution (ADR) before the commission. No substantive changes to ADR procedures are proposed.

Proposed new Chapters 50 and 55 replace existing Chapter 263. Chapter 50 relates to actions taken on an application by the commission or the executive director. Chapter 50, Subchapter B relates to actions taken by the commission on uncontested applications. Chapter 50, Subchapter C relates to action by the executive director and is recodified primarily from Subchapter A of Chapter 263, but also duplicates a portion of Chapter 305, Subchapter E. The principal change to current practice proposed in Chapter 50 is the consolidation of the process for executive director approval of air, water, and waste applications into a single process governing all media. This single process eliminates the *Texas Register* notice requirement regarding possible action by the executive director. The proposed rules continue the distinction between media of the limitation upon the executive director's authority to act on protested applications.

Proposed new Chapter 55 relates to commission action upon hearing requests related to permit applications and is a recodification of Subchapter B of Chapter 263. The commission seeks to clarify the process in this new chapter. New §55.21(d) attempts to clearly set forth the timelines for filing hearing requests. Persons concerned with production area authorizations should note that the public notice requirement for an application has been increased from ten to 30 days in §55.21(d). Section 55.27 makes clear it is necessary to both seek party status and file a motion for rehearing of the denial of a hearing request prior to seeking judicial review, and that this motion should be filed after action by the commission on the permit or other application. Future rulemaking will be undertaken to further define the factors considered in evaluating hearing requests. At this time, there is insufficient experience with the current process, adopted in August of 1995, to fairly evaluate how well existing rules concerning the processing of hearing requests are meeting the needs of the regulated community, the public, and the commission.

Proposed new Chapter 70 contains the sections from Chapter 337 that were not related to hearing procedures.

Proposed Chapter 80 unifies the contested case hearing procedures contained in current Chapters 265 and 337. Where substantive and procedural issues differed significantly under the existing rules, the commission attempted to maintain these differences. Section 80.25 is modified to clarify that attorney's fees are not included in the payment of "costs" required for withdrawal of an application without prejudice, and makes it clear that payment of "costs" is one of three avenues for withdrawal without prejudice. Section 80.107 duplicates the sanctions list allowed in Senate Bill 12, and unifies the sanctions sections from the other rules proposed for repeal or amendment in this package. Section 80.137 modifies the summary judgment procedure from Chapter 337. Inclusion of this procedure in Chapter 80 will make summary disposition available in all contested cases. Discovery rules that duplicate the Texas Rules of Civil Procedure have been replaced with a reference to those rules. Voluntary discovery rules have been eliminated. Language is added to the discovery rules to make clear that drafts of prefiled testimony are not discoverable. The "freeze rules" in Chapter 265, Subchapter F have been clarified and streamlined, and duplicate procedures have been consolidated with the general procedures in Chapter 80. Language is added to §80.207 to require a reasonable basis for protestants' issues listed in the freeze process. This change was not intended to shift the burden of proof upon an application. Twenty days have been added to the end of the first discovery period in the freeze process to allow more time for the listing of issues.

Proposed new Chapter 86 contains special procedural rules of Chapter 275 (which is proposed for repeal) not moved to Chapter 20. No substantive changes are proposed in this recodification.

Chapter 305, Subchapter E is proposed for repeal. Rules contained in that subchapter will be recodified in Chapters 50 and 55, and in the new Chapter 39, when proposed.

Chapter 339 is proposed to be repealed in its entirety.

Chapter 340 is amended to consolidate requirements for pump installers from Chapter 339 with those of water well drillers in Chapter 340. In addition, references to the former Water Well Drillers Board are changed to commission or Water Well Drillers Advisory Council (council) as appropriate. Enforcement rules are deleted and references made to the proposed new Chapters 70 and 80. Additional changes are proposed to reflect recent changes in the statutory authority of the council, and to delete sections that are duplicated in new Chapter 5.

Chapter 341, which was the former Water Well Drillers Board procedures for enforcement and hearings, is proposed to be repealed in its entirety and these council proceedings will be governed by new Chapters 70 and 80.

Persons seeking help in comparing this rule proposal and recodification to the existing rules, can obtain a redlined/strikeout version of this package and disposition/derivation tables from the commission. Please contact David Bolduc at (512) 239-1000 for a copy of this information.

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the sections are in effect there will be no significant fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Minick 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 improvement in the hearings process and

for contested matters before the commission and enhanced consistency in the conduct of administrative proceedings for state agencies. 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.

The proposed rule revisions are intended to clarify, streamline, and recodify the procedural rules of the agency. The commission prepared a takings impact assessment of these rules and determined that the proposal will not create any burden on private real property rights.

A public hearing on the proposal will be held April 18, 1996, at 9:00 a.m. in Room 131E of TNRCC Building C, located at 12100 North IH-35, Park 35 Circle, Austin. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion within the audience will not occur during the hearing; however, a TNRCC staff member will be available to discuss the proposal 30 minutes prior to the hearing and answer questions before and after the hearing.

Written comments not presented at the hearing may be submitted to the TNRCC Office of Policy and Regulatory Development in Austin through April 18, 1996. Material received by the TNRCC Office of Policy and Regulatory Development by 4:00 p.m. on that date will be considered by the commission prior to any final action on the proposal. Please mail comments to Lisa Martin, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, and reference Rules Tracking Log Number 95123-263-AD. Please fax comments to (512) 239-4808. Copies of the revision are available from the Office of Policy and Regulatory Development, located at 12100 Park 35 Circle, Building F, Austin, and at all TNRCC regional offices. For further information, please contact Randall Terrell at (512) 239-0577.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

The new sections are proposed under the Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed new sections implement Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412.

§20.1. General. This chapter applies to commission rulemaking.

§20.2. Policy. Rulemaking hearings shall be conducted in the manner the commission deems most suitable to obtain all relevant information and testimony on proposed rules as conveniently, inexpensively, and expeditiously as possible without prejudicing the rights of any person.

§20.3. APA Rulemaking. The commission shall follow APA rulemaking requirements.

§20.5. Mailing List of Persons Requesting Notice of Rulemaking. The executive director shall maintain a mailing list of persons requesting advance notice of proposed commission rules. When the commission sends notice of proposed rules to the secretary of state, the executive director shall also send notice of proposed rules by regular mail to each person on the list; however, failure to provide the notice does not invalidate any action taken or rule adopted. At the end of each state fiscal year, the executive director will notify all persons included on the list of the requirement to affirmatively express a desire to continue receiving the notices described herein, and shall eliminate those persons on the list who do not respond within 30 days of this notification.

§20.7. Appearance. Any person may appear in person or by authorized representative at a rulemaking hearing. A representative shall disclose his authority to speak for the person represented.

§20.9. Submission of Documents. Written documents may be submitted to the executive director no later than the time of the hearing, provided that the commission may grant additional time for submission of additional documents.

§20.11. Oral Presentations.

(a) A person desiring to make an oral presentation shall so indicate on the commission's registration form provided at the hearing.

(b) The presiding officer will establish the order of presentations at the hearing.

(c) When necessary, the presiding officer may limit:

(1) the number of times a person may speak;

(2) the time period for oral presentations; and

(3) the time period for raising questions.

(d) The presiding officer may limit or exclude cumulative, irrelevant, or unduly repetitious presentations.

§20.13. Action After Hearing Concluded.

(a) After the close of the hearing and the receipt of all documents, the presiding officer shall prepare a report to the commission, which shall include:

(1) a summary of the subject of the hearing;

(2) a review and analysis of the comments submitted;

(3) any revisions recommended as the result of public comment presented;

(4) a copy of the rule as recommended for adoption; and

(5) other pertinent information.

(b) The report shall be submitted to the commission for final action.

§20.15. Petition for Adoption of Rules.

(a) Any person may petition the commission to request the adoption of a rule. Petitions shall be submitted in writing to: Executive Director, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087, and shall comply with the following requirements:

(1) each rule requested must be submitted by separate petition;

(2) each petition must state the name and address of the petitioner;

(3) each petition shall include:

(A) a brief explanation of the proposed rule;

(B) the text of the proposed rule prepared in a manner to indicate the words to be added or deleted from the text of the current rule, if any;

(C) a statement of the statutory or other authority under which the proposed rule is to be promulgated; and

(D) an allegation of injury or inequity that could result from the failure to adopt the proposed rule.

(b) A petition may be denied for failure to comply with the requirements of subsection (a) of this section.

(c) Within 60 days after submission of a petition, the commission shall consider the petition and shall either deny the petition in writing, stating its reasons for the denial, or shall initiate rulemaking proceedings in accordance with the APA.

§20.17. Emergency Rules. If the commission finds that an imminent peril or extraordinary circumstance may threaten the public health, safety, or welfare or the integrity of the commission's regulatory programs, and requires the adoption of a rule on fewer than 30 day's notice, it may proceed, without prior notice and hearing or with any abbreviated notice and hearing that it finds practicable under the circumstances, to adopt an emergency rule. The commission shall make a written finding which shall be filed with the secretary of state setting forth its reasons for such determination and shall file the finding with the secretary of state. The emergency rule shall be effective immediately upon filing with the secretary of state and will continue in effect for a period of up to 120 days. The emergency rule may be renewed once prior to expiration for a period of 60 days.

§20.19. Advisory Conference on Rules. Before initiating any formal rulemaking action, the commission may convene informal working groups to obtain viewpoints and advice of interested persons. The commission may also appoint working groups of experts or interested persons or representatives of the general public to advise it regarding any contemplated rulemaking. The powers of such working groups shall be advisory only.

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 March 6, 1996.

TRD-9603209 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Chapter 40. Alternative Dispute Resolution Procedure

• 30 TAC §§40.1-40.9

The Texas Natural Resource Conservation Commission (commission) proposes new §§40.1-40.9, concerning the commission's procedural rules.

This proposal is the second phase (Phase II) of an ongoing project to reorganize, clarify, and consolidate the procedural rules of the commission. The first phase of the project (Phase I) was intended to implement recent legislation and was completed in the summer of 1995. Phase I made limited substantive changes to the commission's rules and began limited reorganization. Phase II is a more ambitious attempt to reorganize and consolidate the commission's procedural rules, and to eliminate conflicting procedural requirements based solely on media or type of hearing. By consolidating these rules, the commission seeks to cut back on the duplication of requirements and definitions that might create unwarranted non-statutory differences in the treatment of persons working with the commission. As part of this ongoing project, the commission is continuing to examine program and media specific rules for inconsistency with the general rules of the agency. It is anticipated that any further consolidation will be proposed as amendments to specific programs or chapters and not as a further major revision to these procedural rules.

Proposed numbering changes attempt to impose a more logical organization upon the most widely applicable rules of the commission by taking advantage of newly available chapters in Title 30. Chapters 1-99 will be reserved for the procedural rules and broadly applicable substantive rules of the commission. By locating generally applicable rules at the beginning of Title 30, commission rules should be organized in a more logical and user-friendly format. The proposed new format consists of the following reservation of chapters: Chapters 1-10-general rules of the commission; Chapters 11-19-miscellaneous provisions not specific to any media; Chapters 20-29-rulemaking; Chapters 30-49-application procedures; Chapters 50-69-processing of applications; Chapters 70-79-enforcement; and Chapters 80-89-hearings-contested/other. The current proposal conforms to this new format.

Media specific substantive rules, and limited procedural rules will continue to be found in Chapters 100-399 of Title 30.

Proposed new Chapters 1, 3, 5, 10, and 70 were published in the February 20, 1996, issue of the *Texas Register* (21 TexReg 1349). Proposed new Chapters 1 and 10 replace and make limited changes to existing Chapter 261. Chapter 1 sets forth the general rules of the agency. Chapter 10 governs the conduct of commission meetings.

Proposed new Chapter 3 is intended to consolidate the definitions broadly applicable across chapters. Definitions within specific chapters that conflict with definitions in Chapter 3 will continue to apply to the particular chapter within which they are found. Long-term plans call for consolidating these definitions as much as possible, but any further consolidation beyond this proposal will be undertaken as changes to specific chapters.

Proposed new Chapter 5 replaces existing Chapter 345 and sets forth the rules governing the composition of advisory groups to the commission, without substantive changes from the existing rules.

Proposed new Chapter 20 contains the rules governing agency rulemaking from Chapter 275 without substantive changes.

A planned new Chapter 39 contains requirements for notices of public hearings moved, duplicated, or cross-referenced from other chapters. The commission anticipates that this chapter will be proposed later this year.

Proposed Chapter 40 replaces Chapter 264, relating to Alternative Dispute Resolution (ADR) before the commission. No substantive changes to ADR procedures are proposed.

Proposed new Chapters 50 and 55 replace existing Chapter 263. Chapter 50 relates to actions taken on an application by the commission or the executive director. Chapter 50, Subchapter B relates to actions taken by the commission on uncontested applications. Chapter 50, Subchapter C relates to action by the executive director and is recodified primarily from Subchapter A of Chapter 263, but also duplicates a portion of Chapter 305, Subchapter E. The principal change to current practice proposed in Chapter 50 is the consolidation of the process for executive director approval of air, water, and waste applications into a single process governing all media. This single process eliminates the *Texas Register* notice requirement regarding possible action by the executive director. The proposed rules continue the distinction between media of the limitation upon the executive director's authority to act on protested applications.

Proposed new Chapter 55 relates to commission action upon hearing requests related to permit applications and is a recodification of Subchapter B of Chapter 263. The commission seeks to clarify the process in this new chapter. New §55.21(d) attempts to clearly set forth the timelines for filing hearing requests. Persons concerned with production area authorizations should note that the public notice requirement for an application has been increased from ten to 30 days in §55.21(d). Section 55.27 makes clear it is necessary to both seek party status and file a motion for rehearing of the denial of a hearing request prior to seeking judicial review, and that this motion should be filed after action by the commission on the permit or other application. Future rulemaking will be undertaken to further define the factors considered in evaluating hearing requests. At this time, there is insufficient experience with the current process, adopted in August of 1995,

to fairly evaluate how well existing rules concerning the processing of hearing requests are meeting the needs of the regulated community, the public, and the commission.

Proposed new Chapter 70 contains the sections from Chapter 337 that were not related to hearing procedures.

Proposed Chapter 80 unifies the contested case hearing procedures contained in current Chapters 265 and 337. Where substantive and procedural issues differed significantly under the existing rules, the commission attempted to maintain these differences. Section 80.25 is modified to clarify that attorney's fees are not included in the payment of "costs" required for withdrawal of an application without prejudice, and makes it clear that payment of "costs" is one of three avenues for withdrawal without prejudice. Section 80.107 duplicates the sanctions list allowed in Senate Bill 12, and unifies the sanctions sections from the other rules proposed for repeal or amendment in this package. Section 80.137 modifies the summary judgment procedure from Chapter 337. Inclusion of this procedure in Chapter 80 will make summary disposition available in all contested cases. Discovery rules that duplicate the Texas Rules of Civil Procedure have been replaced with a reference to those rules. Voluntary discovery rules have been eliminated. Language is added to the discovery rules to make clear that drafts of prefiled testimony are not discoverable. The "freeze rules" in Chapter 265, Subchapter F have been clarified and streamlined, and duplicate procedures have been consolidated with the general procedures in Chapter 80. Language is added to §80.207 to require a reasonable basis for protestants' issues listed in the freeze process. This change was not intended to shift the burden of proof upon an application. Twenty days have been added to the end of the first discovery period in the freeze process to allow more time for the listing of issues.

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Chapter 341, which was the former Water Well Drillers Board procedures for enforcement and hearings, is proposed to be repealed in its entirety and these council proceedings will be governed by new Chapters 70 and 80.

Persons seeking help in comparing this rule proposal and recodification to the existing rules, can obtain a redlined/strikeout version of this package and disposition/derivation tables from the commission. Please contact David Bolduc at (512) 239-1000 for a copy of this information.

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the sections are in effect there will be no significant fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Minick 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 improvement in the hearings process and for contested matters before the commission and enhanced consistency in the conduct of administrative proceedings for state agencies. 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.

The proposed rule revisions are intended to clarify, streamline, and recodify the procedural rules of the agency. The commission prepared a takings impact assessment of these rules and determined that the proposal will not create any burden on private real property rights.

A public hearing on the proposal will be held April 18, 1996, at 9:00 a.m. in Room 131E of TNRCC Building C, located at 12100 North IH-35, Park 35 Circle, Austin. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion within the audience will not occur during the hearing; however, a TNRCC staff member will be available to discuss the proposal 30 minutes prior to the hearing and answer questions before and after the hearing.

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Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

The new sections are proposed under the Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed new sections implement Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412.

§40.1. Policy. It is the commission's policy to encourage the resolution and early settlement of all contested matters through voluntary settlement procedures. It is the affirmative responsibility of each commission employee to effectuate this policy.

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

ADR-Alternative dispute resolution.

Alternative dispute resolution procedure or ADR procedure-A nonjudicial and informally conducted forum for the voluntary settlement of contested matters through the intervention of an impartial third party.

Alternative dispute resolution office or ADR office-The office of the agency empowered by the commission to coordinate and oversee ADR procedures and mediators.

Contested matter-A request for a license, permit, order, or other formal authorization from the commission that is opposed.

Mediator-The person appointed by the ADR office director to preside over ADR proceedings regardless of which ADR method is used.

Participant-The executive director, the public interest counsel, the person seeking the commission authorization which is the subject of the dispute, and the persons who timely filed hearing requests which gave rise to the dispute.

Private mediator-A person in the profession of mediation who is not a Texas state employee and who has met all the qualifications prescribed by Texas law for mediators.

§40.3. Referral of Contested Matter for Alternative Dispute Resolution Procedures. The commission or the ADR director may seek to

resolve a contested matter through any ADR procedure. Such procedures may include, but are not limited to, those applied to resolve matters pending in the state's district courts.

§40.4. Appointment of Mediator.

(a) For each matter referred for ADR procedures, the ADR director shall assign a mediator from the pool of mediators. The ADR director may assign a substitute or additional mediator to a proceeding without duplicating any duty or function already performed.

(b) A private mediator may be hired for commission ADR procedures provided that:

(1) the participants unanimously agree to use a private mediator;

(2) the participants unanimously agree to the selection of the person to serve as the mediator;

(3) the mediator agrees to be subject to the direction of the commission's ADR director and to all time limits imposed by the director, the judge, statute, or regulation.

(c) Whenever a private mediator is used:

(1) any governmental subdivision or entity that is a statutory party to the hearing, such as the commission's executive director and public interest counsel, is prohibited from paying for the mediator; and

(2) unless otherwise agreed upon by the participants, the costs for the services of the mediator shall be apportioned equally among those participants not otherwise exempted by this section and paid directly to the mediator.

(d) All mediators in commission mediation proceedings shall subscribe to the ethical guidelines for mediators adopted by the ADR Section of the State Bar of Texas.

§40.5. Mediator Pool: Qualifications.

(a) The commission shall establish a pool of commission staff mediators to resolve contested matters through ADR procedures.

(1) To the extent practicable, each mediator shall receive 40 hours of formal training in ADR procedures through programs approved by the ADR office.

(2) Other individuals may serve as mediators on an ad hoc basis in light of particular skills or experience which will facilitate the resolution of individual contested matters.

(b) SOAH mediators, employees of other agencies who are mediators, and private pro bono mediators may be assigned to contested matters as needed.

(1) Each mediator shall first have received 40 hours of Texas mediation training as prescribed by Texas law.

(2) Each mediator shall have some expertise in the area of the contested matter.

(3) If the mediator is a SOAH judge, that person will not also sit as the judge for the case if the contested matter goes to public hearing.

§40.6. Time Period.

(a) Informal ADR. Informal ADR procedures may begin, at the discretion of the ADR director, anytime after the application has been deemed administratively complete by the executive director and at least one letter protesting the application has been filed with the commission.

(b) Formal ADR. Formal ADR procedures shall not be employed until the executive director has completed processing the subject application or petition and has issued a draft permit or determined that a draft permit should not be issued. Upon unanimous motion of the parties and at the discretion of the judge, the provisions of this subsection may apply to contested hearings. In such cases, it is within the discretion of the judge to continue the hearing to allow the use of formal ADR procedures.

§40.7. Stipulations. When ADR procedures do not result in the full settlement of a contested matter, the participants, in conjunction with the mediator, shall limit the contested issues through the entry of written stipulations. Such stipulations shall be forwarded or formally presented to the judge assigned to conduct the hearing on the merits and shall be included in the hearing record.

§40.8. Agreements to Be in Writing.

(a) Agreements of the participants reached as a result of ADR must be in writing.

(b) An agreement, under subsection (a) of this section, is enforceable in the same manner as any other written contract.

§40.9. Confidentiality of Communications in Alternative Dispute Resolution Procedures.

(a) Except as provided in subsections (c) and (d) of this section, a communication relating to the subject matter made by a participant in an ADR procedure, whether before or after the institution of formal proceedings, is confidential, is not subject to disclosure, and may not be used as evidence in any further proceeding.

(b) Any notes or record made of an ADR procedure are confidential, and the participants, including the mediator, may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

(c) An oral communication or written material used in or made a part of an ADR procedure is admissible or discoverable only if it is admissible or discoverable independent of the procedure.

(d) If this section conflicts with other legal requirements for disclosure of communications or materials, the issue of confidentiality may be presented to the judge to determine, in camera, whether the facts, circumstances, and the context of the communications or materials sought to be disclosed warrant a protective order of the judge or whether the communications or materials are subject to disclosure.

(e) The mediator may not, directly or indirectly, communicate with the judge or any commissioner, on any aspect of ADR negotiations made confidential by this section.

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 March 6, 1996.

TRD-9603210 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Chapter 50. Actions on Applications and Hearing Requests

The Texas Natural Resource Conservation Commission (commission) proposes new §§50.2, 50.13, 50.15, 50.17, 50.31, 50.33, 50.35, 50.37, 50.39, and 50. 41, concerning the commission's procedural rules.

This proposal is the second phase (Phase II) of an ongoing project to reorganize, clarify, and consolidate the procedural rules of the commission. The first phase of the project (Phase I) was intended to implement recent legislation and was completed in the summer of 1995. Phase I made limited substantive changes to the commission's rules and began limited reorganization. Phase II is a more ambitious attempt to reorganize and consolidate the commission's procedural rules, and to eliminate conflicting procedural requirements based solely on media or type of hearing. By consolidating these rules, the commission seeks to cut back on the duplication of requirements and definitions that might create unwarranted non-statutory differences in the treatment of persons working with the commission. As part of this ongoing project, the commission is continuing to examine program and media specific rules for inconsistency with the general rules of the agency. It is anticipated that any further consolidation will be proposed as amendments to specific programs or chapters and not as a further major revision to these procedural rules.

Proposed numbering changes attempt to impose a more logical organization upon the most widely applicable rules of the commission by taking advantage of newly available chapters in Title 30. Chapters 1-99 will be reserved for the procedural rules and broadly applicable substantive rules of the commission. By locating generally applicable rules at the beginning of Title 30, commission rules should be organized in a more logical and user-friendly format. The proposed new format consists of the following reservation of chapters: Chapters 1-10-general rules of the commission; Chapters 11-19-miscellaneous provisions not specific to any media; Chapters 20-29-rulemaking; Chapters 30-49-application procedures; Chapters 50-69-processing of applications; Chapters 70-79-enforcement; and Chapters 80-89-hearings-contested/other. The current proposal conforms to this new format.

Media specific substantive rules, and limited procedural rules will continue to be found in Chapters 100-399 of Title 30.

Proposed new Chapters 1, 3, 5, 10, and 70 were published in the February 20, 1996, issue of the *Texas Register* (21 TexReg 1349). Proposed new Chapters 1 and 10 replace and make limited changes to existing Chapter 261. Chapter 1 sets forth the general rules of the agency. Chapter 10 governs the conduct of commission meetings.

Proposed new Chapter 3 is intended to consolidate the definitions broadly applicable across chapters. Definitions within specific chapters that conflict with definitions in Chapter 3 will continue to apply to the particular chapter within which they are found. Long-term plans call for consolidating these definitions as much as possible, but any further consolidation beyond this proposal will be undertaken as changes to specific chapters.

Proposed new Chapter 5 replaces existing Chapter 345 and sets forth the rules governing the composition of advisory groups to the commission, without substantive changes from the existing rules.

Proposed new Chapter 20 contains the rules governing agency rulemaking from Chapter 275 without substantive changes.

A planned new Chapter 39 contains requirements for notices of public hearings moved, duplicated, or cross-referenced from other chapters. The commission anticipates that this chapter will be proposed later this year.

Proposed Chapter 40 replaces Chapter 264, relating to Alternative Dispute Resolution (ADR) before the commission. No substantive changes to ADR procedures are proposed.

Proposed new Chapters 50 and 55 replace existing Chapter 263. Chapter 50 relates to actions taken on an application by the commission or the executive director. Chapter 50, Subchapter B relates to actions taken by the commission on uncontested applications. Chapter 50, Subchapter C relates to action by the executive director and is recodified primarily from Subchapter A of Chapter 263, but also duplicates a portion of Chapter 305, Subchapter E. The principal change to current practice proposed in Chapter 50 is the consolidation of the process for executive director approval of air, water, and waste applications into a single process governing all media. This single process eliminates the *Texas Register* notice requirement regarding possible action by the executive director. The proposed rules continue the distinction between media of the limitation upon the executive director's authority to act on protested applications.

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Proposed Chapter 80 unifies the contested case hearing procedures contained in current Chapters 265 and 337. Where substantive and procedural issues differed significantly under the existing rules, the commission attempted to maintain these differences. Section 80.25 is modified to clarify that attorney's fees are not included in the payment of "costs" required for withdrawal of an application without prejudice, and makes it clear that payment of "costs" is one of three avenues for withdrawal without prejudice. Section 80.107 duplicates the sanctions list allowed in Senate Bill 12, and unifies the sanctions sections from the other rules proposed for repeal or amendment in this package. Section 80.137 modifies the summary judgment procedure from Chapter 337. Inclusion of this procedure in Chapter 80 will make summary disposition available in all contested cases. Discovery rules that duplicate the Texas Rules of Civil Procedure have been replaced with a reference to those rules. Voluntary discovery rules have been eliminated. Language is added to the discovery rules to make clear that drafts of prefiled testimony are not discoverable. The "freeze rules" in Chapter 265, Subchapter F have been clarified and streamlined, and duplicate procedures have been consolidated with the general procedures in Chapter 80. Language is added to §80.207 to require a reasonable basis for protestants' issues listed in the freeze process. This change was not intended to shift the burden of proof upon an application. Twenty days have been added to the end of the first discovery period in the freeze process to allow more time for the listing of issues.

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Chapter 339 is proposed to be repealed in its entirety.

Chapter 340 is amended to consolidate requirements for pump installers from Chapter 339 with those of water well drillers in Chapter 340. In addition, references to the former Water Well Drillers Board are changed to commission or Water Well Drillers Advisory Council (council) as appropriate. Enforcement rules are deleted and references made to the proposed new Chapters 70 and 80. Additional changes are proposed to reflect recent changes in the statutory authority of the council, and to delete sections that are duplicated in new Chapter 5.

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Persons seeking help in comparing this rule proposal and recodification to the existing rules, can obtain a redlined/strikeout version of this package and disposition/derivation tables from the commission. Please contact David Bolduc at (512) 239-1000 for a copy of this information.

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the sections are in effect there will be no significant fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Minick 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 improvement in the hearings process and for contested matters before the commission and enhanced consistency in the conduct of administrative proceedings for state agencies. 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.

The proposed rule revisions are intended to clarify, streamline, and recodify the procedural rules of the agency. The commission prepared a takings impact assessment of these rules and determined that the proposal will not create any burden on private real property rights.

A public hearing on the proposal will be held April 18, 1996, at 9:00 a.m. in Room 131E of TNRCC Building C, located at 12100 North IH-35, Park 35 Circle, Austin. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion within the audience will not occur during the hearing; however, a TNRCC staff member will be available to discuss the proposal 30 minutes prior to the hearing and answer questions before and after the hearing.

Written comments not presented at the hearing may be submitted to the TNRCC Office of Policy and Regulatory Development in Austin through April 18, 1996. Material received by the TNRCC Office of Policy and Regulatory Development by 4:00 p.m. on that date will be considered by the commission prior to any final action on the proposal. Please mail comments to Lisa Martin, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, and reference Rules Tracking Log Number 95123-263-AD. Please fax comments to (512) 239-4808. Copies of the revision are available from the Office of Policy and Regulatory Development, located at 12100 Park 35 Circle, Building F, Austin, and at all TNRCC regional offices. For further information, please contact Randall Terrell at (512) 239-0577.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

Subchapter A. Purpose, Applicability, and Definitions

• 30 TAC §50.2

The new section is proposed under the Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed new section implements Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412.

§50.2. Applicability.

(a) This chapter applies to any application to issue, amend, modify, renew, correct, endorse, or transfer a permit, license, registration, or other authorization or approval.

(b) This chapter does not apply to applications for emergency or temporary orders or temporary authorizations.

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 March 6, 1996.

TRD-9603211 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Subchapter B. Action by the Commission

• 30 TAC §§50.13, 50.15, 50.17

The new sections are proposed under the Texas Water Code, §§5.103, 5. 105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed new sections implement Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412.

§50.13. Action on Application. After the time for filing a hearing request as provided in §55.21(d) of this title (relating to Requests for Contested Case Hearings),the commission may act on an application for which no timely hearing request has been received under Chapter 55 of this title (relating to Request for Contested Case Hearing), or for which all timely hearing requests have been withdrawn or denied by the commission, or which a judge has remanded because of settlement, without holding a contested case hearing.

§50.15. Scope of Proceedings. The commission may limit consideration in permit renewal, amendment, or modification proceedings to only those portions of a permit for which the application requests action. All terms, conditions, and provisions of an existing permit remain in full force and effect during such proceedings, and the permittee shall comply with an existing permit until a new, amended, or modified permit is issued.

§50.17. Commission Actions.

(a) The commission may grant or deny an application in whole or in part, suspend the authority to conduct an activity or dispose of waste for a specified period of time, dismiss proceedings, amend or modify a permit or order, or take any other appropriate action.

(b) For applications involving hazardous waste under the TSWDA, the commission may issue or deny a permit for one or more units at the facility. The interim status of any facility unit compliant with the provisions of Texas Health and Safety Code, §361.082(e) and §335.2(c) of this title (relating to Permit Required) for which a permit has not been issued or denied is not affected by the issuance or denial of a permit to any other unit at the facility.

(c) If the commission directs a person to perform or refrain from performing any act or activity, the order shall set forth the findings on which the directive is based. The commission may set a reasonable compliance deadline in its order in which:

(1) to terminate the operation or activity;

(2) to cease disposal, handling, or storage of any waste;

(3) to conform to the permit requirements, including any new or additional conditions imposed by the commission; or

(4) to otherwise comply with the commission's order.

(d) For a good cause, the commission may grant an extension of time to a compliance deadline upon application by the permittee.

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 March 6, 1996.

TRD-9603212 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Subchapter C. Action by Executive Director

• 30 TAC §§50.31, 50.33, 50.35, 50.37, 50.39, 50.41

The new sections are proposed under the Texas Water Code, §§5.103, 5. 105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed new sections implement Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412.

§50.31. Purpose and Applicability.

(a) The purpose of this subchapter is to delegate authority to the executive director and to specify applications on which the executive director may take action on behalf of the commission.

(b) This subchapter applies to applications for permits or other approvals listed in subsection (c) of this section, including any application for a new permit, or to renew, modify, amend, correct, endorse, or transfer a permit. This subchapter also applies to any application seeking an order that has the effect of issuing, renewing, modifying, amending, or transferring a permit.

(c) Except as provided by subsection (d) of this section, this subchapter applies to the following applications:

(1) air quality permits under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification);

(2) appointments to the board of directors of districts created by special law;

(3) certificates of adjudication;

(4) certificates of convenience and necessity;

(5) district matters under Texas Water Code, Chapters 49-66;

(6) districts' proposed impact fees, charges, assessments, or contributions approvable under Local Government Code, Chapter 395;

(7) extensions of time to commence or complete construction;

(8) industrial and hazardous waste permits;

(9) municipal solid waste permits;

(10) on-site waste water disposal system permits;

(11) radioactive waste or radioactive material permits or licenses;

(12) rate matters for water and wastewater utilities under Texas Water Code, Chapters 11, 12, or 13;

(13) underground injection control permits;

(14) water rights permits;

(15) wastewater permits;

(16) weather modification measures permits;

(17) driller licenses under Texas Water Code, Chapter 32;

(18) pump installer licenses under Texas Water Code, Chapter 33;

(19) irrigator or installer registrations under Texas Water Code, Chapter 34; and

(20) municipal management district matters under Local Government Code, Chapter 375.

(d) This subchapter does not apply to the following applications:

(1) air quality standard permits under Chapter 116 of this title;

(2) air quality permits under Chapter 122 of this title (relating to Federal Operating Permits);

(3) air quality standard exemptions;

(4) consolidated proceedings covering additional matters not within the scope of subsection (c) of this section;

(5) district matters under Texas Water Code, Chapters 49-66, as follows:

(A) an appeal under Texas Water Code, §49.052, by a member of a district board concerning his removal from the board;

(B) an application under Texas Water Code, Chapter 49, Subchapter K, for the dissolution of a district;

(C) an application under Texas Water Code, §49.456, for authority to proceed in bankruptcy; or

(D) an appeal under Texas Water Code, §54. 239, of a board decision involving the cost, purchase, or use of facilities;

(6) emergency or temporary orders or temporary authorizations;

(7) actions of the executive director under Chapters 101, 111-115, and 117-119 of this title (relating to General Rules; Control of Air Pollution From Visible Emissions and Particulate Matter; Control of Air Pollution From Sulfur Compounds; Control of Air Pollution From Toxic Materials; Control of Air Pollution From Motor Vehicles; Control of Air Pollution From Volatile Organic Compounds; Control of Air Pollution from Nitrogen Compounds; Control of Air Pollution Episodes; and Control of Air Pollution From Carbon Monoxide);

(8) all municipal solid waste facilities authorized to operate by registration under Chapter 330 of this title (relating to Municipal Solid Waste);

(9) all compost facilities authorized to operate by registration under Chapter 332 of this title (relating to Composting); and

(10) concentrated animal feeding operations (CAFOs) under Chapter 321, Subchapter K of this title (relating to Concentrated Animal Feeding Operations) .

§50.33. Executive Director Action on Application.

(a) The executive director may act on an application subject to this subchapter if:

(1) public notice has been issued as required by law and commission rules;

(2) the application meets all relevant statutory and administrative criteria;

(3) the application does not raise new issues that require the interpretation of commission policy;

(4) the executive director's staff and public interest counsel do not raise objections; and

(A) for other than air quality applications, no timely protests or hearing requests are filed with the chief clerk, the application has become uncontested because the applicant and the persons who filed the protests or requests have agreed in writing to the action to be taken by the executive director or the protests or requests for hearing have been withdrawn in writing; or

(B) for air quality applications, no timely hearing requests are filed with the chief clerk, or the application has become uncontested because any timely hearing requests have been withdrawn in writing.

(b) If an application does not meet the requirements of subsection (a) of this section, the executive director shall refer the application to the chief clerk. The chief clerk shall schedule the application for the consideration and action by the commission.

§50.35. Effective Date of Executive Director Action. A permit or other approval is effective when signed by the executive director.

§50.37. Remand for Action by Executive Director. At any time during the processing of an application, if all protests and hearing requests concerning the application are withdrawn, the commission, or the judge if SOAH holds jurisdiction over the application, may remand the application to the executive director. If the application has been scheduled for a commission meeting, the chief clerk shall remove it from the commission's agenda.

§50.39. Motion for Reconsideration.

(a) The applicant, public interest counsel or other person may file with the chief clerk a motion for reconsideration of the executive director's action on an application.

(b) A motion for reconsideration must be filed no later than 20 days after the signed permit, approval, or other written notice of the executive director's action is mailed to the applicant. In addition to a specific motion for reconsideration, the commission shall consider as a motion for reconsideration any objection, protest, or hearing request filed with the chief clerk after the filing deadline for hearing requests and not later than 20 days after the date the signed permit, approval, or other written notice of the executive director's action is mailed to the applicant.

(c) An action by the executive director under this subchapter is not affected by a motion for reconsideration filed under this section unless expressly ordered by the commission.

(d) Extension of time limits. With the agreement of the parties or on their own motion, the commission or the general counsel may extend the period of time for filing motions for reconsideration and for taking action on the motions so long as the period for taking action is not extended beyond 90 days after the date the signed permit, approval, or other written notice of the executive director's action is mailed to the applicant.

(e) Motion denied.

(1) Unless an extension of time is granted, if a motion for reconsideration is not acted on by the commission within 45 days after the date the signed permit, approval, or other written notice of the executive director's action is mailed to the applicant, the motion is denied.

(2) In the event of an extension, the motion for reconsideration is overruled by operation of law on the date fixed by the order, or in the absence of a fixed date, 90 days after the date the signed permit, approval, or other written notice of the executive director's action is mailed to the applicant.

(f) Section 80.271 of this title (relating to Motion for Rehearing) and Texas Government Code, §2001.146, regarding motions for rehearing in contested cases do not apply when a motion for reconsideration is denied by commission action or under subsection (e) of this section and no motions for rehearing shall be filed. If applicable, the commission decision may be subject to judicial review under Texas Water Code, §5.351, or the Texas Health and Safety Code, §§361.321, 382.032, or 401. 341.

§50.41. Eligibility of Executive Director. The executive director may issue Texas pollutant discharge elimination system (TPDES) permits or other TPDES-related approvals only if he or she does not receive, and has not during the previous two years received, a significant portion of income directly or indirectly from permit holders or applicants for a permit.

(1) For the purposes of this section:

(A) "Significant portion of income" means 10% or more of gross personal income for a calendar year, except that it means 50% or more of gross personal income for a calendar year if the recipient is over 60 years of age and is receiving that portion under retirement pension, or similar arrangement.

(B) "Permit holders or applicants for a permit" does not include any department or agency of a state government, such as a Department of Parks or a Department of Fish and Wildlife.

(C) "Income" includes retirement benefits, consultant fees, and stock dividends.

(2) For purposes of this section, income is not received "directly or indirectly from permit holders or applicants for a permit" when it is derived from mutual fund payments, or from other diversified investments for which the recipient does not know the identity of the primary sources of income.

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 March 6, 1996.

TRD-9603213 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Chapter 55. Request for Contested Case Hearing

The Texas Natural Resource Conservation Commission (commission) proposes new §§55.1, 55.3, 55.21, 55.23, 55.25, 55.27, 55.29, 55.31, and 55.33, concerning the commission's procedural rules.

This proposal is the second phase (Phase II) of an ongoing project to reorganize, clarify, and consolidate the procedural rules of the commission. The first phase of the project (Phase I) was intended to implement recent legislation and was completed in the summer of 1995. Phase I made limited substantive changes to the commission's rules and began limited reorganization. Phase II is a more ambitious attempt to reorganize and consolidate the commission's procedural rules, and to eliminate conflicting procedural requirements based solely on media or type of hearing. By consolidating these rules, the commission seeks to cut back on the duplication of requirements and definitions that might create unwarranted non-statutory differences in the treatment of persons working with the commission. As part of this ongoing project, the commission is continuing to examine program and media specific rules for inconsistency with the general rules of the agency. It is anticipated that any further consolidation will be proposed as amendments to specific programs or chapters and not as a further major revision to these procedural rules.

Proposed numbering changes attempt to impose a more logical organization upon the most widely applicable rules of the commission by taking advantage of newly available chapters in Title 30. Chapters 1-99 will be reserved for the procedural rules and broadly applicable substantive rules of the commission. By locating generally applicable rules at the beginning of Title 30, commission rules should be organized in a more logical and user-friendly format. The proposed new format consists of the following reservation of chapters: Chapters 1-10-general rules of the commission; Chapters 11-19-miscellaneous provisions not specific to any media; Chapters 20-29-rulemaking; Chapters 30-49-application procedures; Chapters 50-69-processing of applications; Chapters 70-79-enforcement; and Chapters 80-89-hearings-contested/other. The current proposal conforms to this new format.

Media specific substantive rules, and limited procedural rules will continue to be found in Chapters 100-399 of Title 30.

Proposed new Chapters 1, 3, 5, 10, and 70 were published in the February 20, 1996, issue of the *Texas Register* (21 TexReg 1349). Proposed new Chapters 1 and 10 replace and make limited changes to existing Chapter 261. Chapter 1 sets forth the general rules of the agency. Chapter 10 governs the conduct of commission meetings.

Proposed new Chapter 3 is intended to consolidate the definitions broadly applicable across chapters. Definitions within specific chapters that conflict with definitions in Chapter 3 will continue to apply to the particular chapter within which they are found. Long-term plans call for consolidating these definitions as much as possible, but any further consolidation beyond this proposal will be undertaken as changes to specific chapters.

Proposed new Chapter 5 replaces existing Chapter 345 and sets forth the rules governing the composition of advisory groups to the commission, without substantive changes from the existing rules.

Proposed new Chapter 20 contains the rules governing agency rulemaking from Chapter 275 without substantive changes.

A planned new Chapter 39 contains requirements for notices of public hearings moved, duplicated, or cross-referenced from other chapters. The commission anticipates that this chapter will be proposed later this year.

Proposed Chapter 40 replaces Chapter 264, relating to Alternative Dispute Resolution (ADR) before the commission. No substantive changes to ADR procedures are proposed.

Proposed new Chapters 50 and 55 replace existing Chapter 263. Chapter 50 relates to actions taken on an application by the commission or the executive director. Chapter 50, Subchapter B relates to actions taken by the commission on uncontested applications. Chapter 50, Subchapter C relates to action by the executive director and is recodified primarily from Subchapter A of Chapter 263, but also duplicates a portion of Chapter 305, Subchapter E. The principal change to current practice proposed in Chapter 50 is the consolidation of the process for executive director approval of air, water, and waste applications into a single process governing all media. This single process eliminates the *Texas Register* notice requirement regarding possible action by the executive director. The proposed rules continue the distinction between media of the limitation upon the executive director's authority to act on protested applications.

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Persons seeking help in comparing this rule proposal and recodification to the existing rules, can obtain a redlined/strikeout version of this package and disposition/derivation tables from the commission. Please contact David Bolduc at (512) 239-1000 for a copy of this information.

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the sections are in effect there will be no significant fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Minick 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 improvement in the hearings process and for contested matters before the commission and enhanced consistency in the conduct of administrative proceedings for state agencies. 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.

The proposed rule revisions are intended to clarify, streamline, and recodify the procedural rules of the agency. The commission prepared a takings impact assessment of these rules and determined that the proposal will not create any burden on private real property rights.

A public hearing on the proposal will be held April 18, 1996, at 9:00 a.m. in Room 131E of TNRCC Building C, located at 12100 North IH-35, Park 35 Circle, Austin. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion within the audience will not occur during the hearing; however, a TNRCC staff member will be available to discuss the proposal 30 minutes prior to the hearing and answer questions before and after the hearing.

Written comments not presented at the hearing may be submitted to the TNRCC Office of Policy and Regulatory Development in Austin through April 18, 1996. Material received by the TNRCC Office of Policy and Regulatory Development by 4:00 p.m. on that date will be considered by the commission prior to any final action on the proposal. Please mail comments to Lisa Martin, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, and reference Rules Tracking Log Number 95123-263-AD. Please fax comments to (512) 239-4808. Copies of the revision are available from the Office of Policy and Regulatory Development, located at 12100 Park 35 Circle, Building F, Austin, and at all TNRCC regional offices. For further information, please contact Randall Terrell at (512) 239-0577.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

Subchapter A. Applicability and Definitions

• 30 TAC §55.1, §55.3

The new sections are proposed under the Texas Water Code, §§5.103, 5. 105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

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§55.1. Applicability.

(a) This chapter applies to hearing requests regarding any application to issue, amend, modify, renew, or transfer a permit, license, registration, or other authorization or approval.

(b) This chapter does not apply to hearing requests related to:

(1) applications for emergency or temporary orders;

(2) applications for temporary or term permits for water rights.

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

Affected person–A person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest. The determination of whether a person is affected shall be governed by §55.29 of this title (relating to Determination of Affected Person).

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 March 6, 1996.

TRD-9603214 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Subchapter B. Hearing Requests

• 30 TAC §§55.21, 55.23, 55.25, 55.27, 55.29, 55.31, 55.33

The new sections are proposed under the Texas Water Code, §§5.103, 5. 105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed new sections implement Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412.

§55.21. Requests for Contested Case Hearings.

(a) The following may request a contested case hearing under this chapter:

(1) a commissioner;

(2) the executive director;

(3) the applicant;

(4) affected persons, when authorized by law; and

(5) for applications for air quality permits, or standard exemptions required to provide public notice, a legislator from the general area of the proposed facility.

(b) A request for a contested case hearing by an affected person must:

(1) be in writing;

(2) filed with the chief clerk within the time provided by subsection (d) of this section.

(c) A hearing request must substantially comply with the following:

(1) give the name, address, and daytime telephone number of the person who files the request. If the request is made by group or association, the request must identify one person by name address, daytime telephone number, and, where possible, fax number, who shall be responsible for receiving all official communications and documents for the group;

(2) identify the person's personal justiciable interest affected by the application;

(3) request a contested case hearing; and

(4) provide any other information specified in the public notice of application.

(d) Time to make request. A hearing request under this chapter must be filed within the time period specified in the notice, which shall be no less than 30 days after the first publication of the notice of application, except that a request must be submitted within the time period specified in the notice, which shall be:

(1) 60 days after the first publication of the notice of a Class 3 modification of a solid waste permit under the TSWDA;

(2) 30 days after the second publication for a new permit or permit amendment under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification);

(3) 15 days after the second publication for a permit renewal or standard exemption for a concrete plant under Chapter 116 of this title;

(4) ten days after the mailing of notice of the application for a minor amendment or for the transfer of a permit;

(5) no less than 30 days after the mailing of the notice of opportunity for hearing for an application for a municipal solid waste permit or to amend, extend, or renew such a permit;

(6) no less than 30 days after the mailing of the notice of draft permit for an application for an industrial waste facility permit or to amend, extend, or renew such a permit;

(7) no less than 45 days after the mailing of the notice of draft permit for an application for a hazardous waste facility permit or to amend, extend, or renew such a permit;

(8) no less than 30 days after the publication of the notice of draft permit for an application for a wastewater discharge except as provided in paragraph (9) of this subsection;

(9) no less than ten days after the mailing of the notice of draft permit for an application to amend a wastewater discharge permit where the application is to improve the quality of waste authorized to be discharged and does not seek to increase significantly the quantity of waste authorized to be discharged or change materially the pattern or place of discharge;

(10) not less than 30 days after the publication of the notice of draft permit for an application for an injection well permit or to amend, extend, or renew such a permit;

(11) not less than 30 days after the notice of draft production area authorization under Chapter 331 of this title (relating to Underground Injection Control);

(12) the time specified in commission rules for other specific types of application.

(e) The commission may extend the time allowed for submitting a hearing request.

§55.23. Request by Group or Association.

(a) A group or association may request a contested case hearing only if the group or association meets all of the following requirements:

(1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;

(2) the interests the group or association seeks to protect are germane to the organization's purpose; and

(3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

(b) The executive director, the public interest counsel, or the applicant may request that a group or association provide an explanation of how the group or association meets the requirements of subsection (a) of this section. The request and response shall be filed according to the procedure in §55.25(e) and (f) of this title (relating to Processing of Hearing Request).

§55.25. Hearing Request Processing.

(a) The chief clerk shall deliver or mail to the executive director, the public interest counsel, and the applicant copies of all documents filed with the chief clerk in response to public notice of an application.

(b) The chief clerk shall respond in writing to a hearing request, protest, or other response to the notice of application to explain how the person may submit public comment to the executive director and to describe alternative dispute resolution under commission rules.

(c) The executive director shall file a statement with the chief clerk indicating that technical review of the application is complete. The executive director may file the statement with the chief clerk either before or after public notice of the application is issued.

(d) After a hearing request is filed and the executive director has filed a statement that technical review of the application is complete, the chief clerk shall process the hearing request by:

(1) referring the application and hearing request to the alternative dispute resolution director. The alternative dispute resolution director shall try to resolve any dispute between the applicant and the person making the request for hearing; and

(2) scheduling the hearing request for a commission meeting. The chief clerk should try to schedule the request for a commission meeting that will be held approximately 30 days after the later of the following:

(A) the deadline to request a hearing specified in the public notice of the application; or

(B) the date the executive director filed the statement that technical review is complete.

(e) The executive director, the public interest counsel, and the applicant may submit a written response to the hearing request no later than 15 days before the commission meeting at which the commission will evaluate the hearing request. A response shall be filed with the chief clerk, and served on the same day to the executive director, the public interest counsel, the applicant, and any persons filing hearing requests.

(f) The person who filed the hearing request may submit a written reply to the response no later than five days before the scheduled commission meeting at which the commission will evaluate the hearing request. A reply shall be filed with the chief clerk, and served on the same day to the executive director, the public interest counsel, and the applicant.

(g) The executive director, a commissioner, or the applicant, may file a request with the chief clerk that the application be sent directly to SOAH for a hearing. If a request is filed under this subsection, the commission's scheduled consideration of the hearing request will be canceled.

§55.27. Action on Hearing Request.

(a) The commission will evaluate the hearing request at the scheduled commission meeting, and may:

(1) determine that a hearing request does not meet the requirements of this subchapter, and act on the application;

(2) determine that a hearing request meets the require-

ments of this subchapter, and direct the chief clerk to refer the application to SOAH for hearing; or

(3) direct the chief clerk to refer the hearing request to SOAH. The referral may specify that SOAH should prepare a recommendation on the sole question of whether the request meets the requirements of this subchapter. The referral may also direct SOAH to proceed with a hearing on the application if the judge finds that a hearing request meets the requirements of this chapter.

(b) A request for a contested case hearing shall be granted if the request is:

(1) made by a commissioner, applicant, or the executive director;

(2) made by an affected person if the request:

(A) is reasonable;

(B) is supported by competent evidence;

(C) complies with the requirements of §55.21 of this title (relating to Requests for Contested Case Hearings);

(D) is timely filed with the chief clerk; and

(E) is pursuant to a right to hearing authorized by law;

(3) for an air quality permit, made by a legislator in the general area of the facility if the request:

(A) is reasonable;

(B) complies with the requirements of §55.21 of this title, except for subsection (c)(2)-(4);

(C) is timely filed with the chief clerk; and

(D) is pursuant to a statutory right to hearing.

(c) The commission may refer an application to SOAH if there is no hearing request complying with this subchapter, if the commission determines that a hearing would be in the public interest.

(d) The executive director shall determine the sufficiency of hearing requests on utility matters listed in this subsection. If a hearing request meets the requirements in this subsection, the executive director shall refer the hearing request to the chief clerk. The executive director shall review hearing requests concerning the following matters and shall use the specified standards for reviewing the requests.

(1) If a utility files a statement of intent to change rates under Texas Water Code, §13.187, the executive director shall evaluate any complaints or hearing requests received and determine if a hearing is required.

(2) If a person files an application or petition concerning a certificate of convenience and necessity under Texas Water Code, Chapter 13, Subchapter G, the executive director shall evaluate any complaints or hearing requests and determine if a hearing is required.

(3) If a person files an appeal under Texas Water Code, §13.043, invoking the commission's appellate jurisdiction over water, sewer, or drainage rates, the executive director shall evaluate the appeal and determine if a hearing is required.

(e) During the commission meeting, the commission may determine whether the application should be processed under the requirements of Chapter 80, Subchapter E of this title (relating to Freezing the Process). When evaluating whether the provisions of that subchapter should apply, the commission may consider: the number and sophistication of the parties or potential parties; the expected length of the hearing; and the complexity of the issues.

(f) A person whose hearing request is denied may still seek to be admitted as a party under §80.109 of this title (relating to Designation of Parties) if any hearing request is granted on an application. Failure to seek party status shall be deemed a withdrawal of a person's hearing request.

(g) If a hearing request is denied, §80.271 of this title (relating to Motion for Rehearing) is applicable. A motion for rehearing in such a case must be filed no earlier than, and no more than 20 days after, the date the person or his attorney of record is notified of the commission's final decision or order on the application.

§55.29. Determination of Affected Person.

(a) For any application, an affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest.

(b) Governmental entities, including local governments and public agencies, with authority under state law over issues contemplated by the application may be considered affected persons.

(c) All relevant factors shall be considered, including, but not limited to, the following:

(1) whether the interest claimed is one protected by the law under which the application will be considered;

(2) distance restrictions or other limitations imposed by law on the affected interest;

(3) whether a reasonable relationship exists between the interest claimed and the activity regulated;

(4) likely impact of the regulated activity on the health, safety, and use of property of the person;

(5) likely impact of the regulated activity on use of the impacted natural resource by the person; and

(6) for governmental entities, the statutory authority over or interest in the issues relevant to the application.

§55.31. Determination of Reasonableness of Request for Hearing.

(a) The reasonableness of a hearing request shall be based on all relevant factors including the following:

(1) whether the request is based solely on concerns outside of the jurisdiction of the commission; and

(2) whether the request is based on concerns related to other media that cannot be addressed by the pending application, even though within the jurisdiction of the commission.

(b) For hearing requests on air quality applications:

(1) The following criteria shall also be considered in making a determination of reasonableness:

(A) whether the project is an emissions reduction project including:

(i) whether there are no increases in emissions of any contaminants and the reduction project is not driven by a noncompliance situation; and

(ii) whether the project will have both emission reductions and incidental increases where the net effect is an emission reduction;

(B) whether the project is mandated by commission rule;

(C) the location of the proposed project;

(D) whether the applicant requests authority to substitute an equivalent or more efficient control device;

(E) whether the request for a contested case hearing is based solely on something other than concerns about air pollution;

(F) the extent to which the person requesting a hearing is likely to be impacted by the emissions; and

(G) the applicant's compliance history.

(2) A request concerning an amendment, modification, or renewal that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted is unreasonable.

(3) Notwithstanding paragraph (2) of this subsection, a request may be determined reasonable if the application involves a facility for which the applicant's compliance history contains violations which are unresolved and which constitute a recurring pattern of egregious conduct which demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations.

§55.33. Request for SOAH to Acquire Jurisdiction Over Case.

(a) If the chief clerk is directed by the commission or is requested by a commissioner, the executive director, or an applicant to refer an application or a hearing request to SOAH, the chief clerk shall take the following actions:

(1) file with SOAH a Request for Setting of Hearing form, or Request for Assignment of Administrative Law Judge form, whichever is appropriate;

(2) coordinate with SOAH to determine a time and place for hearing; and

(3) issue public notice of the hearing as required by Chapter 39 of this title (relating to Public Notice).

(b) Before the hearing, the commission shall provide to the judge a list of issues or areas that must be addressed. In addition, the commission may identify and provide to the judge at any time additional issues or areas that must be addressed.

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 March 6, 1996.

TRD-9603215 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

Chapter 80. Contested Case Hearings

The Texas Natural Resource Conservation Commission (commission) proposes new §§80.1, 80.3, 80.5, 80.7, 80.9, 80.11, 80.13, 80.15, 80.17, 80.19, 80.21, 80.23, 80.25, 80.27, 80.29, 80.31, 80.33, 80.101, 80.103, 80.105, 80.107, 80. 109, 80.111, 80.113, 80.115, 80.117, 80.119, 80.125, 80.127, 80.129, 80.131, 80.133, 80.135, 80.137, 80.151, 80.153, 80.155, 80.201, 80.203, 80.205, 80.207, 80.209, 80.213, 80.215, 80.251, 80.253, 80.255, 80.257, 80.259, 80.261, 80. 263, 80.265, 80.267, 80.269, 80.271, 80.273, 80.275, 80.277, and 80.279, concerning the commission's procedural rules.

This proposal is the second phase (Phase II) of an ongoing project to reorganize, clarify, and consolidate the procedural rules of the commission. The first phase of the project (Phase I) was intended to implement recent legislation and was completed in the summer of 1995. Phase I made limited substantive changes to the commission's rules and began limited reorganization. Phase II is a more ambitious attempt to reorganize and consolidate the commission's procedural rules, and to eliminate conflicting procedural requirements based solely on media or type of hearing. By consolidating these rules, the commission seeks to cut back on the duplication of requirements and definitions that might create unwarranted non-statutory differences in the treatment of persons working with the commission. As part of this ongoing project, the commission is continuing to examine program and media specific rules for inconsistency with the general rules of the agency. It is anticipated that any further consolidation will be proposed as amendments to specific programs or chapters and not as a further major revision to these procedural rules.

Proposed numbering changes attempt to impose a more logical organization upon the most widely applicable rules of the commission by taking advantage of newly available chapters in Title 30. Chapters 1-99 will be reserved for the procedural rules and broadly applicable substantive rules of the commission. By locating generally applicable rules at the beginning of Title 30, commission rules should be organized in a more logical and user-friendly format. The proposed new format consists of the following reservation of chapters: Chapters 1-10-general rules of the commission; Chapters 11-19-miscellaneous provisions not specific to any media; Chapters 20-29-rulemaking; Chapters 30-49-application procedures; Chapters 50-69-processing of applications; Chapters 70-79-enforcement; and Chapters 80-89-hearings-contested/other. The current proposal conforms to this new format.

Media specific substantive rules, and limited procedural rules will continue to be found in Chapters 100-399 of Title 30.

Proposed new Chapters 1, 3, 5, 10, and 70 were published in the February 20, 1996, issue of the *Texas Register* (21 TexReg 1349). Proposed new Chapters 1 and 10 replace and make limited changes to existing Chapter 261. Chapter 1 sets forth the general rules of the agency. Chapter 10 governs the conduct of commission meetings.

Proposed new Chapter 3 is intended to consolidate the definitions broadly applicable across chapters. Definitions within specific chapters that conflict with definitions in Chapter 3 will continue to apply to the particular chapter within which they are found. Long-term plans call for consolidating these definitions as much as possible, but any further consolidation beyond this proposal will be undertaken as changes to specific chapters.

Proposed new Chapter 5 replaces existing Chapter 345 and sets forth the rules governing the composition of advisory groups to the commission, without substantive changes from the existing rules.

Proposed new Chapter 20 contains the rules governing agency rulemaking from Chapter 275 without substantive changes.

A planned new Chapter 39 contains requirements for notices of public hearings moved, duplicated, or cross-referenced from other chapters. The commission anticipates that this chapter will be proposed later this year.

Proposed Chapter 40 replaces Chapter 264, relating to Alternative Dispute Resolution (ADR) before the commission. No substantive changes to ADR procedures are proposed.

Proposed new Chapters 50 and 55 replace existing Chapter 263. Chapter 50 relates to actions taken on an application by the commis-

sion or the executive director. Chapter 50, Subchapter B relates to actions taken by the commission on uncontested applications. Chapter 50, Subchapter C relates to action by the executive director and is recodified primarily from Subchapter A of Chapter 263, but also duplicates a portion of Chapter 305, Subchapter E. The principal change to current practice proposed in Chapter 50 is the consolidation of the process for executive director approval of air, water, and waste applications into a single process governing all media. This single process eliminates the *Texas Register* notice requirement regarding possible action by the executive director. The proposed rules continue the distinction between media of the limitation upon the executive director's authority to act on protested applications.

Proposed new Chapter 55 relates to commission action upon hearing requests related to permit applications and is a recodification of Subchapter B of Chapter 263. The commission seeks to clarify the process in this new chapter. New §55.21(d) attempts to clearly set forth the timelines for filing hearing requests. Persons concerned with production area authorizations should note that the public notice requirement for an application has been increased from ten to 30 days in §55.21(d). Section 55.27 makes clear it is necessary to both seek party status and file a motion for rehearing of the denial of a hearing request prior to seeking judicial review, and that this motion should be filed after action by the commission on the permit or other application. Future rulemaking will be undertaken to further define the factors considered in evaluating hearing requests. At this time, there is insufficient experience with the current process, adopted in August of 1995, to fairly evaluate how well existing rules concerning the processing of hearing requests are meeting the needs of the regulated community, the public, and the commission.

Proposed new Chapter 70 contains the sections from Chapter 337 that were not related to hearing procedures.

Proposed Chapter 80 unifies the contested case hearing procedures contained in current Chapters 265 and 337. Where substantive and procedural issues differed significantly under the existing rules, the commission attempted to maintain these differences. Section 80.25 is modified to clarify that attorney's fees are not included in the payment of "costs" required for withdrawal of an application without prejudice, and makes it clear that payment of "costs" is one of three avenues for withdrawal without prejudice. Section 80.107 duplicates the sanctions list allowed in Senate Bill 12, and unifies the sanctions sections from the other rules proposed for repeal or amendment in this package. Section 80.137 modifies the summary judgment procedure from Chapter 337. Inclusion of this procedure in Chapter 80 will make summary disposition available in all contested cases. Discovery rules that duplicate the Texas Rules of Civil Procedure have been replaced with a reference to those rules. Voluntary discovery rules have been eliminated. Language is added to the discovery rules to make clear that drafts of prefiled testimony are not discoverable. The "freeze rules" in Chapter 265, Subchapter F have been clarified and streamlined, and duplicate procedures have been consolidated with the general procedures in Chapter 80. Language is added to §80.207 to require a reasonable basis for protestants' issues listed in the freeze process. This change was not intended to shift the burden of proof upon an application. Twenty days have been added to the end of the first discovery period in the freeze process to allow more time for the listing of issues.

Proposed new Chapter 86 contains special procedural rules of Chapter 275 (which is proposed for repeal) not moved to Chapter 20. No substantive changes are proposed in this recodification.

Chapter 305, Subchapter E is proposed for repeal. Rules contained in that subchapter will be recodified in Chapters 50 and 55, and in the new Chapter 39, when proposed.

Chapter 339 is proposed to be repealed in its entirety.

Chapter 340 is amended to consolidate requirements for pump installers from Chapter 339 with those of water well drillers in Chapter 340. In addition, references to the former Water Well Drillers Board are changed to commission or Water Well Drillers Advisory Council (council) as appropriate. Enforcement rules are deleted and references made to the proposed new Chapters 70 and 80. Additional changes are proposed to reflect recent changes in the statutory authority of the council, and to delete sections that are duplicated in new Chapter 5.

Chapter 341, which was the former Water Well Drillers Board procedures for enforcement and hearings, is proposed to be repealed in its entirety and these council proceedings will be governed by new Chapters 70 and 80.

Persons seeking help in comparing this rule proposal and recodification to the existing rules, can obtain a redlined/strikeout version of this package and disposition/derivation tables from the commission. Please contact David Bolduc at (512) 239-1000 for a copy of this information.

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the sections are in effect there will be no significant fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Minick 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 improvement in the hearings process and for contested matters before the commission and enhanced consistency in the conduct of administrative proceedings for state agencies. 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.

The proposed rule revisions are intended to clarify, streamline, and recodify the procedural rules of the agency. The commission prepared a takings impact assessment of these rules and determined that the proposal will not create any burden on private real property rights.

A public hearing on the proposal will be held April 18, 1996, at 9:00 a.m. in Room 131E of TNRCC Building C, located at 12100 North IH-35, Park 35 Circle, Austin. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion within the audience will not occur during the hearing; however, a TNRCC staff member will be available to discuss the proposal 30 minutes prior to the hearing and answer questions before and after the hearing.

Written comments not presented at the hearing may be submitted to the TNRCC Office of Policy and Regulatory Development in Austin through April 18, 1996. Material received by the TNRCC Office of Policy and Regulatory Development by 4:00 p.m. on that date will be considered by the commission prior to any final action on the proposal. Please mail comments to Lisa Martin, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, and reference Rules Tracking Log Number 95123-263-AD. Please fax comments to (512) 239-4808. Copies of the revision are available from the Office of Policy and Regulatory Development, located at 12100 Park 35 Circle, Building F, Austin, and at all TNRCC regional offices. For further information, please contact Randall Terrell at (512) 239-0577.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

Subchapter A. General Rules

- **30 TAC §§80.1, 80.3, 80.5, 80.7, 80.9, 80.11, 80.13, 80.15, 80.17, 80.19, 80.21, 80.23, 80.25, 80.27, 80.29, 80.31, 80.33**

The new sections are proposed under the Texas Water Code, §§5.103, 5. 105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed new sections implement Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412.

§80.1. Applicability and Purpose. This chapter applies to and provides procedures for all contested case hearings and other hearings held by SOAH.

§80.3. Judges.

(a) The commission delegates to SOAH the authority to conduct hearings designated by the commission. The chief administrative law judge will assign judges to hearings. When more than one judge is assigned to a hearing, one of the judges will be designated as the presiding judge and shall resolve all procedural and evidentiary questions.

(b) The presiding judge shall have authority to:

(1) set hearing dates;

(2) convene the hearing at the time and place specified in the notice for the hearing;

(3) establish the jurisdiction of the commission;

(4) rule on motions and on the admissibility of evidence and amendments to pleadings;

(5) designate and align parties and establish the order for presentation of evidence;

(6) examine and administer oaths to witnesses;

(7) issue subpoenas to compel the attendance of witnesses, or the production of papers and documents;

(8) authorize the taking of depositions and compel other forms of discovery;

(9) set prehearing conferences and issue prehearing orders;

(10) ensure that information and testimony are introduced as conveniently and expeditiously as possible, including limiting the time of presentation without prejudicing any rights of parties to the proceeding;

(11) limit testimony to matters under the commission's jurisdiction;

(12) continue any hearing from time to time and from place to place;

(13) reopen the record of a hearing, before a proposal for decision is issued, for additional evidence where necessary to make the record more complete;

(14) impose appropriate sanctions; and

(15) exercise any other appropriate powers necessary or convenient to carry out his responsibilities.

§80.5. Request for SOAH to Acquire Jurisdiction Over Case.

(a) When a case is referred to SOAH, the chief clerk shall:

(1) file with SOAH a Request for Setting of Hearing form, or Request for Assignment of Administrative Law Judge form, whichever is appropriate;

(2) coordinate with SOAH to determine a time and place for hearing;

(3) issue public notice of the hearing as required by law and commission rules; and

(4) send a copy of the chief clerk's case file to SOAH.

(b) The commission shall provide to the judge a list of issues or areas that must be addressed. In addition, the commission may identify and provide additional issues or areas that must be addressed to the judge at any time.

§80.7. Substitution of Judges. The chief administrative law judge may, for good cause, assign a substitute or additional judge to a proceeding without the necessity of duplicating any duty or function already performed by the previous judge.

§80.9. Representation at Hearings.

(a) A representative of record is one who has appeared in a proceeding or whose name is subscribed to any application, petition, or other pleading or to some agreement of the parties filed in the proceedings. The representative shall be the representative of record until the end of the proceeding unless there is a statement to the contrary appearing in the record.

(b) Not more than one representative for each party or aligned group of parties shall be heard on any question or in the hearing except upon leave of the judge.

(c) Representatives shall:

(1) observe the letter and spirit of the Texas Lawyer's Creed, as adopted by the Texas Supreme Court, and the State Bar of Texas' Texas Disciplinary Rules of Professional Conduct, including those provisions concerning improper ex parte communications with the commissioners and judges;

(2) advise their clients and witnesses of applicable requirements of conduct and decorum;

(3) direct all objections, arguments, and other comments to the judge and not to other participants.

§80.11. Conduct and Decorum.

(a) Those who attend or participate in a hearing should conduct themselves in a manner respectful of the conduct of public business, and conducive to orderly and polite discourse. All those in attendance shall comply with the judge's directions concerning the offer of public comment, and conduct and decorum.

(b) In a hearing before a judge, the judge shall first warn a person violating this section to refrain from the specific conduct in violation. Upon further violation of this section by the same person, the judge may exclude that person from the proceeding for such time and under such conditions as necessary to correct the situation. Violation of this section shall also be sufficient cause for the judge to recess the hearing.

§80.13. Consolidation and Severance of Issues and Parties.

(a) Consolidation. Consistent with notices required by law, the judge may consolidate related cases or claims if consolidation will not prejudice any party and may save time and expense or otherwise benefit the public interest and welfare. With the judge's permission, the executive director may consolidate cases or claims, including those involving different media or persons. The commission may, when referring matters to SOAH, direct that cases or claims be consolidated for hearing.

(b) Severance. The judge may sever issues in a proceeding or hold special hearings on separate issues if doing so will not prejudice any party and may save time and expense or benefit the public interest and welfare. The judge may sever contested enforcement cases or claims involving any number of parties, upon motion by any respondent, where the respondent can show that he would be unduly prejudiced if severance were not granted.

§80.15. Ex Parte Communications.

(a) No ex parte communications. Unless required for the disposition of an ex parte matter authorized by law, during the pendency of a contested case either at SOAH or before the commission, no party, person, or their representatives shall communicate directly or indirectly with any commissioner or the judge concerning

any issue of fact or law relative to the pending case, except on notice and opportunity for all parties to participate.

(b) Utilizing special skills of the commission. The judge may seek the special skills or knowledge of commission staff in evaluating the evidence in a contested case. The judge shall follow the following procedure.

(1) The judge shall issue an order, copied to all parties, asking the executive director to assign a staff person with expertise who has not participated in the proceeding or in the processing of the matter being considered for potential consultation.

(2) All communications between the designated staff expert and the judge shall be either recorded or in writing, and all such communications submitted to or considered by the judge shall be made available as public records when the proposal for decision is issued.

(3) During the pendency of the case either before the judge or at the commission, no party, person, or their representatives shall communicate directly or indirectly with the designated staff expert assigned to help the judge concerning any issue of fact or law relative to the pending case, except on notice and opportunity for all parties to participate.

§80.17. Burden of Proof.

(a) In any proceeding other than a proceeding involving a proposed change of rates, the burden of proof is on the moving party by a preponderance of the evidence.

(b) The burden of proof in a proceeding involving a proposed change of rates is governed by §291.12 of this title (relating to Burden of Proof).

(c) In an enforcement case, the executive director shall have the burden of proving by a preponderance of the evidence the occurrence of any violation and the appropriateness of any proposed technical ordering provisions. The respondent shall have the burden of proving by a preponderance of the evidence all elements of any affirmative defense asserted. Any party submitting facts relevant to the factors prescribed by the applicable statute to be considered by the commission in determining the amount of the penalty shall have the burden of proving those facts by a preponderance of the evidence.

§80.19. Audio Recording of Proceedings. The judge shall record each proceeding on audio cassette tape. Any person may obtain a copy of the tape recording from the judge or, after conclusion of the hearing, may submit a request to the chief clerk accompanied by payment of all reproduction costs.

§80.21. Witness Fees.

(a) A person who is not a party and is compelled to attend any hearing or proceeding or to produce books, records, papers, or other objects is entitled to receive mileage reimbursement if the place is more than 25 miles from the person's place of residence. Reimbursement shall be at the current rate for state employees. The person is also entitled to receive a minimum fee of $70 or the amount equal to state employees' current maximum travel reimbursement for overnight lodging plus meals, whichever is greater, for each day or part of a day the person is necessarily present as a witness or deponent. This fee shall be paid to the witness or deponent even if overnight lodging is not used, and the fee shall not be prorated for parts of days.

(b) Mileage and fees to which a witness is entitled under this section shall be paid by the party at whose request the witness appears or the deposition is taken, on presentation of proper vouchers sworn by the witness and approved by the judge.

§80.23. Transcriptions of Hearings.

(a) Official court reporter. Consistent with its court reporting services agreement, the commission will provide a certified court reporter to make a verbatim record and transcript of any commission meeting, hearing, or other proceeding upon the timely request of any person. The court reporter provided by the commission shall be the official reporter for commission proceedings. If the commission does not provide a court reporter a party may, at his own expense, furnish a certified court reporter who the commission may designate as the official reporter for the proceeding.

(b) Court reporter. Requests for court reporter services.

(1) A request for a verbatim record or transcript of a proceeding may be submitted at any time, but shall be submitted in writing to the chief clerk of the commission or the judge and shall specify: the name, mailing address, and daytime telephone number of the requester; the name and date of the commission proceeding; and a statement of whether a transcript is requested. A request for a transcript of a proceeding already reported may be made directly to the court reporter.

(2) A person requesting a verbatim record without a transcript of a proceeding shall pay the applicable reporting fees in the commission's court reporting services agreement.

(3) A person requesting a transcript of a proceeding shall pay for at least an original and two copies of the transcript in addition to any applicable reporting fees in accordance with the commission's court reporting services agreement. The court reporter shall provide the commission the original and one copy of the transcript free of charge.

(4) Upon his or her own motion, the judge may request a verbatim record and an original and two copies of a transcript of a proceeding.

(5) The judge may require the applicant to pay for the transcript in advance subject to reimbursement from other parties upon assessment of costs.

(c) Cancellation of court reporter services. A person who causes the judge to cancel a hearing or meeting for which a verbatim record or transcript has been requested is responsible for paying the court reporter, upon demand, the full daily reporting fee in the commission's court reporting services agreement unless the cancellation occurs more than 24 hours prior to the scheduled beginning of the hearing or meeting.

(d) Assessment of reporting and transcription costs.

(1) Upon the timely filed motion of a party or upon its own motion, the commission may assess reporting and transcription costs to one or more of the parties participating in the proceeding. The commission shall consider the following factors in assessing reporting and transcription costs:

(A) the party who requested the transcript;

(B) the financial ability of the party to pay the costs;

(C) the extent to which the party participated in the hearing;

(D) the relative benefits to the various parties of having a transcript;

(E) the budgetary constraints of a state or federal administrative agency participating in the proceeding;

(F) in rate proceedings, the extent to which the expense of the rate proceeding is included in the utility's allowable expenses; and

(G) any other factor which is relevant to a just and reasonable assessment of costs.

(2) The commission will not assess reporting or transcription costs to statutory parties who are precluded by law from appealing any ruling, decision, or other act of the commission.

(3) In any proceeding where the assessment of reporting or transcription costs is an issue, the judge shall provide the parties an opportunity to present evidence and argument on the issue. A judge shall include in the proposal for decision a recommendation for the assessment of costs.

(4) The parties may agree upon the division or assessment of reporting and transcription costs. The terms of such an agreement shall be made part of the record of the proceeding.

(e) Payment of reporting or transcription assessment.

(1) Each party assessed a reporting or transcription cost in a commission proceeding shall pay the assessment in full within ten days after the commission's order is final, as provided by the APA. The assessment shall be paid by check payable to the order of the court reporter firm that reports or transcribes the proceeding, or as otherwise ordered by the commission. Payment shall be remitted to the chief clerk of the commission or as otherwise ordered by the commission.

(2) If a party fails to pay the assessment under subsection (a) of this section, the commission may forward the matter to the attorney general of Texas for prosecution and collection.

(3) Upon a party's filing a sworn motion showing good cause for failure to pay its assessment under subsection (a) of this section, accompanied by tender of payment of the party's assessment in full, the commission may grant an exception to the time within which payment must have been made under subsection (a) of this section, accept the payment, and otherwise enforce its assessment.

(f) Sale of transcript copies. The court reporter may sell copies of a transcript of a commission proceeding in accordance with the commission's court reporting services agreement, but the commission shall not be precluded from complying with the Public Information Act.

§80.25. Withdrawing the Application.

(a) An applicant may file a request to withdraw its application at any time before the proposal for decision is issued.

(b) If the request is to withdraw the application with prejudice, the judge shall remand the application and request to the executive director, who shall enter an order dismissing the application with prejudice.

(c) If the parties agree in writing to the withdrawal of the application without prejudice, the judge shall remand the application and request to the executive director, who shall enter an order dismissing the application without prejudice, on the terms agreed to by the parties.

(d) If neither subsection (b) nor (c) of this section apply, the judge will forward the application, the request, and a recommendation on the request to the commission.

(e) An applicant is entitled to an order dismissing an application without prejudice if:

(1) the parties agree in writing;

(2) the applicant reimburses the other parties all expenses, not including attorneys fees, that the other parties have incurred in the permitting process for the subject application; or

(3) the commission authorizes the dismissal of the application without prejudice.

§80.27. Form of Pleadings.

(a) All pleadings filed under this chapter should contain:

(1) the name of the party;

(2) the names of all other known parties;

(3) a concise statement of the facts and the law relied upon;

(4) a prayer stating the type of relief, action, or order desired;

(5) any other matter required by statute;

(6) a certificate of service; and

(7) the signature of the party or the party's authorized representative.

(b) All pleadings shall include the docket number assigned the case by the chief clerk.

(c) Any pleading may adopt and incorporate, by reference, any part of any document or entry in the official files and records of the agency. Copies of the relevant portions of such documents must be attached to the pleadings.

§80.29. Amended and Supplemental Pleadings in Enforcement Cases.

(a) Up to seven days before the hearing, parties to an enforcement action may file supplemental or amended pleadings, so long as such do not operate as an unfair surprise to the opposite party. Amendments after that time will be at the discretion of the judge and may constitute grounds for a continuance.

(b) The executive director may amend an enforcement petition to include changes in, but not limited to:

(1) the amount of the penalty up to the maximum allowable by statute;

(2) the violations alleged;

(3) the number of days of occurrence of previously alleged violations; and

(4) the injunctive relief (or remedial ordering provisions) sought.

(c) The right to change the violations alleged includes the right to add causes of action based on any statutes within the commission's jurisdiction other than the one or ones upon which the executive director's preliminary report in the case was based.

§80.31. Motions.

(a) A motion, unless made during a hearing, shall be made in writing, shall set forth the relief or order sought, and shall be timely filed with the chief clerk. Any reply to the motion shall be timely filed with the chief clerk with copies served on the judge and other parties. Failure to furnish copies may be grounds for withholding consideration of the motion or reply. Motions based on matters which do not appear of record must be supported by affidavit.

(b) Motions made during a hearing shall be stated on record or filed with the judge.

(c) When necessary in the judgment of the commission, a

hearing will be held to consider any motion.

§80.33. Lost Records and Papers. When any papers or records in the custody and control of the commission are lost or destroyed, the parties, with the approval of the commission, may agree in writing on a brief statement of the matters contained therein or any person may at any time supply such lost records or papers as follows.

(1) Any person may make a written sworn motion before the commission stating the loss or destruction of such record or papers, accompanied by certified copies of the originals, if obtainable, or by substantial copies thereof.

(2) If, upon hearing, the commission is satisfied that they are substantial copies of the original, an order will be entered substituting such copies for the missing originals.

(3) Such substituted copies will be filed with and constitute a part of the record and have the force and effect of the originals.

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

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TRD-9603216 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

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

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Subchapter C. Hearing Procedures

• 30 TAC §§80.101, 80.103, 80.105, 80.107, 80.109, 80.111, 80. 113, 80.115, 80.117, 80.119, 80.125, 80.127, 80.129, 80.131, 80.133, 80.135, 80.137

The new sections are proposed under the Texas Water Code, §§5.103, 5. 105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed new sections implement Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412.

§80.101. Remand to Executive Director. After providing opportunity for all affected persons to be named parties, a judge may remand an application to the executive director if all hearing requests have been withdrawn or all parties to a contested case reach a settlement so that no facts or issues remain controverted. After remand, the application shall be uncontested, the applicant is deemed to have agreed to the action of the executive director, and all hearing requests are deemed withdrawn.

§80.103. Procedure Before Preliminary Hearing.

(a) Conference before preliminary hearing.

(1) At the judge's discretion, a conference before hearing may be held at a time and place stated in the notice. If notice of the conference is not given in the notice of public hearing, notice of the conference shall be mailed at least ten days prior to the conference or the conference may be held at the public hearing date, time, and place stated in the notice of public hearing. If notice of public hearing is required to be published, notice of a conference to be held prior to the initial public hearing date shall be published at least ten days prior to the conference.

(2) Any issue appropriately considered at a preliminary hearing may be considered at a conference.

(b) Record of conference action. As determined by the judge, action taken at the conference shall be reduced to writing and made a part of the record or a statement thereof shall be made on the record at the close of the conference or at the hearing. After a prehearing conference, the judge may make appropriate rulings concerning matters discussed at the conference.

§80.105. Preliminary Hearings.

(a) After the required notice has been issued, the judge shall convene a preliminary hearing to consider the jurisdiction of the commission over the proceeding. A preliminary hearing is not required in an enforcement matter.

(b) If jurisdiction is established, the judge shall:

(1) accept public commentary and name the parties;

(2) set a discovery and procedural schedule including a mechanism for the timely and expeditious resolution of discovery disputes; and

(3) allow the parties an opportunity for settlement negotiations.

(c) When agreed to by all parties in attendance at the preliminary hearing, the judge may proceed with the evidentiary hearing on the same date of the first preliminary hearing.

(d) One or more preliminary hearings may be held to discuss:

(1) formulating and simplifying issues;

(2) evaluating the necessity or desirability of amending pleadings;

(3) all pending motions;

(4) stipulations;

(5) the procedure at the hearing;

(6) specifying the number and identity of witnesses;

(7) filing and exchanging prepared testimony and exhibits;

(8) scheduling discovery; and

(9) other matters that may expedite or facilitate the hearing process.

§80.107. Sanctions.

(a) On the judge's own motion or on motion of a party and after notice and an opportunity for a hearing, a judge may impose sanctions against a party or its representative for:

(1) filing a motion or pleading that is groundless and brought:

(A) in bad faith;

(B) for the purpose of harassment; or

(C) for any other improper purpose, such as to cause unnecessary delay or needless increase in the cost of the proceeding;

(2) abuse of the discovery process in seeking, making, or resisting discovery; or

(3) failure to obey an order of the administrative law judge or the commission.

(b) A sanction imposed under this section may include, as appropriate and justified, issuance of an order:

(1) disallowing further discovery of any kind or of a particular kind by the offending party;

(2) charging all or any part of the expenses of discovery against the offending party or its representatives;

(3) holding that designated facts be considered admitted for purposes of the proceeding;

(4) refusing to allow the offending party to support or oppose a designated claim or defense or prohibiting the party from introducing designated matters in evidence;

(5) disallowing in whole or in part requests for relief by the offending party and excluding evidence in support of those requests; and

(6) striking pleadings or testimony, or both, in whole or part.

§80.109. Designation of Parties.

(a) Determination by judge. All parties to a proceeding shall be determined at the preliminary hearing or when the judge otherwise designates. To be admitted as a party, a person must have a justiciable interest in the matter being considered and must, unless the person is specifically named in the matter being considered, appear at the preliminary hearing in person or by representative and seek to be admitted as a party. After parties are designated, no other person will be admitted as a party except upon a finding of good cause and extenuating circumstances and that the hearing in progress will not be unreasonably delayed. At the discretion of the judge, persons who are not parties may be permitted to make or file statements.

(b) Parties.

(1) The executive director and public interest counsel of the commission are parties to all commission proceedings.

(2) The applicant is a party in a hearing on its application.

(3) Affected persons shall be parties to hearings on permit applications, based upon the standards set forth in §55. 29 of this title (relating to Determination of Affected Person).

(4) The Texas Water Development Board shall be a party to any commission proceeding in which the board requests party status.

(5) The Texas Parks and Wildlife Department shall be a party in commission proceedings on applications for permits to store, take, or divert water if the department requests party status.

(6) The parties to a contested enforcement case include the respondent(s), and any other parties authorized by statute.

(7) The parties to a hearing upon a challenge to commission rules include the person(s) challenging the rule and any other parties authorized by statute.

(8) The parties to a permit revocation action initiated by a person other than the executive director shall include the respondent and the petitioner.

(c) Procedural rights and obligations. Parties have such procedural rights and obligations as may be specified by applicable statutes and rules of the commission.

(d) Alignment of participants. Participants (both party and non-party) may be aligned according to the nature of the proceeding and their relationship to it. The judge may require participants of an aligned class to select one or more persons to represent them in the proceeding.

(e) Effect of postponement. If a hearing is postponed for any reason, any person already designated as a party retains party status.

§80.111. Persons Not Parties. Persons not designated as parties may register their protest or make comments orally or in writing. These shall be included in the files of the proceeding, but shall not be considered by the judge as evidence in the record in proceedings other than enforcement proceedings. In addition, these persons may, at the judge's request, submit questions to the judge. The judge may address any such questions to witnesses where it appears that this may lead to a full disclosure of the facts without unduly delaying the hearing or burdening the record.

§80.113. Appearance.

(a) Any person may appear at a hearing in person or by authorized representative. A person appearing in a representative capacity may be required to prove his authority.

(b) Except for good cause, the applicant or petitioner shall appear at the public hearing. Failure to so appear may be grounds for withholding consideration of a matter or for dismissal without prejudice.

(c) An affidavit, may be made by either the party or a representative, unless otherwise provided by statute.

(d) Failure to appear at an enforcement hearing may result in a default order under §70.106 of this title (relating to Default Orders).

§80.115. Rights of Parties. A party has the right to conduct discovery, present a direct case, cross-examine witnesses, make oral and written arguments, obtain copies of all pleadings, motions, replies, and other filed documents, receive copies of all notices issued by the commission concerning the proceeding to which the person is a party, and, as directed by the judge, otherwise fully participate as a party in the proceeding. Except in enforcement matters, a person may seek leave to withdraw his or her party status at any time upon written request to the judge or by request stated on the record during a hearing. Party status is not withdrawn unless and until the judge grants the request for leave to withdraw.

§80.117. Order of Presentation.

(a) In all proceedings, the moving party has the right to open and close. Where several matters have been consolidated, the judge will designate who will open and close. The judge will determine at what stage other parties will be permitted to offer evidence and argument. After all parties have completed the presentation of their evidence, the judge may call upon any party for further material or relevant evidence upon any issue.

(b) In a permit hearing, the executive director shall open with a simple statement of his preliminary position on the application and, in a permit hearing, will present the draft permit including special provisions, if any. The applicant shall then present evidence to meet its burden of proof on the application, followed by protestants, the public interest counsel, and the executive director. In all cases, the applicant shall be allowed a rebuttal. Any party may present a rebuttal case when another party presents evidence that could not have been reasonably anticipated.

(c) In all contested enforcement case hearings, the executive director has the right to open and close. In all such cases, the executive director shall be allowed to close with his rebuttal.

§80.119. Continuance.

(a) The judge may continue a hearing from time to time and from place to place. If the time and place for the hearing to reconvene are not announced at the hearing, a notice shall be mailed at a reasonable time to all parties and other persons who, in the opinion of the judge, may be affected by action taken as a result of the hearing.

(b) Motions for continuance shall be in writing or stated on the record, and shall be sworn unless the facts alleged therein to show good cause are part of the record of the proceeding.

(c) The judge shall continue a hearing upon joint motion of all parties for the purpose of allowing the parties to engage in and complete settlement negotiations.

(d) Upon agreement of all parties, the judge may refer the case to a SOAH mediator for alternative dispute resolution.

§80.125. Agreements to be in Writing. Agreements between parties affecting any pending matter must be in writing, signed and filed as a part of the record, or announced at the hearing and entered in the record.

§80.127. Evidence.

(a) General admissibility of evidence.

(1) Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The Texas Rules of Civil Evidence as applied in nonjury civil cases in the district courts of this state, shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible under those rules may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent people in the conduct of their affairs. The judge shall give effect to the rules of privilege recognized by law.

(2) When a proceeding will be expedited and the interest of parties will not be prejudiced substantially, testimony may be received in written form. The prepared testimony of a witness upon direct examination, either in narrative or question and answer form, may be admitted into evidence as if read or presented orally, upon the witness' being sworn and identifying the same as a true and accurate record of what the testimony would be if given orally. The witness shall be subject to cross-examination, and the prepared testimony shall be subject to objection.

(3) Testimony will be received only from witnesses called by a party or the judge. The judge may allow or request testimony from any person whose position is not adequately represented by any party, subject to cross-examination by all parties. Such testimony shall only be allowed at the judge's discretion. All parties shall have an opportunity to conduct discovery of such person.

(4) Testimony offered by any witness shall be under oath.

(b) Stipulation. Evidence may be stipulated by agreement of all parties. The judge and commission will determine the weight, if any, to be accorded stipulated evidence.

(c) Prefiled testimony and exhibits. The judge may require parties to prepare their direct testimony in written form if the judge determines that a proceeding will be expedited and that the interests of the parties will not be prejudiced substantially. The judge may require the parties to file and serve their direct testimony and exhibits prior to the beginning of the hearing.

(d) Exhibits.

(1) Exhibits of a documentary character shall not exceed 8 1/2 by 11 inches unless they are folded to the required size. Maps and drawings which are offered as exhibits shall be rolled or folded so as not to unduly encumber the record. Exhibits not conforming to this rule may be excluded.

(2) Each exhibit offered shall be tendered for identification and placed in the record. Copies shall be furnished to the judge, each of the parties, and the hearings reporter, unless the judge rules otherwise.

(3) If an exhibit has been identified, objected to, and excluded, it may be withdrawn by the offering party. If withdrawn, the exhibit will be returned and the offering party waives all objections to the exclusion of the exhibit. If not withdrawn, the exhibit shall be included in the record for the purpose of preserving the objection to the exclusion of the exhibit.

(e) Official notice.

(1) The judge may take official notice of all facts judicially cognizable. In addition, the judge may take official notice of any generally recognized facts within the specialized knowledge of the commission.

(2) The judge shall notify all parties of any material officially noticed, including any memoranda or data prepared by the executive director and relied upon by the commission in prior proceedings. All parties shall be afforded an opportunity to contest any material so noticed.

§80.129. Objections. Objections shall be timely noted in the record. Formal exception to the ruling of the judge is not necessary to preserve the objecting party's right on appeal.

§80.131. Interlocutory Appeals and Certified Questions.

(a) No interlocutory appeals may be made to the commission by a party to a proceeding before a judge except that in an enforcement action a party may seek an interlocutory appeal to the commission on jurisdictional issues only.

(b) On a motion by a party or on the judge's own motion, the judge may certify a question to the commission. Certified questions may be made at any time during a proceeding, regarding commission policy, jurisdiction, or the imposition of any sanction by the judge which would substantially impair a party's ability to present its case. Policy questions for certification purposes include, but are not limited to:

(1) the commission's interpretation of its rules and applicable statutes;

(2) which rules or statutes are applicable to the proceeding; or

(3) whether commission policy should be established or clarified as to a substantive or procedural issue of significance to the proceeding.

(c) If a motion is granted, the judge shall file the certified question with the chief clerk and serve copies on the parties. Within five days after the certified question is filed, parties to the proceeding may file briefs or replies. The chief clerk shall provide copies of the certified question and any briefs or replies to the general counsel and commission. Upon the request of the general counsel or a commissioner to the general counsel, the certified question will be scheduled for consideration during a commission meeting. The chief clerk shall give the judge and parties notice of the meeting. The judge may abate the hearing until the commission answers the certified question, or continue with the hearing if the judge determines that no party will be substantially harmed. If the chief clerk does not receive a request from the general counsel to set the

question for consideration within 15 days after filing, the request is denied by operation of law.

§80.133. Oral Argument. At the conclusion of the hearing, oral argument may be heard upon request of the parties or at the judge's direction. Reasonable time limits may be prescribed. The judge may require or accept written briefs in lieu of oral arguments.

§80.135. Submittal of Findings of Fact and Conclusions of Law. The judge may request that the parties submit proposed findings of fact and conclusions of law separately stated.

§80.137. Summary Disposition.

(a) Motion. After the preliminary hearing and up to 21 days before the evidentiary hearing, a party may file a motion for a summary disposition of all or any part of an action. The motion shall state the specific issues upon which summary disposition is sought, the specific grounds justifying the summary disposition, and shall include any supporting affidavits, and any other relevant documentary evidence.

(b) Written response. Not later than seven days before the hearing upon a motion for summary disposition, a party may file a written response, any supporting affidavits, and any other relevant documentary evidence.

(c) Summary disposition. Summary disposition shall be rendered if the pleadings, admissions, affidavits, stipulations, and exhibits on file in the case at the time of the hearing show that there is no genuine issue as to any material fact and the moving party is entitled to summary disposition as a matter of law on the issues expressly set out in the motion. If the judge grants a motion for summary disposition on all parts of an action, the judge shall close the hearing and prepare a proposal for decision. If the judge grants a motion for summary disposition on any part of an action, the judge shall not take evidence or hear further argument upon that part of the action.

(d) Testimony. A summary disposition may be based on uncontroverted testimonial evidence of an interested witness, or of an expert witness as to subject matter concerning which the judge must be guided solely by the opinion testimony of experts. The evidence must be clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted. No oral testimony shall be received at a hearing on a motion for summary disposition.

(e) Argument. At the discretion of the judge, oral argument may be presented on the motion.

(f) Undisputed facts. If a motion for summary disposition is denied, in whole or in part, the judge may, if practicable, ascertain what facts are not in dispute or are incontrovertible by examining the evidence filed, interrogating counsel, or holding a conference. The judge may then specify what facts, if any, will be deemed established for all purposes.

(g) Proposal for decision. At the close of the hearing, the judge shall include in the proposal for decision a statement of reasons, findings of fact and conclusions of law in support of any summary disposition rendered.

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 March 6, 1996.

TRD-9603218 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

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

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Subchapter D. Discovery and Discovery Sanctions

• 30 TAC §§80.151, 80.153, 80.155

The new sections are proposed under the Texas Water Code, §§5.103, 5. 105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed new sections implement Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412.

§80.151. Discovery Generally. Discovery shall be conducted according to the Texas Rules of Civil Procedure, unless commission rules provide or the judge orders otherwise. The Rules of Civil Procedure shall be interpreted consistently with this chapter, the Texas Water Code, the Texas Health and Safety Code, and the APA. Drafts of prefiled testimony are not discoverable.

§80.153. Issuance of Subpoena or Commission to Take Deposition.

(a) Upon proper request by a party, the judge shall issue subpoenas and commissions to take depositions according to the APA. A request for issuance shall be filed with the chief clerk, and a copy shall be served on the judge and the parties.

(b) Before seeking issuance of either a subpoena or commission, the requestor shall attempt to secure voluntary appearance of the witness or production of materials. If this is not possible, the requestor shall indicate what circumstances prevent such voluntary appearance or production in the request.

(c) If the requestor and witness sign an Agreement to Waive Fee form, subpoenas and commissions may be issued without a witness fee deposit. Only a non-party witness or deponent is entitled to receive this fee.

(d) If the witness fee is not waived, the requestor shall make the witness fee deposit in the appropriate amount as indicated on the forms requesting issuance. This amount is based on an estimate of the mileage to be traveled to and from the hearing or deposition, if over 25 miles, and days expected to be spent in the hearing or deposition. This deposit should be made payable to the commission and should be filed with chief clerk and must be made before issuance of the subpoena or commission.

(e) Upon deposit of all necessary monies and completion of all forms, the subpoena or commission shall be issued to the requestor to effect service.

§80.155. Form of Subpoena. The heading of the subpoena shall be "The State Office of Administrative Hearings." It shall state the style of the hearing, that the hearing is pending before SOAH, the time and place at which the witness is required to appear, and the party at whose insistence the witness is summoned. It shall be signed by the judge, but need not be under the seal of SOAH and the date of issuance shall be noted thereon. It may be made returnable forthwith, or on any date for which hearing of the docketed matter may be set. It shall be addressed to any sheriff or constable of the State of Texas or other person authorized to serve subpoenas as provided in the Texas Rules of Civil Procedure, Rule 178.

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 Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Subchapter E. Freezing the Process

• 30 TAC §§80.201, 80.203, 80.205, 80.207, 80.209, 80.213, 80. 215

The new sections are proposed under the Texas Water Code, §§5.103, 5. 105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed new sections implement Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412.

§80.201. Applicability.

(a) The provisions of this subchapter apply to permit hearings as designated in the hearing notice, except as provided as follows, as well as to other hearings designated by the judge for good cause.

(1) Unless the parties agree, the provisions of this subchapter do not apply to permit hearings at which jurisdiction is established before July 22, 1994.

(2) Notwithstanding the designation made in the notice of hearing, an application may either be included in, or excluded from, the applicability of this subchapter or any portion of this subchapter by:

(A) agreement of the parties with the judge's approval; or

(B) by the judge for good cause. Good cause may include without limitation a finding that the lack of complexity of a proceeding in a hearing does not warrant the implementation of all or a portion of this subchapter.

(b) When evaluating whether the provisions of this subchapter should apply to a permit hearing, the judge shall consider at a minimum:

(1) the number and sophistication of the parties or potential parties;

(2) the expected length of the hearing; and

(3) the complexity of the issues. The judge shall allow the parties to present evidence and argument regarding this determination.

(c) If a judge orders a contested case hearing to be placed under the provisions of this subchapter after the notice of hearing, the judge shall allow reasonable time for all parties to comply with the requirements of this subchapter.

(d) The commission rules for contested case hearings apply to cases conducted under this subchapter, unless those rules conflict with this subchapter.

§80.203. Procedures for Executive Director and Public Interest Counsel.

(a) Executive director.

(1) After technical review of an application is complete, the executive director shall prepare a draft permit. The executive director shall develop an initial position recommending issuance, issuance with additional or different permit provisions, or denial of the permit. If the executive director recommends denial, he or she shall issue a document summarizing the basis for that position. The executive director shall forward the proposed permit and any additional documents to the chief clerk. This provision does not impair the executive director's ability to return applications.

(2) The executive director may change position based on evidence or other new information. The executive director shall timely notify all parties on the record or in writing if that position changes, and the other parties shall be given the opportunity to respond.

(b) Public interest counsel. The public interest counsel shall comply with all time frames and procedures for protestants under this chapter, unless the judge decides otherwise.

§80.205. First Preliminary Hearing. In addition to following §80.60 of this title (relating to Preliminary Hearings), the following things shall be done at the first preliminary hearing:

(1) the executive director shall:

(A) provide the draft permit;

(B) present the executive director's recommendation on the draft permit; and

(C) provide any additional documents related to the executive director's recommendation on the permit;

(2) the applicant shall:

(A) submit proposed findings of fact and conclusions of law;

(B) identify what constitutes the application; and

(C) provide a total of two copies of the permit application, for use by all of the protestants in the case. These copies shall include all notices of deficiency and the applicant's response to those notices;

(3) the executive director and the applicant shall provide witness lists with addresses, phone numbers, resumes, and expected area of testimony for each witness. These lists may be amended to address the protestants and public interest counsel's lists of issues.

§80.207. Discovery.

(a) Generally. Except when the judge orders otherwise, discovery in hearings held under this subchapter will be separated into three distinct periods. Within the time frame set for each period in this subsection, the judge shall have discretion to set the duration of each discovery period.

(b) First discovery period. The first discovery period shall last 30 to 80 days beginning immediately after jurisdiction is established. This period is reserved for the protestants' discovery from the applicant. The applicant may conduct limited discovery related to

the nature of each protestant (including, for example, the type and date of organization, purpose, and number of members) and whether the source of funding is by a competitor of the applicant.

(c) Protestants' first list of issues. Within 20 days after the end of the first discovery period, the protestants shall:

(1) identify issues based on the applicant's proposed findings of fact and conclusions of law;

(2) include a statement as to the reasonable basis of the protestant's dispute on each issue. It is not a reasonable basis that the applicant has the burden of proof or has not yet proven the assertions in the application;

(3) raise other issues not based on the applicant's findings of fact and conclusions of law;

(4) submit proposed findings of fact and conclusions of law; and

(5) submit witness lists, including addresses, phone numbers, resumes, and expected area of testimony for each witness.

(d) Second discovery period. The second discovery period shall last 30 to 80 days beginning immediately after the protestants' list of issues is submitted. The applicant may begin discovery immediately after the end of the first discovery period, before the protestant submits its list of issues, but this time shall not count in calculating the time for the second discovery period. Discovery during this period shall consist of:

(1) the protestants' discovery from the executive director;

(2) the applicant's discovery from the protestants and the executive director; and

(3) the executive director's discovery from the protestants and the applicant.

(e) Applicant's response. No later than the last day of the second discovery period the applicant may amend the application or proposed findings of fact and conclusions of law to respond to the issues raised by the other parties. Given the nature and degree of amendment, the judge may remand the application to the executive director for further technical review. The applicant may be subject to additional notice, discovery, and hearing requirements. After the time for filing a response under this subsection, the applicant may not file any amendment to its application except as allowed in subsection (h) of this section.

(f) Third discovery period. This period shall last 20 to 45 days immediately following the conclusion of the second discovery period. During this period, any discovery by the protestant or the applicant from the executive director shall be limited to the executive director's position regarding the applicant's response, and the executive director's position regarding the protestants' issues. Discovery from the applicant and the protestants shall be limited to the scope of the protestants' first list of issues and the applicant's response. The judge shall have discretion to limit or expand discovery in this period in the interest of fairness. The judge shall decide which time period listed in subsections (b) or (d) of this section applies to discovery for parties that do not fit into a listed category.

(g) Protestants' second list of issues. On or before the last day of the third discovery period, protestants may submit a second list of issues. The protestants' second list of issues shall be limited in scope to the applicant's response provided under subsection (e) of this section.

(h) Applicants' second response. The applicant may respond to issues raised in the protestants' second list of issues within seven days after the third discovery period. The judge may allow the applicant to respond with a minor amendment and proposed findings of fact and conclusions of law limited to protestants' second list of issues, within seven days after the third discovery period. At the prehearing conference, the judge will consider issues related to any minor amendment filed by the applicant for inclusion in the final issue list. After the time for filing a response under this subsection, the applicant may not file any amendment except by agreement of the parties.

(i) Discovery from executive director. Discovery may be sought of the executive director only according to the following provisions.

(1) After jurisdiction is taken, all parties shall have access to all unprivileged documents in the agency's files without submitting an open records request or a request for production. The agency shall ensure that privileged documents are removed from agency public files and that all assertions of privilege are made when jurisdiction is taken or in another timely manner.

(2) The executive director shall answer interrogatories and requests for production during the second and third discovery periods.

(3) The executive director shall be subject to depositions during the second and third discovery periods

(j) Interrogatories.

(1) In the first or second discovery period, each party shall be allowed to serve one set of interrogatories, as permitted in the Texas Rules of Civil Procedure. If the applicant uses interrogatories during the first discovery period, the interrogatories shall be considered part of the total number of interrogatories the applicant is allowed during the second discovery period.

(2) In the third discovery period, each party shall also be allowed a second set of 20 interrogatories.

§80.209. Freezing the Process.

(a) Prehearing filings. The applicant and protestants shall file findings of fact and conclusions of law, and all parties shall file stipulations to other parties' findings of fact and conclusions of law at least three working days before the prehearing conference. All parties may file motions to limit issues or other pretrial motions before the prehearing conference. Other parties may respond to these motions before or during the prehearing conference.

(b) Prefiled exhibits. Exhibits shall be offered and marked and the judge will rule on their admissibility insofar as possible. At hearing, all objections to exhibits, which could have been cured if raised in a timely manner, shall be deemed waived if they were not raised during the prehearing conference. Parties wishing to offer exhibits at any time subsequent to the prehearing conference shall notify all other parties as soon as practicable of their intention to seek leave to submit additional exhibits. The judge has the discretion to permit the offer of exhibits not submitted at the prehearing conference for good cause. Good cause includes the need for one party to prepare an exhibit in response to another party's exhibit first seen at the prehearing conference, the need to prepare an exhibit in response to the direct testimony of another party, and other cases which are justified by the party seeking to submit the exhibit.

(c) Prehearing conference and order. Between seven and 14 days after the end of the third discovery period, the judge shall hold a prehearing conference.

(1) The judge shall decide which issues remain and which findings of fact and conclusions of law have been stipulated. Proposed findings and conclusions shall be treated as follows.

(A) A proposed finding or conclusion stipulated by all parties shall be regarded as established.

(B) A proposed finding or conclusion that has not been stipulated and that the other parties have a reasonable basis for contesting, may be raised as an issue at the hearing. During the prehearing conference, the judge may inquire further into the reasonableness of the basis for contesting the issue. If the judge determines that the other parties have not shown a reasonable basis for contesting the finding or conclusion and the executive director did not raise the issue as a basis for permit denial, the judge shall deem the finding or conclusion stipulated.

(2) The judge shall set final time limits at or before the prehearing conference.

(3) The judge shall promptly incorporate all rulings in a written prehearing order.

(d) Prefiled testimony. The judge may specify time to submit prefiled testimony before final preparation under subsection (h) of this section.

(e) Failure to comply with schedules. Parties who do not identify issues, make amendments, propose findings of fact and conclusions of law, or submit responses according to the schedules established under this subchapter and with the judge's orders will be deemed to have waived the right to pursue them in an evidentiary hearing conducted under this subchapter.

(f) Final preparation. Final preparation for hearing shall extend no more than 14 calendar days from the date of the prehearing conference or from the time the last pre-filed testimony is submitted.

(g) Evidentiary hearing. The evidentiary hearing shall not be longer than 25 days unless, for good cause, the judge extends the time. The judge shall set reasonable time limits for each party to present its case.

(h) Modification of schedules. The scheduled periods set out in this section are the presumptive time limits, but the judge may modify them for good cause. Good cause may include without limitation a finding that the complexity or lack thereof of a proceeding warrants modification of one or more of the scheduled periods.

(i) Motion for rehearing. A party may not raise for the first time on motion for rehearing an issue of fact or law that it has not previously raised as a contested issue unless the issue is related to:

(1) a procedural irregularity; or

(2) changed circumstance, where the issue is material and a party demonstrates good cause for failure to raise it as an issue before the prehearing conference. Notwithstanding the foregoing, the commission may exercise its discretion to address an issue not raised by the other parties or remand an issue depending on the evidence in the record.

§80.213. Limiting the Number of Witnesses. At the request of a party or on the judge's own motion, the judge may reduce excessive numbers of witnesses as follows.

(1) The judge may direct a party to do one of the following:

(A) voluntarily reduce its listed witnesses to a specified number; or

(B) provide a summary of the expected testimony of each witness sufficiently specific to show the need for the testimony.

(2) The judge may use the witness lists and any summaries of testimony to strike witnesses whose testimony would be unduly repetitious or irrelevant, or to render discovery and the hearing process manageable.

§80.215. Additional Testimony. When it appears to be necessary to the administration of justice, the judge may permit additional evidence to be offered at any time.

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 March 6, 1996.

TRD-9603220 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

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

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Subchapter F. Post Hearing Procedures

- **30 TAC §§80.251, 80.253, 80.255, 80.257, 80.259, 80.261, 80. 263, 80.265, 80.267, 80.269, 80.271, 80.273, 80.275, 80.277, 80.279**

The new sections are proposed under the Texas Water Code, §§5.103, 5. 105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed new sections implement Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412.

§80.251. Judge's Proposal for Decision.

(a) Judge's Proposal for decision. After closing the hearing record, the judge will file a written proposal for decision with the chief clerk within 30 working days and will send a copy by certified mail to each party. If the judge is unable to file the proposal within the 30 days, the judge shall request an extension from the commission by filing a request with the chief clerk. Neither the judge's failure to request an extension, the commission's failure to grant the requested extension, nor the judge's failure to file the proposal within the 30 day or extended period shall in any way affect the validity of the judge's proposal for decision or the commission's jurisdiction, consideration, or action relative to the proposal for decision.

(b) Proposal for decision: adverse to a party. A proposal for decision shall be filed by the judge who conducted the hearing or by a substitute judge who has read the record. If the proposal for decision is adverse to a party to the proceeding, it shall contain a statement of the reasons for the proposal as well as findings of fact and conclusions of law which support the proposal. If any party has filed proposed findings of fact upon the judge's request, the judge shall include with his proposal for decision recommended rulings on all findings of fact so proposed. Where more than one judge has been assigned to hear a particular proceeding, the presiding judge will issue the proposal for decision and the other assigned judge or judges may file comments

(c) Proposal for decision: not adverse to any party. If the proposal for decision is not adverse to any party to the proceeding, the judge may informally dispose of the matter by proposing to the commission an order which need not contain findings of fact, conclusions of law, or reasons for the proposal. If the proposal for decision is not adverse to any party and a permit is to be issued, the judge need not propose an order to the commission.

§80.253. Enforcement Proposal for Decision.

(a) In an enforcement case, a proposal for decision shall also include a proposal for remedial relief (technical ordering provisions) where appropriate, and one of the following recommendations:

(1) that a violation has occurred and that a specific amount of penalties should be assessed;

(2) that a violation has occurred but that no penalty should be assessed; or

(3) that no violation has occurred.

(b) When recommending an administrative penalty, the judge shall analyze each factor prescribed by the applicable statute to be considered by the commission in determining the amount of the penalty. The judge shall recommend to the commission an appropriate penalty amount based upon the evidence adduced at the hearing and the factors articulated in the applicable statutes.

(c) Weight to be given by the judge to individual statutory factors for determining penalty amount need not be equal and may vary depending on the facts of the particular case. The absence of evidence as to any particular factor does not negate the ability of the judge to arrive at a finding of an appropriate penalty based upon the totality of the circumstances, though such lack of evidence may be a factor in determining the penalty amount.

§80.255. Waiver of Right to Review Judge's Proposal. Any party may waive the right to review and comment upon the judge's proposal for decision. The waiver shall be either in writing or stated on the record at the hearing.

§80.257. Pleadings Following Proposal for Decision.

(a) Pleadings. Unless right of review has been waived, any adversely affected party may, within 20 days after the date of issuance of the proposal for decision, file exceptions or briefs. Proposed findings of fact may be filed when permitted or requested by the commission. Any replies to exceptions, briefs, or proposed findings of fact shall be filed within 30 days after the date of issuance of the proposal for decision.

(b) Change of filing deadlines. The general counsel may change the deadlines to file pleadings following the proposal for decision. A party requesting a change must file a written request with the chief clerk, and must serve a copy on the general counsel, the judge, and the other parties. The request must explain that the party requesting the change has contacted the other parties, and whether the request is opposed by any party. The request must include proposed dates (preferably a range of dates) and must indicate whether the judge and the parties agree on the proposed dates.

§80.259. Amending the Proposal for Decision. The judge may file an amended proposal for decision in response to exceptions, replies, or briefs submitted by the parties. The parties are not entitled to file exceptions or briefs in response to the amended Proposal for Decision (PFD), but may raise any issues before the commission as permitted by the commission at the time of oral presentation.

§80.261. Scheduling Commission Meeting.

(a) The chief clerk, in coordination with the judge, shall schedule motions by parties requiring commission action and the presentation of the proposal for decision. The judge, when transmitting the proposal for decision, shall notify the parties of the date of the commission meeting and the deadlines for the filing of exceptions and replies. The general counsel, either by agreement of the parties and the judge, or on the general counsel's own motion, may reschedule the presentation of the proposal for decision. The chief clerk shall send notice of the rescheduled meeting date to the parties no later than ten days before the rescheduled meeting.

(b) Consistent with notices required by law, the commission may consolidate related matters if the consolidation will not injure any party and may save time and expense or otherwise benefit the public interest and welfare.

(c) The commission may sever issues in a proceeding or hold special hearings on separate issues if doing so will not injure any party and may save time and expense or benefit the public interest and welfare.

§80.263. Oral Presentation Before the Commission. In proceedings where a judge has held a public hearing and has issued a proposal for decision or other report to the commission, all oral presentations before the commission shall be limited to five minutes each, excluding time for answering questions, unless the chairman establishes other limitations. Before the commission meeting, the general counsel may allot time for oral presentations. Oral presentations and responses to questions shall be directed to the commission.

§80.265. Reopening the Record. The commission, on the motion of any party or on its own motion, may order the judge to reopen the record for further proceedings on specific issues in dispute. The commission's order shall include instructions as to the subject matter of further proceedings and the judge's duties in preparing supplemental materials or revised orders based upon those proceedings for the commission's final adoption.

§80.267. Decision.

(a) Final decision. The commission shall make its final decision upon the expiration of 30 days or later, following service of the judge's proposal for decision, unless the parties have waived review. The final decision, if adverse to any party, shall include findings of fact and conclusions of law separately stated. If any party has filed proposed findings of fact at the request of the judge, the commission will include in its final decision a ruling on the proposed findings of fact, unless waived by the party.

(b) Prompt final decision. The commission's final decision will be rendered within 60 days after the date the hearing is finally closed. In a case heard by a judge, a longer period of time may be necessary in order to present the matter to the commission for final decision. If additional time is likely to required, that fact shall be announced by the judge at the conclusion of the hearing.

§80.269. Commission's Decision after Contested Enforcement Case Hearing.

(a) In an enforcement case, a decision shall also include provisions requiring remedial relief (technical ordering provisions), as necessary, and one of the following findings:

(1) that a violation has occurred and that a specific amount of penalties should be assessed;

(2) that a violation has occurred but that no penalty should be assessed; or

(3) that no violation has occurred.

(b) When assessing an administrative penalty, the commission shall analyze each factor prescribed by the applicable statute to be considered by the commission in determining the amount of the penalty.

(c) Weight to be given by the commission to individual statutory factors for determining penalty amount need not be equal and may vary depending on the facts of the particular case. The absence of evidence as to any particular factor does not negate the ability of the commission to arrive at a finding of an appropriate penalty based upon the totality of the circumstances, though such

lack of evidence may be a factor in reducing or increasing the penalty amount.

§80.271. Motion for Rehearing.

(a) Filing motion. Except as provided by the APA, a motion for rehearing is a prerequisite to appeal. The motion shall be filed with the chief clerk within 20 days after the date the party or his attorney of record is notified of the final decision or order. A party or attorney of record is presumed to have been notified on the date that the final decision or order is mailed by first-class mail. On or before the date of filing of a motion for rehearing, a copy of the motion shall be mailed or delivered to all parties with certification of service furnished to the commission. The motion shall contain:

(1) the name and representative capacity of the person filing the motion;

(2) the style and official docket number assigned by SOAH, and official docket number assigned by the commission;

(3) the date of the final decision or order; and

(4) a concise statement of each allegation of error.

(b) Reply to motion for rehearing. A reply to a motion for rehearing must be filed with the chief clerk within 30 days after the date a party or his attorney of record is notified of the final decision or order. A party or attorney of record is presumed to have been notified on the date that the final decision or order is mailed by first-class mail.

(c) Ruling on motion for rehearing.

(1) Upon the request of the general counsel or a commissioner, the motion for rehearing will be scheduled for consideration during a commission meeting. Unless the commission rules on the motion for rehearing within 45 days after the date the party or his attorney of record is notified of the final decision or order, the motion is overruled by operation of law.

(2) A motion for rehearing may be granted in whole or in part. When a motion for rehearing is granted, the final decision or order is nullified. The commission may reopen the hearing to the extent it deems necessary. Thereafter, the commission shall render a final decision or order as required by this subchapter.

(d) Extension of time limits. With the agreement of the parties or on their own motion, the commission or the general counsel may extend the period of time for filing motions for rehearing and replies and for taking action on the motions so long as the period for taking agency action is not extended beyond 90 days after the final decision or order.

(e) Motion overruled. In the event of an extension, the motion for rehearing is overruled by operation of law on the date fixed by the order, or in the absence of a fixed date, 90 days after the date of the final decision or order.

§80.273. Decision Final and Appealable. In the absence of a timely motion for rehearing, a decision or order of the commission is final on the expiration of the period for filing a motion for rehearing. If a party files a motion for rehearing, a decision or order of the commission is final and appealable on the date of the order overruling the motion for rehearing or on the date the motion is overruled by operation of law.

§80.275. Appeal of Final Decision.

(a) Petition. A person affected by a final decision or order of the commission may file a petition for judicial review within 30 days after the decision or order is final and appealable. General procedures for appealing an order of the commission in contested cases are governed by the APA.

(b) The record. The record in a contested case shall include the following:

(1) all pleadings, motions, and intermediate rulings;

(2) evidence received or considered;

(3) a statement of matters officially noticed;

(4) questions and offers of proof, objections, and rulings on them;

(5) summaries of the results of any conferences held before or during the hearing;

(6) proposed findings, exceptions, and briefs;

(7) any decision, opinion, or report by the officer presiding at the hearing;

(8) prefiled testimony;

(9) all staff memoranda or data submitted to or considered by the judge or commissioners who are involved in the decision; and

(10) the final order and all interlocutory orders.

§80.277. Appeals of Enforcement Orders.

(a) Within the 30-day period immediately following the day on which the commission's order in a contested case is final, in accordance with the APA, the person charged with a penalty shall pay the penalty in full.

(b) The person assessed a penalty by the commission may suspend enforcement of the penalty while seeking judicial review by forwarding the amount of the penalty to the commission for placement in an escrow account or posting with the commission a supersedeas bond payable to the Texas Natural Resource Conservation Commission for the amount of the penalty, within the 30-day period immediately following the day on which the commission's order is final.

(c) In the event the person assessed fails to take any of the actions in subsections (a) and (b) of this section, the executive director may forward the matter to the attorney general for enforcement.

(d) In the event that the final appellate determination is against the person assessed a penalty, he or she shall pay the commission the full amount of the penalty, and the commission shall deposit the amount of the penalty in the state treasury to the credit of the general revenue fund.

(e) To the extent that the final appellate determination is in favor of the person assessed, he or she shall be absolved of liability for payment of that portion of the amount of the penalty as is required to comply with that determination, and the commission shall return that amount of the penalty assessed which is excessive according to that determination, or any amount of the supersedeas bond or escrow account filed with the commission for the purpose of suspending the enforcement of the penalty while seeking judicial review which is in excess of the final penalty determination with a certificate of its return.

(f) Any supersedeas bond or escrow account filed with the commission for the purpose of suspending the enforcement of the penalty while seeking judicial review of the final decision of the commission shall be drawn according to a form on file in the Office of the Chief Clerk. Upon request, the chief clerk shall certify the receipt of the amount of any penalty received by the commission for the purpose of suspending the enforcement of the penalty while seeking judicial review.

§80.279. Costs of Record on Appeal. A party who appeals a final decision in a contested case shall pay all costs of preparation of the original or a certified copy of the record of the agency proceeding that is required to be transmitted to the reviewing court. A charge imposed as provided by this section is considered to be a court cost and may be assessed by the court in accordance with the Texas Rules of Civil Procedure.

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 March 6, 1996.

TRD-9603221 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

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

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Chapter 86. Special Provisions for Contested Case Hearings

The Texas Natural Resource Conservation Commission (commission) proposes new §§86.1, 86.11-86.18, 86.31-86.36, 86.51-86.59, 86.91-86.101, and 86. 130-86.132, concerning the commission's procedural rules.

This proposal is the second phase (Phase II) of an ongoing project to reorganize, clarify, and consolidate the procedural rules of the commission. The first phase of the project (Phase I) was intended to implement recent legislation and was completed in the summer of 1995. Phase I made limited substantive changes to the commission's rules and began limited reorganization. Phase II is a more ambitious attempt to reorganize and consolidate the commission's procedural rules, and to eliminate conflicting procedural requirements based solely on media or type of hearing. By consolidating these rules, the commission seeks to cut back on the duplication of requirements and definitions that might create unwarranted non-statutory differences in the treatment of persons working with the commission. As part of this ongoing project, the commission is continuing to examine program and media specific rules for inconsistency with the general rules of the agency. It is anticipated that any further consolidation will be proposed as amendments to specific programs or chapters and not as a further major revision to these procedural rules.

Proposed numbering changes attempt to impose a more logical organization upon the most widely applicable rules of the commission by taking advantage of newly available chapters in Title 30. Chapters 1-99 will be reserved for the procedural rules and broadly applicable substantive rules of the commission. By locating generally applicable rules at the beginning of Title 30, commission rules should be organized in a more logical and user-friendly format. The proposed new format consists of the following reservation of chapters: Chapters 1-10-general rules of the commission; Chapters 11-19-miscellaneous provisions not specific to any media; Chapters 20-29-rulemaking; Chapters 30-49-application procedures; Chapters 50-69-processing of applications; Chapters 70-79-enforcement; and Chapters 80-89-hearings-contested/other. The current proposal conforms to this new format.

Media specific substantive rules, and limited procedural rules will continue to be found in Chapters 100-399 of Title 30.

Proposed new Chapters 1, 3, 5, 10, and 70 were published in the February 20, 1996, issue of the *Texas Register* (21 TexReg 1349). Proposed new Chapters 1 and 10 replace and make limited changes to existing Chapter 261. Chapter 1 sets forth the general rules of the agency. Chapter 10 governs the conduct of commission meetings.

Proposed new Chapter 3 is intended to consolidate the definitions broadly applicable across chapters. Definitions within specific chapters that conflict with definitions in Chapter 3 will continue to apply to the particular chapter within which they are found. Long-term plans call for consolidating these definitions as much as possible, but any further consolidation beyond this proposal will be undertaken as changes to specific chapters.

Proposed new Chapter 5 replaces existing Chapter 345 and sets forth the rules governing the composition of advisory groups to the commission, without substantive changes from the existing rules.

Proposed new Chapter 20 contains the rules governing agency rulemaking from Chapter 275 without substantive changes.

A planned new Chapter 39 contains requirements for notices of public hearings moved, duplicated, or cross-referenced from other chapters. The commission anticipates that this chapter will be proposed later this year.

Proposed Chapter 40 replaces Chapter 264, relating to Alternative Dispute Resolution (ADR) before the commission. No substantive changes to ADR procedures are proposed.

Proposed new Chapters 50 and 55 replace existing Chapter 263. Chapter 50 relates to actions taken on an application by the commission or the executive director. Chapter 50, Subchapter B relates to actions taken by the commission on uncontested applications. Chapter 50, Subchapter C relates to action by the executive director and is recodified primarily from Subchapter A of Chapter 263, but also duplicates a portion of Chapter 305, Subchapter E. The principal change to current practice proposed in Chapter 50 is the consolidation of the process for executive director approval of air, water, and waste applications into a single process governing all media. This single process eliminates the *Texas Register* notice requirement regarding possible action by the executive director. The proposed rules continue the distinction between media of the limitation upon the executive director's authority to act on protested applications.

Proposed new Chapter 55 relates to commission action upon hearing requests related to permit applications and is a recodification of Subchapter B of Chapter 263. The commission seeks to clarify the process in this new chapter. New §55.21(d) attempts to clearly set forth the timelines for filing hearing requests. Persons concerned with production area authorizations should note that the public notice requirement for an application has been increased from ten to 30 days in §55.21(d). Section 55.27 makes clear it is necessary to both seek party status and file a motion for rehearing of the denial of a hearing request prior to seeking judicial review, and that this motion should be filed after action by the commission on the permit or other application. Future rulemaking will be undertaken to further define the factors considered in evaluating hearing requests. At this time, there is insufficient experience with the current process, adopted in August of 1995, to fairly evaluate how well existing rules concerning the processing of hearing requests are meeting the needs of the regulated community, the public, and the commission.

Proposed new Chapter 70 contains the sections from Chapter 337 that were not related to hearing procedures.

Proposed Chapter 80 unifies the contested case hearing procedures contained in current Chapters 265 and 337. Where substantive and procedural issues differed significantly under the existing rules, the commission attempted to maintain these differences. Section 80.25 is modified to clarify that attorney's fees are not included in the payment of "costs" required for withdrawal of an application without prejudice, and makes it clear that payment of "costs" is one of three avenues for withdrawal without prejudice. Section 80.107 duplicates the sanctions list allowed in Senate Bill 12, and unifies the sanctions sections from the other rules proposed for repeal or amendment in this package. Section 80.137 modifies the summary judgment procedure from Chapter 337. Inclusion of this procedure in Chapter 80 will make summary disposition available in all contested cases. Discovery rules that duplicate the Texas Rules of Civil Procedure have been replaced with a reference to those rules. Voluntary discovery rules have been eliminated. Language is added to the discovery rules to make clear that drafts of prefiled testimony are not discoverable. The "freeze rules" in Chapter 265, Subchapter F have been clarified and streamlined, and duplicate procedures have been consolidated with the general procedures in Chapter 80. Language is added to §80.207 to require a reasonable basis for protestants' issues listed in the freeze process. This change was not intended to shift the burden of proof upon an application. Twenty days have been added to the end of the first discovery period in the freeze process to allow more time for the listing of issues.

Proposed new Chapter 86 contains special procedural rules of Chapter 275 (which is proposed for repeal) not moved to Chapter 20. No

substantive changes are proposed in this recodification.

Chapter 305, Subchapter E is proposed for repeal. Rules contained in that subchapter will be recodified in Chapters 50 and 55, and in the new Chapter 39, when proposed.

Chapter 339 is proposed to be repealed in its entirety.

Chapter 340 is amended to consolidate requirements for pump installers from Chapter 339 with those of water well drillers in Chapter 340. In addition, references to the former Water Well Drillers Board are changed to commission or Water Well Drillers Advisory Council (council) as appropriate. Enforcement rules are deleted and references made to the proposed new Chapters 70 and 80. Additional changes are proposed to reflect recent changes in the statutory authority of the council, and to delete sections that are duplicated in new Chapter 5.

Chapter 341, which was the former Water Well Drillers Board procedures for enforcement and hearings, is proposed to be repealed in its entirety and these council proceedings will be governed by new Chapters 70 and 80.

Persons seeking help in comparing this rule proposal and recodification to the existing rules, can obtain a redlined/strikeout version of this package and disposition/derivation tables from the commission. Please contact David Bolduc at (512) 239-1000 for a copy of this information.

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the sections are in effect there will be no significant fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Minick 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 improvement in the hearings process and for contested matters before the commission and enhanced consistency in the conduct of administrative proceedings for state agencies. 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.

The proposed rule revisions are intended to clarify, streamline, and recodify the procedural rules of the agency. The commission prepared a takings impact assessment of these rules and determined that the proposal will not create any burden on private real property rights.

A public hearing on the proposal will be held April 18, 1996, at 9:00 a.m. in Room 131E of TNRCC Building C, located at 12100 North IH-35, Park 35 Circle, Austin. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion within the audience will not occur during the hearing; however, a TNRCC staff member will be available to discuss the proposal 30 minutes prior to the hearing and answer questions before and after the hearing.

Written comments not presented at the hearing may be submitted to the TNRCC Office of Policy and Regulatory Development in Austin through April 18, 1996. Material received by the TNRCC Office of Policy and Regulatory Development by 4:00 p.m. on that date will be considered by the commission prior to any final action on the proposal. Please mail comments to Lisa Martin, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, and reference Rules Tracking Log Number 95123-263-AD. Please fax comments to (512) 239-4808. Copies of the revision are available from the Office of Policy and Regulatory Development, located at 12100 Park 35 Circle, Building F, Austin, and at all TNRCC regional offices. For further information, please contact Randall Terrell at (512) 239-0577.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

Subchapter A. General

• 30 TAC §86.1

The new section is proposed under the Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed new section implements Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412.

§86.1. Special Procedures to Prevail. This chapter supplements Chapters 39 and 80 of this title (relating to Public Notice and Contested Case Hearings) by providing special procedures to be followed for particular types of hearings. Whenever there is a conflict between this chapter and Chapters 39 and 80 of this title, this chapter prevails.

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 March 6, 1996.

TRD-9603222 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Subchapter B. Water Rights Adjudication

• 30 TAC §§86.11-86.18

The new sections are proposed under the Texas Water Code, §§5.103, 5. 105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed new sections implement Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412.

§86.11. General.

(a) Applicability. This subchapter applies to the duties, responsibilities, and activities of the commission under the Water Rights Adjudication Act of 1967, Texas Water Code, §§11.301, et seq.

(b) Motions. A motion may be filed with the commission as provided by §80.56 of this title (relating to Motions), with copies served only on those parties participating in the evidentiary hearing; except that, if there are other parties whose interests are likely to be substantially affected by the relief sought in the motion, copies shall be served on each such party or his representative.

(c) Mailing list. The commission shall maintain an official mailing list for each stream or segment being adjudicated, which shall include the following:

(1) the persons within the stream or segment being adjudicated who filed claims in accordance with Texas Water Code, §11.307;

(2) all other persons who filed claims under Texas Water Code, §11.303, or who have permits or certified filings within the segment being adjudicated;

(3) all other diverters of state water within the segment being adjudicated who can be reasonably ascertained from the records of the commission or from the executive director's investigation;

(4) all attorneys or other interested persons who request to be put on the mailing list, either in writing or on the record during one of the hearings in the adjudication; and

(5) all contesting parties.

(d) Definition. As used in this subchapter, the term "mailing list" means the commission's official mailing list for the stream or segment being adjudicated.

§86.12. Prehearing Procedures.

(a) Initiation of adjudication. The water rights in any stream or segment may be adjudicated as provided in Texas Water Code, §11.304:

(1) on motion of the commission;

(2) on petition to the commission signed by ten or more claimants of water rights from the source of supply; or

(3) on petition of the Texas Water Development Board.

(b) Investigation and preparation of investigation report. Promptly after an adjudication is initiated under Texas Water Code, §11.304, the commission shall investigate the facts and conditions necessary to determine whether the adjudication would be in the public interest.

(1) If the commission finds that an adjudication would be in the public interest, it shall enter an order to that effect, designating the stream or segment to be adjudicated and directing the executive director to investigate the area involved to gather relevant data and information essential to the proper understanding of the claimed water rights involved. The results of the investigation shall be reduced to a written report and made a matter of record in the commission's office. This report shall be available for public inspection during regular business hours of the commission at its offices in Austin.

(2) In connection with the investigation, the executive director shall have a map or plat made showing, with substantial accuracy, the course of the stream or segment, and the location of reservoirs and diversion works and places of use, including irrigated lands which are relevant to the alleged water rights involved.

(c) Notice of adjudication. The commission shall prepare a notice of adjudication describing the stream or segment to be adjudicated and the date by which all claims of water rights in the stream or segment must be filed with the commission under Texas Water Code, §11.307.

(1) The notice shall be published once a week for two consecutive weeks in one or more newspapers having general circulation in the counties in which the stream or segment is located.

(2) The notice shall be sent by first-class mail to all persons on the mailing list.

(3) The notice required under Texas Water Code, §11.308 may be incorporated with the notice required by this rule and Texas Water Code, §11.306.

(d) Filing of claims. Every person claiming a water right of any nature, except for domestic and livestock purposes, from the stream or segment under adjudication, shall file a sworn claim under Texas Water Code, §11.307 within the time prescribed in the notice of adjudication or any extension.

(1) Sworn claims should state:

(A) the name and mailing address of the claimant;

(B) the nature of the right claimed, including the number of any permit, certified filing or claim filed under Texas Water Code, §11.303;

(C) the maximum acre-feet of water claimed;

(D) the purpose of use claimed;

(E) the date of first diversion of state water for other than domestic or livestock purposes;

(F) the earliest priority date claimed;

(G) the source of water;

(H) a description of diversion works;

(I) the maximum total diversion rate claimed;

(J) a description of impounding facilities, including the location, whether it is on-channel or off-channel, and the impounding capacity, surface area, and average depth at normal maximum operating level;

(K) the maximum number of acres per year if an irrigation right is claimed; and

(L) all other information necessary to show the nature and extent of the claim.

(2) The commission shall prescribe forms for claims filed under this rule, but use of commission forms is not mandatory.

(3) The commission may extend the time for filing claims under this rule and Texas Water Code, §11.307 and may accept a claim filed beyond the deadline or any such extension.

(4) All water rights claimants, except users of water for domestic or livestock purposes, shall file a sworn statement of the claim of right with the commission. Failure to file a sworn statement under this provision in accordance with the commission's notice of adjudication bars the recognition of any right in the claimant.

(e) Notice of hearings. The commission shall set a time and place for hearing of all claims in the stream or segment being adjudicated.

(1) The commission shall give 30 day's notice of the commencement of the hearings by certified mail to all persons on the mailing list as described in paragraphs (2)-(4) of this subsection. This notice may be included in the notice of adjudication provided for in Texas Water Code, §11.306.

(2) The commission shall schedule individual evidentiary hearings for each diverter of state water within the segment being adjudicated who can be ascertained from the records of the commission or from the executive director's investigation. The commission shall give notice by first-class mail to all other persons on the mailing list.

(3) A final docket of hearings will be scheduled as necessary for individual claims that were continued during the regularly scheduled hearings. Notice of the date, time, and place of these hearings will be mailed by certified mail to each person appearing on the docket and by first-class mail to all other persons on the mailing list.

(4) The commission may continue hearings from time to time and place to place. At the time of continuation, the commission shall state on the record the date, time, and place of the subsequent hearing. If unknown at the time of continuation, the commission

shall give notice of the date, time, and place of the subsequent hearing to all parties on the mailing list.

§86.13. Jurisdiction Hearing.

(a) Purpose. Hearings in each adjudication segment will begin with a hearing to establish the commission's jurisdiction to adjudicate all claims of water rights in the stream or segment and to provide information concerning the adjudication.

(b) Procedure. Exhibits will be introduced to evidence jurisdiction. The qualifications of the project engineer or project manager, and any assistants, will be examined and ruling made on their abilities to testify in the upcoming individual evidentiary hearings as expert witnesses. The expert witnesses so qualified will remain under oath throughout all hearings in the adjudication of the stream or segment.

(c) Question and answer. The commission will entertain questions of general concern to all parties in the adjudication from any person attending the hearing.

§86.14. Procedure at Individual Evidentiary Hearings.

(a) Opening statements and exhibits. The commission will call up the individual claim and entertain any opening statement on behalf of any party. Exhibits may be tendered into evidence after the parties present are provided an opportunity to view them.

(b) Order of presentation. Unless otherwise directed by the commission, the hearing will proceed as follows:

(1) after the introduction of exhibits, the project engineer or project manager will orient the parties to facts concerning the claim derived from his investigation;

(2) the claimant will present evidence concerning the claim;

(3) the executive director may then present evidence;

(4) upon completion of presentation by the claimant and the executive director, any other party may offer relevant evidence; and

(5) closing arguments will be entertained.

§86.15. Preliminary Determination.

(a) Preparation of judge's recommendations. A judge presiding at the individual evidentiary hearings or one who has read the record shall prepare written recommendations, including proposed findings of fact and conclusions of law, in regard to each individual claim and shall submit his recommendations and the record of the hearing to the commission for its consideration.

(b) Preparation of preliminary determination. After reviewing any judge recommendations and the record of the hearings, the commission shall adopt a preliminary determination of all claims of water rights in the segment being adjudicated as required by Texas Water Code, §11.309.

(c) Distribution of preliminary determination. One copy of the preliminary determination shall be furnished and sent without charge by first-class mail to each person on the mailing list. Additional copies of the preliminary determination shall be made available for public inspection at convenient locations throughout the river basin as designated by the commission. Copies shall also be made available for other persons at a reasonable price based upon the cost of production.

(d) Public inspection of record. The record of the hearings shall be open to public inspection as required by the Public Information Act, Texas Government Code, Chapter 552 and Texas Water Code, §11.310.

(e) Notice of preliminary determination. The commission shall publish notice of the preliminary determination.

(1) Promptly after the preliminary determination is adopted, notice shall be published once a week for two consecutive weeks in one or more newspapers having general circulation in the river basin in which the segment that is the subject of the adjudication is located.

(2) The commission shall also send the notice by first-class mail to each claimant of water rights within the river basin in which the stream or segment is located, to the extent that the claimants can be reasonably ascertained from the records of the commission, and to other persons on the mailing list.

(3) Each notice shall state the following:

(A) the place where the preliminary determination and record of the hearings will be open for public inspection;

(B) the locations throughout the river basin where copies of the preliminary determination will be available for public inspection;

(C) the method of ordering copies of the preliminary determination and the charge for copies; and

(D) the date by which contests of the preliminary determination must be filed.

§86.16. Contests to Preliminary Determination.

(a) Filing deadline. The commission shall set a date for filing contests to the preliminary determination, which shall be not less than 90 days from the date of the notice of the preliminary determination.

(b) Filing of contest. Any water right claimant affected by the preliminary determination, including any claimant to water rights within the river basin, but outside the segment under adjudication, who disputes the preliminary determination may, within the time for filing contests prescribed by the commission in the notice, including any extensions of time, file a written contest with the commission.

(c) Copy of contest to claimant. If the contest directed against the preliminary determination of the water rights of other claimants, a copy shall be sent by the contestant to each of these claimants or his representative by certified mail, and proof of service shall be filed with the commission.

(d) Extension of time for filing contests. The commission may accept contests filed beyond the deadline but prior to the issuance of the notice of hearings on the contests.

(e) Contents of contests. Each contest shall do the following:

(1) state the name of the claimant, nature of the claim, and the page number in the preliminary determination to which the contest is directed;

(2) describe the specific parts of the preliminary determination to which objection is made, pointing out the specific findings of fact, conclusions of law, or other matters objected to, or specifying the findings of fact, conclusions of law, or other matters alleged to have been erroneously omitted from the preliminary determination; and

(3) describe the facts relied upon to support the grounds of the contest and be verified by an affidavit of the contestant or his representative.

(f) Amendments to contests. Amendments to contests may be authorized at any time, provided that the commission finds that the amendment will not result in undue surprise to any party and will not significantly change the grounds of the contest as described in the commission's notice of the contest hearings.

(g) Notice of hearing on contests. After the time for filing contests has expired, the commission shall prepare a notice setting forth the parts of the preliminary determination to which each contest is directed and the date, time, and place of the hearing on each contest. The notice shall be sent by certified mail to each contestant and by first-class mail to each claimant of water rights within the river basin within which the segment is located and to all other persons on the mailing list. The notice shall set a specific date, time, and place for each contestant to appear.

§86.17. Procedure at Contest Hearing.

(a) Jurisdiction. The commission shall consider evidence concerning jurisdiction.

(b) Individual cases and order of presentation. Unless otherwise directed by the commission, the hearing will proceed as follows:

(1) the contestant and all other parties may make opening statements;

(2) the project manager or project engineer will orient the commission and the parties to the claim involved in the contest;

(3) the contestant will present evidence in support of the contest;

(4) evidence may be presented by the executive director;

(5) any other party may present evidence relevant to the particular contestant's case.

(c) Legal argument. Oral arguments may be permitted by the commission upon request, but the commission will prescribe reasonable limits.

§86.18. Final Determination and Appeal.

(a) Proposed final determination. When a majority of the commission has not heard the contest or read the record, the judge who presided at the contest hearing or one who has read the record shall prepare a proposal for final determination and shall send it by first-class mail to all persons on the commission's mailing list. The proposed final determination shall contain a statement of the reasons therefor and a statement of each finding of fact and conclusion of law stated separately necessary to support the proposed final determination. Any party adversely affected may file exceptions and present briefs to the commission concerning the proposal for final determination within the time limit stated in the notice of the proposal for final determination. The parties may waive compliance with this rule by written stipulation filed with the commission.

(b) Final determination. The adjudication hearings shall be closed at the conclusion of the last contest hearing. The commission will make a final determination of the claims to water rights in the adjudication within 60 days after the closing of the adjudication hearings, provided that where the case was not heard by the commission, the judge may set a reasonable time for the issuance of a final determination and shall announce such extension at the closing of the adjudication hearings. The commission shall send a copy of the final determination, and any modification thereof, by first-class mail to each person of record on the mailing list as required by Texas Water Code, §11. 315.

(c) Notice of final determination. The commission shall send a notice of the final determination by first-class mail to each claimant of water rights within the river basin in which the segment is located, to the extent that the claimants can be reasonably ascertained from the records of the commission, and to each other person on the commission's mailing list.

(1) Each notice shall state the following:

(A) the place that the final determination and record of hearings will be open for public inspection;

(B) the method of ordering copies of the final determination and the cost of copies; and

(C) the date by which applications for rehearing must be filed, which shall be 15 days from the date of issuance of the final determination.

(2) The commission shall provide in the final determination and notice thereof the effective date of the determination in order to provide a sufficient period of time within which the determination and notice can be printed and mailed.

(d) Application and rehearing of final determination. An application for rehearing is the same as a motion for rehearing under the APA, and is a prerequisite to filing an exception to the final determination under Texas Water Code, §§11.318, et seq.

(1) If an application for rehearing is granted, the commission shall issue notice setting forth the substance of the application and setting the time and place of the hearing. Notice shall be sent in the same manner provided for in contest hearings.

(2) If the final determination is modified after a rehearing, the commission shall send a copy of the modified final determination by first-class mail to each person on the mailing list. However, if the modifications are such that they are likely to substantially affect the rights of other water right holders within the basin but outside the watershed or segment being adjudicated, then a summary of the modifications shall also be sent to all other water rights holders in the basin.

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 March 6, 1996.

TRD-9603223 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Subchapter C. Water Rate Hearings

• 30 TAC §§86.31-86.36

The new sections are proposed under the Texas Water Code, §§5.103, 5. 105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed new sections implement Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412.

§86.31. General. This subchapter applies to water rate hearings before the commission initiated under Chapter 291 of this title (relating to Water Rates) and applicable statutes.

§86.32. Setting of Hearing. Upon referral by the executive director of a petition for rate review, the commission will enter an order setting a time and place for a preliminary hearing.

§86.33. Additional Deposit. The commission may require the petitioner to make an additional deposit or to execute a bond satisfactory to the commission in an amount fixed by the commission conditioned on the payment of all costs of the proceeding.

§86.34. Notice of Preliminary Hearing. At least 20 days before the date set for the hearing, the commission shall transmit by certified mail a certified copy of the hearing order to the water supplier and water customer.

§86.35. Preliminary Hearing and Order. At the preliminary hearing, the commission will consider jurisdiction, designation of parties, interim rates, service during pendency of hearings, requests for discovery, and any other matter deemed appropriate by the commission. After the preliminary hearing, the commission shall enter an interlocutory order determining jurisdiction, interim rates, and other such matters considered by the commission. This order shall include a setting of a time and place for the hearing on the merits of the petition. The commission will send a certified copy of the order to all parties of record in the proceeding.

§86.36. Hearing and Order. After the hearing on the merits of the petition, the commission shall enter an order determining permanent rates and other such matters considered by the commission.

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 March 6, 1996.

TRD-9603224 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Subchapter D. Appeals of City Actions Relating to Water Pollution Control and Abatement Outside the Corporate Limits of the City

• 30 TAC §§86.51-86.59

The new sections are proposed under the Texas Water Code, §§5.103, 5. 105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed new sections implement Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412.

§86.51. General. This subchapter applies to appeals to the commission from actions of a city relating to water pollution control and abatement outside the corporate limits of such city, initiated under Texas Water Code, §26.177(c).

§86.52. Petition by an Affected Person. Any person affected by a city's ruling, order, decision, ordinance, program, resolution, or any other act, relating to water pollution control and abatement outside the corporate limits of such city and adopted under Texas Water Code, §26.177, or any other statutory authorization, may appeal the city's action by filing a petition for review with the commission.

§86.53. Issues on Appeal. The issues on appeal are whether the action or program of the city is invalid, arbitrary, unreasonable, inefficient, or ineffective in its attempt to control water quality.

§86.54. Prerequisites to Appeal. The following are prerequisites to appeal under Texas Water Code, §26.177(c).

(1) Filing of a petition. Any appeal to the commission under this subchapter requires the filing of a petition for review with the executive director within 60 days of the enactment of the ruling, order, decision, ordinance, program, resolution, or act of the city. The petition must be accompanied by a certificate of service.

(2) Service of pleadings. A copy of the petition for review and all other pleadings shall be mailed by first-class mail or delivered to the city whose action is being appealed.

(3) Filing fee. Each petition shall be accompanied by a filing fee of $100.

(4) Hearing. A time and place for hearing on the matter(s) in dispute shall be set and the commission shall issue notice of the time and place of hearing. The party seeking commission action is responsible for the cost of required notice.

§86.55. Contents of Petition for Review. The petition shall contain:

(1) the name of the party seeking commission action, with the original copy of the pleading signed by the petitioner or his authorized representative;

(2) the business phone number and address of the city whose action is being appealed and the city's authorized representative, if any;

(3) a clear and concise statement that the petition for review is an appeal of a specific action of the municipality in question, as well as a concise description and date of the action;

(4) a copy of the applicable ruling, order, decision, ordinance, program, resolution, or other act of the city, if any;

(5) a list of the known persons and areas which might be affected if the petition is granted;

(6) a concise statement of the facts relied upon by the pleader;

(7) a prayer stating the type of relief, action, or order desired by the pleader; and

(8) any other matter required by statute.

§86.56. Answer. Not later than the 20th day after the date on which the city receives a copy of the petition for review, the city may submit to the executive director an answer in defense of the action from which the appeal is taken.

§86.57. Review by Commission. The commission shall hear the appeal and may, in its final order, affirm, overturn, or modify the action of the city from which the appeal was taken. The commission, on its own motion, or at the request of any party to an appeal, may refer the appeal to SOAH for hearing prior to commission decision. If the commission issues an order without prior referral to SOAH, the record on any appeal from the commission's order under §86.59 of this title (relating to Appeal of Commission Order) shall include the pleadings of all parties, including attachments, and the argument and testimony before the commission, except where specifically indicated in the commission's order.

§86.58. Consolidation. The commission may consolidate any or all of the appeals, if any, which relate to the action in question of the city.

§86.59. Appeal of Commission Order. If an appeal is taken from a commission order, the commission order shall remain in effect for all purposes until final disposition is made by a court of competent jurisdiction.

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 March 6, 1996.

TRD-9603225 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Subchapter E. Appeals of Rules of the Edwards Underground Water District

• 30 TAC §§86.91-86.101

The new sections are proposed under the Texas Water Code, §§5.103, 5. 105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed new sections implement Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412.

§86.91. General. This subchapter applies to appeals to the commission of rules promulgated by the Edwards Underground Water District under Texas Civil Statutes, Article 8280-219, Water Auxiliary Laws (1988 Pamphlet), as amended by House Bill 1942, 70th Legislature, 1987. For the purposes of this subchapter, the term "rule" shall mean an established standard, guide, or regulation prescribing or directing action, forbearance, or responsibility.

§86.92. Petition by an Affected Person. Any person affected by a rule promulgated by the Edwards Underground Water District may appeal such rule by filing a petition for appeal with the commission.

§86.93. Issues on Appeal. A rule may be determined unreasonable or otherwise invalid by the commission if the rule:

(1) exceeds the authority conferred by applicable state law;

(2) irreconcilably conflicts with state or federal law;

(3) extends or modifies applicable state law;

(4) has no reasonable relationship to statutory purposes and authorizations;

(5) was promulgated upon unlawful procedures which prejudiced substantial rights of the appellant;

(6) requires the doing of an act so vague that persons of common intelligence must guess at its meaning and differ as to its application;

(7) causes an unreasonably disproportionate hardship or is discriminatory in a manner not in accordance with established priorities for water use and the alleged hardship or discrimination cannot be addressed under the rules of the Edwards Underground Water District providing for variances for the district's rules; or

(8) is otherwise unreasonable or violates such principles provided by the courts of this state relating to the invalidity of a rule.

§86.94. Burden of Proof. It is the burden of the petitioner to demonstrate that the rule is unreasonable or otherwise invalid.

§86.95. Rule Remains Effective Pending Appeal Unless Stayed or Reformed.

(a) During the pendency of an appeal of a rule to the commission, the rule shall remain in effect for all purposes until final disposition of the appeal by the commission, unless, after consideration of a proper request as provided in this section, enforcement of the rule is stayed by the commission, in whole or in part, or the rule is reformed by the commission pending appeal. A request for commission stay of the enforcement and/or reformation of a rule pending appeal must contain the grounds for such request and the relief sought and be filed with the chief clerk of the commission.

(b) A copy of the request must be served by the person filing the request by certified mail or personal delivery on the Edwards Underground Water District on or before the date the request is filed with the chief clerk. Commission determination on such request may not be made earlier than ten days from filing of the request with the chief clerk. Commission determination on the request shall be made on an expedited basis.

(c) Any person may file a written request with the chief clerk of the commission to be mailed notice by the chief clerk within five days of receipt of a petition by the commission of any appeal of a rule to the commission taken pursuant to §86.92 of this title (relating to Petition by an Affected Person), or to be so notified of any request made pursuant to §86.95 of this title (relating to Rule Remains Effective Pending Appeal Unless Stayed or Reformed) for a stay of the enforcement or for reformation of a rule pending commission action on the appeal. The chief clerk shall maintain a current list of persons requesting to be notified and shall furnish a copy of the list to any person requesting it. Failure to provide the notice does not invalidate any action by the commission. At the end of each state fiscal year, the chief clerk shall notify persons who have requested to be notified as provided in this section to confirm their desire to continue to be notified. The names of any persons who fail to so confirm within 30 days of such notification shall be removed from the list. The chief clerk shall, on an annual basis, assess fees for notices under this section in accordance with Texas Water Code, §5. 174.

§86.96. Prerequisites to Appeal. The following are prerequisites to appeal under this subchapter.

(1) Filing a petition. An appeal under this subchapter requires the filing of a petition for review with the chief clerk of the commission as provided under §86.97 of this title (relating to Contents of Petition for Appeal).

(2) Service of pleadings. A copy of the petition and all other pleadings shall be served by the petitioner by certified mail or personal delivery on the Edwards Underground Water District, the executive director of the commission, and the public interest counsel of the commission. A certificate of service shall be furnished to the chief clerk with the original pleading.

(3) Filing fee. Each petition shall be accompanied by a filing fee of $100, unless the petition is submitted by a state agency or other entity exempt from such fee requirements.

(4) Hearing. A time and place for hearing on the matter in dispute shall be set and due notice of the hearing shall be issued by the commission as required by law. The petitioner is responsible for the cost of required notice.

§86.97. Contents of Petition for Appeal. The following information shall be contained in the petition for appeal under this subchapter:

(1) the name of the petitioner, with the original copy of the pleading signed by the petitioner or his authorized representative;

(2) the telephone number and address of the petitioner and his authorized representative;

(3) a clear and concise statement of the legal grounds for such appeal including how the petitioner is an "affected" person as provided by §86.92 of this title (relating to Petition by an Affected Person);

(4) a certified copy of the applicable rule; and

(5) a prayer stating the type of relief, action, or order desired by the petitioners (e.g., repeal of the rule or specified modification to the rule);

(6) a certificate of service; and

(7) any other matter required by law.

§86.98. Answer. Not later than the 20th day after the date on which the Edwards Underground Water District receives a copy of the petition, the district may submit to the chief clerk of the commission an answer in defense of the rule from which the appeal is taken.

§86.99. Review by Commission. If the commission determines a rule is unreasonable or invalid, it shall, at its discretion, either declare that the rule is null and void and direct the board of directors of the district to adopt a substitute rule or reform the rule so that it is reasonable and valid. The commission on its own motion, or at the request of any party to an appeal, may refer the appeal to the office of hearings examiners for hearing prior to commission decision.

§86.100. Consolidation. The commission may consolidate any or all of the appeals, if any, which relate to the same rule being appealed.

§86.101. Finality of Commission Order. The commission's order shall be the final decision in the appeal required by Texas Water Code Auxiliary Laws, Article 8280-219, §3(c), as amended by House Bill 1942 (1987) .

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 March 6, 1996.

TRD-9603226 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Subchapter F. Variance Hearings

• 30 TAC §§86.130-86.132

The new sections are proposed under the Texas Water Code, §§5.103, 5. 105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.00€ and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed new sections implement Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412.

§86.130. Variance Hearings Pursuant to the Texas Clean Air Act. Upon the filing of a proper petition, a date for a hearing on the petition shall be set not be more than 90 days after the date the petition is filed. Notice of the hearing shall be given as required by the TCAA and the APA, Texas Government Code, Chapter 2001. A petition for the variance shall be considered to be in proper form if it identifies the person seeking the variance; identifies the particular rule or provisions of the TCAA from which a variance is sought; identifies the source of air contaminants which are the subject of the petition, including information on the nature and the amount of emissions from the source, if available, and the location of the source; and includes a short and plain statement of the grounds upon which the relief is sought. Forms to assist in the filing of a petition are available upon request, but are not mandatory.

§86.131. Time for Filing Petition for Variance. In the event a compliance hearing is called to examine the status of a particular source with regard to the TCAA or the rules and regulations of the commission, the source owner or operator must file with the commission a petition for variance prior to the commencement of said hearing in order to be entitled to have the commission consider the right to a variance with regard to the particular provisions of the TCAA or rules or regulations which are the subject of the hearing. Any order of the commission as a result of such hearing shall be deemed to have disposed of the issue of the right to a variance. Any petition for variance filed subsequent to the hearing shall be returned to the applicant without action by the staff or the commission, unless the petition demonstrates that circumstances have so changed as to make it just and equitable to reopen the matter.

§86.132. Effect of Institution of Civil Suit on Petition for Variance. If the commission or the executive director, as authorized by the commission, should request institution of a civil suit pursuant to the TCAA , for violation of the TCAA or any rule, regulation, variance, or order of the commission prior to the time that the commission takes action on a petition for variance submitted with regard to the violations to be alleged in the suit, the petition for variance shall be returned to the applicant without further action.

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 March 6, 1996.

TRD-9603227 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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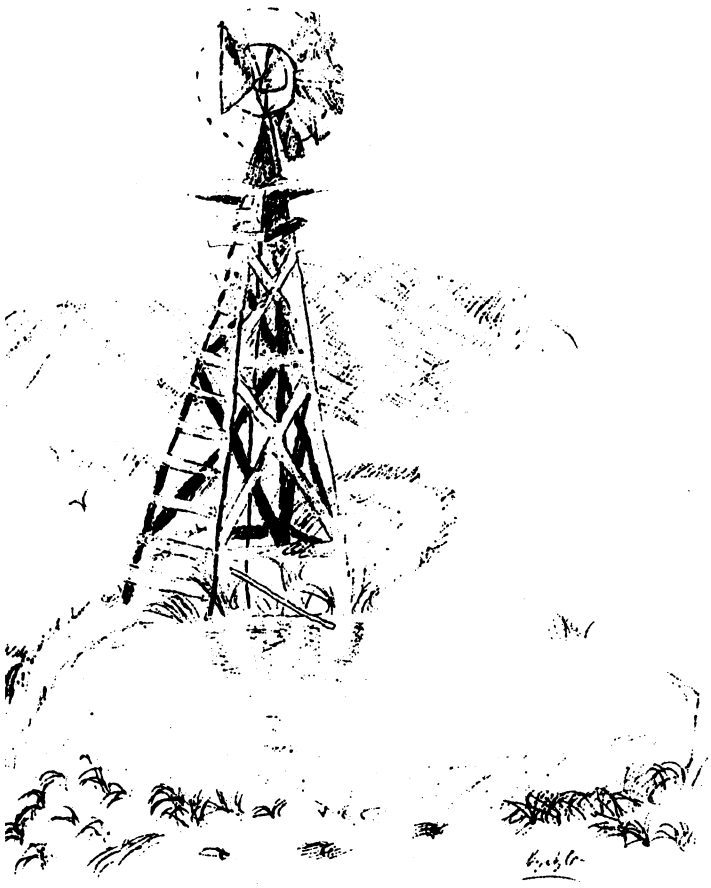

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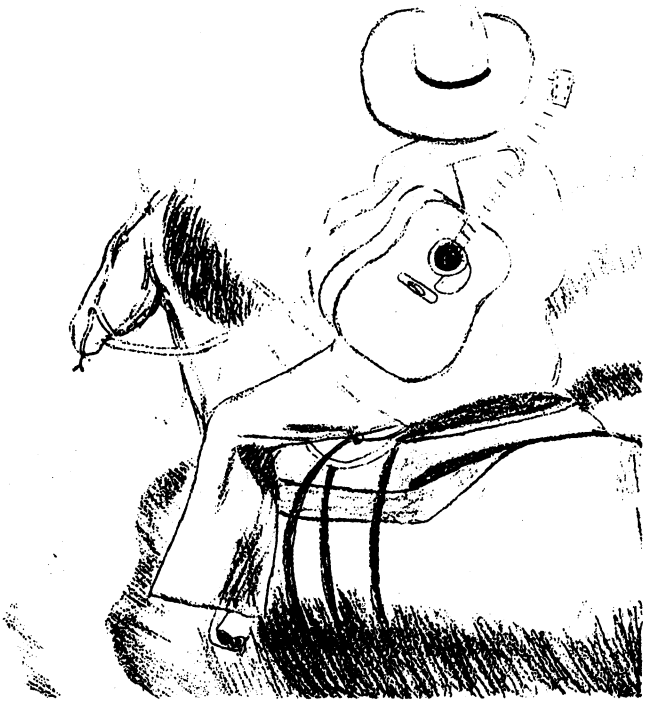
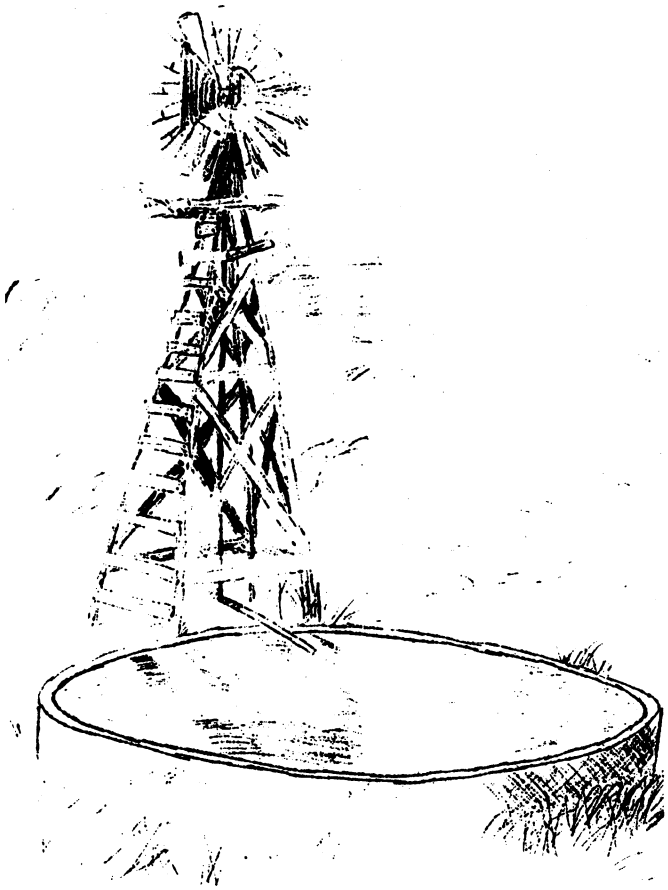
Grade: 12
School: Brady High School, Brady ISD





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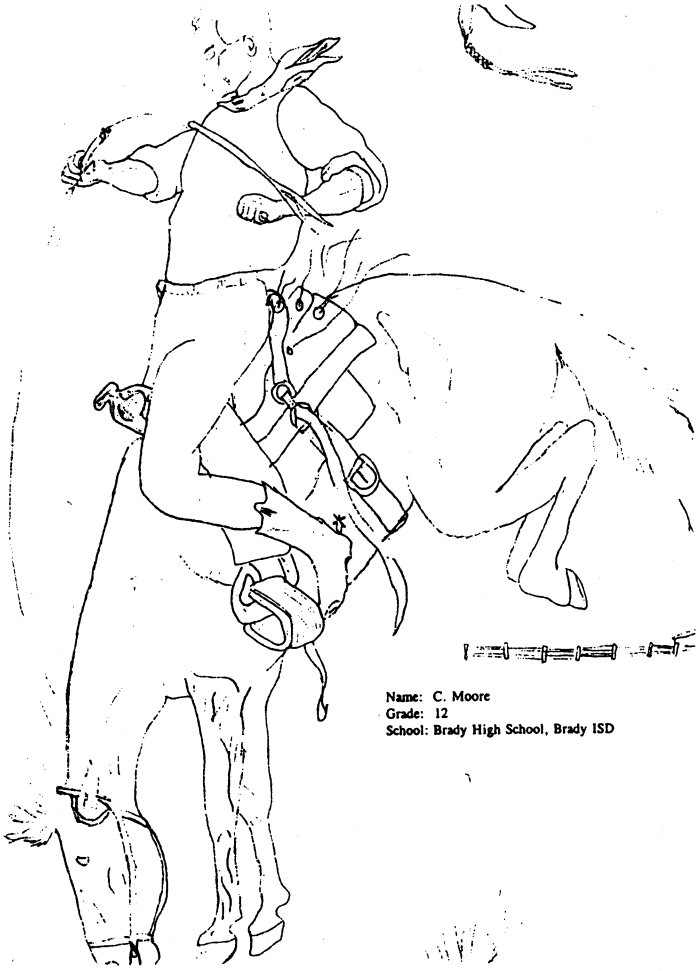
Grade: 10



Name: C. Moore
Grade: 12
School: Brady High School, Brady ISD

Chapter 263. Final Approval by Executive Director, Evaluation of Request for Contested Case Hearing

The Texas Natural Resource Conservation Commission (commission) proposes the repeal of §§263.1-263.12, 263.21-263.28, and 263.40, concerning the commission's procedural rules.

This proposal is the second phase (Phase II) of an ongoing project to reorganize, clarify, and consolidate the procedural rules of the commission. The first phase of the project (Phase I) was intended to implement recent legislation and was completed in the summer of 1995. Phase I made limited substantive changes to the commission's rules and began limited reorganization. Phase II is a more ambitious attempt to reorganize and consolidate the commission's procedural rules, and to eliminate conflicting procedural requirements based solely on media or type of hearing. By consolidating these rules, the commission seeks to cut back on the duplication of requirements and definitions that might create unwarranted non-statutory differences in the treatment of persons working with the commission. As part of this ongoing project, the commission is continuing to examine program and media specific rules for inconsistency with the general rules of the agency. It is anticipated that any further consolidation will be proposed as amendments to specific programs or chapters and not as a further major revision to these procedural rules.

Proposed numbering changes attempt to impose a more logical organization upon the most widely applicable rules of the commission by taking advantage of newly available chapters in Title 30. Chapters 1-99 will be reserved for the procedural rules and broadly applicable substantive rules of the commission. By locating generally applicable rules at the beginning of Title 30, commission rules should be organized in a more logical and user-friendly format. The proposed new format consists of the following reservation of chapters: Chapters 1-10-general rules of the commission; Chapters 11-19-miscellaneous provisions not specific to any media; Chapters 20-29-rulemaking; Chapters 30-49-application procedures; Chapters 50-69-processing of applications; Chapters 70-79-enforcement; and Chapters 80-89-hearings-contested/other. The current proposal conforms to this new format.

Media specific substantive rules, and limited procedural rules will continue to be found in Chapters 100-399 of Title 30.

Proposed new Chapters 1, 3, 5, 10, and 70 were published in the February 20, 1996, issue of the *Texas Register* (21 TexReg 1349). Proposed new Chapters 1 and 10 replace and make limited changes to existing Chapter 261. Chapter 1 sets forth the general rules of the agency. Chapter 10 governs the conduct of commission meetings.

Proposed new Chapter 3 is intended to consolidate the definitions broadly applicable across chapters. Definitions within specific chapters that conflict with definitions in Chapter 3 will continue to apply to the particular chapter within which they are found. Long-term plans call for consolidating these definitions as much as possible, but any further consolidation beyond this proposal will be undertaken as changes to specific chapters.

Proposed new Chapter 5 replaces existing Chapter 345 and sets forth the rules governing the composition of advisory groups to the commission, without substantive changes from the existing rules.

Proposed new Chapter 20 contains the rules governing agency rulemaking from Chapter 275 without substantive changes.

A planned new Chapter 39 contains requirements for notices of public hearings moved, duplicated, or cross-referenced from other chapters. The commission anticipates that this chapter will be proposed later this year.

Proposed Chapter 40 replaces Chapter 264, relating to Alternative Dispute Resolution (ADR) before the commission. No substantive changes to ADR procedures are proposed.

Proposed new Chapters 50 and 55 replace existing Chapter 263. Chapter 50 relates to actions taken on an application by the commission or the executive director. Chapter 50, Subchapter B relates to actions taken by the commission on uncontested applications. Chapter 50, Subchapter C relates to action by the executive director and is recodified primarily from Subchapter A of Chapter 263, but also duplicates a portion of Chapter 305, Subchapter E. The principal change to current practice proposed in Chapter 50 is the consolidation of the process for executive director approval of air, water, and waste applications into a single process governing all media. This single process eliminates the *Texas Register* notice requirement regarding possible action by the executive director. The proposed rules continue the distinction between media of the limitation upon the executive director's authority to act on protested applications.

Proposed new Chapter 55 relates to commission action upon hearing requests related to permit applications and is a recodification of Subchapter B of Chapter 263. The commission seeks to clarify the process in this new chapter. New §55.21(d) attempts to clearly set forth the timelines for filing hearing requests. Persons concerned with production area authorizations should note that the public notice requirement for an application has been increased from ten to 30 days in §55.21(d). Section 55.27 makes clear it is necessary to both seek party status and file a motion for rehearing of the denial of a hearing request prior to seeking judicial review, and that this motion should be filed after action by the commission on the permit or other application. Future rulemaking will be undertaken to further define the factors considered in evaluating hearing requests. At this time, there is insufficient experience with the current process, adopted in August of 1995, to fairly evaluate how well existing rules concerning the processing of hearing requests are meeting the needs of the regulated community, the public, and the commission.

Proposed new Chapter 70 contains the sections from Chapter 337 that were not related to hearing procedures.

Proposed Chapter 80 unifies the contested case hearing procedures contained in current Chapters 265 and 337. Where substantive and procedural issues differed significantly under the existing rules, the commission attempted to maintain these differences. Section 80.25 is modified to clarify that attorney's fees are not included in the payment of "costs" required for withdrawal of an application without prejudice, and makes it clear that payment of "costs" is one of three avenues for withdrawal without prejudice. Section 80.107 duplicates the sanctions list allowed in Senate Bill 12, and unifies the sanctions sections from the other rules proposed for repeal or amendment in this package. Section 80.137 modifies the summary judgment procedure from Chapter 337. Inclusion of this procedure in Chapter 80 will make summary disposition available in all contested cases. Discovery rules that duplicate the Texas Rules of Civil Procedure have been replaced with a reference to those rules. Voluntary discovery rules have been eliminated. Language is added to the discovery rules to make clear that drafts of prefiled testimony are not discoverable. The "freeze rules" in Chapter 265, Subchapter F have been clarified and streamlined, and duplicate procedures have been consolidated with the general procedures in Chapter 80. Language is added to §80.207 to require a reasonable basis for protestants' issues listed in the freeze process. This change was not intended to shift the burden of proof upon an application. Twenty days have been added to the end of the first discovery period in the freeze process to allow more time for the listing of issues.

Proposed new Chapter 86 contains special procedural rules of Chapter 275 (which is proposed for repeal) not moved to Chapter 20. No substantive changes are proposed in this recodification.

Chapter 305, Subchapter E is proposed for repeal. Rules contained in that subchapter will be recodified in Chapters 50 and 55, and in the new Chapter 39, when proposed.

Chapter 339 is proposed to be repealed in its entirety.

Chapter 340 is amended to consolidate requirements for pump installers from Chapter 339 with those of water well drillers in Chapter 340. In addition, references to the former Water Well Drillers Board are changed to commission or Water Well Drillers Advisory Council (council) as appropriate. Enforcement rules are deleted and references

made to the proposed new Chapters 70 and 80. Additional changes are proposed to reflect recent changes in the statutory authority of the council, and to delete sections that are duplicated in new Chapter 5.

Chapter 341, which was the former Water Well Drillers Board procedures for enforcement and hearings, is proposed to be repealed in its entirety and these council proceedings will be governed by new Chapters 70 and 80.

Persons seeking help in comparing this rule proposal and recodification to the existing rules, can obtain a redlined/strikeout version of this package and disposition/derivation tables from the commission. Please contact David Bolduc at (512) 239-1000 for a copy of this information.

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the repeals are in effect there will be no significant fiscal implications for state or local government as a result of enforcing or administering the repeals.

Mr. Minick 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 improvement in the hearings process and for contested matters before the commission and enhanced consistency in the conduct of administrative proceedings for state agencies. 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.

The proposed rule revisions are intended to clarify, streamline, and recodify the procedural rules of the agency. The commission prepared a takings impact assessment of these rules and determined that the proposal will not create any burden on private real property rights.

A public hearing on the proposal will be held April 18, 1996, at 9:00 a.m. in Room 131E of TNRCC Building C, located at 12100 North IH-35, Park 35 Circle, Austin. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion within the audience will not occur during the hearing; however, a TNRCC staff member will be available to discuss the proposal 30 minutes prior to the hearing and answer questions before and after the hearing.

Written comments not presented at the hearing may be submitted to the TNRCC Office of Policy and Regulatory Development in Austin through April 18, 1996. Material received by the TNRCC Office of Policy and Regulatory Development by 4:00 p.m. on that date will be considered by the commission prior to any final action on the proposal. Please mail comments to Lisa Martin, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, and reference Rules Tracking Log Number 95123-263-AD. Please fax comments to (512) 239-4808. Copies of the revision are available from the Office of Policy and Regulatory Development, located at 12100 Park 35 Circle, Building F, Austin, and at all TNRCC regional offices. For further information, please contact Randall Terrell at (512) 239-0577.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

Subchapter A. Final Approval by Executive Director

• 30 TAC §§263.1-263.12

(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 Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§263.1. Applicability and Definitions.

§263.2. Executive Director Shall Review Application.

§263.3. Notice that Executive Director Will Issue Final Approval.

§263.4. Executive Director's Final Approval.

§263.5. Remand for Consideration by Executive Director.

§263.6. Motion for Reconsideration.

§263.7. Eligibility of Executive Director.

§263.8. Air Quality Permits.

§263.9. Air Quality Permits-Executive Director Shall Review Application.

§263.10. Air Quality Permits-Executive Director's Final Approval.

§263.11. Air Quality Permits-Remand for Consideration by Executive Director.

§263.12. Air Quality Permits-Motion for Reconsideration.

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 March 6, 1996.

TRD-9603228 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Subchapter B. Evaluation of Request for Contested Case Hearing, Referral of Application to State Office of Administrative Hearings

• 30 TAC §§263.21-263.28

(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 Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§263.21. Contested Case Hearing Required.

§263.22. Request for Hearing by Affected Person.

§263.23. Processing of Request for Hearing.

§263.24. Substantive Requirements.

§263.25. Determination of Affected Person.

§263.26. Determination of Reasonableness of Request for Hearing.

§263.27. Request for Contested Case Hearing by Group or Association.

§263.28. Request for SOAH to Acquire Jurisdiction Over Case.

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 March 6, 1996.

TRD-9603229 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Subchapter C. Expiration

• 30 TAC §263.40

(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 Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under the Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeal implements Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§263.40. Expiration.

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 March 6, 1996.

TRD-9603230 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Chapter 264. Alternative Dispute Resolution

• 30 TAC §§264.1-264.10, 264.20

(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 Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Natural Resource Conservation Commission (commission) proposes the repeal of §§264.1-264.10 and 264.20, concerning the commission's procedural rules.

This proposal is the second phase (Phase II) of an ongoing project to reorganize, clarify, and consolidate the procedural rules of the commission. The first phase of the project (Phase I) was intended to implement recent legislation and was completed in the summer of 1995. Phase I made limited substantive changes to the commission's rules and began limited reorganization. Phase II is a more ambitious attempt to reorganize and consolidate the commission's procedural rules, and to eliminate conflicting procedural requirements based solely on media or type of hearing. By consolidating these rules, the commission seeks to cut back on the duplication of requirements and definitions that might create unwarranted non-statutory differences in the treatment of persons working with the commission. As part of this ongoing project, the commission is continuing to examine program and media specific rules for inconsistency with the general rules of the agency. It is anticipated that any further consolidation will be proposed as amendments to specific programs or chapters and not as a further major revision to these procedural rules.

Proposed numbering changes attempt to impose a more logical organization upon the most widely applicable rules of the commission by taking advantage of newly available chapters in Title 30. Chapters 1-99 will be reserved for the procedural rules and broadly applicable substantive rules of the commission. By locating generally applicable rules at the beginning of Title 30, commission rules should be organized in a more logical and user-friendly format. The proposed new format consists of the following reservation of chapters: Chapters 1-10-general rules of the commission; Chapters 11-19-miscellaneous provisions not specific to any media; Chapters 20-29-rulemaking; Chapters 30-49-application procedures; Chapters 50-69-processing of applications; Chapters 70-79-enforcement; and Chapters 80-89-hearings-contested/other. The current proposal conforms to this new format.

Media specific substantive rules, and limited procedural rules will continue to be found in Chapters 100-399 of Title 30.

Proposed new Chapters 1, 3, 5, 10, and 70 were published in the February 20, 1996, issue of the *Texas Register* (21 TexReg 1349). Proposed new Chapters 1 and 10 replace and make limited changes to existing Chapter 261. Chapter 1 sets forth the general rules of the agency. Chapter 10 governs the conduct of commission meetings.

Proposed new Chapter 3 is intended to consolidate the definitions broadly applicable across chapters. Definitions within specific chapters that conflict with definitions in Chapter 3 will continue to apply to the particular chapter within which they are found. Long-term plans call for consolidating these definitions as much as possible, but any further consolidation beyond this proposal will be undertaken as changes to specific chapters.

Proposed new Chapter 5 replaces existing Chapter 345 and sets forth the rules governing the composition of advisory groups to the commission, without substantive changes from the existing rules.

Proposed new Chapter 20 contains the rules governing agency rulemaking from Chapter 275 without substantive changes.

A planned new Chapter 39 contains requirements for notices of public hearings moved, duplicated, or cross-referenced from other chapters. The commission anticipates that this chapter will be proposed later this year.

Proposed Chapter 40 replaces Chapter 264, relating to Alternative Dispute Resolution (ADR) before the commission. No substantive changes to ADR procedures are proposed.

Proposed new Chapters 50 and 55 replace existing Chapter 263. Chapter 50 relates to actions taken on an application by the commission or the executive director. Chapter 50, Subchapter B relates to actions taken by the commission on uncontested applications. Chapter 50, Subchapter C relates to action by the executive director and is recodified primarily from Subchapter A of Chapter 263, but also duplicates a portion of Chapter 305, Subchapter E. The principal change to current practice proposed in Chapter 50 is the consolidation of the

process for executive director approval of air, water, and waste applications into a single process governing all media. This single process eliminates the *Texas Register* notice requirement regarding possible action by the executive director. The proposed rules continue the distinction between media of the limitation upon the executive director's authority to act on protested applications.

Proposed new Chapter 55 relates to commission action upon hearing requests related to permit applications and is a recodification of Subchapter B of Chapter 263. The commission seeks to clarify the process in this new chapter. New §55.21(d) attempts to clearly set forth the timelines for filing hearing requests. Persons concerned with production area authorizations should note that the public notice requirement for an application has been increased from ten to 30 days in §55.21(d). Section 55.27 makes clear it is necessary to both seek party status and file a motion for rehearing of the denial of a hearing request prior to seeking judicial review, and that this motion should be filed after action by the commission on the permit or other application. Future rulemaking will be undertaken to further define the factors considered in evaluating hearing requests. At this time, there is insufficient experience with the current process, adopted in August of 1995, to fairly evaluate how well existing rules concerning the processing of hearing requests are meeting the needs of the regulated community, the public, and the commission.

Proposed new Chapter 70 contains the sections from Chapter 337 that were not related to hearing procedures.

Proposed Chapter 80 unifies the contested case hearing procedures contained in current Chapters 265 and 337. Where substantive and procedural issues differed significantly under the existing rules, the commission attempted to maintain these differences. Section 80.25 is modified to clarify that attorney's fees are not included in the payment of "costs" required for withdrawal of an application without prejudice, and makes it clear that payment of "costs" is one of three avenues for withdrawal without prejudice. Section 80.107 duplicates the sanctions list allowed in Senate Bill 12, and unifies the sanctions sections from the other rules proposed for repeal or amendment in this package. Section 80.137 modifies the summary judgment procedure from Chapter 337. Inclusion of this procedure in Chapter 80 will make summary disposition available in all contested cases. Discovery rules that duplicate the Texas Rules of Civil Procedure have been replaced with a reference to those rules. Voluntary discovery rules have been eliminated. Language is added to the discovery rules to make clear that drafts of prefiled testimony are not discoverable. The "freeze rules" in Chapter 265, Subchapter F have been clarified and streamlined, and duplicate procedures have been consolidated with the general procedures in Chapter 80. Language is added to §80.207 to require a reasonable basis for protestants' issues listed in the freeze process. This change was not intended to shift the burden of proof upon an application. Twenty days have been added to the end of the first discovery period in the freeze process to allow more time for the listing of issues.

Proposed new Chapter 86 contains special procedural rules of Chapter 275 (which is proposed for repeal) not moved to Chapter 20. No substantive changes are proposed in this recodification.

Chapter 305, Subchapter E is proposed for repeal. Rules contained in that subchapter will be recodified in Chapters 50 and 55, and in the new Chapter 39, when proposed.

Chapter 339 is proposed to be repealed in its entirety.

Chapter 340 is amended to consolidate requirements for pump installers from Chapter 339 with those of water well drillers in Chapter 340. In addition, references to the former Water Well Drillers Board are changed to commission or Water Well Drillers Advisory Council (council) as appropriate. Enforcement rules are deleted and references made to the proposed new Chapters 70 and 80. Additional changes are proposed to reflect recent changes in the statutory authority of the council, and to delete sections that are duplicated in new Chapter 5.

Chapter 341, which was the former Water Well Drillers Board procedures for enforcement and hearings, is proposed to be repealed in its entirety and these council proceedings will be governed by new Chapters 70 and 80.

Persons seeking help in comparing this rule proposal and recodification to the existing rules, can obtain a redlined/strikeout version of this package and disposition/derivation tables from the commission. Please contact David Bolduc at (512) 239-1000 for a copy of this information.

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the repeals are in effect there will be no significant fiscal implications for state or local government as a result of enforcing or administering the repeals.

Mr. Minick 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 improvement in the hearings process and for contested matters before the commission and enhanced consistency in the conduct of administrative proceedings for state agencies. 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.

The proposed rule revisions are intended to clarify, streamline, and recodify the procedural rules of the agency. The commission prepared a takings impact assessment of these rules and determined that the proposal will not create any burden on private real property rights.

A public hearing on the proposal will be held April 18, 1996, at 9:00 a.m. in Room 131E of TNRCC Building C, located at 12100 North IH-35, Park 35 Circle, Austin. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion within the audience will not occur during the hearing; however, a TNRCC staff member will be available to discuss the proposal 30 minutes prior to the hearing and answer questions before and after the hearing.

Written comments not presented at the hearing may be submitted to the TNRCC Office of Policy and Regulatory Development in Austin through April 18, 1996. Material received by the TNRCC Office of Policy and Regulatory Development by 4:00 p.m. on that date will be considered by the commission prior to any final action on the proposal. Please mail comments to Lisa Martin, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, and reference Rules Tracking Log Number 95123-263-AD. Please fax comments to (512) 239-4808. Copies of the revision are available from the Office of Policy and Regulatory Development, located at 12100 Park 35 Circle, Building F, Austin, and at all TNRCC regional offices. For further information, please contact Randall Terrell at (512) 239-0577.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

The repeals are proposed under the Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§264.1. Policy.

§264.2. Definitions.

§264.3. Informal Disposition of Protested/Contested Matters.

§264.4. Referral of Contested Matter for Alternative Dispute Resolution Procedures.

§264.5. Appointment of Mediator.

§264.6. Mediator Pool: Qualifications.

§264.7. Time Period.

§264.8. Stipulations.

§264.9. Agreements to Be in Writing.

§264.10. Confidentiality of Communications in Alternative Dispute Resolution Procedures.

§264.20. Expiration.

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 March 6, 1996.

TRD-9603231 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Chapter 265. Procedures Before Public Hearings

The Texas Natural Resource Conservation Commission (commission) proposes the repeal of §§265.1, 265.2, 265.21-265.30, 265.41-265.45, 265.47, 265.48, 265.60-265.73, 265.81-265.88, 265.101-265.104, 265.106-265.113, 265.121-265. 134, 265.141-265.145, 265.151-265.166, and 265.170, concerning the commission's procedural rules.

This proposal is the second phase (Phase II) of an ongoing project to reorganize, clarify, and consolidate the procedural rules of the commission. The first phase of the project (Phase I) was intended to implement recent legislation and was completed in the summer of 1995. Phase I made limited substantive changes to the commission's rules and began limited reorganization. Phase II is a more ambitious attempt to reorganize and consolidate the commission's procedural rules, and to eliminate conflicting procedural requirements based solely on media or type of hearing. By consolidating these rules, the commission seeks to cut back on the duplication of requirements and definitions that might create unwarranted non-statutory differences in the treatment of persons working with the commission. As part of this ongoing project, the commission is continuing to examine program and media specific rules for inconsistency with the general rules of the agency. It is anticipated that any further consolidation will be proposed as amendments to specific programs or chapters and not as a further major revision to these procedural rules.

Proposed numbering changes attempt to impose a more logical organization upon the most widely applicable rules of the commission by taking advantage of newly available chapters in Title 30. Chapters 1-99 will be reserved for the procedural rules and broadly applicable substantive rules of the commission. By locating generally applicable rules at the beginning of Title 30, commission rules should be organized in a more logical and user-friendly format. The proposed new format consists of the following reservation of chapters: Chapters 1-10-general rules of the commission; Chapters 11-19-miscellaneous provisions not specific to any media; Chapters 20-29-rulemaking; Chapters 30-49-application procedures; Chapters 50-69-processing of applications; Chapters 70-79-enforcement; and Chapters 80-89-hearings-contested/other. The current proposal conforms to this new format.

Media specific substantive rules, and limited procedural rules will continue to be found in Chapters 100-399 of Title 30.

Proposed new Chapters 1, 3, 5, 10, and 70 were published in the February 20, 1996, issue of the *Texas Register* (21 TexReg 1349). Proposed new Chapters 1 and 10 replace and make limited changes to existing Chapter 261. Chapter 1 sets forth the general rules of the agency. Chapter 10 governs the conduct of commission meetings.

Proposed new Chapter 3 is intended to consolidate the definitions broadly applicable across chapters. Definitions within specific chapters that conflict with definitions in Chapter 3 will continue to apply to the particular chapter within which they are found. Long-term plans call for consolidating these definitions as much as possible, but any further consolidation beyond this proposal will be undertaken as changes to specific chapters.

Proposed new Chapter 5 replaces existing Chapter 345 and sets forth the rules governing the composition of advisory groups to the commission, without substantive changes from the existing rules.

Proposed new Chapter 20 contains the rules governing agency rulemaking from Chapter 275 without substantive changes.

A planned new Chapter 39 contains requirements for notices of public hearings moved, duplicated, or cross-referenced from other chapters. The commission anticipates that this chapter will be proposed later this year.

Proposed Chapter 40 replaces Chapter 264, relating to Alternative Dispute Resolution (ADR) before the commission. No substantive changes to ADR procedures are proposed.

Proposed new Chapters 50 and 55 replace existing Chapter 263. Chapter 50 relates to actions taken on an application by the commission or the executive director. Chapter 50, Subchapter B relates to actions taken by the commission on uncontested applications. Chapter 50, Subchapter C relates to action by the executive director and is recodified primarily from Subchapter A of Chapter 263, but also duplicates a portion of Chapter 305, Subchapter E. The principal change to current practice proposed in Chapter 50 is the consolidation of the process for executive director approval of air, water, and waste applications into a single process governing all media. This single process eliminates the *Texas Register* notice requirement regarding possible action by the executive director. The proposed rules continue the distinction between media of the limitation upon the executive director's authority to act on protested applications.

Proposed new Chapter 55 relates to commission action upon hearing requests related to permit applications and is a recodification of Subchapter B of Chapter 263. The commission seeks to clarify the process in this new chapter. New §55.21(d) attempts to clearly set forth the timelines for filing hearing requests. Persons concerned with production area authorizations should note that the public notice requirement for an application has been increased from ten to 30 days in §55.21(d). Section 55.27 makes clear it is necessary to both seek party status and file a motion for rehearing of the denial of a hearing request prior to seeking judicial review, and that this motion should be filed after action by the commission on the permit or other application. Future rulemaking will be undertaken to further define the factors considered in evaluating hearing requests. At this time, there is insufficient experience with the current process, adopted in August of 1995, to fairly evaluate how well existing rules concerning the processing of hearing requests are meeting the needs of the regulated community, the public, and the commission.

Proposed new Chapter 70 contains the sections from Chapter 337 that were not related to hearing procedures.

Proposed Chapter 80 unifies the contested case hearing procedures contained in current Chapters 265 and 337. Where substantive and procedural issues differed significantly under the existing rules, the commission attempted to maintain these differences. Section 80.25 is modified to clarify that attorney's fees are not included in the payment of "costs" required for withdrawal of an application without prejudice, and makes it clear that payment of "costs" is one of three avenues for withdrawal without prejudice. Section 80.107 duplicates the sanctions list allowed in Senate Bill 12, and unifies the sanctions sections from the other rules proposed for repeal or amendment in this package. Section 80.137 modifies the summary judgment procedure from Chapter 337. Inclusion of this procedure in Chapter 80 will make summary disposition available in all contested cases. Discovery rules that duplicate the Texas Rules of Civil Procedure have been replaced with a reference to those rules. Voluntary discovery rules have been eliminated. Language is added to the discovery rules to make clear that drafts of prefiled testimony are not discoverable. The "freeze rules" in Chapter 265, Subchapter F have been clarified and streamlined, and duplicate procedures have been consolidated with the general procedures in Chapter 80. Language is added to §80.207 to require a

reasonable basis for protestants' issues listed in the freeze process. This change was not intended to shift the burden of proof upon an application. Twenty days have been added to the end of the first discovery period in the freeze process to allow more time for the listing of issues.

Proposed new Chapter 86 contains special procedural rules of Chapter 275 (which is proposed for repeal) not moved to Chapter 20. No substantive changes are proposed in this recodification.

Chapter 305, Subchapter E is proposed for repeal. Rules contained in that subchapter will be recodified in Chapters 50 and 55, and in the new Chapter 39, when proposed.

Chapter 339 is proposed to be repealed in its entirety.

Chapter 340 is amended to consolidate requirements for pump installers from Chapter 339 with those of water well drillers in Chapter 340. In addition, references to the former Water Well Drillers Board are changed to commission or Water Well Drillers Advisory Council (council) as appropriate. Enforcement rules are deleted and references made to the proposed new Chapters 70 and 80. Additional changes are proposed to reflect recent changes in the statutory authority of the council, and to delete sections that are duplicated in new Chapter 5.

Chapter 341, which was the former Water Well Drillers Board procedures for enforcement and hearings, is proposed to be repealed in its entirety and these council proceedings will be governed by new Chapters 70 and 80.

Persons seeking help in comparing this rule proposal and recodification to the existing rules, can obtain a redlined/strikeout version of this package and disposition/derivation tables from the commission. Please contact David Bolduc at (512) 239-1000 for a copy of this information.

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the repeals are in effect there will be no significant fiscal implications for state or local government as a result of enforcing or administering the repeals.

Mr. Minick 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 improvement in the hearings process and for contested matters before the commission and enhanced consistency in the conduct of administrative proceedings for state agencies. 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.

The proposed rule revisions are intended to clarify, streamline, and recodify the procedural rules of the agency. The commission prepared a takings impact assessment of these rules and determined that the proposal will not create any burden on private real property rights.

A public hearing on the proposal will be held April 18, 1996, at 9:00 a.m. in Room 131E of TNRCC Building C, located at 12100 North IH-35, Park 35 Circle, Austin. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion within the audience will not occur during the hearing; however, a TNRCC staff member will be available to discuss the proposal 30 minutes prior to the hearing and answer questions before and after the hearing.

Written comments not presented at the hearing may be submitted to the TNRCC Office of Policy and Regulatory Development in Austin through April 18, 1996. Material received by the TNRCC Office of Policy and Regulatory Development by 4:00 p.m. on that date will be considered by the commission prior to any final action on the proposal. Please mail comments to Lisa Martin, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, and reference Rules Tracking Log Number 95123-263-AD. Please fax comments to (512) 239-4808. Copies of the revision are available from the Office of Policy and Regulatory Development, located at 12100 Park 35 Circle, Building F, Austin, and at all TNRCC regional offices. For further information, please contact Randall Terrell at (512) 239-0577.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

Subchapter A. Definitions

• 30 TAC §265.1, §265.2

(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 Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§265.1. Definitions.

§265.2. Evidentiary Hearing Held by Commissioners.

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 March 6, 1996.

TRD-9603232 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Subchapter B. General Rules

• 30 TAC §§265.21-265.30

(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 Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§265.21. Administrative Law Judges.

§265.22. Substitution of Judges.

§265.23. Representation at Hearings.

§265.24. Conduct and Decorum.

§265.25. Consolidation and Severance.

§265.26. Ex Parte Communications.

§265.27. Burden of Proof.

§265.28. Audio Recording of Proceedings.

§265.29. Witness Fees.

§265.30. Transcriptions of Hearings.

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 March 6, 1996.

TRD-9603234 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Subchapter C. General Procedures

• 30 TAC §§265.41-265.45, 265.47, 265.48

(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 Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§265.41. Informal Proceeding/Remand to Executive Director.

§265.42. Withdrawing the Application.

§265.43. Procedure Before Preliminary Hearing.

§265.44. Initial Pleadings.

§265.45. Executive Director Forwards Initial Pleadings to the Commission.

§265.47. Affidavit of Publication.

§265.48. Effect of Failure to Furnish Affidavit.

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 March 6, 1996.

TRD-9603235 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Subchapter D. Hearing Procedures

• 30 TAC §§265.60-265.73

(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 Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§265.60. Preliminary Hearings.

§265.61. Designation of Parties.

§265.62. Persons Not Parties.

§265.63. Appearance.

§265.64. Rights and Obligations of Parties at the Hearing.

§265.65. Continuance.

§265.66. Motions.

§265.67. Conference After Preliminary Hearing.

§265.68. Agreements to be in Writing.

§265.69. Evidence.

§265.70. Objections.

§265.71. Interlocutory Appeals and Certified Questions.

§265.72. Oral Argument.

§265.73. Submittal of Findings of Fact and Conclusions of Law.

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 March 6, 1996.

TRD-9603236 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Subchapter E. Discovery and Sanctions

• 30 TAC §§265.81-265.88

(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 Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§265.81. Discovery.

§265.82. Scope of Discovery.

§265.83. Types of Discovery.

§265.84. Issuance of Subpoena or Commission to Take Deposition.

§265.85. Form of Subpoena.

§265.86. Protective Orders.

§265.87. Duty to Supplement.

§265.88. Sanctions for Failure to Comply with Discovery.

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 March 6, 1996.

TRD-9603237 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Subchapter F. Special Procedures for Freezing the Process Procedures

Procedures

• 30 TAC §§265.101-265.104, 265.106-265.113

(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 Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§265.101. Applicability.

§265.102. Procedures Applicable to the Executive Director and Public Interest Counsel.

§265.103. First Preliminary Hearing.

§265.104. Discovery Schedule and Freezing the Process for Hearings Conducted Pursuant to this Subchapter.

§265.106. Identification of Witnesses.

§265.107. Limiting the Number of Witnesses.

§265.108. Rebuttal.

§265.109. Prefiled Testimony.

§265.110. Supplementing Prefiled Testimony and Objections.

§265.111. Witness Shall Attend Hearing.

§265.112. Evidence.

§265.113. Additional Testimony.

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 March 6, 1996.

TRD-9603238 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Discovery

• 30 TAC §§265.121-265.134

(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 Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

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§265.121. Discovery in Hearings Held under Subchapter F.

§265.122. Forms and Scope of Discovery; Protective Orders; Supplementation of Responses.

§265.123. Stipulations Regarding Discovery Procedure.

§265.124. Discovery and Production of Documents and Things for Inspection, Copying, or Photography.

§265.125. Interrogatories to Parties.

§265.126. Requests for Admissions.

§265.127. Depositions.

§265.128. Issuance of Subpoena or Commission to Take Deposition.

§265.129. Sanctions for Failure to Comply with Subpoena or Commission to Take Deposition.

§265.130. Non-Stenographic Recording; Deposition by Telephone.

§265.131. Failure of Party or Witness to Attend or to Serve Subpoena; Expenses.

§265.132. Deposition Examination, Cross-Examination, and Objections.

§265.133. Submission to Witness; Changes; Signing.

§265.134. Use of Deposition Transcripts in Commission Proceedings.

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 March 6, 1996.

TRD-9603239 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Sanctions

• 30 TAC §§265.141-265.145

(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 Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§265.141. Abuse of Discovery; Sanctions.

§265.142. Sanctions for Failure to Serve or Deliver Copy of Pleadings and Motions.

§265.143. Failure to Identify Witnesses.

§265.144. Failure to Identify Testimony.

§265.145. Barring Exhibits.

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 March 6, 1996.

TRD-9603240 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Subchapter G. Post-hearing Procedures

• 30 TAC §§265.151-265.166

(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 Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§265.151. Pleadings Prior to Proposal for Decision.

§265.152. Judge's Proposal for Decision.

§265.153. Waiver of Right to Review Judge's Proposal.

§265.154. Pleadings Following Proposal for Decision.

§265.155. Judge May Amend Proposal for Decision.

§265.156. Scheduling Commissioners' Meetings.

§265.157. Oral Presentation Before the Commissioners.

§265.158. Conduct and Decorum in Commissioners' Meetings and Hearings.

§265.159. Remand to Judge.

§265.160. Decision.

§265.161. After Public Hearing Before the Full Commission Pleadings Prior to Final Decision.

§265.162. After Public Hearing Before the Full Commission-Final Decision.

§265.163. Motion for Rehearing.

§265.164. Decision Final and Appealable.

§265.165. Appeal of Final Decision.

§265.166. Costs of Record on Appeal.

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 March 6, 1996.

TRD-9603241 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Subchapter H. Expiration

• 30 TAC §265.170

(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 Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under the Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeal implements Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§265.170. Expiration.

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 March 6, 1996.

TRD-9603242 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Chapter 275. Special Provisions

The Texas Natural Resource Conservation Commission (commission) proposes the repeal of §§275.1, 275.11-275.18, 275.31-275.36, 275.51-275.59, 275. 71-275.80, 275.91-275.101, and 275.130-275.132, concerning the commission's procedural rules.

This proposal is the second phase (Phase II) of an ongoing project to reorganize, clarify, and consolidate the procedural rules of the commission. The first phase of the project (Phase I) was intended to implement recent legislation and was completed in the summer of 1995. Phase I made limited substantive changes to the commission's rules and began limited reorganization. Phase II is a more ambitious attempt to reorganize and consolidate the commission's procedural rules, and to eliminate conflicting procedural requirements based solely on media or type of hearing. By consolidating these rules, the commission seeks to cut back on the duplication of requirements and definitions that might create unwarranted non-statutory differences in the treatment of persons working with the commission. As part of this ongoing project, the commission is continuing to examine program and media specific rules for inconsistency with the general rules of the agency. It is anticipated that any further consolidation will be proposed as amendments to specific programs or chapters and not as a further major revision to these procedural rules.

Proposed numbering changes attempt to impose a more logical organization upon the most widely applicable rules of the commission by taking advantage of newly available chapters in Title 30. Chapters 1-99 will be reserved for the procedural rules and broadly applicable substantive rules of the commission. By locating generally applicable rules at the beginning of Title 30, commission rules should be organized in a more logical and user-friendly format. The proposed new format consists of the following reservation of chapters: Chapters 1-10-general rules of the commission; Chapters 11-19-miscellaneous provisions not specific to any media; Chapters 20-29-rulemaking; Chapters 30-49-application procedures; Chapters 50-69-processing of applications; Chapters 70-79-enforcement; and Chapters 80-89-hearings-contested/other. The current proposal conforms to this new format.

Media specific substantive rules, and limited procedural rules will continue to be found in Chapters 100-399 of Title 30.

Proposed new Chapters 1, 3, 5, 10, and 70 were published in the February 20, 1996, issue of the *Texas Register* (21 TexReg 1349). Proposed new Chapters 1 and 10 replace and make limited changes to existing Chapter 261. Chapter 1 sets forth the general rules of the agency. Chapter 10 governs the conduct of commission meetings.

Proposed new Chapter 3 is intended to consolidate the definitions broadly applicable across chapters. Definitions within specific chapters that conflict with definitions in Chapter 3 will continue to apply to the particular chapter within which they are found. Long-term plans call for consolidating these definitions as much as possible, but any further consolidation beyond this proposal will be undertaken as changes to specific chapters.

Proposed new Chapter 5 replaces existing Chapter 345 and sets forth the rules governing the composition of advisory groups to the commission, without substantive changes from the existing rules.

Proposed new Chapter 20 contains the rules governing agency rulemaking from Chapter 275 without substantive changes.

A planned new Chapter 39 contains requirements for notices of public hearings moved, duplicated, or cross-referenced from other chapters. The commission anticipates that this chapter will be proposed later this year.

Proposed Chapter 40 replaces Chapter 264, relating to Alternative Dispute Resolution (ADR) before the commission. No substantive changes to ADR procedures are proposed.

Proposed new Chapters 50 and 55 replace existing Chapter 263. Chapter 50 relates to actions taken on an application by the commission or the executive director. Chapter 50, Subchapter B relates to actions taken by the commission on uncontested applications. Chapter 50, Subchapter C relates to action by the executive director and is recodified primarily from Subchapter A of Chapter 263, but also duplicates a portion of Chapter 305, Subchapter E. The principal change to current practice proposed in Chapter 50 is the consolidation of the process for executive director approval of air, water, and waste applications into a single process governing all media. This single process eliminates the *Texas Register* notice requirement regarding possible action by the executive director. The proposed rules continue the distinction between media of the limitation upon the executive director's authority to act on protested applications.

Proposed new Chapter 55 relates to commission action upon hearing requests related to permit applications and is a recodification of Subchapter B of Chapter 263. The commission seeks to clarify the process in this new chapter. New §55.21(d) attempts to clearly set forth the timelines for filing hearing requests. Persons concerned with production area authorizations should note that the public notice requirement for an application has been increased from ten to 30 days in §55.21(d). Section 55.27 makes clear it is necessary to both seek party status and file a motion for rehearing of the denial of a hearing request prior to seeking judicial review, and that this motion should be filed after action by the commission on the permit or other application.

Future rulemaking will be undertaken to further define the factors considered in evaluating hearing requests. At this time, there is insufficient experience with the current process, adopted in August of 1995, to fairly evaluate how well existing rules concerning the processing of hearing requests are meeting the needs of the regulated community, the public, and the commission.

Proposed new Chapter 70 contains the sections from Chapter 337 that were not related to hearing procedures.

Proposed Chapter 80 unifies the contested case hearing procedures contained in current Chapters 265 and 337. Where substantive and procedural issues differed significantly under the existing rules, the commission attempted to maintain these differences. Section 80.25 is modified to clarify that attorney's fees are not included in the payment of "costs" required for withdrawal of an application without prejudice, and makes it clear that payment of "costs" is one of three avenues for withdrawal without prejudice. Section 80.107 duplicates the sanctions list allowed in Senate Bill 12, and unifies the sanctions sections from the other rules proposed for repeal or amendment in this package. Section 80.137 modifies the summary judgment procedure from Chapter 337. Inclusion of this procedure in Chapter 80 will make summary disposition available in all contested cases. Discovery rules that duplicate the Texas Rules of Civil Procedure have been replaced with a reference to those rules. Voluntary discovery rules have been eliminated. Language is added to the discovery rules to make clear that drafts of prefiled testimony are not discoverable. The "freeze rules" in Chapter 265, Subchapter F have been clarified and streamlined, and duplicate procedures have been consolidated with the general procedures in Chapter 80. Language is added to §80.207 to require a reasonable basis for protestants' issues listed in the freeze process. This change was not intended to shift the burden of proof upon an application. Twenty days have been added to the end of the first discovery period in the freeze process to allow more time for the listing of issues.

Proposed new Chapter 86 contains special procedural rules of Chapter 275 (which is proposed for repeal) not moved to Chapter 20. No substantive changes are proposed in this recodification.

Chapter 305, Subchapter E is proposed for repeal. Rules contained in that subchapter will be recodified in Chapters 50 and 55, and in the new Chapter 39, when proposed.

Chapter 339 is proposed to be repealed in its entirety.

Chapter 340 is amended to consolidate requirements for pump installers from Chapter 339 with those of water well drillers in Chapter 340. In addition, references to the former Water Well Drillers Board are changed to commission or Water Well Drillers Advisory Council (council) as appropriate. Enforcement rules are deleted and references made to the proposed new Chapters 70 and 80. Additional changes are proposed to reflect recent changes in the statutory authority of the council, and to delete sections that are duplicated in new Chapter 5.

Chapter 341, which was the former Water Well Drillers Board procedures for enforcement and hearings, is proposed to be repealed in its entirety and these council proceedings will be governed by new Chapters 70 and 80.

Persons seeking help in comparing this rule proposal and recodification to the existing rules, can obtain a redlined/strikeout version of this package and disposition/derivation tables from the commission. Please contact David Bolduc at (512) 239-1000 for a copy of this information.

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the sections are in effect there will be no significant fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Minick 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 improvement in the hearings process and for contested matters before the commission and enhanced consistency in the conduct of administrative proceedings for state agencies. 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.

The proposed rule revisions are intended to clarify, streamline, and recodify the procedural rules of the agency. The commission prepared a takings impact assessment of these rules and determined that the proposal will not create any burden on private real property rights.

A public hearing on the proposal will be held April 18, 1996, at 9:00 a.m. in Room 131E of TNRCC Building C, located at 12100 North IH-35, Park 35 Circle, Austin. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion within the audience will not occur during the hearing; however, a TNRCC staff member will be available to discuss the proposal 30 minutes prior to the hearing and answer questions before and after the hearing.

Written comments not presented at the hearing may be submitted to the TNRCC Office of Policy and Regulatory Development in Austin through April 18, 1996. Material received by the TNRCC Office of Policy and Regulatory Development by 4:00 p.m. on that date will be considered by the commission prior to any final action on the proposal. Please mail comments to Lisa Martin, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, and reference Rules Tracking Log Number 95123-263-AD. Please fax comments to (512) 239-4808. Copies of the revision are available from the Office of Policy and Regulatory Development, located at 12100 Park 35 Circle, Building F, Austin, and at all TNRCC regional offices. For further information, please contact Randall Terrell at (512) 239-0577.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

General

• 30 TAC §275.1

(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 Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under the Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeal implements Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§275.1. Special procedures to Prevail.

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 March 6, 1996.

TRD-9603243 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Water Rights Adjudication

• 30 TAC §§275.11-275.18

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

The repeals are proposed under the Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017,

361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§275.11. General.

§275.12. Prehearing Procedures.

§275.13. Jurisdiction Hearing.

§275.14. Procedure at Individual Evidentiary Hearings.

§275.15. Preliminary Determination.

§275.16. Contests to Preliminary Determination.

§275.17. Procedure at Contest Hearing.

§275.18. Final Determination and Appeal.

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 March 6, 1996.

TRD-9603244 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Water Rate Hearings Special Procedures

• 30 TAC §§275.31-275.36

(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 Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§275.31. General.

§275.32. Setting of Hearing.

§275.33. Additional Deposit.

§275.34. Notice of Preliminary Hearing.

§275.35. Preliminary Hearing and Order.

§275.36. Hearing and Order.

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 March 6, 1996.

TRD-9603245 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Appeals of City Actions Relating to Water Pollution Control and Abatement Outside the Corporate Limits of the City

• 30 TAC §§275.51-275.59

(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 Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§275.51. General.

§275.52. Petition by an Affected Person.

§275.53. Issues on Appeal.

§275.54. Prerequisites to Appeal.

§275.55. Contents of Petition for Review.

§275.56. Answer.

§275.57. Review by Commission.

§275.58. Consolidation.

§275.59. Appeal of Commission Order.

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 March 6, 1996.

TRD-9603246 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Rulemaking Public Hearings of the Commission

• 30 TAC §§275.71-275.80

(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 Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§275.71. General.

§275.72. Policy.

§275.73. Mailing List of Persons Requesting Notice of Rulemaking by the Commission.

§275.74. Appearance.

§275.75. Submission of Documents.

§275.76. Oral Presentations.

§275.77. Action After Hearing Concluded.

§275.78. Petition for Adoption of Rules.

§275.79. Emergency Rules.

§275.80. Advisory Conference on Rules.

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 March 6, 1996.

TRD-9603247 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Appeals of Rules of the Edwards Underground Water District

• 30 TAC §§275.91-275.101

(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 Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§275.91. General.

§275.92. Petition by an Affected Person.

§275.93. Issues on Appeal.

§275.94. Burden of Proof.

§275.95. Rule Remains Effective Pending Appeal Unless Stayed or Reformed.

§275.96. Prerequisites to Appeal.

§275.97. Contents of Petition for Appeal.

§275.98. Answer.

§275.99. Review by Commission.

§275.100. Consolidation.

§275.101. Finality of Commission Order.

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 March 6, 1996.

TRD-9603248 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Variance Hearings

• 30 TAC §§275.130-275.132

(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 Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§275.130. Variance Hearings Pursuant to the Texas Clean Air Act.

§275.131. Time for Filing Petition for Variance.

§275.132. Effect of Institution of Civil Suit on Petition for Variance.

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 March 6, 1996.

TRD-9603252 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Chapter 305. Consolidated Permits

Subchapter E. Actions, Notice, and Hearing

• 30 TAC §§305.91-305.107

(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 Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Natural Resource Conservation Commission (commission) proposes the repeal of §§305.91-305.107, concerning the commission's procedural rules.

This proposal is the second phase (Phase II) of an ongoing project to reorganize, clarify, and consolidate the procedural rules of the commission. The first phase of the project (Phase I) was intended to implement recent legislation and was completed in the summer of 1995. Phase I made limited substantive changes to the commission's rules and began limited reorganization. Phase II is a more ambitious attempt to reorganize and consolidate the commission's procedural rules, and to eliminate conflicting procedural requirements based solely on media or type of hearing. By consolidating these rules, the commission seeks to cut back on the duplication of requirements and definitions that might create unwarranted non-statutory differences in the treatment of persons working with the commission. As part of this ongoing project, the commission is continuing to examine program and media specific rules for inconsistency with the general rules of the agency. It is anticipated that any further consolidation will be proposed as amendments to specific programs or chapters and not as a further major revision to these procedural rules.

Proposed numbering changes attempt to impose a more logical organization upon the most widely applicable rules of the commission by taking advantage of newly available chapters in Title 30. Chapters 1-99 will be reserved for the procedural rules and broadly applicable substantive rules of the commission. By locating generally applicable rules at the beginning of Title 30, commission rules should be organized in a more logical and user-friendly format. The proposed new format consists of the following reservation of chapters: Chapters 1-10-general rules of the commission; Chapters 11-19-miscellaneous provisions not specific to any media; Chapters 20-29-rulemaking; Chapters 30-49-application procedures; Chapters 50-69-processing of applications; Chapters 70-79-enforcement; and Chapters 80-89-hearings-contested/other. The current proposal conforms to this new format.

Media specific substantive rules, and limited procedural rules will continue to be found in Chapters 100-399 of Title 30.

Proposed new Chapters 1, 3, 5, 10, and 70 were published in the February 20, 1996, issue of the *Texas Register* (21 TexReg 1349). Proposed new Chapters 1 and 10 replace and make limited changes to existing Chapter 261. Chapter 1 sets forth the general rules of the agency. Chapter 10 governs the conduct of commission meetings.

Proposed new Chapter 3 is intended to consolidate the definitions broadly applicable across chapters. Definitions within specific chapters that conflict with definitions in Chapter 3 will continue to apply to the particular chapter within which they are found. Long-term plans call for consolidating these definitions as much as possible, but any further consolidation beyond this proposal will be undertaken as changes to specific chapters.

Proposed new Chapter 5 replaces existing Chapter 345 and sets forth the rules governing the composition of advisory groups to the commission, without substantive changes from the existing rules.

Proposed new Chapter 20 contains the rules governing agency rulemaking from Chapter 275 without substantive changes.

A planned new Chapter 39 contains requirements for notices of public hearings moved, duplicated, or cross-referenced from other chapters. The commission anticipates that this chapter will be proposed later this year.

Proposed Chapter 40 replaces Chapter 264, relating to Alternative Dispute Resolution (ADR) before the commission. No substantive changes to ADR procedures are proposed.

Proposed new Chapters 50 and 55 replace existing Chapter 263. Chapter 50 relates to actions taken on an application by the commission or the executive director. Chapter 50, Subchapter B relates to actions taken by the commission on uncontested applications. Chapter 50, Subchapter C relates to action by the executive director and is recodified primarily from Subchapter A of Chapter 263, but also duplicates a portion of Chapter 305, Subchapter E. The principal change to current practice proposed in Chapter 50 is the consolidation of the process for executive director approval of air, water, and waste applications into a single process governing all media. This single process eliminates the *Texas Register* notice requirement regarding possible action by the executive director. The proposed rules continue the distinction between media of the limitation upon the executive director's authority to act on protested applications.

Proposed new Chapter 55 relates to commission action upon hearing requests related to permit applications and is a recodification of Subchapter B of Chapter 263. The commission seeks to clarify the process in this new chapter. New §55.21(d) attempts to clearly set forth the timelines for filing hearing requests. Persons concerned with production area authorizations should note that the public notice requirement for an application has been increased from ten to 30 days in §55.21(d). Section 55.27 makes clear it is necessary to both seek party status and file a motion for rehearing of the denial of a hearing request prior to seeking judicial review, and that this motion should be filed after action by the commission on the permit or other application. Future rulemaking will be undertaken to further define the factors considered in evaluating hearing requests. At this time, there is insufficient experience with the current process, adopted in August of 1995, to fairly evaluate how well existing rules concerning the processing of hearing requests are meeting the needs of the regulated community, the public, and the commission.

Proposed new Chapter 70 contains the sections from Chapter 337 that were not related to hearing procedures.

Proposed Chapter 80 unifies the contested case hearing procedures contained in current Chapters 265 and 337. Where substantive and procedural issues differed significantly under the existing rules, the commission attempted to maintain these differences. Section 80.25 is modified to clarify that attorney's fees are not included in the payment of "costs" required for withdrawal of an application without prejudice, and makes it clear that payment of "costs" is one of three avenues for withdrawal without prejudice. Section 80.107 duplicates the sanctions list allowed in Senate Bill 12, and unifies the sanctions sections from the other rules proposed for repeal or amendment in this package. Section 80.137 modifies the summary judgment procedure from Chapter 337. Inclusion of this procedure in Chapter 80 will make summary disposition available in all contested cases. Discovery rules that duplicate the Texas Rules of Civil Procedure have been replaced with a reference to those rules. Voluntary discovery rules have been eliminated. Language is added to the discovery rules to make clear that drafts of prefiled testimony are not discoverable. The "freeze rules" in Chapter 265, Subchapter F have been clarified and streamlined, and duplicate procedures have been consolidated with the general procedures in Chapter 80. Language is added to §80.207 to require a reasonable basis for protestants' issues listed in the freeze process. This change was not intended to shift the burden of proof upon an application. Twenty days have been added to the end of the first discovery period in the freeze process to allow more time for the listing of issues.

Proposed new Chapter 86 contains special procedural rules of Chapter 275 (which is proposed for repeal) not moved to Chapter 20. No

substantive changes are proposed in this recodification.

Chapter 305, Subchapter E is proposed for repeal. Rules contained in that subchapter will be recodified in Chapters 50 and 55, and in the new Chapter 39, when proposed.

Chapter 339 is proposed to be repealed in its entirety.

Chapter 340 is amended to consolidate requirements for pump installers from Chapter 339 with those of water well drillers in Chapter 340. In addition, references to the former Water Well Drillers Board are changed to commission or Water Well Drillers Advisory Council (council) as appropriate. Enforcement rules are deleted and references made to the proposed new Chapters 70 and 80. Additional changes are proposed to reflect recent changes in the statutory authority of the council, and to delete sections that are duplicated in new Chapter 5.

Chapter 341, which was the former Water Well Drillers Board procedures for enforcement and hearings, is proposed to be repealed in its entirety and these council proceedings will be governed by new Chapters 70 and 80.

Persons seeking help in comparing this rule proposal and recodification to the existing rules, can obtain a redlined/strikeout version of this package and disposition/derivation tables from the commission. Please contact David Bolduc at (512) 239-1000 for a copy of this information.

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the sections are in effect there will be no significant fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Minick 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 improvement in the hearings process and for contested matters before the commission and enhanced consistency in the conduct of administrative proceedings for state agencies. 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.

The proposed rule revisions are intended to clarify, streamline, and recodify the procedural rules of the agency. The commission prepared a takings impact assessment of these rules and determined that the proposal will not create any burden on private real property rights.

A public hearing on the proposal will be held April 18, 1996, at 9:00 a.m. in Room 131E of TNRCC Building C, located at 12100 North IH-35, Park 35 Circle, Austin. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion within the audience will not occur during the hearing; however, a TNRCC staff member will be available to discuss the proposal 30 minutes prior to the hearing and answer questions before and after the hearing.

Written comments not presented at the hearing may be submitted to the TNRCC Office of Policy and Regulatory Development in Austin through April 18, 1996. Material received by the TNRCC Office of Policy and Regulatory Development by 4:00 p.m. on that date will be considered by the commission prior to any final action on the proposal. Please mail comments to Lisa Martin, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, and reference Rules Tracking Log Number 95123-263-AD. Please fax comments to (512) 239-4808. Copies of the revision are available from the Office of Policy and Regulatory Development, located at 12100 Park 35 Circle, Building F, Austin, and at all TNRCC regional offices. For further information, please contact Randall Terrell at (512) 239-0577.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

The repeals are proposed under the Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§305.91. Applicability.

§305.92. Action on Applications.

§305.93. Action on Application for Permit.

§305.94. Action on Application for Production Area Authorization.

§305.95. Action on Application for Renewal.

§305.96. Action on Application for Amendment or Modification.

§305.97. Action on Application for Transfer.

§305.98. Scope of Proceedings.

§305.99. Commission Action.

§305.100. Notice of Application.

§305.101. Notice of Hearing.

§305.102. Notice by Publication.

§305.103. Notice by Mail.

§305.104. Radio Broadcasts.

§305.105. Request for Public Hearing.

§305.106. Response to Comments.

§305.107. Public Meeting and Notice Requirements.

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 March 6, 1996.

TRD-9603253 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Chapter 331. Underground Injection Control

(Editor's Note: The following proposed sections were inadvertently omitted from the March 1, 1996, issue of the Texas Register. The Texas Natural Resource Conservation Commission submitted these proposals on February 21, 1996. The earliest possible date of adoption is April 1, 1996.)

The Texas Natural Resource Conservation Commission (TNRCC or commission) proposes amendments to §331.2 and §331.11, and new §§331.181-331.186, concerning additional standards and requirements for Class V aquifer storage wells.

The proposed rules will implement recent legislation in House Bill 1989

(1995) that directs the TNRCC to investigate the feasibility of storing appropriated water in various aquifers around the state by encouraging the issuance of temporary or term permits for aquifer storage and retrieval projects that would store appropriated water in certain aquifers for subsequent retrieval and beneficial use.

Proposed amendment to §331.2, Definitions, would add a definition for the term "aquifer storage well."

Proposed amendment to §331.11, Classification of Injection Wells, would clarify that an aquifer storage well is a Class V injection well.

New §§331.181-331.186, Subchapter K, concerning Additional Requirements for Class V Aquifer Storage Wells, is being proposed to assure protection of the ground water resources in the state and to specify the requirements for Class V aquifer storage wells which will be used in Phase I (pilot demonstration phase) of an aquifer storage and retrieval project.

Proposed new §331.181, Applicability, states that the requirements contained in proposed new §§331.182- 331.186 are applicable to all Class V injection wells used for aquifer storage and are in addition to the requirements in §§331.131-331.133 of this chapter.

Proposed new §331.182, Area of Review, would provide the standards applicable to Class V aquifer storage wells for the identification and review of activities in the project area that may affect the injection operation.

Proposed new §331.183, Construction and Closure Standards, would provide the construction standards applicable to Class V aquifer storage wells including design criteria, plans and specification requirements, construction performance standards, and well construction and well workover or closure supervision requirements.

Proposed new §331.184, Operating Requirements, would provide the operating requirements applicable to Class V aquifer storage wells with the primary objectives of preventing the wells from being operated in a manner that creates a hazard to any underground sources of drinking water (USDW) and preventing leakage from the well into unauthorized zones.

Proposed new §331.185, Monitoring and Reporting Requirements, specifies the operating functions to monitored, the monitoring frequency, and the elements to be reported to the executive director applicable to Class V aquifer storage wells. In addition, a final report on all required construction, testing and evaluation of data from Phase I of the project shall be submitted to the executive director within 45 days of the completion of Phase I of the project.

Proposed new §331.186, Additional Requirements for Final Project Authorization, provides for the additional requirements for Class V aquifer storage wells for data acquisition and facility construction during the pilot demonstration project, Phase I, that would be sufficient for an evaluation of the project under an application for the final project, Phase II, authorization. The additional requirements would require as-built construction information, logging and testing results, modeling results, and any additional information which might reasonably affect the operation of the injection well and its affect on underground sources of drinking water.

Steve Minick, Strategic Planning and Appropriations Division, has determined that for the first five years the sections as proposed are in effect there are no fiscal implications anticipated for state or local governments as a result of enforcing or administering the proposed rules.

Mr. Minick also has determined that for each of the first five years the sections as proposed are in effect the public benefits anticipated as a result of enforcement of and compliance with the sections will be the clarification and streamlining of the permitting process for aquifer storage and retrieval projects. There are no economic costs anticipated for any person, including any small business, required to comply with the sections as proposed.

A public hearing on the proposal will be held March 22, 1996, at 10:00 a.m. in Room 2210 of TNRCC Building F, located at 12100 Park 35 Circle, Austin. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in the order of registration. Open discussion within the audience will not occur during the hearing; however, a TNRCC staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

Written comments on the proposal should mention Log Number 95160-295-WT and may be submitted to Lutrecia Oshoko, Texas Natural Resource Conservation Commission, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, (512) 239-4640. Please fax comments to (512) 239-5687. Written comments must be received by 5:00 p.m., 30 days from the date of publication of this proposal in the *Texas Register*. For further information, please contact James Kowis at (512) 239-4900.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

Subchapter A. General Provisions

• 30 TAC §331.2, §331.11

The amendments are proposed under the Texas Water Code, §§5.103, 5. 105, and 27.019, and Texas Health and Safety Code, §361.017 and §361.024, which authorize the TNRCC to adopt any rules necessary to carry out its powers and duties under the Texas Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed rules implement the Texas Water Code, §§11.153-11.155, which authorize the TNRCC to investigate the feasibility of storing appropriated water in various aquifers around the state by encouraging the issuance of permits for Phase I of aquifer storage and retrieval projects for the storage of appropriated water in certain aquifers for subsequent retrieval and beneficial use.

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

Aquifer Storage Well-A Class V injection well used for the injection of water into a geologic formation, group of formations or part of a formation that is capable of underground storage of water for later retrieval and beneficial use.

§331.11. Classification of Injection Wells.

(a) Injection wells within the jurisdiction of the commission are classified as follows:

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

(4) Class V. Injection wells within the jurisdiction of the commission, but not included in Classes I, III, or IV. Class V wells include, but are not limited to:

(A)-(J) (No change.)

(K) Aquifer storage wells used for the injection of water for storage and subsequent retrieval for beneficial use.

(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 February 21, 1996.

TRD-9603044 Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission

Earliest possible date of adoption: April 1, 1996

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

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Subchapter K. Additional Requirements for Class V Aquifer Storage Wells

• **30 TAC §§331.181-331.186**

The new sections are proposed under the Texas Water Code, §§5.103, 5. 105, and 27.019, which provides the Texas Natural Resource Conservation Commission with the authority to adopt rules necessary to carry out its powers and duties under the code and laws of the state.

§331.181. Applicability. In addition to the requirements of Subchapter H of this chapter (relating to Standards for Class V Wells), the requirements of this subchapter apply to all Class V aquifer storage wells.

§331.182. Area of Review. The area of review for a Class V aquifer storage well is the area determined by a radius of 1/4 mile from the proposed or existing wellbore. In the application for authorization, the applicant shall provide information on the activities within the area of review including the following factors and their adverse impacts, if any, on the injection operation:

(1) location of all artificial penetrations that penetrate the interval to be used for aquifer storage, including but not limited to: water wells and abandoned water wells from TNRCC well files or ground water district files; oil and gas wells and saltwater injection wells from the Railroad commission files; and waste disposal wells/other injection wells from the TNRCC disposal well files;

(2) completion and construction information, where available, for identified artificial penetrations; and

(3) site specific, significant geologic features, such as faults and fractures.

§331.183. Construction and Closure Standards. All Class V aquifer storage wells shall be designed, constructed, completed and closed to prevent, commingling, through the wellbore and casing, of injection waters with other fluids outside of the authorized injection zone; mixing through the wellbore and casing of fluids from aquifers of substantively different water quality; and infiltration through the wellbore and casing of water from the surface into ground water zones.

(1) Plans and specifications. Except as specifically required in the terms of the Class V aquifer storage well authorization, the drilling and completion of a Class V aquifer storage well shall be done in accordance with the requirements of §331.132 of this title (relating to Construction Standards) and the closure of a Class V aquifer storage well shall be done in accordance with the requirements of §331.133 of this title (relating to Closure Standards).

(A) If the operator proposes to change the injection interval to one not reviewed during the authorization process, the operator shall notify the executive director immediately. The operator may not inject into any unauthorized zone.

(B) The executive director shall be notified immediately of any other changes, including but not limited to, changes in the completion of the well, changes in the setting of screens and changes in the injection intervals within the authorized injection zone.

(2) Construction materials. Casing materials for Class V aquifer storage wells shall be constructed of materials resistant to corrosion.

(3) Construction and workover supervision. All phases of any aquifer storage well construction, workover or closure shall be supervised by qualified individuals who are knowledgeable and experienced in practical drilling engineering and who are familiar with the special conditions and requirements of injection well and water well construction.

§331.184. Operating Requirements.

(a) All Class V aquifer storage wells shall be operated in such a manner that they do not present a hazard to or cause pollution of an underground source of drinking water.

(b) Injection pressure at the wellhead shall not exceed a maximum which shall be calculated so as to assure the pressure in the injection zone does not cause movement of fluid out of the injection zone.

(c) The owner or operator of an aquifer storage well that has ceased operations for more than two years shall notify the executive director 30 days prior to resuming operation of the well.

(d) The owner or operator shall maintain the mechanical integrity of all wells operated under this section.

(e) The quality of water to be injected must meet the quality criteria prescribed by the commission's drinking water standards as provided in Chapter 290 of this title (relating to Water Hygiene).

§331.185. Monitoring and Reporting Requirements.

(a) The following must be monitored at the required frequency and reported to the executive director on a quarterly basis or a schedule to be agreed upon by the executive director:

(1) monthly average injection rates;

(2) monthly injection volumes;

(3) monthly average injection pressures;

(4) monthly water quality analyses; and

(5) other information as determined by the executive director as necessary for the protection of underground sources of drinking water.

(b) A final report for Phase I of a project must be submitted to the executive director within 45 days of the completion of Phase I of a project addressing items in §331.186 of this title (relating to Additional Requirements Necessary for Final Project Authorization).

§331.186. Additional Requirements Necessary for Final Project Authorization. Upon completion of the aquifer storage well, the following information shall be obtained during the first phase of the project and submitted along with the application for final authorization:

(1) as-built drilling and completion data on the well;

(2) all logging and testing data on the well;

(3) formation fluid analyses;

(4) injection fluid analyses;

(5) injectivity and pumping tests determining well capacity and reservoir characteristics;

(6) hydrogeologic modeling, with supporting data, predicting mixing zone characteristics and injection fluid movement and quality; and

(7) other information as determined by the executive director as necessary for the protection of underground sources of drinking water.

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 February 21, 1996.

TRD-9603045 Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission

Earliest possible date of adoption: April 1, 1996

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

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Chapter 336. Radiation Rules

Source Material Recovery and Radioactive Substance Disposal

• 30 TAC §336.8

The Texas Natural Resource Conservation Commission (TNRCC) proposes new §336.8, concerning adoption of a Memorandum of Understanding (MOU) between the Railroad Commission of Texas (RCT), and the Texas Department of Health (TDH), and the TNRCC relating to jurisdiction over uranium surface mining, ore milling, and mill tailings disposal.

The MOU defines the respective jurisdictions of the agencies and provides for coordination of responsibilities. The respective authorities of the TDH and TNRCC are covered under the Texas Health and Safety Code, Chapter 401, and the authorities of the RCT are covered under the Texas Natural Resources Code, Chapter 131.

The MOU amends an existing MOU between the TDH and RCT which has been effective since August 5, 1988. The amendment of the MOU is necessary because of the transfer of regulatory jurisdiction for responsibilities covered under the existing agreement. Senate Bill 2, First Called Session, 72nd Texas Legislature, Chapter 3, 1991, Texas General Laws 4, transferred the jurisdiction for disposal of radioactive substances from the TDH to the Texas Water Commission, a predecessor agency to the TNRCC, effective March 1, 1992. Senate Bill 1043, 73rd Texas Legislature, Chapter 992, 1993, Texas Session Laws 4343, transferred jurisdiction over source material recovery and processing from the TDH to the TNRCC effective September 1, 1993.

The new MOU incorporates the changed regulatory jurisdiction between the TDH and the TNRCC with respect to uranium ore milling and tailings disposal. In addition, the new MOU incorporates the legislative mandate placing jurisdiction under the TNRCC for uranium ore milling operations and tailings disposal impoundments. This results in a more efficient regulatory program for milling and tailings disposal placed in a single agency, in conformance with the statutes, whereas the existing agreement provides for joint jurisdiction with the RCT. The new MOU provides for exchanges of information by the three agencies and coordination and cooperation to assure the highest level of technical expertise in the regulatory programs.

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period this section as proposed is in effect there are no significant fiscal implications anticipated for state or local governments as a result of administration or enforcement of the section.

Mr. Minick also has determined that for the first five-year period this section as proposed is in effect the public benefit anticipated as a result of administration of and compliance with the section will be a clarification of the respective responsibilities of state agencies relating to surface mining of uranium, ore milling, and tailings disposal; more cost-effective regulation of these activities; and elimination of duplicative regulatory efforts without reduction in the levels of environmental protection. There are no economic costs anticipated for any person or small businesses required to comply with this section as proposed.

The commission has prepared a Takings Impact Assessment for this proposed new section pursuant to Texas Government Code, Annotated, §2007.043. The following is a summary of that Assessment. The specific purpose of the new section is to implement Senate Bill 2, First Called Session, 72nd Texas Legislative, and Senate Bill 1043, 73rd Texas Legislative session, to clearly delineate jurisdictional responsibilities and delete duplicative regulatory efforts. The new section will substantially advance this specific purpose by placing jurisdiction for uranium ore milling operations and tailings disposal in the TNRCC. Promulgation and enforcement of this new section will not affect private real property which is the subject of the rules because the amendment is an interagency agreement that simply outlines specific jurisdictions.

Written comments on the proposal should mention Log Number 95067-336-WS and may be submitted to Bettie Mabry Bell, TNRCC Office of Policy and Regulatory Development, MC205, Texas Register Team, P.O. Box 13087, Austin, Texas 78711-3087. Written comments may be faxed to (512) 239-4808 and must be received by 5:00 p.m., 30 days from the date of publication of this proposal in the Texas Register. For further information, please contact Betty Rogers, Waste Policy and Regulations Division, (512) 239-0048.

The new section is proposed under the Health and Safety Code, §401.412(c), which provides the TNRCC with the authority to adopt rules and guidelines reasonably necessary to exercise its authority over the disposal of radioactive substances and source material recovery and processing.

There are no other codes, rules or statutes that will be affected by this proposal.

§336.8. Memorandum of Understanding between Railroad Commission of Texas, Texas Department of Health, and Texas Natural Resource Conservation Commission Regarding Uranium Surface Mining, Uranium Ore Milling, and Tailings Ponds and Impoundments.

(a) Now therefore, the Railroad Commission of Texas (RCT), the Texas Department of Health (TDH), and the Texas Natural Resource Conservation Commission (TNRCC) hereby agree to the following:

(1) Uranium surface mining.

(A) The RCT shall have responsibility for permitting and enforcement activities, including reclamation, for all uranium surface mining facilities. The regulation of uranium exploration and surface mining activities by the RCT shall cover non-radiological aspects of all exploration activity and open pit mining and shall be enforced through its adopted rules. The RCT shall ensure that the proposed activities meet the RCT standards; determine the adequacy of pre-operational information provided by the applicant; assess the degree of environmental impact that would result from the proposed activity; issue permits and permit revisions and renewals; enforce all the RCT permit conditions and standards, including the maintenance of financial assurance for activities for which the RCT is directly responsible.

(B) The RCT and the TDH shall be jointly responsible, from both radiological and non-radiological considerations, for regulation of releases and disposal of mine effluents, mine drainages, and other wastes resulting from uranium surface mining. Regulation relating to all surface discharges of effluents or other liquid or solid streams from the mining areas shall be determined in cooperation with TNRCC. The RCT shall have the primary responsibility for regulation of reclamation and revegetation activities and for subsequent release of the land affected by mining. The TDH will perform confirmatory radiological surveys of the reclaimed areas and advise the RCT of its findings.

(2) Uranium ore milling.

(A) The TNRCC shall have responsibility for licensing and enforcement activities for the ore milling process plant facilities starting from the raw ore receipt and storage to the packing for transportation of the uranium oxide concentrate. The TNRCC shall ensure the proposed activities meet TNRCC standards; determine the adequacy of radiological and non-radiological pre-operational information provided, and assess the impact of proposed activities on public health and safety and the environment; review the applicant's design, construction, operation, monitoring,

recordkeeping, reporting, maintenance, closure, and post-closure activities, including decommissioning and reclamation, to ensure that they meet TNRCC standards; address environmental impacts resulting from the proposed activities in a TNRCC-prepared environmental assessment; and issue licenses and enforce all TNRCC license conditions and standards, including determination and maintenance of financial assurance for activities for which the TNRCC is directly responsible.

(B) The TNRCC shall review decommissioning and reclamation plans for ore milling and processing facilities. The TNRCC will also approve releases and disposal of all effluents and wastes on the land surface.

(3) Tailings ponds and impoundments.

(A) The TNRCC shall have responsibility for licensing and enforcement activities for uranium mill tailings ponds and other impoundments. The TNRCC and RCT shall each share with the other agency submitted technical information and keep the other agency informed of its key decisions to assure that the state's best technical expertise is employed for oversight. This cooperation shall cover activities such as ponds and impoundments (to assure that they meet with applicable construction or closure standards); pre-operational site information; applicant's proposed design, construction, operation, monitoring, recordkeeping, reporting, maintenance, decommissioning, reclamation, and post-closure activities; environmental monitoring data; and financial assurance requirements.

(B) The TNRCC, in accordance with its authority, shall have exclusive responsibility for post-reclamation long-term surveillance, including environmental monitoring of tailings ponds and other impoundments from the effective date of this MOU.

(C) The TNRCC shall be responsible for the evaluation and regulation of radiological and non-radiological impacts of the operation of tailings ponds and other impoundments that may lead to tailings accumulation and discharges or releases to the surface or subsurface; address the environmental impacts resulting from the operation; issue licenses and enforce all TNRCC license conditions and standards, including determination and maintenance of financial assurance under the Radiation and Perpetual Care Fund; coordinate the transfer of reclaimed land to the State of Texas and assume responsibility for long-term surveillance at the site, or coordinate transfer to the federal government. The TNRCC activities, as provided herein, shall be carried out under the authority and conditions granted by its own rules and the United States Nuclear Regulatory Commission and the applicable standards set forth by the United States Environmental Protection Agency. In the foregoing activities, the TNRCC shall share with the RCT all technical and financial assurance information and keep the RCT informed of all significant decision recommendations prior to their being made to assure that the RCT's permitting requirements are met.

(4) The RCT shall forward one copy of each application for uranium surface mining to the TDH and the TNRCC. Information bearing on the technical merit of an application, or other substantive issues received by any agency, will be forwarded to the other agencies.

(5) The RCT and the TNRCC may coordinate inspections, sampling programs, and enforcement actions. TNRCC will be solely responsible for conducting inspections, sampling programs, and enforcement actions at mill sites, tailings ponds and impoundments.

(6) In the event that a public hearing is requested or is required, the hearing shall be called and conducted by the agency having jurisdiction over the issues that have compelled the public hearing and may be attended by legal and technical staff of the other agencies.

(7) The technical staffs of the RCT and the TNRCC will cooperate so that their highest level of technical expertise will be available to assess environmental impacts, attend public hearings, and enforce the respective agency's mandates.

(8) The RCT, TDH, and the TNRCC agree to review and revise their respective rules and procedures as needed to implement this Memorandum of Understanding.

(9) Agency representatives shall meet, as needed, but no less than annually, to discuss possible changes in this Memorandum of Understanding and to encourage increased communications between the agencies.

(10) Nothing in this Memorandum of Understanding shall be construed to reduce the statutory jurisdiction of these agencies.

(11) If any provision of this Memorandum of Understanding is held to be invalid, the remaining provisions shall not be affected thereby.

(b) This Memorandum of Understanding will take effect when signed by all three agencies and remain in effect until rescinded by formal action of any one of these agencies.

(c) Signed this 3rd day of November, 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 March 11, 1996.

TRD-9603413 Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission

Earliest possible of adoption: April 19, 1996

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

Chapter 339. Pump Installers

The Texas Natural Resource Conservation Commission (commission) proposes the repeal of §§339.1-339.7, 339.10-339.16, 339.20-339.24, and 339.30-339.44, concerning the commission's procedural rules.

This proposal is the second phase (Phase II) of an ongoing project to reorganize, clarify, and consolidate the procedural rules of the commission. The first phase of the project (Phase I) was intended to implement recent legislation and was completed in the summer of 1995. Phase I made limited substantive changes to the commission's rules and began limited reorganization. Phase II is a more ambitious attempt to reorganize and consolidate the commission's procedural rules, and to eliminate conflicting procedural requirements based solely on media or type of hearing. By consolidating these rules, the commission seeks to cut back on the duplication of requirements and definitions that might create unwarranted non-statutory differences in the treatment of persons working with the commission. As part of this ongoing project, the commission is continuing to examine program and media specific rules for inconsistency with the general rules of the agency. It is anticipated that any further consolidation will be proposed as amendments to specific programs or chapters and not as a further major revision to these procedural rules.

Proposed numbering changes attempt to impose a more logical organization upon the most widely applicable rules of the commission by taking advantage of newly available chapters in Title 30. Chapters 1-99 will be reserved for the procedural rules and broadly applicable substantive rules of the commission. By locating generally applicable rules at the beginning of Title 30, commission rules should be organized in a more logical and user-friendly format. The proposed new format consists of the following reservation of chapters: Chapters 1-10-general rules of the commission; Chapters 11-19-miscellaneous provisions not specific to any media; Chapters 20-29-rulemaking;

Chapters 30-49-application procedures; Chapters 50-69-processing of applications; Chapters 70-79-enforcement; and Chapters 80-89-hearings-contested/other. The current proposal conforms to this new format.

Media specific substantive rules, and limited procedural rules will continue to be found in Chapters 100-399 of Title 30.

Proposed new Chapters 1, 3, 5, 10, and 70 were published in the February 20, 1996, issue of the *Texas Register* (21 TexReg 1349). Proposed new Chapters 1 and 10 replace and make limited changes to existing Chapter 261. Chapter 1 sets forth the general rules of the agency. Chapter 10 governs the conduct of commission meetings.

Proposed new Chapter 3 is intended to consolidate the definitions broadly applicable across chapters. Definitions within specific chapters that conflict with definitions in Chapter 3 will continue to apply to the particular chapter within which they are found. Long-term plans call for consolidating these definitions as much as possible, but any further consolidation beyond this proposal will be undertaken as changes to specific chapters.

Proposed new Chapter 5 replaces existing Chapter 345 and sets forth the rules governing the composition of advisory groups to the commission, without substantive changes from the existing rules.

Proposed new Chapter 20 contains the rules governing agency rulemaking from Chapter 275 without substantive changes.

A planned new Chapter 39 contains requirements for notices of public hearings moved, duplicated, or cross-referenced from other chapters. The commission anticipates that this chapter will be proposed later this year.

Proposed Chapter 40 replaces Chapter 264, relating to Alternative Dispute Resolution (ADR) before the commission. No substantive changes to ADR procedures are proposed.

Proposed new Chapters 50 and 55 replace existing Chapter 263. Chapter 50 relates to actions taken on an application by the commission or the executive director. Chapter 50, Subchapter B relates to actions taken by the commission on uncontested applications. Chapter 50, Subchapter C relates to action by the executive director and is recodified primarily from Subchapter A of Chapter 263, but also duplicates a portion of Chapter 305, Subchapter E. The principal change to current practice proposed in Chapter 50 is the consolidation of the process for executive director approval of air, water, and waste applications into a single process governing all media. This single process eliminates the *Texas Register* notice requirement regarding possible action by the executive director. The proposed rules continue the distinction between media of the limitation upon the executive director's authority to act on protested applications.

Proposed new Chapter 55 relates to commission action upon hearing requests related to permit applications and is a recodification of Subchapter B of Chapter 263. The commission seeks to clarify the process in this new chapter. New §55.21(d) attempts to clearly set forth the timelines for filing hearing requests. Persons concerned with production area authorizations should note that the public notice requirement for an application has been increased from ten to 30 days in §55.21(d). Section 55.27 makes clear it is necessary to both seek party status and file a motion for rehearing of the denial of a hearing request prior to seeking judicial review, and that this motion should be filed after action by the commission on the permit or other application. Future rulemaking will be undertaken to further define the factors considered in evaluating hearing requests. At this time, there is insufficient experience with the current process, adopted in August of 1995, to fairly evaluate how well existing rules concerning the processing of hearing requests are meeting the needs of the regulated community, the public, and the commission.

Proposed new Chapter 70 contains the sections from Chapter 337 that were not related to hearing procedures.

Proposed Chapter 80 unifies the contested case hearing procedures contained in current Chapters 265 and 337. Where substantive and procedural issues differed significantly under the existing rules, the commission attempted to maintain these differences. Section 80.25 is modified to clarify that attorney's fees are not included in the payment of "costs" required for withdrawal of an application without prejudice, and makes it clear that payment of "costs" is one of three avenues for withdrawal without prejudice. Section 80.107 duplicates the sanctions list allowed in Senate Bill 12, and unifies the sanctions sections from the other rules proposed for repeal or amendment in this package. Section 80.137 modifies the summary judgment procedure from Chapter 337. Inclusion of this procedure in Chapter 80 will make summary disposition available in all contested cases. Discovery rules that duplicate the Texas Rules of Civil Procedure have been replaced with a reference to those rules. Voluntary discovery rules have been eliminated. Language is added to the discovery rules to make clear that drafts of prefiled testimony are not discoverable. The "freeze rules" in Chapter 265, Subchapter F have been clarified and streamlined, and duplicate procedures have been consolidated with the general procedures in Chapter 80. Language is added to §80.207 to require a reasonable basis for protestants' issues listed in the freeze process. This change was not intended to shift the burden of proof upon an application. Twenty days have been added to the end of the first discovery period in the freeze process to allow more time for the listing of issues.

Proposed new Chapter 86 contains special procedural rules of Chapter 275 (which is proposed for repeal) not moved to Chapter 20. No substantive changes are proposed in this recodification.

Chapter 305, Subchapter E is proposed for repeal. Rules contained in that subchapter will be recodified in Chapters 50 and 55, and in the new Chapter 39, when proposed.

Chapter 339 is proposed to be repealed in its entirety.

Chapter 340 is amended to consolidate requirements for pump installers from Chapter 339 with those of water well drillers in Chapter 340. In addition, references to the former Water Well Drillers Board are changed to commission or Water Well Drillers Advisory Council (council) as appropriate. Enforcement rules are deleted and references made to the proposed new Chapters 70 and 80. Additional changes are proposed to reflect recent changes in the statutory authority of the council, and to delete sections that are duplicated in new Chapter 5.

Chapter 341, which was the former Water Well Drillers Board procedures for enforcement and hearings, is proposed to be repealed in its entirety and these council proceedings will be governed by new Chapters 70 and 80.

Persons seeking help in comparing this rule proposal and recodification to the existing rules, can obtain a redlined/strikeout version of this package and disposition/derivation tables from the commission. Please contact David Bolduc at (512) 239-1000 for a copy of this information.

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the sections are in effect there will be no significant fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Minick 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 improvement in the hearings process and for contested matters before the commission and enhanced consistency in the conduct of administrative proceedings for state agencies. 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.

The proposed rule revisions are intended to clarify, streamline, and recodify the procedural rules of the agency. The commission prepared a takings impact assessment of these rules and determined that the proposal will not create any burden on private real property rights.

A public hearing on the proposal will be held April 18, 1996, at 9:00 a.m. in Room 131E of TNRCC Building C, located at 12100 North IH-35, Park 35 Circle, Austin. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion within the audience will not occur during the hearing; however, a TNRCC staff member will be available to discuss the proposal 30 minutes prior to the hearing and answer questions before and after the hearing.

Written comments not presented at the hearing may be submitted to the TNRCC Office of Policy and Regulatory Development in Austin through April 18, 1996. Material received by the TNRCC Office of Policy and Regulatory Development by 4:00 p.m. on that date will be

considered by the commission prior to any final action on the proposal. Please mail comments to Lisa Martin, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, and reference Rules Tracking Log Number 95123-263-AD. Please fax comments to (512) 239-4808. Copies of the revision are available from the Office of Policy and Regulatory Development, located at 12100 Park 35 Circle, Building F, Austin, and at all TNRCC regional offices. For further information, please contact Randall Terrell at (512) 239-0577.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

Subchapter A. General Provisions

• 30 TAC §§339.1-339.7

(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 Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§339.1. Purpose of Rules.

§339.2. Definitions.

§339.3. Business Office and Mailing Address.

§339.4. Minutes of the Board.

§339.5. Effect of Invalidity of Rule.

§339.6. Variance of Rules.

§339.7. Fees.

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 March 6, 1996.

TRD-9603254 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Subchapter B. Licensing

• 30 TAC §§339.10-339.16

(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 Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§339.10. License required.

§339.11. Application.

§339.12. Application Review and Certification.

§339.13. Examinations.

§339.14. Licenses.

§339.15. Renewal of Licenses.

§339.16. Apprentices.

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 March 6, 1996.

TRD-9603255 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Subchapter C. Standards of Professional Conduct

• 30 TAC §§339.20-339.24

(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 Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§339.20. Offer to Perform Services.

§339.21. Representations.

§339.22. Unauthorized Practice.

§339.23. Adherence to Statutes and Codes.

§339.24. Marking Vehicles.

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 March 6, 1996.

TRD-9603256 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Subchapter D. Enforcement

• 30 TAC §§339.30-339.44

(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 Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§339.30. Complaint File.

§339.31. Confidentiality of Enforcement Information.

§339.32. Remedies.

§339.33. Executive Director's Petition.

§339.34. Notice of Executive Director's Petition.

§339.35. Answer to Executive Director's Petition.

§339.36. Show-cause Enforcement Procedures.

§339.37. Hearings on Violations.

§339.38. Remand to Hearings Examiner.

§339.39. Consent Order.

§339.40. Board Action.

§339.41. Appeal of Board Action.

§339.42. Appeals of Administrative Penalties.

§339.43. Reinstatement After Disciplinary Action.

§339.44. Civil Proceedings.

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 March 6, 1996.

TRD-9603257 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Chapter 340. **Licensing Requirements and Complaint Procedures for Water Well Drillers and Pump Installers** [General Rules]

The Texas Natural Resource Conservation Commission (commission) proposes the repeal of §§340.1, 340.3-340.7, 340.10, 340.15, 340.43, 340.49, 340. 82-340.87, 340.91, 340.93, 340.95, 340.97, 340.99, 340.133, 340.135, and 340. 137; new §§340.1, 340.3, 340.43, 340.49, 340.82-340.86, 340.88-340.93, 340. 101, 340.103, 340.105, 340.107, 340.109, 340.133, 340.135, and 340.137; and amendments to §§340.2, 340.31, 340.33, 340.35, 340.37, 340.39, 340.41, 340. 45, 340.51, 340.53, 340.71, 340.73, 340.75, 340.77, 340.81, 340.111, and 340. 131, concerning the commission's procedural rules.

This proposal is the second phase (Phase II) of an ongoing project to reorganize, clarify, and consolidate the procedural rules of the commission. The first phase of the project (Phase I) was intended to implement recent legislation and was completed in the summer of 1995. Phase I made limited substantive changes to the commission's rules and began limited reorganization. Phase II is a more ambitious attempt to reorganize and consolidate the commission's procedural rules, and to eliminate conflicting procedural requirements based solely on media or type of hearing. By consolidating these rules, the commission seeks to cut back on the duplication of requirements and definitions that might create unwarranted non-statutory differences in the treatment of persons working with the commission. As part of this ongoing project, the commission is continuing to examine program and media specific rules for inconsistency with the general rules of the agency. It is anticipated that any further consolidation will be proposed as amendments to specific programs or chapters and not as a further major revision to these procedural rules.

Proposed numbering changes attempt to impose a more logical organization upon the most widely applicable rules of the commission by taking advantage of newly available chapters in Title 30. Chapters 1-99 will be reserved for the procedural rules and broadly applicable substantive rules of the commission. By locating generally applicable rules at the beginning of Title 30, commission rules should be organized in a more logical and user-friendly format. The proposed new format consists of the following reservation of chapters: Chapters 1-10-general rules of the commission; Chapters 11-19-miscellaneous provisions not specific to any media; Chapters 20-29-rulemaking; Chapters 30-49-application procedures; Chapters 50-69-processing of applications; Chapters 70-79-enforcement; and Chapters 80-89-hearings-contested/other. The current proposal conforms to this new format.

Media specific substantive rules, and limited procedural rules will continue to be found in Chapters 100-399 of Title 30.

Proposed new Chapters 1, 3, 5, 10, and 70 were published in the February 20, 1996, issue of the *Texas Register* (21 TexReg 1349). Proposed new Chapters 1 and 10 replace and make limited changes to existing Chapter 261. Chapter 1 sets forth the general rules of the agency. Chapter 10 governs the conduct of commission meetings.

Proposed new Chapter 3 is intended to consolidate the definitions broadly applicable across chapters. Definitions within specific chapters that conflict with definitions in Chapter 3 will continue to apply to the particular chapter within which they are found. Long-term plans call for consolidating these definitions as much as possible, but any further consolidation beyond this proposal will be undertaken as changes to specific chapters.

Proposed new Chapter 5 replaces existing Chapter 345 and sets forth the rules governing the composition of advisory groups to the commission, without substantive changes from the existing rules.

Proposed new Chapter 20 contains the rules governing agency rulemaking from Chapter 275 without substantive changes.

A planned new Chapter 39 contains requirements for notices of public hearings moved, duplicated, or cross-referenced from other chapters. The commission anticipates that this chapter will be proposed later this year.

Proposed Chapter 40 replaces Chapter 264, relating to Alternative Dispute Resolution (ADR) before the commission. No substantive changes to ADR procedures are proposed.

Proposed new Chapters 50 and 55 replace existing Chapter 263. Chapter 50 relates to actions taken on an application by the commission or the executive director. Chapter 50, Subchapter B relates to actions taken by the commission on uncontested applications. Chapter 50, Subchapter C relates to action by the executive director and is recodified primarily from Subchapter A of Chapter 263, but also duplicates a portion of Chapter 305, Subchapter E. The principal change to current practice proposed in Chapter 50 is the consolidation of the process for executive director approval of air, water, and waste applications into a single process governing all media. This single process eliminates the *Texas Register* notice requirement regarding possible action by the executive director. The proposed rules continue the distinction between media of the limitation upon the executive director's authority to act on protested applications.

Proposed new Chapter 55 relates to commission action upon hearing requests related to permit applications and is a recodification of Subchapter B of Chapter 263. The commission seeks to clarify the process in this new chapter. New §55.21(d) attempts to clearly set forth the timelines for filing hearing requests. Persons concerned with production area authorizations should note that the public notice requirement for an application has been increased from ten to 30 days in §55.21(d). Section 55.27 makes clear it is necessary to both seek party status and file a motion for rehearing of the denial of a hearing request prior to seeking judicial review, and that this motion should be filed after action by the commission on the permit or other application. Future rulemaking will be undertaken to further define the factors considered in evaluating hearing requests. At this time, there is insufficient experience with the current process, adopted in August of 1995, to fairly evaluate how well existing rules concerning the processing of hearing requests are meeting the needs of the regulated community, the public, and the commission.

Proposed new Chapter 70 contains the sections from Chapter 337 that were not related to hearing procedures.

Proposed Chapter 80 unifies the contested case hearing procedures contained in current Chapters 265 and 337. Where substantive and procedural issues differed significantly under the existing rules, the commission attempted to maintain these differences. Section 80.25 is modified to clarify that attorney's fees are not included in the payment of "costs" required for withdrawal of an application without prejudice, and makes it clear that payment of "costs" is one of three avenues for withdrawal without prejudice. Section 80.107 duplicates the sanctions list allowed in Senate Bill 12, and unifies the sanctions sections from the other rules proposed for repeal or amendment in this package. Section 80.137 modifies the summary judgment procedure from Chapter 337. Inclusion of this procedure in Chapter 80 will make summary disposition available in all contested cases. Discovery rules that duplicate the Texas Rules of Civil Procedure have been replaced with a reference to those rules. Voluntary discovery rules have been eliminated. Language is added to the discovery rules to make clear that drafts of prefiled testimony are not discoverable. The "freeze rules" in Chapter 265, Subchapter F have been clarified and streamlined, and duplicate procedures have been consolidated with the general procedures in Chapter 80. Language is added to §80.207 to require a reasonable basis for protestants' issues listed in the freeze process. This change was not intended to shift the burden of proof upon an application. Twenty days have been added to the end of the first discovery period in the freeze process to allow more time for the listing of issues.

Proposed new Chapter 86 contains special procedural rules of Chapter 275 (which is proposed for repeal) not moved to Chapter 20. No substantive changes are proposed in this recodification.

Chapter 305, Subchapter E is proposed for repeal. Rules contained in that subchapter will be recodified in Chapters 50 and 55, and in the new Chapter 39, when proposed.

Chapter 339 is proposed to be repealed in its entirety.

Chapter 340 is amended to consolidate requirements for pump installers from Chapter 339 with those of water well drillers in Chapter 340. In addition, references to the former Water Well Drillers Board are changed to commission or Water Well Drillers Advisory Council (council) as appropriate. Enforcement rules are deleted and references made to the proposed new Chapters 70 and 80. Additional changes are proposed to reflect recent changes in the statutory authority of the council, and to delete sections that are duplicated in new Chapter 5.

Chapter 341, which was the former Water Well Drillers Board procedures for enforcement and hearings, is proposed to be repealed in its entirety and these council proceedings will be governed by new Chapters 70 and 80.

Persons seeking help in comparing this rule proposal and recodification to the existing rules, can obtain a redlined/strikeout version of this package and disposition/derivation tables from the commission. Please contact David Bolduc at (512) 239-1000 for a copy of this information.

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the sections are in effect there will be no significant fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Minick 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 improvement in the hearings process and for contested matters before the commission and enhanced consistency in the conduct of administrative proceedings for state agencies. 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.

The proposed rule revisions are intended to clarify, streamline, and recodify the procedural rules of the agency. The commission prepared a takings impact assessment of these rules and determined that the proposal will not create any burden on private real property rights.

A public hearing on the proposal will be held April 18, 1996, at 9:00 a.m. in Room 131E of TNRCC Building C, located at 12100 North IH-35, Park 35 Circle, Austin. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion within the audience will not occur during the hearing; however, a TNRCC staff member will be available to discuss the proposal 30 minutes prior to the hearing and answer questions before and after the hearing.

Written comments not presented at the hearing may be submitted to the TNRCC Office of Policy and Regulatory Development in Austin through April 18, 1996. Material received by the TNRCC Office of Policy and Regulatory Development by 4:00 p.m. on that date will be considered by the commission prior to any final action on the proposal. Please mail comments to Lisa Martin, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, and reference Rules Tracking Log Number 95123-263-AD. Please fax comments to (512) 239-4808. Copies of the revision are available from the Office of Policy and Regulatory Development, located at 12100 Park 35 Circle, Building F, Austin, and at all TNRCC regional offices. For further information, please contact Randall Terrell at (512) 239-0577.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

Subchapter A. Introductory Provisions

• 30 TAC §§340.1, 340.3-340.7, 340.10, 340.15

(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 Natural Resource Conservation Commission or in the Texas Register office,

Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§340.1. Purpose of Rules.

§340.3. Business Office and Mailing Address.

§340.4. Minutes of the Agency.

§340.5. Promulgation of Board Rules.

§340.6. Effect of Invalidity of Rule.

§340.7. Suspension of Rules.

§340.10. Procedures Not Otherwise Provided For.

§340.15. Board Council Meetings.

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 March 6, 1996.

TRD-9603258 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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• 30 TAC §§340.1-340.3

The new sections and amendment are proposed under the Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366. 012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed new sections and amendment implement Texas Water Code, §§5. 103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366. 012, 382.017, 401.011, 401.051, and 401.412.

§340.1. Purpose of Rules. The purpose of this chapter is to provide procedural and substantive requirements for the licensing, continuing education, and professional conduct of water well drillers and pump installers and complaint procedures in accordance with Texas Water Code, Chapters 32 and 33.

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

[Act or the Act-The Water Well Drillers Act, Texas Water Code Auxiliary Laws, Article 7621e.]

[Application or petitioner-A party seeking a license, permit, order, or rule from the board.]

[Commission-The Texas Water Commission.]

Complainant-A party who has filed a signed, written complaint with the **commission** [board] against any party subject to the jurisdiction of the **commission** [board].

[Department-The Texas Department of Water Resources.]

Dewatering well-Any artificial excavation constructed **to produce** [for the purpose of producing] groundwater **to lower** [for the purpose of lowering] the water table [and/]or [the] potentiometric surface. The term **does** [shall] not include a [an] dewatering well **that** [which] is used **to produce** [for the production of,] or to facilitate the production of[, any] minerals under a state regulatory program.

Dewatering well driller-A person, including an owner, operator, contractor, or drilling supervisor, who **drills, bores, cores, or constructs** [engages in the drilling, boring, coring, or construction of] a dewatering well. **The term**[, but] does not include a person who drills, bores, cores, or constructs a dewatering well under the direct supervision of a licensed dewatering well driller and who is not primarily responsible for the drilling operation.

[Executive director-The executive director, or acting executive director of the Texas Department of Water Resources, or any authorized individual designated by the executive director to act in his place for the commission.]

Groundwater-Water below the land surface in a zone of saturation.

Injection well-A well into which fluids are injected including:

(A) an air-conditioning return flow well used to return water that has been used for heating or cooling in a heat pump to the aquifer that supplied the water;

(B) a cooling water return flow well used to inject water that has been used for cooling;

(C) a drainage well used to drain surface fluid into a subsurface formation;

(D) a recharge well used to replenish water in an aquifer;

(E) a saltwater intrusion barrier well used to inject water into a fresh water aquifer to prevent the intrusion of salt water into fresh water;

(F) a sand backfill well used to inject a mixture of water and sand, mill tailings, or other solids into subsurface mines;

(G) a subsidence control well used to inject fluids into a non-oil producing or non-gas producing zone to reduce or eliminate subsidence associated with the overdraft of fresh water; and

(H) a closed system geothermal well used to circulate water, other fluids, or gases through the earth as a heat source or heat sink.

Injection well driller-A person, including an owner, operator, contractor, or drilling supervisor, who **drills, bores, cores, or constructs** [engages in the drilling, boring, coring, or construction of] an injection well. **The term does** [as defined by these sections, but

does] not include a person[,] who drills, bores, cores, or constructs an injection well under the direct supervision of a licensed injection well driller and who is not primarily responsible for the drilling operation.

Licensed installer-A person who holds a license for pump installation issued under this chapter.

Monitoring [Monitor] well-Any artificial excavation constructed to measure or monitor the **quality and** quantity or movement of substances, elements, chemicals, or fluids below the surface of the ground. The term **does** [shall] not include any monitoring well [which is] used in conjunction with the production of oil, gas, or any other minerals. **Included within this definition are environmental soil borings, piezometer wells, observation wells, and recovery wells.**

Monitoring well driller-A person, including an owner, operator, **contractor** [contract] or drilling supervisor, who **drills, bores, cores, or constructs** [engages in the drilling, boring, coring, or construction of] a monitoring well.

[Party-Each person named or admitted as a party by the board.]

[Respondent-Any person against whom any complaint has been filed.]

Pollution-The alteration of the physical, thermal, chemical, or biological quality of water in a way that makes the water harmful to humans, animals, vegetation, property, or that impairs the public enjoyment of water for a reasonable purpose.

Pump installer-A person who installs or repairs water well pumps and equipment for hire or compensation.

Water well-Any artificial excavation constructed for the purpose of exploring for or producing groundwater. The term **does** [however, shall] not include any test or blast holes in quarries or mines, or any well or excavation **constructed to explore** [for the purpose of exploring] for, or **produce** [producing] oil, gas, or any other minerals unless the holes are used to produce groundwater. The term **does** [shall] not include any injection water source well regulated by the Railroad Commission of Texas **under** [pursuant to the] Natural Resources Code, §91.101.

Water well driller-Any person (including an owner, operator, contractor, or drilling supervisor) who **drills, bores, cores, or constructs** [engages in the drilling, boring, coring, or construction of] any water well in this state. The term **does not**[, however, shall] include any person who drills, bores, cores, or constructs a water well on his own property for his own use or a person who assists in the construction of a water well under the direct supervision of a licensed driller and is not primarily responsible for the drilling operations.

Water Well Drillers Advisory Council (council)-A nine-member council established by statute in Texas Water Code, §32.006 whose members are appointed by the commission. The council is responsible for advising the commission on matters pertaining to water well drillers and pump installers.

Well pumps and equipment-Equipment and materials used to obtain water from a well, including the seals and safeguards necessary to protect the water from contamination.

§340.3. Council Meetings.

(a) The council shall hold regular meetings at the call of the chairman. Meetings shall be conducted in compliance with the Open meetings Act, Texas Government Code, Chapter 551.

(b) Officers of the council shall be elected at the first meeting of each fiscal year.

(c) Special meetings of the council may be called by the chairman at any time upon 72 hour's notice to each member of the council and may be held at any place within the State of Texas as designated by the chairman.

(d) All notices of regular or special meetings of the council shall be directed to the official residence of the members of the council as they are recorded on the official records of the council and commission.

(e) The chairman shall preside at all council meetings and shall not vote except to break a tie vote.

(f) In the absence of the chairman or vice chairman of the council, the members present shall choose one member to act as chairman.

(g) The permanent or temporary chairman may appoint any member of the council present to act for any other officer of the council who is not present.

(h) A majority of the board is a quorum for conducting business.

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

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TRD-9603263 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

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

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Subchapter B. Licensing Procedures

• 30 TAC §§340.31, 340.33, 340.35, 340.37, 340.39, 340.41, 340.43, 340.45, 340.49, 340.51, 340.53

The new sections and amendments are proposed under the Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366. 012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed new sections and amendments implement Texas Water Code, §§5. 103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366. 012, 382.017, 401.011, 401.051, and 401.412.

§340.31. License Required. It shall be unlawful for any person to act as, or to offer to perform services as a **driller for**[,] a water well, injection well, dewatering well, **or** [and] monitoring well **or a pump installer** [driller] without first obtaining a license pursuant to the Texas Water Code [Drillers Act] and these sections.

§340.33. Exceptions. **The following are not required to obtain a license:**

(1)[(a)] **Any** [A] person who drills, bores, cores, or constructs a water well on his property for his own use; [.]

(2)[(b)] **Any** [A] person who assists in the construction of a water well under the direct supervision of a licensed water well driller and is not primarily responsible for the drilling operation; [.]

(3) any person who possesses a Class A underground storage tank (UST) installer's license who drills observation wells within the backfill of the original excavation for USTs, including associated piping and pipe trenches (tank plumbing and piping), to a depth of no more than two feet below the tank bottom. However, if the total depth exceeds 20 feet below ground surface, a licensed driller is required to drill the well;

(4) any person who drills environmental hand auger soil borings no more than ten feet in depth;

(5) any person who installs or repairs water well pumps and equipment on his own property, or on property that he has leased or rented, for his own use;

(6) any person who assists in the procedure of pump installation under the direct supervision of a licensed installer and who is not primarily responsible for the installation;

(7) any person who is a ranch or farm employee whose general duties include installing or repairing a water well pump or equipment on his employer's property for his employer's use, but who is not employed or in the business of installation or repair of water pumps or equipment; or

(8) any registered water well driller trainees and pump installer apprentices.

§340.35. Requirements for Issuance of a License.

(a) An application, **accompanied by the required examination fee,** must be submitted by each person desiring to obtain a water well driller's **or pump installer's** license.

(b) Each applicant shall have been a resident of the state for not less than 90 days **before applying** [consecutive prior to making application] for a license unless this requirement is waived by the **executive director under** [board in accordance with] §340.39(c) of this title (relating to Establishing Texas Residency).

[(c) Each applicant must pay the required examination fee to the department upon submission of his application.]

(c)[(d)] Each applicant's qualifications must be certified by the **executive director** [board] before [he may take] the examination.

(d)[(e)] **Within** [Subsequent to certification and within] 90 days **after certification** [thereof], each applicant must successfully pass an examination prepared by the **executive director** [board].

(e)[(f)] **Upon** [Subsequent to] passing the examination, an applicant must submit the required license fee to the **commission** [department].

*§340.37. **Applications for Licenses and Renewals** [Application].*

(a) (No change.)

(b) Applications shall include:

(1) (No change.)

(2) a sworn and satisfactory letter of reference from a licensed water well driller or **pump installer, as applicable,** with at least two year's licensed experience in water well drilling**/pump installing**;

(3) satisfactory letters of reference from:

(A) (No change.)

(B) two satisfied water well drilling **or pump installer** customers, **as applicable,** who are not related within the second degree of consanguinity to the applicant **(i.e., may not be the applicant's spouse, or related to the applicant or applicant's spouse, as a child, grandchild, parent, sister, brother, or grandparent)**;

(4) the applicant's sworn statement that he has drilled water wells **or installed pumps** under the supervision of a driller **or pump installer** licensed under the Texas Water **Code** [Well Drillers Act] for two years or that he has other comparable water well drilling **or pump installing** experience; and

(5) the applicant's sworn statement that he has read [them, of] the **commission's** [board's] standards of conduct.

(c) The application must be received by the **executive director at least** [commission] 28 days **before a council's** [prior to the board's next] meeting **in order to be scheduled for consideration at the meeting.** The commission will **send** [issue] written notice [sent] to the applicant by certified mail. [within five working days after receipt of the application] **The notice shall inform** [informing] the applicant that the application is administratively complete and accepted for filing, or that the application is deficient in specific areas[. If the application is insufficient, the applicant shall be notified by certified mail that he] **and the applicant** has 30 days to submit [the] additional information **to correct the deficiencies.** If the additional information is received within 30 days of receipt of the deficiency notice, the **executive director** [staff] will evaluate the information [within five working days] and, where applicable, shall prepare a statement of receipt of the application and declaration of administrative completeness **under** [in accordance with] §281.17 of this title (relating to Notice of Receipt of Application and Declaration of Administrative Completeness). If the required information is not forthcoming from the applicant within 30 days of the date of receipt of the deficiency notice, the staff shall return the incomplete application to the applicant. If the applicant disagrees that the application is deficient [or when notice was not issued within five working days], the applicant may file a **motion for reconsideration of the executive director's action under §50.39 of this title (relating to Motion for Reconsideration)** [direct appeal to the board by filing a request with the commission for board consideration at the next regularly scheduled board meeting. The request for board consideration must be filed with the commission 17 days prior to the board meeting being requested. The filing fee shall be reimbursed to any applicant that written notice was not issued to within the five working days and/or when the board rules the application was not deficient].

(d) An application shall be null and void[, and the examination fee shall be forfeited,] if the examination is not taken within 90 days after the **executive director's** [board's] certification of the application.

§340.39. Establishing Texas Residency.

(a) Except as provided in subsection (c) of this section, an applicant must provide a sworn statement indicating that he has been physically present in the State of Texas, with the intent of making Texas his permanent home, for at least 90 [consecutive] days **before** [prior to] submitting an [his] application for a license.

(b) If the **executive director deems** [board should deem] it necessary, an applicant must provide tangible proof establishing his status as a Texas resident.

(c) The **executive director** [board] may waive the residency requirement set out in subsection (a) of this section for any applicant [who is not a resident of the State of Texas and] who holds a valid current license or registration issued by proper authority of any other state of the United States if the licensing standard [under which such license was issued] is [of a standard] not lower than that established by the **commission** [board] and if that state extends similar privileges to Texas drillers **or pump installers** licensed by the **commission** [board].

(d) The commission shall maintain a list of all other states which have licensing requirements substantially equivalent to those of Texas and which extend reciprocity to Texas drillers licensed by the **commission** [board].

§340.41. Examination Fee.

(a) (No change.)

(b) Each time an applicant applies to retake the **commission's** [board's] examination, he must submit the examination fee.

§340.43. Certification by the Executive Director.

(a) The executive director, with advice of the council, shall review and pass upon each applicant's qualifications.

(b) In assessing an applicant's qualifications, the executive director and the council shall examine the letters of reference submitted, the applicant's experience and competence in water well drilling or pump installing and related fields, his residency status, and any other relevant information which may be presented including, but not limited to, compliance history.

(c) An applicant, at the discretion of the executive director, may not be certified for up to a one-year period following a finding by the commission or a court of competent jurisdiction which resulted in the revocation of the applicant's license or a finding that the applicant operated without a license in violation of Texas Water Code, §32.002 and/or §33.002 and/or §340.31 of this title (relating to License Required).

(d) After assessing the qualifications of an applicant, the executive director, with advice of the council, shall determine the type(s) of well drilling or pump installation, if any, it finds the applicant competent to perform. Types of drilling include water well, monitoring well, injection well, and dewatering well. Types of pump installation include: windmills, hand pumps, and pump jacks; fractional to five horsepower; submersible five horsepower and over; and line-shaft turbine pumps. An applicant who has demonstrated competency in water well drilling shall be deemed qualified for licensing for all other types of drilling. An applicant who has demonstrated competency in all types of pump installation shall be deemed qualified for a master pump installer's license.

(e) A licensee, not licensed to perform all types of well drilling and pump installation, may apply for designation for additional types of well drilling or pump installation. Applications for additional designations shall be accompanied by the appropriate application fee and shall contain all information required by this subchapter for an initial license, except information regarding residency and letters of reference from the applicant's banker. Upon examination of the applicant's qualifications, the executive director, with advice of the council, shall make his recommendation on the application.

§340.45. Disposition of Application. The executive director shall **mail notice to** [notify] each applicant as to the disposition of his application **within** ten days [after the issuance] of **the** [a] final decision. [by the board. The examination fee shall be reimbursed to any applicant that the executive director does not notify within ten days after the issuance of a final decision by the board.] **If the applicant disagrees with the executive director's final decision, the applicant may file a motion for reconsideration under §50.39 of this title (relating to Motion for Reconsideration).**

§340.49. Examinations.

(a) Examinations shall be designed to determine if the applicant possesses the requisite knowledge of pump installation techniques; well drilling, completion, and plugging methods and techniques; and of groundwater formations to ensure that the licensee will not present a serious risk of pollution of a groundwater source.

(b) Examinations shall be written except that upon petition of an applicant filed with the commission not less than 30 days prior to the scheduled date of the examination, the examination shall be administered orally. The commission will administer its licensing examinations in a manner that prevents any unlawful discrimination and that is compliant with the Americans with Disabilities Act of 1990, Public Law 101-336.

(c) Examinations shall be offered on a regular basis by the commission at a time and place designated by the executive director.

(d) Additional examinations shall be offered if more than ten applicants petition the commission in writing.

(e) An applicant may take the examination only twice within any 12-month period.

§340.51. Licenses.

(a) Upon successfully completing an examination and **submitting** [upon the submission of] a **$125** [$100] license fee to the commission, [the board shall cause to be issued to the applicant] a water well driller's **or pump installer's** license **shall be issued. A combination water well driller's and pump installer's license may be issued upon successful completion of both examinations and submission of a $175 license fee to the commission.**

(b) (No change.)

(c) A duplicate license to replace a lost or destroyed license shall be issued by the commission upon application [thereof] and [the] payment of a $10 fee.

(d) (No change.)

(e) Each license shall bear one or more of the following designations to identify the type of well drilling **or pump installing** for which the **license** [licensee] has **been issued** [demonstrated the requisite competence and experience, as provided by §340.43(c) and (d) of this title (relating to Certification by the Board)]:

(1) (No change.)

(2) M for **monitoring** [monitor] well drilling;

(3) (No change.)

(4) D for dewatering well drilling ;[.]

(5) L for windmills, hand pumps, and pump jacks;

(6) P for pump installation, domestic fractional to five horsepower;

(7) K for pump installation submersible five horsepower and over;

(8) T for line-shaft turbine pumps; and

(9) I for master pump installer license.

*§340.53. **License** Renewal [of Licenses].*

(a) On or before the expiration date of the license, the licensee shall pay to the commission a **$125** [$100] **or, for combination water well driller and pump installer licenses, a $175** renewal fee and submit an application for renewal.

(b) If a person's license has been expired 90 days or less, the person may renew the license by paying to the commission the **required** renewal fee **and a late fee equal to** [in addition to] one-half the examination fee **($50)**.

(c) If a person's license has been expired for more than 90 days but less than two years, the person may renew the license by **paying** [applying] all renewal fees **and** [which have accrued in addition to] a **late** fee that is equal to the examination fee **($100)**.

(d) If a person's license has been expired for two years or more, the person may not renew the license; he may obtain a new license by submitting to reexamination and complying with all [the other] requirements and procedures for obtaining an original license.

[(e) Applications for renewal shall be made according to

commission rules and on forms which may be obtained from the commission.]

(e)[(f)] When a licensee has made timely and sufficient application for the renewal of a license, the existing license does not expire until action on the application has been finally determined by the **commission** [board], and in case the application is denied or the terms of the new license limited, until the last day for seeking review of the **commission** [board] order or a later date fixed by order of the reviewing court.

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 Services Division
Texas Natural Resource Conservation Commission

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

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• 30 TAC §340.43, §340.49

(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 Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§340.43. Certification by the Board.

§340.49. Examinations.

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 C. Duties of Licensed Water Well Drillers **and Pump Installers**

• 30 TAC §§340.71, 340.73, 340.75, 340.77

The amendments are proposed under the Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed amendments implement Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412.

§340.71. Marking Vehicles and Equipment. It is the duty of all licensed water well drillers **and pump installers** to see that all water well rigs **and pump installer vehicles** used by them or their employees in the water well drilling **or pump installer** business are marked with legible and plainly visible identification numbers at all times.

(1) The identification number to be used on water well rigs shall be the license number of the water well driller responsible for the water well drilling operations. **The identification number to be used on pump installer vehicles shall be the license number of the pump installer responsible for installing or repairing the pump, the owner of the business if he has a pump installer's license, or the designated licensed supervising pump installer.**

(2) License numbers shall be printed, upon each side of every water well rig **or pump installer vehicle,** [in numerals of] not less than two inches high[,] and [such numerals shall be] in a color sufficiently different from the color of the vehicle or equipment so that the **license** [registration] number shall be plainly legible.

(3) A driller **or pump installer** shall have 30 days from the date a license is issued [to him] to see that all water well rigs **or pump installer vehicles** used by him or his employees [in the water well drilling business] are marked as provided in paragraphs (1) and (2) of this section.

§340.73. Well Logs.

(a) Every licensed [water] well driller, deepening or otherwise altering a [water] well within this state shall make and keep[, or cause to be made and kept,] a legible and accurate well log on forms supplied by the commission. **The well log shall be recorded at the time of drilling and must show the depth, thickness, and character of the strata penetrated, the location of water-bearing strata, the depth, size, and character of casing installed, and any other information required by this section.**

(b) **Not later than the 60th day after the completion or cessation of drilling, deepening, or otherwise altering the well, the licensed driller shall deliver or transmit by certified mail a copy of the well log to the commission and to the owner of the well or the person for whom the well was drilled** [Every licensed water well driller shall deliver or transmit a copy of the well log to the commission by certified mail and a copy to the owner or other person having the well drilled, deepened, or otherwise altered by regular first-class mail within 60 days from the completion or cessation of operations].

(c) (No change.)

§340.75. Plugging and Completion of Water Wells.

(a) Each licensed [water] well driller shall **assure that all wells are plugged, repaired, or properly completed according** [adhere] to **commission** [the commission's] rules and [the] Texas Water **Code, §32.017 (relating to plugging of water wells)** [Well Drillers Act governing the plugging and completion of water wells]. **Each pump installer shall install or repair pumps according to commission rules and Texas Water Code, §33.014 (relating to completion, repair, and plugging of water wells).**

(b) **A licensed driller or pump installer shall notify the commission and the landowner or person having a well drilled or pump installed when he encounters water injurious to vegetation, land, or other water, and the well must be plugged, repaired, or properly completed in order to avoid injury or pollution.**

(c) **A licensed driller or pump installer who knows of an abandoned or deteriorated well, as those terms are defined by**

Texas Water Code, §32.017 and §33.014 (relating to completion, repair, and plugging of water wells), shall notify the landowner or person possessing the well that the well must be plugged or capped in order to avoid injury or pollution.

§340.77. Supervising Drillers ***or Pump Installers.***

(a) Drillers **or pump installers** who are not licensed under the Texas Water **Code** [Well Drillers Act] may drill **or install pumps** under the direct supervision of a **licensed** driller **or pump installer** [who is licensed under the Texas Water Well Drillers Act].

(b) The licensed driller **or pump installer** shall be present at the well site at all times during all operations or [he] may be represented by **an apprentice or trainee** [a trusted employee who is] capable **of** [or] immediate communication with the licensed driller **or pump installer** at all times [between his visits]; provided that the licensed driller visits the well site at least once each day of operation to direct the manner in which the **operations are conducted** [drilling or completion work shall be conducted].

[(c) Subsequent to January 1, 1983, the licensed driller shall be present at the well site at all times during all operations or, he may be represented by a registered driller trainee who can immediately communicate with the licensed driller at all times between his visits.]

(d)[(c)] The supervising licensed driller **or pump installer is responsible** [shall bear the responsibility] for compliance [in all respects] with the Texas Water **Code, Chapters 32 and 33 (relating to Water Well Drillers and Water Well Pump Installers)** [Well Drillers Act, the board's rules,] and **commission** [the department's] rules.

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 D. Driller Trainee Registration

• 30 TAC §§340.81-340.86

The new sections and amendment are proposed under the Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366. 012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed new sections and amendment implement Texas Water Code, §§5. 103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366. 012, 382.017, 401.011, 401.051, and 401.412.

§340.81. Registration for Driller Trainees. A person who wishes to undertake a training program under the supervision of a licensed driller **must submit a registration form to** [may apply to register his name with] the **commission** [board] and provide proof that the licensed driller has agreed to accept the responsibility of supervising the driller in training. [Approval of such applications shall be considered by the board.]

§340.82. Registration Forms.

(a) Registration forms may be obtained from the executive director.

(b) Registration forms shall include:

(1) the name, business address, and permanent mailing address of the driller in training;

(2) the name and business address of the licensed driller who will supervise the driller in training;

(3) a brief description of the training program which the driller will provide;

(4) the effective commencement and termination dates of the training program;

(5) a statement by the licensed driller accepting financial responsibility for the activities of the driller trainee associated with the training program or undertaken on behalf of the licensed driller; and

(6) the signatures of the driller trainee and the licensed driller and the notarized statement of both that the information provided is true and correct.

§340.83. Commencement of Registration. The executive director, with advice of the council, shall review driller trainee registration forms.

(1) If the application conforms to the rules and the training program meets commission requirements, the executive director will notify the trainee and the supervising driller that the trainee has been accepted as a registered driller trainee and that the registration form shall remain in the commission's files for the stated duration of the training period.

(2) If the application and training program do not conform to the rules and the registration is not approved, the trainee and the licensed driller shall be notified by the executive director.

§340.84. Termination of Driller Trainee Status. Upon completion of a training program of at least one year, a driller trainee may apply to obtain a water well driller's license or submit a new registration form to renew the status as a driller trainee. Either the supervising driller or the driller trainee may terminate the training program by written notice to the commission. A reason for termination is not required. Upon receipt of the notice, the staff shall terminate the trainee's status as a registered driller trainee.

§340.85. Required Activities of Driller Trainees. A registered driller trainee shall:

(1) represent his supervising driller during operations at the well site;

(2) cosign well logs with the supervising driller; and

(3) perform services associated with drilling, deepening, or otherwise altering a water well under the direct supervision of the supervising driller in accordance with his abilities.

§340.86. Prohibited Activities of Driller Trainees. A registered driller in training may not perform, or offer to perform, any services associated with drilling, deepening, or otherwise altering a water well except under the supervision of a licensed driller and/or according to the supervising driller's express directions. A driller trainee's registration may be revoked if the driller trainee is found to have engaged in prohibited activities.

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 March 6, 1996.

TRD-9603266 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

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

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• 30 TAC §§340.82-340.87

(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 Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§340.82. Requirements for Obtaining Driller Trainee Status.

§340.83. Registration Forms.

§340.84. Commencement of Registration.

§340.85. Termination of Driller Trainee Status.

§340.86. Required Activities of Driller Trainees.

§340.87. Prohibited Activities of Driller Trainees.

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

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TRD-9603260 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

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Subchapter E. Pump Installer Apprentices

• 30 TAC §§340.88-340.93

The new sections are proposed under the Texas Water Code, §§5.103, 5. 105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed new sections implement Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412.

§340.88. Training Program. A person who wishes to undertake a training program under the supervision of a licensed pump installer must submit a registration form accompanied by a $50 fee to the commission and provide proof that the licensed pump installer has agreed to accept the responsibility of supervising the pump installer in apprentice. Progress reports on apprentices must be submitted to the commission by the supervising installer every six months. Registered pump installers shall have not more than three apprentices unless approved by the commission.

§340.89. Requirements for Obtaining Pump Installer Apprentice Status.

(a) Registration forms may be obtained from the executive director.

(b) Registration forms shall include:

(1) the name, business address, and permanent mailing address of the pump installer apprentice;

(2) the name and business address of the licensed pump installer who will supervise the pump installer apprentice;

(3) a description of the apprentice program which the pump installer will provide;

(4) the effective commencement and termination dates of the apprentice program;

(5) a statement by the licensed pump installer that he accepts financial responsibility for the activities of the pump installer apprentice associated with the apprentice program or undertaken on behalf of the licensed pump installer; and

(6) the signatures of the pump installer apprentice and the licensed pump installer and the notarized statement of both that the information provided is true and correct.

§340.90. Commencement of Registration. The executive director, with advice of the council, shall review pump installer apprentice registration forms.

(1) If the application conforms to the rules and the apprentice program meets commission requirements, the executive director will notify the apprentice and the supervising pump installer that the apprentice has been accepted as a registered pump installer apprentice and that the registration form shall remain in the commission's files for the stated duration of the apprentice period.

(2) If the application and apprentice program do not conform to the rules and the registration is not approved, the apprentice and the licensed pump installer shall be notified by the executive director.

§340.91. Termination of Pump Installer Apprentice Status. Upon completion of an apprentice program, a pump installer apprentice may apply to obtain the appropriate pump installer's license or submit a new registration form and $50 fee to renew status as an apprentice. Either the supervising pump installer or the pump installer apprentice may terminate the apprentice program by written notice to the commission. A reason for termination is not required. Upon receipt of a letter stating that the apprentice program has been discontinued, the executive director shall terminate the apprentice's status as a registered pump installer apprentice.

§340.92. Required Activities of Pump Installer Apprentice. A registered pump installer apprentice shall:

(1) represent his supervising pump installer during operations at the well site;

(2) co-sign pump installation reports with the supervising pump installer; and

(3) perform services associated with pump installation or repairs under the direct supervision of a licensed installer by on-site oversight or by radio or other direct communication at all times.

§340.93. Prohibited Activities of Pump Installer Apprentice. A registered pump installer apprentice may not perform, or offer to perform, any services associated with pump installation except under the supervision of a licensed pump installer and/or according to the supervising pump installer's expressed directions. A pump installer apprentice registration may be revoked if the pump installer apprentice is found to have engaged in prohibited activities.

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

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TRD-9603272 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Subchapter E. Standards of Conduct

• 30 TAC §§340.91, 340.93, 340.95, 340.97, 340.99

(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 Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§340.91. Ethical Standards.

§340.93. Intent.

§340.95. Offer to Perform Services.

§340.97. Representations.

§340.99. Unauthorized Practice.

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

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TRD-9603261 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

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

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Subchapter F. Standards of Conduct

• 30 TAC §§340.101, 340.103, 340.105, 340.107, 340.109, 340. 111

The new sections and amendment are proposed under the Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366. 012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed new sections and amendment implement Texas Water Code, §§5. 103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366. 012, 382.017, 401.011, 401.051, and 401.412.

§340.101. Ethical Standards.

(a) The correct practice of water well drilling or pump installing as a profession is essential for the protection and conservation of the groundwater of the state and has important effects on the welfare, property, economy, and security of the public. The construction of water wells and installation and repair of pumps should be conducted by individuals with high moral and ethical standards. The state legislature has vested in the commission the authority and duty to establish and enforce standards of professional conduct and ethics for practitioners of the water well drilling and pump installation profession. These standards of conduct are adopted to ensure compliance with and enforcement of the commission's statutory charge.

(b) Every applicant for a license under Texas Water Code, Chapters 32 and 33 (relating to Water Well Drillers and Water Well Pump Installers) shall be fully informed of the obligation and responsibility inherent in the practice of drilling water wells and installing pumps as outlined by the standards of conduct. Each applicant or licensee is required to submit, as part of their application, a sworn statement that he has read the standards of conduct and is required to abide by the standards.

§340.103. Intent.

(a) These standards are binding on all licensees, but nothing in these standards supersedes pertinent state statutes.

(b) These standards require that the commission determine what actions violate the standards, and institute appropriate disciplinary action which may lead to the suspension or revocation of a license.

§340.105. Offer To Perform Services.

(a) Competence in the performance of services by a licensee requires that the licensee's knowledge and skill encompass the necessary current knowledge of drilling, completion, pump installation, and plugging techniques, and of the occurrence and availability of groundwater, to the extent that the performance of services by the driller or pump installer will not create a risk of polluting waters in the state. Therefore, licensees must maintain proficiency in the field of water well drilling and pump installation.

(b) No licensee shall offer to perform services unless such services can be competently performed.

(c) A licensee shall accurately and truthfully represent to a prospective client his qualifications and the capabilities of his equipment to perform the services to be rendered.

(d) A licensee shall neither perform nor offer to perform services for which he is not qualified by experience or knowledge in

any of the technical fields involved.

§340.107. Representations.

(a) Licensees shall not mislead others in any way regarding their personal qualifications or capabilities regarding the construction, altering, or plugging of a water well or installing pumps or equipment in a water well.

(b) A licensee shall not enter into a partnership or any agreement in which a person, not legally qualified to perform the services to be rendered, has control over the licensee's equipment and/or independent judgment as related to construction, alteration, or plugging of a water well or installation of pumps or equipment in a water well.

(c) A licensee shall not make false, misleading, or deceptive representations.

(d) A licensee shall make known all adverse, or suspicions of adverse, conditions concerning the quantity or quality of groundwater in the area of the prospective client's interest. If there is any uncertainty regarding the quality of water in any water well, the licensee shall recommend that the client have the suspected water analyzed.

(e) It is recommended that the licensee and consumer develop a written agreement specifying the approximate starting and completion dates; depth range(s); amount and type of material to be used; guarantees, if any; costs, method, and time of payment, as well as any other information that might help to prevent any possible misunderstanding between the driller and consumer following completion of the well.

§340.109. Unauthorized Practice.

(a) A licensee shall inform the commission of any unauthorized well drilling or pump installation practice of which the licensee has personal knowledge.

(b) A licensee shall not aid or abet an unlicensed person to unlawfully drill or offer to drill water wells or install pump equipment.

(c) A licensee shall, upon request of the executive director or his authorized representatives, furnish any information the licensee possesses concerning any alleged violation of Texas Water Code, Chapters 32 and 33 (relating to Water Well Drillers or Water Well Pump Installers) or commission rules.

§340.111. Adherence to Statutes and Codes.

(a) A licensee shall **comply with** [abide by, and conform to,] all [permitting] laws **requiring** [within the state including any] permits [necessary] for the drilling of a well **or installation of pump equipment**.

[(b) A licensee shall abide by, and conform to, the provisions of the Water Code and all local codes and ordinances.]

(b)[(c)] A licensee shall **not** [neither] violate a rule of conduct **or** [nor] engage in any conduct that adversely affects his [or her] fitness to practice as a water well **or pump installation** contractor.

(c)[(d)] A licensee shall **comply with** [strictly adhere to requirements of related sections of] the statutes, the **Texas** Water Code, and all local codes and ordinances in connection with all water well drilling **or pump installation** services rendered.

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 March 6, 1996.

TRD-9603273 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

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

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Subchapter G. Disposition of Violation

• 30 TAC §§340.131, 340.133, 340.135, 340.137

The new sections and amendment are proposed under the Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366. 012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed new sections and amendment implement Texas Water Code, §§5. 103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366. 012, 382.017, 401.011, 401.051, and 401.412.

§340.131. Disciplinary Actions.

(a) **The commission may assess an administrative penalty, reprimand a licensee, suspend or revoke a license, or take any appropriate action described in Chapters 70 and 80 of this title (relating to Enforcement and Contested Case Hearings) or Texas Water Code, Chapters 32 and 33 (relating to Water Well Drillers and Pump Installers) for violations of the statutes or commission rules** [The board may assess a civil penalty, reprimand a licensee, suspend a license, place on probation a person whose license has been suspended, or revoke a license for a violation of the Texas Water Well Drillers Act, Chapter 338 of this title (relating to Water Well Drillers Rules) or this chapter].

(b) Grounds for disciplinary action [shall] include, but are not limited to, the following:

(1) intentionally misstating or misrepresenting a fact on an application, renewal application, well log, plugging report, or in connection with any other information or evidence furnished to the **agency** [board] in connection with official **commission** [board] matters;

(2) (No change.)

(3) failing to mark a water well rig **or pump installation vehicle as required by §340.71 of this title (relating to Marking Vehicles and Equipment)**;

(4) failing to advise a person for whom a well is being drilled, deepened, or otherwise altered **(including pump and related equipment installation)** that injurious water has been encountered, that this poses a potential pollution hazard, and that the well must be plugged or properly completed **according to §340. 75 of this title (relating to Plugging and Completion of Water Wells)** [in accordance with the department's rules];

(5) failing to **properly plug, repair, or complete a well which has encountered water injurious to vegetation, land, or other water according to §340.75 of this title** [see that a well which has encountered undesirable water is plugged or properly completed in accordance with the department's rules];

(6) failing to provide direct supervision to an unlicensed driller or a registered driller trainee **or pump installer apprentice** whom he has agreed to supervise **according to commission** [in accordance with the board's] rules;

(7) aiding and abetting an unlicensed person to **violate**

[evade the provisions of the] Texas Water **Code** [Well Drillers Act], **Chapters 32 and 33**, [or] knowingly combining or conspiring with an unlicensed person, [or] allowing his license to be used by an unlicensed person, or acting as an agent, partner, associate, or otherwise, of an unlicensed person with the intent to **violate** [evade the provisions of the] Texas Water **Code, Chapters 32 and 33, this chapter, and** [Well Drillers Act], Chapter 338 of this title (relating to Water Well Drillers Rules **and Water Well Pump Installers**)[, or this chapter];

(8) violating the **commission's** [board] standards of conduct;

(9) conducting himself as an incompetent driller **or pump installer**;

(10) failing in any other material respect to comply with [the provisions of the] Texas Water **Code, Chapters 32 and 33** [Well Drillers Act], Chapter 338 of this title (relating to Water Well Drillers Rules **and Pump Installers**), or this chapter;

(11) misrepresenting or misstating the class of well **or pump** which the licensee is licensed to drill **or install**.

(c) Procedures relating to **complaints** [disciplinary action].

(1) **Any person who** [Whosoever] believes that a licensed driller **or pump installer** has violated or is violating [the] Texas Water **Code, Chapters 32 and 33** [Well Drillers Act], Chapter 338 of this title (relating to Water Well Drillers Rules **and Pump Installers**), or this chapter **may** [shall] file a signed written complaint with the executive director [board] which briefly states:

(A) the licensed driller **or pump installer's** [(respondent's)] name, address, and, if known, the licensed driller's **or pump installer's** [(respondent's)] business name and address;

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

(D) the complainant's name, **telephone number**, and address.

(2) **If the executive director determines that enforcement action is warranted in response to the complaint, such action shall be taken under Chapters 70 and 80 of this title (relating to Enforcement and Contested Case Hearings).** [At least ten days prior to the board meeting at which the board will review the complaint to determine whether or not grounds exist to set the complaint for a public disciplinary hearing, the licensed driller (respondent) shall be informed of the complaint and of the time, date, and place of the board meeting at which the board will review the complaint.]

[(3) If the board, after its preliminary review of the complaint, determines that there is probable cause to believe that grounds exist for disciplinary action, the board shall set the matter for a public disciplinary hearing and issue written notice to the licensed driller (respondent).

[(A) The notice shall state:

[(i) the charges made against respondent and the portions of the Texas Water Well Drillers Act and/or board rules allegedly violated;

[(ii) the time and place at which the hearing will be held;

[(iii) the nature of the hearing and the possible action which may be taken by the board;

[(iv) the legal authority and jurisdiction under which the hearing will be held; and

[(v) respondent's right to appear and to present testimony on his own behalf.

[(B) The board shall give said notice at least ten days prior to the date set for hearing.

[(C) The board shall serve this notice by mailing it by registered mail to the last known business address of the respondent; but if no business address is known, then notice shall be sent to the most recent address found on the respondent's applications or other documents submitted to the board.

[(4) At the public hearing, respondent, complainant, other parties to the proceeding, and any witnesses for any party shall be entitled to present evidence, oral or written, which may be relevant.

[(5) The board shall duly swear all witnesses and cause a record for the proceedings to be made.

[(6) Any party to the proceedings may request and shall be furnished a copy of the record upon payment to the board of a fee equal to $.50 per page.

[(7) The board shall issue every decision and order which it renders in a disciplinary hearing in writing.

[(A) The board shall briefly state its finding and conclusions, and the effective date of the decision or order.

[(B) The board shall transmit such decisions or orders no later than 30 days from the conclusion of the hearing.

[(C) The board may transmit such decisions or orders in person or by mail.

[(8) If, after its preliminary review of the complaint, the board determines that the alleged violation might constitute a violation of the department's rules, the board shall refer the complaint to the department for investigation and appropriate action.]

§340.133. Commission Investigations. The commission may investigate matters concerning water well drillers and pump installers and may take appropriate enforcement action, as necessary, under Chapters 70 and 80 of this title (relating to Enforcement and Contested Case Hearings).

§340.135. Notice of Agency Proceedings. The commission, before revoking or suspending a license, or reprimanding a licensee, shall notify the licensee in writing of the alleged violation and provide the licensee with an opportunity for a hearing. The notice shall be given not later than the tenth day before the date set for the hearing. The notice shall be made by registered mail to the last known business address of the licensee.

§340.137. Reinstatement after Disciplinary Action.

(a) A licensee who has been suspended must pay all accrued fees or penalties to regain his status as a driller or pump installer in good standing.

(b) A driller or pump installer whose license has been revoked must apply for a new license and comply with all requirements and procedures for obtaining an original license in order to regain license standing.

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

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TRD-9603274 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

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

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Subchapter F. Disposition of Violations

• 30 TAC §§340.133, 340.135, 340.137

(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 Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§340.133. Reinstatement after Disciplinary Action.

§340.135. Appeal of Board Action.

§340.137. Enforcement Proceedings.

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

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TRD-9603262 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

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

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Chapter 341. Practice and Procedure

The Texas Natural Resource Conservation Commission (commission) proposes the repeal of §§341.1-341.18, 341.20-341.22, 341.31-341.42, 341.51-341.75, 341.81-341.90, 341.101, 341.102, 341.111-341.117, and 341.131-341.138, concerning the commission's procedural rules.

This proposal is the second phase (Phase II) of an ongoing project to reorganize, clarify, and consolidate the procedural rules of the commission. The first phase of the project (Phase I) was intended to implement recent legislation and was completed in the summer of 1995. Phase I made limited substantive changes to the commission's rules and began limited reorganization. Phase II is a more ambitious attempt to reorganize and consolidate the commission's procedural rules, and to eliminate conflicting procedural requirements based solely on media or type of hearing. By consolidating these rules, the commission seeks to cut back on the duplication of requirements and definitions that might create unwarranted non-statutory differences in the treatment of persons working with the commission. As part of this ongoing project, the commission is continuing to examine program and media specific rules for inconsistency with the general rules of the agency. It is anticipated that any further consolidation will be proposed as amendments to specific programs or chapters and not as a further major revision to these procedural rules.

Proposed numbering changes attempt to impose a more logical organization upon the most widely applicable rules of the commission by taking advantage of newly available chapters in Title 30. Chapters 1-99 will be reserved for the procedural rules and broadly applicable substantive rules of the commission. By locating generally applicable rules at the beginning of Title 30, commission rules should be organized in a more logical and user-friendly format. The proposed new format consists of the following reservation of chapters: Chapters 1-10-general rules of the commission; Chapters 11-19-miscellaneous provisions not specific to any media; Chapters 20-29-rulemaking; Chapters 30-49-application procedures; Chapters 50-69-processing of applications; Chapters 70-79-enforcement; and Chapters 80-89-hearings-contested/other. The current proposal conforms to this new format.

Media specific substantive rules, and limited procedural rules will continue to be found in Chapters 100-399 of Title 30.

Proposed new Chapters 1, 3, 5, 10, and 70 were published in the February 20, 1996, issue of the *Texas Register* (21 TexReg 1349). Proposed new Chapters 1 and 10 replace and make limited changes to existing Chapter 261. Chapter 1 sets forth the general rules of the agency. Chapter 10 governs the conduct of commission meetings.

Proposed new Chapter 3 is intended to consolidate the definitions broadly applicable across chapters. Definitions within specific chapters that conflict with definitions in Chapter 3 will continue to apply to the particular chapter within which they are found. Long-term plans call for consolidating these definitions as much as possible, but any further consolidation beyond this proposal will be undertaken as changes to specific chapters.

Proposed new Chapter 5 replaces existing Chapter 345 and sets forth the rules governing the composition of advisory groups to the commission, without substantive changes from the existing rules.

Proposed new Chapter 20 contains the rules governing agency rulemaking from Chapter 275 without substantive changes.

A planned new Chapter 39 contains requirements for notices of public hearings moved, duplicated, or cross-referenced from other chapters. The commission anticipates that this chapter will be proposed later this year.

Proposed Chapter 40 replaces Chapter 264, relating to Alternative Dispute Resolution (ADR) before the commission. No substantive changes to ADR procedures are proposed.

Proposed new Chapters 50 and 55 replace existing Chapter 263. Chapter 50 relates to actions taken on an application by the commission or the executive director. Chapter 50, Subchapter B relates to actions taken by the commission on uncontested applications. Chapter 50, Subchapter C relates to action by the executive director and is recodified primarily from Subchapter A of Chapter 263, but also duplicates a portion of Chapter 305, Subchapter E. The principal change to current practice proposed in Chapter 50 is the consolidation of the process for executive director approval of air, water, and waste applications into a single process governing all media. This single process eliminates the *Texas Register* notice requirement regarding possible action by the executive director. The proposed rules continue the distinction between media of the limitation upon the executive director's authority to act on protested applications.

Proposed new Chapter 55 relates to commission action upon hearing requests related to permit applications and is a recodification of Subchapter B of Chapter 263. The commission seeks to clarify the process in this new chapter. New §55.21(d) attempts to clearly set forth the timelines for filing hearing requests. Persons concerned with production area authorizations should note that the public notice requirement for an application has been increased from ten to 30 days in §55.21(d). Section 55.27 makes clear it is necessary to both seek party status and file a motion for rehearing of the denial of a hearing request prior to seeking judicial review, and that this motion should be filed after action by the commission on the permit or other application. Future rulemaking will be undertaken to further define the factors considered in evaluating hearing requests. At this time, there is insufficient experience with the current process, adopted in August of 1995, to fairly evaluate how well existing rules concerning the processing of hearing requests are meeting the needs of the regulated community, the public, and the commission.

Proposed new Chapter 70 contains the sections from Chapter 337 that were not related to hearing procedures.

Proposed Chapter 80 unifies the contested case hearing procedures contained in current Chapters 265 and 337. Where substantive and procedural issues differed significantly under the existing rules, the commission attempted to maintain these differences. Section 80.25 is modified to clarify that attorney's fees are not included in the payment of "costs" required for withdrawal of an application without prejudice, and makes it clear that payment of "costs" is one of three avenues for withdrawal without prejudice. Section 80.107 duplicates the sanctions list allowed in Senate Bill 12, and unifies the sanctions sections from the other rules proposed for repeal or amendment in this package. Section 80.137 modifies the summary judgment procedure from Chapter 337. Inclusion of this procedure in Chapter 80 will make summary disposition available in all contested cases. Discovery rules that duplicate the Texas Rules of Civil Procedure have been replaced with a reference to those rules. Voluntary discovery rules have been eliminated. Language is added to the discovery rules to make clear that drafts of prefiled testimony are not discoverable. The "freeze rules" in Chapter 265, Subchapter F have been clarified and streamlined, and duplicate procedures have been consolidated with the general procedures in Chapter 80. Language is added to §80.207 to require a reasonable basis for protestants' issues listed in the freeze process. This change was not intended to shift the burden of proof upon an application. Twenty days have been added to the end of the first discovery period in the freeze process to allow more time for the listing of issues.

Proposed new Chapter 86 contains special procedural rules of Chapter 275 (which is proposed for repeal) not moved to Chapter 20. No substantive changes are proposed in this recodification.

Chapter 305, Subchapter E is proposed for repeal. Rules contained in that subchapter will be recodified in Chapters 50 and 55, and in the new Chapter 39, when proposed.

Chapter 339 is proposed to be repealed in its entirety.

Chapter 340 is amended to consolidate requirements for pump installers from Chapter 339 with those of water well drillers in Chapter 340. In addition, references to the former Water Well Drillers Board are changed to commission or Water Well Drillers Advisory Council (council) as appropriate. Enforcement rules are deleted and references made to the proposed new Chapters 70 and 80. Additional changes are proposed to reflect recent changes in the statutory authority of the council, and to delete sections that are duplicated in new Chapter 5.

Chapter 341, which was the former Water Well Drillers Board procedures for enforcement and hearings, is proposed to be repealed in its entirety and these council proceedings will be governed by new Chapters 70 and 80.

Persons seeking help in comparing this rule proposal and recodification to the existing rules, can obtain a redlined/strikeout version of this package and disposition/derivation tables from the commission. Please contact David Bolduc at (512) 239-1000 for a copy of this information.

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the repeals are in effect there will be no significant fiscal implications for state or local government as a result of enforcing or administering the repeals.

Mr. Minick 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 improvement in the hearings process and for contested matters before the commission and enhanced consistency in the conduct of administrative proceedings for state agencies. 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.

The proposed rule revisions are intended to clarify, streamline, and recodify the procedural rules of the agency. The commission prepared a takings impact assessment of these rules and determined that the proposal will not create any burden on private real property rights.

A public hearing on the proposal will be held April 18, 1996, at 9:00 a.m. in Room 131E of TNRCC Building C, located at 12100 North IH-35, Park 35 Circle, Austin. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion within the audience will not occur during the hearing; however, a TNRCC staff member will be available to discuss the proposal 30 minutes prior to the hearing and answer questions before and after the hearing.

Written comments not presented at the hearing may be submitted to the TNRCC Office of Policy and Regulatory Development in Austin through April 18, 1996. Material received by the TNRCC Office of Policy and Regulatory Development by 4:00 p.m. on that date will be considered by the commission prior to any final action on the proposal. Please mail comments to Lisa Martin, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, and reference Rules Tracking Log Number 95123-263-AD. Please fax comments to (512) 239-4808. Copies of the revision are available from the Office of Policy and Regulatory Development, located at 12100 Park 35 Circle, Building F, Austin, and at all TNRCC regional offices. For further information, please contact Randall Terrell at (512) 239-0577.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

Subchapter A. General Rules of Procedure

• 30 TAC §§341.1-341.18, 341.20-341.22

(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 Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§341.1. Copies and Certification.

§341.2. Filing of Documents.

§341.3. Lost Records and Paper.

§341.4. Hearing Examiners.

§341.5. Power of the Hearing Examiner.

§341.6. Substitution of Hearing Examiners.

§341.7. Appearance at the Hearing.

§341.8. Conduct and Decorum.

§341.9. Failure to Appear.

§341.10. Affidavit by Representative.

§341.11. Attorney of Record.

§341.12. Lead Counsel.

§341.13. Motions.

§341.14. Extensions for Filing Pleading.

§341.15. Appointment of Official Hearing Reporters.

§341.16. Service by Mail.

§341.17. Service by Publication or Personal Service.

§341.18. Computing Time.

§341.20. Amended and Supplemental Pleadings.

§341.21. Consolidated Hearings.

§341.22. Names of Parties.

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 March 6, 1996.

TRD-9603275 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Subchapter B. Procedures Before Public Hearing

• 30 TAC §§341.31-341.42

(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 Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§341.31. Initial Pleadings.

§341.32. Acceptance for Filing.

§341.33. Form and Content of Pleadings.

§341.34. Examination of Pleadings by Hearing Examiner.

§341.35. Setting and Notice of Public Hearing.

§341.36. Affidavit of Publication.

§341.37. Effect of Failure to Furnish Affidavit.

§341.38. Subpoenas and Depositions.

§341.39. Conference Before Hearing.

§341.40. Recordation of Conference Action.

§341.41. Motions on Matters Before the Agency.

§341.42. Written Protest Requirements.

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 March 6, 1996.

TRD-9603276 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Subchapter C. Duties of Licensed Water Well Drillers

• 30 TAC §§341.51-341.75

(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 Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§341.51. Designation of Parties.

§341.52. Protestants as Parties.

§341.53. Furnishing Copies of Pleadings.

§341.54. Conference During Hearing.

§341.55. Recordation of Conference Action.

§341.56. Agreements to be in Writing.

§341.57. Number of Counsel Heard.

§341.58. Limiting Number of Witnesses.

§341.59. Order of Presentation.

§341.60. General Admissibility.

§341.61. Objections.

§341.62. Cross-examination of Witnesses.

§341.63. Stipulation.

§341.64. Exhibits.

§341.65. Copies of Exhibits.

§341.66. Prepared Testimony and Exhibits to be Prefiled.

§341.67. Admissibility of Prepared Testimony.

§341.68. Abstracts of Documents.

§341.69. Excluding Exhibits.

§341.70. Official Notice.

§341.71. Parties to be Informed of Material Officially.

§341.72. Utilizing Special Skills of the Department.

§341.73. Continuance.

§341.74. Oral argument.

§341.75. Party to Draft Order.

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 March 6, 1996.

TRD-9603277 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Subchapter D. Procedures after Public Hearing Before an Examiner

• 30 TAC §§341.81-341.90

(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 Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§341.81. Action Following Hearing.

§341.82. Pleadings Prior to Proposal for Decision.

§341.83. Hearing Examiner's Proposal for Decision: Adverse to a Party.

§341.84. Proposal for Decision: Not Adverse to Any Party.

§341.85. Waiver of Right to Review Hearing Examiner's Proposal.

§341.86. Pleadings Following Proposal for Decision.

§341.87. Hearing Examiner May Amend Proposal for Decision.

§341.88. Remand to Hearing Examiner.

§341.89. Final Decision.

§341.90. Prompt Final Decision.

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 March 6, 1996.

TRD-9603278 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Subchapter E. Procedures After Public Hearing Before an Agency Quorum

• 30 TAC §341.101, §341.102

(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 Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§341.101. Pleadings Prior to Final Decision.

§341.102. Final Decision.

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 March 6, 1996.

TRD-9603279 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Subchapter F. Procedures After Final Decision

• 30 TAC §§341.111-341.117

(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 Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§341.111. Motion for Rehearing.

§341.112. Reply to Motion for Rehearing.

§341.113. Granting of Motion for Rehearing.

§341.114. Modification of Time Limits.

§341.115. Decision Final and Appealable.

§341.116. Appeal.

§341.117. The record.

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 March 6, 1996.

TRD-9603280 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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Subchapter G. Special Procedures

• 30 TAC §§341.131-341.138

(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 Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§341.131. Show Cause Orders and Complaints.

§341.132. Notice of Agency Proceedings.

§341.133. Form of Complaints.

§341.134. Duties of the Executive Director.

§341.135. Agency Investigations.

§341.136. Executive Director Investigations.

§341.137. Hearings.

§341.138. Suspension of Rules.

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 March 6, 1996.

TRD-9603281 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

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

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TITLE 31. NATURAL RESOURCES

Part X. Texas Water Development Board

Chapter 365. Investment Rules

The Texas Water Development Board (the board) proposes amendments to 31 TAC Chapter 365 regarding Investment Rules. The Board proposes amendments to §§365.1, 365.2, 365.11, and 365.12, repeal of §§365.21-365.24, §§365. 31-365.35, and §§365.51-365.54, and new §§365.5-365.10 and §§365.13-365. 21. The rule changes are proposed to satisfy procedural and substantive changes made to the Public Funds Investment Act Chapter 2256 of the Government Code by H.B. 2459 effective September 1, 1995.

Section 365.1 is amended to be more specific about the scope of the chapter and to list specific funds for which the investment policy will apply. Definitional changes are made in §365.2 to reflect changes in the rules and eliminate definitions which are no longer needed. New §365.5 states the board's policy for investment of the board's and Texas Water Resources Finance Authority's portfolio in order of priority. Section 365.6 establishes a prudent person standard and explains considerations in determining whether prudence was followed in investments. Section 365.7 provides that the board's and authority's portfolio will be invested with the following objectives in order of priority: 1) presentation and safety of principal; 2) liquidity; and 3) yield/return on investments. This section also provides a strategy for investments by fund indicating types of securities that may be purchased and maximum security dates. Section 365.8 delegates the authority for investments to the investment officer, and requires such officer to establish a system of written controls approved by the board's Finance Committee. Section 365.9 establishes training requirements. Section 365.10 establishes provisions relating to ethics and conflicts of interest. Section 365.11 and §365.12 provide for selection of primary and secondary dealers with which the board will make investments and includes provisions relating to rotation of authorized dealers for investments, and methods for terminating investment activity with dealers. The section prohibits the use of the board's or authority's financial advisor to buy or sell securities. Section 365.13 specifies those investments which are suitable and which are prohibited for the portfolio. Section 365.14 provides for collateralization. Section 365.15 provides provisions for delivery, safekeeping, and custody. Section 365.16 provides

for diversification. Section 365.17 provides for maximum maturities, including longer maturities for reserve components of funds. Section 365.18 provides for internal audit review of the investment functions annually and annual review of the investment policy by the board. Section 365.19 provides for performance standards. Section 365.20 provides for market yield and benchmarking against the six-month U.S. Treasury bill. Section 365.21 provides for a quarterly report on investment transaction by fund. The repeal of §§365.21-365.24, §§365.31-365.35, and §§365.51-365.54 are being proposed because the content of these sections is provided in the revised or proposed sections.

Pamela Ansboury, the Director of Finance, has determined that for the first five year period the sections are in effect the fiscal implication on state government will be an estimated additional cost of $100 for 1996, $3,200 for 1997, $2,000 for 1998, $2,000 for 1999, and $2,000 for 2000. There will be no fiscal implications for local government as a result of enforcing or administering the sections.

Ms. Ansboury also has determined that for each year of the first five years that the sections are in effect the public benefit anticipated as a result of enforcing the sections will be to provide greater specificity in board rules relating to investments. There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the amendment as proposed.

Comments on the proposed sections will be accepted for 30 days following publication and may be submitted to Veronica Hinojosa, Securities Management Section, (512) 463-7871, Texas Water Development Board, P.O. Box 13231, Austin, Texas, 78711-3231.

General Provisions

• 31 TAC §§365.1, 365.2, 365.5-365.10

The amendments are proposed under the authority of the Texas Water Code, §6.101, which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, and the Texas Government Code, Chapters 2256 and 2257, which require each State agency to adopt rules necessary to invest funds and relating to collateral for securities.

There are no statutory provisions affected by the proposed sections.

§365.1. Scope of ***Chapter*** *[Subchapter].*

(a) **This chapter shall govern all funds managed by the board and by the board on behalf of the authority, as authorized by the Sales and Servicing Agreement executed between the board and authority. The funds are accounted for individually in a Statement of Investments Owned as reported in the board's Annual Financial Report and as a grand total by fund in the State of Texas' Comprehensive Annual Financial Report.** [This subchapter shall govern investments of board funds. Provisions in bond resolutions or other documents which govern transactions relating to investments which specifically limit investments shall govern in the event of conflict.]

(b) **The funds to which this chapter applies are categorized as enterprise funds, special revenue funds, and debt service funds.** [This subchapter shall govern investments of Texas Water Resources Finance Authority funds which the board has been authorized to invest on behalf of the authority pursuant to the "Sales and Servicing Agreement" entered into by the board and the authority.]

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

U.S. government agencies [Agencies]-The Federal Home Loan Bank, the Federal National Mortgage Association and the Government National Mortgage Association.

[Authorized investments:

[(A) direct obligations of the United States;

[(B) other obligations unconditionally guaranteed by United States agencies;

[(C) obligations of the State of Texas;

[(D) obligations of cities, counties, and other political subdivisions of the state;

[(E) direct security repurchase agreements under which the board buys, holds in its possession or the possession of a financial institution acting solely as agent for the board for a specified time and then sells back any of the securities or obligations; or

[(F) any investment authorized by statute or bond resolution of the board or authority.]

[Bond proceeds-the funds remaining after bonds have been issued and expenses have been paid.]

Dealer-A company which seeks to provide investments to the board or authority.

Development fund **manager** [director]- The director of the Development Fund Division or a designated representative.

[Firm-the company which employs the authorized dealer.]

Investment officer-**The Cash & Securities Manager of the Development Fund or any other person authorized by the board or executive administrator to invest funds of the board or authority.** [A person authorized by the Development Fund Director to invest funds of the Board or funds for which the board has assumed responsibility to invest].

[Investment staff-The staff employed by the Texas Water Development Board to make investments.]

[Political subdivision-A city, county, district or authority created under Article III, Section 52, or Article XVI, Section 59, of the Texas Constitution, any other political subdivision of the state, and any nonprofit water supply corporation created and operating under Chapter 76, Acts of the 43rd Legislature, 1st Called Session, 1933 (Article 1434a, Vernon's Texas Civil Statutes).]

[Rating firm-Those companies which are in the business of rating firms' outstanding debt and credit.]

[Safekeeping Trust Company-The division of the State Treasury which manages trust assets for state agencies and local governments.]

[State Treasury-The Treasury of the State of Texas.]

[Treasury pool-The investments made on behalf of the Board by the State Treasury or the Safekeeping Trust Company.]

§365.5. Policy. The board will invest the portfolio pursuant to the following principles in order of priority and in conformance with state law:

(1) understanding the suitability of the investment to the financial requirements of the board and authority;

(2) preservation and safety of the principal;

(3) maintaining liquidity in order to meet cash flow needs;

(4) being mindful of the marketability of each investment should the need arise to liquidate the investment prior to maturity;

(5) diversifying the portfolio; and

(6) providing the highest investment return while satisfying all five previous priorities.

§365.6. Prudence.

(a) Prudent person standard. Investments shall be made with

judgment and care, under circumstances then prevailing, which a person of prudence, discretion, and intelligence would exercise in the management of the person's own affairs, not for speculation, but for investment, considering the probable safety of capital and the probable income to be derived.

(b) Considerations. In determining whether the investment officer has exercised prudence with respect to an investment decision, the following shall be considered:

(1) the investment of all funds under the board's control, over which the officer had responsibility rather than a consideration as to the prudence of a single investment;

(2) whether the investment decision was consistent with this chapter and state law; and

(3) whether deviations from expectation are reported in a timely fashion and appropriate action is taken to control any adverse developments.

§365.7. Objectives and Strategies.

(a) Objectives. The portfolio shall be governed by the following investment objectives, in order of priority:

(1) Preservation and safety of principal. The most important objective in investment of funds is preservation and safety of principal by looking at the investments of all funds in the portfolio rather than any single investment. In order to attain this objective, the board will diversify the portfolio so any potential loss on any individual security does not exceed the income generated from the remainder of the portfolio.

(2) Liquidity. Investments will be purchased so funds in the portfolio are sufficiently available to meet all of the boards and authority's funding requirements as might be reasonably expected.

(3) Yield/Return on Investments. The portfolio shall be designed with an objective of attaining a rate of return that maintains compliance with federal tax regulations and allows financial programs to continue a self-supporting status. The goal will be met by taking into consideration the investment risk constraints and the cashflow characteristics of each fund.

(b) Strategy by Fund.

(1) Enterprise Fund-Investments in this fund will be used primarily to match cashflow needs for financial programs and for the payment of debt service. This objective will be accomplished by purchasing securities backed by the full faith and credit of the U.S. government and U.S. government agencies in a laddered structure or through the use of pooled funds of state agencies in the Texas State Treasury. Except for the reserve components of the enterprise fund, which may be invested under §365.17(b) of this title (relating to Maximum Maturities) for up to seven years, the maturities of each security in this fund will be 360 days or less, unless specific approval is received from the board.

(2) Special Revenue Fund-Investments in this fund will be used primarily to match cashflow needs for financial programs. This objective will be accomplished by purchasing securities backed by the full faith and credit of the U.S. government and U.S. government agencies in a laddered structure or through the use of pooled funds of state agencies in the Texas State Treasury. The maturities of each security in this fund will be 360 days or less, unless specific approval is received from the board.

(3) Debt Service-Investments in this fund will be used primarily to match cashflow needs for debt service payments. This objective may be accomplished by purchasing securities backed by the full faith and credit of the U.S. government and U.S. government agencies in a laddered structure or through the use of pooled funds of state agencies in the Texas State Treasury. Except for the reserve components of the debt service fund, which may be invested under §365.17(b) of this title (relating to Maximum Maturities) for up to seven years, the maturities of each security in this fund will be 360 days or less, unless specific approval is received from the board.

§365.8. Delegation of Authority. Pursuant to the authority of the Texas Water Code, the Texas Government Code, and bond resolutions, the management responsibility for investing the portfolio is delegated to the investment officer who shall be responsible for all transactions undertaken and shall have a system of written controls established consistent with this chapter. Such written controls shall be approved by the Finance Committee of the board. All investment transactions shall be conducted pursuant to this chapter and such written controls. The investment officer shall be responsible for all investment transactions and shall direct the activities of subordinate investment staff.

§365.9. Training. Each member of the board's and authority's governing body, its investment officer and all subordinate investment staff shall attend at least one training session relating to the person's responsibilities within six months after taking office or assuming duties. Thereafter, the investment officer and investment staff shall attend at least one training session annually. The training sessions will conform to the requirements of the Texas Government Code, Chapter 2256, Public Funds Investment Act.

§365.10. Ethics and Conflicts of Interest. The investment officer and investment staff shall refrain from personal business activity that could conflict with proper execution of the investment program, or which could impair their ability to make impartial investment decisions. The investment officer or investment staff who has a personal business relationship with an entity seeking to sell an investment to the board or authority shall file a statement disclosing that personal business interest to the executive administrator and the internal auditor. The investment officer or investment staff who is related within the second degree by affinity or consanguinity to an individual seeking to sell an investment to the board or authority shall file a statement disclosing that relationship. The statement must be filed with the Texas Ethics Commission and the board.

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

Issued in Austin, Texas, on March 9, 1996.

TRD-9603389 Craig D. Pedersen
Executive Administrator
Texas Water Development Board

Proposed date of adoption: May 16, 1996

For further information, please call: (512) 463-7981

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Selection of Authorized Dealers

• 31 TAC §§365.11, 365.12, 365.13-365.20

The amendments and new sections are proposed under the authority of the Texas Water Code, §6.101 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, and the Texas Government Code, Chapters 2256 and 2257, which require each State agency to adopt rules necessary to invest funds and relating to collateral for securities.

*§365.11. **Authorized Dealers** [Information Required].* **The investment officer will invest funds through the use of banks and broker/dealers which are approved as authorized dealers. A list of authorized dealers will be maintained by the investment officer.** All primary dealers and secondary dealers requesting quali-

fication as an authorized dealer must submit all of the following information, if applicable, to the development fund **manager:** [director.]

(1) name, address, telephone number, and contact person of the **dealer**[firm] **which**[who] would like to do business with the board **or authority**;

(2) most current audited financial statement showing the net capital of the **dealer**[firm] which clears the securities;

(3) years of experience and the type of securities that the **dealer**[firm] primarily trades;

(4) proof that the **dealer**[firm] is registered through National Association of Securities Dealers, or the Comptroller of the Currency;

(5) references from investment activity in Texas and one reference from the state in which the **dealer**[firm] has its principle place of business;

(6) proof that the **dealer**[firm] is registered to do business in Texas or is registered with the State Securities board; **and**

(7) proof that the **dealer**[firm] qualifies as a HUB[; and]

[(8) a copy of the firm's focus report].

§365.12. Selection of Authorized Dealers.

(a) A primary dealer will automatically be added to the list of authorized dealers upon request and submission of information pursuant to **§365.11** [§365. 21] of this title (relating to **Authorized Dealers** [Staff Requirements]).

(b) Only those secondary dealers that meet the following criteria may be selected to do business with the board **or authority**:

(1) the **dealer** [firm] must execute or have traded in government securities for at least one year;

(2) the **dealer** [firm] must have at least $300,000 in net or liquid capital if it settles securities through its own **clearinghouse** [firm];

(3) if the **dealer** [firm] settles securities through an outside clearinghouse, then the **dealer** [firm] acting as the clearinghouse must have at least $2 million in capital; **and**

(4) the **dealer** [firm] must be registered with the National Association of Securities Authorized Dealers and registered to do business in Texas for at least one year.

(c) A written copy of the investment policy shall be presented to any **dealer**[person] seeking to sell to the board **or authority** an authorized investment. The registered principal of the **dealer** [business organization] seeking to sell an authorized investment shall execute a written instrument **substantially** to the effect that the registered principal has received and thoroughly reviewed the investment policy of the board **or authority** and acknowledged that the **dealer** [business organization] has implemented reasonable procedures and controls in an effort to preclude imprudent investment activities arising out of investment transactions conducted between the board **or authority** and the **dealer** [business organization].

(d) An annual review of the financial condition and registrations of authorized dealers will be conducted by the Internal Auditor and investment officer.

(e) Funds will be invested through a competitive bid or offer process unless the investment officer determines that it is to the board's or authority's benefit to negotiate or process a transaction with one authorized dealer. All authorized dealers will be rotated so each authorized dealer is allowed an equal opportunity to do business with the board or authority. The investment officer may reduce the amount of times an authorized dealer is rotated based upon service, efficiency in the execution of trades, and competitiveness after notification to such dealer. At least three authorized dealers will be telephoned simultaneously prior to the purchase or sale of each investment, If three authorized dealers cannot be reached, staff will verify the price of the security with the most recent issue of the Wall Street Journal or a financial data base service that offers fair and marketable quotes representing the then-current market. A good-faith effort will be made by the investment officer to include HUB firm participation in at least 30% of the investment activity by including a HUB firm as one of the minimum of three authorized dealers from which competitive bids and offers are sought.

(f) The investment officer will terminate all investment activity with an authorized dealer if any one of the following occurs:

(1) the authorized dealer fails to deliver a security on two occasions;

(2) the authorized dealer fails to provide efficient and professional service; or

(3) the authorized dealer is placed on credit watch by a rating firm.

(g) The board and authority will not buy or sell securities with a representative of their current financial advisory firm(s).

§365.13. Authorized and Suitable Investments.

(a) The board is authorized to invest the portfolio in the following securities:

(1) obligations of the U.S. or U.S. government agencies;

(2) direct obligations of the State of Texas or its agencies and instrumentalities;

(3) other obligations, the principal and interest of which are unconditionally guaranteed or insured by or backed by the full faith and credit of Texas or the United States or their respective agencies and instrumentalities;

(4) obligations of states, agencies, counties, cities, and other political subdivisions of any state rated as to investment quality by a nationally recognized investment rating firm not less than A or its equivalent;

(5) through pooled funds of state agencies in the Texas State Treasury; and

(6) any obligations authorized by a bond resolution of the board or authority if such obligation is not listed in subsection (b) of this section and if prior approval of the board is obtained.

(b) The board is not authorized to invest the portfolio in the following securities:

(1) obligations whose payment represents the coupon payments on the outstanding principal balance of the underlying mortgage-backed security collateral and pays no principal;

(2) obligations whose payment represents the principal stream of cash flow from the underlying mortgage-backed security collateral and bears no interest;

(3) collateralized mortgage obligations that have a stated final maturity date of greater than 10 years; and

(4) collateralized mortgage obligations the interest rate of which is determined by an index that adjusts opposite to the changes in a market index.

§365.14. Collateralization. The board requires collateralization of the board's and authority's funds that are left overnight at the board's or authority's servicing bank or when repurchase agreements are purchased. In order to provide a level of security for all funds, the board or authority shall require collateralization in an amount equal to at least 102% of market value of principal and accrued interest of the security at the time the trade is executed. Collateral shall be limited to obligations of the U.S. or U.S. government agencies. The securities which are pledged as collateral must be held in the board's or authority's name and deposited with the Texas State Treasury or the Texas State Treasury Safekeeping Trust Company at the direction of the investment officer. Ownership of the securities will be evidenced by an investment trust receipt which states the safekeeping receipt number of the collateral.

§365.15. Delivery, Safekeeping and Custody. The board and authority will only make payment for and accept delivery of securities on a delivery versus payment basis, or any other method recognized as standard practice for specific securities in the securities and banking industries, which would include book entry procedures of the Federal Reserve Bank. The delivery of the securities will be made to a third party which may include the Texas State Treasury, Texas State Treasury Safekeeping Trust Company, or a national or state bank.

§365.16. Diversification. The board and the authority will diversify their investment portfolio by both the type of security and financial institution. Neither the board nor the board for the authority shall invest more than 50% of their portfolios in one single security type or with a single financial institution, except for U.S. Government Securities or in the pooled funds of state agencies in the Texas State Treasury.

§365.17. Maximum Maturities.

(a) The board and authority shall attempt to match investments in order to meet all funding requirements necessary to conduct business and to maintain adequate cashflows. Due to the nature of the board's or authority's business, the investment portfolio, other than investments associated with reserve funds, shall not contain investments which mature longer than one- and-a-half years from the date of purchase, with the exception that investments in repurchase agreements may extend up to two years in maturity.

(b) With the prior consent of the board, the board's and authority's reserve funds may be invested in securities that have a maximum maturity of seven years. Such maturities will match as closely as possible the potential use of the funds.

§365.18. Internal Control. The internal auditor annually will review the investment functions and the internal investment controls. The review will be based upon policies and procedures which are put in place by both the investment officer and the internal auditor. In addition, all investment functions will be open for review by the State Auditor. The board shall review the investment policy and strategies listed in this chapter at least annually.

§365.19. Performance Standards. As stated in §365.7 of this title (relating to Objectives and Strategies) the primary objectives of the board's or authority's policy are preservation and safety of principal and liquidity, however the yield or the rate of return on the portfolio will be given special consideration. The investment portfolio shall be designed to attain a rate of return that maintains compliance with federal tax regulations, if market conditions allow, and allows financial programs to continue a self-supporting status.

§365.20. Market Yield, Benchmark. The board will take a buy and hold strategy in most instances. Based upon this strategy, the basis used to determine whether market yields are being achieved will be the six-month U. S. Treasury Bill, provided that the six month yield is not greater than the arbitrage rate for specific bond sales.

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 March 9, 1996.

TRD-9602972 Craig D. Pedersen
Executive Administrator
Texas Water Development Board

Proposed date of adoption: May 16, 1996

For further information, please call: (512) 463-7981

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Investment Procedures

• 31 TAC §§365.21-365.24

(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 Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the authority of the Texas Water Code, §6.101 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, and the Texas Government Code, Chapters 2256 and 2257, which require each State agency to adopt rules necessary to invest funds and relating to collateral for securities.

§365.21. Staff Requirements.

§365.22. Authorized Dealer Requirements.

§365.23. General Provisions.

§365.24. Termination of an Authorized Dealer.

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 March 9, 1996.

TRD-9602974 Craig D. Pedersen
Executive Administrator
Texas Water Development Board

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For further information, please call: (512) 463-7981

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Investment Procedures

• 31 TAC §365.21

The new section is proposed under the authority of the Texas Water Code, §6.101, which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, and the Texas Government Code, Chapters 2256 and 2257, which require each State agency to adopt rules necessary to invest funds and relating to collateral for securities.

§365.21. Reporting. The investment officer will prepare and present to the board not less than quarterly, a report of investment transactions for all funds. The report, at a minimum, will contain all the requirements specified in Texas Government Code, Chapter 2256, §2256.023 of the Public Funds Investment Act. The report will include a summary for each fund which shows the strategy for each fund and which shows book value, market value, maturity date,

yield, and purchase cost of each security.

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

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TRD-9602973 Craig D. Pedersen
Executive Administrator
Texas Water Development Board

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For further information, please call: (512) 463-7981

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Standards for Investments and Reporting of Investments

• 31 TAC §§365.31-365.35

(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 Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the authority of the Texas Water Code, §6.101, which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, and the Texas Government Code, Chapters 2256 and 2257, which require each State agency to adopt rules necessary to invest funds and relating to collateral for securities.

§365.31. Objectives.

§365.32. Designation of Investment Officers.

§365.33. Investment Pool.

§365.34. Management Reporting.

§365.35. Investments.

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 March 9, 1996.

TRD-9602975 Craig D. Pedersen
Executive Administrator
Texas Water Development Board

Proposed date of adoption: May 16, 1996

For further information, please call: (512) 463-7981

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Payment, Delivery, and Deposit of Investments

• 31 TAC §§365.51-365.54

(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 Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the authority of the Texas Water Code, §6.101, which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, and the Texas Government Code, Chapters 2256 and 2257, which require each State agency to adopt rules necessary to invest funds and relating to collateral for securities.

§365.51. Payment of Investments.

§365.52. Delivery of Investments Purchased by the Board.

§365.53. Deposit of Investments.

§365.54. Deposit of Funds.

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 March 9, 1996.

TRD-9602976 Craig D. Pedersen
Executive Administrator
Texas Water Development Board

Proposed date of adoption: May 16, 1996

For further information, please call: (512) 463-7981

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TITLE 34. PUBLIC FINANCE

Part I. Comptroller of Public Accounts

Chapter 3. Tax Administration

Subchapter K. Hotel Occupancy Tax

• 34 TAC §3.161

The Comptroller of Public Accounts proposes an amendment to §3.161, concerning definitions. The purpose of the amendment is to clarify the types of organizations that may qualify for exemption as charitable, educational or religious and to make the definitions in this section consistent with the definitions in Franchise Tax §3.541 and State Sales and Use Tax §3.322.

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 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 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, §156.102.

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

Charitable or eleemosynary organization–**A nonprofit** [An] organization devoting all or substantially all of its **activities** [activity] to the alleviation of poverty, disease, pain, and suffering by providing food[s], **clothing,** drugs, treatment, shelter, [clothing,] or **psychological** counseling **directly to indigent or similarly deserving members of society** [to needy persons] with its funds derived **primarily** [, at least in part,] from sources other than fees or charges for its services. **If the organization engages in any substantial activity other than the activities described in this section, it will not be considered as having been organized for purely public charity, and therefore, will not qualify for exemption under this provision. No part of the net earnings of the organization may inure to the benefit of any private party or individual other than as reasonable compensation for services rendered to the organi-**

zation. Some examples of organizations that do not meet the requirements for exemption under this definition are fraternal [Fraternal] organizations, lodges, fraternities, sororities, service clubs, **veterans groups,** [and the like, even though not organized for profit, are not charitable within the meaning of this rule.] **mutual** [Mutual] benefit or social groups, professional groups, trade or business groups, trade associations, medical associations, chambers of commerce, and similar organizations. **Even** [, even] though not organized for profit and performing services which are often charitable in nature, **these types of organizations do not meet the requirements for exemption under this provision.** [are not charitable organizations within the meaning of this rule.]

Educational organization-A **nonprofit organization or** [permanent regularly organized entity, corporate,] governmental **entity whose activities are** [, or otherwise,] devoted solely to systematic instruction, particularly in the commonly accepted arts, sciences, and vocations, **and has a regularly scheduled curriculum,** [staffed by qualified instructors,] using the commonly accepted methods of teaching, **a faculty of qualified instructors, and an enrolled student body or students in attendance at a place where the educational activities are regularly conducted. An organization that has activities consisting solely of presenting discussion groups, forums, panels, lectures, or other similar programs, may qualify for exemption under this provision, if the presentations provide instruction in the commonly accepted arts, sciences, and vocations. The organization will not be considered for exemption under this provision if the systematic instruction or educational classes are incidental to some other facet of the organization's activities. No part of the net earnings of the organization may inure to the benefit of any private party or individual other than as reasonable compensation for services rendered to the organization. Some examples of organizations that do not meet the requirements for exemption under this definition are professional associations, business leagues, information resource groups, research organizations, support groups, home schools, and organizations that merely disseminate information by distributing printed publications. Entities that are defined in the Education Code, §61. 003, as "institutions of higher education" are recognized for exemption under this provision. Included in the definition of "institutions of higher education" are state and private universities and colleges.** [provided that no part of the net earnings of any such organization inure to the benefit of any shareholder or private person other than as reasonable compensation for services rendered to the institution.]

Religious organization-A **nonprofit organization that is an** [regularly] organized group of people **regularly meeting** [associating] for the **primary** [predominant] purpose **of** [, and actually engaged in, or if new, to engage in,] holding, conducting and sponsoring [, according to rites of their sect,] religious worship **services, according to the rites of their sect. The organization must be able to provide evidence of an established congregation showing that there is an organized group of people regularly attending these services. An** [, without pecuniary benefit (participation in the net earnings) inuring directly or indirectly, to anyone, except as reasonable compensation for services actually rendered to the organization. All salaries paid must be commensurate with services actually rendered. The fact that one of the purposes of an] organization **that supports** [is to support] and **encourages religion as an incidental part of its overall purpose, or one whose general purpose is furthering religious work or instilling its membership with** [encourage religious, or further religious work, or, that its general purpose is concerned with the mutual benefit of its membership, even giving them] a religious understanding, **will not qualify for exemption under this provision.** [is not sufficient to qualify the entity as a religious organization.] **No part of the net earnings of the organization may inure to the benefit of any private party or individual other than as reasonable compensation for services rendered to the organization. Some examples of organizations that do not meet the requirements for exemption under this definition are conventions or associations of churches, evangelistic associations, churches with membership consisting of family members only, missionary organizations, and groups who meet for the purpose of holding prayer meetings, bible study or revivals.**

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 March 8, 1996.

TRD-9603328 Martin Cherry
Chief General Law
Comptroller of Public Accounts

Earliest possible of adoption: April 19, 1996

For further information, please call: (512) 463-4028

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Subchapter V. Franchise Tax

• 34 TAC §3.541

The Comptroller of Public Accounts proposes an amendment to §3.541, concerning exemptions. The proposed changes to this existing rule reflect amendments made by Senate Bills 373 and 644, 74th Legislature, 1995, and also conform the definitions of corporations qualifying for franchise tax exemption as religious, educational, or charitable with existing policy. Added to the corporations qualifying for franchise tax exemption are corporations exempted from federal income tax under the provisions of Internal Revenue Code, §501(c)(8), (10), or (19). An electric cooperative corporation participating in a joint powers agency on or after September 1, 1995, is subject to franchise tax. The franchise tax exemption for a homeowners' association is clarified as confined to residential condominium projects and residential real estate developments. Additionally, the resident owners of a homeowners' association must control at least 51% of the votes of the corporation.

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 clarification of comptroller rules related to franchise tax exemptions. 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 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 Bills 373 and 644, 74th Legislature, 1995.

§3.541. Exemptions.

(a) Application for exemption.

(1) (No change.)

(2) Except as indicated in subsection (e) of this section, each corporation must submit to the comptroller:

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

(C) a copy of the articles of incorporation and, for a foreign corporation, a copy of the application for a certificate of authority; [and]

(D) for a homeowners' association only, a copy of all relevant documents, such as, the bylaws or the declaration, specifying the requirements for membership in the association, the classes of membership and the attendant voting rights for each membership class, the conditions or events, if any, resulting in the termination of a membership class or resulting in the reinstatement of a membership class, and a listing of each lot or unit within the association and the name and address of the owner of that lot or unit; and [any additional information the comptroller may require to make a determination whether the corporation is eligible for a franchise tax exemption.]

(E) any additional information the comptroller may require to make a determination whether the corporation is eligible for a franchise tax exemption.

(b) (No change.)

(c) Qualification for exemption.

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

(3) A nonprofit corporation seeking franchise tax exemption as a religious organization must be an organized group of people regularly meeting for the [purpose of religious worship is an incorporated group of people associating for the] primary purpose of holding, conducting, and sponsoring religious worship services [,] according to the rites of their [the] sect[, religious worship]. The corporation must be able to provide evidence of an established congregation showing that there is an organized group of people regularly attending these services. A corporation that supports and encourages [supporting and encouraging] religion as an incidental part of its overall purpose, or one whose [or an organization with the] general purpose is [of] furthering religious work or instilling its membership with a religious understanding, will [does] not qualify for [a franchise tax] exemption under this provision. No part of the net earnings of the organization may inure to the benefit of any private party or individual other than as reasonable compensation for services rendered to the organization. Some examples of corporations that do not meet the requirements for exemption under this definition are conventions or associations of churches, evangelistic associations, churches with membership consisting of family members only, missionary organizations, and groups who meet for the purpose of holding prayer meetings, bible study or revivals. Although these organizations do not qualify for exemption under this category of exemption as religious organizations, they may qualify for the exemption under the Tax Code, §171. 063, if they obtain an exemption from the Internal Revenue Service (IRS) under Internal Revenue Code, §501(c). [the Tax Code, §171.058, unless all of its other purposes and activities are exempt under other provisions of the Tax Code, Subchapter B, or this section.]

(4) A nonprofit corporation seeking a franchise tax exemption as organized for purely public charity must be devoting all or substantially all of its activities to the alleviation of poverty, disease, pain, and suffering by providing food, clothing, drugs, treatment, shelter, or psychological counseling directly [will be required to supply evidence that the substantial portion of the corporation's activities are devoted to supplying aid and assistance] to indigent or similarly deserving members of society with its funds derived primarily from sources other than fees or charges for its services. If a corporation engages in any substantial activity other than the activities that are described in this section [public charity], it will not be considered as having been organized for purely public charity, and therefore, will not qualify for exemption under this provision. No part of the net earnings of the organization may inure to the benefit of any private party or individual other than as reasonable compensation for services rendered to the organization. Some examples of organizations that do not meet the requirements for exemption under this definition are fraternal organizations, lodges, fraternities, sororities, service clubs, veterans groups, mutual benefit or social groups, professional groups, trade or business groups, trade associations, medical associations, chambers of commerce, and similar organizations. Even though not organized for profit and performing services that are often charitable in nature, these types of organizations do not meet the requirements for exemption under this provision. Although these organizations do not qualify for exemption under this category of exemption as charitable organizations, they may qualify for the exemption under the Tax Code, §171.063, if they obtain an exemption from the IRS under Internal Revenue Code, §501(c). [A corporation also will not be considered as having been organized for purely public charity if the public derives only an indirect benefit from the corporation's activities. A corporation is presumed to satisfy this definition if it devotes substantially all of its activity to the alleviation of poverty, disease, pain, and suffering by providing foods, drugs, treatment, shelter, clothing, or counseling to needy persons with funds derived at least in part from sources other than fees or charges for its services.]

(5) A nonprofit corporation seeking a franchise tax exemption as an educational organization must show that its activities are [on the basis of having been organized for strictly educational purposes must show that it is] devoted solely to systematic instruction, particularly in the commonly accepted arts, sciences, and vocations, and has [with] a regularly scheduled curriculum, using the commonly accepted methods of teaching, a [regular] faculty of qualified instructors, and an [regularly] enrolled student body or students in attendance at a place where the educational activities are regularly conducted. [carried on; or] A corporation that has activities consisting solely of presenting public discussion groups, forums, panels, lectures, or other similar programs, may qualify for exemption under this provision, if the presentations provide instruction in the commonly accepted arts, sciences, and vocations. The [A] corporation will not be considered for exemption under this provision if the systematic instruction or educational classes are [as having been organized for strictly educational purposes if education is] incidental to some other facet of the corporation's activities. No part of the net earnings of the organization may inure to the benefit of any private party or individual other than as reasonable compensation for services rendered to the organization. Some examples of organizations that do not meet the requirements for exemption under this definition are professional associations, business leagues, information resource groups, research organizations, support groups, home schools, and organizations that merely disseminate information by distributing printed publications. Although these organizations do not qualify for exemption under this category of exemption as educational organizations, they may qualify for the exemption under the Tax Code, § 171.063, if they obtain an exemption from the IRS under Internal Revenue Code, §501(c).

(6) A nonprofit corporation requesting franchise tax exemption as a homeowners' association must prove that it meets all requirements to qualify for the exemption. The corporation must show that it is organized and operated to obtain, manage, construct, and maintain the property in or of a residential condominium or residential real estate development. The corporation also must prove that the condominium project, or, for a real estate development, the related property, is legally restricted for use as residences. Furthermore, the corporation must establish that the collective resident owners of individual lots, residences or units control at least 51% of the votes of the corporation and that voting control, however acquired, is not held by: a single individual or family; one or more developers, declarants, banks, investors, or other similar parties. For example, an association is formed for a residential condominium consisting of 12 units with each unit being entitled to one vote. Each of five individuals separately owns and occupies one unit, a

total of five units. A sixth individual owns two units, living in one unit and leasing the other. A seventh individual owns and leases the remaining five units. None of the owners are related. In determining whether the collective resident owners control at least 51% of the votes of the corporation, the sixth owner is a resident owner regarding the one unit in which the owner lives and an investor regarding the other. The collective resident owners, therefore, have a total of six votes. Consequently, since the collective resident owners only have 50% of the votes of the corporation, the association does not meet the requirement that the resident owners must control at least 51% of the votes of the corporation. Accordingly, the corporation does not qualify for the franchise tax exemption as a homeowners' association.

(d) Revocation, **withdrawal, or loss** of exemptions.

(1) (No change.)

(2) For nonprofit corporations granted an exemption under the Tax Code, §171.063, the revocation, **withdrawal, or loss** of the federal income tax exemption will automatically terminate the franchise tax exemption as of the effective date of the revocation, **withdrawal, or loss** of the federal tax exemption. **The effective date of the revocation, withdrawal, or loss of exemption by the Internal Revenue Service is considered the corporation's beginning date for purposes of determining its privilege periods and for all other purposes of the franchise tax. The corporation must notify the comptroller in writing of the revocation, withdrawal or loss of exemption within 30 days of receiving notice from the Internal Revenue Service of such revocation, withdrawal, or loss.**

(3) An electric cooperative corporation previously exempted from franchise tax under the Tax Code, §171.079, that participates in a joint powers agency on or after September 1, 1995, thereby loses its franchise tax exemption. The commencing date of participation in the joint powers agency shall be considered the corporation's beginning date for purposes of determining the corporation's privilege periods and for all other purposes of the franchise tax. The electric cooperative corporation must notify the comptroller in writing that it is a participant in a joint powers agency within 30 days after the commencing date of its participation.

(e) Federal exemption. A corporation **meeting** [that meets] the requirements of any paragraph of this subsection **establishes** [may establish] its exempt status [merely] by furnishing to the comptroller a copy of **a current** [the] exemption letter [which it received] from the Internal Revenue Service.

(1) a nonprofit corporation that has been exempted from the federal income tax under the provisions of the Internal Revenue Code, §501(c)(3), (4), (5), (6), or (7)[, as it existed on January 1, 1975]; or

(2) for reports due on or after January 1, 1988, any corporation that has been exempted under the provisions of the Internal Revenue Code [of 1986], §501(c)(2) **or** [and] (25), if the entity or entities for which it holds title to property are either exempt from or not subject to the franchise tax; **or** [and]

(3) for each annual period that begins on or after June 2, 1989, and for each initial period that on that date has six months or more before expiration and for any second period if the change applies to the initial period, a corporation that is exempted from federal income tax under the Internal Revenue Code [of 1986], §501(c)(16); **and** [.]

(4) for reports due on or after January 1, 1996, a nonprofit corporation that has been exempted from the federal income tax under the provisions of Internal Revenue Code, §501(c)(8), (10), or (19).

(f)-(g) (No change.)

(h) Exemption for recycling operation. A corporation engaged solely in the business of recycling sludge as defined by **Health and Safety Code, Chapter 361, Solid Waste Disposal Act, §361.003, [the Texas Civil Statutes, Article 4477-7, Texas Solid Waste Disposal Act, §2,] is exempt from franchise tax beginning with reports due on or after September 1, 1991.**

(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 March 7, 1996.

TRD-9603301 Martin Cherry
Chief General Law
Comptroller of Public Accounts

Earliest possible of adoption: April 19, 1996

For further information, please call: (512) 463-4028

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• 34 TAC §3.576

The Comptroller of Public Accounts proposes new §3.576, concerning earned surplus: allocation. This new section is the result of new Tax Code, §171.1061.

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 legislation's fiscal note.

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 clarifying comptroller rules related to allocation of income. 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, §171.1061.

§3.576. Earned Surplus: Allocation.

(a) Effective date. This section applies to reports originally due on or after January 1, 1994.

(b) Presumption. All income is presumed to be unitary income. Factors in determining whether income is unitary are: centralization of management, functional integration, and economies of scale. Income may only be allocated when the income is in the nature of an investment, rather than operational.

(c) Allocation.

(1) If it is determined that an item of income is non-unitary, with the exception of dividends and interest, it will be allocated to Texas net of related expenses, rather than apportioned, if Texas is the corporation's commercial domicile.

(2) If it is determined that an item of income is non-unitary and it is allocated, rather than apportioned, but not to Texas because the corporation's commercial domicile is not in Texas, the allocation must be net of related expenses.

(3) Non-unitary income and its related expenses must be excluded in determining apportioned earned surplus.

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 March 7, 1996.

TRD-9603302 Martin Cherry
Chief General Law
Comptroller of Public Accounts

Earliest possible of adoption: April 19, 1996

For further information, please call: (512) 463-4028

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TITLE 37. PUBLIC SAFETY

Part I. Texas Department of Public Safety

Chapter 1. Organization and Administration

Personnel and Employment Policies

• 37 TAC §1.30

The Texas Department of Public Safety proposes an amendment to §1.30, concerning personnel and employment policies. The amendment allows for further screening of applicants by the division chief or his authorized assistant or special section heads before interviews and final selections are made.

Tom Haas, Chief of Finance, has determined that for each year of the first five year period the rule is in effect there will be no fiscal implications as a result of enforcing or administering the rule. There will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Haas 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 clarification of department policy. There is no anticipated cost to persons who are required to comply with the section as proposed. There are no anticipated economic costs to small or large businesses.

Comments on the proposal may be submitted to John C. West, Jr., Chief of Legal Services, Texas Department of Public Safety, Box 4087, Austin, Texas 78773-0001, (512) 424-2890.

The amendment is proposed under Texas Government Code, §411.006(4), which provides the director with the authority to adopt rules, subject to commission approval, considered necessary for the control of the department.

Texas Government Code §411.006(4) is affected by this proposal.

§1.30. Selection of Employees in Headquarters Complex. Except positions where direct appointment is appropriate, applicants for positions in the Austin headquarters complex who are referred by the Personnel Bureau **may be further screened** [will be interviewed] by the division chief or his authorized assistant or special section heads [and final selections will be made at that level]. **Interviews of applicants and final selections will be made at that level.**

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 March 1, 1996.

TRD-9603306 James R. Wilson
Director, Texas Department of Public Safety
Texas Department of Public Safety

Earliest possible date of adoption: April 19, 1996

For further information, please call: (512) 424-2890

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

Part I. Texas Department of Human Services

Chapter 3. Income Assistance Services

The Texas Department of Human Services (DHS) proposes the repeal of §§3. 6001-3.6003; amendments to §§3.301, 3.501, 3.603, 3.902, 3.1104, 3.1801, 3. 1901, 3.3909; and new §§3.2209, and 3.6001-3.6003, regarding new eligibility requirements for the Aid to Families with Dependent Children (AFDC) recipient responsibility agreement, AFDC time limits and related transitional Medicaid and child care benefits, and verification of citizenship, in its Income Assistance Services rule chapter. Subchapter PP, formerly titled "Immunization Requirements" is changed to "Applicability of Policies Resulting from Texas House Bill 1863." The purpose of the amendments, repeals, and new sections is to implement new policies required by Human Resources Code, §§31.0031-31. 0033, 31.0035, and 31.0065. The proposal establishes new requirements that AFDC recipients must comply with in order to become eligible for AFDC and to continue receiving the maximum amount of AFDC financial benefits. The new responsibility agreement requirements are related to school attendance, medical screening, and immunizations for children, abuse of alcohol and illegal drugs, voluntarily quitting employment, employment services, and child support cooperation. The other new policies are related to requiring proof of citizenship, time limits on AFDC benefits, and transitional Medicaid and child care benefits for recipients who exhaust their AFDC eligibility due to the time limits.

Burton F. Raiford, commissioner, has determined that for the first five-year period the proposed sections will be in effect there will be fiscal implications as a result of enforcing or administering the sections. The effect on state government for the first five-year period the sections will be in effect is an estimated additional cost of $783,218 in fiscal year (FY) 1996; $3,799,350 in FY 1997; $4,860,277 in FY 1998; $5,639,022 in FY 1999; and $6, 175,376 in FY 2000. The additional cost is a result of the implementation of the personal responsibility agreement, and policy regarding AFDC-Unemployed Parent and transitional benefits. There will be an estimated reduction in cost for state government for the first five-year period the sections will be in effect in the amounts of $0.00 in FY 1996; $25,497 in FY 1997; $1,334,895 in FY 1998; $3,816,332 in FY 1999; and $5,337,855 in FY 2000. The reduction in costs is a result of the implementation of time-limits and citizenship policies. There will be no effect on local government as a result of enforcing or administering the sections.

Mr. Raiford also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be that the department will be implementing the welfare reform initiative passed by the legislature in House Bill 1863 of the 1995 Regular Session of the 74th Texas Legislature. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed sections.

Questions about the content of the proposal may be directed to Rita King at (512) 438-4148 in DHS's Client Self-Support Services Department. Comments on the proposal may be submitted to Supervisor, Rules Unit, Media and Policy Services-183, Texas Department of Human Services E-205, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

Subchapter C. The Application Process

• 40 TAC §3.301

The amendment is proposed under the Human Resources Code, Title 2, Chapters 22 and 31, which provides the department with the authority to administer public assistance and financial assistance.

The amendment implements the Human Resources Code, §22.001 and §31.003.

§3.301. Responsibilities of Clients and ***the Texas Department of Human Services (DHS)*** *[DHS].*

(a) To apply, clients [the client] must complete the application process. Clients must [This includes]

(1) fill [filling] out and sign an application. Clients must answer the questions on the application before DHS can certify them.

(2) give [giving] the application to DHS. Except for households with all SSI recipients, clients must file their applications at the office DHS designates. Applications may be filed in person, by mail, or through an authorized representative. Clients may file an application anytime during office hours and on the same day they get the form.

(3) participate [participating] in an interview. DHS does not require clients to be interviewed before they file their application.

(4) sign a responsibility agreement as specified in subsection (d) of this section [signing a declaration of citizenship or alien status as required by the Immigration and Control Act of 1986. Clients for whom no signature is received are ineligible].

(5) provide [providing] proof of any eligibility factor specified in Chapter 3 of this title (relating to Income Assistance Services) [some information]. Clients have the primary responsibility for providing proof needed by DHS to determine their eligibility and benefits. DHS allows clients 10 calendar days to provide requested proof.

(b)-(c) (No change.)

(d) Additional client responsibilities are explained by eligibility staff to households as a condition of Aid to Families with Dependent Children (AFDC) eligibility in Texas as specified in paragraphs (1)-(6) of this subsection.

(1) Affected areas. The rules in this section apply to recipients statewide except those designated by DHS as members of the State Welfare Reform Control Group as described in §3.6001 of this title (relating to Applicability of Aid to Families with Dependent Children (AFDC) Policies Resulting from Human Resources Code, §31.0031, Relating to the Personal Responsibility Agreement).

(2) Requirements. DHS requires each adult AFDC recipient, including minor parents applying as a caretaker/second parent, as a condition of eligibility to sign a personal responsibility agreement as specified in Human Resources Code, §31.0031(a). Unless exempted by Human Resources Code, §31.0031(f), regarding unavailability of funding for support services, DHS requires household members to comply with requirements listed in Human Resources Code, §31.0031(d) after the agreement has been signed by an adult recipient, or the household is subject to a penalty as described in paragraph

(5) of this subsection. Additionally, the requirements and penalties related to immunizations specified in Human Resources Code, §31.0031(d)(2) apply to cases in which the adult caretaker relative is not a certified recipient.

(3) Establishing compliance. Compliance with Human Resources Code, §31. 0031(d) is established in the following manner:

(A) Recipients must provide proof of compliance with provisions in Human Resources Code, §31.0031(d)(2), (6), and (7) at each periodic review. DHS accepts the following as proof of compliance:

(i) Human Resources Code, §31.0031(d)(2). For Early and Periodic Screening, Diagnosis, and Treatment (EPSDT), DHS uses a computer match with the Texas Department of Health (TDH); or verification provided by staff of TDH as a backup. For the immunization requirement, DHS accepts immunization records completed by a doctor or other medical professional licensed to perform immunization services indicating that a child's immunizations are current or if not current that the medical provider has established an alternate schedule for the child. DHS also accepts verification of school attendance at a public school in Texas, or proof that a child is current for EPSDT as proof for purposes of meeting the immunization requirement.

(ii) Human Resources Code, §31.0031(d)(6) and (7). DHS accepts written or verbal proof from the school that each household member, unless exempted under Human Resource Code, §31.0031(d)(6) is attending school regularly (as determined by the school).

(B) Recipients are considered to be in compliance related to the sections of the Human Resource Code described in clauses (i)-(iv) of this subparagraph unless noncompliance is determined.

(i) Human Resources Code, §31.0031(d)(4) and (8) unless noncompliance is determined pursuant to §3.1104 of this title (relating to Failure to Comply with the Job Opportunities and Basic Skills (JOBS) Program);

(ii) Human Resources Code, §31.0031(d)(3) unless DHS verifies the recipient voluntarily quit a job;

(iii) Human Resources Code, §31.0031(d)(5) unless DHS determines the recipient has been convicted of any alcohol or drug-related offense under local, state, or federal law in the six-month period preceding periodic review or since the last periodic review; or

(iv) Human Resources Code, §31.0031(d)(1) unless noncompliance is determined pursuant to §3.1801 of this title (relating to Aid to Families with Dependent Children Child Support Requirements).

(4) Failure to sign the agreement. If a member of the household who is required to sign the agreement fails or refuses to sign, the application or case for the entire AFDC household is denied.

(5) Penalties for noncompliance with requirements. Failure to comply results in the penalties specified in subparagraphs (A)-(D) of this paragraph.

(A) Penalty amounts for noncompliance with Human Resources Code, §31.0031(d)(1) and (4). Noncompliance results in a financial penalty of the grant amount equal to the recognizable needs figure of:

(i) a single parent if one adult fails to comply; or

(ii) a caretaker and second parent if two adults are subject to a noncompliance penalty in the same month.

(B) Penalty amounts for noncompliance with each of the remaining requirements specified in Human Resources Code, §31.0031(d). Noncompliance results in a monthly financial penalty of $25 for each separate determination of noncompliance until the penalty has ended, subject to the caps specified in subparagraph (C) of this paragraph.

(C) Penalty caps. The maximum penalty is $75 when three or more penalties as described in subparagraph (B) of this paragraph apply for the same month. If penalties pursuant to subparagraphs (A) and (B) of this paragraph are

applicable for the same month, DHS applies only the penalty or penalties pursuant to subparagraph (A) of this paragraph.

(D) Penalty periods. The penalty for noncompliance with Human Resources Code, §31.0031(d)(4) is imposed for the time period specified in §3.1104 and §3.1105 of this title (relating to Failure to Comply with the Job Opportunities and Basic Skills (JOBS) Program and Establishing Eligibility). The penalty for noncompliance with Human Resources Code, §31.0031(d)(3) is imposed for three consecutive months, or fewer than three months, if the recipient returns to that job or another comparable job, according to the regulations applicable to the Food Stamp Program, as specified in 7 Code of Federal Regulation §273.7(n)(5)(ii), relating to voluntary quit. The penalty for noncompliance with Human Resources Code, §31.0031(d)(5) is imposed for six consecutive months. The penalties for noncompliance with requirements specified in Human Resources Code, §31. 0031(d)(1), (2), (6), (7), and (8) remain in effect until the month after the noncompliance ends. DHS considers noncompliance with these requirements to have ended as specified in:

(i) Human Resources Code, §31.0031(d)(1). DHS is notified by the Title IV-D agency of the parent's compliance with child support requirements.

(ii) Human Resources Code, §31.0031(d)(2). Medical screening for the child is completed, treatments are completed, or the recipient has shown good faith effort because treatments are initiated by the medical provider. Immunizations are current or the recipient has shown good faith effort because an immunization schedule is established by the medical provider.

(iii) Human Resources Code, §31.0031(d)(6) and (7). The recipient has shown a good faith effort because he or she provides verification from the school that the required student has attended school without an unexcused absence (as determined by the school) for one calendar month.

(iv) Human Resources Code, §31.0031(8). The trainer notifies DHS that the noncomplying recipient has shown a good faith effort by attending parenting skills training classes for a one-week period with no unexcused absences (as determined by the trainer).

(E) Delayed penalties. If a particular penalty cannot be imposed initially due to the penalty cap explained in subparagraph (C) of this paragraph, it will be imposed later during the penalty period if the removal of another penalty makes it possible to do so without exceeding the penalty cap. For purposes of counting months of penalty pursuant to Human Resources Code, §31.0031(d)(3) and (5), a month in which a penalty is applicable counts even if the penalty cannot be imposed because of the penalty cap specified in subparagraph (C) of this paragraph.

(6) Good cause. Good cause for noncompliance as specified in Human Resources Code, §31.0033 is established for the requirements listed in Human Resources Code, §31.0031(d) as explained in the following subparagraphs.

(A) Human Resources Code, §31. 0033(d)(1). Good cause is established as specified in 45 Code of Federal Regulations (CFR) §§232.40-232.47, regarding child support.

(B) Human Resources Code, §31.0033(d)(2). Good cause is established for recipients who are exempt under the provisions in Health and Safety Code, §161.004(d), regarding immunizations.

(C) Human Resources Code, §31.0033(d)(3). Good cause is established according to the regulations applicable to the Food Stamp Program as specified in 7 CFR §273.7(n)(3), regarding voluntary quit.

(D) Human Resources Code, §31.0031(d)(4). Good cause is established as specified in 45 CFR §250.35 and Human Resources Code, §31.0031(f), regarding employment education and training activities.

(E) Human Resources Code, §31.0031(d)(5). Good cause cannot be established for this requirement.

(F) Human Resources Code, §31. 0031(d)(6) and (7). Good cause is established as specified in Human Resources Code, §31.0031(f) regarding lack of funding for support services. Regarding child care or day care, good cause is established if child care for a child under the age of 12 years (or day care for any incapacitated individual) living in the same home as the recipient is necessary for an individual to attend school, and such care is not available and outside funding is not available to provide such care. If there is another responsible household member in the home who can provide such care, good cause does not apply. Good cause is also established if a student is expelled from school and the school system verifies it does not offer an alternative educational program.

(G) Human Resources Code, §31.0031(d)(8). Good cause is established as specified in 45 CFR §250.35 and Human Resources Code, §31. 0031(f), regarding parenting skills training.

(H) Good cause noncompliance hearings. As required by the Human Resources Code, §31. 0033, if the recipient claims good cause during the 13-day period after notice of adverse action concerning the noncompliance penalty is sent, DHS either makes a determination on the claim before the 13-day period expires or files the claim as a fair hearing pursuant to DHS's rules.

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 March 8, 1996.

TRD-9603355 Glenn Scott
General Counsel, Legal Division
Texas Department of Human Services

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For further information, please call: (512) 438-3765

Subchapter E. Household Determination

• 40 TAC §3.501

The amendment is proposed under the Human Resources Code, Title 2, Chapters 22 and 31, which provides the department with the authority to administer public assistance and financial assistance programs.

The amendment implements the Human Resources Code, §22.001 and §31.003.

*§3.501. **Aid to Families with Dependent Children (AFDC)** [AFDC] and Food Stamp Household Determination.*

(a) (No change.)

(b) Aid to Families with Dependent Children. The following persons are not included in an AFDC certified group:

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

(3) Disqualified persons. [DHS does not include the needs of persons disqualified because they are found guilty of an intentional program violation, do not meet citizenship requirements, refuse to cooperate with child support requirements, or refuse to comply with work registration or social security number requirements.]

(A) Persons are disqualified because they:

(i) **are found guilty of an intentional program violation;**

(ii) **do not meet citizenship requirements;**

(iii) **fail to cooperate with child support requirements;**

(iv) **fail to comply with employment services, social security number, or third-party resources (TPR) requirements; or**

(v) **are caretakers and second parents (except for those who are members of the state welfare reform waiver control group as described in §3.6002 of this title (relating to Applicability of Aid to Families with Dependent Children (AFDC) Policies Resulting from Human Resources Code §31.0065, Relating to Time-Limits) who have exhausted their time limits of 12, 24, or 36 months, assigned according to the guidelines in Human Resources Code §31.0065 for receiving AFDC cash benefits.**

(B) Once time limits are exhausted, the caretakers and second parents are not eligible to receive AFDC cash benefits for five years, unless they meet one of the criteria for severe personal hardship or local economic hardship.

(C) A person disqualified after exhausting his AFDC time limits pursuant to this subsection may reestablish eligibility by:

(i) **making application before the five-year period of ineligibility has expired and providing verification that they meet the criteria for severe personal hardship or local economic hardship; or**

(ii) **making application after five complete years of disqualification or nonparticipation in the AFDC program, except for participation pursuant to clause (i) of this subparagraph.**

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

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

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

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TRD-9603356 Glenn Scott
General Counsel, Legal Services
Texas Department of Human Services

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For further information, please call: (512) 438-3765

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Subchapter F. Citizenship

• 40 TAC §3.603

The amendment is proposed under the Human Resources Code, Title 2, Chapters 22 and 31, which provides the department with the authority to administer public assistance and financial assistance programs.

The amendment implements the Human Resources Code, §22.001 and §31.003.

§3.603. Disqualification because Verification of [Questionable] Citizenship Is Pending.

(a) Aid to Families with Dependent Children.

(1) An applicant must not be certified for benefits until proof of citizenship is received, unless good cause exists. The Texas Department of Human Services (DHS) obtains proof for persons born in Texas through an automated inquiry process with the Texas Bureau of Vital Statistics when possible. If good cause exists at application, the person is certified and must provide proof by the next periodic review or be disqualified until proof is provided.

(2) Good cause exists if the person has a reasonable explanation for being unable to provide proof, as determined by DHS.

(b) Food stamps.

(1)[(a)] A person with a questionable citizenship claim must not be certified for benefits until proof of citizenship is received.

(2)[(b) Food stamps.] DHS disqualifies a person with a questionable claim and counts the disqualified person's pro rata share of income and all resources as household income and resources.

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 March 8, 1996.

TRD-9603357 Glenn Scott
General Counsel, Legal Services
Texas Department of Human Services

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For further information, please call: (512) 438-3765

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Subchapter I. Income

• 40 TAC §3.902

The amendment is proposed under the Human Resources Code, Title 2, Chapters 22 and 31, which provides the department with the authority to administer public assistance and financial assistance programs.

The amendment implements the Human Resources Code, §22.001 and §31.003.

§3.902. Types.

(a) Aid to Families with **Dependent Children** [dependent children]. The Texas Department of Human Services (DHS) counts the following as income:

(1)-(16) (No change.)

(17) disqualified legal parent. DHS counts the income of a [disqualified] legal parent **disqualified for noncompliance with social security number requirements, third party resource requirements, intentional program violations, child support requirements, or employment services requirements using regular budgeting policy and allowing an exclusion for diverted income**

only as specified in subsection (b)(1) of this section. DHS counts the income of a parent(s) disqualified because of alien status as specified in 45 Code of Federal Regulation (CFR) §233.50(c), citizenship requirements as specified in §3.603(a) of this title (relating to Disqualification because Verification of Citizenship Is Pending), or exhaustion of time limits as specified in §3.501(b)(3) of this title (relating to Aid to Families with Dependent Children (AFDC) and Food Stamp Household Determination). The income of such a parent is counted as specified in 45 CFR 233.20(a)(3)(B)(vi).

(18)-(29) (No change.)

(b)-(d) (No change.)

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

Issued in Austin, Texas, on March 8, 1996.

TRD-9603358 Glenn Scott
General Counsel, Legal Services
Texas Department of Human Services

Earliest possible date of adoption: April 19, 1996

For further information, please call: (512) 438-3765

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Subchapter K. Employment Services

• 40 §3.1104

The amendment is proposed under the Human Resources Code, Title 2, Chapters 22 and 31 which provides the department with the authority to administer public assistance and financial assistance programs.

The amendment implements the Human Resources Code, §22.001 and §31.003.

§3.1104. Failure to Comply ***with the Job Opportunities and Basic Skills (JOBS) Program.***

(a) An Aid to Families with Dependent Children (AFDC) client **who is a member of the state welfare reform control group or is certified for AFDC as a child and** who does not comply with a Job Opportunities and Basic Skills (JOBS) requirement and cannot establish good cause:

(1) is sanctioned as stipulated in 45 Code of Federal Regulations §250.34 if nonexempt, and

(2) loses priority to participate as stipulated in 45 Code of Federal Regulations §250.31(b)(1) if exempt.

(b) Penalties for other recipients are described in §3.301(d)(4) of this title (relating to Responsibilities of Clients and the Texas Department of Human Services (DHS)).

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 March 8, 1996.

TRD-9603359 Glenn Scott
General Counsel, Legal Services
Texas Department of Human Services

Earliest possible date of adoption: April 19, 1996

For further information, please call: (512) 438-3765

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Subchapter R. Child Support

• 40 TAC §3.1801

The amendment is proposed under the Human Resources Code, Title 2, Chapters 22 and 31, which provides the department with the authority to administer public assistance and financial assistance programs.

The amendment implements the Human Resources Code §22.001 and §31.003.

§3.1801. ***Aid to Families with Dependent Children Child Support*** *Requirements.* **The Texas Department of Human Services (DHS)** [DHS] adheres to the requirements and procedures as stipulated in [the following sections of] 45 Code of Federal Regulations §§232.11-232.20; 232. 40-232.47; and 232.49 **with the following exception related to penalties for noncompliance. In regard to recipients subject to the requirements specified in §3.301(d) of this title (relating to Responsibilities of Clients and the Texas Department of Human Services (DHS)), DHS applies a noncompliance penalty as specified in 3.301(d)(5)(A) of this title (relating to Responsibilities of Clients and the Texas Department of Human Services (DHS)).**

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 March 8, 1996.

TRD-9603360 Glenn Scott
General Counsel, Legal Division
Texas Department of Human Services

Earliest possible date of adoption: April 19, 1996

For further information, please call: (512) 438-3765

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Subchapter S. School Attendance

• 40 TAC §3.1901

The amendment is are proposed under the Human Resources Code, Title 2, Chapters 22 and 31, which provides the department with the authority to administer public assistance and financial assistance programs.

The amendment implements the Human Resources Code, §22.001 and §31.003.

§3.1901. Aid to Families with Dependent Children ***(AFDC)*** *School Attendance Requirements.* **AFDC** [Aid to Families with Dependent Children] clients must meet school attendance requirements as stipulated in 45 Code of Federal Regulations §233.90(b)(2) and (3). **Children with disabilities** [Handicapped children] may attend fewer hours than other students or receive instructions from a visiting teacher at home. **Additionally, clients must comply with school attendance requirements specified in §3.301(d) of this title (relating to Responsibilities of Clients and the Texas Department of Human Services (DHS)).**

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 March 8, 1996.

TRD-9603361 Glenn Scott
General Counsel, Legal Services
Texas Department of Human Services

Earliest possible date of adoption: April 19, 1996

For further information, please call: (512) 438-3765

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Subchapter V. Medicaid Eligibility

• 40 TAC §3.2209

The new section is proposed under the Human Resources Code, Title 2, Chapters 22 and 31 which provides the department with the authority to administer public and financial assistance programs.

The new section implements the Human Resources Code, §22.001 and §31. 003.

§3.2209. Type Program 29 Medicaid. Aid to Families with Dependent Children (AFDC) caretakers and second parents who are denied AFDC because of time-limited cash benefits described in §3.501(a)(3) of this title (relating to Aid to Families with Dependent Children (AFDC) and Food Stamp Household Determination) are eligible for 12 months post-Medicaid. AFDC caretakers and second parents who volunteer for Job Opportunities and Basic Skills Training Program (JOBS) services when they are exempt from participating because they are caring for a child under age five (under age four beginning September 1, 1997), or because they are needed in the home to care for an ill or incapacitated child, are eligible for 18 months post-Medicaid after their time-limited cash benefits are denied.

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 March 8, 1996.

TRD-9603362 Glenn Scott
General Counsel, Legal Services
Texas Department of Human Services

Earliest possible date of adoption: April 19, 1996

For further information, please call: (512) 438-3765

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Subchapter MM. Aid to Families with Dependent Children - Unemployed Parent Program

- **40 TAC §3.3909**

The amendment is proposed under the Human Resources Code, Title 2, Chapters 22 and 31, which provides the department with the authority to administer public assistance and financial assistance programs.

The amendment implements the Human Resources Code, §22.001 and §31.003.

*§3.3909. Failure to Comply with **Job Opportunities and Basic Skills (JOBS) [JOBS] Program.*** **Aid to Families with Dependent Children-Unemployed Parents (AFDC-UP)** [AFDC-UP] clients **who are members of the State Welfare Reform Control Group or who are certified for AFDC as a child and** who do not comply with a JOBS requirement and cannot establish good cause are sanctioned as stipulated in 45 Code of Federal Regulations §§250.34(a)(1) and 250.34(c)(2). This sanction can continue into the **Medical Assistance Only (MAO)** [MAO] period. Clients reestablish eligibility for AFDC-UP or AFDC-UP MAO according to procedures specified in §3.1105 of this title (relating to Reestablishing Eligibility).

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 March 8, 1996.

TRD-9603363 Glenn Scott
General Counsel, Legal Services
Texas Department of Human Services

Earliest possible date of adoption: April 19, 1996

For further information, please call: (512) 438-3765

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Subchapter PP. Immunization Requirements

- **40 TAC §§3.6001-3.6003**

(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 Human Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Human Resources Code, Title 2, Chapters 22 and 31, which provides the department with the authority to administer public assistance and financial assistance programs.

The repeals implement the Human Resources Code, §22.001 and §31.003.

§3.6001. Immunization Requirements.

§3.6002. Sanction for Noncompliance with Immunization Requirements.

§3.6003. Good Cause.

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 March 8, 1996.

TRD-9603364 Glenn Scott
General Counsel, Legal Division
Texas Department of Human Services

Earliest possible date of adoption: April 19, 1996

For further information, please call: (512) 438-3765

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Subchapter PP. Applicability of Policies Resulting from Texas House Bill 1863

- **40 TAC §§3.6001-3.6003**

The new sections are proposed under the Human Resources Code, Title 2, Chapters 22 and 31 which provides the department with the authority to administer public assistance and financial assistance programs.

The new sections implement the Human Resources Code, §22.001 and §31. 003.

§3.6001. Applicability of Aid to Families with Dependent Children (AFDC) Policies Resulting from Human Resources Code, §31.0031, Relating to the Personal Responsibility Agreement.

(a) Identifying cases to whom policies apply. The requirements and penalties specified in Human Resources Code, §31.0031(d) apply to all AFDC cases statewide except cases identified as belonging to the State Welfare Reform Control Group in this subchapter.

(b) Control group and non-control group. The State Welfare Reform Control Group includes individuals identified by the Texas Department of Human Services (DHS) whose AFDC eligibility and benefits will continue to be determined by DHS according to federal regulations and DHS rules other than rules resulting from Human Resources Code, §31.0031(d). This group consists of recipients who are identified by the last Social Security Number digits 3, 4, 5, 8, or 9 of the household member selected based on a statistically valid hierarchy process in offices and/or counties selected by DHS approved by the Department of Health and Human Services (DHHS). After recipients are identified as members of the control group or non-control group, they remain in that group even if the household moves to another area. All clients not identified as members of the control group are considered members of the non-control group.

(c) Changes that result from adding household members. If a client who has been identified as a control group client pursuant to subsection (b) of this section is added to a case identified as a non-control group case pursuant to this section or §3.6002 of this title (relating to Applicability of Aid to Families with Dependent Children (AFDC) Policies Resulting from Human Resources Code, §31.0065, Relating to Time-Limits) or §3.6003 of this title (relating to Applicability of Aid to Families with Dependent Children (AFDC) Policies Resulting from Human Resources Code, §31.0035, Relating to Transitional Benefits), all the clients on the case are then

considered non-control group clients in this subchapter. This is also the result if a person identified as a non-control group member pursuant to this section, §3.6002 of this title (relating to Applicability of Aid to Families with Dependent Children (AFDC) Policies Resulting from Human Resources Code, §31.0065, Relating to Time-Limits) or §3.6003 of this title (relating to Applicability of Aid to Families with Dependent Children (AFDC) Policies Resulting from Human Resources Code, §31. 0035, Relating to Transitional Benefits), is added to a case identified as a control group case pursuant to this section.

§3.6002. Applicability of Aid to Families with Dependent Children (AFDC) Policies Resulting from Human Resources Code, §31.0065, Relating to Time-Limits.

(a) Time limits. The time-limitation policies specified in Human Resources Code, §31.0065 apply to all AFDC cases in areas designated by the Texas Department of Human Services (DHS), except cases identified as belonging to the State Welfare Reform Control Group for this subchapter. For purposes of applying AFDC time limits, DHS designates only counties in which support services are available as required by the Human Resources Code, §31.0065(a).

(b) Control group for time-limits. The control group for this purpose includes individuals identified by DHS whose AFDC eligibility and benefits will continue to be determined by DHS according to federal regulations and DHS rules other than rules resulting from Human Resources Code, §31.0065. This group consists of current recipients who are identified by the last Social Security Number digits 3,4, 5, 8, or 9 of the household member selected based on a statistically valid hierarchy process in offices and/or counties selected by DHS and approved by the federal Department of Health and Human Services (DHHS). All clients not identified as members of the control group are considered as members of the non-control group. After recipients are identified as members of the control group or non-control group, they remain in that group even if the household moves to another county.

(c) Changes that result from adding household members. If a client who has been identified as a control group client pursuant to subsection (b) of this section is added to a case identified as a non-control group case pursuant to this section or §3.6001 of this title (relating to Applicability of Aid to Families with Dependent Children (AFDC) Policies Resulting from Human Resources Code, §31.0031, Relating to the Personal Responsibility Agreement) or §3.6003 of this title (relating to Applicability of Aid to Families with Dependent Children (AFDC) Policies Resulting from Human Resources Code, §31.0035, Relating to Transitional Benefits) all the clients on the case are then considered non-control group clients for this subchapter. This is also the result if a person identified as a non-control group member pursuant to this section or §3.6001 of this title (relating to Applicability of Aid to Families with Dependent Children (AFDC) Policies Resulting from Human Resources Code, §31.0031, Relating to the Personal Responsibility Agreement) or §3.6003 of this title (relating to Applicability of Aid to Families with Dependent Children. (AFDC) Policies Resulting from Human Resources Code, §31.0035, Relating to Transitional Benefits) is added to a case identified as a control group case pursuant to this section.

§3.6003. Applicability of Aid to Families with Dependent Children (AFDC) Policies Resulting from Human Resources Code, §31.0035, Relating to Transitional Benefits.

(a) Transitional benefits. The transitional policies specified in Human Resources Code, §31.0035 apply to all cases in areas designated by the Texas Department of Human Services (DHS), except cases identified as belonging to the State Welfare Reform Control Group identified in this subchapter.

(b) Control group for transitional benefits. The control group for this purpose includes individuals identified by DHS whose transitional benefits will continue to be determined by DHS according to federal regulations and DHS rules other than rules resulting from Human Resources Code, §31.0035. This group consists of recipients who belong to the control group specified in §3.6002(b) of this title (relating to Applicability of Aid to Families with Dependent Children (AFDC) Policies Resulting from Human Resources Code, §31.0065, Relating to Time-Limits) and who are therefore not time-limited on AFDC cash benefits. All clients not identified as members of the control group are considered as members of the non-control group. After recipients are identified as members of the control group or non-control group, they remain in that group even if the household moves to another county.

(c) Changes that result from adding household members. If a client who has been identified as a control group client pursuant to subsection (b) of this section is added to a case identified as a non-control group case pursuant to this section or §3.6001 of this title (relating to Applicability of Aid to Families with Dependent Children (AFDC) Policies Resulting from Human Resources Code, §31.0031, Relating to the Personal Responsibility Agreement) or §3.6002 of this title (relating to Applicability of Aid to Families with Dependent Children (AFDC) Policies Resulting from Human Resources Code, §31.0065, Relating to Time-Limits) all the clients on the case are then considered non- control group clients for this subchapter. This is also the result if a person identified as a non-control group member pursuant to this section or §3.6001 of this title (relating to Applicability of Aid to Families with Dependent Children (AFDC) Policies Resulting from Human Resources Code, §31.0031, Relating to the Personal Responsibility Agreement or §3.6002 of this title (relating to Applicability of Aid to Families with Dependent Children (AFDC) Policies Resulting from Human Resources Code, §31.0065, Relating to Time-Limits) is added to a case identified as a control group case pursuant to this section.

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 March 8, 1996.

TRD-9603365 Glenn Scott
General Counsel, Legal Services
Texas Department of Human Services

Earliest possible date of adoption: April 19, 1996

For further information, please call: (512) 438-3765

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Subchapter 4. Medicaid Programs-Children and Pregnant Women

Eligibility Requirements

• 40 TAC §4.1010

The Texas Department of Human Services (DHS) proposes an amendment to §4.1010, concerning determining income eligibility, in its Medicaid Programs-Children and Pregnant Women rule chapter. The purpose of the amendment is to exercise an option under the Social Security Act that allows states the choice to use less restrictive income and resource methods than those used under the most closely related cash assistance programs. DHS proposes to exercise the option to allow a less restrictive income method of determining Medicaid eligibility for children and is amending rules and the Medicaid State Plan to reflect this change.

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

Mr. Raiford 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 eligibility determination process

will be streamlined, which will improve staff productivity. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Questions about the content of the proposal may be directed to Rita King at (512) 438-4148 in DHS's Client Self-Support Services Section. Comments on the proposal may be submitted to Supervisor, Rules Unit, Media and Policy Services-195, Texas Department of Human Services E-205, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

The amendment is proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which provides the department with the authority to administer public and medical assistance programs and under Texas Government Code, §531. 021, which provides the Health and Human Service Commission with the authority to administer federal medical assistance funds.

The amendment implements the Human Resources Code, §§22.001-22.024 and §§32.001-32.042.

§4.1010. Determining Income Eligibility. Income eligibility is determined using the **Aid to Families with Dependent Children (AFDC)** [AFDC] eligibility requirements outlined in the AFDC rules with the following exceptions:

(1)-(9) (No change.)

(10) The 185% income test is not applied to type programs 46 and 47.

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 March 5, 1996.

TRD-9603112 Glenn Scott
General Counsel, Legal Services
Texas Department of Human Services

Earliest possible date of adoption: April 19, 1996

For further information, please call: (512) 438-3765

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Chapter 15. Medicaid Eligibility

The Texas Department of Human Services (DHS) proposes the repeal of §15. 453; new §15.453 and §15.454; and an amendment to §15.475; concerning wage-related exemptions, reduction of pension and benefit checks for recoupment of overpayments, and deeming of income, in its Medicaid Eligibility rule chapter. The purpose of the repeals is to correct an error in the section numbering. Section 15.543 was assigned to two separate sections. DHS is repealing both of these sections and proposing them as new §15.453, Wage-related Exemptions, and §15.454, Reduction of Pension and Benefit Checks for Recoupment of Overpayments. The purpose of the amendment is to include in the rules that DHS does not deem income or resources from an alien's sponsor in its long term care Medicaid programs.

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

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

Questions about the content of the proposal may be directed to Judy Coker at (512) 438-3227 in DHS's Long Term Care Division. Comments on the proposal may be submitted to Supervisor, Rules Unit, Media and Policy Services-190, Texas Department of Human Services E-205, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

Subchapter E. Income

• 40 TAC §15.453

(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 Department of Human Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which provides the department with the authority to administer public and medical assistance programs and under Texas Government Code §531. 021, which provides the Health and Human Services Commission with the authority to administer federal medical assistance funds.

The repeal implements the Human Resources Code §§22.001-22.024 and §§32. 001-32.042.

§15.453. Wage-related Exemptions.

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 March 11, 1996.

TRD-9603410 Glenn Scott
General Counsel, Legal Services
Texas Department of Human Services

Proposed date of adoption: May 1, 1996

For further information, please call: (512) 438-3765

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• 40 TAC §§15.543, 15.454, 15.475

The new sections and amendment are proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which provides the department with the authority to administer public and medical assistance programs and under Texas Government Code, §531.021, which provides the Health and Human Services Commission with the authority to administer federal medical assistance funds.

The amendment and new sections implement the Human Resources Code, §§22. 001-22.024 and §§32.001-32.042.

§15.453. Wage-related Exemptions.

(a) Cafeteria Plans.

(1) Salary reductions to purchase qualified benefits under a cafeteria plan are not part of the employee's wages and are not income for eligibility or applied income purposes.

(2) Payroll deductions used to purchase cafeteria plan benefits in addition to or instead of those purchased under a salary reduction agreement are part of the employee's wages and are counted as earned income.

(3) A cafeteria plan is a written benefit plan offered by an employer in which all participants are employees and can choose, cafeteria-style, from a menu of qualified benefits. A qualified benefit is a benefit that the Internal Revenue Service (IRS), by express provision of Section 125 of Chapter 1 of the Internal Revenue Code (IRC) or IRS regulations, does not consider part of an employee's gross income. Qualified benefits include, but are not limited to:

(A) accident and health plans (including medical plans, vision plans, dental plans, accident and disability insurance);

(B) group term life insurance plans (up to $50,000);

(C) dependent care assistance plans; and

(D) certain profit-sharing or stock bonus plans under

section 401(k)(2) of the IRC. IRS does not exclude from income salary reductions made under 401(k)(1) plans. Salary reductions to fund benefits under 401(k)(1) are counted as wages for eligibility and applied income purpose.

(4) Cash is not a qualified benefit.

(5) A salary reduction agreement is an agreement between employer and employee whereby the employee, in exchange for the right to participate in a cafeteria plan, accepts a lower salary or forgoes a salary increase.

(b) Employer-paid Taxes. When an employer pays an employee's share of social security or Federal Insurance Contribution Act (FICA) or unemployment compensation taxes without making a reduction in the employee's wages, the amount the employer pays is countable income. There are two exceptions:

(1) when the employee is in domestic service in the employer's home; and

(2) for agricultural labor only.

§15.454. Reduction of Pension and Benefit Checks for Recoupment of Overpayments. When pension or benefit checks are reduced because of recovery of overpayments, the following guidelines apply:

(1) For all overpayments except Retirement, Survivors, and Disability Insurance (RSDI).

(A) If the client was receiving Supplemental Security Income (SSI) or Medical Assistance Only (MAO) at the time of overpayment, disregard as income the amount being recovered. Count the net amount of the benefit (for example, the gross benefit minus the amount being recouped) for eligibility and applied income purposes.

(B) If the client was not receiving SSI or MAO at the time of overpayment, the recovered amount is still countable income. Count the gross amount of the benefit for eligibility and applied income purposes.

(2) For RSDI overpayments.

(A) If there was an overpayment of Social Security (RSDI or Title II) benefits, the recoupment is not voluntary. Count the net amount of the RSDI benefit (for example, the gross RSDI minus the amount being recouped) for eligibility and applied income purposes.

(B) If there was an overpayment of Supplemental Security Income (SSI or Title XVI) benefits, the recoupment is voluntary. Determine if the client signed the voluntary agreement for recoupment. If there is a signed agreement, count the gross RSDI for eligibility and applied income purposes. (If there is no signed agreement, there should be no recoupment from RSDI benefits.) The eligibility specialist should explain to the client that he is responsible for paying the full applied income amount, the adverse effect of agreeing to the RSDI benefit reduction, and that he may elect to revoke such an agreement.

§15.475. Deeming of Income.

(a) (No change.)

(b) The following exceptions apply to deeming of income:

(1)-(9) (No change.)

(10) DHS does not deem income from an alien's sponsor.

(c) (No change.)

(d) Federal regulations require states to provide Medicaid benefits to aliens ineligible for the Supplemental Security Income (SSI) program because of deeming of income and/or resources from their sponsors. Deeming from sponsors does not apply in the Medicaid program. The clients must meet all other eligibility criteria for SSI.

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 March 11, 1996.

TRD-9603412 Glenn Scott
General Counsel, Legal Services
Texas Department of Human Services

Proposed date of adoption: May 1, 1996

For further information, please call: (512) 438-3765

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Chapter 19. Nursing Facility Requirements for Licensure and Medicaid Certification

Subchapter S. Reimbursement Methodology for Nursing Facilities

• 40 TAC §19.1807

The Texas Department of Human Services (DHS) proposes an amendment to§19.1807, concerning rate setting methodology, in its Nursing Facility Requirements for Licensure and Medicaid Certification chapter. The purpose of the amendment is to allow additional nursing facility Medicaid recipients to participate in the ventilator-dependent supplemental reimbursement. The amendment will reimburse facilities for recipients who require less than continuous ventilation. Supplemental reimbursements currently are limited to residents who qualify for the Texas Index for Level of Effort (TILE) heavy-care case mix classification and require continuous artificial ventilation in order to sustain life. This amendment will allow residents in any TILE classification to participate if they receive at least six consecutive hours of ventilation daily. Individuals requiring six consecutive hours or more but less than continuous ventilation will be eligible to receive 40% of the total ventilator-dependent supplemental reimbursement.

Burton F. Raiford, commissioner, has determined that for the first five-year period the proposed section will be in effect there will be fiscal implications for state government as a result of enforcing or administering the section. The effect on state government for the first five-year period the section will be in effect is an estimated additional cost of $21,612 in fiscal year (FY) 1996; $32,112 in FY 1997; $32,112 in FY 1998; $32,112 in FY 1999; and $32,200 in FY 2000.

Mr. Raiford 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 include more residents who are not currently eligible for the ventilator reimbursement supplement. There will be no effect on small businesses as a result of enforcing or administering the section. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Questions about the content of this proposal may be directed to Geri Bischoff at (512) 438-3171 in DHS's Long Term Care Policy Section. Written comments on the proposal may be submitted to Supervisor, Rules Unit, Media and Policy Services-187, *Texas Department* of Human Services E-205, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register.*

The amendment is proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department to administer public and medical assistance programs, and under Texas Government Code, §531.021, which provides the Health and Human Services Commission with the authority to administer federal medical assistance funds.

The amendment implements the Human Resources Code, §§22.001-22.024 and §§32.001-32.042.

§19.1807. Rate Setting Methodology.

(a) (No change.)

(b) Rate determination. The Texas Board of Human Services determines general reimbursement rates for medical assistance programs for Medicaid recipients under provisions of the Human Resources Code, Chapter 24 (relating to Reimbursement Methodology). The Texas Board of Human Services determines reimbursement rates for nursing facilities based on consideration of Texas Department of Human Services (DHS) staff recommendations. To develop reimbursement rate recommendations for nursing facilities, DHS staff apply the following procedures.

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

(3) Per diem rate methodology. Staff determine per diem rate recommendations for each of the 11 TILE groups and for the default group according to the following procedures:

(A)-(E) (No change.)

(F) Supplemental reimbursement for ventilator-dependent residents. Qualifying residents receive a supplement to the per diem rate specified in paragraph (3)(E) of this subsection.

(i) To qualify for supplemental reimbursement, a resident must[:] **require artificial ventilation for at least six consecutive hours daily and the use must be prescribed by a licensed physician.**

[(I) qualify for the TILE heavy-care case mix classification, as described in paragraph (5) of this subsection, and

[(II) require continuous artificial ventilation in order to sustain life, as certified by a licensed physician.]

(ii) A ventilator-dependent resource differential case mix index is calculated, based on time-study research data. This resource differential index reflects the difference between direct nursing services for ventilator-dependent residents and services for residents in the most severe heavy-care TILE group. The per diem rate supplement is calculated by multiplying the resource differential case mix index times the per diem average recipient care rate component, as described in paragraph (3)(C) of this subsection.

(I) The supplemental reimbursement for residents requiring continuous artificial ventilation is 100% of the per diem ventilator rate supplement.

(II) The supplemental reimbursement for residents not requiring continuous artificial ventilation daily but requiring artificial ventilation for at least six consecutive hours daily is 40% of the per diem ventilator rate supplement.

(4)-(5) (No change.)

(c)-(e) (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 March 5, 1996.

TRD-9603113 Glenn Scott
General Counsel, Legal Services
Texas Department of Human Services

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For further information, please call: (512) 438-3765

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Part III. Texas Commission on Alcohol and Drug Abuse

Chapter 144. Funding Requirements

Subchapter C. Fiscal

- **40 TAC §§144.211-144.215, 144.221-144.227, 144.231-144. 233, 144.235-144.239, 144.241-144.245, 144.251-144.256, 144.261-144.265, 144. 271, and 144.281-144.283**

The Texas Commission on Alcohol and Drug Abuse proposes new §§144. 211-144.215, 144.221-144.227, 144.231-144.233, 144.235-144.239, 144.241-144. 245, 144.251-144.256, 144.261-144.265, 144.271, and 144.281-144.283, concerning fiscal requirements for providers funded by the commission. The new sections are being proposed to establish minimum criteria for fiscal practices, including financial management; accounting systems; internal controls; budget controls; cost allocation plan; payments; cash management; matching; program income; award revisions; allowable costs; costs requiring prior approval; unallowable costs; double billing; minor remodeling, financial documentation; use of property; procurement; subcontracting; termination; and refunds.

Sharon F. Logan, Interim Executive Director, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing the sections.

Ms. Logan 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 sound financial management by providers and more effective use of public dollars. There will be no effect on small businesses. There are no anticipated economic costs to currently funded providers who are required to comply with the sections as proposed, because these requirements are already included in the contract. Cost of compliance for future providers will vary, depending on each organizations structure and operations.

Comments on the proposal may be submitted to Tamara Allen, Program Compliance, Texas Commission on Alcohol and Drug Abuse, 710 Brazos Street, Austin, Texas 78701.

The new sections are proposed under the Texas Health and Safety Code, §461.012(15), which provides the Texas Commission on Alcohol and Drug Abuse with the authority to adopt rules governing the functions of the commission, including rules that prescribe the policies and procedures followed by the commission in administering any commission programs.

The code affected by the proposed new sections is the Texas Health and Safety Code, Chapter 461.

§144.211. General Principles.

(a) Providers who have multiple awards and funding sources shall ensure that program activities and costs are allocated and charged to the correct award and funding source and are documented.

(b) Commission funds shall not be used to displace federal, state, local, and other funds that would otherwise be available for the services provided under the award.

(c) Unless otherwise stated, all requirements in this chapter apply to both prevention/intervention and treatment providers.

§144.212. Financial Management.

(a) The provider shall maintain a financial management system which provides:

(1) information needed to prepare all reports required by federal and state law, commission rules and procedures, and the award agreement;

(2) documentation identifying the source and application of funds to establish that the funds have not been used in violation of any applicable statute or regulation;

(3) comparisons of actual amounts expended with budgeted amounts for each award, and relation of financial information with performance or productivity data; and

(4) effective control over and accountability for all funds, property, and other assets.

(b) Providers shall adequately safeguard all assets and shall assure that they are used solely for authorized purposes.

(c) Expenditures and administration of commission funds shall follow guidelines for reasonableness, allowability, and administration according to the cost principles and administrative requirements for the appropriate organizational structure as specified below:

(1) state and local governments or Indian Tribal governments shall comply with cost principles found in the Office of Management and Budget (OMB) Circular A-87 and administrative requirements found in Code of Federal Regulations, Title 34, Part 80; OMB Circular A-102, the Common Rule, and Revisions; and the Uniform Grant and Contract Management Standards (UGMS);

(2) not-for-profit organizations and hospitals shall comply with cost principles found in OMB Circular A-122 and administrative requirements found in OMB Circular A-110 (Code of Federal Regulations, Title 45, Part 74);

(3) educational organizations shall comply with cost principles found in OMB Circular A-21 and administrative requirements found in OMB Circular A-110 (Code of Federal Regulations, Title 45, Part 74); and

(4) commercial organizations and hospitals shall comply with cost principles found in Code of Federal Regulations, Title 48, Part 31, and administrative requirements found in OMB Circular A-110 (Code of Federal Regulations, Title 45, Part 74).

§144.213. Accounting Systems.

(a) All providers shall have written accounting policies and procedures that are available for staff use and that are reviewed and approved annually; policies shall be approved by the board of directors.

(b) Accounting for commission funds, and any required match funds, shall be in accordance with Generally Accepted Accounting Principles (GAAP) applicable to providers of state and federal funds.

(c) The accounting system shall establish a separate cost center for each commission-funded program using a double entry bookkeeping system.

(d) The system shall have a chart of accounts.

(e) The system shall provide information to separately identify the receipt and expenditure of the commission funds and shall include copies of all financial reports submitted to the commission.

(f) Expenditures shall be recorded in sufficient detail to show the exact nature and purpose of the expenditures for each account.

(g) The accounting records shall be supported by source documentation.

(h) The following accounting records and related documentation shall be maintained for the program:

(1) a general ledger;

(2) a cash receipts journal;

(3) a cash disbursement journal;

(4) individual payroll records for all staff members employed by the provider;

(5) all bank statements and canceled checks;

(6) all invoices, purchase orders, vouchers, and paid bills;

(7) employee attendance records;

(8) copies of all contracts and lease agreements to which the provider is a party; and

(9) any other financial documentation that the commission may require by rule or by the terms and conditions of the provider's individual letter of award.

(i) The system shall provide accurate, current, and complete financial reporting information.

(j) The system shall be integrated with systems of internal controls designed to safeguard funds and assets, check the accuracy and reliability of accounting data, promote operational efficiency, and encourage adherence to management policies.

(k) The system shall include procedures for regular inventories and procedures for the acquisition, maintenance, and disposition of property (and funds derived from the sale of property) purchased in whole or in part with commission funds.

(l) The system shall include procedures for recording the actual time and percent of effort for each employee whose salary is charged to the funded program.

(m) Records shall be maintained in a manner which permits preparation of commission required financial reports and shows that funds are used for the purpose for which the award is made.

§144.214. Internal Controls.

(a) Providers shall establish and maintain internal control systems to provide accountability and safeguard assets, ensure usage and purpose are in compliance with applicable laws and regulations, and ensure that personnel are qualified, knowledgeable, adequately trained, and managed effectively.

(b) The provider shall compare recorded accountability for assets to existing assets at reasonable intervals and take appropriate action when differences are identified.

(c) The system of internal controls shall include:

(1) segregation of functions;

(2) proper authorization;

(3) proper recording of transactions;

(4) limiting access to assets; and

(5) evaluation of progress toward objectives.

§144.215. Budget Controls.

(a) During the award period, providers shall ensure that recorded financial transactions relate to that specific award.

(b) Providers shall then compare actual expenditures with approved budgeted amounts to determine if the project is in accord with projected timelines and expenditures.

(c) The provider shall notify the commission of any substantial deviations and submit written justification and a corrective action plan.

§144.221. Cost Allocation Plan.

(a) Cost allocation plans shall be submitted to the commission for advance approval whenever indirect cost reimbursements are requested. The plan shall include a detailed explanation and itemization of which costs are included as direct and which costs are allocated as indirect. This plan shall be submitted with the budget plan.

(b) The plan shall set forth the formula or basis for distributing shared (indirect) costs to a cost center. The formula shall include elements such as cost center, cost type, allocation factors, and allocation rationale. These elements shall be supported by documentation.

(c) When a cost allocation plan is submitted supporting documentation for the plan shall include:

(1) the basis upon which costs are allocated;

(2) the rationale for the basis selected; and

(3) the relevance to the commission-funded program.

(d) The maximum reimbursable indirect cost rate is 10% with an approved cost allocation plan.

§144.222. Payments.

(a) Payments shall be made only when the grant has been fully executed and the provider is in good standing.

(b) Providers shall receive payment according to the terms and conditions of the award, contingent upon compliance with commission requirements, which include:

(1) rules published in the Texas Administrative Code;

(2) terms and conditions in the award agreement; and

(3) procedures documented in the commission's Provider Compliance Manual.

(c) The provider shall submit all performance reports, financial reports, and requests for payment through the Electronic Forms Interchange (EFI) system, unless exempted in writing.

§144.223. Methods of Payment.

(a) The commission uses two payment mechanisms: the financial assistance payment mechanism and the unit cost payment mechanism.

(b) Under the financial assistance mechanism, payments must be supported by an approved line item budget and may be either reimbursements or advances. This payment method is used for both prevention/intervention and treatment providers.

(c) Under the unit cost mechanism, providers are reimbursed at an approved unit cost rate which is based on a line item budget of estimated program costs and an approved bid rate. The unit cost mechanism is used only for treatment providers.

(d) To receive payment, the provider must submit a request for advance or reimbursement form and/or a client billing form, as appropriate. Payments are based on actual client services provided and cash disbursements made for allowable expenditures which can be supported by documentation.

§144.224. Cash Management.

(a) Providers receiving advance payments shall deposit and maintain the commission's funds in an insured account. The bank account shall be interest bearing unless the provider receives less than $120,000, the interest earned per year does not exceed $100, or the required average or minimum balance is not feasible for the entity.

(b) The provider shall remit interest earned on advanced funds to the commission at least quarterly. Up to $100 per year may be retained by a state or local government provider and up to $250 per year may be retained by all other providers for administrative expenses.

(c) Providers receiving cash advances shall implement procedures for minimizing the time between receipt and disbursement of funds.

(d) The provider shall be placed on the reimbursement method of payment for noncompliance with cash management standards.

§144.225. Matching. Unless waived in writing by the commission, all prevention/intervention providers funded through the grant mechanism shall contribute a 5.0% cash match for each grant funded by the commission. Cash match shall:

(1) be verifiable by records;

(2) not be included as match for any other federally assisted program;

(3) be necessary and reasonable;

(4) be allowable under the appropriate cost principles; and

(5) not be paid for using by another award funded with federal funds.

§144.226. Program Income.

(a) Providers shall separately record and report all program income earned or directly generated through commission-funded activities.

(b) The provider may charge fees for services that are funded by the commission, provided no one is refused services for inability to pay and that the resulting income is used according to applicable regulations. Program income may be used only as follows.

(1) Matching funds. With prior approval from the commission, program income may be used to offset allowable costs of the program and may count toward satisfying commission cash match requirements for that program.

(2) Additional costs. With prior approval from the commission, income may be used to expand or increase funded program activities or objectives.

(3) Award deduction. Program income is deducted from total program expenditures. Any program income generated as a result of a commission-funded program during the fiscal year and not expended or used for cash match shall be used to reduce the amount of the award.

(4) Any other use of these funds is prohibited.

(c) Revenue generated through legal and appropriate double billing shall be treated as program income.

§144.227. Revisions of Grant Awards. All changes or additions to the grant award shall be approved in writing by the commission before implementation. The provider shall submit a written request to propose a revision in any of the following:

(1) an award provision;

(2) the catchment area or approved services/activities;

(3) budget line items for personnel, equipment, contractual, program income, or cash match;

(4) the total award amount;

(5) the award or budget period;

(6) award terms and conditions; and

(7) approved program design, target population, or any portion of the approved application.

§144.231. Allowable Cost Criteria. An allowable cost meets the following criteria:

(1) It is necessary and reasonable for proper and efficient administration of the funded program.

(2) It can be allocated to the funded program and is not a general expense needed to carry out the provider's general responsibilities.

(3) It is authorized or is not prohibited under applicable laws or regulations.

(4) It conforms to applicable limitations or exclusions.

(5) It is consistent with applicable policies procedures.

(6) It is treated consistently through the application of generally accepted accounting principles appropriate to the circumstances.

(7) It is not allocated or included as a cost of any other program.

(8) It is net of all applicable credits.

§144.232. Direct Costs. Direct costs that can be charged to an award include but are not limited to:

(1) Personnel. Wages for personnel directly associated with the funded program.

(2) Fringe benefits. Benefits paid to personnel directly associated with the funded program. These benefits may include retirement plan costs, health insurance premiums, paid vacations, and sick leave.

(3) Depreciation. Costs related to buildings, capital improvements, and equipment directly associated with funded program. Any generally-accepted method of computing depreciation may be used. However, the method of computing depreciation must be consistently applied for any specific asset or class of assets for all commission-funded programs. The computation for depreciation shall be based on acquisition cost, and adequate property records shall be maintained. Depreciation costs must be allocated when assets are used in two or more programs. Depreciation of assets may not be less then the useful life. Depreciation on idle or excess facilities is not allowable unless specifically authorized by the commission. No depreciation may be charged to the commission for assets purchased through a commission-funded award.

(4) Rent. The rental or lease cost of equipment or facilities used in providing commission-funded substance abuse services.

(5) Maintenance and repair. The direct costs incurred to keep facilities and equipment used in the funded program in working condition.

(6) Utilities. Fuel, electricity, telephones, water, and sewer costs of the funded program.

(7) Direct services. Costs associated with approved subcontracting of direct services.

(8) Materials and supplies. Materials and supplies used to provide commission-funded services.

(9) Travel. Parking and other travel costs necessary under the award. The reimbursement may not exceed current federal rate for out-of-state travel and the current State of Texas rate for local and other in-state travel. If the provider cannot find accommodations at the current State of Texas rate, the commission may reimburse up to the current federal rate for in-state travel. If the provider's board approves a lower rate, that rate shall be used.

§144.233. Indirect Cost. Allowable indirect costs include but are not limited to administrative costs, data processing, and bookkeeping. The provider may charge indirect costs up to 10% of the total award with an approved cost allocation plan.

§144.235. Expenditures Requiring Commission's Prior Approval. Costs that are allowable only with prior approval from the commission include but are not limited to:

(1) Equipment. Costs incurred for the purchase of equipment having a unit price of $1,000 or more, a useful life of more than one year, and which is used solely for the delivery of funded substance abuse services.

(2) Contractual services. Costs incurred for the purchase of professional services, including medical, psychological, counseling, legal, accounting, auditing, training, program development, evaluation, data processing, and urinalysis.

(3) Vehicle purchase and use. A vehicle is defined as a full-size van or mini-van, a mobile unit such as a camper-trailer, or a bus which also meets the definition of equipment. Vehicles purchased with commission funds shall be used only for program related purposes; personal use of a vehicle is not allowed. The provider shall not charge the commission for options not specifically allowed by the Provider Compliance Guide. When vehicles are purchased by a commission-funded program, the provider shall:

(A) obtain advance written approval by the commission;

(B) purchase and take possession of the vehicle during the award period for which the vehicle purchase was approved;

(C) have a written board-approved policy for the use of vehicles;

(D) maintain written documentation of the vehicle's usage;

(E) in the event the program for which approval was made no longer provides services, submit a written disposition to the commission designating title transfer in accordance with applicable administrative requirements;

(F) in the event the program for which the vehicle was approved terminates, notify the commission in writing and dispose of or transfer the vehicle in accordance with applicable administrative requirements; and

(G) follow all applicable state, federal, local and commission laws, regulations and policies pertaining to the purchase, use, and disposition of vehicles.

(4) Other. Costs incurred for items such as insurance and indemnification, management studies, pre-agreement costs, proposal costs, and public information costs.

§144.236. Unallowable Costs. Providers shall not budget or expend funds for unallowable costs as defined in applicable Office of

Management and Budget Circulars and the Code of Federal Regulations. Unallowable costs include but are not limited to the following items:

(1) advertising costs other than those incurred for personnel recruitment, solicitation of bids and disposal of surplus materials;

(2) bad debts;

(3) contingency reserve fund;

(4) contributions and donations;

(5) entertainment costs including amusement/social activities and their related costs (meal, beverages, lodgings, rentals, transportation, and gratuities);

(6) fines and penalties;

(7) fundraising;

(8) interest; and

(9) lobbying.

§144.237. Prohibitions Against Billing More Than One Entity. A provider shall not bill and receive payment in excess of actual costs from more than one entity for the same service at the same time for the same client. The total amount paid to a provider shall not exceed the actual costs of providing the services, either by client or in the aggregate. Double billing may result in the termination of an existing award and the inability to obtain future awards.

§144.238. Minor Remodeling.

(a) Providers shall not use commission funds to purchase, construct, or permanently improve any building or other facility, except for minor remodeling.

(b) Minor remodeling is work required to change the interior arrangements or other physical characteristics of an existing facility, or to install equipment so that the facility may be used more effectively.

(c) Minor remodeling shall meet the following criteria:

(1) the buildings useful life shall be consistent with the funded program purposes;

(2) the remodeling shall be essential to the program funded by the grant;

(3) the remodeled space shall be occupied by the program;

(4) prior approval from the commission shall be obtained before remodeling begins; and

(5) the facility shall be owned by the provider; or if the facility is leased, there shall be a minimum of three years remaining in the lease period.

(d) The provider shall meet all procurement requirements and request approval from the commission before initiating a minor remodeling project.

(e) The amount budgeted or expended for minor remodeling for each award during three consecutive budget periods cannot exceed the lesser of:

(1) $150,000; or

(2) 25% of total funds awarded for direct costs for the three consecutive budget periods.

(f) Remodeling projects which are not allowable include relocation of exterior walls, roofs and floors, development or repair of parking lots, and completion of unfinished shell space.

(g) If the program is funded in part by the commission, only a pro-rata share of the total minor remodeling cost shall be charged to the commission.

§144.239. Major Medical Equipment. A piece of major medical equipment is not an allowable cost if it:

(1) is a single item of equipment, either fixed or movable;

(2) is used solely for medical purposes;

(3) has a useful life of two years or more; and

(4) costs $5,000 or more.

§144.241. General Documentation Requirements.

(a) Appropriate documentation shall be available to support any cost charged to a grant or contract.

(b) Documentation shall be:

(1) written;

(2) independently generated or verifiable by an independent third party;

(3) generated at the point of occurrence of the transaction;

(4) in support of the amounts reflected on the books; and

(5) filed in a manner that allows easy retrieval.

(c) Documentation for direct, program-specific costs charged to the commission or shown as cash match shall show the cost's relevance and application to the program.

§144.242. Personnel Documentation. Documentation for personnel costs shall include payroll records, personnel activity reports (PARs) or timekeeping reports for all staff whose activities are funded in whole or in part by an award or are used for match.

(1) PARs. The PAR shall account for the employee's total activity. Additional documentation shall be maintained for nonprofessional or nonexempt personnel indicating the hours worked each day. PARs for professional and professorial staff employed by universities shall be completed each academic term, but not less than once every six months. All other PARs shall be completed at least monthly.

(2) Timekeeping reports. If administrative personnel costs are charged through a percentage allocation method, timesheets shall clearly reflect the amount of total time and the basis for allocation. All PARs and timekeeping reports shall include:

(A) grant number(s) worked on;

(B) employee name;

(C) position or job title;

(D) grant related activities;

(E) number of hours worked per activity category and total hours worked;

(F) employee signature;

(G) supervisor signature; and

(H) applicable pay period(s).

(3) Personnel files. Personnel files shall contain:

(A) signed and completed form W-4 (for IRS withholding allowances);

(B) signed and completed form I-9 (certification of citizenship, which should be filed separately);

(C) personnel data form that includes date hired, rate of pay, prior work history, credentials, qualifications, mailing address, and results of reference checks;

(D) documentation of specific qualifications for professional employees such as licensure or certification;

(E) job description;

(F) performance evaluations;

(G) written summary of the exit interview (for terminated employees) that includes reason for leaving, date of termination, whether fired or quit, latest mailing address and phone number; and

(H) documentation of all pay increases and bonuses. Bonuses are not allowed unless the organization establishes and maintains a written policy setting forth criteria for bonuses which is applicable to the entity as a whole and not specific to the commission's funded program.

(4) Fringe benefit schedule. A fringe benefit schedule shall be prepared which shows the distribution of fringe benefits to each employee supported by award funds.

§144.243. Travel Documentation.

(a) A system of documenting travel costs related to the program shall be developed, including written prior approval from the executive director or designee for out-of-town travel.

(b) Documentation for local travel shall include a travel log recording all travel expenses to agency staff for use of a personal vehicle for program-related activities. The log shall include:

(1) name and signature of individual receiving travel funds;

(2) signature of supervisor of financial administration authority;

(3) grant number;

(4) date the particular log was approved;

(5) date(s) of travel;

(6) destination/specific locations traveled to and from;

(7) purpose/relationship to program;

(8) number of miles incurred; and

(9) total cost for trip.

§144.244. Other Documentation.

(a) Equipment. Records shall be maintained on all equipment purchased with commission funds. In addition, a physical inventory shall be conducted and reconciled with the accounting records at least once per year. Differences shall be investigated. Equipment records shall include:

(1) a description of the equipment;

(2) identification number;

(3) acquisition date, unit cost, and total costs;

(4) information which can be used to calculate the percentage of federal participation in the cost of the equipment;

(5) location and condition of the equipment and the date the information was reported; and

(6) ultimate disposition, including date of disposal and sales price or method used to determine current fair market value, if applicable.

(b) Photocopy/postage. To receive commission reimbursement for the cost of photocopying or postage, a system of recognizing and documenting costs related to the award shall be developed. This may include a postage/photocopy log or other reasonable allocation method. If a log is used, it shall include:

(1) date;

(2) initials of user;

(3) number of copies or stamps;

(4) cost per copy or stamp;

(5) description of relevance to the award; and

(6) signature of the authority reviewing the log.

(c) Printed material. All printed program materials developed with commission funds which are copyrightable work shall contain this disclaimer: "The contents of this (insert type of publication) were developed under an award from the Texas Commission on Alcohol and Drug Abuse. However, these contents do not necessarily represent the policy of the commission, and you should not assume endorsement by the Federal or State Government."

(d) Donated time. A timekeeping report shall be kept for each person whose donated services are recorded as match, including:

(1) month ended (for which services were provided);

(2) donor name;

(3) description of services provided;

(4) hours worked;

(5) signature of donor; and

(6) signature of supervisor or authorized individual.

(e) Donated property. Records of donated materials, equipment, and facilities shall include an appraisal form or a signed form indicating how the estimated value was determined. For facilities, the provider shall obtain a written opinion of fair rental value from an independent licensed real estate brokerage firm.

§144.245. Federal and State Tax Requirements.

(a) The provider shall file quarterly and annual payroll tax returns for wages to employees who are subject to FICA or withholding. Late fees, interest, and penalties are not allowable costs.

(b) The provider shall obtain an employer ID number from the IRS and the Texas Employment Commission.

(c) The provider shall file all required federal tax returns.

§144.251. Property Standards. The provider shall establish property standards that set uniform requirements governing the management and disposition of property whose cost was charged to a project supported by a federal or state award. These standards shall include the provisions in §§144.252-144.256 of this title (relating to Real Property, Equipment, Supplies, Intangible Property, and Insurance Coverage(s).

§144.252. Real Property. Capital expenditures for the purchase or improvement of real property are unallowable. Real property includes land, land improvements, structures, and facilities, but excludes movable machinery and equipment. This includes all situations in which a portion of the acquisition cost is charged as a direct cost to federal or state funds.

§144.253. Equipment.

(a) Approval. Capital expenditures for equipment shall be approved in advance by the commission. This includes all situations in which a portion of the acquisition cost is charged as a direct cost to federal or state funds.

(b) Definition. Equipment includes all tangible personal property that costs more than $1,000 per unit and has a useful life of more than one year.

(c) Title. Unless otherwise provided by the terms of the grant or contract, title to equipment shall vest in the provider. The provider shall, however, use the equipment for the authorized purpose of the project as long as it is needed and shall not encumber the equipment without approval from the commission.

(d) Replacement equipment. With the commission's approval, equipment may be exchanged or sold and the proceeds used to purchase replacement equipment.

(e) Disposition. When equipment is no longer needed for the originally authorized purpose, or when the provider ceases to be funded by the commission, the provider shall request disposition instructions from the commission. The instructions shall prescribe one of the following alternatives:

(1) equipment with a current per-unit fair market value of less than $5,000 may be retained, sold, or otherwise disposed of with no further obligation to the commission;

(2) equipment with a current per-unit fair market value of $5,000 or more may be retained or sold, provided the commission receives compensation; or

(3) the commission has the option to transfer title to the commission or to a designated third party and compensate the provider for its participation in the cost of the original purchase to the current fair market value of equipment.

§144.254. Supplies.

(a) Definition. Materials, supplies, and other expendable property includes property needed to carry out an award that costs less than $1,000.

(b) Title. Title to supplies and other expendable property shall vest in the provider .

(c) Disposition. When the award ends, the provider shall compensate the commission for its share of any unused materials and supplies that exceeds $5,000 in total aggregate fair market value, unless the supplies are needed for another federal or state sponsored program.

§144.255. Intangible Property.

(a) The provider may copyright any work which is subject to copyright and was developed or purchased under an award. The commission reserves a royalty-free, non-exclusive, and irrevocable license to reproduce, publish, distribute, or otherwise use, and to authorize others to use, the work for federal or state purposes.

(b) Providers are subject to applicable state and federal regulations governing patents and inventions, including government-wide regulations issued by the Department of Commerce.

§144.256. Insurance Coverage. The provider shall have insurance to cover the replacement or repair of damaged, lost, or stolen capital expenditure items purchased with federal or state funds. Insurance coverage shall include but is not limited to:

(1) property insurance covering losses due to fire, theft, and accident;

(2) liability insurance on property and vehicles;

(3) workers' compensation insurance for employees; and

(4) employee bonding for all employees who have direct access to commission funds and for those who are responsible for the administration, direct care, management, or supervision of the funds. These employees shall be bonded through a licensed insurance company or otherwise covered for possible losses that might result from unauthorized use of the funds or from lack of care and oversight.

§144.261. Procurement Standards.

(a) The provider shall establish written policies and procedures governing the procurement of goods and services.

(b) Providers shall award subcontracts only to contractors demonstrating the ability to perform successfully under the terms and conditions of a proposed procurement.

(1) Provider Responsibilities. The provider is responsible for all contractual and administrative issues related to procurements made under the award. This includes disputes, protests of award, source evaluation, and other contractual matters.

(2) Codes of Conduct. The provider shall have written standards of conduct governing the performance of its employees involved in the award and administration of contracts. No employee, officer, or agent of the provider can participate in the selection, award, or administration of a contract if a real or apparent conflict of interest exists.

(3) Competition. All procurement transactions shall provide open and free competition. Contractors who develop or draft specifications, requirements, statements of work, invitations for bids, and/or requests for proposals cannot compete for those procurements. Providers shall select the bidder who responds appropriately to the solicitation and offers the greatest advantage in terms of price, quality, and other factors.

§144.262. Procurement Procedures.

(a) Procedures. All providers shall have written procurement procedures that provide for:

(1) review of proposed procurements to avoid purchase of unnecessary or duplicate items;

(2) analysis of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical and practical procurement; and

(3) solicitations for goods and services which clearly describe all requirements that must be met in order for a bid to be evaluated.

(b) Use of small businesses, minority-owned and women's

business enterprises. Providers shall make positive efforts to use small businesses, minority-owned firms, and women's business enterprises.

(c) Protest procedures. Providers shall have protest procedures to resolve disputes relating to their procurements. Each time a protest is filed, the provider shall inform the commission. A protester cannot pursue a protest with the commission until all administrative remedies with the provider have been exhausted. The commission shall not review any protest unless it involves:

(1) violations of federal law or regulations or commission rules and procedures; or

(2) violations of the provider's protest procedures for failure to review a complaint or protest.

(d) Use of historically underutilized businesses. Providers shall make a good faith effort to include historically underutilized businesses in at least 30% of the total value of contracts awarded.

§144.263. Methods of Procurement.

(a) Methods. Providers shall follow one of the procurement methods described in this section.

(b) Procurement by small purchase procedures. These are simple and informal methods for obtaining services, supplies, or other property costing no more than $25,000 in total. Price or rate quotations shall be obtained from a minimum of three qualified sources.

(c) Procurement by sealed bids (formal advertising). Bids are publicly solicited and a firm fixed-price contract is awarded to the responsible bidder whose bid conforms with all the material terms and conditions of the invitation for bids and is the lowest in price.

(1) Sealed bids shall not be used unless:

(A) a complete, adequate, and realistic specification or purchase description is available;

(B) three or more responsible bidders are willing and able to compete for the business; and

(C) the procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made largely on the basis of price.

(2) The following requirements apply:

(A) the invitation for bids shall be publicly advertised and bids solicited from an adequate number of known suppliers;

(B) the invitation for bids shall clearly define the items or services;

(C) all bids shall be opened at the time and place stated in the invitation;

(D) a firm fixed-price contract award shall be made in writing to the lowest responsive and responsible bidder; and

(E) any or all bids may be rejected if there is sound documented reason.

(d) Procurement by competitive proposals. Proposals are publicly solicited, and either a fixed-price or reimbursement-type contract is awarded. The following requirements apply:

(1) requests for proposals shall be publicized and shall identify all evaluation factors and their relative importance;

(2) proposals shall be solicited from a minimum of three qualified sources;

(3) providers shall have a method for conducting technical evaluations of the proposals received and for selecting providers; and

(4) awards shall be made to the applicant who submits the proposal that provides the greatest benefit to the program, with price and other factors considered.

(e) Procurement by noncompetitive proposals. This method shall be used only when the award of a contract is not feasible under small purchase procedures, sealed bids, or competitive proposals and one of the following circumstances apply:

(1) the item is available only from a single source;

(2) a public emergency does not permit the delay that would result from a competitive process;

(3) the awarding agency authorizes noncompetitive proposals; or

(4) after competitive solicitation, competition is found to be inadequate.

§144.264. Cost and Price Analysis. The provider shall perform a cost or price analysis for every procurement action, including contract modifications. Providers shall make independent estimates before receiving bids or proposals.

(1) A cost analysis shall be performed when bidders submit the elements of their estimated cost, and when competition is lacking.

(2) Price analysis may be used for other procurements.

(3) Costs or prices based on estimated costs for contracts under grants are allowable only to the extent that costs incurred (or cost estimates included in negotiated prices) are consistent with applicable cost principles.

(4) The cost plus a percentage of cost and the percentage of construction cost methods of contracting are not allowed as a bases for estimated costs.

§144.265. Procurement Records.

(a) Providers shall maintain records detailing the significant history of a procurement. These records shall include:

(1) cost and price analysis;

(2) the rationale for the method of procurement;

(3) the rationale for the selection of contract type;

(4) the rationale for the contractor selection or rejection; and

(5) the basis for the contract price.

(b) If a small purchase method is not used, the records shall also include:

(1) the basis for contractor selection;

(2) the justification for lack of competition when a competitive process is not used; and

(3) the basis for the award cost or price.

§144.271. Subcontract Administration and Provisions.

(a) The provider shall maintain a system for subcontract administration to ensure the subcontractor complies with the terms, conditions, and specifications of the subcontract and to ensure timely follow up of all purchases.

(b) The provider shall evaluate the subcontractor's performance, documenting whether the terms, conditions, and specifications of the contract were met.

(c) In addition to provisions defining a sound and complete agreement, providers shall include the following provisions in all subcontracts greater than $25,000. These provisions also apply to subcontracts.

(1) The subcontract shall allow and provide for administrative, subcontractual, or legal remedies when the subcontractor violates or breaches the terms of the subcontract.

(2) The subcontract shall state how and under what conditions the provider may terminate the subcontract. It shall also describe conditions under which the subcontract may be terminated for default or for circumstances beyond the control of the subcontractor.

(3) The subcontract shall allow authorized representatives of the provider, the commission, or the Comptroller General of the United States to examine or copy any books, documents, papers, and records of the subcontractor which relate directly to a specific program.

§144.281. Close-out Procedures.

(a) The commission shall close out all awards at the end of the fiscal year or as otherwise directed by the commission.

(b) The provider shall submit all reports and other required documents.

(c) The commission is not liable for provider costs filed after the specified closeout deadline.

(d) The commission shall review the closeout reports and make any necessary adjustments to the final allowable costs.

(e) The provider shall refund any balances of unobligated cash unless the commission authorizes the provider to retain it.

(f) If the commission paid the provider more than the finally determined amount, the provider shall refund this amount to the commission within 15 calendar days of notification.

(g) The close out of an award does not affect:

(1) the commission's right to disallow costs and recover funds on the basis of a later audit or other review;

(2) the provider's obligation to return funds due as a result of later refunds, corrections, or other transactions;

(3) record retention;

(4) property management requirements; or

(5) audit requirements.

§144.282. Termination for Convenience.

(a) The provider may terminate an award in whole or in part by notifying the commission in writing of the effective date of termination.

(b) The commission may terminate an award in whole or in part at any time without the consent of the provider. The commission shall send written notification with the effective date of termination.

§144.283. Refunds.

(a) Currently funded providers who owe a refund may:

(1) pay the total amount due by the due date;

(2) execute a repayment agreement or agreed order allowing payments to be deducted from subsequent requests for reimbursement for a period of time not to exceed two years. If the provider is placed on suspension or the award is terminated, the full amount becomes due and shall be paid by the specified date; or

(3) execute a repayment agreement or agreed order signed by the authorized official agreeing to repay funds by a specific due date, in specific amounts, over a specified period of time, not to exceed two years.

(b) Providers who are not currently funded shall pay the total amount due at the time specified by the commission. A repayment agreement or agreed order may be negotiated if it is approved by the commission and does not exceed two years.

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 March 8, 1996.

TRD-9603329 Mark S. Smock
Assistant Deputy for Finance
Texas Commission on Alcohol and Drug Abuse

Earliest possible of adoption: April 19, 1996

For further information, please call: (512) 867-8241

♦ ♦ ♦

WITHDRAWN RULES

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

TITLE 1. ADMINISTRATION

Part II. Texas Ethics Commission

Chapter 20. Reporting Political Contributions and Expenditures

Subchapter A. General Rules

• 1 TAC §20.27

Pursuant to Texas Government Code, §2001.027 and 1 TAC §91.24(b), the proposed new section to §20.27, submitted by the Texas Ethics Commission has been automatically withdrawn, effective February 27, 1996. The new section as proposed appeared in the August 25, 1995, issue of the *Texas Register* (20 TexReg 6557).

TRD-9602925

♦ ♦ ♦

TITLE 28. INSURANCE

Part I. Texas Department of Insurance

Chapter 11. Health Maintenance Organizations

Subchapter P. Prohibited Practices

• 28 TAC §11.1503

The Texas Department of Insurance has withdrawn from consideration for permanent adoption the proposed new section, which appeared in the December 22, 1995, issue of the *Texas Register* (20 TexReg 10970).

Issued in Austin, Texas, on March 11, 1996.

TRD-9603416 Alicia M. Fechtel
General Counsel and Chief Clerk
Texas Department of Insurance

Effective date: March 11, 1996

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

♦ ♦ ♦

Part II. Texas Workers' Compensation Commission

Chapter 102. Practice and Procedures

• 28 TAC §102.6

Pursuant to Texas Government Code, §2001.027 and 1 TAC §91.24(b), the proposed new section to §102.6, submitted by the Texas Workers' Compensation Commission has been automatically withdrawn, effective February 20, 1996. The new section as proposed appeared in the August 18, 1995, issue of the *Texas Register* (20 TexReg 6296).

TRD-9602924

♦ ♦ ♦

TITLE 30. ENVIRONMENTAL QUALITY

Part I. Texas Natural Resource Conservation Commission

Chapter 261. General Provisions

Subchapter B. Environmental, Social, and Economic Impacts Statements

• 30 TAC §§261.21-261.26

The Texas Natural Resource Conservation Commission has withdrawn from consideration for permanent adoption the proposed repealed sections, which appeared in the February 20, 1996, issue of the *Texas Register* (21 TexReg 1365).

Issued in Austin, Texas, on March 6, 1996.

TRD-9603197 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Effective date: March 6, 1996

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

♦ ♦ ♦

Subchapter D. Guidelines for Preparation of Environmental Impact Studies

• 30 TAC §§261.41-261.43

The Texas Natural Resource Conservation Commission has withdrawn from consideration for permanent adoption the proposed repealed sections, which appeared in the February 20, 1996, issue of the *Texas Register* (21 TexReg 1365).

Issued in Austin, Texas, on March 6, 1996.

TRD-9603325 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Effective date: March 6, 1996

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

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February - December 1996 Publication Schedule

The following is the February-December 1996 Publication Schedule for the *Texas Register*. Listed below are the deadline dates for these issues of the *Texas Register*. Because of printing schedules, material received after the deadline for an issue cannot be published until the next issue. Generally, deadlines for a Tuesday edition of the *Texas Register* are Monday and Wednesday of the previous week, and deadlines for a Friday edition are Wednesday of the previous week and Monday of the week of publication. No issues will be published on February 23, March 15, November 8, December 3, and December 31. An asterisk beside a publication date indicates that the deadlines have been moved because of state holidays.

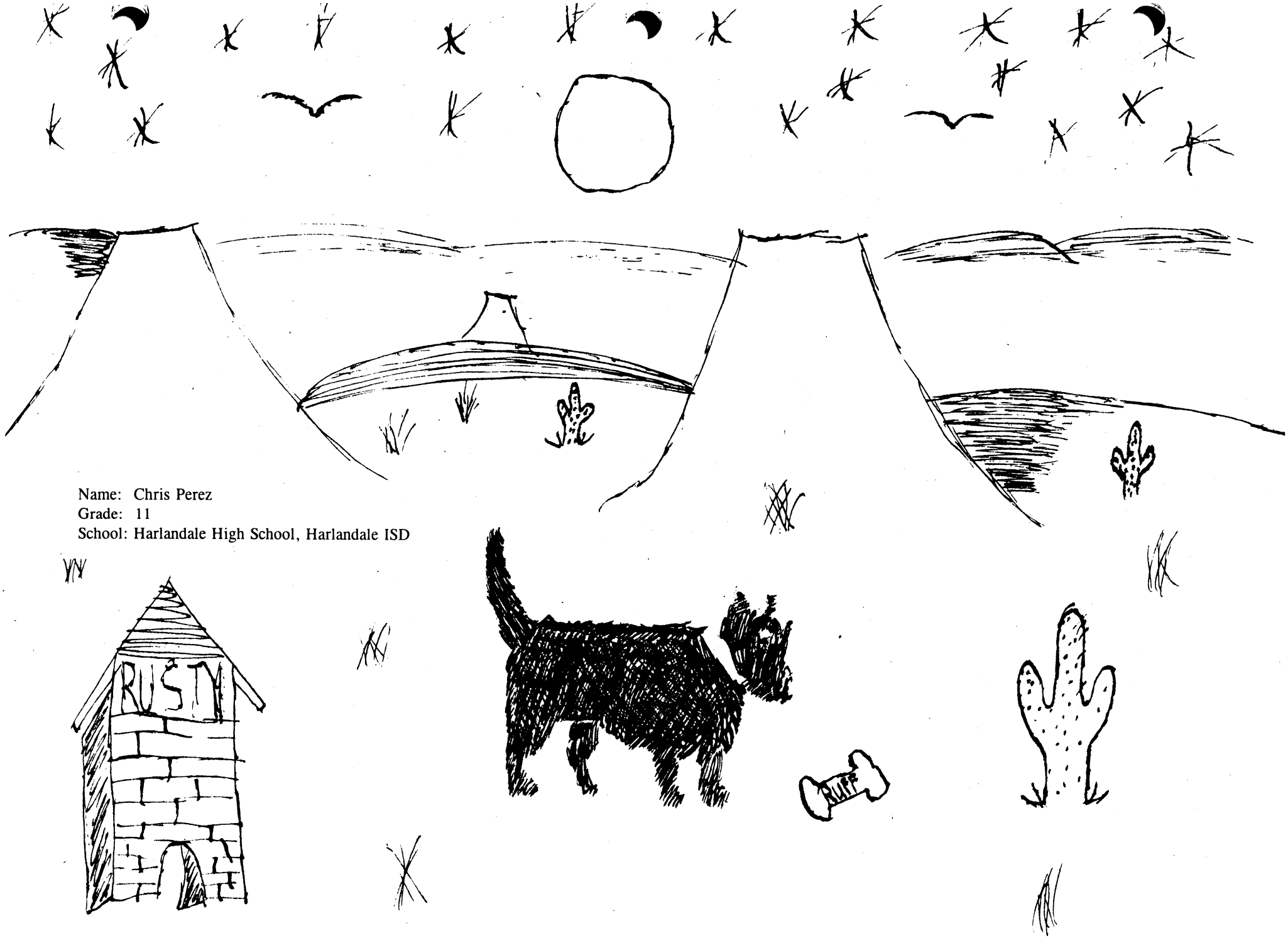
FOR ISSUE PUBLISHED ON:	DEADLINES FOR RULES BY 10 A.M.	DEADLINES FOR MISCELLANEOUS DOCUMENTS BY 10 A.M.	DEADLINES FOR OPEN MEETINGS BY 10 A.M.
9 Friday, February 2	Wednesday, January 24	Monday, January 29	Monday, January 29
10 Tuesday, February 6	Monday, January 29	Wednesday, January 31	Wednesday, January 31
11 Friday, February 9	Wednesday, January 31	Monday, February 5	Monday, February 5
12 Tuesday, February 13	Monday, February 5	Wednesday, February 7	Wednesday, February 7
13 Friday, February 16	Wednesday, February 7	Monday, February 12	Monday, February 12
14 Tuesday, February 20	Monday, February 12	Wednesday, February 14	Wednesday, February 14
Friday, February 23	*No Issue Published*		
15 Tuesday, February 27	*Tuesday, February 20	Wednesday, February 21	Wednesday, February 21
16 Friday, March 1	Wednesday, February 21	Monday, February 26	Monday, February 26
17 Tuesday, March 5	Monday, February 26	Wednesday, February 28	Wednesday, February 28
18 Friday, March 8	Wednesday, February 28	Monday, March 4	Monday, March 4
19 Tuesday, March 12	Monday, March 4	Wednesday, March 6	Wednesday, March 6
Friday, March 15	*No Issue Published*		
20 Tuesday, March 19	Monday, March 11	Wednesday, March 13	Wednesday, March 13
21 Friday, March 22	Wednesday, March 13	Monday, March 18	Monday, March 18

22 Tuesday, March 26	Monday, March 18	Wednesday, March 20	Wednesday, March 20
23 Friday, March 29	Wednesday, March 20	Monday, March 25	Monday, March 25
24 Tuesday, April 2	Monday, March 25	Wednesday, March 27	Wednesday, March 27
25 Friday, April 5	Wednesday, March 27	Monday, April 1	Monday, April 1
Tuesday, April 9	*First Quarterly Index*		
26 Friday, April 12	Wednesday, April 3	Monday, April 8	Monday, April 8
27 Tuesday, April 16	Monday, April 8	Wednesday, April 10	Wednesday, April 10
28 Friday, April 19	Wednesday, April 10	Monday, April 15	Monday, April 15
29 Tuesday, April 23	Monday, April 15	Wednesday, April 17	Wednesday, April 17
30 Friday, April 26	Wednesday, April 17	Monday, April 22	Monday, April 22
31 Tuesday, April 30	Monday, April 22	Wednesday, April 24	Wednesday, April 24
32 Friday, May 3	Wednesday, April 24	Monday, April 29	Monday, April 29
33 Tuesday, May 7	Monday, April 29	Wednesday, May 1	Wednesday, May 1
34 Friday, May 10	Wednesday, May 1	Monday, May 6	Monday, May 6
35 Tuesday, May 14	Monday, May 6	Wednesday, May 8	Wednesday, May 8
36 Friday, May 17	Wednesday, May 8	Monday, May 13	Monday, May 13
37 Tuesday, May 21	Monday, May 13	Wednesday, May 15	Wednesday, May 15
38 Friday, May 24	Wednesday, May 15	Monday, May 20	Monday, May 20
39 Tuesday, May 28	Monday, May 20	Wednesday, May 22	Wednesday, May 22
40 Friday, May 31	Wednesday, May 22	*Friday, May 24	*Friday, May 24
41 Tuesday, June 4	*Tuesday, May 28	Wednesday, May 29	Wednesday, May 29
42 Friday, June 7	Wednesday, May 29	Monday, June 3	Monday, June 3
43 Tuesday, June 11	Monday, June 3	Wednesday, June 5	Wednesday, June 5
44 Friday, June 14	Wednesday, June 5	Monday, June 10	Monday, June 10
45 Tuesday, June 18	Monday, June 10	Wednesday, June 12	Wednesday, June 12
46 Friday, June 21	Wednesday, June 12	Monday, June 17	Monday, June 17

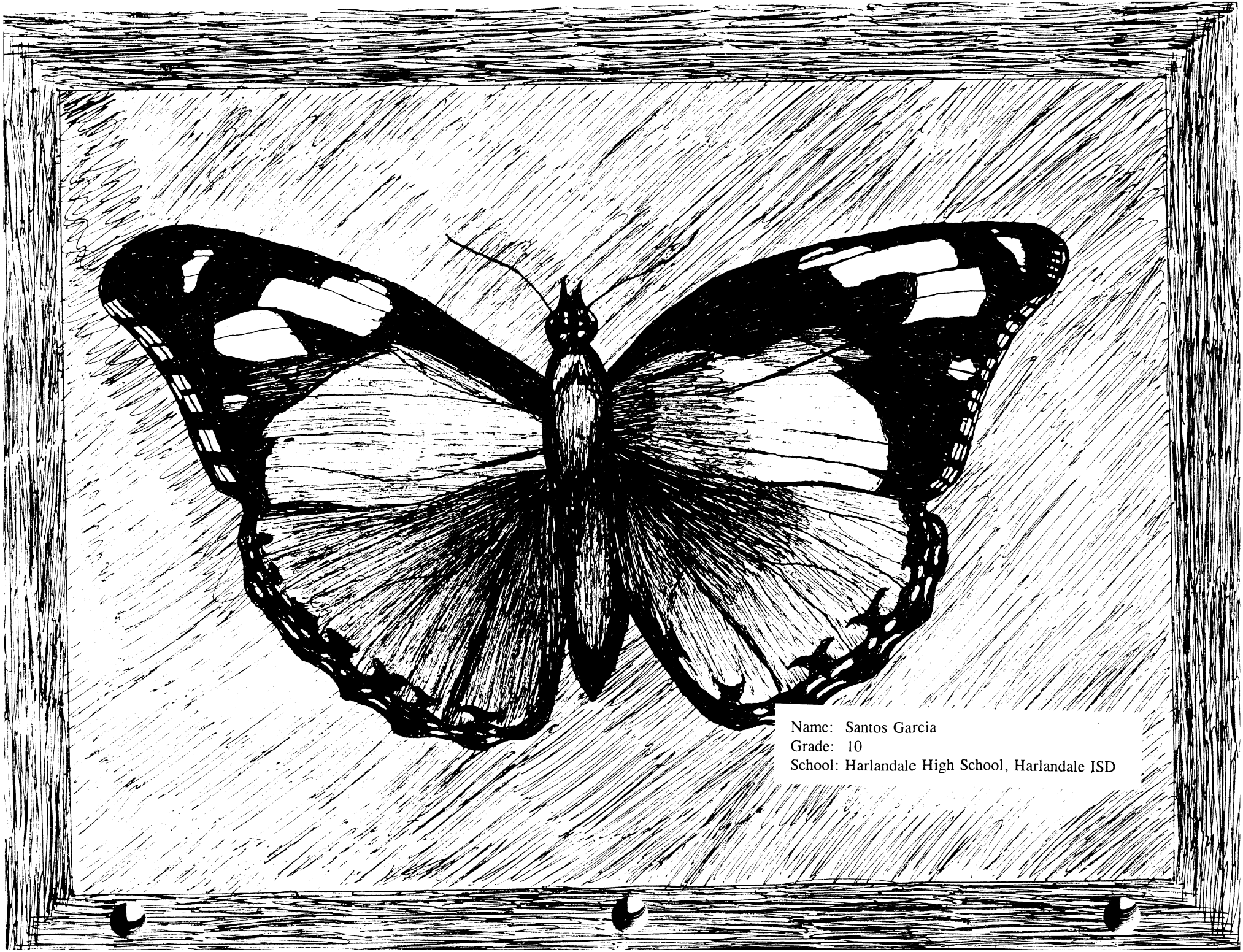
47 Tuesday, June 25	Monday, June 17	Wednesday, June 19	Wednesday, June 19
48 Friday, June 28	Monday, June 19	Wednesday, June 24	Wednesday, June 24
49 Tuesday, July 2	Wednesday, June 24	Wednesday, June 26	Wednesday, June 26
50 Friday, July 5	Wednesday, June 26	Monday, July 1	Monday, July 1
51 Tuesday, July 9	Monday, July 1	Wednesday, July 3	Wednesday, July 3
Friday, July 12	*2nd Quarterly Index*		
52 Tuesday, July 16	Monday, July 8	Wednesday, July 10	Wednesday, July 10
53 Friday, July 19	Wednesday, July 10	Monday, July 15	Monday, July 15
54 Tuesday, July 23	Monday, July 15	Wednesday, July 17	Wednesday, July 17
55 Friday, July 26	Wednesday, July 17	Monday, July 22	Monday, July 22
56 Tuesday, July 30	Monday, July 22	Wednesday, July 24	Wednesday, July 24
57 Friday, August 2	Wednesday, July 24	Monday, July 29	Monday, July 29
58 Tuesday, August 6	Monday, July 29	Wednesday, July 31	Wednesday, July 31
59 Friday, August 9	Wednesday, July 31	Monday, August 5	Monday, August 5
60 Tuesday, August 13	Monday, August 5	Wednesday, August 7	Wednesday, August 7
61 Friday, August 16	Wednesday, August 7	Monday, August 12	Monday, August 12
62 Tuesday, August 20	Monday, August 12	Wednesday, August 14	Wednesday, August 14
63 Friday, August 23	Wednesday, August 14	Monday, August 19	Monday, August 19
64 Tuesday, August 27	Monday, August 19	Wednesday, August 21	Wednesday, August 21
65 Friday, August 30	Wednesday, August 21	Monday, August 26	Monday, August 26
66 Tuesday, September 3	Monday, August 26	Wednesday, August 28	Wednesday, August 28
67 Friday, September 6	Wednesday, August 28	*Friday, August 30	*Friday, August 30
68 Tuesday, September 10	*Tuesday, September 3	Wednesday, September 4	Wednesday, September 4
69 Friday, September 13	Wednesday, September 4	Monday, September 9	Monday, September 9
70 Tuesday, September 17	Monday, September 9	Wednesday, September 11	Wednesday, September 11
71 Friday, September 20	Wednesday, September 11	Monday, September 16	Monday, September 16

72 Tuesday, September 24	Monday, September 16	Wednesday, September 18	Wednesday, September 18
73 Friday, September 27	Wednesday, September 18	Monday, September 23	Monday, September 23
74 Tuesday, October 1	Monday, September 23	Wednesday, September 25	Wednesday, September 25
75 Friday, October 4	Wednesday, September 25	Monday, September 30	Monday, September 30
Tuesday, October 8	*Third Quarterly Index*		
76 Friday, October 11	Wednesday, October 2	Monday, October 7	Monday, October 7
77 Tuesday, October 15	Monday, October 7	Wednesday, October 9	Wednesday, October 9
78 Friday, October 18	Wednesday, October 9	Monday, October 14	Monday, October 14
79 Tuesday, October 22	Monday, October 14	Wednesday, October 16	Wednesday, October 16
80 Friday, October 25	Wednesday, October 16	Monday, October 21	Monday, October 21
81 Tuesday, October 29	Monday, October 21	Wednesday, October 23	Wednesday, October 23
82 Friday, November 1	Wednesday, October 23	Monday, October 28	Monday, October 28
83 Tuesday, November 5	Monday, October 28	Wednesday, October 30	Wednesday, October 30
Friday, November 8	*No Issue Published*		
84 Tuesday, November 12	Monday, November 4	Wednesday, November 6	Wednesday, November 6
85 Friday, November 15	Wednesday, November 6	*Friday, November 8	*Friday, November 8
86 Tuesday, November 19	*Tuesday, November 12	Wednesday, November 13	Wednesday, November 13
87 Friday, November 22	Wednesday, November 13	Monday, November 18	Monday, November 18
88 Tuesday, November 26	Monday, November 18	Wednesday, November 20	Wednesday, November 20
89 Friday, November 29	Wednesday, November 20	Monday, November 25	Monday, November 25
Tuesday, December 3	*No Issue Published*		
90 Friday, December 6	Wednesday, November 27	Monday, December 2	Monday, December 2
91 Tuesday, December 10	Monday, December 2	Wednesday, December 4	Wednesday, December 4
92 Friday, December 13	Wednesday, December 4	Monday, December 9	Monday, December 9
93 Tuesday, December 17	Monday, December 9	Wednesday, December 11	Wednesday, December 11
94 Friday, December 20	Wednesday, December 11	Monday, December 16	Monday, December 16

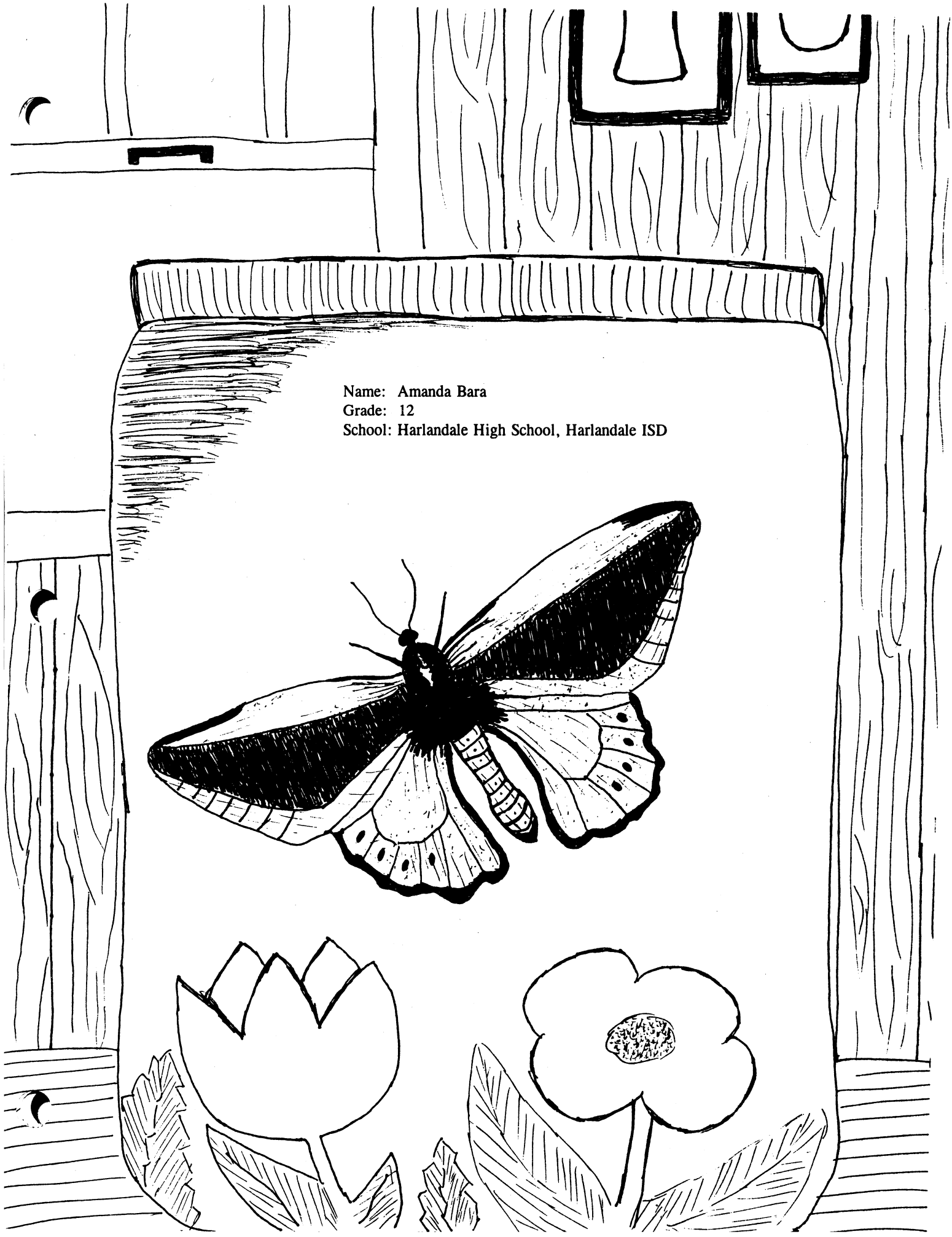
95 Tuesday, December 24	Monday, December 16	Wednesday, December 18	Wednesday, December 18
96 Friday, December 27	Wednesday, December 18	Monday, December 23	Monday, December 23
Tuesday, December 31	*No Issue Published*		



Name: Chris Perez
Grade: 11
School: Harlandale High School, Harlandale ISD

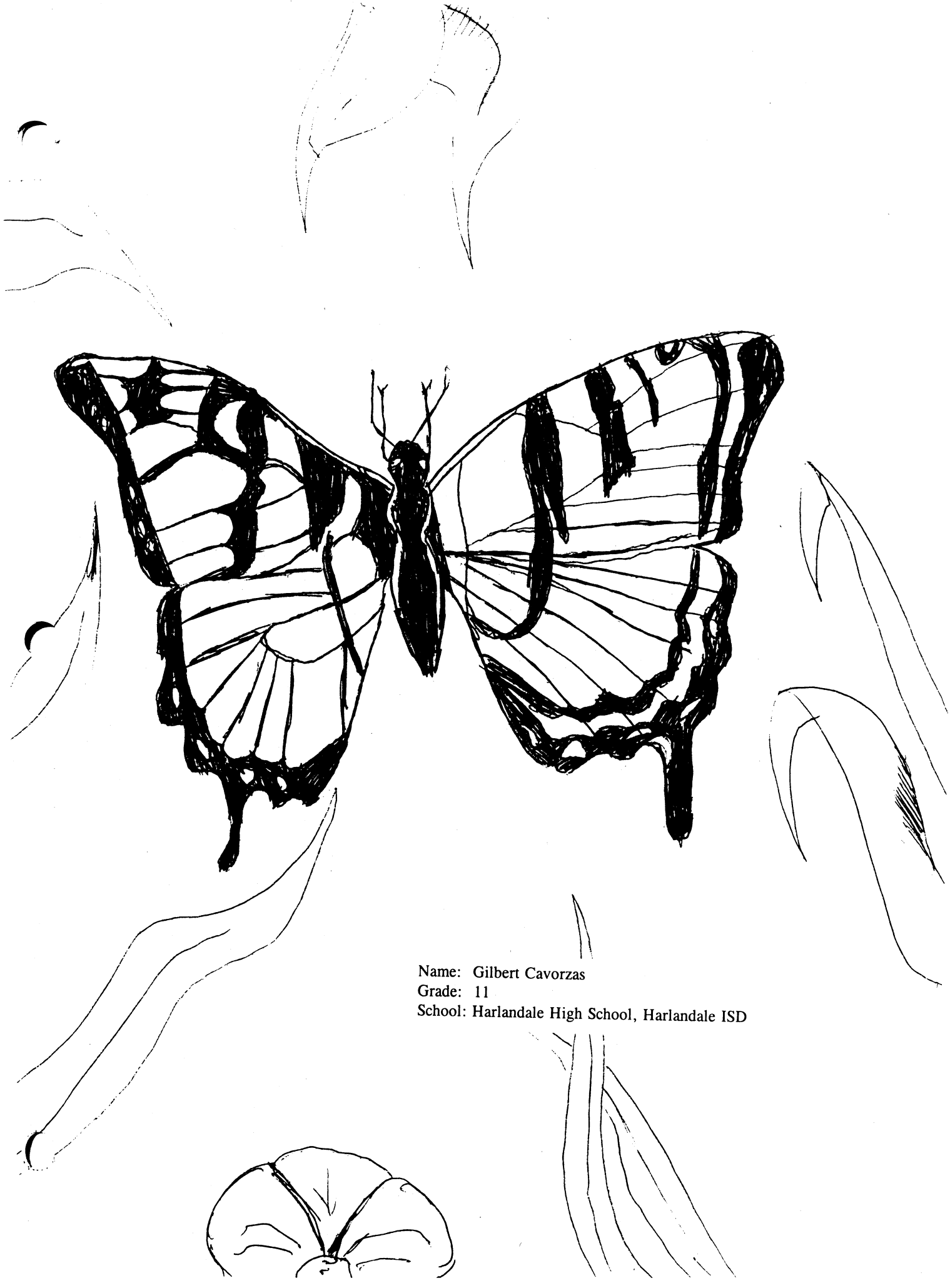


Name: Santos Garcia
Grade: 10
School: Harlandale High School, Harlandale ISD

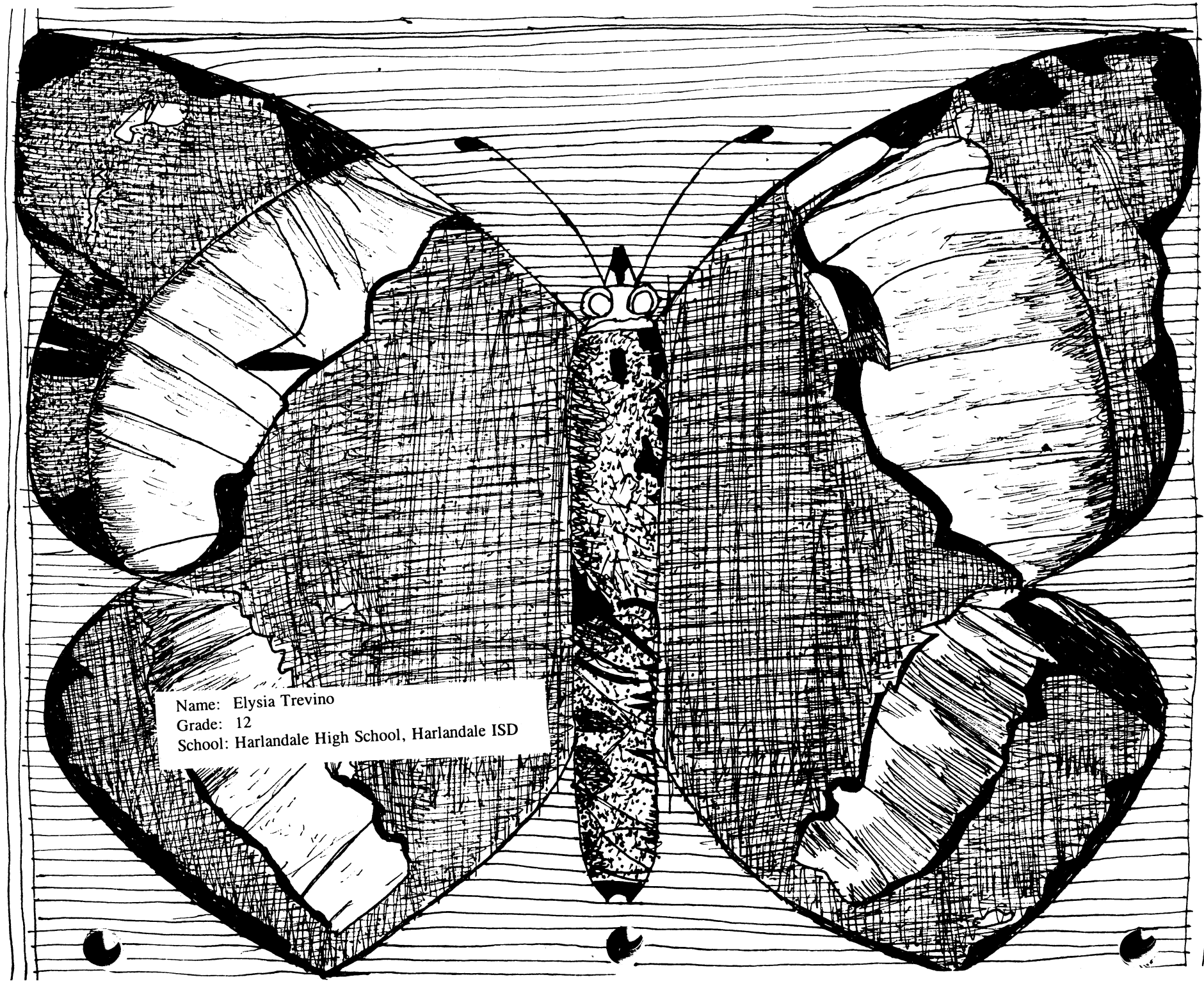


Name: Amanda Bara
Grade: 12
School: Harlandale High School, Harlandale ISD

Name: Maricela Talamantes
Grade: 11
School: Harlandale High School, Harlandale ISD



Name: Gilbert Cavorzas
Grade: 11
School: Harlandale High School, Harlandale ISD



Name: Elysia Trevino
Grade: 12
School: Harlandale High School, Harlandale ISD

How to Use the Texas Register

Information Available: The 13 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.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

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

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 21 (1996) is cited as follows: 21 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 "21 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 21 TexReg 3."

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

Both the *Texas Register* and the *Texas Administrative Code* are available online through the Internet. The address is: http://www.sos.state.tx.us. The *Register* is available in a plain text version as well as a .pdf (portable document format) version through the Internet. In addition to the Internet version, the *Texas Register* is available online through a dialup bulletin board and as ASCII files on diskettte. For subscription information, see the back or call the Texas Register at (800) 226-7199.

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.

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
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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 26, April 9, July 12, and October 8, 1996). In its second issue each month the *Texas Register* contains a cumulative *Table of TAC Titles Affected* for the preceding month. If a rule has changed during the time period covered by the table, the rule's *TAC* number will be printed with one or more *Texas Register* page numbers, as shown in the following example.

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

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

Update by FAX: An up-to-date *Table of TAC Titles Affected* is available by FAX upon request. Please specify the state agency and the TAC number(s) you wish to update. This service is free to *Texas Register* subscribers. Please have your subscription number ready when you make your request. For non-subscribers there will be a fee of $2.00 per page (VISA, MasterCard). (512) 463-5561 or (800) 226-7199.

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