TEXAS REGISTER

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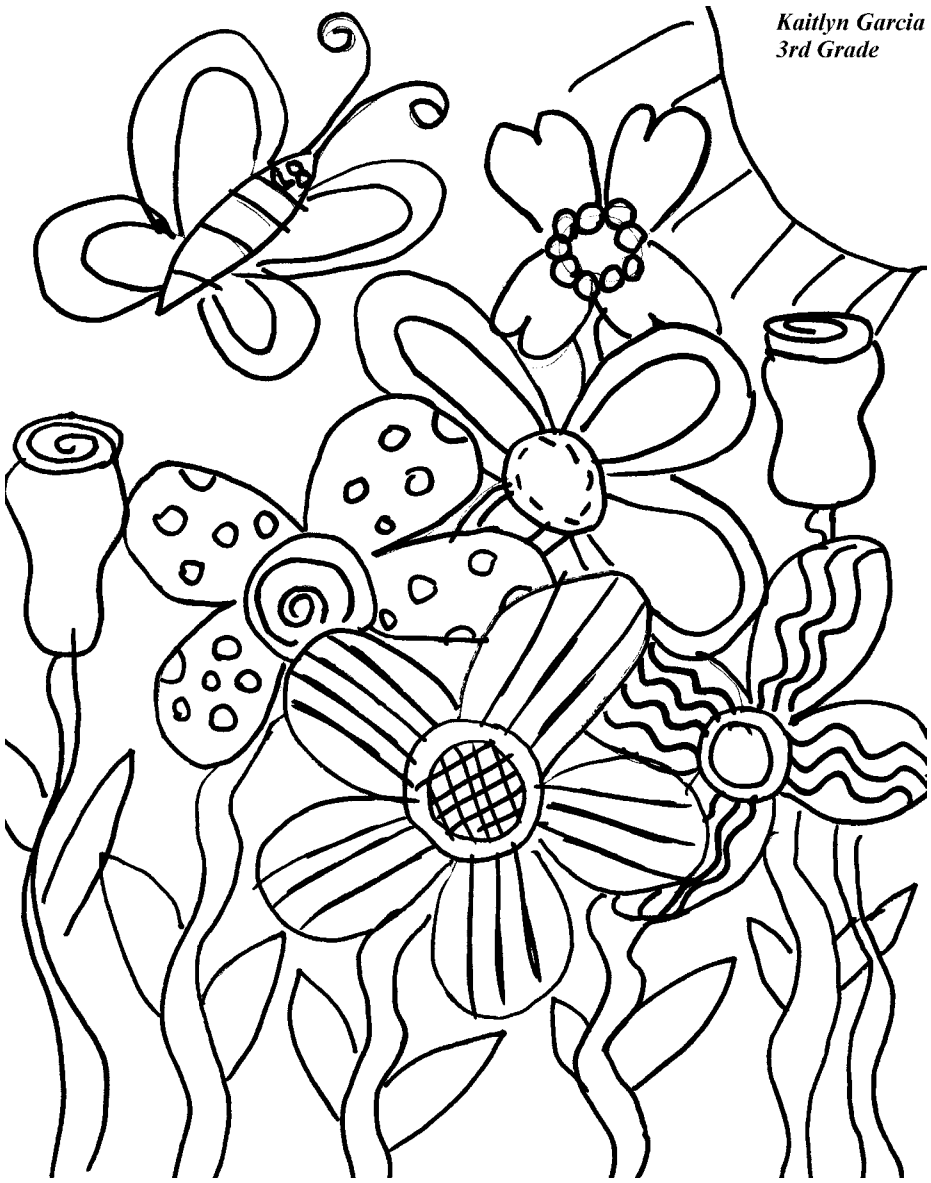

Kaitlyn Garcia
3rd Grade

School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. 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.

The artwork featured on the front cover is chosen at random. Inside each issue, 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*.

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a section of the
Office of the Secretary of State
P.O. Box 13824
Austin, TX 78711-3824
(512) 463-5561
FAX (512) 463-5569

http://www.sos.state.tx.us
register@sos.state.tx.us

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IN THIS ISSUE

Open Meetings

Statewide agencies and regional agencies that extend into four or more counties post meeting notices with the Secretary of State.

Meeting agendas are available on the *Texas Register*'s Internet site:
http://www.sos.state.tx.us/open/index.shtml

Members of the public also may view these notices during regular office hours from a computer terminal in the lobby of the James Earl Rudder Building, 1019 Brazos (corner of 11th Street and Brazos) Austin, Texas. To request a copy by telephone, please call 512-463-5561. Or request a copy by email: register@sos.state.tx.us

For items ***not*** available here, contact the agency directly. Items not found here:

- minutes of meetings
- agendas for local government bodies and regional agencies that extend into fewer than four counties
- legislative meetings not subject to the open meetings law

The Office of the Attorney General offers information about the open meetings law, including Frequently Asked Questions, the *Open Meetings Act Handbook*, and Open Meetings Opinions.
http://www.oag.state.tx.us/open/index.shtml

The Attorney General's Open Government Hotline is 512-478-OPEN (478-6736) or toll-free at (877) OPEN TEX (673-6839).

Additional information about state government may be found here:
http://www.texas.gov

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Meeting Accessibility. Under the Americans with Disabilities Act, an individual with a disability must have equal opportunity for effective communication and participation in public meetings. Upon request, agencies must provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, large print or Braille documents. In determining type of auxiliary aid or service, agencies must give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify the contact person listed on the meeting notice several days before the meeting by mail, telephone, or RELAY Texas. TTY: 7-1-1.

THE GOVERNOR

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

Appointments

Appointments for June 6, 2012

Appointed to the State Employee Charitable Campaign Advisory Committee for a term to expire January 1, 2014, Jolene Miller of Huntsville (replacing Rose Gonzales of San Antonio whose term expired).

Appointed to the State Employee Charitable Campaign Advisory Committee for a term to expire January 1, 2014, Elizabeth J. "Betty" Protas of League City (replacing Patrick Chavez of El Paso whose term expired).

Appointed to the State Employee Charitable Campaign Advisory Committee for a term to expire January 1, 2014, MariBen Ramsey of Austin (Ms. Ramsey is being reappointed).

Appointed to the State Employee Charitable Campaign Advisory Committee for a term to expire January 1, 2014, James "Jim" Reed of San Antonio (replacing Decobia Gray of Dallas whose term expired).

Appointed to the State Employee Charitable Campaign Advisory Committee for a term to expire January 1, 2014, Leah R. Thornton of Austin (replacing Elizabeth Fitzgerald of Austin whose term expired).

Appointed to the State Employee Charitable Campaign Advisory Committee for a term to expire January 1, 2014, Homer D. Trevino of Waco (replacing Donna Brosh of San Angelo whose term expired.

Appointed to the State Employee Charitable Campaign Advisory Committee for a term to expire January 1, 2014, Paul D. Urban of Kerrville (replacing Robert Kelly of Kerrville whose term expired).

Appointed to the State Employee Charitable Campaign Advisory Committee for a term to expire January 1, 2014, William "Bill" Wilson of Hutto (replacing Edie Muehlberger of Austin whose term expired).

Appointed as Judge of the 199th Judicial District Court, Collin County, for a term until the next General Election and until her successor shall be duly elected and qualified, Angela M. Tucker of McKinney. Ms. Tucker is replacing Judge Robert Dry, Jr. who resigned.

Appointed as Justice of the Fourteenth Appellate District, Place 3, for a term until the next General Election and until his successor shall be duly elected and qualified, J. Brett Busby of Houston. Mr. Busby is replacing Justice John Anderson who resigned.

Appointed to the Texas Department of Motor Vehicles Board for a term to expire February 1, 2013, Robert S. "Barney" Barnwell, III of Magnolia (replacing Clifford Butler of Mount Pleasant who resigned).

Appointed to the Texas Guaranteed Student Loan Corporation for a term to expire January 31, 2017, Fernando Trevino, Jr. of Del Rio (replacing Steven Tays of San Antonio who resigned).

Appointed to the Crime Victims' Institute Advisory Council for a term to expire January 31, 2014, Victoria Camp of Austin (reappointed).

Appointed to the Crime Victims' Institute Advisory Council for a term to expire January 31, 2014, Ben Crouch of College Station (reappointed).

Appointed to the Crime Victims' Institute Advisory Council for a term to expire January 31, 2014, Nancy Ghigna of The Woodlands (reappointed).

Appointed to the Crime Victims' Institute Advisory Council for a term to expire January 31, 2014, Rodman F. Goode of Cedar Hill (reappointed).

Appointed to the Crime Victims' Institute Advisory Council for a term to expire January 31, 2014, Henry Porretto of Galveston (reappointed).

Appointed to the Crime Victims' Institute Advisory Council for a term to expire January 31, 2014, Richard L. Reynolds of Manor (reappointed).

Appointed to the Crime Victims' Institute Advisory Council for a term to expire January 31, 2014, Debbie Unruh of Austin (reappointed).

Appointed to the Crime Victims' Institute Advisory Council for a term to expire January 31, 2014, Mary Anne Wiley of Austin (reappointed).

Appointments for June 15, 2012

Appointed to the San Jacinto River Authority Board of Directors for a term to expire October 16, 2017, John D. Eckstrum of Montgomery (replacing Joseph Turner of Willis whose term expired).

Appointed to the San Jacinto River Authority Board of Directors for a term to expire October 16, 2017, Joseph L. Stunja of Kingwood (Mr. Stunja is being reappointed).

Appointments for June 18, 2012

Appointed as State Administrator for the Interstate Agreement on Detainers for a term at the pleasure of the Governor, Kelly Enloe of Normangee (replacing Vanessa Jones of Willis).

Appointed to the Texas School Safety Center Board for a term to expire February 1, 2013, Daniel F. Gilliam of Victoria (replacing Ruben Reyes of Lubbock who resigned).

Pursuant to HB 1754, 82nd Legislature, Regular Session, appointed to the Governing Board of the Texas Indigent Defense Commission for a term to expire February 1, 2013, J. Knox Fitzpatrick of Dallas.

Pursuant to HB 1754, 82nd Legislature, Regular Session, appointed to the Governing Board of the Texas Indigent Defense Commission for a term to expire February 1, 2014, Jon H. Burrows of Temple.

Pursuant to HB 1754, 82nd Legislature, Regular Session, appointed to the Governing Board of the Texas Indigent Defense Commission for a term to expire February 1, 2014, Olen U. Underwood of Willis.

Pursuant to HB 1754, 82nd Legislature, Regular Session, appointed to the Governing Board of the Texas Indigent Defense Commission for a term to expire February 1, 2014, B. Glen Whitley of Hurst.

Pursuant to HB 1754, 82nd Legislature, Regular Session, appointed as an Ex-Officio member to the Governing Board of the Texas Indigent Defense Commission for a term to expire at the pleasure of the Governor, Sherry Radack of Houston.

Pursuant to HB 1754, 82nd Legislature, Regular Session, appointed as an Ex-Officio member to the Governing Board of the Texas Indigent Defense Commission for a term to expire at the pleasure of the Governor, Laura Weiser of Victoria.

Appointments for June 22, 2012

Appointed to the Select Committee on Economic Development for a term at the pleasure of the Governor, Morris E. Foster of Austin (replacing James Epperson, Jr. of Dallas). Mr. Foster will serve as presiding officer of the Committee.

Appointments for June 25, 2012

Appointed to the Texas Transportation Commission for a term to expire February 1, 2017, Jeffrey A. Moseley of Houston (replacing Ned Holmes of Houston whose term expired).

Rick Perry, Governor

TRD-201203405

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Appointments

Appointments for June 28, 2012

Appointed to the West Central Texas Regional Review Committee for a term at the pleasure of the Governor, Carolyn Merriman of Coleman (replacing Nick Poldrack of Coleman).

Appointed to the North Central Texas Regional Review Committee for a term at the pleasure of the Governor, Michael E. "Mike" Allen of Mineral Wells (replacing Tom Durington of Alvarado).

Appointed to the OneStar National Service Commission for a term to expire March 15, 2014, Amber Rose Wall of Pflugerville (replacing Taylor Ellison of Austin whose term expired).

Appointed to the OneStar National Service Commission for a term to expire March 15, 2015, Kirk M. Beckert of Richardson (replacing Reymundo Torres of Lubbock whose term expired).

Appointed to the OneStar National Service Commission for a term to expire March 15, 2015, Veronica "Ronnie" Hagerty of Houston (replacing Dolores Schwertner of Miles whose term expired).

Appointed to the OneStar National Service Commission for a term to expire March 15, 2015, Robert G. Marbut, Jr. of San Antonio (Dr. Marbut is being reappointed).

Appointed to the OneStar National Service Commission for a term to expire March 15, 2015, Arturo "Art" Serna, Jr. of Kyle (Mr. Serna is being reappointed).

Appointed to the OneStar National Service Commission for a term to expire March 15, 2015, Dan S. Woodward of Houston (replacing Connie Roberts of Cedar Park whose term expired).

Appointed to the OneStar Foundation for a term to expire March 15, 2013, Melissa G. Pardue of Austin (replacing Betty Wu Adams of Austin who resigned).

Appointed to the OneStar Foundation for a term to expire March 15, 2015, Brenda Coleman-Beattie of Austin (replacing Beau Egert of Friendswood whose term expired).

Appointed to the OneStar Foundation for a term to expire March 15, 2015, Robert G. Wright, II of Dallas (Mr. Wright is being reappointed).

Appointed to the Pharmaceutical and Therapeutics Committee for a term to expire September 1, 2013, Rene F. Garza of Austin (replacing John Dennison, Jr. of Orange who resigned).

Appointed to the Pharmaceutical and Therapeutics Committee for a term to expire September 1, 2013, Scott T. Schams of College Station (replacing Guadalupe Zamora of Austin whose term expired).

Appointed to the Western States Water Council for a term at the pleasure of the Governor, Fredrick "Rick" Rylander of Iraan (replacing T. Weir Labatt, III of San Antonio).

Appointed to the Western States Water Council for a term at the pleasure of the Governor, Alternate Member G. Dave Scott, III of Richmond (replacing Christopher DeCluitt of Waco).

Designating Commissioner Carlos Rubinstein as the Texas Representative on the Executive Committee of the Western States Water Council for a term at the pleasure of the Governor.

Appointed to the Texas State Board of Examiners of Psychologists for a term to expire October 31, 2017, John R. Huffman of Southlake (replacing Doris Couch of Burleson who resigned).

Appointed to the State Cemetery Committee for a term to expire February 1, 2017, James L. Bayless, Jr. of Austin (replacing Michael McKinney of Austin who is deceased).

Appointments for July 2, 2012

Appointed to the Rehabilitation Council of Texas for a term to expire October 29, 2012, Saul Herrera of Midland (replacing Wilma "Michelle" Crain of Lubbock who no longer qualifies.

Appointed to the Rehabilitation Council of Texas for a term to expire October 29, 2014, Jeffrey Foster of Mount Vernon (pursuant to the U.S. Rehabilitation Act).

Appointed to the Rehabilitation Council of Texas for a term to expire October 29, 2014, Martha Garber of Coppell (pursuant to the U.S. Rehabilitation Act).

Appointed to the Rehabilitation Council of Texas for a term to expire October 29, 2014, Manuel Lopez, Jr. of Rosenberg (pursuant to the U.S. Rehabilitation Act).

Appointed to the Rehabilitation Council of Texas for a term to expire October 29, 2014, Joyce D. Taylor of Houston (pursuant to the U.S. Rehabilitation Act).

Appointed to the Texas Appraiser Licensing and Certification Board for a term to expire January 31, 2014, Malachi Boyuls of Dallas (reappointed).

Appointed to the Texas Appraiser Licensing and Certification Board for a term to expire January 31, 2014, Luis F. De La Garza, Jr. of Laredo (reappointed).

Appointed to the Texas Appraiser Licensing and Certification Board for a term to expire January 31, 2014, Laurie C. Fontana of Houston (reappointed).

Appointed to the Texas Appraiser Licensing and Certification Board for a term to expire January 31, 2014, Shannon K. McClendon of Dripping Springs (reappointed).

Appointed as District Attorney for the 266th Judicial District, Erath County, for a term until the next General Election and until his successor shall be duly elected and qualified, M. Alan Nash of Stephenville (replacing Jason Cashon of Stephenville who resigned).

Appointed as Judge of the 266th Judicial District Court, Erath County, for a term until the next General Election and until his successor shall be duly elected and qualified, Jason Cashon of Stephenville. Mr. Cashon is replacing Judge Donald Jones who resigned.

Rick Perry, Governor

TRD-201203487

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Proclamation 41-3301

TO ALL TO WHOM THESE PRESENTS SHALL COME:

WHEREAS, a vacancy now exists in the membership of the Texas House of Representatives in District No. 144 which consists of part of Harris County; and

WHEREAS, Article III, Section 13 of the Texas Constitution requires the Governor to issue a writ of election ordering an election upon such a vacancy; and

WHEREAS, Texas Election Code §203.004 requires that, absent a finding of an emergency, the special election be held on the next uniform election date occurring on or after the 36th day after the date the election is ordered; and

WHEREAS, November 6, 2012 is the next such available uniform election date occurring after the date the election is ordered; and

WHEREAS, Texas Election Code §3.003 requires the election to be ordered by proclamation of the Governor;

NOW, THEREFORE, I, RICK PERRY, Governor of Texas, under the authority vested in me by the Constitution and Statutes of the State of Texas, do hereby order a special election to be held in District 144 on November 6, 2012, for the purpose of electing a State Representative for House District No. 144 to serve out the unexpired term of the Honorable Ken Legler.

Candidates who wish to have their names placed on the special election ballot must file their applications with the Secretary of State no later than 5:00 p.m. on Thursday, August 23, 2012, in accordance with Texas Election Code §201.054(f).

Early voting by personal appearance shall begin on October 22, 2012, in accordance with Texas Election Code §85.001(a).

A copy of this order shall be mailed immediately to the County Judge of Harris County; and all appropriate writs will be issued and all proper proceedings will be followed for the purpose that said election may be held to fill the vacancy in District 144 and its result proclaimed in accordance with law.

IN TESTIMONY WHEREOF, I have hereto signed my name and have officially caused the Seal of State to be affixed at my Office in the City of Austin, Texas, this the 15th day of June, 2012.

Rick Perry, Governor

TRD-201203406

♦ ♦ ♦

Proclamation 41-3302

TO ALL TO WHOM THESE PRESENTS SHALL COME:

I, RICK PERRY, Governor of the State of Texas, issued an Emergency Disaster Proclamation on July 5, 2011, certifying that exceptional drought conditions posed a threat of imminent disaster in specified counties in Texas.

WHEREAS, record high temperatures, preceded by significantly low rainfall, have resulted in declining reservoir and aquifer levels, threatening water supplies and delivery systems in many parts of the state; and

WHEREAS, prolonged dry conditions continue to increase the threat of wildfire across many portions of the state; and

WHEREAS, these drought conditions have reached historic levels and continue to pose an imminent threat to public health, property and the economy; and

WHEREAS, this state of disaster includes the counties of Andrews, Aransas, Archer, Armstrong, Atascosa, Austin, Bailey, Bandera, Bastrop, Baylor, Bee, Bell, Bexar, Blanco, Borden, Brewster, Briscoe, Brooks, Brown, Burnet, Caldwell, Callahan, Cameron, Carson, Castro, Childress, Clay, Cochran, Coke, Coleman, Collingsworth, Colorado, Comal, Concho, Cottle, Crane, Crockett, Crosby, Culberson, Dallam, Dawson, Deaf Smith, DeWitt, Dickens, Dimmit, Donley, Duval, Eastland, Ector, Edwards, El Paso, Fayette, Fisher, Floyd, Foard, Frio, Gaines, Garza, Gillespie, Glasscock, Goliad, Gonzales, Gray, Guadalupe, Hale, Hall, Hansford, Hardeman, Hartley, Haskell, Hays, Hidalgo, Hockley, Howard, Hudspeth, Hutchinson, Irion, Jackson, Jeff Davis, Jim Hogg, Jim Wells, Jones, Karnes, Kendall, Kenedy, Kent, Kerr, Kimble, King, Kinney, Kleberg, Knox, La Salle, Lamb, Lavaca, Lee, Lipscomb, Live Oak, Llano, Loving, Lubbock, Lynn, Martin, Mason, Matagorda, Maverick, McCulloch, McMullen, Medina, Menard, Midland, Milam, Mitchell, Moore, Motley, Nolan, Nueces, Ochiltree, Oldham, Parmer, Pecos, Potter, Presidio, Randall, Reagan, Real, Reeves, Refugio, Runnels, San Patricio, San Saba, Schleicher, Scurry, Shackelford, Sherman, Stephens, Sterling, Stonewall, Sutton, Swisher, Taylor, Terrell, Terry, Throckmorton, Tom Green, Travis, Upton, Uvalde, Val Verde, Victoria, Ward, Webb, Wharton, Wheeler, Wichita, Wilbarger, Willacy, Williamson, Wilson, Winkler, Yoakum, Young, Zapata and Zavala.

THEREFORE, in accordance with the authority vested in me by Section 418.014 of the Texas Government Code, I do hereby renew the disaster proclamation and direct that all necessary measures, both public and private as authorized under Section 418.017 of the code, be implemented to meet that threat.

As provided in Section 418.016 of the code, all rules and regulations that may inhibit or prevent prompt response to this threat are suspended for the duration of the state of disaster.

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

IN TESTIMONY WHEREOF, I have hereunto signed my name and have officially caused the Seal of State to be affixed at my Office in the City of Austin, Texas, this the 15th day of June, 2012.

Rick Perry, Governor

TRD-201203407

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THE ATTORNEY GENERAL

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

An index to the full text of these documents is available from the Attorney General's Internet site http://www.oag.state.tx.us. Telephone: 512-936-1730. For information about pending requests for opinions, telephone 512-463-2110.

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

Requests for Opinions

RQ-1070-GA

Requestor:

The Honorable Rene Oliveira

Chair, Committee on Land and Resource Management

Texas House of Representatives

Post Office Box 2910

Austin, Texas 78768-2910

Re: Whether a "project duration ordinance" adopted by the City of Austin contravenes section 245.005 of the Local Government Code (RQ-1070-GA)

Briefs requested by July 30, 2012

For further information, please access the website at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-201203493
Katherine Cary
General Counsel
Office of the Attorney General
Filed: July 3, 2012

♦ ♦ ♦

Opinions

Opinion No. GA-0954

Mr. David U. Flores

Williamson County Auditor

Williamson County Courthouse

710 South Main Street, Suite 301

Georgetown, Texas 78626

Re: Calculation of a county's rollback tax rate (RQ-1025-GA)

S U M M A R Y

Chapter 26 of the Tax Code authorizes a petition for a rollback election when the sum of a county's individually adopted tax rates exceeds the combined rollback rate, but under chapter 26's plain terms, the right to petition for a rollback election is not automatically triggered when a county adopts a rate for a particular tax that is above the rollback rate for that particular tax.

For further information, please access the website at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-201203482
Katherine Cary
General Counsel
Office of the Attorney General
Filed: July 2, 2012

♦ ♦ ♦

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

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

TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER R. CUSTOMER PROTECTION RULES FOR RETAIL ELECTRIC SERVICE

16 TAC §25.483

The Public Utility Commission of Texas (commission) proposes amendments to §25.483, relating to Disconnection of Service. The proposed amendments conform §25.483 to amendments made in §25.214, relating to Terms and Conditions of Retail Delivery Service Provided by Investor Owned Transmission and Distribution Utilities, adopted by the commission in Project Number 38674, *Amendments to Customer Protection Rules Relating to Advanced Meters,* with regard to Transmission and Distribution Utility (TDU) deadlines for reconnection of service. The proposed amendments also conform §25.483 to amendments made to §25.497, relating to Critical Load Industrial Customers, Critical Load Public Safety Customers, Critical Care Residential Customers, and Chronic Condition Residential Customers, adopted by the commission in Project Number 40180, *Rulemaking to Amend Substantive Rule §25.497 to Make a Secondary/Emergency Contact Optional,* and the form approved by the commission in Project Number 39622, *Application for Chronic Condition or Critical Care Residential Customer Status,* by changing references from secondary contact to emergency contact. In addition, amendments are proposed to §25.483 that clarify the intent of the rule regarding Retail Electric Provider (REP) timelines for submitting a reconnection request to the TDU. These amendments constitute a competition rule subject to judicial review as specified in Public Utility Regulatory Act §39.001(e). Project Number 39926 is assigned to this proceeding.

Ms. Therese Harris, Policy Analyst, Infrastructure and Reliability Division, has determined that for each year of the first five-year period the proposed amendments are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amendments.

Ms. Harris has also determined that for each year of the first five years the proposed amendments are in effect the public benefit anticipated as a result of enforcing the amendments will derive from the consistency achieved in the Substantive Rules as a result of conforming §25.483 to amendments adopted in Project Number 38674 that require the TDUs to reconnect service for customers with provisioned advanced meters with remote disconnect/reconnect capability more quickly and to amendments adopted in Project Number 40180 and the form adopted in Project Number 39622 that changed references to emergency contact from secondary contact in both §25.497 and the *Application for Chronic Condition or Critical Care Residential Customer Status* form to better describe the nature of this type of contact information.

No adverse economic effect is anticipated on small businesses or micro-businesses as a result of enforcing these amendments. Therefore, no regulatory flexibility analysis is required. There is no anticipated economic cost to persons who are required to comply with the amendments as proposed.

Ms. Harris has also determined that for each year of the first five years the proposed amendments are in effect there should be no effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act, Texas Government Code §2001.022.

The commission staff will conduct a public hearing on this rulemaking, if requested pursuant to the Administrative Procedure Act, Texas Government Code §2001.029, at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701 on Tuesday, September 4, 2012. The request for a public hearing must be received by Tuesday, August 28, 2012.

Initial comments on the proposed amendments may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, by Monday, August 13, 2012. Sixteen copies of comments to the proposed amendment are required to be filed pursuant to §22.71(c) of this title. Reply comments may be submitted by Monday, August 27, 2012. Comments should be organized in a manner consistent with the organization of the amended rule. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed amendments. The commission will consider the costs and benefits in deciding whether to adopt the amendments. All comments should refer to Project Number 39926.

These amendments are proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.001 (West 2007 and Supp. 2011) (PURA), which gives the commission the general power to regulate and supervise the business of each public utility within its jurisdiction; §14.002, which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and, in particular, §14.005, which gives the commission authority to create criteria for the termination of services to the elderly and disabled; and §17.004(b) and §39.101(e), which grant the commission authority to adopt and enforce rules as necessary or appropriate

for carrying out customer protections, including minimum service standards and termination of service.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.001, 14.002, 14.005, 17.004(b), and 39.101(e).

§25.483. Disconnection of Service.

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

(g) Disconnection of Critical Care Residential Customers. A REP having disconnection authority under the provisions of subsection (b) of this section shall not authorize a disconnection for nonpayment of electric service at a permanent, individually metered dwelling unit of a delinquent Critical Care Residential Customer when that customer establishes that disconnection of service will cause some person at that residence to become seriously ill or more seriously ill.

(1) (No change.)

(2) The prohibition against service disconnection of a Critical Care Residential Customer provided by this subsection shall last 63 days from the issuance of the bill for electric service or a shorter period agreed upon by the REP and the customer, emergency (secondary) [~~secondary~~] contact listed on the commission-approved application form, or attending physician. If the Critical Care Residential Customer does not accomplish the requirements of paragraph (1) of this subsection:

(A) The REP shall provide written notice to the Critical Care Residential Customer and the emergency [~~secondary~~] contact listed on the commission-approved application form of its intention to disconnect service not later than 21 days prior to the date that service would be disconnected. Such notice shall be a separate mailing or hand delivered notice with a stated date of disconnection with the words "disconnection notice" or similar language prominently displayed. If the REP has offered and the customer has agreed for the customer and/or emergency [~~secondary~~] contact to receive disconnection notices from the REP by email, a separate email with the words "disconnection notice" or similar language in the subject line shall be sent in addition to the separate mailing or hand delivered notice. Except as provided in this subsection, the notice shall comply with the requirements of subsections (l) and (m) of this section; and

(B) Prior to disconnecting a Critical Care Residential Customer, a TDU shall contact the customer and the emergency [~~secondary~~] contact listed on the commission-approved application form. If the TDU does not reach the customer and emergency [~~secondary~~] contact by phone, the TDU shall visit the premises, and, if there is no response, shall leave a door hanger containing the pending disconnection information and information on how to contact the REP and TDU.

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

(h) Disconnection of Chronic Condition Residential Customers. A REP having disconnection authority under the provisions of subsection (b) of this section shall not authorize a disconnection for nonpayment of electric service at a permanent, individually metered dwelling unit of a delinquent customer when that customer has been designated as a Chronic Condition Residential Customer pursuant to §25.497 of this title (relating to Critical Load Industrial Customers, Critical Load Public Safety Customers, Critical Care Residential Customers, and Chronic Condition Residential Customers), except as provided in this subsection. The REP shall notify the Chronic Condition Residential Customer and the emergency [~~secondary~~] contact listed on the commission-approved application form with a written notice of its intention to disconnect service not later than 21 days prior to the date that service would be disconnected. Such notice shall be a separate mailing or hand delivered notice with a stated date of disconnection with the words "disconnection notice" or similar language prominently displayed. If the REP has offered and the customer has agreed for the customer and/or emergency [~~secondary~~] contact to receive disconnection notices from the REP by email, a separate email with the words "disconnection notice" or similar language in the subject line shall be also be sent in addition to the separate mailing or hand delivered notice. Except as provided in this subsection, the notice shall comply with the requirements of subsections (l) and (m) of this section.

(i) - (m) (No change.)

(n) Reconnection of service. Upon a customer's satisfactory correction of the reasons for disconnection, the REP shall request the TDU, municipally owned utility, or electric cooperative to reconnect the customer's electric service as quickly as possible. The REP shall inform the customer of the [~~approximate~~] reconnection timelines [~~time~~] in accordance with this subsection and the reconnection timelines in §25.214 of this title (relating to Terms and Conditions of Retail Delivery Service Provided by Investor Owned Transmission and Distribution Utilities). For premises without a provisioned advanced meter with remote disconnect/reconnect capabilities, if a REP submits a standard reconnect request and the TDU completes the reconnect the same day, the TDU shall not assess a same-day reconnect fee. For such premises, a TDU may assess a same-day reconnect fee only when the customer expressly requests a same-day reconnect. A REP shall send a reconnection request no later than the timelines in this subsection. The TDU shall complete the reconnection in accordance with the timelines in §25.214 of this title. [~~If a REP submits a reconnection order with no priority or same day reconnect request and the TDU completes the reconnect the same day, the TDU shall not assess a priority reconnect fee. A TDU may assess a priority reconnect fee only when the customer expressly requests it. A customer's service shall be reconnected no later than the timelines set forth in paragraphs (1) - (7) of this subsection.~~]

(1) For payments made before [~~between 8:00 a.m. and~~] 12:00 p.m. on a business day, a REP shall send a reconnection request to the TDU no later than 2:00 p.m. on the same day. [~~The TDU shall reconnect service to that customer that day if possible, but no later than the end of the next utility field operational day after the reconnection request was received by the TDU.~~]

(2) For payments made after 12:00 p.m.[~~,~~] but before 5:00 p.m. on a business day, a REP shall send a reconnection request to the TDU by 7:00 p.m. on the same day. [~~The TDU shall reconnect service to that customer the next day if possible, but no later than the end of the next utility field operational day after the reconnection request was received by the TDU.~~]

(3) For payments made after 5:00 p.m.[~~,~~] but before 7:00 p.m. on a business day, a REP shall send a reconnection request to the TDU by 9:00 p.m. on the same day. [~~The TDU shall reconnect service to that customer as soon as possible, but no later than the end of the next utility field operational day after the reconnection request was received by the TDU.~~]

(4) For payments made after 7:00 p.m. on a [~~, but before 8:00 a.m. on the next~~] business day, a REP shall send a reconnection request to the TDU by 2:00 p.m. on the next business day. [~~The TDU shall reconnect service to that customer no later than the end of the next utility field operational day after the reconnection request was received by the TDU.~~]

(5) For payments made on a weekend day or a holiday, a REP shall send a reconnection request to the TDU by 2:00 p.m. on the first business day after the payment was made. [~~The TDU shall reconnect service to that customer no later than the end of the next~~

~~utility field operational day after the reconnection request was received by the TDU.~~]

(6) In no event shall a REP fail to send a reconnection notice within 48 hours after the customer's satisfactory correction of the reasons for disconnection as specified in the disconnection notice.

~~[(7) In no event shall a TDU fail to reconnect service within 48 hours after a reconnection request is received.]~~

~~[(o) Effective date. The effective date of this section is January 1, 2011.]~~

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

Filed with the Office of the Secretary of State on June 29, 2012.

TRD-201203440
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: August 12, 2012
For further information, please call: (512) 936-7223

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TITLE 19. EDUCATION

PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

CHAPTER 21. STUDENT SERVICES
SUBCHAPTER NN. EXEMPTION PROGRAM FOR VETERANS AND THEIR DEPENDENTS (THE HAZLEWOOD ACT)

19 TAC §21.2105, §21.2107

The Texas Higher Education Coordinating Board (Coordinating Board) proposes amendments to §21.2105 and §21.2107, concerning the Exemption Program for Veterans and their Dependents (The Hazlewood Act).

Specifically, the purpose of the Hazlewood amendments is to authorize institutions to collect applications and supporting documentation on an annual or per-semester basis, whichever they choose. Annual documentation can lessen paperwork for the schools and students, but raises the possibility of required refunds if the applicant's eligibility changes in the course of a given academic year. The proposed amendments to the rules will let the institutions decide which approach to follow.

Mr. Dan Weaver, Assistant Commissioner for Business and Support Services, has determined that for each year of the first five years the amendments are in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the rules.

Mr. Weaver has also determined that, for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of administering the sections will be a clearer understanding of the requirements and restrictions of benefits of the program. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Dan Weaver, P.O. Box 12788, Austin, Texas 78711, (512) 427-6165, dan.weaver@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The amendments are proposed under the Texas Education Code, §54.341, which provides the Coordinating Board with the authority to adopt rules to administer the program.

The amendments affect Texas Education Code, §54.341.

§21.2105. The Application.

(a) (No change.)

(b) For an otherwise eligible veteran, spouse, or child to be entitled to a Hazlewood Act exemption in a given term or semester, he or she must have [~~provide~~] a completed Hazlewood Act Exemption Application and [~~provide~~] the supporting documentation on file with [~~to~~] the institution no later than one year after the institution provides written notice to the applicant of his or her eligibility or receives written confirmation from the applicant acknowledging the applicant's awareness of his or her eligibility for the exemption, whichever is earlier.

(c) All institutions shall require the completed Hazlewood Act Exemption Application Form with supporting documentation at least once each year in which an exemption [~~for each exemption that~~] is granted.

§21.2107. Subsequent Hazlewood Exemption Awards.

(a) For each subsequent [~~term or semester of an~~] academic year in which the veteran, spouse, or child receives a Hazlewood Act Exemption, the institution shall confirm that the veteran, spouse, or child:

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

(b) At least once for [~~For~~] each [~~term or semester of an~~] academic year in which the veteran, spouse, or child receives a Hazlewood Act Exemption, he or she shall, as instructed by the institution, submit the appropriate program application to his or her institution.

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

Filed with the Office of the Secretary of State on July 2, 2012.

TRD-201203451
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: October 25, 2012
For further information, please call: (512) 427-6114

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CHAPTER 22. GRANT AND SCHOLARSHIP PROGRAMS
SUBCHAPTER U. EXEMPTION FOR PEACE OFFICERS ENROLLED IN LAW ENFORCEMENT OR CRIMINAL JUSTICE COURSES

19 TAC §§22.531, 22.533, 22.534

The Texas Higher Education Coordinating Board (Coordinating Board) proposes amendments to §§22.531, 22.533 and 22.534, concerning the Exemption for Peace Officers Enrolled in Law Enforcement or Criminal Justice Courses.

Specifically, the enabling legislation (Texas Education Code §54.2081 and §54.353) indicates that participating peace officers must be undergraduate students. This is currently incorrectly expressed in Board rules as a restriction that a peace officer may enroll only in undergraduate courses. To align Board rules with the legislation, §22.531 is amended by adding a definition of "undergraduate student," §22.533 is amended to indicate the peace officer must be enrolled as an undergraduate student, and §22.534 is amended to remove the restriction that only undergraduate courses may be taken.

Mr. Dan Weaver, Assistant Commissioner for Business and Support Services, has determined that for each year of the first five years the amendments are in effect, there will be no significant fiscal implications to state or local government as a result of enforcing or administering the rules.

Mr. Weaver has also determined that for each year of the first five years the amendments are in effect the public benefit anticipated as a result of administering the sections will be a clearer understanding of the requirements and restrictions of benefits under this subchapter. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Dan Weaver, P.O. Box 12788, Austin, Texas 78711, (512) 427-6165, dan.weaver@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The amendments are proposed under Texas Education Code, §54.2081 and §54.353, which provide the Coordinating Board with the authority to adopt rules governing the granting or denial of an exemption, including rules relating to the determination of a student's eligibility for an exemption under these sections.

The amendments affect Texas Education Code, §54.2081 and §54.353.

§22.531. Definitions.

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

(1) - (10) (No change.)

(11) Undergraduate Student--A person classified by his or her institution as an undergraduate.

§22.533. Eligible Peace Officers.

To qualify, a Peace Officer must:

(1) be an undergraduate student enrolled in an eligible criminal justice or law enforcement-related degree or certificate program at the institution pursuant to this subchapter;

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

§22.534. Eligible Courses.

(a) Only [undergraduate] courses pertaining to [the major requirements of] law enforcement-related or [and] criminal justice degree or certificate programs are eligible for the tuition and laboratory fees exemption.

(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 legal authority to adopt.

Filed with the Office of the Secretary of State on July 2, 2012.

TRD-201203452
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: October 25, 2012
For further information, please call: (512) 427-6114

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 5. PROPERTY AND CASUALTY INSURANCE

SUBCHAPTER E. TEXAS WINDSTORM INSURANCE ASSOCIATION

DIVISION 7. INSPECTIONS FOR WINDSTORM AND HAIL INSURANCE

28 TAC §5.4608

The Texas Department of Insurance (TDI) proposes new 28 TAC §5.4608, concerning appointment of engineers as qualified inspectors. The proposed section implements Insurance Code §2210.254, which was amended by House Bill 3, 82nd Legislature, First Called Session, effective September 28, 2011. As amended by HB 3, §2210.254 requires a licensed professional engineer to be on the roster of engineers (roster) maintained by the Texas Board of Professional Engineers (TBPE) under Occupations Code §1001.652 in order for the commissioner to appoint that engineer as a qualified inspector (appointed engineer) to inspect structures for insurability through the Texas Windstorm Insurance Association.

The proposed section requires appointed engineers to inform the department that they are on the roster no later than December 31, 2012. An engineer who is not on the roster may not act as an appointed engineer on or after January 1, 2013, and must apply or reapply for appointment.

Appointed engineers are integral to determining whether a structure is eligible for association windstorm and hail insurance coverage. The appointed engineer is responsible for the design and inspection of both new construction and repairs to existing structures. Disruption in the availability of appointed engineers to provide these services would be detrimental to the legislative purpose of Insurance Code Chapter 2210.

HB 3 did not establish a date by which an engineer must be on the roster in order to be appointed as a qualified inspector or any provisions excepting current appointed engineers from the roster requirement. HB 3 only directed the TBPE to adopt rules implementing the roster not later than December 1, 2011. Thus, as of September 28, 2011, the effective date of HB 3, no engineer did

or could comply with Insurance Code §2210.254. Because compliance was impossible and enforcement would have disrupted the inspection process for policyholders and applicants for association insurance, the department determined that the legislature intended the roster requirement in Insurance Code §2210.254 to be implemented in an orderly manner, after the TBPE's implementation of the roster.

The TBPE timely adopted its rules and has fully implemented its processes for placing engineers on the roster. Because engineers now can be placed on the roster, the department proposes implementing the roster requirement in Insurance Code §2210.254. To provide for an orderly transition, the department proposes that after December 31, 2012, only those engineers on the roster will be authorized to act as appointed engineers.

Appointed engineers who inform the department that they are on the TBPE roster on or before December 31, 2012, may act as appointed engineers without reapplying for appointment. Appointed engineers who do not inform the department that they are on the TBPE roster on or before December 31, 2012, may reapply for an appointment after they have been placed on the roster. The section will function as follows:

§5.4608. Texas Board of Professional Engineers Roster.

Section 5.4608(a) states that §5.4608 adds to the appointment requirements in §5.4604 (relating to Appointment of Engineers as Qualified Inspectors) and provides that in the event of a conflict, §5.4608 shall control.

Section 5.4608(b) adds the requirement that an engineer appointed as a qualified inspector be on the roster of engineers maintained by the TBPE under Occupations Code §1001.652. On or after January 1, 2013, an engineer who is not on the roster may not act as an appointed engineer. This prohibition is without regard to whether the engineer has an existing appointment.

Section 5.4608(c) describes how engineers may continue an existing appointment after December 31, 2012. Engineers with an existing appointment must submit to the department Form ENG-2, affirming that they are on the TBPE roster. Appointed engineers must submit Form ENG-2 to the department on or before December 31, 2012, or the department will cancel their appointments. Engineers whose appointments are canceled for failure to submit a Form ENG-2 on or before December 31, 2012, will need to reapply for appointment as qualified inspectors.

Section 5.4608(d) states that engineers applying for appointment as qualified inspectors must submit to the department Form ENG-2, affirming that they are on the TBPE roster.

Section 5.4608(e) states that after December 31, 2012, the department will not accept windstorm applications, certifications, or verifications from engineers who are not on the TBPE roster.

Section 5.4608(f) adopts Form ENG-2 by reference.

FISCAL NOTE. Alexis Dick-Paclik, director of the Inspections Office in the Property and Casualty Section, has determined that for each year of the first five years the proposed section will be in effect, there will be no fiscal impact to state and local governments as a result of the enforcement or administration of the proposal. Ms. Dick-Paclik does not anticipate any measurable effect on local employment or the local economy as a result of the proposal.

PUBLIC BENEFIT/COST NOTE. Ms. Dick-Paclik also has determined that for each year of the first five years the proposed section is in effect, there will be public benefits resulting from the proposal and there will be costs to persons required to comply with the proposal.

A. Anticipated Public Benefits.

The anticipated public benefit is implementation of Insurance Code §2210.254, which requires all appointed engineers to be on the roster maintained by the TBPE.

B. Estimated Costs for Persons Required to Comply with the Proposal.

Engineers will incur costs by complying with the proposal's requirement to submit Form ENG-2 to the department. Any costs associated with placement on the roster result from the requirements of Insurance Code §2210.254, Occupations Code §1001.652, and the rules of the TBPE.

Because §5.4608 requires them to submit Form ENG-2 to the department, engineers seeking to continue an appointment or applying for an appointment will incur costs associated with printing and mailing the form to TDI. While there are other methods of generating and submitting required documents that could comply with §5.4608, the department bases its cost analysis on the submission of documents by first class mail, because that method of compliance is available to all persons required to comply with this proposal. The department anticipates that each person will choose the most cost-efficient method of compliance. Choosing a method of compliance is a business decision of each person.

The department's cost estimates are based on the costs of printing and submission. The printing cost is based on the department's latest determination of an estimated cost of 8 cents for one printed page (7 cents for paper and 1 cent for ink). The submission cost is based on the postage rate of 45 cents for a one-ounce standard envelope mailed first class. The department estimates a cost of 5 cents for a standard envelope. In considering all of these cost factors, the department estimates the cost of compliance to be approximately 58 cents per submission.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS. Government Code §2006.002(c) requires that if a proposed rule may have an adverse economic impact on small businesses or micro businesses, a state agency must prepare an economic impact statement that assesses the potential impact of the proposed rule on these businesses. The agency must also prepare a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule.

As of May 1, 2012, approximately 890 engineers were appointed as qualified inspectors. Because each of these persons is licensed and appointed in an individual capacity, the department presumes that each appointed engineer is a small business or micro business for the purpose of this analysis.

As stated in the Public Benefit/Cost Note in this proposal, the department anticipates that each engineer seeking to maintain an appointment or applying for an appointment as a qualified engineer may incur some cost because of this proposal. That cost results from the requirement that the engineer inform the department that the engineer is on the roster.

The department, in accordance with Government Code §2006.002(c-1), has considered requiring alternative means of compliance. The first alternative is to not enforce the requirement. The department has determined that this alternative is neither practical nor reasonable because it does not implement Insurance Code §2210.254. The legislature was aware that the

statute imposed a requirement on engineers and, presumably, intended that the statute nevertheless be implemented.

The second alternative is delayed implementation of the requirement. The department has determined that this alternative is neither practical nor reasonable because it also prevents the implementation of the legislative requirement. The department has considered the timely and orderly implementation of the roster requirement in this proposal.

A third alternative is for the department to confirm with the TBPE which engineers are on the roster. The department has determined that this alternative is neither practical nor reasonable because engineers have the greatest interest in ensuring that they are on the roster. An engineer who acts as an appointed engineer without being on the roster could lose his or her engineering license or appointment. The department does not know which engineers will seek to be on the roster and the TBPE is under no obligation to provide roster information updates on a regular basis. If a dispute or question as to placement on the roster arises, it is a matter between the engineer and the TBPE. For appointed engineers, submitting Form ENG-2 is essentially an application requirement to continue an appointment. Continuing an appointment as a qualified inspector is a business decision of each appointed engineer. The engineers are in the best position to determine that they are on the roster and make the submission.

TAKINGS IMPACT ASSESSMENT. The department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action. Therefore, this proposal does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. To have your comments considered, you must submit written comments on the proposal no later than 5:00 p.m. on August 13, 2012 to the Office of Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comments must be simultaneously submitted to Alexis Dick-Paclik, Director of the Inspections Office in the Property and Casualty Section, Mail Code 105-5G, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. You must submit any request for a public hearing separately to the Office of Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104 before the close of the public comment period. If the department holds a hearing, it will consider written and oral comments presented at the hearing.

STATUTORY AUTHORITY. New §5.4608 is proposed under Insurance Code §§2210.008, 2210.254, and 36.001.

Section 2210.008(b) authorizes the commissioner to adopt reasonable and necessary rules to implement Chapter 2210. Section 2210.254(a)(2) states that a qualified inspector includes a licensed professional engineer who is on the roster described by Occupations Code §1001.652 and authorizes the commissioner to adopt rules specifying the requirements for appointment to conduct windstorm inspections.

Section 36.001 provides that the commissioner of insurance may adopt any rules necessary and appropriate to implement the department's powers and duties under the Insurance Code and other laws of the state.

CROSS REFERENCE TO STATUTE. The following statutes are related to this proposal: Occupations Code §1001.652 and Insurance Code §2210.254.

§5.4608. Texas Board of Professional Engineers Roster.

(a) The requirements in this section are in addition to the appointment requirements set forth in §5.4604 of this title (relating to Appointment of Engineers as Qualified Inspectors). This section shall control over any conflicting provision in §5.4604 of this title.

(b) Each engineer appointed as a qualified inspector must be on the roster of engineers maintained by the Texas Board of Professional Engineers under Occupations Code §1001.652. An engineer who is not on the roster may not act as an appointed engineer on or after January 1, 2013.

(c) To continue an existing appointment after December 31, 2012, each appointed engineer must, no later than December 31, 2012, submit to the department Form ENG-2, affirming that the engineer is on the roster of engineers maintained by the Texas Board of Professional Engineers under Occupations Code §1001.652. The department will cancel the appointment of each appointed engineer who does not submit the Form ENG-2 on or before December 31, 2012. An engineer whose appointment is canceled under this section may reapply for appointment as a qualified inspector.

(d) Each engineer applying for appointment as a qualified inspector must submit to the department Form ENG-2, affirming that the engineer is on the roster of engineers maintained by the Texas Board of Professional Engineers under Occupations Code §1001.652.

(e) After December 31, 2012, the department will not accept windstorm applications, certifications, or verifications from engineers who are not on the roster maintained by the Texas Board of Professional Engineers under Occupations Code §1001.652.

(f) Form ENG-2 is adopted by reference. The form may be obtained at www.tdi.texas.gov/forms/form13windstorm.html.

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

Filed with the Office of the Secretary of State on July 2, 2012.

TRD-201203455
Sara Waitt
General Counsel
Texas Department of Insurance
Earliest possible date of adoption: August 12, 2012
For further information, please call: (512) 463-6327

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 30. OCCUPATIONAL LICENSES AND REGISTRATIONS

SUBCHAPTER K. PUBLIC WATER SYSTEM OPERATORS AND OPERATIONS COMPANIES

30 TAC §30.387, §30.402

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes amendments to §30.387 and §30.402.

Background and Summary of the Factual Basis for the Proposed Rules

The agency's Public Drinking Water Program received a request from Sheppard Air Force Base (SAFB) requesting an exception to the existing rules requiring that all individuals who collect microbiological samples and determine disinfection residuals within its drinking water distribution system be licensed in accordance with 30 TAC Chapters 30 and 290. Specifically, SAFB requested that active duty military personnel, who have completed the Bioenvironmental Engineering Apprentice (BEA) training, be allowed to collect microbiological samples and determine disinfection residuals within its drinking water distribution system without holding a public water system operator license issued by the executive director.

According to §30.381(b), public water system operators who perform process control duties in the production or distribution of drinking water, as defined in Chapter 290, must be licensed.

Section 290.38(63) defines process control duties as "Activities that directly affect the potability of public drinking water, including: making decisions regarding the day-to-day operations and maintenance of public water system production and distribution; maintaining system pressures; determining the adequacy of disinfection and disinfection procedures; taking routine microbiological samples; taking chlorine residuals and microbiological samples after repairs or installation of lines or appurtenances; and operating chemical feed systems, filtration, disinfection, or pressure maintenance equipment; or performing other duties approved by the executive director."

The BEA course reviewed by the executive director's staff includes training on: laboratory safety; the Hazardous Communications Act; chlorine safety; characteristics of various water sources, waterborne diseases, and the hydrologic cycle; monitoring plans and sampling requirements for public water systems; basic chemistry and math related to water treatment, distribution, and dosage calculations; cross-connection control and backflow prevention basics in a distribution system; and disinfection concepts and types used in public water systems. The executive director's staff evaluated the BEA course, exam categories and questions and determined that the BEA course is comparable, but not identical, to the agency's occupational licensing section's basic public drinking water system training.

Once an individual has successfully completed the BEA training, and passed the applicable exam, they are certified by the military to perform various duties relating to the drinking water distribution system. SAFB contends that active duty military personnel that have completed the BEA training possess sufficient knowledge and skill to collect microbiological samples and determine disinfection residuals at military facilities' water distribution systems and that the time and expense incurred by the military to have active duty military personnel take the additional training and exam to obtain a license issued from the executive director, does not add to the protection of the environment or public health.

The executive director's staff concurs with SAFB that requiring active duty military personnel to take the additional training and exam to obtain a license issued by the executive director does not add to the protection of the environment or public health. The executive director's staff also concludes that active duty military personnel who have successfully completed the BEA or equivalent military training, as determined by the executive director are qualified to collect microbiological samples and determine disinfection residuals at military facilities' water distribution systems. The executive director's staff also recognizes that, while the exception request came from SAFB, the majority of Texas military facilities uses active duty military personnel to collect microbiological samples and determine disinfection residuals and would benefit from the exception.

The rulemaking would amend Chapter 30 by adding a provision that defines a military operator-in-training and a provision that would allow individuals who have successfully completed the BEA, or equivalent military training, as determined by the executive director, to collect microbiological samples and determine disinfection residuals at military facilities, without holding a public water system operator license issued by the executive director. Additionally, the rulemaking would clarify the existing definition of operator-in-training.

Section by Section Discussion

Subchapter K, Public Water System Operators and Operations Companies

The proposed amendment to §30.387, Definitions, would add a definition for military operator-in-training. The proposed change is necessary to identify active duty military personnel who collect microbiological samples and determine disinfection residuals at military facilities' water distribution systems. Additionally, the proposed amendment to §30.387 would clarify the existing definition of operator-in-training. This proposed change is necessary to add clarity and improve the readability of the rule.

The proposed amendment to §30.402, Exemptions, would allow active duty military personnel who do not hold a public water system operator license issued by the executive director, but have successfully completed the BEA or equivalent military training, as determined by the executive director, to collect microbiological samples and determine disinfection residuals at military facilities' water distribution systems. The proposed change is necessary to save the military the time and expense that is incurred by having active duty military personnel take the additional training and exam to obtain the license issued by the TCEQ.

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rules. The proposed rules would not have any fiscal impact on other units of state or local government.

The proposed rules would apply only to active military personnel at military facilities who have completed the BEA or equivalent military training (as determined by the executive director). The proposed rules would allow active duty military personnel to collect microbiological samples and determine the level of disinfection residuals in drinking water at military facilities' water distribution systems without holding a license issued by the executive director for a public water system operator as required by Chapters 30 and 290. The agency has analyzed the BEA course, exam categories, and exam questions and has determined that active duty military personnel that have completed the BEA training possess the basic knowledge and skill to perform these specific tasks.

The proposed rules would save the military the time and expense of having active military personnel take additional training and exams without compromising the protection of the environment or public health, since agency rules would still require the public drinking water system of a military facility to be under the supervision of a licensed public water system operator. The proposed exemption of active duty military personnel from public water system operator licensing requirements is limited in scope and would only allow active duty military personnel to collect microbiological samples and determine the levels of disinfection residuals at military facilities' water distribution systems. Currently, there are 11 major military facilities in Texas. Cost savings resulting from the proposed license exemption for the military are not expected to be significant, but the proposed rules are expected to save the military the time and expense of having their personnel study for a license and taking the required examination. Cost savings for the military would include, per individual, $250 for the basic water operator training course, an estimated $400 for 30 hours of continuing education, $111 to take the test to obtain an initial three-year license, and $111 every three years afterward for the renewal of the license.

The agency would not experience a significant decrease in revenue (Account 468 - Occupational Licensing Account) as a result of the proposed rules, and there would be no fiscal impact on other state agencies or units of local government.

Public Benefits and Costs

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be continued protection of the environment and public health coupled with efficient use of military resources.

The proposed rules would not have a fiscal impact on individuals. The proposed rules would allow military facilities in Texas to save the cost associated with requiring active duty military personnel who have completed the BEA or equivalent military training to obtain a public water system operator license issued by the executive director.

The proposed rules are not expected to have a fiscal impact on large businesses. The proposed rules would only apply to active duty military personnel on military facilities in Texas, and the proposed exemption is limited in scope to collecting microbiological samples and determining levels of disinfection residuals at military facilities' water distribution systems, without obtaining a public water system operator license issued by the executive director.

Small Business and Micro-Business Assessment

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed this rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rules are not subject to that statute. Texas Government Code, §2001.0225 applies only to rules that are specifically intended to protect the environment or reduce risks to human health from environmental exposure. The intent of the proposed rules is to provide an exception for active duty military personnel who have successfully completed the BEA, or equivalent military training to collect, microbiological samples and determine disinfection residuals without obtaining a public water system operator license issued by the executive director. Additionally, the proposed rules will clarify the existing definition of operator-in-training. The proposed rules are not specifically intended to protect the environment or reduce risk to human health from environmental exposure, but rather to provide an exception for active duty military personnel from obtaining a license issued by the executive director, provided that they have sufficient training. The proposed rules will also provide clarification for the existing definition of operator-in-training. The proposed rules would not adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Thus, the proposed rules do not meet the definition of "a major environmental rule" as defined in Texas Government Code, §2001.0225(g)(3), and thus, do not require a full regulatory impact analysis.

Furthermore, the proposed rules do not meet any of the four applicability requirements listed in Texas Government, §2001.0225(a). Texas Government Code, §2001.0225 applies only to a major environmental rule which: 1) exceeds a standard set by federal law, unless the rule is specifically required by state law; 2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; 3) exceeds a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) is adopted solely under the general powers of the agency instead of under a specific state law.

There are no federal standards regulating occupational licensing. These rules do not exceed state law requirements, and state law requires their implementation, not federal law. There are no delegation agreements or contracts between the State of Texas and an agency or representative of the federal government to implement a state and federal program regarding occupational licensing. And finally, these rules are being proposed under specific state laws, in addition to the general powers of the agency.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated these proposed rules and performed an assessment of whether these proposed rules constitute a taking under Texas Government Code, Chapter 2007. The purpose of the proposed rules is to provide an exception for active duty military personnel, who have successfully completed the BEA,

or equivalent military training, to collect microbiological samples and determine disinfection residuals without obtaining a public water system operator license issued by the executive director. Promulgation and enforcement of these proposed rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulations do not affect a landowner's rights in private real property because this rulemaking will neither restrict or limit the owner's right to property nor reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. These proposed rules are specific to certain functions within water distribution systems at military facilities and do not affect private real property.

Consistency with the Coastal Management Program

The commission reviewed the proposed rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rules are not subject to the Texas Coastal Management Program.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on July 26, 2012, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Bruce McAnally, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.texas.gov/rules/ecomments*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2012-024-030-WS. The comment period closes August 13, 2012. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.texas.gov/nav/rules/propose_adopt.html*. For further information, please contact Terry Thompson, Occupational Licensing Section, (512) 239-6095.

Statutory Authority

The amendments are proposed under Texas Water Code (TWC), §5.013, concerning the General Jurisdiction of the Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which establishes the commission's general authority necessary to carry out its jurisdiction; TWC, §5.103, concerning Rules, which requires the commission to adopt rules necessary to carry out its powers and duties; TWC, §5.105, which provides the commission with the authority to establish and approve all general policies of the commission by rule; TWC, §37.002, concerning Rules, which provides the commission with the authority to adopt rules for various occupational licenses; TWC, §37.003, concerning License or Registration Required, which provides that persons engaged in certain occupations must be licensed by the commission; TWC, §37.008, concerning Training; Continuing Education, which provides the commission with the authority to approve training; Texas Health and Safety Code (THSC), §341.033, concerning protection of public water supplies; THSC, §341.034 concerning licensing and registration of persons who perform duties relating to public water supplies; and THSC, §341.0315 which requires public water systems to comply with commission rules and adopted to ensure the safe supply of drinking water.

These proposed amendments implement TWC, §§5.013, 5.102, 5.103, 5.105, 37.002, 37.003, and 37.008, and THSC, §§341.033, 341.034, and 341.0315.

§30.387. Definitions.

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

(1) Chief operator--An individual who has overall responsibility for the operation of a public water system.

(2) Honorary license--License converted from a perpetual license that has been discontinued by the commission. This honorary license does not award the licensee the authority to perform process control duties in production or distribution of drinking water for public water systems.

(3) Military operator-in-training--An individual who is an active duty member of the military of the United States and has successfully completed the Bioenvironmental Engineering Apprentice (BEA) or equivalent military training, as determined by the executive director, and collects microbiological samples and determines disinfection residuals for military facilities' water distribution systems. This individual may not perform any other process control duties in the water distribution or treatment facilities of a military installation.

(4) [~~(3)~~] Operator-in-charge--An individual who has overall responsibility for the operation of a public water system in the absence of the chief operator.

(5) [~~(4)~~] Operator-in-training--An unlicensed individual entering the field of public water system operation for the first time who has less than one year of experience and is in training to perform process control duties in production or distribution of public drinking water.

(6) [~~(5)~~] Public water system operations company--A person or other nongovernmental entity that provides operations services to one or more public water systems on a contractual basis.

(7) [~~(6)~~] Public water system operator--Licensed operator who performs process control duties in production or distribution of drinking water.

(8) [~~(7)~~] Work experience--The actual performance of job tasks in a public water supply system, that are considered essential for the treatment or distribution of drinking water.

§30.402. Exemptions.

(a) An individual who performs process control duties in production or distribution of drinking water for a transient non-community [~~noncommunity~~] water system as defined in §290.38(77) [~~§290.38(46)~~] of this title (relating to Definitions), is exempt from the licensing requirements of this subchapter, if the source water for the water system

is purchased treated water or groundwater that is not under the direct influence of surface water.

(b) An operator-in-training under the direct supervision of a licensed public water system operator is exempt from the licensing requirements of this subchapter.

(c) A military operator-in-training under the direct supervision of a licensed public water system operator is exempt from the licensing requirements of this subchapter for the purpose of collecting microbiological samples or determining disinfection residuals at military facilities' water distribution systems. The military operator-in-training is not exempt from the licensing requirements of this subchapter for the purpose of performing any other process control duties in the distribution or treatment facilities of a public water system.

(d) [~~(c)~~] An individual who holds a groundwater or surface water license may perform duties relating to the operation and maintenance of drinking water production, purchased water, and water distribution systems and is not required to hold a distribution license.

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

Filed with the Office of the Secretary of State on June 29, 2012.

TRD-201203427
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: August 12, 2012
For further information, please call: (512) 239-2141

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CHAPTER 285. ON-SITE SEWAGE FACILITIES

The Texas Commission on Environmental Quality (commission) proposes amendments to §§285.3 - 285.6, 285.32 - 285.36, 285.90, and 285.91.

Background and Summary of the Factual Basis for the Proposed Rules

The proposed rulemaking would update the rule requirements. The proposed rules would remove setbacks between on-site sewage facility (OSSF) components and drainage easements; clarify that a permit and an approved plan are required to construct, alter, repair, extend or operate an OSSF; and exempt subdivisions from submitting planning materials when a tract is divided into two five-acre or larger tracts. The proposed rules would allow the repair or alteration of existing cluster systems. The proposed rules would update sizing formulas for leaching chambers. The proposed rulemaking would require new or replacement disinfection devices to be certified by a third party. The proposed rules would add the option to reduce the size of aerobic treatment units when using an equalization tank; establish guidelines for the installation of new equalization tanks; and clarify what constitutes an emergency repair. The proposed rules would increase the cleanout spacing to 100 feet for consistency with the Uniform Plumbing Code; would add language that applies to pipes crossing drainage easements; and would clarify that once tanks are no longer used to hold sewage must be abandoned. The proposed rules would allow another option for sewage pipes installed under a driveway or sidewalk and update figures and tables to be consistent with the changes discussed previously.

Section by Section Discussion

§285.3, General Requirements

The proposal would amend §285.3(a) to clarify that an approved plan is necessary in addition to a permit to construct, alter, repair, extend or operate an OSSF. The proposed amendment would clarify requirements for the public and incorporate statutory language to be consistent with the Texas Health and Safety Code (THSC), §366.051(a).

§285.4, Facility Planning

The proposal would add §285.4(a)(1)(C), which would not require the submittal of planning materials if a platted or unplatted subdivision tract is divided into two tracts with five or more acres for family transfers. The proposed amendment would not have a negative impact on water quality because lots that are five or more acres can support an OSSF. The proposal would also change "public water supply" to "public water system" in §285.4(a)(1) to provide consistency with the Public Water Supply Rules (30 TAC Chapter 290).

§285.5, Submittal Requirements for Planning Materials

The proposed rulemaking would include §285.5(a)(2)(E), which would require that all applications for new OSSF construction within the Edwards Aquifer Recharge Zone require a professional design.

§285.6, Cluster Systems

Proposed §285.6(a) and (b) would be changed to state that new cluster systems are not authorized under Chapter 285, but existing cluster systems may be repaired or altered if there is no increase in the volume of the permitted flow or change in the nature of the permitted flow. Most cluster systems that are failing are currently required to obtain a permit under 30 TAC Chapter 309, Subchapter C, but it is difficult for existing cluster systems to qualify for this permit. This proposed amendment would allow cluster system owners to repair or alter the system instead of replacing the system or operating a system that does not meet the permit requirements.

§285.32, Criteria for Sewage Treatment Systems

Proposed §285.32(a)(8) would be added that would provide guidance for a pipe that crosses a drainage easement. The proposed rule would also increase the cleanout spacing to 100 feet for consistency with the Uniform Plumbing Code. Proposed §285.32(c)(1) would provide an option to reduce the size of aerobic treatment units through the installation of an equalization tank. The proposed rulemaking would also amend §285.32(b)(1)(C) to match the figure contained in §285.90(7). The proposed rule would modify §285.32(d) to clarify when an OSSF must be designed by a professional engineer or a professional sanitarian.

§285.33, Criteria for Effluent Disposal Systems

The proposed rulemaking would outline the requirements for pipe that crosses a drainage easement. The proposed rulemaking also updates the formulas to use to determine the appropriate length of leaching chambers. It would also clarify the allowable gravel content for soils beneath low pressure dosing and drip irrigation systems. The proposed rule would require that all new disinfection devices used at OSSFs be listed as an American National Standard Institute (ANSI)/National Science Foundation (NSF) Standard 46 approved dispenser or disinfection device for wastewater treatment systems. The

proposed rulemaking would allow the replacement of a disinfection device on existing systems to be an emergency repair that could be performed by a licensed Installer II, a licensed maintenance provider, or a registered maintenance technician. Third party certification would improve reliability of chlorinators that are used in OSSFs and decrease the potential for disease transmission through OSSFs.

Seeking Comments Regarding the Mandatory Use of NSF Certified Disinfection Devices

The commission is seeking comments related to the efficiency of NSF certified disinfection devices and the impacts of transitioning to the mandatory use of such devices by requiring the use of NSF certified disinfection devices in on-site sewage facilities after a specified date. The commission specifically requests comments on the efficiency of disinfection devices, the cost of disinfection devices to the consumer, and an appropriate effective date.

§285.34, Other Requirements

The proposed rulemaking amends §285.34(b)(4), which would provide requirements if an equalization tank is used. The proposed rule would offer a potentially lower cost option to reduce aerobic treatment unit sizing if an equalization tank is installed.

§285.35, Emergency Repairs

The proposed rulemaking would clarify the list of items that are considered emergency repairs. The proposed rulemaking would also replace the word "installer" with "individual authorized to make the repair" to accommodate that an installer, maintenance technician or maintenance provider might perform the emergency repair.

§285.36, Abandoned Tanks, Boreholes, Cesspools, and Seepage Pits

The proposed rulemaking would clarify that a tank that is no longer used to hold sewage must be abandoned.

§285.90, Figures

The proposed rule would implement changes in Figure 3 that would provide space for an authorized individual to indicate that the access ports were secured before leaving the site in accordance with House Bill 240, 82nd Legislature, 2011.

§285.91, Tables

The proposed rule would clarify that Table II (Aerobic Treatment Unit Sizing) also applies to apartments and townhomes and provides clarity when sizing for one to three bedroom homes. The proposed rule would remove drainage easements from Table X. The proposed rule would change Table X to allow another option for sewage pipes that are installed under a driveway or sidewalk.

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rules. State agencies and units of local government that own or operate OSSFs could experience cost savings under the proposed rules, but the significance of any savings will vary depending on the particular circumstances of each OSSF.

The proposed rules would amend sections of Chapter 285 concerning On-Site Sewage Facilities to clarify existing requirements, provide additional means of compliance, and incorporate new technologies and standards. The proposed rules would: clarify that a permit and approved plan are required to construct, alter, repair, extend, or operate an OSSF; clarify what constitutes an emergency repair; and clarify that all applications for new OSSF construction within the Edwards Aquifer Recharge Zone require a professional design. The proposed rules would also: require new or replacement disinfection devices to be certified by a third party; allow for the repair or alteration of existing cluster systems; remove drainage easement setbacks when these easements would not convey storm water; provide technical requirements to set minimum acceptable criteria for crossing drainage easements and eliminate the need to request a variance from OSSF rules; exempt subdivisions from submitting planning materials when a tract is divided into tracts larger than five acres among family members; update sizing formulas for leaching chambers; add the option to reduce the size of aerobic treatment units when using an equalization tank; establish guidelines for the installation of new equalization tanks; and update figures and tables to provide consistency with the proposed rules.

OSSFs are owned by some state agencies like the Texas Department of Parks and Wildlife and the Texas Department of Transportation. Some school districts also own OSSFs. The agency does not have data available to determine how many OSSFs are owned by governmental entities.

In general, the proposed rules are expected to lower the cost of installing new OSSFs or in modifying existing OSSFs since they offer new options to comply with regulations. The requirement for certified disinfection devices could cost as much as $125 per device under the proposed rules, and state agencies or units of local government that own or operate an OSSF would pay for a certified disinfection device if they are required to repair an existing disinfection device or if they install a new OSSF that requires one. However, by adding disinfection devices to the proposed list of emergency repairs, OSSF owners would be able to save the more expensive cost of upgrading the entire OSSF when a disinfection device fails. The remaining options provided by the proposed rules are more likely to affect non-governmental property owners, and the fiscal impact of those proposals can be found in the Public Benefit and Costs section of this fiscal note.

Units of local government that enforce OSSF rules are not expected to experience increased costs as a result of the proposed rules since the number of modifications of existing systems and installations of new systems is not expected to significantly increase the enforcement burden of units of local government.

Public Benefits and Costs

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be continued protection of the environment and public health while providing more options for compliance and incorporating updated technology for the proper installation, maintenance, and repair of OSSFs.

Individual property owners are expected to experience overall cost savings as a result of the proposed rules. The significance of cost savings would depend on the particular location and circumstance of each OSSF. The requirement for certified disinfection devices could cost as much as $125 per device under the proposed rules. However, by adding disinfection devices to the list of emergency repairs, the proposed rules would allow such devices to be upgraded without paying more to upgrade the en-

tire OSSF. The proposed rules are expected to result in cost savings for those property owners whose OSSF installations cross drainage easements if those easements do not convey storm water. The amount of savings could range from $200 to $5,000 under the proposed rules. The proposed use of equalization tanks could allow for the reduction in treatment unit capacity, which could also reduce costs for a property owner. Possible savings could range from $200 to $2,000 depending on the size of the home or the number of residences served by an OSSF. By allowing cluster systems to be repaired instead of requiring a permit under Chapter 309, Subchapter C, the proposed rules are also expected to reduce costs for property owners where obtaining a permit is not practical. Estimated savings could exceed $100,000 and will vary depending on the number of lots served by the OSSF. By allowing the repair of cluster systems, the proposed rules would allow property owners to repair OSSFs that currently might be out of compliance and that endanger the environment and public health. By exempting subdivisions with tracts larger than five acres being transferred to family members from requirements to submit subdivision planning materials, property owners could save from $200 to $400 in professional costs on tracts whose sizes are capable of supporting an OSSF. By establishing a size requirement that is five acres or larger, the proposed rules would require planning materials only for lots that are not capable of supporting an OSSF.

Large businesses are expected to experience the same cost savings as individuals if they own or operate OSSFs. The significance of any cost savings would depend on the particular circumstances of each OSSF installed or modified.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses that install, modify, or use OSSFs as a result of the proposed rules. There are approximately 3,081 licensed individuals who own small or micro-businesses that would be required to comply with the proposed rules if they install or replace OSSFs and related equipment. The proposed rules are not expected to have a significant fiscal impact on licensed individuals since they could pass any cost impacts or savings on to customers. Small businesses that own an OSSF are expected to see the same cost savings overall as those experienced by individual property owners and large businesses.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed this rulemaking action in light of the regulatory analysis requirements of the Administrative Procedure Act, Texas Government Code, §2001.001 *et seq.,* and determined that the proposed rules are not subject to Texas Government Code, §2001.0225 because they do not meet the definition of "major environmental rule" as defined in Texas Government Code, §2001.0225(g)(3). A "major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The intent of the proposed rules is to update the rules by removing setbacks between OSSF components and drainage easements; by clarifying that a permit and an approved plan are required to construct, alter, repair, extend or operate an OSSF; and by exempting subdivisions from submitting planning materials when a tract is divided into two five-acre or larger tracts. The proposed rules are also intended to allow the repair or alteration of existing cluster systems. The proposed rules are intended to update sizing formulas for leaching chambers. The proposed rules are intended to require new or replacement disinfection devices to be certified by a third party. The proposed rules are intended to add the option to reduce the size of aerobic treatment units when using an equalization tank; to establish guidelines for the installation of new equalization tanks; to clarify what constitutes an emergency repair; and to update figures and tables to be consistent with the previous list of changes. Protection of human health and the environment may be a by-product of these proposed rules, but it is not the specific intent of the rules.

Further, these proposed rules would not adversely affect, in a material way, the economy, a section of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. These proposed rules are not expected to result in significant fiscal implications for OSSF aerobic system owners, installers, aerobic system maintenance providers, engineers, sanitarians, site evaluators, authorized agents or designated representatives. Similarly, these proposed rules are not expected to affect the environment and public health and safety in any material, adverse way. Thus, these proposed rules do not meet the definition of "a major environmental rule" as defined in Texas Government Code, §2001.0225(g)(3), and do not require a full regulatory impact analysis.

Furthermore, these proposed rules do not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 applies only to a major environmental rule that: 1) exceeds a standard set by federal law, unless the rule is specifically required by state law; 2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; 3) exceeds a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopts a rule solely under the general powers of the agency instead of under a specific state law. The proposed rules do not exceed a federal standard because there are no federal standards regulating on-site sewage facilities. The proposed rules do not exceed an express requirement of state law. Texas Health and Safety Code, §366.012(a) grants the commission specific authority to adopt rules concerning on-site sewage disposal systems. Also, the proposed rules do not exceed a requirement of an agreement because there are no delegation agreements or contracts between the State of Texas and an agency or representative of the federal government to implement a state and federal program regarding on-site sewage facilities. Finally, these rules are being proposed under specific state laws, in addition to the

general powers of the agency. Therefore, Texas Government Code, §2001.0225 is not applicable to these proposed rules.

The commission invites public comment regarding this draft regulatory impact analysis determination. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated these proposed rules and performed an analysis of whether these proposed rules constitute a taking under Texas Government Code, Chapter 2007. The purpose of these proposed rules is to update the rules. The proposed rules would substantially advance this stated purpose by removing setbacks between OSSF components and drainage easements; by clarifying that a permit and an approved plan is required to construct, alter, repair, extend or operate an OSSF; and by exempting subdivisions from submitting planning materials when a tract is divided into two five-acre or larger tracts. The proposed rules would allow for the repair or alteration of existing cluster systems, which is not allowed under current rules. The proposed rules would update sizing formulas for leaching chambers. The proposed rules would require new or replacement disinfection devices to be certified by a third party. The proposed rules would add the option to reduce the size of aerobic treatment units when an equalization tank is used; would establish guidelines for the installation of new equalization tanks; would clarify what constitutes an emergency repair; and would update figures and tables to be consistent with the above list of changes.

Promulgation and enforcement of these proposed rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulations do not affect a landowner's rights in private real property because this rulemaking does not burden nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. These proposed rules do not affect private real property.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.,* and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the proposed rulemaking is consistent with the applicable CMP goals and policies.

The applicable goals of the CMP are: to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas; to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone; to ensure and enhance planned public access to and enjoyment of the coastal zone in a manner that is compatible with private property rights and other uses of the coastal zone; and to balance these competing interests.

The specific CMP policies applicable to these proposed amendments include Nonpoint Source (NPS) Water Pollution and require, under the THSC, Chapter 366, governing on-site sewage disposal systems, that on-site disposal systems be located, designed, operated, inspected, and maintained so as to prevent releases of pollutants that may adversely affect coastal waters. The proposed amendments will make the rules more protective by allowing the repair or alteration of existing cluster systems and by clarifying what constitutes and emergency repair, and therefore, the amendments are consistent with the CMP policies.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rules are consistent with these CMP goals and policies, because these rules do not create or have a direct or significant adverse effect on any coastal natural resource areas, and because the proposed rules do not relax current treatment or disposal standards.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on August 6, 2012, at 2:00 p.m. in Building B, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Charlotte Horn, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.texas.gov/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2012-023-285-CE. The comment period closes August 13, 2012. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.texas.gov/nav/rules/propose_adopt.html.* For further information, please contact Candy Garrett, Program Support Section, (512) 239-1457.

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §§285.3 - 285.6

Statutory Authority

These amendments are proposed under Texas Water Code (TWC), §5.012, concerning Declaration of Policy; TWC, §5.013, concerning the General Jurisdiction of the Commission; TWC, §5.102, concerning General Powers; and TWC, §5.103, concerning Rules. These amendments are also proposed under Texas Health and Safety Code (THSC), §366.001, concerning Policy and Purpose; THSC, §366.011, concerning General Supervision and Authority; THSC, §366.012, concerning Rules Concerning On-Site Sewage Disposal Systems; THSC, §366.051, concerning Permits; THSC, §366.052, concerning Permit Not Required for On-Site Sewage Disposal on Certain Single Residences; THSC, §366.053, concerning Permit Ap-

plication; THSC, §366.054, concerning Notice From Installer; THSC, §366.056, concerning Approval of On-Site Sewage Disposal System; THSC, §366.057, concerning Permit Issuance; THSC, §366.058, concerning Permit Fee; and THSC, §366.059, concerning Permit Fee Paid to Department of Authorized Agent.

These proposed amendments implement TWC, §§5.012, 5.013, 5.102, 5.103, and THSC, §§366.001, 366.011, 366.012, 366.051, 366.052, 366.053, 366.054, 366.056, 366.057, 366.058, and 366.059.

§285.3. General Requirements.

(a) Permit required. A person shall hold a permit and an approved plan to construct, alter, repair, extend or operate an on-site sewage facility (OSSF) [~~for an OSSF~~] unless the OSSF meets one of the exceptions in subsection (f) of this section.

(1) All aspects of the permitting, planning, construction, operation, and maintenance of OSSFs shall be conducted according to this chapter, or according to an order, ordinance, or resolution of an authorized agent.

(2) The executive director is the permitting authority unless a local governmental entity has an OSSF order, ordinance, or resolution approved by the executive director. In areas where the executive director is the permitting authority, the staff from the appropriate regional office shall be responsible for the proper implementation of this chapter.

(3) Permits shall be transferred to a new owner automatically upon sale or other legal transfer of an OSSF.

(4) Conditioning of Permits. The permitting authority may require conditions to a permit in order to ensure that the permitted OSSF system will operate in accordance with the planning materials and system approval. Failure to comply with these conditions is a violation of the permit and this chapter. Any violation of a condition of a permit that would be considered an alteration as defined in §285.2(2) of this title (relating to Definitions) would require a new permit.

(b) General Application Requirements.

(1) The owner or owner's agent must obtain an authorization to construct from the permitting authority before construction may begin on an OSSF. Before an authorization to construct can be issued, the permitting authority shall require submittal of the following from the owner or owner's agent:

(A) an application, on the form provided by the permitting authority;

(B) all planning materials, according to §285.5 of this title (relating to Submittal Requirements for Planning Materials);

(C) the results of a site evaluation, conducted according to §285.30 of this title (relating to Site Evaluation); and

(D) the appropriate fee.

(2) Variance requests shall be submitted with the application and shall be reviewed by the permitting authority according to subsection (h) of this section.

(3) Before the permitting authority issues an authorization to construct, the owner of OSSFs identified in §285.91(12) of this title (relating to Tables) or the owner's agent, must record an affidavit in the county deed records of the county or counties where the OSSF is located. Additionally, the owner or the owner's agent must submit, to the permitting authority, an affidavit affirming the recording. An example of the affidavit is located in §285.90(2) of this title (relating to Figures). The affidavit must include:

(A) the owner's full name;

(B) the legal description of the property;

(C) that an OSSF requiring continuous maintenance is located on the property;

(D) that the permit for the OSSF is transferred to the new owner upon transfer of the property; and

(E) that at any time after the initial two-year service policy, the owner of an aerobic treatment system for a single family residence shall either obtain a maintenance contract within 30 days of the transfer or maintain the system personally.

(c) Action on Applications. The permitting authority shall either approve or deny an application within 30 days of receiving an application. If the application and planning materials are approved, the permitting authority shall issue an authorization to construct. If the application and planning materials are denied, the permitting authority shall explain the reasons for the denial in writing to the owner, and the owner's agent.

(d) Construction and Inspection.

(1) An authorization to construct is valid for one calendar year from the date of its issuance. If the installer does not request a construction inspection by the permitting authority within one year of the issuance of the authorization to construct, the authorization to construct expires, and the owner will be required to submit a new application and application fee before an OSSF can be installed. A new application and application fee are not required if the owner decides not to install an OSSF.

(2) The installer shall notify the permitting authority at least five working days (Monday through Friday, excluding holidays) before the date the OSSF will be ready for inspection.

(3) The permitting authority shall conduct a construction inspection.

(4) If the OSSF does not pass the construction inspection, the permitting authority shall:

(A) at the close of the inspection, advise the owner and the owner's agent, if present, of the deficiencies identified and that the OSSF cannot be used until it passes inspection; and

(B) within seven calendar days after the inspection, issue a letter to the owner and the owner's agent listing the deficiencies identified and stating that the OSSF cannot be used until it passes inspection.

(5) If a reinspection is necessary, a reinspection fee may be assessed by the permitting authority.

(6) The reinspection fee must be paid before the reinspection is conducted.

(e) Notice of Approval.

(1) Within seven calendar days after the OSSF has passed the construction inspection, the permitting authority shall issue, to the owner or owner's agent, a written notice of approval for the OSSF.

(2) The notice of approval shall have a unique identification number, and shall be issued in the name of the owner.

(f) Exceptions.

(1) An owner of an OSSF will not be required to comply with the permitting, operation, and installation requirements of this chapter if the OSSF is not creating a nuisance and:

(A) the OSSF was installed before September 1, 1989, provided the system has not been altered, and is not in need of repair;

(B) the OSSF was installed before the effective date of the order, ordinance, or resolution in areas where the local governmental entity had an approved order, ordinance, or resolution dated before September 1, 1989, provided the system has not been altered and is not in need of repair; or

(C) the owner received authorization to construct from a permitting authority before the effective date of this chapter.

(2) No planning materials, permit, or inspection are required for an OSSF for a single family dwelling located on a tract of land that is ten acres or larger and:

(A) the OSSF is not causing a nuisance or polluting groundwater;

(B) all parts of the OSSF are at least 100 feet from the property line;

(C) the effluent is disposed of on the property; and

(D) the single family dwelling is the only dwelling located on that tract of land.

(3) Connecting recreational vehicles or manufactured homes to rental spaces is not considered construction if the existing OSSF system is not altered.

(g) Exclusions. The following systems are not authorized by this subchapter and may require a permit under Chapter 205 or Chapter 305 of this title (relating to General Permits for Waste Discharges or Consolidated Permits, respectively):

(1) one or more systems that cumulatively treat and dispose of more than 5,000 gallons of sewage per day on one piece of property;

(2) any system that accepts waste that is either municipal, agricultural, industrial, or other waste as defined in Texas Water Code, Chapter 26;

(3) any system that will discharge into or adjacent to waters in the state; or

(4) any new cluster systems.

(h) Variances. Requests for variances from provisions of this chapter may be considered by the appropriate permitting authority on a case-by-case basis.

(1) A variance may be granted if the owner, or a professional sanitarian or professional engineer representing the owner, demonstrates to the satisfaction of the permitting authority that conditions are such that equivalent or greater protection of the public health and the environment can be provided by alternate means. Variances for separation distances shall not be granted unless the provisions of this chapter cannot be met.

(2) Any request for a variance under this subsection must contain planning materials prepared by either a professional sanitarian or a professional engineer (with appropriate seal, date, and signature).

(i) Unauthorized systems. Boreholes, cesspools, and seepage pits are prohibited for installation or use. Boreholes, cesspools, and seepage pits that treat or dispose of less than 5,000 gallons of sewage per day shall be closed according to §285.36 of this title (relating to Abandoned Tanks, Boreholes, Cesspools, and Seepage Pits). Boreholes, cesspools, and seepage pits that exceed 5,000 gallons of sewage per day must be closed as a Class V injection well under Chapter 331 of this title (relating to Underground Injection Control).

§285.4. Facility Planning.

(a) Land planning and site evaluation. Property that will use an on-site sewage facility (OSSF) [~~OSSF~~] for sewage disposal shall be evaluated for overall site suitability. For property located on the Edwards Aquifer recharge zone, see §285.40 of this title (relating to OSSFs on the Recharge Zone of the Edwards Aquifer) for additional requirements. The following requirements apply to all sites where an OSSF may be located.

(1) Residential lot sizing.

(A) Platted or unplatted subdivisions served by a public water system [~~supply~~]. Subdivisions of single family dwellings platted or created after the effective date of this section, served by a public water supply and using individual OSSFs for sewage disposal, shall have lots of at least 1/2 acre.

(B) Platted or unplatted subdivisions not served by a public water system [~~supply~~]. Subdivisions of single family dwellings platted or created after the effective date of this section, not served by a public water supply and using individual OSSFs, shall have lots of at least one acre.

(C) A platted or unplatted subdivision where one tract is divided into four or fewer parts; where each tract is five acres or larger; and each tract is to be sold, given, or otherwise transferred to an individual who is related to the owner within the third degree by consanguinity or affinity, as determined under Texas Government Code, Chapter 573 is exempt from submitting planning materials required in this section.

(2) Manufactured housing communities or multi-unit residential developments. The owners of manufactured housing communities or multi-unit residential developments that are served by an OSSF and rent or lease space shall submit a sewage disposal plan to the permitting authority for approval. The total anticipated sewage flow for the individual tract of land shall not exceed 5,000 gallons per day. The plan shall be prepared by a professional engineer or professional sanitarian. This plan is in addition to the requirements of subsection (c) of this section.

(b) Approval of OSSF systems on existing small lots or tracts.

(1) Existing small lots or tracts that do not meet the minimum lot size requirements under subsection (a)(1)(A) or (B) of this section, and were either subdivided before January 1, 1988, or had a site-specific sewage disposal plan approved between January 1, 1988, and the effective date of this section, are allowed to use OSSFs, but the OSSFs must comply with the requirements set forth in this Chapter.

(2) The owner of a single family dwelling on an existing small lot or tract (property 1) may transport the wastewater from the dwelling to an OSSF at another location (property 2) provided that:

(A) both properties (properties 1 and 2) are owned by the same person;

(B) the owner or owner's agent demonstrates that no OSSF authorized under these rules can be installed on the property which contains the single-family dwelling (property 1);

(C) if property not owned by the owner of properties 1 and 2 must be crossed in transporting the sewage, the application includes all right-of-ways and permanent easements needed for the sewage conveyance lines; and

(D) the application includes an affidavit indicating that the owner or the owner's agent recorded the information required by §285.3(b)(3) of this title (relating to General Requirements) on the real

property deeds of both properties (properties 1 and 2). The deed recording shall state that the properties cannot be sold separately.

(c) Review of subdivision or development plans. Persons proposing residential subdivisions, manufactured housing communities, multi-unit residential developments, business parks, or other similar structures that use OSSFs for sewage disposal shall submit planning materials for these developments to the permitting authority and receive approval prior to submitting an OSSF application.

(1) The planning materials must be prepared by a professional engineer or professional sanitarian and must include:

(A) an overall site plan;

(B) a topographic map;

(C) a 100-year floodplain map;

(D) a soil survey;

(E) the locations of water wells;

(F) the locations of easements, as identified in §285.91(10) of this title (relating to Tables);

(G) a comprehensive drainage plan;

(H) a complete report detailing the types of OSSFs to be considered and their compatibility with area-wide drainage and groundwater; and

(I) other requirements, including Edwards Aquifer requirements that are pertinent to the proposed OSSF.

(2) If the proposed development includes restaurants or buildings with food service establishments, the planning materials must show adequate land area for doubling the land needed for the treatment units. The designer may consider increasing the amount of land area for the treatment units beyond doubling the minimum required area.

(3) The permitting authority will either approve or deny the planning materials, in writing, within 45 days of receipt.

§285.5. Submittal Requirements for Planning Materials.

(a) Submittal of planning material. Planning materials required under this chapter shall be submitted by the owner, or owner's agent, to the permitting authority for review and approval according to this section. All planning materials shall comply with this chapter and shall be submitted according to §285.91(9) of this title (relating to Tables). A legal description of the property where an on-site sewage facility (OSSF) is to be installed must be included with the permit application. Additionally, a scale drawing of the OSSF, all structures served by the OSSF, and all items specified in §285.30(b) of this title (relating to Site Evaluation) and §285.91(10) of this title must be included with the permit application.

(1) Planning materials prepared by an owner or installer. Either the owner or installer may prepare the planning materials for any proposed OSSF not requiring the preparation of plans according to paragraphs (2) or (3) of this subsection.

(2) Planning materials prepared by a professional engineer or professional sanitarian. OSSF planning materials shall be prepared by a professional engineer or professional sanitarian (with appropriate seal, date, and signature) as follows, unless otherwise specified in this chapter:

(A) any proposals for treatment or disposal that are not standard as described in Subchapter D of this chapter (relating to Planning, Construction, and Installation Standards for OSSFs) unless otherwise specified under §285.91(9) of this title;

(B) any proposal for an OSSF to serve manufactured housing communities, recreational vehicle parks, or multi-unit residential developments where spaces are rented or leased;

(C) all subdivision and development plans as required in §285.4(c) of this title (relating to Facility Planning); [~~or~~]

(D) a proposal for multiple treatment and disposal systems on large tracts of land; or[~~.~~]

(E) all applications for new OSSF construction within the Edwards Aquifer Recharge Zone.

(3) Planning materials prepared by a professional engineer. OSSF planning materials shall be prepared by a professional engineer (with appropriate seal, date, and signature) as follows, unless otherwise specified in this chapter:

(A) all proposals for non-standard treatment systems that require secondary treatment as detailed in Subchapter D of this chapter; or

(B) verifications that precast concrete septic tanks conform to the requirements of §285.32(b)(1)(E)(i) of this title (relating to Criteria for Sewage Treatment Systems); or

(C) designs demonstrating that the requirements of §285.31(c)(2) of this title (relating to Selection Criteria for Treatment and Disposal Systems) related to the regulated floodway have been met.

(b) Review of planning materials.

(1) Standard planning materials. All planning materials for standard treatment or disposal systems shall be reviewed by the permitting authority.

(2) Non-standard planning materials. The executive director shall review and respond to initial plans for all non-standard planning material for any system described in §285.32(d) of this title and §285.33(d)(6) of this title (relating to Criteria for Effluent Disposal Systems) within ten calendar days of receipt of the planning materials. After favorable review by the executive director, the same non-standard system planning materials may be reviewed and approved by the authorized agent for different locations, provided the same site conditions exist for which the planning materials were developed.

(3) Proprietary planning materials. Planning materials for proprietary treatment or disposal systems, as described in §285.32(c) or §285.33(c) of this title, shall be submitted to the executive director for review. The systems and the testing protocol shall be approved by the executive director before the systems can be installed in the state.

§285.6. Cluster Systems.

(a) New cluster [~~Cluster~~] systems are not authorized under this chapter after the effective date of these rules. New cluster [~~Cluster~~] systems may be authorized under other chapters of this title including Chapter 331 of this title (relating to Underground Injection Control).

(b) Existing cluster systems may be repaired or altered under this chapter. However, the alteration may not result in an increase in the volume of the permitted flow or change the nature of the permitted flow. [~~Existing cluster systems may not be repaired, altered, or extended under this chapter and may require authorization under other chapters of this title including Chapter 331 of this title when the system is malfunctioning or expanded.~~]

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

Filed with the Office of the Secretary of State on June 29, 2012.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-0779

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SUBCHAPTER D. PLANNING, CONSTRUCTION, AND INSTALLATION STANDARDS FOR OSSFS

30 TAC §§285.32 - 285.36

Statutory Authority

These amendments are proposed under Texas Water Code (TWC), §5.012, concerning Declaration of Policy; TWC, §5.013, concerning the General Jurisdiction of the Commission; TWC, §5.102, concerning General Powers; and TWC, §5.103, concerning Rules. These amendments are also proposed under Texas Health and Safety Code (THSC), §366.001, concerning Policy and Purpose; THSC, §366.011, concerning General Supervision and Authority; THSC, §366.012, concerning Rules Concerning On-Site Sewage Disposal Systems; THSC, §366.051, concerning Permits; THSC, §366.052, concerning Permit Not Required for On-Site Sewage Disposal on Certain Single Residences; THSC, §366.053, concerning Permit Application; THSC, §366.054, concerning Notice From Installer; THSC, §366.056, concerning Approval of On-Site Sewage Disposal System; THSC, §366.057, concerning Permit Issuance; THSC, §366.058, concerning Permit Fee; and THSC, §366.059, concerning Permit Fee Paid to Department of Authorized Agent.

These proposed amendments implement TWC, §§5.012, 5.013, 5.102, 5.103, and THSC, §§366.001, 366.011, 366.012, 366.051, 366.052, 366.053, 366.054, 366.056, 366.057, 366.058, and 366.059.

§285.32. Criteria for Sewage Treatment Systems.

(a) Pipe from building to treatment system.

(1) The pipe from the sewer stub out to the treatment system shall be constructed of cast iron, ductile iron, polyvinyl chloride (PVC) Schedule 40, standard dimension ratio (SDR) 26 or other material approved by the executive director.

(2) The pipe shall be watertight.

(3) The slope of the pipe shall be no less than 1/8 inch fall per foot of pipe.

(4) The sewer stub out should be as shallow as possible to facilitate gravity flow.

(5) A two-way cleanout plug must be provided between the sewer stub out and the treatment tank. Only sanitary type fittings constructed of PVC Schedule 40 or SDR 26 shall be used on this section of the sewer. An additional cleanout plug shall be provided every 100 [~~50~~] feet on long runs of pipe and within five feet of 90 degree bends.

(6) Additional cleanout plugs shall be of the single sanitary type.

(7) The pipe shall have a minimum inside diameter of three inches.

(8) Pipe that crosses drainage easements shall be sleeved with American Society for Testing and Materials (ASTM) Schedule 40 pipe; the pipes shall be buried at least one foot below the surface, or buried less than one foot and encased in concrete; the outside pipe shall have locater tape attached to the pipe; and markers shall be placed at the easement boundaries to indicate the location of the pipe crossing.

(b) Standard treatment systems.

(1) Septic tanks. A septic tank shall meet the following requirements.

(A) Tank volume. The liquid volume of a septic tank, measured from the bottom of the outlet, shall not be less than established in §285.91(2) of this title (relating to Tables). Additionally, the liquid depth of the tank shall not be less than 30 inches.

(B) Inlet and outlet devices. The flowline of the tank's inlet device in the first compartment of a two-compartment tank, or in the first tank in a series of tanks, shall be at least three inches higher than the flowline of the outlet device. For a configuration of the tank and inlet and outlet devices, see §285.90(6) and (7) of this title (relating to Figures). The inlet devices shall be "T" branch fittings, constructed baffles or other structures or fittings approved by the executive director. The outlet devices shall use a "T" unless an executive director approved fitting is installed on the outlet. All inlet and outlet devices shall be installed water tight to the septic tank walls and shall be a minimum of three inches in diameter.

(C) Baffles and series tanks. All septic tanks shall be divided into two or three compartments by the use of baffles or by connecting two or more tanks in a series.

(i) Baffled tanks. In a baffled tank, the baffle shall be located so that one half to two thirds of the total tank volume is located in the first compartment. Baffles shall be constructed the full width and height of the tank with a gap between the top of the baffle and the tank top. The baffle shall have an opening located below the liquid level of the tank at a depth between 25% and 50% of the liquid level. The opening may be a slot or hole. If a "T" is fitted to the slot or hole, the inlet to the fitting shall be at the depth stated in this paragraph. See §285.90(6) of this title for details. Any metal structures, fittings, or fastenings shall be stainless steel.

(ii) Series tanks. Two or more tanks shall be arranged in a series to attain the required liquid volume. The first tank in a two-tank system shall contain at least one half to two thirds [~~one-half~~] the required volume. The first tank in a three-tank system shall contain at least one-third of the total required volume, but no less than 500 gallons. The first tank in a four or more tank system shall contain no less than 500 gallons, and the last tank in a four or more tank system shall contain no more than one third of the total required volume. Interconnecting inlet and outlet devices may be installed at the same elevation for multiple tank installations.

(D) Inspection or cleanout ports. All septic tanks shall have inspection or cleanout ports located on the tank top over the inlet and outlet devices. Each inspection or cleanout port shall be offset to allow for pumping of the tank. The ports may be configured in any manner as long as the smallest dimension of the opening is at least 12 inches, and is large enough to provide for maintenance and for equipment removal. Septic tanks buried more than 12 inches below the ground surface shall have risers over the port openings. The risers shall extend from the tank surface to no more than six inches below the ground. The risers shall be sealed to the tank. The risers shall have inside diameters which are equal to or larger than the inspection or cleanout ports. The risers shall be fitted with removable watertight caps and prevent unauthorized access.

(E) Septic tank design and construction materials. The septic tank shall be of sturdy, water-tight construction. The tank shall be designed and constructed so that all joints, seams, component parts, and fittings prevent groundwater from entering the tank, and prevent wastewater from exiting the tank, except through designed inlet and outlet openings. Materials used shall be steel-reinforced poured-in-place concrete, steel-reinforced precast concrete, fiberglass, reinforced plastic polyethylene, or other materials approved by the executive director. Metal septic tanks are prohibited. The septic tank shall be structurally designed to resist buckling from internal hydraulic loading and exterior loading caused by earth fill and additional surface loads. Tanks exhibiting deflections, leaks, or structural defects shall not be used. Sweating at construction joints is acceptable on concrete tanks.

(i) Precast concrete tanks. In addition to the general requirements in subparagraph (E) of this paragraph, precast concrete tanks shall conform to requirements in the Materials and Manufacture Section and the Structural Design Requirements Section of [~~American Society for Testing and Materials (~~]ASTM[~~)~~] Designation: C 1227, Standard Specification for Precast Concrete Septic Tanks (2000) or under any other standards approved by the executive director. A professional engineer shall verify in writing that the manufacturer is in compliance with ASTM Standard C 1227. This verification shall be submitted to the permitting authority from the tank manufacturer. If this verification has not been previously submitted or accepted by the permitting authority, a new verification shall be completed within 30 days of the effective date of this section.

(ii) Fiberglass and plastic polyethylene tank specifications.

(I) The tank shall be fabricated to perform its intended function when installed. The tank shall not be adversely affected by normal vibration, shock, climate conditions, nor typical household chemicals. The tank shall be free of rough or sharp edges that would interfere with installation or service of the tank.

(II) Full or empty tanks shall not collapse or rupture when subjected to earth and hydrostatic pressures.

(iii) Poured-in-place concrete tanks. Concrete tanks shall be structurally sound and water-tight. The concrete tank shall be designed by a professional engineer.

(iv) Tank manufacturer specifications. All precast or prefabricated tanks shall be clearly and permanently marked, tagged, or stamped with the manufacturer's name, address, and tank capacity. The identification shall be near the level of the outlet and be clearly visible. Additionally, the direction of flow into and out of the tank shall be indicated by arrows or other identification, and shall be clearly marked at the inlet and outlet.

(F) Installation of tanks. For gravity disposal systems, septic tanks must be installed with at least a 12 inch drop in elevation from the bottom of the outlet pipe to the bottom of the disposal area. A minimum of four inches of sand, sandy loam, clay loam, or pea gravel, free of rock larger than 1/2 inch in diameter, shall be placed under and around all tanks, except poured-in-place concrete tanks. Unless otherwise approved by the permitting authority, tank excavations shall be left open until they have been inspected by the permitting authority. Tank excavations must be backfilled with soil or pea gravel that is free of rock larger than 1/2 inch in diameter. Class IV soils and gravel larger than one-half inch in diameter are not acceptable for use as backfill material. If the top of a septic tank extends above the ground surface, soil may be mounded over the tank to maintain slope to the drainfield.

(G) Pretreatment (Trash) tanks. If an aerobic treatment unit does not prevent plastic and other non-digestible sewage from interfering with aeration lines and diffusers, the executive director may require the use of a pretreatment tank. All pretreatment tanks shall meet all applicable structural and fitting requirements of this section.

(H) Leak Testing. At the discretion of the permitting authority, leak testing using water filled to the inside level of the tank lid or to the top of the tank riser(s) may be required.

(2) Intermittent sand filters. A typical layout and cross-section of an intermittent sand filter is presented in §285.90(8) of this title. Requirements for intermittent sand filters are as follows.

(A) Sand media specifications. Sand filter media must meet ASTM C-33 specifications as outlined in §285.91(11) of this title.

(B) Loading rate. The loading rate shall not exceed 1.2 gallons per day per square foot.

(C) Surface area. The minimum surface area shall be calculated using the formula: Q/1.2=Surface Area (Square Feet), where Q is the wastewater flow in gallons per day.

(D) Thickness of sand media. There shall be a minimum of 24 inches of sand media.

(E) Filter bed containment. The filter bed containment shall be an impervious lined pit or tank. Liners shall meet the specifications detailed in §285.33(b)(2)(A) of this title (relating to Criteria for Effluent Disposal Systems).

(F) Underdrains. For gravity discharge of effluent to a drainfield, there shall be a three inch layer of pea gravel over a six inch layer of 0.75 inch gravel, that contains the underdrain collection pipe. When pumpwells are to be used to pump the effluent from the underdrain to the drainfield, they must be constructed of concrete or plastic sewer pipe. The pumpwell must contain a sufficient number of holes so that effluent can flow from the gravel void space as rapidly as the effluent is pumped out of the pumpwell to the drainfield. Refer to §285.90(9) of this title.

(c) Proprietary treatment systems. This subsection does not apply to proprietary septic tanks described in subsection (b)(1) of this section.

(1) Tank sizing. Proprietary treatment systems that serve single family residences, combined flows from single family residences, or multi-unit residential developments shall be designed using Table II in §285.91(2) of this title unless there is an equalization tank preceding the aerobic treatment unit. If there is an equalization tank preceding the aerobic treatment unit, the equalization tank shall meet the requirements set forth in §285.34(b)(4) of this title (relating to Other Requirements) and the aerobic treatment units can be sized using the wastewater flows in Figure III in §285.91(3) of this title. Proprietary Treatment systems for non-residential facilities shall be sized using the wastewater flows in Figure III in §285.91(3) of this title. [~~Proprietary treatment systems must be designed using Table II, located in Figure: 30 TAC §285.91(2) of this title (relating to Septic Tank and Aerobic Treatment Unit Sizing).~~] Leak testing shall be performed in accordance with subsection (b)(1)(H) of this section [~~§285.32(b)(1)(H) of this title (relating to Leak Testing)~~].

(2) Installation. Proprietary treatment systems shall be installed according to this subchapter. If the manufacturer has installation specifications that are more stringent than given in this subchapter, the manufacturer shall submit these specifications to the executive director for review. If approved by the executive director, the treatment systems may be installed according to these more stringent specifications. Any subsequent changes to these manufacturer's installation specifications must be approved by the executive director before installation. Inspection, cleanout ports, or maintenance ports shall have risers installed

according to the riser installation provisions in subsection (b)(1)(D) of this section. Tank excavations shall be backfilled according to the backfill provisions in subsection (b)(1)(F) of this section. At the discretion of the permitting authority, leak testing using water filled to the inside level of the tank lid or to the top of the riser(s) may be required.

(3) System maintenance. Ongoing maintenance contracts are required for all proprietary treatment systems except those systems maintained by homeowners under the provisions of §285.7(d)(4) of this title (relating to Maintenance Requirements). The maintenance contract shall satisfy §285.7(d) of this title.

(4) Electrical wiring. Electrical wiring for proprietary systems shall be according to §285.34(c) of this title [~~(relating to Other Requirements)~~].

(5) Approval of proprietary treatment systems. Proprietary treatment systems must be approved by the executive director prior to their installation and use. Approval of proprietary treatment systems shall follow the procedures found in this section. After the effective date of these rules, only systems tested according to subparagraph (A) or (B) of this paragraph will be placed on the list of approved systems. The list may be obtained from the executive director. All systems on the list of approved systems on the effective date of these rules shall continue to be listed subject to the retesting requirements in paragraph (6) of this subsection. In addition, all proprietary treatment systems undergoing testing under this paragraph on the effective date of these rules shall be considered for inclusion on the list of approved systems.

(A) Treatment systems that have been tested by and are currently listed by National Science Foundation (NSF) [~~NSF~~] International as Class I systems under NSF Standard 40 (2005), or have been tested and certified as Class I systems according to NSF Standard 40 (2005), by an American National Standard Institute (ANSI) accredited testing institution, or under any other standards approved by the executive director, shall be considered for approval by the executive director. All systems approved by the executive director on the effective date of these rules shall continue to be listed on the list of approved systems, subject to retesting under the requirements of NSF Standard 40 (2005), and Certification Policies for Wastewater Treatment Devices (1997) or under any standards approved by the executive director. The manufacturers of proprietary treatment systems and the accredited certification institution must comply with all the provisions of NSF Standard 40 (2005), and Certification Policies for Wastewater Treatment Devices (1997) or under any standards approved by the executive director.

(i) Proprietary units under this section have been approved to treat flows equal to or less than their rated capacity and with an influent wastewater strength ranging from a 30-day average Carbonaceous Biochemical Oxygen Demand (CBOD) concentration between 100 milligrams per liter (mg/l) and 300 mg/l and a 30-day average TSS concentration between 100 mg/l and 350 mg/l.

(ii) Proprietary units may be used as components in an overall treatment system treating influent stronger than the ranges listed in this section. However, the overall treatment system will be considered a non-standard treatment system and shall meet the requirements set forth in subsection (d) of this section.

(B) Treatment systems that will not be accepted for testing because of system size or type by NSF International, or ANSI accredited third party testing institutions, and are not approved systems at the time of the effective date of these rules, may only be approved in the following manner.

(i) The proprietary systems shall be tested by an independent third party for two years and all the supporting data from the test shall be submitted to the executive director for review and approval, or denial before the system is marketed for sale in the state.

(ii) The independent third party shall obtain a temporary authorization from the executive director before testing. The temporary authorization shall contain the following:

(I) the number of systems to be tested (between 20 and 50);

(II) the location of the test sites (the test sites must be typical of the sites where the system will be used if final authorization is granted);

(III) provisions as to how the proprietary system will be installed and maintained;

(IV) the testing protocol for collecting and analyzing samples from the system;

(V) the equipment monitoring procedures, if applicable; and

(VI) provisions for recording data and data retention necessary to evaluate the performance as well as the effect of the proprietary system on public health, groundwater, and surface waters.

(iii) Permitting authorities may issue authorizations to construct upon receipt of the temporary authorization. The owner must be advised, in writing, that the system is temporarily approved for testing. If a system fails, regardless of the reason, it shall be replaced with a system that meets the requirements of this subchapter by the manufacturer at the manufacturer's expense. A system installed under this subparagraph is the responsibility of the manufacturer until the system has obtained final authorization by the executive director according to this subparagraph.

(iv) Upon completion of the two-year test period, the executive director shall require the independent third party to submit a detailed report on the performance of the system. After evaluating the report, the executive director may issue conditional approval of the system, or may deny use of the system.

(I) The conditional approval will authorize installations only in areas similar to the area in which the system was tested.

(II) The conditional approval shall be for a specified performance and evaluation (monitoring) period, not to exceed an additional five years. The system must be monitored according to a plan approved by the executive director. Approval or disapproval of these systems will be based on their performance during the monitoring period. Failure of one or more of the installed systems may be cause for disapproval of the proprietary system. The owner must be advised, in writing, that the system is conditionally approved.

(III) If the executive director denies use of the system after the two-year period, the executive director shall provide, in writing, the reasons for denying the use of the system. If a system fails, regardless of the reason, it shall be replaced with a system that meets the requirements of this subchapter by the manufacturer at the manufacturer's expense.

(v) Upon successful completion of the monitoring period, the monitoring requirements may be lifted by the executive director, the notice of approval may be made permanent for the test systems and the systems will be deemed suitable for use in conditions similar to areas in which the systems were tested and monitored.

(6) System reviews. The manufacturers of systems that are approved for listing under this section shall ensure that their systems

are reviewed every seven years, or as often as deemed necessary by the executive director, starting from the date the system was originally added to the executive director's approved list. All reviews shall be completed before the end of the seven-year period. The manufacturer of any system that was approved by the executive director more than seven years before the effective date of these rules, will be given 365 days from the effective date of these rules to complete a review.

(A) The review shall be performed by either an ANSI accredited institution according to the reevaluation requirements in NSF Standard 40 (2005), and Certification Policies for Wastewater Treatment Devices (1997), or under any standards approved by the executive director, or by an independent third party for those systems not tested under NSF Standard 40.

(B) If the system being reviewed was not approved under the requirements of NSF Standard 40, the independent third party shall evaluate between 20 and 50 systems in the state that have been in operation for at least two years and are the same design as originally approved.

(C) The review under this subsection shall include an evaluation of:

(i) the short-term and long-term effectiveness of the system;

(ii) the structural integrity of the system;

(iii) the maintenance of the system;

(iv) owner access to maintenance support;

(v) any impacts that system failures may have had on the environment; and

(vi) an evaluation of the effectiveness of the manufacturer's installer training program.

(D) Any system that is not approved by the executive director as a result of the review will be removed from the list of approved systems. The manufacturer shall ensure that maintenance support remains available for the existing systems.

(d) Non-standard treatment systems. All OSSFs not described or defined in subsections (b) and (c) of this section are non-standard treatment systems. These systems shall be designed by a professional engineer or a professional sanitarian in accordance with §295.91(9) of this title, and the planning materials shall be submitted to the permitting authority for review according to §285.5(b)(2) of this title (relating to Submittal Requirements for Planning Materials). Upon approval of the planning materials, an authorization to construct will be issued by the permitting authority.

(1) Non-standard treatment systems include all forms of the activated sludge process, rotating biological contactors, recirculating sand filters, trickling type filters, submerged rock biological filters, and sand filters not described in subsection (b)(2) of this section.

(2) The planning materials for non-standard treatment systems submitted for review will be evaluated using the criteria established in this chapter, or basic engineering and scientific principles.

(3) Approval for a non-standard treatment system is limited to the specific system described in the planning materials. Approval is on a case-by-case basis only.

(4) The need for ongoing maintenance contracts shall be determined by the permitting authority based on the review required by §285.5(b) of this title. If the permitting authority determines that a maintenance contract is required, the contract must meet the requirements in §285.7 of this title.

(5) Electrical wiring for non-standard treatment systems shall be installed according to §285.34(c)(4) of this title.

(e) Effluent quality. The following effluent criteria shall be met by the treatment systems for those disposal systems listed in §285.33 of this title that require secondary treatment.
Figure: 30 TAC §285.32(e) (No change.)

(f) Other Design Considerations.

(1) Restaurant/food establishment sewage. When designing for restaurants, food service establishments, or similar activities, the minimum design strength value shall be 1,200 mg/l Biochemical Oxygen Demand (BOD) after a properly sized grease trap/interceptor. It is the responsibility of the designer to properly design a system which reduces the wastewater strength to 140 mg/l BOD prior to disposal unless secondary treatment levels are required.

(2) Other high-strength sewage. For situations where sewage as defined in this chapter is expected to be a higher strength than residential sewage, it is the responsibility of the professional designer to justify sewage design strength estimations and properly design a system that reduces the wastewater strength to 140 mg/l BOD prior to disposal unless secondary treatment levels are required. Residential sewage is sewage that has a strength of less than 300 mg/l BOD.

(3) Flow equalization. The designer should consider whether flow-equalization will be needed for the treatment system to function properly.

§285.33. Criteria for Effluent Disposal Systems.

(a) General requirements.

(1) All disposal systems in this section shall have an approved treatment system as specified in §285.32(b) - (d) of this title (relating to Criteria for Sewage Treatment Systems).

(2) All criteria in this section shall be met before the permitting authority issues an authorization to construct.

(3) The pipe between all treatment tanks and the pipe from the final treatment tank to a gravity disposal system shall be a minimum of three inches in diameter and be American Society for Testing and Materials (ASTM) 3034, Standard dimension ratio (SDR) 35 polyvinyl chloride (PVC) pipe or a pipe with an equivalent or stronger pipe stiffness at a 5% deflection. The pipe must maintain a continuous fall to the disposal system.

(4) The pipe from the final treatment tank to a gravity disposal system shall be a minimum of five feet in length.

(5) Except for drip irrigation tubing, pipe under internal pressure within any part of an on-site sewage facility system shall meet the minimum requirements of ASTM Schedule 40.

(6) Pipe that crosses drainage easements shall be sleeved with ASTM Schedule 40 pipe; the pipes shall be buried at least one foot below the surface, or buried less than one foot and encased in concrete; the outside pipe shall have locater tape attached to the pipe; and markers shall be placed at the easement boundaries to indicate the location of the pipe crossing.

(b) Standard disposal systems. Acceptable standard disposal methods shall consist of a drainfield to disperse the effluent either into adjacent soil (absorptive) or into the surrounding air through evapotranspiration (evaporation and transpiration).

(1) Absorptive drainfield. An absorptive drainfield shall only be used in suitable soil. There shall be two feet of suitable soil

from the bottom of the excavation to either a restrictive horizon or to groundwater.

(A) Excavation. The excavation must be made in suitable soils as described in §285.31(b) of this title (relating to Selection Criteria for Treatment and Disposal Systems).

(i) The excavation shall be at least 18 inches deep but shall not exceed a depth of either three feet or six inches below the soil freeze depth, whichever is deeper. Single excavations shall not exceed 150 feet.

(ii) In areas of the state where annual precipitation is less than 26 inches per year (as identified in the *Climatic Atlas of Texas,* (1983) published by the Texas Department of Water Resources or other standards approved by the executive director), [~~and suitable soils (Class Ib, II, or III) lie below unsuitable soil caps,~~] the maximum permissible excavation depth shall be five feet.

(iii) Multiple excavations must be separated horizontally by at least three feet of undisturbed soil. The sidewalls and bottom of the excavation must be scarified as needed. When there are multiple excavations, it is recommended that the ends be looped together.

(iv) The bottom of the excavation shall be not less than 18 inches in width.

(v) The bottom of the excavation shall be level to within one inch over each 25 feet of excavation or within three inches over the entire excavation, whichever is less.

(vi) If the borings or backhoe pits excavated during the site evaluation encounter a rock horizon and the site evaluation shows that there is both suitable soil from the bottom of the rock horizon to two feet below the bottom of the proposed excavation and no groundwater anywhere within two feet of the bottom of the proposed excavation, a standard subsurface disposal system may be used, providing the following are met.

(I) The depth of the excavation shall comply with clause (i) of this subparagraph.

(II) The rock horizon shall be at least six inches above the bottom of the excavation.

(III) Surface runoff shall be prevented from flowing over the disposal area.

(IV) Subsurface flow along the top of the rock horizon shall be prevented from flowing into the excavation.

(V) The sidewall area will not be counted toward the required absorptive area.

(VI) The formulas in clause (vii)(I) - (III) of this subparagraph shall be adjusted so that no credit is given for sidewall area.

(VII) No single pipe drainfields on sloping ground as shown in §285.90(5) of this title (relating to Figures) or no systems using serial loading shall be used.

(vii) The size of the excavation shall be calculated using data from §285.91(1) and (3) of this title (relating to Tables). The soil application rate is based on the most restrictive horizon along the media, or within two feet below the bottom of the excavation. The formula A = Q/Ra shall be used to determine the total absorptive area where:
Figure: 30 TAC §285.33(b)(1)(A)(vii) (No change.)

(I) The absorptive area shall be calculated by adding the bottom area (L x W) of the excavation to the total absorptive area along the excavated perimeter 2(L+W), (in feet) multiplied by one foot.
Figure: 30 TAC §285.33(b)(1)(A)(vii)(I) (No change.)

(II) The length of the excavation may be determined as follows when the area and width are known.
Figure: 30 TAC §285.33(b)(1)(A)(vii)(II) (No change.)

(III) For excavations three feet wide or less, use the following formula, or §285.91(8) of this title to determine L.
Figure: 30 TAC §285.33(b)(1)(A)(vii)(III) (No change.)

(B) Media. The media shall consist of clean, washed and graded gravel, broken concrete, rock, crushed stone, chipped tires, or similar aggregate that is generally one uniform size and approved by the executive director. The size of the media must range from 0.75 - 2.0 inches as measured along its greatest dimension except as noted in clause (i) of this subparagraph.

(i) If chipped tires are used:

(I) a geotextile fabric heavier than specified in subparagraph (E) of this paragraph must be used; and

(II) the size of the chipped tires must not exceed three inches as measured along their greatest dimension.

(ii) Soft media such as oyster shell and soft limestone shall not be used.

(C) Drainline. The drainline shall be constructed of perforated distribution pipe and fittings in compliance with any one of the following specifications:

(i) three- or four-inch diameter PVC pipe with an SDR of 35 or stronger;

(ii) four-inch diameter corrugated polyethylene, ASTM F405 in rigid ten foot joints;

(iii) three- or four-inch diameter polyethylene smoothwall, ASTM F810;

(iv) three- or four-inch diameter PVC ASTM D2729 pipe;

(v) three- or four-inch diameter polyethylene ASTM F892 corrugated pipe with a smoothwall interior and fittings; or

(vi) any other pipe approved by the executive director.

(D) Drainline installation requirements. The drainline shall be placed in the media with at least six inches of media between the bottom of the excavation and the bottom of the drainline. The drainline shall be completely covered by the media and the drainline perforations shall be below the horizontal center line of the pipe. For typical drainfield configurations, see §285.90(5) of this title. For excavations greater than four feet in width, the maximum distance between parallel drainlines shall be four feet (center to center). Multiple drainlines shall be manifolded together with solid or perforated pipe. Additionally, the ends of the multiple drainlines opposite the manifolded end shall either be manifolded together with a solid line, looped together using a perforated pipe and media, or capped.

(E) Permeable soil barrier. Geotextile fabric shall be used as the permeable soil barrier and shall be placed between the top of the media and the excavation backfill. Geotextile fabric shall conform to the following specifications for unwoven, spun-bounded polypropylene, polyester, or nylon filter wrap.

Figure: 30 TAC §285.33(b)(1)(E) (No change.)

(F) Backfilling. Only Class Ib, II, or III soils as described in §285.30 of this title (relating to Site Evaluation) shall be used for backfill. Class Ia and IV soils are specifically prohibited for use as a backfill material. The backfill material shall be mounded over the excavated area so that the center of the backfilled area slopes down to the outer perimeter of the excavated area to allow for settling. Surface runoff impacting the disposal area is not permitted and the diversion method shall be addressed during development of the planning materials.

(G) Drainfields on irregular terrain. Where the ground slope is greater than 15% but less than 30%, a multiple line drainfield may be constructed along descending contours as shown in §285.90(5) of this title. An overflow line shall be provided from the upper excavations to the lower excavations. The overflow line shall be constructed from solid pipe with an SDR of 35 or stronger, and the excavation carrying the overflow pipe shall be backfilled with soil only.

(H) Drainfield plans. A number of sketches, specifications, and details for drainfield construction are provided in §285.90(4) and (5) of this title.

(2) Evapotranspirative (ET) system. An ET system may be used in soils which are classified as unsuitable for standard subsurface absorption systems according to §285.31(b) of this title with respect to texture, restrictive horizons, or groundwater. Water saving devices must be used if an ET system is to be installed. ET systems shall only be used in areas of the state where the annual average evaporation exceeds the annual rainfall. Evaporation data is provided in §285.91(7) of this title.

(A) Liners. An impervious liner shall be used between the excavated surface and the ET system in all Class Ia soils, where seasonal groundwater tables penetrate the excavation, and where a minimum of two feet of suitable soil does not exist between the excavated surface and either a restrictive horizon or groundwater. Liners shall be rubber, plastic, reinforced concrete, gunite, or compacted clay (one foot thick or more). If the liner is rubber or plastic, it must be impervious, and each layer must be at least 20 mils thick. Rubber or plastic liners must be protected from exposed rocks and stones by covering the excavated surface with a uniform sand cushion at least four inches thick. Clay liners shall have a permeability of 10 -7 centimeters/second or less, as tested by a certified soil laboratory.

(B) ET system sizing. The following formula shall be used to calculate the top surface area of an ET system. The owner of the ET system shall be advised by the person preparing the planning materials of the limits placed on the system by the Q selected. If the Q is less than required by §285.91(3) of this title, the flow rate shall be included as a condition to the permit, and stated in an affidavit properly filed and recorded in the deed records of the county as specified in §285.3(b)(3) of this title (relating to General Requirements).
Figure: 30 TAC §285.33(b)(2)(B) (No change.)

(C) Backfill material. Backfill material shall consist of Class II soil as described in §285.30 of this title. All drainlines must be surrounded by a minimum of one foot of media. Backfill shall be used to fill the excavation between the media to allow the backfill material to contact the bottom of the excavation.

(D) Vegetative cover for transpiration. The final grade shall be covered with vegetation fully capable of taking maximum advantage of transpiration. Evergreen bushes with shallow root systems may be planted in the disposal area to assist in water uptake. Grasses with dormant periods shall be overseeded to provide year-round transpiration.

(E) ET systems. ET systems shall be divided into two or more equal excavations connected by flow control valves. One excavation may be removed from service for an extended period of time to allow it to dry out and decompose biological material which might plug the excavation. If one of the excavations is removed from service, the daily water usage must be reduced to prevent overloading of the excavation(s) still in operation. Normally, an excavation must be removed from service for two to three dry months for biological breakdown to occur.

(F) ET system plans. A number of sketches for ET system construction are provided in §285.90(4) and (5) of this title.

(3) Pumped effluent drainfield. Pumped effluent drainfields shall use the specifications for low-pressure dosed drainfields described in subsection (d)(1) of this section, with the following exceptions.

(A) Applicability. If the slope of the site is greater than 2.0%, pumped effluent drainfields shall not be used. Pumped effluent drainfields may only be used by single family dwellings.

(B) Length of distribution pipe. There shall be at least 1,000 linear feet of perforated pipe for a two bedroom single family dwelling. For each additional bedroom, there shall be an additional 400 linear feet of perforated pipe. No individual distribution line shall exceed 70 feet in length from the header.

(C) Excavation width and horizontal separation. The excavated area shall be at least six inches wide. There shall be at least three feet of separation between trenches.

(D) Lateral depth and vertical separation. All drainfield laterals shall be between 18 inches and three feet deep. There shall be a minimum vertical separation distance of one foot from the bottom of the excavation to a restrictive horizon, and a minimum vertical separation of two feet from the bottom of the excavation to groundwater.

(E) Media. Each dosing pipe shall be placed with the drain holes facing down and placed on top of at least six inches of media (pea gravel or media up to two inches measured along its greatest dimension).

(F) Pipe and hole size. The distribution (dosing) and manifold (header) pipe shall be 1.25 - 1.5 inches in diameter. The manifold may have a diameter larger than the distribution pipe, but shall not exceed 1.5 inches in diameter. Distribution (dosing) pipe holes shall be 3/16 - 1/4 inch in diameter and shall be spaced five feet apart.

(G) Pump size. Pumped effluent drainfields shall use at least a 1/2 horsepower pump.

(H) Backfilling. Only Class Ib, II, or III soils as described in §285.30(b)(1)(A) of this title shall be used for backfill.

(c) Proprietary disposal systems.

(1) Gravel-less drainfield piping. Gravel-less pipe may be used only on sites suitable for standard subsurface sewage disposal methods. Gravel-less pipe shall be eight-inch or ten-inch diameter corrugated perforated polyethylene pipe. The pipe shall be enclosed in a layer of unwoven spun-bonded polypropylene, polyester, or nylon filter wrap. Gravel-less pipe shall meet ASTM F-667 Standard Specifications for large diameter corrugated high density polyethylene (ASTM D 1248) tubing. The filter cloth must meet the same material specifications as described under subsection (b)(1)(E) of this section.

(A) Planning parameters. Gravel-less drainfield pipe may be substituted for drainline pipe in both absorptive and ET systems. When gravel-less pipe is substituted, media will not be required. ET systems shall be backfilled with Class II soils only. All other plan-

ning parameters for absorptive or ET systems apply to drainfields using gravel-less pipe.

(B) Installation. The connection from the solid line leaving the treatment tank to the gravel-less line shall be made by using an eight or ten-inch offset connector. The gravel-less line shall be laid level, the continuous stripe shall be up, and the lines shall be joined together with couplings. A filter cloth must be pulled over the joint to eliminate soil infiltration. The gravel-less pipe must be held in place during initial backfilling to prevent movement of the pipe. The end of each gravel-less line shall have an end cap and an inspection port. The inspection port shall allow for easy monitoring of the amount of sludge or suspended solids in the line, and allow the distribution lines to be back-flushed.

(C) Drainfield sizing. To determine appropriate drainfield sizing, use a drainfield width of W = 2.0 feet for an eight-inch diameter gravel-less pipe, and an excavation width of W = 2.5 for a ten-inch gravel-less pipe.
Figure: 30 TAC §285.33(c)(1)(C) (No change.)

(2) Leaching chambers. Leaching chambers are bottomless chambers that are installed in a drainfield excavation with the open bottom of the chamber in direct contact with the excavation. The ends of the chamber rows shall be linked together with non-perforated sewer pipe. The chambers shall completely cover the excavation, and adjacent chambers must be in contact with each other in such a manner that the chambers will not separate. To obtain the reduction in drainfield size allowed in subparagraph (A)(i) and (ii) of this paragraph for excavations wider than the chambers, the chambers shall be placed edge to edge.

(A) The following formulas shall be used to determine the length of an excavation using leaching chambers.

(i) The following formula is used for leaching chambers without water saving devices and the excavation is the same width as the chamber.
Figure: 30 TAC §285.33(c)(2)(A)(i) (No change.)

(ii) The following formula is used for leaching chambers with water saving devices and the excavation is the same width as the chamber.
Figure: 30 TAC §285.33(c)(2)(A)(ii) (No change.)

(iii) The following formula is used for leaching chambers without water saving devices and the excavation width is greater than the width of the chamber.
Figure: 30 TAC §285.33(c)(2)(A)(iii)

(iv) The following formula is used for leaching chambers with water saving devices and the excavation width is greater than the width of the chamber.
Figure: 30 TAC §285.33(c)(2)(A)(iv)

(B) Leaching chambers shall not be used for absorptive drainfields in Class Ia or IV soils. Leaching chambers may be used instead of media in ET systems, low-pressure dosed drainfields, and soil substitution drainfields; however, the size of the drainfield shall not be reduced from the required area.

(C) Backfill covering leaching chambers shall be Class Ib, II, or III soil.

(3) Drip irrigation. Drip irrigation systems using secondary treatment may be used in all soil classes including Class IV soils. The system must be equipped with a filtering device capable of filtering particles larger than 100 microns and that meets the manufacturer's requirements.

(A) Drainfield layout. The drainfield shall consist of a matrix of small-diameter pressurized lines, buried at least six inches deep, and pressure reducing emitters spaced at a maximum of 30-inch intervals. The pressure reducing emitter shall restrict the flow of effluent to a flow rate low enough to ensure equal distribution of effluent throughout the drainfield.

(B) Effluent quality. The treatment preceding a drip irrigation system shall treat the wastewater to secondary treatment as described in §285.32(e) of this title unless the drip irrigation system has been approved by the executive director as a proprietary disposal system without the use of secondary treatment.

(C) System flushing. Systems must be equipped to flush the contents of the lines back to the pretreatment unit when intermittent flushing is used. If continuous flushing is used during the pumping cycle, the contents of the lines must be returned to the pump tank.

(D) Loading rates. Pressure reducing emitters can be used in all classes of soils using loading rates specified in §285.91(1) of this title. Pressure reducing emitters are assumed to wet four square feet of absorptive area per emitter; however, overlapping areas shall only be counted once toward absorptive area requirements. The loading rate shall be based on the most restrictive soil horizon within one foot of the pressure reducing emitter. When solid rock is less than 12 inches below the pressure reducing emitter, the loading rate shall be based on Class IV soils.

(E) Vertical separation distance. There shall be a minimum of one foot of soil (with less than 60% gravel) between the pressure reducing emitter and groundwater and six inches between the pressure reducing emitter and solid rock, or fractured rock. For proprietary disposal systems that do not pretreat to secondary treatment, there shall be two feet of soil (with less than 30% gravel) between the groundwater and pressure reducing emitter and one foot of soil between solid rock or fractured rock and the pressure reducing emitter.

(F) Labeling or listing. All drip irrigation system devices shall either be labeled by the manufacturer as suitable for use with domestic sewage, or be on the list of approved devices maintained by the executive director according to §285.32(c)(4) of this title.

(4) Approval of proprietary disposal systems. All proprietary disposal systems, other than those described in this section, shall be approved by the executive director before they may be used. Proprietary disposal systems shall be approved by the executive director using the procedures established in §285.32(c)(4)(B) of this title.

(d) Nonstandard disposal systems. All disposal systems not described or defined in subsections (b) and (c) of this section are nonstandard disposal systems. Planning materials for nonstandard disposal systems must be developed by a professional engineer or professional sanitarian using basic engineering and scientific principles. The planning materials for paragraphs (1) - (5) of this subsection shall be submitted to the permitting authority and the permitting authority shall review and either approve or disapprove them on a case-by-case basis according to §285.5 of this title (relating to Submittal Requirements for Planning Materials). Electrical wiring for nonstandard disposal systems shall be installed according to §285.34(c) of this title (relating to Other Requirements). Upon approval of the planning materials, an authorization to construct will be issued by the permitting authority. Approval for a nonstandard disposal system is limited to the specific system described in the planning materials for the specific location. The systems identified in paragraphs (1) - (5) of this subsection must meet these requirements, in addition to the requirements identified for each specific system in this section.

(1) Low-pressure dosed drainfield. Effluent from this type of system shall be pumped, under low pressure, into a solid wall force main and then into a perforated distribution pipe installed within the drainfield area.

(A) The effluent pump in the pump tank must be capable of an operating range that will assure that effluent is delivered to the most distant point of the perforated piping network, yet not be excessive to the point that blowouts occur.

(B) A start/stop switch or timer must be included in the system to control the dosing pump. An audible and visible high water alarm, on an electric circuit separate from the pump, must be provided.

(C) Pressure dosing systems shall be installed according to either design criteria in the *North Carolina State University Sea Grant College Publication UNC-S82-03* (1982) or other publications containing criteria or data on pressure dosed systems which are acceptable to the permitting authority. Additionally, the following sizing parameters are required for all low-pressure dosed drainfields and shall be used in place of the sizing parameters in the *North Carolina State University Sea Grant College Publication* or other acceptable publications.

(i) The low-pressure dosed drainfield area shall be sized according to the effluent loading rates in §285.91(1) of this title and the wastewater usage rates in §285.91(3) of this title. The effluent loading rate (Ra) in the formula in §285.91(1) of this title shall be based on the most restrictive horizon one foot below the bottom of the excavation. Excavated areas can be as close as three feet apart, measured center to center. All excavations shall be at least six inches wide. To determine the length of the excavation, use the following formulas, where L = excavation length, and A = absorptive area.

(I) If the media in the excavation is at least one foot deep, the length of the excavation is L = A/(w+2) where:

(-a-) w = the width of the excavation for excavations one foot wide or greater; or

(-b-) w = 1 for all excavations less than one foot wide.

(II) If the media in the excavation is less than one foot deep, the length of the excavation is L = A/(w + 2H), where H = the depth of the media in feet and:

(-a-) w = the width of the excavation for excavations one foot wide or greater; or

(-b-) w = 1 for all excavations less than one foot wide.

(ii) Each dosing pipe shall be placed with the drain holes facing down and placed on top of at least six inches of media (pea gravel or media up to two inches measured along the greatest dimension).

(iii) Geotextile fabric meeting the criteria in subsection (b)(1)(E) of this section shall be placed over the media. The excavation shall be backfilled with Class Ib, II, or III soil.

(iv) There shall be a minimum of one foot of soil (with less than 30% gravel) between the bottom of the excavation and solid or fractured rock. There shall be a minimum of two feet of soil (with less than 30% gravel) between the bottom of the excavation and groundwater.

(2) Surface application systems. Surface application systems include those systems that spray treated effluent onto the ground.

(A) Acceptable surface application areas. Land acceptable for surface application shall have a flat terrain (with less than or equal to 15% slope) and shall be covered with grasses, evergreen shrubs, bushes, trees, or landscaped beds containing mixed vegetation. There shall be nothing in the surface application area within ten feet of the sprinkler which would interfere with the uniform application of the effluent. Sloped land (with greater than 15%) may be acceptable if it is properly landscaped and terraced to minimize runoff.

(B) Unacceptable surface application areas. Land that is used for growing food, gardens, orchards, or crops that may be used for human consumption, as well as unseeded bare ground, shall not be used for surface application.

(C) Technical report. A technical report shall be prepared for any system using surface application and shall be submitted with the planning materials required in §285.5(a) of this title. The technical report shall describe the operation of the entire on-site sewage facility OSSF system, and shall include construction drawings, calculations, and the system flow diagram. Proprietary aerobic systems may reference the executive director's approval list instead of furnishing construction drawings for the system.

(D) Effluent disinfection. Treated effluent must be disinfected before surface application. The effluent quality in the pump tank must meet the minimum required test results specified in §285.91(4) of this title. All new disinfection devices shall be listed as approved dispensers or disinfection devices for wastewater systems by NSF International under ANSI/NSF Standard 46, approved and listed under any subsequently adopted ANSI/NSF standard for wastewater disinfection devices, or approved by the executive director. Installation of disinfection devices on new systems shall be performed by a licensed installer II. [~~Approved disinfection methods shall include chlorination, ozonation, ultraviolet radiation, or other method approved by the executive director.~~] Tablet or other dry chlorinators shall use calcium hypochlorite properly labeled for wastewater disinfection. The effectiveness of the disinfection procedure will be established by monitoring either the fecal coliform count or total chlorine residual from representative effluent grab samples as directed in the testing and reporting schedule. The frequency of testing, the type of tests, and the required results are shown in §285.91(4) of this title. Replacement of disinfection devices on existing systems may be considered an emergency repair as described in §285.35 of this title (relating to Emergency Repairs) and shall be performed by either a licensed installer II, a licensed maintenance provider, or a registered maintenance technician.

(E) Minimum required application area. The minimum surface application area required shall be determined by dividing the daily usage rate (Q), established in §285.91(3) of this title, by the allowable surface application rate (Ri = effective loading rate in gallons per square foot per day) found in §285.90(1) of this title or as approved by the permitting authority.

(F) Landscaping plan. Applications for surface application disposal systems shall include a landscape plan. The landscape plan shall describe, in detail, the type of vegetation to be maintained in the disposal area. Surface application systems may apply treated and disinfected effluent upon areas with existing vegetation. If any ground within the proposed surface application area does not have vegetation, that bare area shall be seeded or covered with sod before system start-up. The vegetation shall be capable of growth, before system start-up.

(G) Uniform application of effluent. Distribution pipes, sprinklers, and other application methods or devices must provide uniform distribution of treated effluent. The application rate must be adjusted so that there is no runoff.

(i) Sprinkler criteria. The maximum inlet pressure for sprinklers shall be 40 pounds per square inch. Low angle nozzles

(15 degrees or less in trajectory) shall be used in the sprinklers to keep the spray stream low and reduce aerosols. If the separation distance between the property line and the edge of the surface application area is less than 20 feet, sprinkler operation shall be controlled by commercial irrigation timers set to spray between midnight and 5:00 a.m.

(ii) Planning criteria. Circular spray patterns may overlap to cover all irrigated area including rectangular shapes. The overlapped area will be counted only once toward the total application area. For large systems, multiple sprinkler heads are preferred to single gun delivery systems.

(iii) Effluent storage and pumping requirements.

(I) For systems controlled by a commercial irrigation timer and required to spray between midnight and 5:00 a.m., there shall be at least one day of storage between the alarm-on level and the pump-on level, and a storage volume of one-third the daily flow between the alarm-on level and the inlet to the pump tank.

(II) For systems not controlled by a commercial irrigation timer, the minimum dosing volume shall be at least one-half the daily flow, and a storage volume of one-third the daily flow between the alarm-on level and the inlet to the pump tank.

(III) Pump tank construction and installation shall be according to §285.34(b) of this title.

(iv) Distribution piping. Distribution piping shall be installed below the ground surface and hose bibs shall not be connected to the distribution piping. An unthreaded sampling port shall be provided in the treated effluent line in the pump tank.

(v) Color coding of distribution system. All new distribution piping, fittings, valve box covers, and sprinkler tops shall be permanently colored purple to identify the system as a reclaimed water system according to Chapter 210 of this title (relating to Use of Reclaimed Water).

(3) Mound drainfields. A mound drainfield is an absorptive drainfield constructed above the native soil surface. The mound consists of a distribution area installed within fill material placed on the native soil surface. The required area of the fill material is a function of the texture of the native soil surface, the depth of the native soil, basal area sizing considerations, and sideslope requirements. A description of mound construction, as well as construction requirements not addressed in this section can be found in the *North Carolina State University Sea Grant College Publication UNC-SG-82-04* (1982).

(A) A mound drainfield shall only be installed at a site where there is at least one foot of native soil; however, approval for installation on sites with less than one foot of native soil may be granted by the permitting authority on a case-by-case basis.

(B) Mounds and mound distribution systems must be constructed with the longest dimension parallel to the contour of the site.

(C) Soil classification, loading rates (R(a)), and wastewater usage rates (Q) shall all be obtained from this chapter.

(D) The depth of soil material (with less than 30% gravel) between the bottom of the media and a restrictive horizon must be at least 1.5 feet to the restrictive horizon or two feet to groundwater. The soil material includes both the fill and the native soil.

(E) The distribution area is defined as the interface area between the media containing the distribution piping and the fill material or the native soil, if applicable. The distribution length is the dimension parallel with the contour and equivalent to the length of the distribution media which must also run parallel with the contour. The distribution lines within the distribution media must extend to 12 inches of the end of the distribution media. The distribution width is defined as the distribution area divided by the distribution length.

(i) The formula A(d) = Q/R(a) shall be used for calculating the minimum required distribution area of the mound where: Figure: 30 TAC §285.33(d)(3)(E)(i) (No change.)

(ii) The area credited toward the minimum required distribution area can be determined in either of the following ways.

(I) If the distribution area consists of a continuous six-inch layer of media over the fill, the credited area is the bottom interface area between the media and soil beneath the media.

(II) If the distribution area consists of rows of media and distribution piping, the credited area can be calculated using the formulas listed in paragraph (1)(C)(i)(I) or (II) of this subsection depending on the depth of the media.

(iii) For sites with greater than 2% slopes and solid bedrock, saturated zones, or class IV horizons within two feet of the native soil surface, the length to width ratio of the distribution area must be at least 7:1. For sites with greater than 2% slopes and no solid bedrock, saturated zones, or class IV horizons within two feet of the native soil surface, the length to width ratio of the distribution area must be at least 4:1. No length to width ratio is required on a site with 2% slope or less.

(iv) Effluent must be pressure dosed into the distribution piping to ensure equal distribution and to control application rates.

(v) If a continuous layer of media is used, the dosing lines must not be spaced more than three feet apart. If rows of media are used, the rows may be as close as three feet apart, measured edge to edge.

(vi) The dosing holes must not be greater than three feet apart.

(F) The basal area is defined as the interface area between the native soil surface and the fill material. The formula A(b) = Q/R(a) must be used for calculating the minimum required basal area of the mound where: A(b) = minimum required basal absorptive area in square feet; Q = design wastewater usage rate in gallons per day; R(a) = application rate of the native soil surface in gallons per square foot per day.

(i) On sites with greater than 2% slope, the area credited toward the required minimum basal area is computed by multiplying the length of the distribution system by the distance from the upslope edge of the distribution system to the downslope toe of the mound.

(ii) On sites with 2% slopes or less, the area credited toward the minimum required basal area sizing includes all areas below the distribution system as well as the side slope area on all side slope areas greater than six inches deep.

(G) Mounds shall only be installed on sites with less than 10% slope.

(H) The toe of the mound is considered the edge of the soil absorption system.

(I) The side slopes must be no steeper than three to one.

(J) There must be at least six inches of backfill over the distribution media and the mound shall be crowned to shed water.

(4) Soil substitution drainfields. Soil substitution drainfields may be constructed in Class Ia soils, highly permeable fractured rock, highly permeable fissured rock, or Class II and III soils with greater than 30% gravel.

(A) A soil substitution drainfield must not be used in Class IV soils or Class IV soils with greater than 30% gravel. Class III or IV soil shall not be used as the substituted soil in a soil substitution drainfield. There must be at least two feet of substituted soil between the bottom of the media and groundwater.

(B) A soil substitution drainfield is constructed similar to a standard absorptive drainfield except that a minimum two foot thick Class Ib or Class II soil buffer shall be placed below and on all sides of the drainfield excavation. The soil buffer must extend at least to the top of the media. The two-foot buffer area along the sides of the excavation is not credited as bottom area in calculating absorptive area. However, the interface between the media and the substituted soil is credited as absorptive area.

(C) Soil substitution drainfields must be designed to address soil compaction to prevent unlevel disposal. It is recommended that low-pressure dosing be used for effluent distribution. The edge of the substituted soil is considered the edge of the soil absorption drainfield in determining the appropriate separation distances as listed in §285.91(10) of this title.

(D) Class Ia soils do not provide adequate treatment of wastewater through soil contact. A soil substitution drainfield may be constructed in Class Ia soils in order to provide adequate soil for treatment. Absorptive area sizing must be based on the textural class of the substituted soil and must follow the formulas in subsection (b)(1)(A)(vii)(I) of this section.

(E) Highly permeable fractured and fissured rock, which contains soil in the fractures and fissures, does not provide adequate treatment of wastewater through soil contact. A soil substitution drainfield can be constructed in this permeable fractured and fissured rock in order to provide adequate soil for treatment. Absorptive area sizing must be based on the most restrictive textural class between either the native soil residing in the fractures or fissures or the substituted soil. The sizing must follow the formulas in subsection (b)(1)(A)(vii)(I) of this section.

(F) Class II and III soils with greater than 30% gravel do not provide adequate treatment of wastewater through soil contact. A soil substitution drainfield can be constructed in Class II or III soils with greater than 30% gravel in order to provide adequate soil for treatment. Absorptive area sizing must be based on the most restrictive textural class between either the non-gravel portion of the native soil or the substituted soil. The sizing must follow the formulas in subsection (b)(1)(A)(vii)(I) of this section.

(5) Drainfields following secondary treatment and disinfection. Subsurface drainfields following secondary treatment and disinfection may be constructed in Class Ia soils, fractured rock, fissured rock, or other conditions where insufficient soil depth will allow septic tank effluent to reach fractured rock or fissured rock, as long as the following conditions are met.

(A) Drainfield sizing.

(i) If the unsuitable feature is Class Ia soil, the disposal area sizing shall be based on the application rate for Class Ib soil. Some form of pressure distribution shall be used for effluent disposal.

(ii) If the unsuitable feature is fractured or fissured rock, the system sizing should be based on the application rate for Class III soil. Some form of pressure distribution system shall be used for effluent disposal.

(B) Effluent disinfection. Treated effluent must be disinfected as indicated in §285.32(e) of this title before discharging into the drainfield.

(C) Other requirements. The affidavit, maintenance, and testing and reporting requirements of §285.3(b)(3) of this title and §285.7(a) and (d) of this title (relating to Maintenance Requirements) apply to these systems.

(6) All other nonstandard disposal systems. The planning materials for all non-standard disposal systems not described in paragraphs (1) - (5) of this subsection shall be submitted to the executive director for review according to §285.5(b)(2) of this title before the systems can be installed.

§285.34. Other Requirements.

(a) Septic tank effluent filters. Effective 180 days after the effective date of these rules, all effluent filters that are installed in septic tanks shall be listed and approved under the National Science Foundation (NSF) [~~NSF~~] Standard 46 (2000) or under any standard approved by the executive director.

(b) Pump tanks. Pump tanks may be necessary when the septic tank outlet is at a lower elevation than the disposal field or for systems that require pressure disposal. All requirements in §285.32(b)(1)(D) - (F) of this title (relating to Criteria for Sewage Treatment Systems) also apply to pump tanks. The pump tank shall be constructed according to the following specifications.

(1) Pump tank criteria. When effluent must be pumped to a disposal area, an appropriate pump shall be placed in a separate water-tight tank or chamber. A check valve may be required if the disposal area is above the pump tank. The pump tank shall be equipped to prevent siphoning. The tank shall be provided with an audible and visible high water alarm. If an electrical alarm is used, the power circuit for the alarm shall be separate from the power circuit for the pump. Batteries may be used for back-up power supply only. All electrical components shall be listed and labeled by Underwriters Laboratories (UL). At the discretion of the permitting authority, leak testing using water filled to the inside level of the tank lid or to the top of the riser(s) may be required.

(2) Pump tank sizing. Pump tanks shall be sized to contain one-third of a day's flow between the alarm-on level and the inlet to the pump tank. The capacity above the alarm-on level may be reduced to four hours average daily flow if the pump tank is equipped with multiple pumps. See §285.33(d)(2)(G)(iii) of this title (relating to Criteria for Effluent Disposal Systems) for sizing of pump tanks for surface application systems.

(3) Pump specifications. A single pump may be used for flows equal to or less than 1,000 gallons per day. Dual pumps are required for flows greater than 1,000 gallons per day. A dual pump system shall have the "alarm on" level below the "second pump on" level, and shall have a lock-on feature in the alarm circuit so that once it is activated it will not go off when the second pump draws the liquid level below the "alarm on" level. All audible and visible alarms shall have a manual "silence" switch. The pump switch-gear shall be set such that each pump operates as the first pump on an alternating basis. All pumps shall be rated by the manufacturer for pumping sewage or sewage effluent.

(4) Equalization tanks. In addition to the requirements for pump tanks in this section, equalization tanks shall meet the following criteria:

(A) The equalization tank must be preceded by a pre-treatment tank;

(B) If an equalization tank is serving residences, the tank shall have a volume between the pump intake level and the high water level of at least 50% of the design flow and be designed to time dose at equal intervals and equal doses throughout a 24-hour period. The tank may contain a gravity line located above the high water alarm level which allows flow to the aerobic treatment unit. The design will use no fewer than 12 doses throughout the 24-hour period.

(C) If an equalization tank is designed to equalize flows over periods longer than a 24-hour period, the tank shall be designed to time dose at equal intervals and equal doses over the flow equalization time period. The design shall have a storage between the highest wastewater flow line during the period and the high level alarm equal to at least 20% of the flow generated during peak days. The tank may contain a gravity line located above the high water alarm level which allows flow to the aerobic treatment unit.

(c) Electrical wiring. All electrical wiring shall conform to the requirements the National Electric Code (1999) or under any other standards approved by the executive director. Additionally, all external wiring shall be installed in approved, rigid, non-metallic gray code electrical conduit. The conduit shall be buried according to the requirements in the National Electrical Code and terminated at a main circuit breaker panel or sub-panel. Connections shall be in approved junction boxes. All electrical components shall have an electrical disconnect within direct vision from the place where the electrical device is being serviced. Electrical disconnects must be weatherproof (approved for outdoor use) and have maintenance lockout provisions.

(d) Grease interceptors. Grease interceptors shall be used on kitchen waste-lines from institutions, hotels, restaurants, schools with lunchrooms, and other buildings that may discharge large amounts of greases and oils to the OSSF. Grease interceptors shall be structurally equivalent to, and backfilled according to, the requirements established for septic tanks under §285.32(b)(1)(D) - (F) of this title. The interceptor shall be installed near the plumbing fixture that discharges greasy wastewater and shall be easily accessible for cleaning. Grease interceptors shall be cleaned out periodically to prevent the discharge of grease to the disposal system. Grease interceptors shall be properly sized and installed according to the requirements of the 2000 edition of the Uniform Plumbing Code, the 1980 EPA Design Manual: Onsite Wastewater Treatment and Disposal Systems, or other prevailing code.

(e) Holding tanks. Tanks shall be constructed according to the requirements established for septic tanks under §285.32(b)(1)(D) - (E) of this title. Inlet fittings are required. No outlet fitting shall be provided. A baffle is not required. Holding tanks shall be used only on sites where other methods of sewage disposal are not feasible (these holding tank provisions do not apply to portable toilets or to an office trailer at a construction site). All holding tanks shall be equipped with an audible and visible alarm to indicate when the tank has been filled to within 75% of its rated capacity. A port with its smallest dimension being at least 12 inches shall be provided in the tank lid for inspection, cleaning, and maintenance. This port shall be accessible from the ground surface and must be easily removable and watertight.

(1) Minimum capacity. The minimum capacity of the holding tank shall be sufficient to store the estimated or calculated daily wastewater flow for a period of one week (wastewater usage rate in gallons per day x seven days).

(2) Location. Holding tanks shall be installed in an area readily accessible to a pump truck under all weather conditions, and at a location that meets the minimum distance requirements in §285.91(10) of this title (relating to Tables).

(3) Pumping requirements. A scheduled pumping contract with a waste transporter, holding a current registration with the executive director, must be provided to the permitting authority before a holding tank may be installed. Pumping records must be retained for five years.

(f) Composting toilets. Composting toilets will be approved by the executive director provided the system has been tested and certified under NSF International Standard 41 (1999) or under any other standards approved by the executive director.

(g) Condensation. If condensate lines are plumbed directly into an OSSF, the increased water volume must be accounted for (added to the usage rate) in the system planning materials.

§285.35. Emergency Repairs.

(a) An emergency repair may be made to an on-site sewage facility (OSSF) [~~OSSF~~] providing that the repair:

(1) is made for the abatement of an immediate, serious and dangerous health hazard; and

(2) does not constitute an alteration of that OSSF system's planning materials and function.

(b) Emergency repairs include tasks such as replacing tank lids, replacing inlet and outlet devices, repairing risers and riser caps, repairing or replacing disinfection devices, repairing damaged drip irrigation tubing and repairing solid lines. Such repairs must meet criteria established in this chapter.

(c) The individual authorized to make the repair [~~installer~~] shall notify the permitting authority, in writing, within 72 hours after starting the emergency repairs. The notice must include a detailed description of the methods and materials used in the repair.

(d) An inspection of the emergency repairs may be required at the discretion of the permitting authority.

§285.36. Abandoned Tanks, Boreholes, Cesspools, and Seepage Pits.

(a) A [~~An abandoned tank is a~~] tank that is not to be used again for holding sewage shall be abandoned.

(b) To properly abandon, the owner shall conduct the following actions, in the order listed.

(1) All tanks, boreholes, cesspools, seepage pits, holding tanks, and pump tanks shall have the wastewater removed by a waste transporter, holding a current registration with the executive director.

(2) All tanks, boreholes, cesspools, seepage pits, holding tanks, and pump tanks shall be filled to ground level with fill material (less than three inches in diameter) which is free of organic and construction debris.

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

Filed with the Office of the Secretary of State on June 29, 2012.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: August 12, 2012
For further information, please call: (512) 239-0779

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SUBCHAPTER I. APPENDICES

30 TAC §285.90, §285.91

Statutory Authority

These amendments are proposed under Texas Water Code (TWC), §5.012, concerning Declaration of Policy; TWC, §5.013, concerning the General Jurisdiction of the Commission; TWC, §5.102, concerning General Powers; and TWC, §5.103, concerning Rules. These amendments are also proposed under Texas Health and Safety Code (THSC), §366.001, concerning Policy and Purpose; THSC, §366.011, concerning General Supervision and Authority; THSC, §366.012, concerning Rules Concerning On-Site Sewage Disposal Systems; THSC, §366.051, concerning Permits; THSC, §366.052, concerning Permit Not Required for On-Site Sewage Disposal on Certain Single Residences; THSC, §366.053, concerning Permit Application; THSC, §366.054, concerning Notice From Installer; THSC, §366.056, concerning Approval of On-Site Sewage Disposal System; THSC, §366.057, concerning Permit Issuance; THSC, §366.058, concerning Permit Fee; and THSC, §366.059, concerning Permit Fee Paid to Department of Authorized Agent.

These proposed amendments implement TWC, §§5.012, 5.013, 5.102, 5.103, and THSC, §§366.001, 366.011, 366.012, 366.051, 366.052, 366.053, 366.054, 366.056, 366.057, 366.058, and 366.059.

§285.90. Figures.
The following figures are necessary for the proper location, planning, construction, and installation of an on-site sewage facility (OSSF).

(1) Figure 1. Maximum Application Rates for Surface Application of Treated Effluent in Texas.
Figure: 30 TAC §285.90(1) (No change.)

(2) Figure 2. Model Affidavit to the Public.
Figure: 30 TAC §285.90(2) (No change.)

(3) Figure 3. Sample Testing and Reporting Record.
Figure: 30 TAC §285.90(3)
[~~Figure: 30 TAC §285.90(3)~~]

(4) Figure 4. Typical Drainfields - Sectional View.
Figure: 30 TAC §285.90(4) (No change.)

(5) Figure 5. Typical Drainfields.
Figure: 30 TAC §285.90(5) (No change.)

(6) Figure 6. Two Compartment Septic Tank.
Figure: 30 TAC §285.90(6) (No change.)

(7) Figure 7. Two Septic Tanks in Series.
Figure: 30 TAC §285.90(7) (No change.)

(8) Figure 8. Intermittent Sand Filters.
Figure: 30 TAC §285.90(8) (No change.)

(9) Figure 9. Intermittent Sand Filter Underdrain and Pumpwell.
Figure: 30 TAC §285.90(9) (No change.)

§285.91. Tables.
The following tables are necessary for the proper location, planning, construction, and installation of an OSSF.

(1) Table I. Effluent Loading Requirements Based on Soil Classification.
Figure: 30 TAC §285.91(1) (No change.)

(2) Table II. Septic Tank and Aerobic Treatment Unit Sizing.
Figure: 30 TAC §285.91(2)
[~~Figure: 30 TAC §285.91(2)~~]

(3) Table III. Wastewater Usage Rate.
Figure: 30 TAC §285.91(3) (No change.)

(4) Table IV. Required Testing and Reporting.
Figure: 30 TAC §285.91(4) (No change.)

(5) Table V. Criteria for Standard Subsurface Absorption Systems.
Figure: 30 TAC §285.91(5) (No change.)

(6) Table VI. USDA Soil Textural Classifications.
Figure: 30 TAC §285.91(6) (No change.)

(7) Table VII. Yearly Average Net Evaporation (Evaporation-Rainfall).
Figure: 30 TAC §285.91(7) (No change.)

(8) Table VIII. OSSF Excavation Length (3 Feet in Width or Less).
Figure: 30 TAC 285.91(8) (No change.)

(9) Table IX. OSSF System Designation.
Figure: 30 TAC §285.91(9) (No change.)

(10) Table X. Minimum Required Separation Distances for On-Site Sewage Facilities.
Figure: 30 TAC §285.91(10)
[~~Figure: 30 TAC §285.91(10)~~]

(11) Table XI. Intermittent Sand Filter Media Specifications (ASTM C-33).
Figure: 30 TAC §285.91(11) (No change.)

(12) Table XII. OSSF Maintenance Contracts, Affidavit, and Testing/Reporting Requirements.
Figure: 30 TAC §285.91(12) (No change.)

(13) Table XIII. Disposal and Treatment Selection Criteria.
Figure: 30 TAC §285.91(13) (No change.)

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

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CHAPTER 288. WATER CONSERVATION PLANS, DROUGHT CONTINGENCY PLANS, GUIDELINES AND REQUIREMENTS

SUBCHAPTER A. WATER CONSERVATION PLANS

30 TAC §§288.1 - 288.5

The Texas Commission on Environmental Quality (TCEQ or commission) proposes to amend §§288.1 - 288.5.

Background and Summary of the Factual Basis for the Proposed Rules

In 2011, the 82nd Legislature passed Senate Bill (SB) 181, relating to the calculation and reporting of water usage by municipalities and water utilities for state water planning and other purposes. The 82nd Legislature also passed SB 660, related to the review and functions of the Texas Water Development Board (TWDB), including the functions of the board and related entities in connection with the reporting of municipal water use data.

SB 181 amended Texas Water Code (TWC), Chapter 16, related to provisions generally applicable to water development. SB 660 amended TWC, Chapter 16, and TWC, Chapter 11, related to water rights.

SB 181 added TWC, §16.403, and SB 660 amended TWC, §16.402 and added TWC, §16.403, to require that the TWDB and the TCEQ, in consultation with the Water Conservation Advisory Council (WCAC), develop a uniform, consistent methodology and guidance for calculating and reporting water use and conservation. For a municipality or water utility, the bills require a method of calculating total water use, a method of calculating total water use in gallons per capita per day (GPCD), a method of classifying water users within sectors, a method of calculating water use in the non-population dependent sectors, and guidelines on the use of service populations. The methodology and guidance applies to all entities required to submit water conservation plans to the TWDB or the TCEQ. Additionally, the bills require that the TWDB, the TCEQ, and the WCAC develop a data collection and reporting program for municipalities and water utilities with more than 3,300 connections.

SB 181 added TWC, §16.404, and SB 660, §21, amended TWC, §16.402 and §11.1271, to require entities to report the most detailed level of water use possible, but cannot require entities to report at a higher level than their current billing systems allow. SB 181 specifies that the rules may require that new billing systems purchased be capable of reporting water use according to the prescribed methodology.

SB 660 amended TWC, §11.1271 and §16.402, to require the TCEQ, or the TCEQ and TWDB, to jointly adopt rules by January 1, 2013, requiring the methodology and guidance for calculating water use and conservation developed under TWC, §16.403, to be used in water conservation plans or reports.

This proposed rulemaking will implement the amendments made by SB 181 and §21 of SB 660.

Section by Section Discussion

The commission proposes to amend §288.1, Definitions, by adding definitions for commercial use, institutional use, residential use, residential GPCD, total use, total GPCD, and wholesale use, and to renumber the paragraphs to accommodate the addition of definitions. The proposed definitions for commercial use in §288.1(5), institutional use in §288.1(8), and wholesale use in §288.1(25) were derived from the identified definitions of these uses by the American Water Works Association. The proposed definitions for residential use in §288.1(16) and residential GPCD in §288.1(17) were derived from TWC, §16.403(b)(4), as added by SB 181, which requires a method of calculating water use in the residential sector that includes both single-family and multi-family residences, in GPCD. The proposed definition for total use in §288.1(21) was derived from TWC, §16.403(b)(1), as added by SB 181, which requires a method of calculating total use by a municipality or water utility, including water billed and nonrevenue water used. The proposed definition for total GPCD in §288.1(22) was derived from TWC, §16.403(b)(2), as added by SB 181, which requires a method of calculating total water use by a municipality or water utility in GPCD.

The commission proposes to amend the definitions for industrial use, irrigation use, and municipal use. The definition of industrial use in §288.1(7) was amended to remove commercial fish production (aquaculture) which was defined as an agricultural use by the 82nd Legislature in HB 2694, which amended TWC, §11.002(12)(G). The commission proposes to amend the definition of irrigation use in §288.1(9) to change "through a municipal distribution system" to "from a public water supplier" to be consistent with the terminology used throughout the remainder of Chapter 288. The commission proposes to amend the definition of municipal use in §288.1(12) to remove the various listed examples of municipal uses and instead list the sectors of water use required by SB 181 and SB 660, §21.

The commission proposes to delete the definitions for municipal per capita water use in §288.1(10) and municipal use in gallons per capita per day in §288.1(12). These definitions are no longer needed because SB 181 and SB 660, §21 require municipal use to be reported in the proposed definitions for residential use in §288.1(16); residential GPCD in §288.1(17); total use in §288.1(21); and, total GPCD in §288.1(22). The commission proposes to renumber the paragraphs to accommodate the deletion of the definitions.

The definitions proposed to be added, amended, or deleted are necessary to implement SB 181 and SB 660, §21.

The commission proposes to amend §288.2, Water Conservation Plans for Municipal Uses by Public Water Suppliers, to implement the requirements of SB 181 and SB 660, §21.

The commission proposes to amend §288.2(a)(1) by deleting the word "drinking" from "public drinking water suppliers" to ensure consistency of terms throughout Chapter 288.

The commission proposes to amend §288.2(a)(1)(A) by adding "in accordance with the Texas Water Use Methodology" to the requirements for utility profiles of water conservation plans. This uniform methodology, required by the bills, is currently being developed by the TWDB, TCEQ, and WCAC. This amendment also adds "(including total GPCD and residential GPCD)" with respect to the water use data provided in these utility profiles. SB 181 and SB 660, §21 require that municipalities or water utilities report GPCD values in both total GPCD and residential GPCD.

The commission proposes to add §288.2(a)(1)(B) to require the sector-based water use reporting as required by SB 181 and SB 660, §21. This new requirement also specifies that water suppliers do not need to purchase new software immediately, but will need to purchase the appropriate software when upgrading.

The commission proposes to delete existing §288.2(a)(1)(B). The May 1, 2005 date was originally added to implement HB 2660 and HB 2663, passed by the 78th Legislature in 2003. Because this deadline has passed, it is no longer needed in the current rule language.

The commission proposes to amend §288.2(a)(1)(C) to remove the date reference "beginning May 1, 2005." The May 1, 2005 date was originally added to implement HB 2660 and HB 2663, passed by the 78th Legislature in 2003. Because this deadline has passed, it is no longer needed in the current rule language. The proposed amendment does not alter the requirements for entities to submit revised water conservation plans every five years to coincide with regional water planning. The commission also proposes to specify that the goals for municipal use be in

total GPCD and residential GPCD. This change is proposed to ensure that the water use data in §288.2(a)(1)(A) and this subparagraph are consistent.

The commission proposes to amend §288.2(a)(1)(F) by removing the term "unaccounted-for uses of" and add "loss" to the word "water." The term "water loss" is the appropriate semantic for reporting.

The commission proposes to amend §288.2(a)(2)(A) by removing "in order to control unaccounted-for uses of water" because this is an inappropriate semantic for referring to water loss.

The commission proposes to delete existing §288.2(a)(2)(B) which, previous to SB 181 and SB 660, was an additional content requirement for reporting by sectors and to reletter the subparagraphs that follow. The sector-based reporting requirement was added in proposed §288.2(a)(1)(B).

The commission proposes to amend §288.2(c) to remove the date references "Beginning May 1, 2005," "not later than May 1, 2009," and "after that date." The May 1, 2005 date was originally added to implement HB 2660 and HB 2663 passed by the 78th Legislature in 2003. The May 1, 2009 date was originally incorporated into the rule based on comments received during a 2004 agency rulemaking amending §§288.2 - 288.5. Because these deadlines have passed, this language as well as "after that date" are no longer needed in the current rule language. The proposed amendment does not alter the requirements for entities to submit revised water conservation plans every five years to coincide with regional water planning.

The commission proposes to delete §288.3(a)(2) and renumber the paragraphs that follow. The May 1, 2005 date was originally added to implement HB 2660 and HB 2663, passed by the 78th Legislature in 2003. Because this deadline has passed, it is no longer needed in the current rule language. The requirements for industrial water users to submit water conservation goals for water conservation plans are now located in proposed §288.3(a)(2).

The commission proposes to amend renumbered §288.3(a)(2) to remove the date reference "beginning, May 1, 2005." The May 1, 2005 date was originally added to implement HB 2660 and HB 2663, passed by the 78th Legislature in 2003. Because this deadline has passed, it is no longer needed in the current rule language. The proposed amendment does not alter the requirements for entities to submit revised water conservation plans every five years to coincide with regional water planning.

The commission proposes to amend §288.3(b) to remove the date references "Beginning, May 1, 2005," "not later than May 1, 2009," and "after that date." The May 1, 2005 date was originally added to implement HB 2660 and HB 2663 passed by the 78th Legislature in 2003. The May 1, 2009 date was originally incorporated into the rules based on comments received during a 2004 agency rulemaking amending §§288.2 - 288.5. Because these deadlines have passed, this language, as well as "after that date", are no longer needed in the current rule language. The proposed amendment does not alter the requirements for entities to submit revised water conservation plans every five years to coincide with regional water planning.

The commission proposes to delete current §288.4(a)(1)(B) and reletter the subparagraphs that follow. The May 1, 2005 date was originally added to implement HB 2660 and HB 2663, passed by the 78th Legislature in 2003. Because this deadline has passed, it is no longer needed in the current rule language. The requirements for individual agricultural users to submit water conservation goals for water conservation plans are now located in relettered §288.4(a)(1)(B).

The commission proposes to amend relettered §288.4(a)(1)(B) to remove the date reference "beginning, May 1, 2005." The May 1, 2005 date was originally added to implement HB 2660 and HB 2663, passed by the 78th Legislature in 2003. Because this deadline has passed, it is no longer needed in the current rule language. The proposed amendment does not alter the requirements for entities to submit revised water conservation plans every five years to coincide with regional water planning.

The commission proposes to delete current §288.4(a)(2)(D) and reletter the subparagraphs that follow. The May 1, 2005 date was originally added to implement HB 2660 and HB 2663, passed by the 78th Legislature in 2003. Because these deadlines have passed, they are no longer needed in the current rule language. The requirements for individual irrigation users to submit water conservation goals for water conservation plans are now located in proposed §288.4(a)(2)(D).

The commission proposes to amend relettered §288.4(a)(2)(D) by removing the date reference "beginning, May 1, 2005." The May 1, 2005 date was originally added to implement HB 2660 and HB 2663, passed by the 78th Legislature in 2003. Because these deadlines have passed, they are no longer needed in the current rule language. The amendment does not alter the requirements for entities to submit revised water conservation plans for every five years to coincide with regional water planning.

The commission proposes to delete current §288.4(a)(3)(B) and reletter the subparagraphs that follow. The May 1, 2005 date was originally added to implement HB 2660 and HB 2663, passed by the 78th Legislature in 2003. Because this deadline has passed, it is no longer needed in the current rule language. The requirements for systems providing agricultural water to more than one user to submit water conservation goals for water conservation plans are now located in proposed §288.4(a)(3)(B).

The commission proposes to amend relettered §288.4(a)(3)(B) by removing the date reference "beginning, May 1, 2005." The May 1, 2005 date was originally added to implement HB 2660 and HB 2663, passed by the 78th Legislature in 2003. Because this deadline has passed, it is no longer needed in the current rule language. The proposed amendment does not alter the requirements for entities to submit revised water conservation plans every five years to coincide with regional water planning.

The commission proposes to amend §288.4(c) by removing the date references "Beginning, May 1, 2005," "not later than May 1, 2009," and "after that date." The May 1, 2005 date was originally added to implement HB 2660 and HB 2663, passed by the 78th Legislature in 2003. The May 1, 2009 date was originally incorporated into the rule based on comments received during a 2004 agency rulemaking amending §§288.2 - 288.5. Because these deadlines have passed, this language as well as "after that date" are no longer needed in the current rule language. The proposed amendment does not alter the requirements for entities to submit revised water conservation plans every five years to coincide with regional water planning.

The commission proposes to delete current §288.5(1)(B) and reletter the subparagraphs that follow. The May 1, 2005 date was originally added to implement HB 2660 and HB 2663, passed by the 78th Legislature in 2003. Because this deadline has passed, it is no longer needed in the current rule language.

The requirements for wholesale water suppliers to submit water conservation goals for water conservation plans are now in proposed §288.5(1)(B).

The commission proposes to amend relettered §288.5(1)(B) by removing the date reference "beginning, May 1, 2005." This date was originally added to implement HB 2660 and HB 2663, as passed by the 78th Legislature in 2003. Because the deadline has passed it is no longer needed in the current rule language. This amendment does not alter the requirement for entities to submit revised water conservation plans every five years to coincide with regional water planning. The commission also proposes to remove the term "unaccounted for" and add "loss" to the word "water" because the term "water loss" is the appropriate semantic for reporting.

The commission proposes to amend §288.5(3) to remove the date references "Beginning, May 1, 2005," "not later than May 1, 2009," and "after that date." The May 1, 2005 date was originally added to implement HB 2660 and HB 2663, passed by the 78th Legislature in 2003. The May 1, 2009 date was originally incorporated into the rules based on comments received during a 2004 agency rulemaking amending §§288.2 - 288.5. Because these deadlines have passed, this language as well as "after that date" are no longer needed in the current rule language. The proposed amendment does not alter the requirements for entities to submit revised water conservation plans every five years to coincide with regional water planning.

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rules. The agency will use currently available resources to implement the proposed rulemaking. Other units of state and local government are not expected to experience fiscal implications as a result of the proposed rules since provisions to upgrade billing software are optional.

The proposed rules would implement provisions in SB 181 and SB 660 regarding: the establishment of a uniform, consistent methodology and guidance for calculating and reporting water use and conservation; the development of a data collection and reporting program for municipalities and water utilities with more than 3,300 connections; and the requirement to use sector based water usage when submitting water conservation plans to the TWDB and the TCEQ. The proposed rules would also comply with legislative mandates to require public water suppliers to report the most detailed level of water use possible and to require that new billing systems purchased after September 1, 2011, be capable of reporting detailed water use data as required by adopted rules and standards. The legislation does not require public water suppliers to report at a higher level than their current billing systems allow nor would the proposed rules require a public water supplier to purchase a new billing system. There are an estimated 200 public water suppliers that are required to submit water conservation plans that would be affected by the proposed rules.

To implement legislative requirements, the proposed rules amend and add definitions and terminology, remove definitions and terminology that are no longer valid, and remove dates that are no longer needed. The agency estimates that there may be as many as 100 municipalities that are public water suppliers that would be affected by the proposed rules. The proposed rules would not have a fiscal impact on these units of local government. The purchase of a billing system would remain an option under the proposed rules, and governmental entities could use their current billing systems as long as they wish.

Public Benefits and Costs

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be to allow public water suppliers to better identify potential areas for water conservation methods, to allow for better comparisons of water usage among the various sectors that are served by public water suppliers, and to comply with state law.

The agency estimates that the proposed rules could affect as many as 100 public water supply systems that are owned by large and small businesses. However, since the purchase of new billing software would remain optional, the proposed rules are not expected to have a fiscal impact on business entities.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. Since the purchase of new billing software would remain optional, the proposed rules are not expected to have a fiscal impact on small businesses that are public water suppliers.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are required to comply with state law and do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the Texas Administrative Procedure Act. A "major environmental rule" is a rule that is specifically intended to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

This rulemaking does not meet the statutory definition of a "major environmental rule" because it is not the specific intent of the rule amendments to protect the environment or reduce risks to human health from environmental exposure. The specific intent of the proposed rulemaking is to implement legislative changes enacted by SB 181 and SB 660, which require public water suppliers to utilize the uniform methodology and guidance for calculating water use and conservation developed under TWC, §16.403 to be used in the water conservation plans and reports that must be submitted to the TCEQ.

Further, the rulemaking does not meet the statutory definition of a "major environmental rule" because the proposed amendments will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state. The cost of complying with the proposed amendments is not expected to be significant with respect to the economy as a whole or a sector of the economy; therefore, the proposed rulemaking will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs.

Furthermore, the proposed rulemaking does not meet the statutory definition of a "major environmental rule" because it does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225(a) only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The proposed rulemaking does not meet the four applicability requirements, because the proposed amendments: 1) do not exceed a standard set by federal law; 2) do not exceed an express requirement of state law; 3) do not exceed a requirement of federal delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program as no such federal delegation agreement exists with regard to the proposed rules; and 4) are not an adoption of a rule solely under the general powers of the commission as the proposed rules are required by SB 181 and SB 660.

The commission invites public comment regarding this draft regulatory impact analysis determination. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated this proposed rulemaking and performed an assessment of whether the proposed rulemaking constitutes a taking under Texas Government Code, Chapter 2007. The commission proposed this rulemaking for the specific purpose of implementing legislation enacted by the 82nd Legislature in 2011. The proposed rulemaking amends §§288.1 - 288.5. The commission's analysis revealed that amending these rule sections would achieve consistency with TWC, §§11.1271(f), 16.402, 16.403, and 16.404 as added or amended in 2011 by SB 181 and SB 660. The rulemaking would create new definitions and amend or delete other definitions in §288.1. The new and amended definitions define the different categories of water use that must be reported by public water suppliers in their water conservation plans; and are consistent with the terms used by the Legislature in SB 181 and SB 660. The proposed rulemaking would also require public water suppliers to utilize the uniform methodology and guidance for calculating water use and conservation developed under TWC, §16.403, to be used in the water conservation plans and reports that must be submitted to the TCEQ as required by the TWC.

A "taking" under Texas Government Code, Chapter 2007 means a governmental action that affects private real property in a manner that requires compensation to the owner under the United States or Texas Constitution, or a governmental action that affects real private property in a manner that restricts or limits the owner's right to the property and reduces the market value of affected real property by at least 25%. Because no taking of private real property would occur by creating, amending, or deleting the definitions as proposed or requiring public water suppliers to utilize the uniform methodology and guidance in producing the water conservation plans, the commission has determined that promulgation and enforcement of this proposed rulemaking would be neither a statutory nor a constitutional taking of private real property. Specifically, there are no burdens imposed on private real property under the rules because the proposed rulemaking neither relates to, nor has any impact on, the use or enjoyment of private real property, and there would be no reduction in real property value as a result of the rulemaking. Therefore, the proposed rulemaking would not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4), relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the rulemaking is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on August 7, 2012, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Bruce McAnally, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.texas.gov/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2011-058-288-OW. The comment period closes August 13, 2012. Copies of the proposed rulemaking can be obtained from the commission's Web site at

http://www.tceq.texas.gov/nav/rules/propose_adopt.html. For further information, please contact Scott Swanson, Water Rights Permitting and Availability Section, at (512) 239-0703.

Statutory Authority

The amendments are proposed under Texas Water Code (TWC), §5.102, which provides the commission the general powers to carry out duties under the TWC; §5.103, which provides the commission with the authority to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state; §5.105, which establishes the commission's authority to set policy by rule; §11.1271, which requires the commission to adopt rules regarding the methodology and guidance for calculating water use and conservation developed under §16.403 to be used in the water conservation plans; §16.402, which requires the commission to adopt rules regarding the methodology and guidance for calculating water use and conservation developed under §16.403; and §16.404, which requires the commission to adopt rules and standards as necessary to implement TWC, Subchapter K.

The proposed rules implement TWC, §§11.1271, 16.402, 16.403, and 16.404.

§288.1. Definitions.

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

(1) Agricultural or Agriculture--Any of the following activities:

(A) cultivating the soil to produce crops for human food, animal feed, or planting seed or for the production of fibers;

(B) the practice of floriculture, viticulture, silviculture, and horticulture, including the cultivation of plants in containers or non-soil media by a nursery grower;

(C) raising, feeding, or keeping animals for breeding purposes or for the production of food or fiber, leather, pelts, or other tangible products having a commercial value;

(D) raising or keeping equine animals;

(E) wildlife management; and

(F) planting cover crops, including cover crops cultivated for transplantation, or leaving land idle for the purpose of participating in any governmental program or normal crop or livestock rotation procedure.

(2) Agricultural use--Any use or activity involving agriculture, including irrigation.

(3) Best management practices--Voluntary efficiency measures that save a quantifiable amount of water, either directly or indirectly, and that can be implemented within a specific time frame.

(4) Conservation--Those practices, techniques, and technologies that reduce the consumption of water, reduce the loss or waste of water, improve the efficiency in the use of water, or increase the recycling and reuse of water so that a water supply is made available for future or alternative uses.

(5) Commercial use--The use of water by a place of business, such as a hotel, restaurant, or office building. This does not include multi-family residences or agricultural, industrial, or institutional users.

(6) [~~(5)~~] Drought contingency plan--A strategy or combination of strategies for temporary supply and demand management responses to temporary and potentially recurring water supply shortages and other water supply emergencies. A drought contingency plan may be a separate document identified as such or may be contained within another water management document(s).

(7) [~~(6)~~] Industrial use--The use of water in processes designed to convert materials of a lower order of value into forms having greater usability and commercial value, [~~commercial fish production,~~] and the development of power by means other than hydroelectric, but does not include agricultural use.

(8) Institutional Use--The use of water by an establishment dedicated to public service, such as a school, university, church, hospital, nursing home, prison or government facility. All facilities dedicated to public service are considered institutional regardless of ownership.

(9) [~~(7)~~] Irrigation--The agricultural use of water for the irrigation of crops, trees, and pastureland, including, but not limited to, golf courses and parks which do not receive water from a public water supplier [~~through a municipal distribution system~~].

(10) [~~(8)~~] Irrigation water use efficiency--The percentage of that amount of irrigation water which is beneficially used by agriculture crops or other vegetation relative to the amount of water diverted from the source(s) of supply. Beneficial uses of water for irrigation purposes include, but are not limited to, evapotranspiration needs for vegetative maintenance and growth, salinity management, and leaching requirements associated with irrigation.

(11) [~~(9)~~] Mining use--The use of water for mining processes including hydraulic use, drilling, washing sand and gravel, and oil field repressuring.

[~~(10) Municipal per capita water use--The sum total of water diverted into a water supply system for residential, commercial, and public and institutional uses divided by actual population served.~~]

(12) [~~(11)~~] Municipal use--The use of potable water provided by a public water supplier [~~within or outside a municipality and its environs whether supplied by a person, privately owned utility, political subdivision, or other entity~~] as well as the use of sewage effluent for residential, commercial, industrial, agricultural, institutional, and wholesale uses. [~~certain purposes, including the use of treated water for domestic purposes, fighting fires, sprinkling streets, flushing sewers and drains, watering parks and parkways, and recreational purposes, including public and private swimming pools, the use of potable water in industrial and commercial enterprises supplied by a municipal distribution system without special construction to meet its demands, and for the watering of lawns and family gardens.~~]

[~~(12) Municipal use in gallons per capita per day--The total average daily amount of water diverted or pumped for treatment for potable use by a public water supply system. The calculation is made by dividing the water diverted or pumped for treatment for potable use by population served. Indirect reuse volumes shall be credited against total diversion volumes for the purpose of calculating gallons per capita per day for targets and goals.~~]

(13) Nursery grower--A person engaged in the practice of floriculture, viticulture, silviculture, and horticulture, including the cultivation of plants in containers or nonsoil media, who grows more than 50% of the products that the person either sells or leases, regardless of the variety sold, leased, or grown. For the purpose of this definition, grow means the actual cultivation or propagation of the product beyond the mere holding or maintaining of the item prior to sale or lease, and typically includes activities associated with the production or multiplying of stock such as the development of new plants from cuttings, grafts, plugs, or seedlings.

(14) Pollution--The alteration of the physical, thermal, chemical, or biological quality of, or the contamination of, any water in the state that renders the water harmful, detrimental, or injurious to humans, animal life, vegetation, or property, or to the public health, safety, or welfare, or impairs the usefulness or the public enjoyment of the water for any lawful or reasonable purpose.

(15) Public water supplier--An individual or entity that supplies water to the public for human consumption.

(16) Residential use--The use of water that is billed to single and multi-family residences, which applies to indoor and outdoor uses.

(17) Residential gallons per capita per day--The total gallons sold for residential use by a public water supplier. The calculation is made by dividing the number of gallons of water sold by the residential population served divided by the number of days in the year.

(18) [~~(16)~~] Regional water planning group--A group established by the Texas Water Development Board to prepare a regional water plan under Texas Water Code, §16.053.

(19) [~~(17)~~] Retail public water supplier--An individual or entity that for compensation supplies water to the public for human consumption. The term does not include an individual or entity that supplies water to itself or its employees or tenants when that water is not resold to or used by others.

(20) [~~(18)~~] Reuse--The authorized use for one or more beneficial purposes of use of water that remains unconsumed after the water is used for the original purpose of use and before that water is either disposed of or discharged or otherwise allowed to flow into a watercourse, lake, or other body of state-owned water.

(21) Total use--The volume of raw or potable water provided by a public water supplier to billed customer sectors or nonrevenue uses and the volume lost during conveyance, treatment, or transmission of that water.

(22) Total gallons per capita per day (GPCD)--The total amount of water diverted and/or pumped for potable use divided by the total permanent population divided by the days of the year. Diversion volumes of reuse as defined in this chapter shall be credited against total diversion volumes for the purposes of calculating GPCD for targets and goals.

(23) [~~(19)~~] Water conservation plan--A strategy or combination of strategies for reducing the volume of water withdrawn from a water supply source, for reducing the loss or waste of water, for maintaining or improving the efficiency in the use of water, for increasing the recycling and reuse of water, and for preventing the pollution of water. A water conservation plan may be a separate document identified as such or may be contained within another water management document(s).

(24) [~~(20)~~] Wholesale public water supplier--An individual or entity that for compensation supplies water to another for resale to the public for human consumption. The term does not include an individual or entity that supplies water to itself or its employees or tenants as an incident of that employee service or tenancy when that water is not resold to or used by others, or an individual or entity that conveys water to another individual or entity, but does not own the right to the water which is conveyed, whether or not for a delivery fee.

(25) Wholesale use--Water sold from one entity or public water supplier to other retail water purveyors for resale to individual customers.

§288.2. Water Conservation Plans for Municipal Uses by Public Water Suppliers.

(a) A water conservation plan for municipal water use by public water suppliers must provide information in response to the following. If the plan does not provide information for each requirement, the public water supplier shall include in the plan an explanation of why the requirement is not applicable.

(1) Minimum requirements. All water conservation plans for municipal uses by public [~~drinking~~] water suppliers must include the following elements:

(A) a utility profile in accordance with the Texas Water Use Methodology, including, but not limited to, information regarding population and customer data, water use data (including total gallons per capita per day (GPCD) and residential GPCD), water supply system data, and wastewater system data;

(B) a record management system which allows for the classification of water sales and uses into most detailed level of water use data currently available to it, including, if possible, the sectors listed in clauses (i) - (vi) of this subparagraph. Any new billing system purchased by a public water supplier must be capable of reporting detailed water use data as described in clauses (i) - (vi) of this subparagraph:

(i) residential;

(I) single-family;

(II) multi-family;

(ii) commercial;

(iii) institutional;

(iv) industrial;

(v) agricultural; and

(vi) wholesale.

[~~(B) until May 1, 2005, specification of conservation goals including, but not limited to, municipal per capita water use goals, the basis for the development of such goals, and a time frame for achieving the specified goals;~~]

(C) [~~beginning May 1, 2005,~~] specific, quantified five-year and ten-year targets for water savings to include goals for water loss programs and goals for municipal use in total GPCD and residential GPCD[~~, in gallons per capita per day~~]. The goals established by a public water supplier under this subparagraph are not enforceable;

(D) metering device(s), within an accuracy of plus or minus 5.0% in order to measure and account for the amount of water diverted from the source of supply;

(E) a program for universal metering of both customer and public uses of water, for meter testing and repair, and for periodic meter replacement;

(F) measures to determine and control [~~unaccounted-for uses of~~] water loss (for example, periodic visual inspections along distribution lines; annual or monthly audit of the water system to determine illegal connections; abandoned services; etc.);

(G) a program of continuing public education and information regarding water conservation;

(H) a water rate structure which is not "promotional," i.e., a rate structure which is cost-based and which does not encourage the excessive use of water;

(I) a reservoir systems operations plan, if applicable, providing for the coordinated operation of reservoirs owned by the applicant within a common watershed or river basin in order to optimize available water supplies; and

(J) a means of implementation and enforcement which shall be evidenced by:

(i) a copy of the ordinance, resolution, or tariff indicating official adoption of the water conservation plan by the water supplier; and

(ii) a description of the authority by which the water supplier will implement and enforce the conservation plan; and

(K) documentation of coordination with the regional water planning groups for the service area of the public water supplier in order to ensure consistency with the appropriate approved regional water plans.

(2) Additional content requirements. Water conservation plans for municipal uses by public drinking water suppliers serving a current population of 5,000 or more and/or a projected population of 5,000 or more within the next ten years subsequent to the effective date of the plan must include the following elements:

(A) a program of leak detection, repair, and water loss accounting for the water transmission, delivery, and distribution system [~~in order to control unaccounted-for uses of water~~];

[~~(B) a record management system to record water pumped, water deliveries, water sales, and water losses which allows for the desegregation of water sales and uses into the following user classes:~~]

[~~(i)~~ ~~residential;~~]

[~~(ii)~~ ~~commercial;~~]

[~~(iii)~~ ~~public and institutional; and~~]

[~~(iv)~~ ~~industrial;~~]

(B) [~~(C)~~] a requirement in every wholesale water supply contract entered into or renewed after official adoption of the plan (by either ordinance, resolution, or tariff), and including any contract extension, that each successive wholesale customer develop and implement a water conservation plan or water conservation measures using the applicable elements in this chapter. If the customer intends to resell the water, the contract between the initial supplier and customer must provide that the contract for the resale of the water must have water conservation requirements so that each successive customer in the resale of the water will be required to implement water conservation measures in accordance with the provisions of this chapter.

(3) Additional conservation strategies. Any combination of the following strategies shall be selected by the water supplier, in addition to the minimum requirements in paragraphs (1) and (2) of this subsection, if they are necessary to achieve the stated water conservation goals of the plan. The commission may require that any of the following strategies be implemented by the water supplier if the commission determines that the strategy is necessary to achieve the goals of the water conservation plan:

(A) conservation-oriented water rates and water rate structures such as uniform or increasing block rate schedules, and/or seasonal rates, but not flat rate or decreasing block rates;

(B) adoption of ordinances, plumbing codes, and/or rules requiring water-conserving plumbing fixtures to be installed in new structures and existing structures undergoing substantial modification or addition;

(C) a program for the replacement or retrofit of water-conserving plumbing fixtures in existing structures;

(D) reuse and/or recycling of wastewater and/or graywater;

(E) a program for pressure control and/or reduction in the distribution system and/or for customer connections;

(F) a program and/or ordinance(s) for landscape water management;

(G) a method for monitoring the effectiveness and efficiency of the water conservation plan; and

(H) any other water conservation practice, method, or technique which the water supplier shows to be appropriate for achieving the stated goal or goals of the water conservation plan.

(b) A water conservation plan prepared in accordance with 31 TAC §363.15 (relating to Required Water Conservation Plan) of the Texas Water Development Board and substantially meeting the requirements of this section and other applicable commission rules may be submitted to meet application requirements in accordance with a memorandum of understanding between the commission and the Texas Water Development Board.

(c) A [~~Beginning May 1, 2005, a~~] public water supplier for municipal use shall review and update its water conservation plan, as appropriate, based on an assessment of previous five-year and ten-year targets and any other new or updated information. The public water supplier for municipal use shall review and update the next revision of its water conservation plan [~~not later than May 1, 2009, and~~] every five years [~~after that date~~] to coincide with the regional water planning group.

§288.3. Water Conservation Plans for Industrial or Mining Use.

(a) A water conservation plan for industrial or mining uses of water must provide information in response to each of the following elements. If the plan does not provide information for each requirement, the industrial or mining water user shall include in the plan an explanation of why the requirement is not applicable.

(1) a description of the use of the water in the production process, including how the water is diverted and transported from the source(s) of supply, how the water is utilized in the production process, and the estimated quantity of water consumed in the production process and therefore unavailable for reuse, discharge, or other means of disposal;

[~~(2) until May 1, 2005, specification of conservation goals, the basis for the development of such goals, and a time frame for achieving the specified goals;~~]

(2) [~~(3)~~] [~~beginning May 1, 2005,~~] specific, quantified five-year and ten-year targets for water savings and the basis for the development of such goals. The goals established by industrial or mining water users under this paragraph are not enforceable;

(3) [~~(4)~~] a description of the device(s) and/or method(s) within an accuracy of plus or minus 5.0% to be used in order to measure and account for the amount of water diverted from the source of supply;

(4) [~~(5)~~] leak-detection, repair, and accounting for water loss in the water distribution system;

(5) [~~(6)~~] application of state-of-the-art equipment and/or process modifications to improve water use efficiency; and

(6) [(7)] any other water conservation practice, method, or technique which the user shows to be appropriate for achieving the stated goal or goals of the water conservation plan.

(b) An [Beginning May 1, 2005, an] industrial or mining water user shall review and update its water conservation plan, as appropriate, based on an assessment of previous five-year and ten-year targets and any other new or updated information. The industrial or mining water user shall review and update the next revision of its water conservation plan [not later than May 1, 2009, and] every five years [after that date] to coincide with the regional water planning group.

§288.4. Water Conservation Plans for Agricultural Use.

(a) A water conservation plan for agricultural use of water must provide information in response to the following subsections. If the plan does not provide information for each requirement, the agricultural water user must include in the plan an explanation of why the requirement is not applicable.

(1) For an individual agricultural user other than irrigation:

(A) a description of the use of the water in the production process, including how the water is diverted and transported from the source(s) of supply, how the water is utilized in the production process, and the estimated quantity of water consumed in the production process and therefore unavailable for reuse, discharge, or other means of disposal;

[(B) until May 1, 2005, specification of conservation goals, the basis for the development of such goals, and a time frame for achieving the specified goals;]

(B) [(C)] [beginning May 1, 2005,] specific, quantified five-year and ten-year targets for water savings and the basis for the development of such goals. The goals established by agricultural water users under this subparagraph are not enforceable;

(C) [(D)] a description of the device(s) and/or method(s) within an accuracy of plus or minus 5.0% to be used in order to measure and account for the amount of water diverted from the source of supply;

(D) [(E)] leak-detection, repair, and accounting for water loss in the water distribution system;

(E) [(F)] application of state-of-the-art equipment and/or process modifications to improve water use efficiency; and

(F) [(G)] any other water conservation practice, method, or technique which the user shows to be appropriate for achieving the stated goal or goals of the water conservation plan.

(2) For an individual irrigation user:

(A) a description of the irrigation production process which shall include, but is not limited to, the type of crops and acreage of each crop to be irrigated, monthly irrigation diversions, any seasonal or annual crop rotation, and soil types of the land to be irrigated;

(B) a description of the irrigation method, or system, and equipment including pumps, flow rates, plans, and/or sketches of the system layout;

(C) a description of the device(s) and/or methods, within an accuracy of plus or minus 5.0%, to be used in order to measure and account for the amount of water diverted from the source of supply;

[(D) until May 1, 2005, specification of conservation goals including, where appropriate, quantitative goals for irrigation water use efficiency and a pollution abatement and prevention plan;]

(D) [(E)] [beginning May 1, 2005,] specific, quantified five-year and ten-year targets for water savings including, where appropriate, quantitative goals for irrigation water use efficiency and a pollution abatement and prevention plan. The goals established by an individual irrigation water user under this subparagraph are not enforceable;

(E) [(F)] water-conserving irrigation equipment and application system or method including, but not limited to, surge irrigation, low pressure sprinkler, drip irrigation, and nonleaking pipe;

(F) [(G)] leak-detection, repair, and water-loss control;

(G) [(H)] scheduling the timing and/or measuring the amount of water applied (for example, soil moisture monitoring);

(H) [(I)] land improvements for retaining or reducing runoff, and increasing the infiltration of rain and irrigation water including, but not limited to, land leveling, furrow diking, terracing, and weed control;

(I) [(J)] tailwater recovery and reuse; and

(J) [(K)] any other water conservation practice, method, or technique which the user shows to be appropriate for preventing waste and achieving conservation.

(3) For a system providing agricultural water to more than one user:

(A) a system inventory for the supplier's:

(i) structural facilities including the supplier's water storage, conveyance, and delivery structures;

(ii) management practices, including the supplier's operating rules and regulations, water pricing policy, and a description of practices and/or devices used to account for water deliveries; and

(iii) a user profile including square miles of the service area, the number of customers taking delivery of water by the system, the types of crops, the types of irrigation systems, the types of drainage systems, and total acreage under irrigation, both historical and projected;

[(B) until May 1, 2005, specification of water conservation goals, including maximum allowable losses for the storage and distribution system;]

(B) [(C)] [beginning May 1, 2005,] specific, quantified five-year and ten-year targets for water savings including maximum allowable losses for the storage and distribution system. The goals established by a system providing agricultural water to more than one user under this subparagraph are not enforceable;

(C) [(D)] a description of the practice(s) and/or device(s) which will be utilized to measure and account for the amount of water diverted from the source(s) of supply;

(D) [(E)] a monitoring and record management program of water deliveries, sales, and losses;

(E) [(F)] a leak-detection, repair, and water loss control program;

(F) [(G)] a program to assist customers in the development of on-farm water conservation and pollution prevention plans and/or measures;

(G) [(H)] a requirement in every wholesale water supply contract entered into or renewed after official adoption of the plan (by either ordinance, resolution, or tariff), and including any contract

extension, that each successive wholesale customer develop and implement a water conservation plan or water conservation measures using the applicable elements in this chapter. If the customer intends to resell the water, the contract between the initial supplier and customer must provide that the contract for the resale of the water must have water conservation requirements so that each successive customer in the resale of the water will be required to implement water conservation measures in accordance with applicable provisions of this chapter;

(H) [~~(I)~~] official adoption of the water conservation plan and goals, by ordinance, rule, resolution, or tariff, indicating that the plan reflects official policy of the supplier;

(I) [~~(J)~~] any other water conservation practice, method, or technique which the supplier shows to be appropriate for achieving conservation; and

(J) [~~(K)~~] documentation of coordination with the regional water planning groups, in order to ensure consistency with appropriate approved regional water plans.

(b) A water conservation plan prepared in accordance with the rules of the United States Department of Agriculture Natural Resource Conservation Service, the Texas State Soil and Water Conservation Board, or other federal or state agency and substantially meeting the requirements of this section and other applicable commission rules may be submitted to meet application requirements in accordance with a memorandum of understanding between the commission and that agency.

(c) An [~~Beginning May 1, 2005, an~~] agricultural water user shall review and update its water conservation plan, as appropriate, based on an assessment of previous five-year and ten-year targets and any other new or updated information. An agricultural water user shall review and update the next revision of its water conservation plan [~~not later than May 1, 2009, and~~] every five years [~~after that date~~] to coincide with the regional water planning group.

§288.5. Water Conservation Plans for Wholesale Water Suppliers.

A water conservation plan for a wholesale water supplier must provide information in response to each of the following paragraphs. If the plan does not provide information for each requirement, the wholesale water supplier shall include in the plan an explanation of why the requirement is not applicable.

(1) Minimum requirements. All water conservation plans for wholesale water suppliers must include the following elements:

(A) a description of the wholesaler's service area, including population and customer data, water use data, water supply system data, and wastewater data;

[~~(B) until May 1, 2005, specification of conservation goals including, where appropriate, target per capita water use goals for the wholesaler's service area, maximum acceptable unaccounted-for water, the basis for the development of these goals, and a time frame for achieving these goals;~~]

(B) [~~(C)~~] [~~beginning May 1, 2005,~~] specific, quantified five-year and ten-year targets for water savings including, where appropriate, target goals for municipal use in gallons per capita per day for the wholesaler's service area, maximum acceptable [~~unaccounted-for~~] water loss, and the basis for the development of these goals. The goals established by wholesale water suppliers under this subparagraph are not enforceable;

(C) [~~(D)~~] a description as to which practice(s) and/or device(s) will be utilized to measure and account for the amount of water diverted from the source(s) of supply;

(D) [~~(E)~~] a monitoring and record management program for determining water deliveries, sales, and losses;

(E) [~~(F)~~] a program of metering and leak detection and repair for the wholesaler's water storage, delivery, and distribution system;

(F) [~~(G)~~] a requirement in every water supply contract entered into or renewed after official adoption of the water conservation plan, and including any contract extension, that each successive wholesale customer develop and implement a water conservation plan or water conservation measures using the applicable elements of this chapter. If the customer intends to resell the water, then the contract between the initial supplier and customer must provide that the contract for the resale of the water must have water conservation requirements so that each successive customer in the resale of the water will be required to implement water conservation measures in accordance with applicable provisions of this chapter;

(G) [~~(H)~~] a reservoir systems operations plan, if applicable, providing for the coordinated operation of reservoirs owned by the applicant within a common watershed or river basin. The reservoir systems operations plans shall include optimization of water supplies as one of the significant goals of the plan;

(H) [~~(I)~~] a means for implementation and enforcement, which shall be evidenced by a copy of the ordinance, rule, resolution, or tariff, indicating official adoption of the water conservation plan by the water supplier; and a description of the authority by which the water supplier will implement and enforce the conservation plan; and

(I) [~~(J)~~] documentation of coordination with the regional water planning groups for the service area of the wholesale water supplier in order to ensure consistency with the appropriate approved regional water plans.

(2) Additional conservation strategies. Any combination of the following strategies shall be selected by the water wholesaler, in addition to the minimum requirements of paragraph (1) of this section, if they are necessary in order to achieve the stated water conservation goals of the plan. The commission may require by commission order that any of the following strategies be implemented by the water supplier if the commission determines that the strategies are necessary in order for the conservation plan to be achieved:

(A) conservation-oriented water rates and water rate structures such as uniform or increasing block rate schedules, and/or seasonal rates, but not flat rate or decreasing block rates;

(B) a program to assist agricultural customers in the development of conservation pollution prevention and abatement plans;

(C) a program for reuse and/or recycling of wastewater and/or graywater; and

(D) any other water conservation practice, method, or technique which the wholesaler shows to be appropriate for achieving the stated goal or goals of the water conservation plan.

(3) Review and update requirements. The [~~Beginning May 1, 2005, the~~] wholesale water supplier shall review and update its water conservation plan, as appropriate, based on an assessment of previous five-year and ten-year targets and any other new or updated information. A wholesale water supplier shall review and update the next revision of its water conservation plan [~~not later than May 1, 2009, and~~] every five years [~~after that date~~] to coincide with the regional water planning group.

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

Filed with the Office of the Secretary of State on June 29, 2012.

TRD-201203429
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: August 12, 2012
For further information, please call: (512) 239-2141

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 1. ORGANIZATION AND ADMINISTRATION

SUBCHAPTER K. INSCRIPTION ON VEHICLES

37 TAC §1.151

The Texas Department of Public Safety (the department) proposes amendments to §1.151, concerning Exemption of Inscription. Texas Transportation Code, Chapter 721 requires state agency vehicles to have inscriptions printed on each side of the vehicle identifying the agency that has custody of the vehicle. Section 721.003 provides that the governing bodies of certain state agencies, including the Department of Public Safety, may exempt vehicles from the inscription requirement by rule. Transportation Code, §721.003(c) provides that a rule exempting vehicles must specify the purpose served by not printing the required inscription and the primary use of the motor vehicle. Amendments to §1.151 clarify the existing grounds for exemption and also add an additional basis for exemption for situations where department vehicles may need to be operated in areas where identification as a department vehicle may create risks to the safety of department personnel as determined by the director.

Denise Hudson, Assistant Director, Finance, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Hudson has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rule as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Hudson has also determined that for each year of the first five-year period the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to ensure public knowledge of the existing grounds for exemptions to Texas Transportation Code, Chapter 721.

The department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this rule. Accordingly, the department is not required to complete a takings impact assessment regarding this rule.

Comments on this proposal may be submitted to Susan Estringel, Legal Assistant, Texas Department of Public Safety, P.O. Box 4087 (MSC 0140), Austin, Texas 78773-0001. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

These amendments are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Transportation Code, §721.003 which allows the governing body by rule to exempt the department from the requirements of §721.002.

Texas Government Code, §411.004(3) and Texas Transportation Code, Chapter 721 are affected by this proposal.

§1.151. Exemption of Inscription.

The director of the Texas Department of Public Safety is authorized to exempt certain vehicles from having printed on them the inscription set out in Texas Transportation Code, §721.002. In order to further law enforcement capabilities and effectively carry out administrative functions, the following vehicles are exempt from the requirement of having printed inscriptions: [~~the director exempts from the inscription requirement those department vehicles that will be routinely used by personnel involved in confidential, legal, and personnel investigations which require that personnel go undetected in order to accomplish the task.~~]

(1) vehicles primarily used for law enforcement and administrative purposes for which confidentiality is necessary; or

(2) vehicles primarily used in areas where agency inscriptions would create an undue risk to department staff operating those vehicles as determined by the director.

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

Filed with the Office of the Secretary of State on June 28, 2012.

TRD-201203400
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: August 12, 2012
For further information, please call: (512) 424-5848

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PART 5. TEXAS BOARD OF PARDONS AND PAROLES

CHAPTER 143. EXECUTIVE CLEMENCY

SUBCHAPTER B. CONDITIONAL PARDON

37 TAC §§143.22 - 143.24

The Texas Board of Pardons and Paroles proposes amendments to 37 TAC §§143.22, 143.23, and 143.24, concerning consideration of request, revocation of conditional pardon, and request of governor. The amendments to §§143.22, 143.23, and 143.24 are proposed to replace "inmate" with "offender," add "written" to clarify the type of request considered, and update the current agency names.

Rissie Owens, Chair of the Board, has determined that for each year of the first five-year period the proposed amendments are in effect, no fiscal implications exist for state or local government as a result of enforcing or administering these sections.

Ms. Owens has also determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of enforcing the amendments to these sections will be to provide a method of applying for a conditional pardon. There will be no effect on small businesses. There is no anticipated economic cost to persons required to comply with the amended rules as proposed.

An Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed amendments will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Comments should be directed to Bettie Wells, General Counsel, Texas Board of Pardons and Paroles, 209 W. 14th Street, Suite 500, Austin, Texas 78701 or by e-mail to bettie.wells@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of this proposal.

The amendments are proposed under the Texas Constitution, Article 4, §11, and the Code of Criminal Procedure, Article 48.01, which authorizes the board to make clemency recommendations to the Governor.

No other statutes, articles, or codes are affected by these amendments.

§143.22. Consideration of Request.

The board will consider a written request for conditional pardon, only to release an offender [~~inmate~~] to another country or in cases where extreme, exceptional, and unusual circumstances exist, and only after minimum statutory parole eligibility has been attained.

§143.23. Revocation of Conditional Pardon.

(a) (No change.)

(b) The board or parole panel, on order of the governor, is responsible for ordering the issuance of any warrant upon being notified by the [~~Pardons and Paroles~~] Division that a violation has occurred. The warrant shall issue to appropriate law enforcement authorities, authorizing any sheriff, peace officer, or other addressee named therein to arrest and hold the named releasee until further order of the governor or the board or until such time as he may be placed in the custody of an agent of the TDCJ CID [~~Texas Department of Criminal Justice Institutional Division~~], or until further order of the governor or the board.

§143.24. Request of the Governor.

The board shall consider a recommendation for conditional pardon in any case upon the request of the governor (§508.050, Government Code).

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

Filed with the Office of the Secretary of State on July 2, 2012.

TRD-201203457
Bettie Wells
General Counsel
Texas Board of Pardons and Paroles
Earliest possible date of adoption: August 12, 2012
For further information, please call: (512) 406-5388

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SUBCHAPTER C. REPRIEVE

37 TAC §§143.31 - 143.35

The Texas Board of Pardons and Paroles proposes amendments to 37 TAC §§143.31 - 143.35, concerning general rules, reprieve for family emergency, emergency reprieve to attend civil court proceedings, emergency medical reprieve, and reprieve of misdemeanor jail sentence and/or fine. The amendments to §§143.31 - 143.35 are proposed to replace "inmate" with "offender," add "written" to clarify the type of request considered, update the current agency names, and revise the section title in both §143.33 and §143.35.

Rissie Owens, Chair of the Board, has determined that for each year of the first five-year period the proposed amendments are in effect, no fiscal implications exist for state or local government as a result of enforcing or administering these sections.

Ms. Owens has also determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of enforcing the amendments to these sections will be to clarify the procedures regarding requests for reprieve. There will be no effect on small businesses. There is no anticipated economic cost to persons required to comply with the amended rules as proposed.

An Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed amendments will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Comments should be directed to Bettie Wells, General Counsel, Texas Board of Pardons and Paroles, 209 W. 14th Street, Suite 500, Austin, Texas 78701 or by e-mail to bettie.wells@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of this proposal.

The amendments are proposed under the Texas Constitution, Article 4, §11, and the Code of Criminal Procedure, Article 48.01, which authorizes the board to make clemency recommendations to the Governor.

No other statutes, articles, or codes are affected by these amendments.

§143.31. General Rules.

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

(d) The board will not consider a written request for reprieve [~~request~~] from a prison sentence which involves travel outside the State of Texas.

(e) The board will not consider a written request for reprieve from a prison sentence requested for business reasons.

(f) (No change.)

(g) The board will not recommend a reprieve without custody if the offender [~~inmate~~] has a detainer filed against his release.

(h) (No change.)

(i) The board will consider a written request for an extension of a reprieve only if the request meets the requirements for the original reprieve.

(j) (No change.)

§143.32. Reprieve for Family Emergency.

(a) The board will consider a written request for reprieve for a family emergency only in cases of critical illness or death of a member of the offender's [~~inmate's~~] immediate family.

(b) The immediate family includes only the parents, spouse, and children of the offender [~~inmate~~], and a person other than a parent who assumed the responsibilities and acted as the parent of the offender [~~inmate~~] during his/her childhood.

(c) Prior to consideration of a request for reprieve for family emergency, the board may require written:

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

(3) proof of the parent-child relationship if the request is for the illness or death of a person, not a parent, who acted as the offender's [~~inmate's~~] parent during his/her childhood.

(d) A board recommendation for reprieve in the continuous custody of a peace officer is contingent upon a verified arrangement by the offender's [~~inmate's~~] family to secure and pay the expense of a peace officer to guard the offender [~~inmate~~].

§143.33. Emergency Reprieve to [~~To~~] Attend Civil Court Proceedings.

(a) An emergency reprieve to attend a civil court proceeding cannot be used for any other purpose unless specific permission is given in the governor's proclamation, and if for any reason the cause is not tried as scheduled, the grantee shall immediately return to prison. The grantee may not, during the reprieve, take temporary employment or travel for any purpose, be it business, visiting relatives, or for an unsolicited visit to the board [~~Board of Pardons and Paroles~~].

(b) The board will consider a written request for [~~recommending~~] an emergency reprieve to attend civil court proceedings only upon receipt [~~in writing~~] of the following:

(1) a request for reprieve by the offender [~~inmate~~] or his or her representative stating the offender's [~~inmate's~~] vested interest in the cause and the date his presence is required with reasons requiring his attendance if date is prior to date set for trial;

(2) a letter signed by the presiding judge of the court in which the cause is pending, stating:

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

(C) that the presence of the offender [~~inmate~~] is an absolute necessity for the protection of his or her interest in the litigation, and that his or her deposition would not suffice to protect that interest; and

(D) (No change.)

§143.34. Emergency Medical Reprieve.

(a) The board will consider a written request for [~~recommending to the governor~~] an indefinite medical emergency reprieve in instances such as terminal illness, total disability, or for needed medical care which cannot be provided by the medical facilities of the TDCJ [~~Texas Department of Corrections~~].

(b) A medical reprieve to private facilities, to a state hospital, to a mental hospital, or a tubercular hospital, or a medical reprieve for childbirth must be requested by the medical director of the TDCJ [~~Texas Department of Corrections~~], and approved by the management of the TDCJ [~~Texas Department of Corrections~~].

§143.35. Reprieve from [~~of~~] Misdemeanor Jail Sentence and/or Fine.

(a) The board will consider a written request of [~~recommending~~] reprieve from [~~of~~] a misdemeanor jail sentence and/or fine upon the unanimous written recommendation of trial officials.

(b) The board will also consider a written request of [~~recommending~~] reprieve from [~~of~~] a misdemeanor jail sentence and/or fine, only for medical reasons or reasons of financial hardship (loss of home or business, or the lack of support for family) or other compelling hardships, only upon receipt in writing of the following information:

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

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

Filed with the Office of the Secretary of State on July 2, 2012.

TRD-201203458
Bettie Wells
General Counsel
Texas Board of Pardons and Paroles
Earliest possible date of adoption: August 12, 2012
For further information, please call: (512) 406-5388

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SUBCHAPTER D. REPRIEVE FROM EXECUTION

37 TAC §143.42, §143.43

The Texas Board of Pardons and Paroles proposes amendments to 37 TAC §143.42 and §143.43, concerning reprieve recommended by board and procedure in capital reprieve cases. The amendments to §143.42 and §143.43 are proposed to correct grammar in the subchapter title, replace "inmate," "condemned felon," and "convicted person" with "offender," add "written" to clarify the type of request considered, update the current agency names, and revise the section title in §143.42. Additional amendments to §143.43 are proposed to clarify how many attachment copies of the application are to be submitted, who can attend an interview, and the material to be considered by a board member during an interview.

Rissie Owens, Chair of the Board, has determined that for each year of the first five-year period the proposed amendments are in effect, no fiscal implications exist for state or local government as a result of enforcing or administering these sections.

Ms. Owens has also determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of enforcing the amendments to these sections will be to clarify the procedures for reprieve from execution. There will be no effect on small businesses. There is

no anticipated economic cost to persons required to comply with the amended rules as proposed.

An Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed amendments will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Comments should be directed to Bettie Wells, General Counsel, Texas Board of Pardons and Paroles, 209 W. 14th Street, Suite 500, Austin, Texas 78701 or by e-mail to bettie.wells@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of this proposal.

The amendments are proposed under the Texas Constitution, Article 4, §11, and the Code of Criminal Procedure, Article 48.01, which authorizes the board to make clemency recommendations to the Governor.

No other statutes, articles, or codes are affected by these amendments.

§143.42. Reprieve Recommended by the Board.

The board will consider [~~recommending to the governor~~] a reprieve of execution from [~~of~~] death sentence upon receipt of a written application in behalf of an offender [~~a condemned felon~~]. The individual filing such application, if other than the offender [~~condemned felon~~], may be required to demonstrate that he is authorized by the offender [~~condemned felon~~] to file such application. Any such application shall contain the following information:

(1) - (9) (No change.)

§143.43. Procedure in Capital Reprieve Cases.

(a) The written application in behalf of an offender [~~a convicted person~~] seeking a board recommendation to the governor of a reprieve from execution must be delivered to the Texas Board of Pardons and Paroles, Clemency Section, 8610 Shoal Creek Boulevard, Austin, Texas 78757, not later than the twenty-first calendar day before the execution is scheduled. If the twenty-first calendar day before the execution is scheduled falls on a weekend or state observed holiday, the application shall be delivered not later than the next business day. [~~Otherwise, the applicant's recourse will be directly to the governor.~~]

(b) (No change.)

(c) Any information filed with the application, including but not limited to amendments, addenda, supplements, or exhibits, which require reproduction facilities, equipment, or technology not operated by the board, must be provided by the applicant in an amount sufficient to allow review by all members of the board. An amount sufficient shall mean not less than 12 [~~10~~] and not more than 20 copies of the duplicate item.

(d) An offender [~~A convicted person~~] seeking a board recommendation to the governor of a reprieve from execution may request an interview with a member of the board. Such request shall be included in the written application or any supplement filed therewith in accordance with this section.

(e) Upon receipt of a request for an interview, the presiding officer (chair) shall designate at least one member of the board to conduct the requested interview. Such interview shall occur at the confining unit of TDCJ. Attendance at such interviews shall be limited to the offender [~~convicted person~~], the designated board member(s), board staff, and TDCJ staff. The board may consider statements made by the offender [~~inmate made~~] at such interviews and any other materials the offender delivers to the board member during the interview when considering the offender's [~~inmate's~~] application for reprieve.

(f) - (g) (No change.)

(h) All hearings conducted by the board under this section shall be in open session pursuant to requirements of the Texas Open Meetings Act[~~, Article 6252-17~~]. For the purpose of discussing matters which are deemed confidential by statute, or where otherwise authorized by the provisions of the Texas Open Meetings Act, the proceedings may be conducted in executive session closed to members of the general public, for that limited purpose. Only those persons whose privacy interests and right to confidentiality may be abridged by discussion involving disclosure of confidential information may be allowed to meet with members of the board in their executive session to discuss that information. No decision, vote, or final action by the board shall be made during a closed meeting; the board's decision, vote, or final action shall be made and announced in an open meeting. The hearing may be recessed prior to its completion and reconvened pursuant to the directions of the board.

(i) - (j) (No change.)

(k) Each of the provisions of this section and §143.42 of this title (relating to Reprieve Recommended by the Board) are subject to waiver by the board when it finds that there exists good and adequate cause to suspend said provisions and adopt a different procedure which it finds to be better suited to the exigencies of the individual case before it.

(l) Successive or repetitious reprieve applications submitted in behalf of the same offender [~~condemned felon~~] may be summarily denied by the board without meeting.

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

Filed with the Office of the Secretary of State on July 2, 2012.

TRD-201203459
Bettie Wells
General Counsel
Texas Board of Pardons and Paroles
Earliest possible date of adoption: August 12, 2012
For further information, please call: (512) 406-5388

SUBCHAPTER E. COMMUTATION OF SENTENCE

37 TAC §§143.52, 143.55, 143.57

The Texas Board of Pardons and Paroles proposes amendments to 37 TAC §§143.52, 143.55, and 143.57, concerning commutation of sentence, felony, or misdemeanor, commutation for time out of prison on reprieve, and commutation of death sentence to lesser penalty. The amendments to §§143.52, 143.55, and 143.57 are proposed to correct grammar, replace "inmate" and "convicted person" with "offender," add "written" to clarify the type of request considered, update the current agency names, clarify that recommendations are provided by current trial officials, and revise the section title in §143.55. Additional amendments to §143.57 are proposed to clarify how many attachment copies of the application are to be submitted and who can attend an interview.

Rissie Owens, Chair of the Board, has determined that for each year of the first five-year period the proposed amendments are

in effect, no fiscal implications exist for state or local government as a result of enforcing or administering these sections.

Ms. Owens has also determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of enforcing the amendments to these sections will be to clarify the procedures regarding commutation of sentence. There will be no effect on small businesses. There is no anticipated economic cost to persons required to comply with the amended rules as proposed.

An Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed amendments will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Comments should be directed to Bettie Wells, General Counsel, Texas Board of Pardons and Paroles, 209 W. 14th Street, Suite 500, Austin, Texas 78701 or by e-mail to bettie.wells@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of this proposal.

The amendments are proposed under the Texas Constitution, Article 4, §11, and the Code of Criminal Procedure, Article 48.01, which authorizes the board to make clemency recommendations to the Governor.

No other statutes, articles, or codes are affected by these amendments.

§143.52. Commutation of Sentence, Felony, or Misdemeanor.

(a) (No change.)

(b) If the offender [~~convicted person~~] has the recommendation of two of the current trial officials and no written communication is received from the third trial official, the board shall give the remaining trial official at least 10 days notice that such a clemency recommendation is being considered by the board (§508.050, Government Code).

(c) In cases tried prior to the tenure of the present office-holders, the recommendation of persons holding such offices at the time of the trial of the case may be used to bolster and support the recommendation of the current [~~present~~] trial officials, if in compliance with the requirements of subsection (d) of this section.

(d) The requirements of a recommendation of the current trial officials for commutation of sentence must include the following:

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

(e) If the offender [~~convicted person~~] is not confined in the TDCJ [~~Texas Department of Corrections~~], a certified copy of the judgment and sentence must be furnished.

§143.55. Commutation of Sentence for Time Out of Prison on Reprieve.

(a) The board will consider a written request for commutation for time out of prison on reprieve only for medical reprieves.

(b) A request for commutation for time out of prison on medical reprieve will be considered only if:

(1) the offender [~~inmate~~] has returned to the TDCJ [~~Texas Department of Corrections~~];

(2) such commutation is recommended by the medical director of the TDCJ [~~Texas Department of Corrections~~] and approved by the management of the TDCJ [~~Texas Department of Corrections~~];

(3) the calendar time under consideration for commutation is time the offender [~~inmate~~] was actually confined as a resident patient (not an out-patient) in a hospital or institution designated by the TDCJ [~~Texas Department of Corrections~~]; and

(4) the offender [~~inmate~~] has in all things complied with the rules of the hospital or institution and the rules of the TDCJ [~~Texas Department of Corrections~~] during the emergency medical reprieve.

(c) Such commutation shall not exceed the actual amount of calendar time that the offender [~~inmate~~] is absent from the TDCJ [~~Texas Department of Corrections~~] on emergency medical reprieve.

§143.57. Commutation of Death Sentence to Lesser Penalty.

(a) The board will consider recommending to the governor a commutation of death sentence to a sentence of life imprisonment or the appropriate maximum penalty that can be imposed upon receipt of:

(1) (No change.)

(2) a written request of the offender [~~convicted person~~] or representative setting forth all grounds upon which the application is based, stating the full name of the offender [~~convicted person~~], the county of conviction, and the execution date.

(b) The written application in behalf of an offender [~~a convicted person~~] seeking a board recommendation to the governor of commutation of the death sentence to a lesser penalty must be delivered to the Texas Board of Pardons and Paroles, Clemency Section, 8610 Shoal Creek Boulevard, Austin, Texas 78757, not later than the twenty-first calendar day before the day the execution is scheduled. If the twenty-first calendar day before the execution is scheduled falls on a weekend or state observed holiday, the application shall be delivered not later than the next business day.

(c) (No change.)

(d) Any information filed with the application, including but not limited to amendments, addenda, supplements, or exhibits, which require reproduction facilities, equipment, or technology not operated by the board must be provided by the applicant in an amount sufficient to allow review by all members of the board. An amount sufficient shall mean not less than 12 [~~10~~] and not more than 20 copies of the duplicate item.

(e) An offender [~~A convicted person~~] seeking a board recommendation to the governor of commutation of the death sentence to a lesser penalty may request an interview with a member of the board. Such request shall be included in the written application or any supplement filed therewith in accordance with this section.

(f) Upon receipt of a request for an interview, the presiding officer (chair) shall designate at least one member of the board to conduct the requested interview. Such interview shall occur at the confining unit of TDCJ. Attendance at such interviews shall be limited to the offender [~~convicted person~~], the designated board member(s), board staff, and TDCJ staff. The board may consider statements made by the offender [~~inmate made~~] at such interviews and any other materials the offender delivers to the board member during the interview when considering the offender's [~~inmate's~~] application for commutation of the death sentence to a lesser penalty.

(g) (No change.)

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

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Bettie Wells
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Texas Board of Pardons and Paroles
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SUBCHAPTER F. REMISSION OF FINES AND FORFEITURES

37 TAC §§143.71 - 143.74

The Texas Board of Pardons and Paroles proposes amendments to 37 TAC §§143.71 - 143.74, concerning remission of fine, remission of fine after reprieve, remission of bond forfeiture, and request of governor. The amendments to §§143.71 - 143.74 are proposed to correct grammar, add "written" to clarify the type of request considered, and revise the section title in §143.74.

Rissie Owens, Chair of the Board, has determined that for each year of the first five-year period the proposed amendments are in effect, no fiscal implications exist for state or local government as a result of enforcing or administering these sections.

Ms. Owens has also determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of enforcing the amendments to these sections will be to clarify the procedures for remission of fines and forfeitures. There will be no effect on small businesses. There is no anticipated economic cost to persons required to comply with the amended rules as proposed.

An Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed amendments will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Comments should be directed to Bettie Wells, General Counsel, Texas Board of Pardons and Paroles, 209 W. 14th Street, Suite 500, Austin, Texas 78701 or by e-mail to bettie.wells@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of this proposal.

The amendments are proposed under the Texas Constitution, Article 4, §11, and the Code of Criminal Procedure, Article 48.01, which authorizes the board to make clemency recommendations to the Governor.

No other statutes, articles, or codes are affected by these amendments.

§143.71. Remission of Fine.

(a) The board will consider a written request to remit a fine upon the unanimous written recommendation of the trial officials, said recommendation to be furnished upon official letterhead of each official.

(b) The board will also consider a written request to remit a fine, only for medical reasons, or reasons of financial hardship (loss of home or business, or the lack of support for family) or other compelling hardships only upon receipt [~~in writing~~] of the following information:

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

§143.72. Remission of Fine after Reprieve.

The board will consider recommending to [~~a request to recommend that~~] the governor remission of [~~remit a~~] fine after satisfactory completion of a reprieve of fine upon receipt of a written request from the applicant or person acting for him and a recommendation of a majority of the trial officials, to be furnished upon official letterhead of each official.

§143.73. Remission of Bond Forfeiture.

The board will consider recommending [~~a recommendation~~] to the governor remission of [~~to remit a~~] bond forfeiture upon receipt of:

(1) (No change.)

(2) a written request accompanied by the following:

(A) - (F) (No change.)

(G) a statement from the sheriff or county treasurer as to whether or not the judgment or any part thereof has been paid or satisfied in any manner on official letterhead of the appropriate official; and

(H) (No change.)

§143.74. Request of the Governor.

The board shall consider a written request [~~recommendation~~] for remission of fine or forfeiture in any case upon the request of the governor (§508.050, Government Code).

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

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Bettie Wells
General Counsel
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SUBCHAPTER G. RESTORATION OF DRIVER'S LICENSE

37 TAC §143.81, §143.82

The Texas Board of Pardons and Paroles proposes amendments to 37 TAC §143.81 and §143.82, concerning preliminary requirements and subsequent requirements. The amendments to §143.81 and §143.82 are proposed to delete the reference to a chauffeur's license.

Rissie Owens, Chair of the Board, has determined that for each year of the first five-year period the proposed amendments are in effect, no fiscal implications exist for state or local government as a result of enforcing or administering these sections.

Ms. Owens has also determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of enforcing the amendments to these sections will be to clarify the procedures for restoration of driver's license. There will be no effect on small businesses. There is no anticipated economic cost to persons required to comply with the amended rules as proposed.

An Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed amendments will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Comments should be directed to Bettie Wells, General Counsel, Texas Board of Pardons and Paroles, 209 W. 14th Street, Suite 500, Austin, Texas 78701 or by e-mail to bettie.wells@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of this proposal.

The amendments are proposed under the Texas Constitution, Article 4, §11, and the Code of Criminal Procedure, Article 48.01, which authorizes the board to make clemency recommendations to the Governor.

No other statutes, articles, or codes are affected by these amendments.

§143.81. Preliminary Requirements.

The board will consider recommending to the governor restoration of a driver's[, ~~chauffeur's,~~] or commercial operator's license only after denial of an application for an occupational driver's[, ~~chauffeur's,~~] or commercial operator's license by the district court having jurisdiction; the applicant must furnish an official statement of the reason(s) for the court's denial.

§143.82. Subsequent Requirements.

Upon making a preliminary determination to recommend to the governor the restoration of a driver's[, ~~chauffeur's,~~] or commercial operator's license, the board will require from the applicant or person acting for him, certified copies of all judgments which resulted in the revocation or suspension of the license; or if the suspension or revocation resulted from administrative action by the Texas Department of Public Safety, a copy of the final departmental order of suspension is required. No further action will be taken by the board prior to receipt of the required judgment(s) or order.

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

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CHAPTER 145. PAROLE
SUBCHAPTER A. PAROLE PROCESS

37 TAC §§145.3, 145.4, 145.6, 145.9, 145.11, 145.12, 145.14 - 145.16

The Texas Board of Pardons and Paroles proposes amendments to 37 TAC §§145.3, 145.4, 145.6, 145.9, 145.11, 145.12, and 145.14 - 145.16, concerning policy statements relating to parole release decisions by the board of pardons and paroles, policy statements relating to felony consecutive sentences, notification of parole panel decision, parole interview, review date subject to change, action upon review, action upon review; release to mandatory supervision, action upon review; extraordinary vote, and action upon special review--release approved. The amendments to §§145.3, 145.4, 145.6, 145.9, 145.11, 145.12, and 145.14 - 145.16 are proposed to correct grammar, replace "prisoner" and "inmate" with "offender," replace "board panel" with "parole panel," update the current agency names, and revise the section titles in §145.14 and §145.15.

Rissie Owens, Chair of the Board, has determined that for each year of the first five-year period the proposed amendments are in effect, no fiscal implications exist for state or local government as a result of enforcing or administering these sections.

Ms. Owens has also determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of enforcing the amendments to these sections will be to clarify the procedures in the parole process. There will be no effect on small businesses. There is no anticipated economic cost to persons required to comply with the amended rules as proposed.

An Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed amendments will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Comments should be directed to Bettie Wells, General Counsel, Texas Board of Pardons and Paroles, 209 W. 14th Street, Suite 500, Austin, Texas 78701 or by e-mail to bettie.wells@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of this proposal.

The amendments are proposed under §§508.036, 508.0441, 508.045, 508.141, and 508.149 Texas Government Code. Section 508.036 requires the board to adopt rules relating to the decision-making processes used by the board and parole panels. Section 508.0441 and §508.045 authorize the board to make release decisions relating to the eligibility of an offender for release to parole or mandatory supervision and to act on matters of release, revocation and imposition of special conditions to mandatory supervision. Section 508.141 provides the board authority to adopt policy establishing the date on which the board may reconsider for release an inmate who has previously been denied release. Section 508.149 provides authority for the discretionary release of offenders on mandatory supervision.

No other statutes, articles, or codes are affected by these amendments.

§145.3. Policy Statements Relating to Parole Release Decisions by the Board of Pardons and Paroles.

To aid the board [~~Board of Pardons and Paroles~~] in its analysis and research of parole release, the board adopts the following policies.

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

(3) An offender will be considered for parole when eligible and when the offender meets the following criteria with regard to behavior during incarceration.

(A) Other than on initial parole eligibility, the person must not have had a major disciplinary misconduct report in the six-month period prior to the date he is reviewed for parole; which has resulted in loss of good conduct time or reduction to a classification status below that assigned during that person's initial entry into TDCJ-CID [~~TDCJ-ID~~].

(B) Other than on initial parole eligibility, at the time he is reviewed for parole the person must be classified in the same or higher time earning classification assigned during that person's initial entry into TDCJ-CID [~~TDCJ-ID~~].

(C) - (F) (No change.)

(4) (No change.)

§145.4. Policy Statements Relating to Felony Consecutive Sentences.

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

(c) A parole panel may not release on parole an offender [~~a prisoner~~] sentenced to serve consecutive felony sentences earlier than the date on which the prisoner becomes eligible for release on parole from the last sentence imposed on the offender [~~prisoner~~].

(d) A parole panel shall designate during each sentence the date, if any, on which the offender [~~prisoner~~] would have been eligible for release on parole if the offender [~~prisoner~~] had been sentenced to serve a single sentence.

§145.6. Notification of Parole Panel Decision.

(a) An offender [~~inmate~~] considered for parole or mandatory supervision shall be notified of the parole panel's decision in writing.

(b) (No change.)

(c) Upon considering a case for parole or mandatory supervision, the parole panel shall make a record of its decision and the reasons for its decision on the minute sheet of the offender's [~~inmate's~~] file.

(d) Reasons for the parole panel's decision include but are not limited to the following:

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

(6) participation in TDCJ-CID [~~TDCJ-ID~~] proposed or specialized programs;

(7) - (10) (No change.)

(e) (No change.)

§145.9. Parole Interview.

Prior to consideration for parole by a parole panel, the offender may be interviewed by a board member or parole commissioner whether it is [~~be~~] the initial review or a subsequent review.

§145.11. Review Date Subject to Change.

Initial or subsequent review dates or both are subject to change in cases where an offender's [~~inmate's~~] status is changed.

§145.12. Action upon Review.

A case reviewed by a parole panel for parole consideration may be:

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

(4) determined that the totality of the circumstances favor the offender's release on parole, further investigation (FI) is ordered with the following available voting options; and, impose all conditions of parole or release to mandatory supervision that the parole panel is required or authorized by law to impose as a condition of parole or release to mandatory supervision;

(A) - (C) (No change.)

(D) FI-4 (Month/Year)--Transfer to a Pre-Parole Transfer facility prior to presumptive parole date set by a parole [~~board~~] panel and release to parole supervision on presumptive parole date;

(E) - (K) (No change.)

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

§145.14. Action upon [~~Upon~~] Review; Release to Mandatory Supervision.

(a) - (d) (No change.)

§145.15. Action upon [~~Upon~~] Review; Extraordinary Vote.

(a) (No change.)

(b) If the offender is sentenced to serve consecutive sentences and each sentence in the series is for an offense committed on or after September 1, 1987, the following voting options are available to the board [~~panel~~]:

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

(c) - (e) (No change.)

§145.16. Action upon Special Review--Release Approved.

(a) Responses received from trial officials or victims after a release to parole or release to mandatory supervision decision shall be considered information not previously available to the parole panel. Provided that release to parole or mandatory supervision has not occurred, the responses shall be referred to the parole panel or to the board office corresponding to the parole [~~board~~] panel that rendered the release to parole or release to mandatory supervision decision. A case reviewed by a parole panel, pursuant to the receipt of information not previously available to the parole panel, may then:

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

(b) (No change.)

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

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Bettie Wells
General Counsel
Texas Board of Pardons and Paroles
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For further information, please call: (512) 406-5388

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SUBCHAPTER B. TERMS AND CONDITIONS OF PAROLE

37 TAC §§145.21, 145.23, 145.24

The Texas Board of Pardons and Paroles proposes amendments to 37 TAC §§145.21, 145.23, and 145.24, concerning parole in absentia (parole review and mandatory supervision for offenders not in actual physical custody of the TDCJ CID), Texas parolees supervised in other states, and out-of-state parolees supervised in Texas. The amendments to §§145.21, 145.23, and 145.24 are proposed to correct grammar, replace "parolee" with "offender," update the current agency names, and update the section titles.

Rissie Owens, Chair of the Board, has determined that for each year of the first five-year period the proposed amendments are in effect, no fiscal implications exist for state or local government as a result of enforcing or administering these sections.

Ms. Owens has also determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of enforcing the amendments to these sections will be to clarify the terms and conditions of parole. There will be no effect on small businesses. There is no anticipated economic cost to persons required to comply with the amended rules as proposed.

An Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed amendments will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Comments should be directed to Bettie Wells, General Counsel, Texas Board of Pardons and Paroles, 209 W. 14th Street, Suite 500, Austin, Texas 78701 or by e-mail to bettie.wells@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of this proposal.

The amendments are proposed under §§508.036, 508.0441, and 508.141, Government Code. Section 508.036 provides the board with the authority to adopt rules relating to the decision-making processes used by the board and parole panels. Section 508.0441 authorizes the board to make release decisions and act in panels relating to the eligibility of an inmate for release on parole or release to mandatory supervision. Section 508.141 provides the board with the authority to consider and order release on parole.

No other statutes, articles, or codes are affected by these amendments.

§145.21. Parole in Absentia (Parole Review and Mandatory Supervision for Offenders Not in Actual Physical Custody of the TDCJ CID [~~Correctional Institutions Division~~]).

Offenders serving state prison sentences for Texas crimes and offenders whose parole or mandatory supervision has been revoked who are not in the actual physical custody of the TDCJ CID [~~Texas Department of Criminal Justice (TDCJ) Correctional Institutions Division~~] are subject to the parole review process as set out in this chapter and title in accord with the following.

(1) Parole in absentia processing is initiated by the assigned CID [~~Correctional Institutions Division~~] staff upon referral from the county of conviction when all necessary pen packet documents have been compiled and presented to the CID [~~Correctional Institutions Division~~].

(2) Prior to consideration for parole by the parole panel, the offender may be interviewed by a representative of the CID [~~Correctional Institutions Division~~] for the purpose of obtaining a parole release plan and completion of a parole in absentia summary in order that the parole panel may make an informed decision concerning parole release suitability (§145.12 of this title, relating to Action upon Review; §145.16 of this title, relating to Action upon Special Review--Release Approved; and §145.17 of this title, relating to Action upon Special Review--Release Denied).

(3) An offender released to parole in absentia or mandatory supervision on a Texas felony sentence shall, after release, be treated the same as an offender released on parole or mandatory supervision directly from the TDCJ CID [~~Correctional Institutions Division~~]. Such offenders are subject to revocation for violation of the terms and conditions of their release pursuant to the provisions and procedures of Chapter 146 of this title (relating to Revocation of Parole or Mandatory Supervision).

§145.23. Texas Offenders [~~Parolees~~] Supervised in Other States.

Texas offenders [~~parolees~~] accepted for supervision in other states under the terms of the Interstate Parole Compact (Chapter 510, Government Code) are required to abide by both the rules of parole for Texas as set forth in §145.22 of this title (relating to Terms and Conditions of Parole) and the rules of parole of the receiving state.

§145.24. Out-of-State Offenders [~~Parolees~~] Supervised in Texas.

Offenders [~~Parolees~~] from outside the State of Texas accepted in Texas for supervision by the Division [~~of Parole Supervision~~] under the terms of the Interstate Parole Compact (Chapter 510, Government Code) are required to abide by both the rules of parole for Texas offenders [~~parolees~~] as set forth in §145.22 of this title (relating to Terms and Conditions of Parole) and the rules of parole of the sending state.

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

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Bettie Wells
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CHAPTER 148. SEX OFFENDER CONDITIONS OF PAROLE OR MANDATORY SUPERVISION

37 TAC §148.50

The Texas Board of Pardons and Paroles proposes amendments to 37 TAC §148.50, concerning procedure after waiver of hearing. The amendments to §148.50 are proposed to provide a procedure for panel members when considering a waiver of a sex offender condition hearings for the imposition of sex offender conditions for releasees not convicted of a sex offense.

Rissie Owens, Chair of the Board, has determined that for each year of the first five-year period the proposed amendments are in effect, no fiscal implications exist for state or local government as a result of enforcing or administering this section.

Ms. Owens has also determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of enforcing the amendments to this section will be to clarify the procedure after waiver of hearing. There will be no effect on small businesses. There is no anticipated economic cost to persons required to comply with the amended rule as proposed.

An Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed amendments will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Comments should be directed to Bettie Wells, General Counsel, Texas Board of Pardons and Paroles, 209 W. 14th Street, Suite 500, Austin, Texas 78701 or by e-mail to bettie.wells@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of this proposal.

The amendments are proposed under §§508.036, 508.0441, and 508.045, Government Code. Section 508.036 authorizes the board to adopt rules relating to the decision-making processes used by the board and parole panels. Section 508.0441 and §508.045 authorize the board to consider the imposition of conditions and act in panels relating to the imposition of conditions of parole or mandatory supervision.

No other statutes, articles, or codes are affected by these amendments.

§148.50. Procedure after Waiver of Hearing.

(a) The parole panel of the board may accept a waiver of the hearing provided that a waiver of the hearing includes the following:

(1) information that releasee was served with written notice of the following:

(A) notice of the right to a hearing, the purpose of which is to determine whether sex offender conditions may be imposed as a special condition of the release;

(B) notice of the right to full disclosure of the evidence;

(C) notice that releasee has the opportunity to be heard in person and to present witnesses and documentary evidence;

(D) notice that the releasee has the right to confront and cross-examine witnesses unless the panel member specifically finds good cause is shown;

(E) notice that the matter will be heard by an impartial decision maker; and

(F) opportunity to waive in writing the right to a hearing.

(2) information TDCJ-PD relied upon to identify the releasee as a sex offender.

(b) After reviewing the waiver of the right to a sex offender condition hearing and receipt of supporting documentation of evidence of the offender's sexual deviant behavior in the offense for which the offender is currently on supervision, the parole panel must determine that, by a preponderance of the evidence, the release constitutes a threat to society by reason of his/her lack of sexual control. The panel shall make final disposition of the case by taking one of the following actions:

(1) impose sex offender conditions; or

(2) deny imposition of sex offender conditions.

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

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 19. NURSING FACILITY REQUIREMENTS FOR LICENSURE AND MEDICAID CERTIFICATION

The Texas Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), amendments to §19.405, concerning additional requirements for trust funds in Medicaid-certified facilities, and §19.2314, concerning financial audits in Chapter 19, Nursing Facility Requirements for Licensure and Medicaid Certification.

BACKGROUND AND PURPOSE

Federal and state law governing nursing facility licensure and Medicaid program participation include specific provisions regarding the management of a resident's personal funds. Residents in licensed-only and Medicaid-certified facilities may manage their own funds, or they may designate another person or authorize the nursing facility to assume that responsibility. If the nursing facility is authorized to manage a resident's funds, DADS monitors the nursing facility to ensure that the funds are properly safeguarded and accounted for by the facility.

The purpose of the proposed amendments is to clarify the requirements for managing residents' personal funds and to explain how DADS monitors and enforces those requirements. The amendments are made, in part, in response to recommendations in a report issued by DADS Internal Audit in November 2008 regarding trust fund monitoring. The audit recommendations have been implemented and the proposed amendments reflect current practices.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §19.405 eliminates the requirement that nursing facilities must use the term "trustee" in titling a resident's trust fund account, clarifies how resident funds are handled and records are kept, and clarifies which items may be purchased and which must be provided by the facility for Medicaid residents. The amendment deletes provisions in subsection (m) regarding allowable costs on cost reports because the Health and Human Services Commission is now responsible for rules regarding cost reporting and rate setting. The amendment also adds new subsections (s) - (u) relating to the authority of DADS to monitor trust funds and conduct audits, including enforcement actions and the appeal rights of providers.

The proposed amendment to §19.2314 deletes out-of-date references and adds a cross-reference to §19.405(s), regarding DADS trust fund monitoring and audit responsibilities.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendments are in effect, enforcing or administering the amendments does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed amendments will not have an adverse economic effect on small businesses or micro-businesses, because the amendments update and reorganize the rules to reflect current practices and do not require any additional resources from nursing facilities.

PUBLIC BENEFIT AND COSTS

Jon Weizenbaum, DADS Deputy Commissioner, has determined that, for each year of the first five years the amendments are in effect, the public benefit expected as a result of enforcing the amendments is to provide greater clarity in rule for nursing facilities and for individuals residing in nursing facilities and their families about management of personal funds by nursing facilities. The public will also benefit from having rules that reflect current practices for trust fund monitoring.

Mr. Weizenbaum anticipates that there will not be an economic cost to persons who are required to comply with the amendments. The amendments will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Questions about the content of this proposal may be directed to David Latimer at (512) 438-2432 in DADS Center for Policy and Innovation. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-10R03, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, Texas 78751; faxed to (512) 438-5759; or e-mailed to *rulescomments@dads.state.tx.us.* To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register.* The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 10R03" in the subject line.

SUBCHAPTER E. RESIDENT RIGHTS

40 TAC §19.405

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

The amendment affects Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§19.405. Additional Requirements for Trust Funds in Medicaid-certified Facilities.

(a) Deposit of funds. The facility must keep funds received from a resident for holding, safeguarding, and accounting, separate from the facility's funds.

(1) This separate account must be identified "[~~Trustee,~~] (Name of Facility), Resident's Trust Fund Account[~~,~~]" or by a similar title that shows a fiduciary relationship exists between a resident and the facility.

(2) A facility may commingle the trust funds of Medicaid residents [~~recipients~~] and private-pay residents.

(3) If the funds are commingled, the facility must provide, upon request, the following records [~~information. This information must be provided~~] to the [~~Texas~~] Department of Aging and Disability [~~Human~~] Services [~~(DHS)~~], the Texas attorney general's Medicaid Fraud Control Unit, and the U.S. Department of Health and Human Services:

(A) [~~(1)~~] copies of release forms signed and dated by each private-pay resident or responsible party whose funds are commingled; and[~~. The facility must include in the release forms permission for the facility to maintain trust fund records of private-pay residents in the same manner as the Medicaid recipient's trust funds. The release forms must:~~]

[~~(A) be secured from the private-pay residents upon admission or at the time of request for trust fund services; and~~]

[~~(B) include a provision allowing inspection of the private-pay resident's trust fund records by the agencies referenced in this subsection; and~~]

(B) [~~(2)~~] legible copies of the trust fund records of private-pay residents whose funds are commingled.

(4) The facility must maintain the forms and records described in paragraph (3) of this subsection [~~keep these records~~] in the same manner as the financial records of Medicaid residents [~~recipients~~] as specified in this section.

(5) A facility must ensure that a release form described in paragraph (3)(A) of this subsection:

(A) includes permission for the facility to maintain trust fund records of private-pay residents in the same manner as those of Medicaid residents;

(B) is obtained from a private-pay resident upon admission or at the time of request for trust fund services; and

(C) includes a provision allowing inspection of the private-pay residents' trust fund records by the agencies described in paragraph (3) of this subsection.

(b) Funds in excess of $50. The facility must deposit any residents' personal funds in excess of $50 in an interest-bearing account (or accounts) that is separate from any of the facility's operating accounts, and that credits all interest earned on the residents' funds to that account. In pooled accounts, there must be a separate accounting for each resident's share.

(c) Funds less than $50. The facility may [~~must~~] maintain a resident's personal funds that do not exceed $50 in a noninterest-bearing account, interest-bearing account, or petty cash fund.

(d) Accounting and records.

(1) The facility must:

(A) establish and maintain current, written, individual records of all financial transactions involving a [~~the~~] resident's personal funds that the facility is holding, safeguarding, and accounting;[~~.~~]

(B) [~~The facility must~~] keep these records in accordance with:

(i) the American Institute of Certified Public Accountants' Generally Accepted Accounting Standards; and[~~.~~]

(ii) the [~~The facility must also keep records in accordance with~~] requirements of law for a [~~trustee in a~~] fiduciary relationship; and [~~that exists for these financial transactions.~~]

(C) [~~The facility must~~] include at least the following in these records:

(i) [~~(1)~~] resident's name;

(ii) [~~(2)~~] identification of resident's legally authorized representative, representative payee, or responsible party, [~~or legal representative,~~] if any, and payor source;

(iii) valid letter of guardianship, if any;

(iv) valid power of attorney, if any;

(v) [~~(3)~~] resident's admission and discharge dates [~~date~~];

(vi) [~~(4)~~] resident's trust fund ledger containing the following: [~~earned interest, if any;~~]

(I) description of each transaction;

(II) the date and amount of each deposit and withdrawal;

(III) the name of the person who accepted any withdrawn funds;

(IV) the balance after each transaction; and

(V) amount of interest earned, posted at least quarterly;

(vii) receipts for purchases and payments, including cash-register tapes or sales statements from a seller;

(viii) written requests for personal funds from the trust fund account; and

(ix) written requests for specific brands, items, or services.

(2) The facility must maintain the following as general trust fund records:

(A) valid trust fund trial balance;

(B) petty cash logs;

(C) bank statements for trust fund and operating accounts;

(D) trust fund checkbook and register;

(E) trust fund account monthly reconciliations;

(F) trust fund bank account agreement form;

(G) applied income ledgers;

(H) applied income payment plans from DADS;

(I) proof of surety bond;

(J) written agreements (e.g., bed hold, private room); and

(K) facility census, admission, discharge, and leave records.

(3) A resident must approve a withdrawal from the resident's personal funds by signing a document that shows the resident's approval and the date of the approval.

(4) Except as provided in subparagraph (B) of this paragraph, a facility must obtain a receipt for the purchase of an item or service.

(A) The receipt must contain:

(i) the resident's name;

(ii) the date the receipt was written or created;

(iii) the amount of funds spent;

(iv) the specific item or service purchased;

(v) the name of the business from which the purchase was made; and

(vi) the signature of the resident.

(B) A receipt is not required if:

(i) a purchase is made with funds withdrawn in accordance with paragraph (3) of this subsection;

(ii) a purchase is made by the resident, a legally authorized representative, a responsible party, or an individual (other than facility personnel) authorized in writing by the resident; or

(iii) the item purchased costs less one dollar or less.

(5) If a facility cannot obtain the signature of a resident as required by paragraph (3) or (4)(A)(vi) of this subsection, the facility must obtain the signature of a witness. The witness may not be the person responsible for accounting for the resident's trust funds, that person's supervisor, or the person who accepts the withdrawn funds or who sells the item being purchased. The facility and DADS staff must be able to identify the witness's name, address, and relationship to the resident or facility.

[~~(5) documentation for all transactions. Facility staff must document, on the resident's trust-fund ledger or deposit/withdrawal document, the date and amount of each deposit and withdrawal, the name of the person who accepted the withdrawn funds, and the balance after each transaction. Each withdrawal must be signed by the resident on the trust-fund ledger or deposit/withdrawal document. If the resident cannot sign, the transaction must be signed by at least one witness. This witness can be any person except the person(s) responsible for accounting for the trust funds, that person's supervisor, or the person(s) who accepts the withdrawn funds; and~~]

[~~(6) receipts for purchases and payments, including cash-register tapes or sales statements from a seller. Receipts are required when the purchase is made by the facility or someone other than the resident, responsible party, legal representative, or individual, other than facility personnel, authorized in writing by the resident, and when the purchase is for items costing more than one dollar. Receipts are not required when purchase is made by the resident, responsible party, legal representative, or individual, other than facility personnel, authorized in writing by the resident, or when the item(s) purchased costs one dollar or less. Required receipts must contain:~~]

[~~(A) the resident's name;~~]

[~~(B) the date the receipt was written or created;~~]

[~~(C) the amount of money spent for the resident;~~]

[~~(D) the specific item(s) purchased with the trust-fund money;~~]

[~~(E) the name of the business from which the purchase was made; and~~]

[~~(F) the signature of the resident. If the signature of the resident cannot be obtained, the signature of a witness as described in paragraph (5) of this subsection must be obtained; and the facility or DHS staff must be able to determine, at a future audit date, the witness's name, address, and relationship to the resident or facility. If the disbursement has been prior authorized as evidenced by the resident's or witness's signature and date on the trust-fund ledger or deposit/withdrawal documents, the signature is not required on the receipt.~~]

(e) Notice of certain balances. The facility must notify each resident that receives Medicaid benefits:

(1) if [~~when~~] the amount in the resident's account reaches $200 less than SSI resource limit for one person, specified in §1611(a)(3)(B) of the Social Security Act; and

(2) that, if the amount in the account, in addition to the value of the resident's other nonexempt resources, reaches the SSI resource limit for one person, the resident may lose eligibility for Medicaid or SSI.

(f) Conveyance upon death.

(1) If [~~Upon the death of~~] a resident with [~~a~~] personal funds managed by a [~~fund deposited with the~~] facility dies, the facility must convey, within 30 days after the resident's death, the resident's funds and a final accounting of those funds to the individual or probate jurisdiction administering the resident's estate, or make a bona fide effort to locate the responsible party or heir to the estate (see also §19.416 of this title (relating to Personal Property)).

(2) If a facility is not able to convey funds in accordance with paragraph (1) of this subsection, the facility must, within [~~Within~~] 30 days after the resident's [~~of a Medicaid recipient's~~] death;[~~, the facility must use the following procedures to clear the recipient's account:~~]

(A) hold the funds by depositing them in a separate account or maintaining them in an existing account, designating on the account records that the resident is deceased; or

(B) submit funds to DADS in accordance with paragraph (4) of this subsection.

(3) If the facility holds funds in accordance with paragraph (2)(A) of this subsection:

(A) the facility must provide DADS with a notarized affidavit that contains:

(i) the resident's name;

(ii) the amount of funds being held;

(iii) a description of the facility's efforts to locate a responsible party or heir;

(iv) a statement acknowledging that the funds are not the property of the facility, but the property of the deceased resident's estate; and

(v) a statement that the facility will hold the funds until they are conveyed to a responsible party or heir or submitted to DADS in accordance with paragraph (4) of this subsection;

(B) the facility must submit the funds to DADS in accordance with paragraph (4) of this subsection within 180 days after the resident's death; and

(C) funds held by a facility in accordance with this paragraph may be monitored or reviewed by DADS or the Health and Human Services Commission, Office of Inspector General.

(4) A facility must submit unclaimed funds to DADS, Accounts Receivable, Mail Code E-411, P.O. Box 149030, Austin Texas 78714-9030.

(A) The funds must be identified as money that will escheat to the state.

(B) If the facility held the funds in accordance with paragraph (3) of this subsection, the facility must include the notarized affidavit described in paragraph (3)(A) of this subsection.

[~~(1) the facility must set up a trust fund for the deceased recipient or deposit the money to already existing accounts;~~]

[~~(2) once DHS-designated regional staff verify that the money owed the deceased recipient is on hand and held in trust, DHS considers the account cleared if the facility supplies DHS with a notarized affidavit outlining the facility's intention. The affidavit must contain:~~]

[~~(A) the recipient's name;~~]

[~~(B) the amount of money being held;~~]

[~~(C) the facility's efforts to locate the responsible party or heirs;~~]

[~~(D) a facility statement acknowledging that this money is not the property of the facility, but the property of the deceased person's estate; and~~]

[~~(E) a statement that the facility will hold the money in trust until the legal heir or responsible party is located or the money escheats to the state. Money held in trust in the facility is subject to future audit and will be reviewed each time the facility is audited; and~~]

[~~(3) facilities choosing not to hold this money in trust for Medicaid recipients may send the money to the Texas Department of Human Services, Fiscal Division, P.O. Box 149055, Austin, Texas 78714-9055, at any time before the money escheats to the state. The money must be identified as escheat money. The facility must include the notarized affidavit described in paragraph (2) of this subsection with the money for identification.~~]

(g) Assurance of financial security. The facility must purchase a surety bond, or otherwise provide assurance satisfactory to the Secretary of Health and Human Services to ensure [~~assure~~] the security of all personal funds of residents deposited with the facility.

(1) The amount of a surety bond must equal the average monthly balance of all the facility's resident trust fund accounts for the 12-month period preceding the bond issuance or renewal date.

(2) Resident trust fund accounts are specific only to the single facility purchasing a resident trust fund surety bond.

(3) If a facility employee is responsible for the loss of funds in a resident's trust fund account, the resident, the resident's family, and the resident's legal representative are not obligated to make any payments to the facility that would have been made out of the trust fund had the loss not occurred.

(h) Items and services that may not be charged to a resident's [~~Limitation on charges to~~] personal funds.

(1) The facility may not impose a charge against the personal funds of a resident for any item or service for which payment is made under Medicaid or Medicare.

(2) Items or services included in Medicare or Medicaid payment that [~~which~~] may not be billed to the resident's personal funds by the facility include:

(A) [~~(1)~~] nursing services as required in §19.1001 of this title (relating to Nursing Services);

(B) [~~(2)~~] dietary services as required in §19.1101 of this title (relating to Dietary Services);

(C) [~~(3)~~] an activities program as required in §19.702 of this title (relating to Activities);

(D) [~~(4)~~] room and bed maintenance services;

(E) [~~(5)~~] routine personal hygiene items and services as required to meet the needs of the resident [~~residents~~], including, but not limited to:

(i) [~~(A)~~] hair hygiene supplies, including shampoo, comb, and brush;

[~~(B) comb;~~]

[~~(C) brush;~~]

(ii) [~~(D)~~] bath soaps, disinfecting soaps, or specialized cleansing agents when indicated to treat special skin problems or to fight infection;

(iii) razor and shaving cream;

[~~(E) razor;~~]

[~~(F) shaving cream;~~]

(iv) [~~(G)~~] toothbrush, toothpaste, and dental floss;

[~~(H) toothpaste;~~]

(v) [~~(I)~~] denture adhesive and denture cleanser;

[~~(J) denture cleaner;~~]

[~~(K) dental floss;~~]

(vi) [~~(L)~~] moisturizing lotion;

(vii) tissues, cotton balls, and cotton swabs;

[~~(M) tissues;~~]

[~~(N) cotton balls;~~]

[~~(O) cotton swabs;~~]

(viii) [~~(P)~~] deodorant;

(ix) [~~(Q)~~] incontinent care and supplies, to include, but not limited to, cloth or disposable incontinent briefs; [~~(diapers), to be provided as follows:~~]

~~*(i)* if attaining or maintaining the resident's highest practicable physical, mental, or psychosocial well-being necessitates the use of briefs (diapers), the facility must provide them. The type of brief (diaper) provided should be based on an individual assessment of the resident's medical and psychosocial condition.~~]

~~*(ii)* If the family makes written request to the facility to put briefs (diapers) on the recipient, and the attending physician and director of nurses (DON) document in the clinical record that there is no medical or psychosocial need for briefs (diapers), the recipient, responsible party, or family may be billed for the briefs (diapers), or the recipient's personal funds may be used to purchase the items, or both];~~

(x) [~~(R)~~] sanitary napkins and related supplies;

(xi) [~~(S)~~] towels and washcloths;

[~~(T) washcloths;~~]

(xii) [~~(U)~~] hospital gowns;

(xiii) [~~(V)~~] over-the-counter drugs;

(xiv) [~~(W)~~] hair and nail hygiene services; and

[~~(X) bathing; and~~]

(xv) [~~(Y)~~] personal laundry; and

(F) [~~(6)~~] medically-related social services as required in §19.703 of this title (relating to Social Services General Requirements).

(3) A facility must base necessity for and type of incontinent brief described in paragraph (2)(E)(ix) of this subsection on an assessment of the resident's medical and psychosocial condition and resulting determination.

(i) Items and services that may be charged to a resident's personal funds. The facility may charge a [~~the~~] resident for requested services that are more expensive than or in excess of covered services in accordance with §19.2601 of this title (relating to Vendor Payment (Items and Services Included)). The following list contains general categories and examples of items and services that the facility may charge to a resident's personal funds if they are requested by a resident, if the facility informs the resident that there will be a charge, and if payment is not made by Medicare or Medicaid:

(1) telephone;

(2) television or [~~and/or~~] radio for personal use;

(3) personal comfort items, including smoking materials, notions and novelties, and confections;

(4) cosmetics and grooming items and services in excess of those for which payment is made under Medicare or Medicaid;

(5) personal clothing;

(6) personal reading material;

(7) gifts purchased on behalf of a resident;

(8) flowers and plants;

(9) social events and entertainment offered outside the scope of the activities program, provided under §19.702 of this title [~~(relating to Activities)~~];

(10) noncovered special care services, such as privately hired nurses and aides;

(11) private room, except when therapeutically required, such as isolation for infection control; [~~and~~]

(12) specially-prepared or alternative food requested instead of the food generally prepared by the facility, as required in §19.1101 of this title; and [~~(relating to Dietary Service)~~]

(13) incontinent briefs if the resident's legally authorized representative or responsible party submits a written request to the facility and the attending physician and director of nurses (DON) determine and document in the clinical record that there is no medical or psychosocial need for supplies.

(j) Request for items or services that may be charged to a resident's personal funds. The facility must:

(1) not charge a resident, nor his representative, for any item or service not requested by the resident;

(2) not require a resident, or [~~nor~~] his representative, to request any item or service as a condition of admission or continued stay; and

(3) inform the resident or his representative, when he requests an item or service for which a charge will be made, that there will be a charge for the item or service and the amount of the charge.

(k) Access to financial record. The individual financial record must be available on request to the resident, responsible party, representative payee or legal representative.

(l) Quarterly statement.

(1) The individual financial record must be available, through quarterly statements and on request, to the resident, legally authorized representative, representative payee, or responsible party [~~his legal representative~~].

(2) The statement must reflect any resident's [~~recipient~~] funds that [~~which~~] the facility has deposited in an account as well as any resident's [~~recipient~~] funds held by the facility in a petty cash account.

(3) The statement must include at least the following:

(A) [~~(1)~~] balance at the beginning of the statement period;

(B) [~~(2)~~] total deposits and withdrawals;

(C) [~~(3)~~] interest earned, if any;

(D) [~~(4)~~] bank name [~~identification number~~] and location of any account in which the resident's [~~recipient's~~] personal funds have been deposited; and

(E) [~~(5)~~] ending balance.

(m) Banking charges.

(1) Charges for checks, deposit slips, and services for pooled checking accounts are the responsibility of the facility and may not be charged to the resident, legally authorized representative [~~recipient, family~~], or responsible party. [~~These costs, however, may be reported as allowable costs by the facility on its cost report.~~]

(2) Bank service charges and charges for checks and deposit slips may be deducted from the individual checking accounts if it is the resident's [~~recipient's~~] written, individual choice to have this type of account [~~to preserve his dignity and independence~~].

(3) Bank fees on individual accounts established solely for the convenience of the facility are the responsibility of the facility and may not be charged to the resident, legally authorized representative [~~recipient, family~~], or responsible party. [~~However, the facility may report these costs as allowable costs on its cost report.~~]

(4) The facility may not charge the resident, legally authorized representative [~~recipient, family~~], or responsible party for the administrative handling of either type of account. [~~These costs may be reported as allowable costs by the facility on its cost report.~~]

(5) If the facility places any part of the resident's funds [~~money~~] in savings accounts, certificates of deposit, or any other plan whereby interest or other benefits are accrued, the facility must distribute the interest or benefit to participating residents on an equitable basis. If pooled accounts are used, interest must be prorated on the basis of actual earnings or end-of-quarter balances.

(n) Access to funds.

(1) Disbursements from the trust fund.

(A) A request for funds from the trust fund or trust fund petty cash box may be made, either orally or in writing, by the resident, the resident's legally authorized representative, representative payee, or responsible party to cover a resident's expenses.

(B) The facility must respond to a request received during normal business hours at the time of the request.

(C) The facility must respond to a request received during hours other than normal business hours immediately at the beginning of the next normal business hours.

(2) Discontinuing trust fund participation.

(A) If a resident, legally authorized representative, or responsible party requests that the facility discontinue managing the resident's personal funds, the facility must return to the resident, legally authorized representative or responsible party all of the resident's personal funds held by the facility, including any interest accrued.

(B) If the request is made during normal business hours, the facility must immediately return the funds.

(C) If the request is made during hours other than normal business hours, the facility must return the funds immediately during the next normal business hours.

(3) Transfer or discharge. If a resident is transferred or discharged from a facility, the facility must, within five working days after the transfer or discharge, return to the resident, legally authorized representative, or responsible party all of the resident's personal funds held by the facility, including any interest accrued.

(4) For purposes of this subsection, normal business hours are 8:00 a.m. to 5:00 p.m., Monday through Friday, excluding national holidays.

[~~(1) Personal funds held in the facility. Upon a Medicaid recipient's request, or transfer or discharge, the facility must return to the recipient, the representative payee, responsible party, or the legal representative the full balance of the recipient's personal funds that the facility has received for holding, safeguarding, and accounting. Because funds held in the facility are usually small amounts, the facility is expected to meet this requirement during normal business hours at the time of request, transfer, or discharge, whichever occurs first. Response to requests received during hours other than normal business hours must be made immediately at the beginning of the next normal business hours. For purposes of this paragraph, normal business hours are 8:00 a.m. to 5:00 p.m. Monday through Friday, excluding national holidays.~~]

[~~(2) Personal funds held outside the facility. Upon request or if a recipient is transferred or discharged, the facility must, within five business days, return to the recipient, representative payee, responsible party, or the legal representative the full balance of a recipient's personal funds that the facility has deposited in an account, including any interest accrued.~~]

(o) Handling of monthly benefits. If the Social Security Administration has determined that a Title II and Title XVI Supplemental Security Income (SSI) benefit to which the resident [~~recipient~~] is entitled should be paid through a representative payee, the provisions in 20 Code of Federal Regulations (CFR), §§404.2001 - 404.2065, for Old Age, Survivors, and Disability Insurance benefits and 20 CFR, §§416.601 - 416.665, for SSI benefits apply.

(p) Change of ownership. If the ownership of a facility changes, the former [~~old~~] owner must transfer the bank balances or trust funds to the new owner with a list of the residents and their balances. The former [~~old~~] owner must get a receipt from the new owner for the transfer of these funds. The former [~~old~~] owner must keep this receipt for monitoring or audit purposes.

(q) Alternate forms of documentation. Without DADS prior written approval [~~of DHS~~], a facility may not submit alternate forms of documentation, including affidavits, [~~will not be accepted by DHS~~] to verify a [~~the~~] resident's personal fund expenditures or as proof of compliance with any requirements specified in these requirements for the resident's personal funds.

(r) Limitation on certain charges. A nursing facility may not impose charges for certain Medicaid-eligible individuals, for nursing facility services that exceed the per diem amount established by DADS [~~DHS~~] for such services. "Certain Medicaid-eligible individuals" means an individual who is entitled to medical assistance for nursing facility services, but for whom such benefits are not being paid because, in determining the individual's [~~individuals'~~] income to be applied monthly to the payment for the costs of nursing facility

services, the amount of such income exceeds the payment amounts established by DADS [~~DHS~~].

(s) Trust fund monitoring and audits.

(1) DADS may periodically monitor all trust fund accounts to assure compliance with this section. DADS notifies a facility of monitoring plans and gives a report of the findings to the facility.

(2) DADS may, as a result of monitoring, refer a facility to the Office of Inspector General (OIG) for an audit.

(3) The facility must provide all records and other documents required by subsection (d) of this section to DADS upon request.

(4) DADS provides the facility with a report of the findings, which may include corrective actions that the facility must take and internal control recommendations that the facility may follow.

(5) The facility may request an informal review in accordance with subsection (t) of this section or a formal hearing in accordance with subsection (u) of this section to dispute the report of findings.

(6) If the facility does not request an informal review or a formal hearing and the report of findings requires corrective actions, the facility must complete corrective actions within 60 days after receiving the report of findings.

(7) If the facility does not complete corrective actions required by DADS within 60 days after receiving the report of findings, DADS may impose a vendor hold on payments due to the facility under the provider agreement until the facility completes corrective actions.

(8) If DADS imposes a vendor hold in accordance with paragraph (7) of this subsection, the facility may request a formal hearing in accordance with subsection (u)(5) of this section. If the failure to correct is upheld, DADS continues the vendor hold until the facility completes the corrective actions.

(t) Informal review.

(1) A facility that disputes the report of findings described in subsection (s)(4) of this section may request an informal review under this section. The purpose of an informal review is to provide for the informal and efficient resolution of the matters in dispute and is conducted according to the following procedures:

(A) DADS must receive a written request for an informal review by United States (U.S.) mail, hand delivery, special mail delivery, or fax no later than 15 days after the date on the written notification of the report of findings described in subsection (s)(4) of this section. If the 15th day is a Saturday, Sunday, national holiday, or state holiday, then the first day following the 15th day is the final day the written request will be accepted. A request for an informal review that is not received by the stated deadline is not granted.

(B) A facility must submit a written request for an informal review:

(i) by U.S. mail to DADS Trust Fund Monitoring Unit, Attn: Manager, P.O. Box 149030, Mail Code W-340, Austin, Texas 78714-9030;

(ii) hand delivery or special mail delivery to 701 West 51st Street, Austin, Texas 78751-2321; or

(iii) by fax to (512) 438-3639.

(C) A facility must, with its request for an informal review:

(i) submit a concise statement of the specific findings it disputes;

(ii) specify the procedures or rules that were not followed;

(iii) identify the affected cases;

(iv) describe the reason the findings are being disputed; and

(v) include supporting information and documentation that directly demonstrates that each disputed finding is not correct.

(D) DADS does not grant a request for an informal review that does not meet the requirements of this subsection.

(2) Informal review process. Upon receipt of a request for an informal review, the Trust Fund Monitoring Unit Manager coordinates the review of the information submitted.

(A) Additional information may be requested by DADS, and must be received in writing by U.S. mail, hand delivery, special mail, or fax in accordance with paragraph (1)(B)(i) - (iii) of this subsection no later than 15 days after the date the facility receives the written request for additional information. If the 15th day is a Saturday, Sunday, national holiday, or state holiday, then the first day following the 15th day is the final day the additional information will be accepted.

(B) DADS sends its written decision to the facility by certified mail, return receipt requested.

(i) If the original findings are upheld, DADS continues the schedule of deficiencies and requirement for corrective action.

(ii) If the original findings are reversed, DADS issues a corrected schedule of deficiencies with the written decision.

(iii) If the original findings are revised, DADS issues a revised schedule of deficiencies including any revised corrective action.

(iv) If the original findings are upheld or revised, the facility may request a formal hearing in accordance with subsection (u) of this section.

(v) If the original findings are upheld or revised and the facility does not request a formal hearing, the facility has 60 days from the date of receipt of the written decision to complete the corrective actions. If the facility does not complete the corrective actions by that date, DADS may impose a vendor hold. If DADS imposes a vendor hold, the facility may request a formal hearing in accordance with subsection (u)(5) of this section. If the failure to correct is upheld, DADS continues the vendor hold until the facility completes the corrective action.

(u) Formal hearing.

(1) The facility must submit a written request for a formal hearing under this section to: HHSC Appeals Division, Mail Code W-613, P.O. Box 149030, Austin, Texas 78714-9030.

(2) The written request for a formal hearing must be received within 15 days after:

(A) the date on the written notification of the report of findings described in subsection (s)(4) of this section; or

(B) the facility receives the written decision sent as described in subsection (t)(2)(B) of this section.

(3) A formal hearing is conducted in accordance with Texas Administrative Code, Title 1, Chapter 357, Subchapter I (relating to Hearings Under the Administrative Procedure Act).

(4) No later than 60 days after a final determination is issued as a result of a formal hearing requested by a facility under subsection (s)(8) or (t)(2)(B)(iv) of this section, the facility must complete any corrective action required by DADS or be subject to a vendor hold on payments due to the facility under the provider agreement until the facility completes corrective action. If DADS imposes a vendor hold, the facility may request a formal hearing in accordance with paragraph (5) of this subsection. If the failure to correct is upheld, DADS continues the vendor hold until the facility completes the corrective action.

(5) If DADS imposes a vendor hold under subsections (s)(7), (t)(2)(B)(v), or (u)(4) of this section, the facility may request a formal hearing within 15 days after receiving notice of the correction failure and the vendor hold. The formal hearing is limited to the issue of whether the facility completed the corrective action.

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

Filed with the Office of the Secretary of State on June 28, 2012.

TRD-201203409
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: August 12, 2012
For further information, please call: (512) 438-3734

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SUBCHAPTER X. REQUIREMENTS FOR MEDICAID-CERTIFIED FACILITIES

40 TAC §19.2314

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; and Texas Health and Safety Code, Chapter 255, which authorizes DADS to license and regulate nursing facilities.

The amendment affects Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§19.2314. Financial Audits.

[~~(a)~~] DADS [~~The Texas Department of Human Services (DHS)~~] may audit or monitor a facility, including the facility's [~~all facilities, including facilities~~'] trust fund accounts, periodically or as a result of a complaint investigation. DADS may also refer a facility to the Office of Inspector General for an audit. A facility is notified of monitoring or audit plans and is given a report of the final [~~audit~~] findings. [~~If vendor payment problems are found, Provider Enrollment requests that the Nursing Facility Billing Unit work with the facility to reconcile the discrepancies. If the findings show that refunds are due residents or their responsible parties, Provider Enrollment requests that the regional staff assist the facility in reconciling the audit findings. Facilities which fail to provide documentation for audit exceptions or evidence of federally-mandated surety bonds or fail to keep other records required for audit are subject to the withholding of vendor payments until such problems are resolved. Money owed to DHS will be recouped from the funds placed on hold.~~]

[~~(b) Upon receipt of an audit exception, the facility must provide additional documentation, reach a final agreement, make restitution within 60 days, or request a hearing within 15 days. Requests for an informal hearing are to be directed to DHS, Provider Enrollment. Requests for a formal hearing are to be directed to DHS's Hearings Department, P.O. Box 149030 (W-613), Austin, Texas 78714-9030~~].

[~~(c) If the facility does not pay the amount due the resident within the specified time frame, DHS may withhold other funds due the facility beginning on the 60th day without providing advance notice. DHS releases funds when the facility produces documentation that it has refunded the proper amount to the resident or responsible party.~~]

[~~(d) DHS may require the facility to pay the resident refund amount to DHS plus any anticipated cost, including personnel salaries, which is incurred by DHS in making the refund to the proper party.~~]

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

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TRD-201203410
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: August 12, 2012
For further information, please call: (512) 438-3734

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 5. FINANCE

The Texas Department of Transportation (department) proposes the repeal of §§5.70 - 5.74 and new §§5.101 - 5.111, concerning the Transportation Development Credit Program.

EXPLANATION OF PROPOSED REPEALS AND NEW SECTIONS

The department is currently modifying the process for allocating, awarding, and administering transportation development credits. To achieve this goal the department has determined that changes to the existing rules are necessary. To streamline this process the department is repealing the existing sections relating to the Transportation Development Credit Program and simultaneously proposing new sections, which will be located in new Subchapter H.

Rider 45 to the appropriations to the department for fiscal years 2012-2013 (page VII-37, General Appropriations Act, 2011) stip-

ulates that the department "shall make it a priority to utilize transportation development credits as the required match in a manner that would maximize the utilization of federal funds on eligible projects. The state funds then no longer needed to be used as the required federal match should then be available to be targeted to priority projects in an effort to streamline their delivery."

On June 30, 2011, the Texas Transportation Commission (commission) created the Transportation Development Credit Rulemaking Advisory Committee (committee) to be comprised of seven members, including representatives from the three metropolitan planning organizations (MPOs) with the largest local balances of credits, the Public Transportation Advisory Committee, an MPO located in a non-transportation management area, a metropolitan transit provider and a city that partners with the state on transportation projects. The committee met four times with department staff to render advice, review draft proposals, and make specific recommendations. In addition to the committee, the department solicited comments on the draft rules from the Public Transportation Advisory Committee and other transit industry stakeholders.

Many of the new sections incorporate concepts included in the current rules; however, the department has made numerous substantive changes to address the requirements of Rider 45 and the recommendations of the committee. The new rule organizational structure subdivides the rules into smaller sections and reorganizes them so that the new rules are easier to read. The revision also permits easier location of and access to specific provisions and makes them more understandable.

New §5.101, Purpose, indicates that the purpose of the subchapter is to set out the policies and procedures for implementation of the program and references the federal law that enables the use of transportation development credits.

New §5.102, Program Goals, sets out the overarching goals for the program, based on the requirements of Rider 45 and the recommendations of the committee. Each MPO and the commission must consider these goals when awarding credits to eligible projects under new §§5.106, 5.108, or 5.109, as appropriate.

New §5.103, Definitions, incorporates most of the definitions from current §5.71 without substantive change. The defined term "Executive director" has been removed because it is unnecessary. The definition for "Metropolitan planning organization" and the acronym "MPO" have been added since the new rules place certain responsibilities on these entities.

New §5.104, Availability of Credits, requires the department to provide information on the availability of transportation development credits as part of the development and update of the Unified Transportation Program (UTP). The UTP is a ten-year statewide plan for transportation project development. Including this information in the UTP will provide interested parties with access to the number of credits that have been previously awarded or may be available for award to eligible projects in the future.

New §5.105, Regional Allocation, provides that the commission will allocate 75 percent of the state's locally earned credits to the MPO in whose planning area they were earned. The purpose of this change is to allow more local control over the award of transportation development credits.

New §5.106, Award by Metropolitan Planning Organizations, sets out the basic framework that will govern the award of credits by each MPO receiving an allocation under new §5.105. This section does not prescribe the type of process that must be used for evaluating applications and awarding credits; however, each MPO will ultimately be responsible for developing guidelines pertaining to the award and management of its credit allocation. The MPO must consider how the award of credits will expand the availability of funding for transportation projects, based on the goals specified in new §5.102. This section also requires the MPO to incorporate information regarding the award of credits into its Transportation Improvement Program, as appropriate, and submit an annual report to the department documenting the management of its credit allocations. Finally, this section specifies that a public transit agency located within the planning area of an MPO must first seek the award of credits from the MPO, unless the credits will apply to a program that is administered by the department on a statewide basis. The department and the committee agree that it is more appropriate for metropolitan transit agencies to seek credits for eligible projects from the regional allocation. The exception applies to statewide programs funded through the department, in which case it is more appropriate for the commission to award any associated credits.

New §5.107, Award by Commission, provides that the commission will award the transportation development credits that are not locally earned and the state's locally earned credits that are not otherwise allocated to MPOs under new §5.105. This section authorizes the commission to award the credits using a competitive process or in its sole discretion. In addition, this section creates a specific allocation for public transit projects, which is equal to the lesser of 15 million credits or fifty percent of the total number of credits available for award by the commission on the first day of the fiscal year. The purpose of this particular allocation is to demonstrate the department's continued commitment to using transportation development credits in support of public transit projects.

New §5.108, Competitive Process, incorporates many of the general concepts contained in current §5.72. This section provides that the department may periodically publish a notice soliciting proposals for award of transportation development credits, and describes the content of the proposal. The commission will award credits after considering the potential of the project to expand the availability of funding for transportation projects, based on the goals specified in new §5.102.

New §5.109, Discretionary Award, continues the practice authorizing the commission to make an award solely in its discretion as described in current §5.73. In making an award, the commission will consider the potential of the project to expand the availability of funding for transportation projects, based on the goals identified in new §5.102, and, if the project is located within the planning boundaries of an MPO, the expressed opinion, if any, of the MPO.

New §5.110, Administration, modifies the language in current §5.74 and clarifies that the agreement must be executed before credits may be used. This section also provides that if an entity does not sign a project agreement within two years after the date of the award of the credits, the credits may be awarded to another eligible entity. The purpose of this new requirement is to aid in the efficient and effective use of transportation development credits.

New §5.111, Transfer of Credits, authorizes an MPO to transfer credits to another MPO or the commission and requires that such a transfer must be documented in the annual report described in new §5.106. This provision will provide flexibility in the use of transportation development credits throughout the state.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years in which the repeals and new sections as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

Mr. Bass has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the repeals and new sections.

PUBLIC BENEFIT AND COST

Mr. Bass has also determined that for each year of the first five years in which the sections are in effect, the public benefit anticipated as a result of enforcing or administering the repeals and new sections will be clarity with regard to the policies and procedures related to the allocation, award, and administration of transportation development credits. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed repeal of §§5.70 - 5.74 and new §§5.101 - 5.111 may be submitted to James Bass, Chief Financial Officer, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on August 13, 2012. In accordance with Transportation Code, §201.811(a)(5), a person who submits comments must disclose, in writing with the comments, whether the person does business with the department, may benefit monetarily from the proposed amendments, or is an employee of the department.

SUBCHAPTER F. TRANSPORTATION DEVELOPMENT CREDIT PROGRAM

43 TAC §§5.70 - 5.74

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

STATUTORY AUTHORITY

The repeals are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

23 U.S.C. §120.

§5.70. Purpose.

§5.71. Definitions.

§5.72. Competitive Process.

§5.73. Discretionary Award.

§5.74. Administration.

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

Filed with the Office of the Secretary of State on June 29, 2012.

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Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: August 12, 2012
For further information, please call: (512) 463-8683

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SUBCHAPTER H. TRANSPORTATION DEVELOPMENT CREDIT PROGRAM

43 TAC §§5.101 - 5.111

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

23 U.S.C. §120.

§5.101. Purpose.

Under 23 U.S.C. §120, a state may use certain toll revenue expenditures, known as transportation development credits, as credit toward the non-federal share of certain projects. This subchapter specifies the policies and procedures for the implementation of the Transportation Development Credit Program.

§5.102. Program Goals.

The goals of the Transportation Development Credit Program are:

(1) to maximize the use of available federal funds, particularly in situations in which federal funds otherwise would be unused because of the inability to provide the non-federal share;

(2) to increase the availability of state and local funds that otherwise would be used as the non-federal share, so that:

(A) a limited number of priority projects may be funded without federal funds, in an effort to streamline project delivery;

(B) a limited number of priority projects that are not eligible for federal funding may be supported from state or local funds; and

(C) available federal transit funds may be used that otherwise would be unused because of the inability to provide the non-federal share or to allow funds that would be used as the non-federal share to be used for other transit projects;

(3) to support public transit; and

(4) to further any other stated goals of the commission or the metropolitan planning organization responsible for awarding credits.

§5.103. Definitions.

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

(1) Commission--The Texas Transportation Commission.

(2) Department--The Texas Department of Transportation.

(3) Eligible entity--Any entity that is eligible for funding under Title 23, U.S.C. or Chapter 53 of Title 49, U.S.C., is in good standing with the department, and has no deficiencies or findings of noncompliance.

(4) Eligible project--A highway, rail, transit, bicycle or pedestrian project, as authorized by Title 23, U.S.C., other than an emergency relief program authorized by 23 U.S.C. §125, or Chapter 53 of Title 49, U.S.C.

(5) Locally earned credits--Transportation development credits earned from:

(A) a project of a regional tollway authority;

(B) a project of a county acting under Transportation Code, Chapter 284;

(C) a project of a regional mobility authority;

(D) an international bridge not owned by the state; and

(E) a department project located within the geographic area of a regional tollway authority, a county acting under Transportation Code Chapter 284, or a regional mobility authority that has developed one or more toll projects.

(6) Metropolitan planning organization--An organization designated in certain urbanized areas to carry out the transportation planning process as required by 23 U.S.C §134.

(7) MPO--A metropolitan planning organization.

(8) Transportation development credits--A financing tool approved by the Federal Highway Administration that allows states to use federal obligation authority without the requirement of non-federal matching dollars. Credits are earned when the state, a toll authority, or a private entity funds a capital transportation investment with toll revenues earned on existing toll facilities, excluding revenues needed for debt service, returns to investors or the operation and maintenance of toll facilities.

§5.104. Availability of Credits.

The department will provide information on the availability of transportation development credits as part of the development and periodic update of the Unified Transportation Program.

§5.105. Regional Allocation.

The commission will allocate for award under §5.106 of this subchapter (relating to Award by Metropolitan Planning Organizations) 75 percent of the state's locally earned credits to the MPO in whose planning area they were earned.

§5.106. Award by Metropolitan Planning Organizations.

(a) Each MPO will award to projects within its planning area the locally earned transportation development credits allocated to it under §5.105 of this subchapter (relating to Regional Allocation).

(b) The MPO must develop and use a documented process for the receipt and evaluation of applications and the award of credits. This process must also provide opportunities for public review and comment at key decision points.

(c) The MPO must consider how the award of credits will expand the availability of funding for transportation projects, based on the goals specified in §5.102 of this subchapter (relating to Program Goals).

(d) The MPO will notify each applicant of the results of the selection process.

(e) The MPO will incorporate information regarding the award of credits into the Transportation Improvement Program, as appropriate.

(f) Not later than December 1st of each year, the MPO will submit a report to the department documenting the management of its credit allocations for the previous fiscal year.

(g) A public transit agency located within the planning area of an MPO must first seek the award of credits under this section for an eligible project, unless the credits will serve as the non-federal share for a public transit program that is administered by the department on a statewide basis.

§5.107. Award by Commission.

(a) Process. The commission will award the transportation development credits that are not locally earned credits and the state's locally earned credits that are not allocated to MPOs under §5.105 of this subchapter (relating to Regional Allocation). The commission will make the awards:

(1) using the competitive process described in §5.108 of this subchapter (relating to Competitive Process); or

(2) in its sole discretion subject to §5.109 of this subchapter (relating to Discretionary Award).

(b) Allocation for public transit projects. For each fiscal year the commission will allocate for award by the commission an amount of transportation development credits that may be used during that fiscal year only to support public transit projects. The minimum number of credits allocated under this subsection is equal to the lesser of 15 million credits or fifty percent of the total number of credits available for award by the commission on the 1st day of that fiscal year. The allocation under this subsection is not intended to set the maximum number of credits that may ultimately be awarded for public transit projects under this subchapter during that fiscal year.

§5.108. Competitive Process.

(a) Program call. The department may periodically publish a notice in the *Texas Register* soliciting proposals for award of transportation development credits under this section.

(b) Proposal. An eligible entity may submit a proposal for an eligible project in response to the notice published under subsection (a) of this section. The proposal must include:

(1) a detailed description of the project and the need for the project;

(2) a detailed explanation of how the award of credits will expand the availability of funding for transportation projects, considering the goals specified in §5.102 of this subchapter (relating to Program Goals); and

(3) if the project is located within the planning area of an MPO, evidence that the eligible entity obtained the concurrence of the MPO before the entity submitted the proposal under this section.

(c) Additional information. The executive director of the department or the executive director's designee may require supplemental information to clarify the issues described in subsection (b)(1) of this section.

(d) Award. The commission will award credits under this section after considering the potential of the project to expand the availability of funding for transportation projects, based on the goals specified in §5.102 of this subchapter.

§5.109. Discretionary Award.

In making an award solely in its discretion, the commission will consider:

(1) the potential of a project to expand the availability of funding for transportation projects, based on the goals specified in §5.102 of this subchapter (relating to Program Goals); and

(2) if the project is located within the planning boundaries of an MPO, the expressed opinion, if any, of the MPO.

§5.110. Administration.

(a) Before an entity that is awarded transportation development credits under this subchapter may use those credits, the entity must enter into a project agreement with the department if the credits are awarded by the commission or with the MPO that awarded the credits.

(b) If an entity does not sign a project agreement within two years after the date of the award of the credits, the credits may be awarded to another eligible entity under this subchapter.

(c) An entity that enters into a project agreement under this section shall comply with all specified terms and conditions of the agreement.

§5.111. Transfer of Credits.

(a) An MPO may transfer transportation development credits allocated to it under §5.105 of this subchapter (relating to Regional Allocation) to another MPO or to the commission.

(b) The transferring MPO shall document each transfer under this section in its annual report required under §5.106 of this subchapter (relating to Award by Metropolitan Planning Organizations).

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

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Bob Jackson
General Counsel
Texas Department of Transportation
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For further information, please call: (512) 463-8683

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CHAPTER 7. RAIL FACILITIES
SUBCHAPTER F. RAILROAD GRADE CROSSINGS

43 TAC §§7.101 - 7.106

The Texas Department of Transportation (department) proposes new §§7.101 - 7.106, concerning Railroad Grade Crossings.

EXPLANATION OF PROPOSED NEW SECTIONS

In 1998 the rules relating to railroad grade crossings were moved to 43 TAC Chapter 25, Traffic Operations, because at that time the responsibility for railroad crossings was assigned to the Traffic Operations Division of the department. The department's Rail Division, which was established in December 2009, currently has responsibility for the oversight of railroad crossings. The purpose of these changes is to move rules pertaining to the department's oversight of railroad crossings from 43 TAC Chapter 25, Traffic Operations, to 43 TAC Chapter 7, Rail Facilities, to revise the statutory citations contained in the rules, and to update the language of the new rules to make them easier to read and understand. The proposed changes repeal 43 TAC §§25.70 - 25.76 and simultaneously add new sections which will be in Chapter 7, new Subchapter F, Railroad Grade Crossings. Current §25.70, Purpose, provides no information in addition to the subchapter heading and has not been revised as a part of new Subchapter F, Chapter 7, because it is unnecessary.

New §7.101, Definitions, essentially contains the definitions that are in current §25.71 that are necessary for new Chapter 7, Subchapter F, Railroad Grade Crossings. A few of the definitions in §25.71 have been integrated into the substantive provisions of the subchapter. Several of the definitions that were in §25.71 are used only in one of the new sections and, therefore, have been moved to the section in which they are used. A new definition of "active warning device" has been added to new §7.101. This definition is based on the definitions of "active warning device" contained in Transportation Code, §471.004 and "warning signal" contained in Transportation Code, §471.005 and combines the definitions of "active warning device," "warning device," and "warning signal" that were contained in current §25.71. The subject matters of both Transportation Code, §471.004 and §471.005 are covered in Chapter 7, new Subchapter F. Those sections use different terms to describe the same type of warning device. New §7.101 contains the elements used in the definition of "warning signal" from Transportation Code, §471.005 for the definition of the new term "active warning device."

New §7.102, Warning Sign Visibility at Railroad Grade Crossings, is substantively the same as current §25.73. The statutory reference has been updated. The definition of "local jurisdiction" contained in current §25.71(9) has been integrated into the wording of new §7.102(e)(2) and that definition has been deleted as unnecessary. The new section clarifies that the Texas Manual on Uniform Traffic Control Devices provides the standard currently used by the department and railroads for the installation and use of the retro-reflective material on the crossbuck sign assemblies rather than the information provided by Appendix A to current §25.73. Appendix A and references to it have been deleted in new §7.102.

New §7.103, Dismantling Active Warning Devices at Railroad Grade Crossings, is substantively the same as current §25.72. The section has been reorganized and the statutory reference contained in the section has been updated. The definitions of "active rail line" contained in current §25.71(1) and "salvage value" contained in current §25.71(19) have been moved to new §7.103 as substantive provisions and those definitions have been deleted as unnecessary. New §7.103 clarifies that an appeal of the denial of a permit to remove an active warning device must be sent to the director of the department's rail division.

New §7.104, Maintenance of Railroad Underpasses, is substantively the same as current §25.74. The definition of "railroad underpass" has been moved to this section because it is not used elsewhere. The definition of "railroad overpass" in current §25.71 is not used in the new rules and has been deleted.

New §7.105, Spur Tracks Crossing Existing Highways, is substantively the same as current §25.75. Under both provisions, if the department allows a spur track grade crossing on a roadway, the person requesting the crossing is required to pay all costs of crossing pavement, highway adjustment, and crossing warning protection. New §7.105(c) clarifies that crossing warning protection includes active warning devices that the department considers to be appropriate for the crossing.

New §7.106, Crossing and Maintenance of Highway-Railroad Grade Crossings, is substantively the same as current §25.76. Subsection (c) clarifies that full-depth concrete panels rather than full depth timber pavement is the current standard for crossings.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years in which the new sections as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the new sections.

William E. Glavin, P.E., Director, Rail Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the new sections.

PUBLIC BENEFIT AND COST

Mr. Glavin has also determined that for each year of the first five years in which the sections are in effect, the public benefit anticipated as a result of enforcing or administering the new sections will be better organization of the department's rules and a clear statement of the policies and procedures governing the department's projects and statutory responsibilities at railroad crossings. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed new §§7.101 - 7.106 may be submitted to William E. Glavin, P.E., Director, Rail Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on August 13, 2012. In accordance with Transportation Code, §201.811(a)(5), a person who submits comments must disclose, in writing with the comments, whether the person does business with the department, may benefit monetarily from the proposed new sections, or is an employee of the department.

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §471.004, which requires the department to adopt rules governing the installation and maintenance of reflecting material at grade crossings, and Transportation Code, §471.005, which authorizes the department to adopt rules related to the dismantling of warning signals at a grade crossing on an active rail line and to define "active rail line."

CROSS REFERENCE TO STATUTE

Transportation Code, §471.004 and §471.005.

§7.101. Definitions.

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

(1) Active warning device--A traffic control device that is activated by the approach or presence of a train and warns motorists of the approach or presence of the train. The term includes a flashing light signal, automatic gate, or similar device.

(2) Crossbuck--A standard highway-rail grade crossing sign designated as Number R15-1, and described in the Texas Manual on Uniform Traffic Control Devices.

(3) Department--The Texas Department of Transportation.

(4) District--One of the 25 geographical areas in which the department conducts its primary work activities.

(5) Grade crossing--The intersection of a railroad and a public roadway at grade.

(6) Person--An individual, corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, or any other legal entity.

(7) Railroad company--A business operating and maintaining rail transportation of freight or passengers.

(8) Retroreflectorized material--Material that reflects light back in the direction of the light source.

§7.102. Warning Sign Visibility at Railroad Grade Crossings.

(a) Purpose. This section provides the guidelines and specifications for the installation and maintenance of reflecting material at all public railroad grade crossings that are not protected by active warning devices, as required by Transportation Code, §471.004.

(b) Installation.

(1) The department shall affix retroreflectorized material to the back of crossbucks and support posts at all public railroad grade crossings that are not protected by active warning devices in a manner that reflects light from vehicle headlights to focus attention on the presence of such a crossing.

(2) Each railroad company owning or operating a grade crossing that is not protected by an active warning device shall permit, by written agreement, department personnel to enter railroad company property at that crossing to affix retroreflectorized material as required under paragraph (1) of this subsection.

(3) All new installations or replacements of crossbucks and supports must meet the design standards and retroreflectorized material requirements of the department and the Texas Manual on Uniform Traffic Control Devices for Streets and Highways that are applicable at the time of the installation or replacement, as appropriate. The design standards and retroreflectorized material requirements are available free of charge on request from the department at: Texas Department of Transportation, Rail Division, 125 East 11th Street, Austin, Texas 78701-2483.

(c) Maintenance. Subject to subsections (d) and (e) of this section, the maintenance of crossbucks, support posts, and retroreflectorized material is the responsibility of the railroad company owning or operating the crossing.

(d) Initial cost. The initial cost of affixing the retroreflectorized material will be paid from money appropriated to the department for the purpose of installing safety devices at public grade crossings.

(e) Maintenance costs. The costs of maintaining the retroreflectorized material installed under this section is the responsibility of:

(1) the department if the crossing is on a public roadway that is designated as part of the state highway system; or

(2) the city or county government that is responsible for the maintenance of the public roadway if the crossing is on a public roadway that is not designated as part of the state highway system.

§7.103. Dismantling Active Warning Devices at Railroad Grade Crossings.

(a) Purpose. This section implements Transportation Code, §471.005, which provides that a person may not dismantle an active warning device at a grade crossing on an active rail line, if any part of the cost of the active warning device was originally paid from public funds, unless the person:

(1) obtains a permit from the governmental entity that maintains the roadway at the intersection with the rail line; and

(2) pays to that governmental entity an amount equal to the present salvage value of the active warning device, as determined by the governmental entity.

(b) Exception. This section does not apply to a railroad company that is classified as a Class I or Class II railroad by the Surface Transportation Board.

(c) Active rail line. For the purposes of this section, "active rail line" refers to any railroad tracks that are:

(1) classified by the United States Department of Transportation to carry freight or passenger trains; and

(2) currently being used and maintained by a railroad company.

(d) Request for determination. A person desiring to dismantle an active warning device at a grade crossing may submit to the district office of the district in which the warning device is located a request for the department to determine:

(1) which governmental entity is responsible for maintaining the roadway at which the warning device is located; and

(2) whether any part of the cost of the warning device was originally paid from public funds.

(e) Permit application. An applicant for a permit to dismantle an active warning device located at the intersection of a rail line with a roadway maintained by the department must submit an application, on a form prescribed by the department, to the district office of the district in which the device is located. The application must be accompanied by a statement that justifies the request. If the applicant is a corporation, the application must be accompanied by a resolution from the board of directors certifying the justification.

(f) Conditional approval. The district engineer of the district in which the active warning device is located will approve the application, conditioned on payment of salvage value of the equipment, if, based on information provided in the permit application and the accompanying justification and after considering the factors set out by subsection (g) of this section, the district engineer determines that removal of the active warning device would not adversely affect public safety.

(g) Factors. In determining if removal of the active warning device would adversely affect public safety, the district engineer will consider:

(1) the current and projected average daily vehicle traffic using the grade crossing;

(2) the nature or type of vehicle traffic using the grade crossing;

(3) the total number and speed of trains conducted through the grade crossing daily;

(4) the nature or type of train operations conducted through the grade crossing;

(5) the sight distance in each quadrant on the roadway approaches to the grade crossing; and

(6) the history of crashes at the grade crossing, including crashes in which trains were involved and in which trains were not involved.

(h) Salvage value. After conditional approval of an application under subsection (f) of this section, the department will determine and inform the applicant of the salvage value of the active warning device. The salvage value is the total monetary value that is expected to be derived from the device proposed to be dismantled plus any material that is necessary for the device's operation. The salvage value includes:

(1) the depreciated value of:

(A) reusable electrical equipment, such as signal controllers, relays, rectifiers, and batteries;

(B) equipment, such as signal heads, lenses, signal hoods and backgrounds, light bulbs, crossbuck signs, gate arm mechanisms, gate arms, lights, and counterweights; and

(C) track circuit equipment, such as termination shunts, capacitors, chokes, tuned joint couplers, and insulated joints; and

(2) the scrap value of items described by paragraph (1) of this subsection and other components, such as signal masts or cantilevers, gate mechanisms, counterweights, signal cabins, and signal cases if there is no reasonable prospect of the sale of those items.

(i) Permit issuance. The department will issue a permit for removal of the active warning device after the department receives an amount equal to the salvage value of the device.

(j) Appeals.

(1) An applicant for a permit under this section may appeal to the director of the department's rail division:

(A) the denial of a permit under this section; or

(B) the amount of the salvage value of the device determined under subsection (h) of this section.

(2) An applicant may appeal an adverse decision of the director of the department's rail division under paragraph (1) of this subsection by filing a petition for an administrative hearing under 43 TAC §§1.21, et seq. (relating to Procedures in Contested Case).

§7.104. Maintenance of Railroad Underpasses.

(a) Definition. In this section, "railroad underpass" means a grade separated structure that allows a roadway to cross under a railroad track.

(b) Maintenance responsibilities. The department will pay for the maintenance of railroad underpass substructure units, which consist of the piers, abutments, and wing walls, but exclude any existing timber substructure for approach spans. A railroad company shall pay for the maintenance of the railroad underpass superstructure, including the beams, bearings, deck, waterproofing, and track structure, except as provided in subsection (c) of this section.

(c) Payment for repair of damage to superstructure by highway traffic. If a railroad underpass superstructure is damaged by highway traffic, the department will pay the cost of repairs to the extent agreed to by the representative of the railroad company and the district engineer of the district in which the underpass is located. On notification by the railroad company, the department will prepare an agreement for execution and a job set up based on the estimated cost of repairs. The repair work will be performed by railroad forces or under contract, as agreed on by the railroad representative and the district engineer. In an extreme emergency, the railroad company, on approval of the district engineer, may undertake the work before the department and the railroad company execute a formal agreement to cover the proposed repairs. However, the department will not pay for work that is undertaken before the district engineer issues a work order.

(d) Applicability limitations. The provisions of this section related to the maintenance of underpass substructure units and the assumption of costs for repair of damage to superstructure caused by highway traffic, apply only to underpass structures constructed or reconstructed after October 28, 1960.

§7.105. Spur Tracks Crossing Existing Highways.

(a) Grade crossing by spur rail line. Grade crossing of any highway or road by a railroad spur track is discouraged.

(b) Requirements for major routes. The department will allow a spur track crossing on an interstate highway or other major route only with initial separation of grades. The person requesting the crossing shall pay the total cost of constructing and maintaining such a grade separation.

(c) Requirements for other roadways. The department may allow a spur track grade crossing on a roadway, other than a roadway to which subsection (b) of this section applies, including a frontage road if technically feasible, if the department determines that the anticipated volumes of train and vehicular traffic and other pertinent factors indicate that the crossing will not be unduly hazardous to the traveling public. If a grade crossing is allowed, the person requesting the crossing shall pay all costs of crossing pavement, highway adjustment, and crossing warning protection, including active warning devices that the department considers appropriate for the crossing. Additionally, the department may specify conditions, such as changes in conditions or volumes of vehicular or train traffic, that will require future separation of grades, at no expense to the state.

§7.106. Crossing and Maintenance of Highway-Railroad Grade Crossings.

(a) Grade crossings. The department, in the expansion, construction, reconstruction, and maintenance of the state highway system, finds it necessary from time to time to cross the tracks of a railroad at grade or to improve existing highway-railroad grade crossings. This section applies to those grade crossings.

(b) Responsibilities. The railroad companies shall furnish to the department, free of cost, the necessary right of way, easement, or license for such a grade crossing. In recognition of those rights, the department will pay from available revenues the cost of construction and reconstruction of a highway or farm-to-market road at grade crossings with an existing railroad. The railroad company shall maintain the grade crossing surface over the tracks of the railroad from one end of the railroad ties to the other end. On a new farm-to-market road project, a county is responsible for the clearing of the right of way, including utility line adjustments and cattle guard adjustments, for the segment of the road located in the county.

(c) Crossing pavement on existing crossings. On existing highway-railroad grade crossings, the department will pay, from available funds, for renewing the crossing approaches and crossing surface to provide a satisfactory riding surface for highway traffic. Asphalt or asphaltic concrete crossings are generally not acceptable. Full-depth concrete panels extending to the ends of railroad ties for the full crown width of the highway are the standard. Full-depth timber pavement or other more durable materials will be used if the railroad company and the department agree to their use.

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

Filed with the Office of the Secretary of State on June 29, 2012.

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Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: August 12, 2012
For further information, please call: (512) 463-8683

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CHAPTER 9. CONTRACT AND GRANT MANAGEMENT

SUBCHAPTER A. GENERAL

43 TAC §9.2, §9.6

The Texas Department of Transportation (department) proposes amendments to §9.2 and §9.6, concerning the contract claim procedure for comprehensive development agreements and certain design-build contracts.

EXPLANATION OF PROPOSED AMENDMENTS

Section 9.6 concerns contract claims under a comprehensive development agreement (CDA). That section authorizes the department and developer to use a dispute resolution board to resolve disputes. The rule sets forth mandatory procedures that must be in the CDA (if the parties elect to use a procedure authorized by §9.6), and discretionary procedures that may be used. Generally, the contract claim procedure provides for resolution of disputes by a dispute resolution board. A decision by a dispute resolution board may be overturned only if there is a dispute resolution board error. In the CDA, the parties may limit this to narrow issues, for example, whether the decision was procured by fraud. Otherwise, the decision by the dispute resolution board is final.

The amendments to §9.2 and §9.6 will allow the department to use the contract claim procedure authorized in §9.6 to resolve claims and disputes arising under a design-build contract entered into under Transportation Code, Chapter 223, Subchapter F, provided the highway project constructed, expanded, extended, maintained, rehabilitated, altered, or repaired under the design-build contract has estimated total project costs of $500 million or more.

The ability of design-build contractors to effectively raise construction financing will be aided by an administrative process for dispute resolution under which the decision maker is not a party to the design-build contract, and that produces finality of decision within a reasonable time. The ability to use this procedure will assist the department in attracting meaningful proposals and in generating competition for design-build projects.

Section 9.2 is amended to provide that a claim under a design-build contract, as defined in §9.6 may be processed under that section if the parties agree to do so in the CDA or design-build contract, or if the design-build contract does not specify otherwise. However, if the design-build contract specifies that a claim procedure authorized by §9.6 applies, then any claim arising under the design-build contract will be processed and resolved in accordance with the claim procedure authorized by §9.6 and not by that section.

Section 9.6 is amended to provide that the executive director of the department may enter into a design-build contract containing a claim procedure and provisions authorized by that section. Section 9.6 defines a design-build contract as an agreement with a design-build contractor for a highway project with estimated total project costs of $500 million or more.

If a design-build contract does not contain a claim procedure authorized by §9.6, either by express reference to that section or by inclusion of provisions required or permitted by that section, then a claim under the agreement will be processed and resolved under §9.2.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years in which the amendments as proposed are in effect, there will be fiscal implications for state government as a result of enforcing or administering the amendments. The fiscal implications cannot be quantified as those impacts are dependent on the number of design-build contracts entered into by the department that use the dispute resolution procedure authorized by §9.6, the number of claims that need to be heard by a disputes board, if any, and the length of time such hearings might last. There will be no fiscal implications for local governments as a result of enforcing or administering the amendments.

Ed Pensock, P.E., Director, Strategic Projects Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Mr. Pensock has also determined that for each year of the first five years in which the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be to assist the department in attracting meaningful proposals and in generating competition for design-build projects. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no cost impact on design-build contractors. The rule applies only if the design-build contractor agrees to the use of a disputes board. If a contract dispute arises, the design-build contractor would incur costs to participate in the proceeding whether it is under §9.2 or §9.6. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §9.2 and §9.6 may be submitted to Ed Pensock, P.E., Director, Strategic Projects Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on August 13, 2012. In accordance with Transportation Code, §201.811(a)(5), a person who submits comments must disclose, in writing with the comments, whether the person does business with the department, may benefit monetarily from the proposed amendments, or is an employee of the department.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §201.112, which allows the commission by rule to establish procedures for the informal resolution of a claim arising out of a contract under the statutes set forth in that section.

CROSS REFERENCE TO STATUTE

Transportation Code, §201.112 and Transportation Code, Chapter 223, Subchapter F.

§9.2. Contract Claim Procedure.

(a) Applicability. A claim shall satisfy the requirements in paragraphs (1) - (3) of this subsection.

(1) The claim is under a contract entered into and administered by the department, acting in its own capacity or as an agent of a local government, under one of the following statutes:

(A) Transportation Code, §22.018 (concerning the designation of the department as agent in contracting and supervising for aviation projects);

(B) Transportation Code, §391.091 (concerning erection and maintenance of specific information logo, major area shopping guide, and major agricultural interest signs);

(C) Transportation Code, Chapter 223 (concerning bids and contracts for highway improvement projects), subject to the provisions of subsection (c) of this section; or

(D) Government Code, Chapter 2254, Subchapters A and B (concerning professional or consulting services).

(2) The claim is for compensation, or for a time extension, or any other remedy.

(3) The claim is brought by a prime contractor.

(b) Pass-through claim; claim and counter claim.

(1) A prime contractor may make a claim on behalf of a subcontractor only if the prime contractor is liable to the subcontractor on the claim.

(2) Only a prime contractor may submit a claim to begin a claim proceeding under this section. After a claim proceeding has begun the department may make a counter claim.

(3) This section does not abrogate the department's authority to file a claim in a court of competent jurisdiction. The procedure for the department to file a claim in a court of competent jurisdiction, including the deadline to file a claim, is set by other law.

(c) Claim concerning comprehensive development agreement or certain design-build contracts. A claim under a comprehensive development agreement (CDA) entered into under Transportation Code, Chapter 223, Subchapter E, or under a design-build contract, as defined in §9.6 of this subchapter (relating to Contract Claim Procedure for Comprehensive Development Agreements and Certain Design-Build Contracts), may be processed under this section if the parties agree to do so in the CDA or design-build contract, or if the CDA or design-build contract does not specify otherwise. However, if the CDA or design-build contract specifies that a claim procedure authorized by §9.6 of this subchapter [~~chapter (relating to Contract Claim Procedure for Comprehensive Development Agreement)~~] applies, then any claim arising under the CDA or design-build contract shall be processed and resolved in accordance with the claim procedure authorized by §9.6 of this subchapter [~~chapter~~] and not by this section.

(d) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise, except that when used in subsection (c) of this section, the terms claim, comprehensive development agreement, [~~and~~] CDA, and design-build contract shall have the meanings given such terms stated in §9.6 of this subchapter [~~chapter~~].

(1) Claim--A claim for compensation, for a time extension, or for any other remedy arising from a dispute, disagreement, or controversy concerning respective rights and obligations under the contract.

(2) Commission--The Texas Transportation Commission.

(3) Committee--The Contract Claim Committee.

(4) Department--The Texas Department of Transportation.

(5) Department office--The department district, division, or office responsible for the administration of the contract.

(6) Department office director--The chief administrative officer of the responsible department office; the officer shall be a district engineer, division director, or office director.

(7) District--One of the 25 districts of the department.

(8) Executive director--The executive director of the Texas Department of Transportation.

(9) Prime contractor--An individual, partnership, corporation, or other business entity that is a party to a written contract with the state of Texas which is entered into and administered by the department under Transportation Code, §22.018, §391.091, Chapter 223, or Government Code, Chapter 2254, Subchapters A and B.

(10) Project--The portion of a contract that can be separated into a distinct facility or work unit from the other work in the contract.

(e) Contract claim committee. The executive director shall name the members and chairman of a committee or committees to serve at the executive director's pleasure. The chairman may add members to the committee, including one or more district engineers who will be assigned to the committee on a rotating basis, with a preference, if possible, for district engineers of districts that do not have a current contractual relationship with the prime contractor involved in a contract claim.

(f) Negotiated resolution. To every extent possible, disputes between a prime contractor and the department's project engineer should be resolved during the course of the contract.

(g) Procedure.

(1) Exclusive procedure. Except as provided in subsection (c) of this section, a prime contractor shall file a claim under the procedure in this subsection. A claim filed by the prime contractor must be considered first by the committee before the claim is considered in a contested case hearing.

(2) Filing claim.

(A) The prime contractor shall file a claim after completion of the contract or when required for orderly performance of the contract. For a claim resulting from the enforcement of a warranty, a prime contractor shall file the claim no later than one year after expiration of the warranty period. For all other types of claims, a prime contractor shall file the claim no later than one year after the earlier of the following:

(i) the department issues notice to the contractor that it is in default, or the department terminates the contract; or

(ii) the department issues final acceptance of the project that is the subject of the contract.

(B) To file a claim, a prime contractor shall file a contract claim request and a detailed report that provides the basis for the claim. The detailed report shall include relevant facts of the claim, cost or other data supporting the claim, a description of any additional compensation requested, and documents supporting the claim. The prime contractor shall file the claim with the department's construction division, the department engineer under whose administration the contract was or is being performed, or the committee.

(C) A claim filed by a prime contractor shall include a certification as follows: I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the contractor believes the department is liable; and that I am duly authorized to certify the claim on behalf of the contractor.

(D) A defective certification shall not deprive the department of jurisdiction over the claim. Prior to the entry by the department of a final decision on the claim the department shall require a defective certification to be corrected.

(E) The construction division or department engineer shall forward the contract claim request and detailed report to the committee.

(F) The deadline for the department to file a counter claim is 45 days before the committee holds an informal meeting under paragraph (3) of this subsection.

(3) Evaluation of claim by the committee.

(A) The committee's responsibility is to gather information, study the relevant issues, and meet informally with the prime contractor if requested. The committee shall attempt to resolve the claim.

(B) The committee shall secure detailed reports and recommendations from the responsible department office, and may confer with any other department office deemed appropriate by the committee. The committee shall give the prime contractor the opportunity to submit a responsive report and recommendation concerning a counter claim filed by the department.

(C) The committee shall afford the prime contractor an opportunity for a meeting to informally discuss the disputed matters and to provide the prime contractor an opportunity to present relevant information and respond to information the committee has received from the department office. Proceedings before the committee are an attempt to mutually resolve a claim without litigation and are not admissible for any purpose in a formal administrative hearing provided in subparagraph (D)(ii) of this paragraph. All oral communications, reports, or other written documentation prepared by department staff in connection with the analysis of a claim are part of the attempt to mutually resolve a claim without litigation, and are also not admissible for any purpose in a formal administrative hearing provided in subparagraph (D)(ii) of this paragraph.

(D) The committee chairman shall give written notice of the committee's decision on the claim to the department and prime contractor. The department and prime contractor are presumed to receive the decision three days after it is sent by United States mail.

(i) If the prime contractor does not object to the committee's decision, the prime contractor shall file a written statement with the committee's chairman stating that the prime contractor does not object. The prime contractor shall file the statement no later than 20 days after receipt of the committee's decision. The chairman shall then prepare a document showing the settlement of the claim including, when required, payment to the prime contractor, and the prime contractor's release of all claims under the contract. The prime contractor shall sign it. The executive director may approve the settlement, or may request the commission to approve the settlement by issuance of an order. The executive director shall then implement the resolution of the claim. If contemplated in the committee's decision, the executive director shall expend funds as specified in the decision. If contemplated in the committee's decision, the executive director shall order the prime contractor to make payment to the department.

(ii) If the prime contractor objects to the committee's decision the prime contractor shall file a petition with the executive director no later than 20 days after receipt of the committee's decision requesting an administrative hearing to litigate the claim under the provi-

sions of §§1.21 et seq. of this title (relating to Procedures in Contested Cases).

(iii) If the prime contractor fails to file a written petition under clause (ii) of this subparagraph within 20 days of receipt of the committee's decision, the prime contractor waives his right to a contested case hearing. All further litigation of claims on the project or contract by the prime contractor shall be barred by the doctrines of issue and claim preclusion. The chairman shall then prepare an order implementing the resolution of the claim under the committee's decision, and stating that further litigation on the claim is prohibited. The executive director shall then issue the order and implement the resolution of the claim. If contemplated in the committee's decision, the executive director shall expend funds as specified in the decision. If contemplated in the committee's decision, the executive director shall order the prime contractor to make payment to the department.

(4) Decision after contested case hearing. This paragraph applies if a contested case hearing has been held on a claim. The administrative law judge's proposal for decision shall be submitted to the executive director for adoption. The executive director may change a finding of fact or conclusion of law made by the administrative law judge or may vacate or modify an order issued by the administrative law judge. The executive director shall provide a written statement containing the reason and legal basis for any change.

(5) This section does not abrogate the department's authority to enforce in a court of competent jurisdiction a final department order issued under the section.

(h) Claim forfeiture. A claim against the department shall be forfeited to the department by any person who corruptly practices or attempts to practice any fraud against the department in the proof, statement, establishment, or allowance thereof. In such cases the department shall specifically find such fraud or attempt and render judgment of forfeiture. This subsection applies only if there is clear and convincing evidence that a person knowingly presented a false claim for the purpose of getting paid for the claim.

(i) Relation of contract claim proceeding and sanction proceeding.

(1) Except as provided in paragraphs (2) and (3) of this subsection, the processing of a contract claim under this section is a separate proceeding and shall not affect the executive director's assessment of a contract sanction under Subchapter G of this chapter (relating to Contractor Sanctions).

(2) If a contested issue arises that is relevant both to a contract claim proceeding and a sanction proceeding concerning the same contract, the issue shall be resolved in the proceeding that the executive director refers first for a contested case hearing under Chapter 1, Subchapter E of this title (relating to Procedures in Contested Cases). If the issue is decided in the first proceeding that decision shall apply to and be binding in all subsequent department proceedings.

(3) This paragraph applies to a contract under which the parties agreed to submit questions which may arise to the decision of a department engineer. If a dispute under the contract leads to a contract claim proceeding or sanction proceeding, the engineer's decision shall be upheld unless it was based on fraud, misconduct, or such gross mistake as would imply bad faith or failure to exercise an honest judgment.

§9.6. Contract Claim Procedure for Comprehensive Development Agreements and Certain Design-Build Contracts [~~Agreement~~].

(a) Purpose. This section concerns processing and resolution of a claim under Transportation Code, §201.112 that arises under a comprehensive development agreement (CDA) or design-build contract.

(b) Applicability.

(1) The executive director may enter into a CDA or design-build contract containing a claim procedure and provisions authorized by this section. When a claim arises under a CDA or design-build contract containing a claim procedure authorized by this section, the requirements of this section apply, §9.2 of this subchapter [~~chapter~~] (relating to Contract Claim Procedure) does not apply, and the parties shall follow the claim procedure contained in the CDA or design-build contract and shall be bound by the outcome of the claim procedure. If a CDA or design-build contract does not contain a claim procedure authorized by this section [~~§9.6 of this chapter~~], either by express reference to this section or by inclusion of provisions required or permitted by this section, then a claim under the agreement shall be processed and resolved under §9.2 of this subchapter [~~chapter~~].

(2) The claim procedure and provisions authorized by this section may be applied to claims that arise under the CDA or design-build contract, related agreements that collectively constitute a CDA or design-build contract, or other agreements entered into with or for the benefit of the department in connection with the CDA or design-build contract. A CDA or design-build contract shall identify the related agreements and any other agreements to which the claim procedure and provisions apply.

(3) This section and §9.2 of this subchapter [~~chapter~~] do not affect or impede the department's or the developer's or design-build contractor's rights to seek judicial relief in connection with the following types of actions or proceedings, and the claim procedures and provisions in this section or in §9.2 of this subchapter [~~chapter~~] do not apply to such actions:

(A) equitable relief that the department is permitted to seek to the extent allowed by law;

(B) mandamus action that a developer or design-build contractor is permitted to bring against the department or the executive director under Government Code, §22.002(c);

(C) mandamus relief sought by a developer under Transportation Code, §223.208(e) (relating to termination compensation and related security obligations); or

(D) other matters or disputes expressly excluded from the dispute resolution procedures authorized by this section, as specified in the CDA or design-build contract or other related agreement between the department and the developer or design-build contractor that is part of the CDA or design-build contract.

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

(1) Claim--A claim for compensation, or other dispute, disagreement, or controversy concerning respective rights, obligations, and remedies under the CDA or design-build contract, or under related agreements that collectively constitute a CDA or design-build contract or other agreements entered into with or for the benefit of the department in connection with the CDA or design-build contract, including any alleged breach or failure to perform.

(2) Comprehensive development agreement (CDA)--An agreement with a developer that, at a minimum, provides for the design and construction, reconstruction, extension, expansion, or improvement of a project described in Transportation Code, §223.201(a), and may also provide for the financing, acquisition, maintenance, or operation of such a project. A CDA is also authorized under Transportation Code, §91.054 (rail facilities). A CDA includes related agreements that collectively constitute a CDA or other agreements

entered into with or for the benefit of the department in connection with the CDA.

(3) Department--The Texas Department of Transportation.

(4) Design-build contract--An agreement with a design-build contractor for a highway project with estimated total project costs of $500 million or more that includes both design and construction services for the construction, expansion, extension, related capital maintenance, rehabilitation, alteration, or repair of the highway project.

(5) Design-build contractor--A partnership, corporation, or other legal entity or team that enters into a design-build contract with the department.

(6) [~~(4)~~] Developer--The private entity or entities that enter into a CDA with the department.

(7) [~~(5)~~] Disputes board--A group of one or more individuals appointed under the terms of a CDA or design-build contract to fairly and impartially consider and decide a claim between the department and a developer or design-build contractor.

(8) [~~(6)~~] Disputes board error--One or more of the following actions:

(A) a disputes board acted beyond the limits of its authority established under subsection (b)(3) of this section;

(B) a disputes board failed, in any material respect, to properly follow or apply the procedure for handling, hearing and deciding a claim established under the CDA or design-build contract and the failure prejudiced the rights of a party;

(C) a disputes board decision was procured by, or there was evident partiality by a disputes board member due to a conflict of interest (which may be defined in the CDA or design-build contract), misconduct (which may be defined in the CDA or design-build contract), corruption, or fraud; or

(D) any other error that the parties agree may be the subject of a contested case hearing, as set out in the CDA or design-build contract.

(9) [~~(7)~~] Executive director--The executive director of the Texas Department of Transportation.

(10) [~~(8)~~] Party--The department, or a developer or design-build contractor who has entered into a CDA or design-build contract with the department. The department and the developer or design-build contractor are together referred to as the "parties."

(11) [~~(9)~~] SOAH--State Office of Administrative Hearings.

(d) Mandatory requirements. A CDA or design-build contract that authorizes the use of a claim procedure authorized by this section shall include (or incorporate by reference) provisions substantially consistent with the provisions in this subsection, but such provisions need not apply to claims excluded from the claim procedure under subsection (b)(3) of this section.

(1) A claim under the CDA or design-build contract that is not resolved by the informal dispute resolution process set forth in the CDA or design-build contract shall be referred to a disputes board for rendering of a disputes board decision on the claim.

(2) The processing of a claim shall include a mandatory informal dispute resolution process, such as mediation, and a mandatory dispute resolution procedure using a disputes board.

(3) The party making a claim shall include in its notice of the claim a certification by an authorized or designated representative to the effect that:

(A) the claim is made in good faith;

(B) to the current knowledge of the party, except as to matters stated in the notice of claim as being unknown or subject to discovery, the supporting data is reasonably believed by the party to be accurate and complete, and the description of the claim contained in the certification accurately reflects the amount of money or other right, remedy, or relief to which the party asserting the claim reasonably believes it is entitled; and

(C) the representative is duly authorized to execute and deliver the certificate on behalf of the party.

(4) The certification required under paragraph [~~subsection (d)~~](3) of this subsection [~~section~~], if defective, shall not deprive a disputes board of jurisdiction over the claim. Prior to the entry by the disputes board of a final decision on the claim, the disputes board shall require a defective certification to be corrected.

(e) Permissive requirements. A CDA or design-build contract that provides for a claim procedure authorized by this section may include (or incorporate by reference) any or all of the provisions in this subsection, or provisions substantially consistent with them, and other terms and conditions regarding claim resolution that are not contrary to the mandatory requirements of this section.

(1) The executive director shall adopt the decision of a disputes board as a ministerial act, subject to a party's right to request a contested case hearing in accordance with the terms of the CDA or design-build contract as to whether disputes board error occurred.

(2) A decision by a disputes board, upon completion of the procedure required in Transportation Code, §201.112, this section, and in the CDA or design-build contract, is final, conclusive, binding upon, and enforceable against the parties, subject to any appeals allowed by the CDA or design-build contract or this section.

(3) A disputes board, upon issuing a decision on a claim, is authorized to direct that an award be paid from the proceeds of any trust or other pool of project funds that the CDA or design-build contract provides shall be available for payment of such claims.

(4) The executive director's discretion or actions in connection with the resolution of a claim are limited or may be purely ministerial in certain circumstances, including:

(A) adoption of the disputes board's decision absent disputes board error;

(B) referral of a disputes board decision to SOAH to determine whether disputes board error occurred; and

(C) issuance of a final order based on the SOAH administrative law judge's proposal for decision.

(5) Certain claims may be categorized and treated by the parties as expedited claims, and informal resolution procedures shall be expedited for such claims.

(6) Certain claims may be categorized and treated by the parties as small claims, and informal resolution procedures shall be expedited for such claims.

(7) The parties may execute a related disputes board agreement, or similar agreement, which shall be part of the CDA or design-build contract and which may govern all aspects of the creation of and procedures to be followed by a disputes board.

(8) The evidence presented to a SOAH administrative law judge in a hearing regarding a claim, and to the Travis County District Court in any appeal, may include: the disputes board's written findings of fact, conclusions of law, and decision; any written dissenting findings, recommendation, or opinions of a disputes board member; all submissions to the disputes board by the parties; and an independent engineer's written evaluations, opinions, findings, reports, recommendations, objections, decisions, certifications, or other determinations, if any, delivered to the parties pursuant to the CDA or design-build contract and related to the claim under consideration.

(9) Certain decisions, orders, or determinations of the executive director may be deemed to have been issued as of a certain date, or after a prescribed number of days, and setting out the parameters of the deemed decision, order, or determination.

(10) The parties are authorized and required to comply with all or certain categories of interim orders of the disputes board, including discovery and procedural orders.

(11) Except as agreed to by the parties in writing, a disputes board shall have no power to alter or modify any terms or provisions of the CDA or design-build contract, or to render any award that, by its terms or effects, would alter or modify any term or provision of the CDA or design-build contract. Notwithstanding the prior sentence, a disputes board decision that contains error in interpretation or application of a term or provision of the CDA or design-build contract but does not otherwise purport to alter or modify terms or provisions of the CDA or design-build contract may not be appealed on grounds of such error; and such error does not deprive the disputes board of power or authority over the claim.

(12) A developer's claim for termination compensation, or to enforce the department's security obligations that secure payment of termination compensation, is not to be resolved under any dispute resolution procedure in the CDA. Rather, a developer may exercise its rights under Transportation Code, §223.208(e) (relating to Terms of Private Participation) by seeking mandamus against the department.

(13) At all times during the processing of a contract claim, the developer or design-build contractor and its subcontractors shall continue with the performance of the work and their obligations, including any disputed work or obligations, diligently and without delay, in accordance with the CDA or design-build contract, except to the extent enjoined by order of a court or otherwise ordered or approved by the department in its sole discretion.

(f) Pass-through claim. A CDA or design-build contract may provide that a developer or design-build contractor who is a party to a CDA or design-build contract with the department may make a claim on behalf of a subcontractor. In order to make such a claim the developer or design-build contractor must be liable to the subcontractor on the claim.

(g) Mandatory requirements concerning disputes board. A CDA or design-build contract that authorizes the use of a disputes board shall include (or incorporate by reference) provisions substantially consistent with the provisions in this subsection.

(1) A disputes board is not a supervisory, advisory, or facilitating body and has no role other than as expressly described in the CDA or design-build contract, including, if applicable, any disputes board agreement.

(2) A disputes board member shall not have a financial interest in the CDA or design-build contract, in any contract or the facility that is the subject of the CDA or design-build contract, or in the outcome of any claim decided under the CDA or design-build contract, except for payments to that member for services on the disputes board. Any person appointed as a disputes board member shall disclose to the parties any circumstances likely to give rise to justifiable doubt as to such disputes board member's impartiality or independence, including any bias or any financial or personal interest in the result of the dispute resolution or any past or present relationship with the parties or their representatives, or developer's subcontractors and affiliates.

(3) The scope of a SOAH contested case hearing on an appeal of a disputes board decision is limited solely to whether disputes board error occurred.

(h) Punitive damages. A disputes board shall have no power or jurisdiction to award punitive damages.

(i) Permissive requirements concerning disputes board. A CDA or design-build contract that authorizes the use of a disputes board may include (or incorporate by reference) any or all of the provisions in this subsection, or provisions substantially consistent with them, and other terms and conditions regarding the disputes board that are not contrary to the specific requirements of this section.

(1) Each party shall endeavor to have a standing list of candidates from which to select a disputes board member. The CDA or design-build contract may specify the qualifications to be a board member, the procedure by which a party nominates a person to the list of candidates, and the method by which the other party may review and object to a proposed candidate. All disputes board members are chosen from the list of candidates of the department or of the developer or design-build contractor.

(2) A disputes board conducts its proceedings in accordance with procedural rules specified in the CDA or design-build contract. The disputes board may allow for discovery similar to that allowed under the Texas Rules of Civil Procedure, and the admission of evidence conforming to the Texas Rules of Evidence, but may allow for exceptions to or deviations from such requirements and rules.

(3) The parties may jointly modify the procedure applicable to the disputes board's proceedings, under the provisions of the CDA or design-build contract.

(4) During the period that a disputes board member is serving on a disputes board, neither party may communicate ex parte with that member. A party may not communicate ex parte with a person on its list of candidates to be a disputes board member regarding the substance of a dispute.

(5) Each party is responsible for paying one-half the costs of all facilities, fees, support services costs, and other expenses of a disputes board.

(6) A disputes board does not have the authority to order that one party compensate the other party for attorney's fees and expenses.

(j) Permissive requirements on a contested case hearing. A CDA or design-build contract that authorizes the use of a contract claim procedure authorized by this section may include (or incorporate by reference) any or all of the provisions in this subsection, or provisions substantially consistent with them, and other terms and conditions regarding a contested case hearing that are not contrary to the specific requirements of this section.

(1) The executive director's referral of a developer's request to SOAH for a contested case hearing as to whether a decision by a disputes board was affected by disputes board error is a purely ministerial act.

(2) If a determination is made after a contested case hearing that disputes board error occurred, the dispute shall be remanded to a

disputes board for further consideration, except that if the error is lack of authority to hear the claim, the decision of the disputes board shall be vacated.

(3) The executive director's issuance of a final order following a contested case hearing is a purely ministerial act, and that if by inaction the executive director does not issue a final order within the time frame established by the CDA or design-build contract, then a final order in a form recommended by the administrative law judge shall be deemed to be automatically issued.

(4) As allowed by Government Code, §2001.144 and §2001.145, an order issued by the executive director after a contested case hearing is final on the date issued and no motion for rehearing is required to appeal the final order.

(5) An executive director's order remanding a dispute to a disputes board, or an executive director's order implementing a disputes board decision following a contested case hearing before SOAH, are subject to judicial review under Government Code, Chapter 2001, under the substantial evidence rule. Review is limited to whether disputes board error occurred.

(k) Other department rules on a contested case hearing.

(1) The parties may agree in the CDA or design-build contract to adopt, modify or not follow procedural provisions, deadlines, evidentiary rules, and any other matters set out in Chapter 1, Subchapter E of this title (relating to Procedures in Contested Cases).

(2) In the event of any conflict or difference between the procedures set out in this section or a CDA or design-build contract, and in Chapter 1, Subchapter E of this title, the procedures in this section or the CDA or design-build contract shall govern with respect to any proceeding before SOAH.

(3) In the event of an appeal to SOAH of a disputes board decision:

(A) the department shall present a copy of this section to SOAH as a written statement of applicable rules or policies, under Government Code, §2001.058(c); and

(B) the parties shall request that the administrative law judge modify and supplement SOAH contested case procedures as necessary or appropriate, and consider this section, consistent with 1 TAC §155.3 (relating to Application and Construction of this Chapter).

(C) the parties shall provide the administrative law judge with a stipulation that the substantive provisions, scope of review, and procedural provisions of this section and the CDA or design-build contract shall apply to and govern the contested case proceeding before SOAH, consistent with 1 TAC §155.417(a) [~~§155.39(a)~~] (relating to Stipulations).

(l) Mandamus relief. Nothing in this section shall restrict a developer's or design-build contractor's rights to seek mandamus relief pursuant to Government Code, §22.002(c) if the executive director fails to perform one or more of the ministerial acts set out in this section and included in the CDA or design-build contract as a ministerial act, or any other act specified in the CDA or design-build contract as a ministerial act.

(m) Confidential information.

(1) The parties may agree that, with respect to the mandatory informal dispute resolution process required under subsection (d)(2) of this section, communications between the parties to resolve a dispute, and all documents and other written materials furnished to a party or exchanged between the parties during any such informal resolution procedure, shall be considered confidential and not subject to disclosure by either party.

(2) The parties may agree that with respect to a proceeding before the disputes board, an administrative hearing before an administrative law judge, or a judicial proceeding in court, either or both parties may request a protective order to prohibit disclosure to third persons of information that the party believes is a trade secret, proprietary, or otherwise entitled to confidentiality under applicable law.

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

Filed with the Office of the Secretary of State on June 29, 2012.

TRD-201203415
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: August 12, 2012
For further information, please call: (512) 463-8683

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CHAPTER 25. TRAFFIC OPERATIONS
SUBCHAPTER E. RAILROAD CROSSINGS

43 TAC §§25.70 - 25.76

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

The Texas Department of Transportation (department) proposes the repeal of §§25.70 - 25.76, concerning Railroad Grade Crossings.

EXPLANATION OF PROPOSED REPEALS

In 1998 the rules relating to railroad grade crossings were moved to 43 TAC Chapter 25, Traffic Operations, because at that time the responsibility for railroad crossings was assigned to the Traffic Operations Division of the department. The department's Rail Division, which was established in December 2009, currently has responsibility for the oversight of railroad crossings. The purpose of these changes is to move rules pertaining to the department's oversight of railroad crossings from 43 TAC Chapter 25, Traffic Operations, to 43 TAC Chapter 7, Rail Facilities, to revise the statutory citations contained in the rules, and to update the language of the new rules to make them easier to read and understand. The proposed changes repeal 43 TAC §§25.70 - 25.76 and simultaneously add new sections which will be in Chapter 7, new Subchapter F, Railroad Grade Crossings.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years in which the repeals as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeals.

William E. Glavin, P.E., Director, Rail Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the repeals.

PUBLIC BENEFIT AND COST

Mr. Glavin has also determined that for each year of the first five years in which the sections are in effect, the public benefit anticipated as a result of enforcing or administering the repeals will be better organization of the department's rules and a clear statement of the policies and procedures governing the department's projects and statutory responsibilities at railroad crossings. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed repeal of §§25.70 - 25.76 may be submitted to William E. Glavin, P.E., Director, Rail Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on August 13, 2012. In accordance with Transportation Code, §201.811(a)(5), a person who submits comments must disclose, in writing with the comments, whether the person does business with the department, may benefit monetarily from the proposed changes, or is an employee of the department.

STATUTORY AUTHORITY

The repeals are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §471.004, which requires the department to adopt rules governing the installation and maintenance of reflecting material at grade crossings, and Transportation Code, §471.005, which authorizes the department to adopt rules related to the dismantling of warning signals at a grade crossing on an active rail line and to define "active rail line."

CROSS REFERENCE TO STATUTE

Transportation Code, §471.004 and §471.005.

§25.70. Purpose and Scope.

§25.71. Definitions.

§25.72. Dismantling Warning Signals at Railroad Grade Crossings.

§25.73. Warning Sign Visibility at Railroad Grade Crossings.

§25.74. Maintenance of Railroad Underpasses.

§25.75. Spur Tracks Crossing Existing Highways.

§25.76. Crossing and Maintenance of Highway-Railroad Grade Crossings.

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

Filed with the Office of the Secretary of State on June 29, 2012.

TRD-201203416
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: August 12, 2012
For further information, please call: (512) 463-8683

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CHAPTER 28. OVERSIZE AND OVERWEIGHT VEHICLES AND LOADS
SUBCHAPTER E. VICTORIA COUNTY NAVIGATION DISTRICT PERMITS

43 TAC §§28.40 - 28.47

The Texas Department of Transportation (department) proposes new §§28.40 - 28.47, concerning the permitting of oversize and overweight vehicles and loads on certain state highways located in Victoria County.

EXPLANATION OF PROPOSED NEW SECTIONS

Under Transportation Code, Chapter 623, Subchapter L, the Texas Transportation Commission (commission) has the authority to authorize the Victoria County Navigation District (district) to issue permits for oversize and overweight vehicles on certain roads within the district. The district contacted the department and expressed the desire to obtain the authority needed to issue permits as allowed under current state law. The proposed new sections are necessary to authorize the district to issue permits and to implement and carry out the provisions of Transportation Code, Chapter 623, Subchapter L. These rules add new Subchapter E, which was developed to be consistent with similar optional permitting programs previously established by the commission.

New §28.40 sets out the purpose of Subchapter E, which is to allow the district the authority to issue permits for the movement on roads designated by Transportation Code, §623.232 of oversize or overweight vehicles weighing up to 140,000 pounds.

New §28.41 sets out the applicable definitions used in the subchapter.

New §28.42 provides the powers and duties of the district and the department for the implementation and oversight of the district permit program. Subsection (a) authorizes the issuance of permits and collection of fees and provides the maximum dimensions and gross weight that may be allowed under a permit. Subsection (b) authorizes the department to require a surety bond to pay for the costs of the maintenance of the roadways that are used by the permitted vehicles if the amount of the fees deposited in the state highway fund is not sufficient to cover those costs. The district can prevent recovery on the bond by paying the amount not covered by the fees. The section also covers the verification of permits, the provision of training necessary for the district to issue permits, and the accounting and auditing requirements. Subsection (g) provides the department's authority to ensure that the district complies with applicable law, including the rules in new Subchapter E. Subsection (h) sets out the fee requirements. Subsection (i) requires the district to enter into a contract with the department for the maintenance of roads on which the permitted vehicles will travel. Finally, subsection (j) sets out the district's reporting requirements. The provisions of the section were developed to be in compliance with Transportation Code, Chapter 623, Subchapter L, and to be consistent with similar optional permitting programs previously established.

New §28.43 establishes the eligibility requirements that must be satisfied for the issuance of a permit by the district. The section prohibits the district from issuing a permit to a person or for a vehicle if administrative penalties imposed under Transportation

Code, §623.271 have not been paid. This prohibition is required under Transportation Code, §623.271.

New §28.44 sets out the requirements related to the form and content of the application for a permit and of the permit. The requirements are necessary to comply with Transportation Code, §623.235 and are as consistent as possible with similar optional permitting programs previously established by the department.

New §28.45 provides the permit weight limits for axles that the district must follow as part of the permit program. Requirements and specifications include minimum axle group spacing and maximum permit weight for single and multiple axles.

New §28.46 sets forth movement requirements and restrictions that the district and a permittee must follow as part of the permit program. A permittee is required to carry the issued permit when moving the permitted vehicle and is prohibited under this section from moving an oversize or overweight load if a permit becomes void. A permit is void on issuance if the applicant for the permit gives false or incorrect information and becomes void when the permittee fails to comply with the restrictions or conditions stated in the permit or when the permittee changes or alters the information in the permit. The section provides limitations on the movement of a permitted vehicle because of weather conditions, road work, or time of day. Finally, the section sets out the requirements for types of scales that may be used to weigh permitted vehicles and provides speed restrictions.

New §28.47 provides the records maintenance requirements that the district must follow as part of the permit program.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years in which the sections as proposed are in effect, there will be minimal fiscal implications for state or local governments as a result of authorizing the district to issue oversize and overweight vehicle permits. The cost of processing the permits and maintaining the affected roads will be offset by the permit fees collected by the district.

Carol Rawson, Interim Director, Maintenance Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the new sections.

PUBLIC BENEFIT AND COST

Ms. Rawson has also determined that for each of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the new sections will be convenience and improved public safety. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed new §§28.40 - 28.47 may be submitted to Carol Rawson, Interim Director, Maintenance Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on August 13, 2012. In accordance with Transportation Code, §201.811(a)(5), a person who submits comments must disclose, in writing with the comments, whether the person does business with the department, may benefit monetarily from the proposed new sections, or is an employee of the department.

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §623.232, which allows the commission to authorize the district to issue permits for the movement of oversize or overweight vehicles; and Transportation Code, §623.239, which provides the commission with the authority to establish rules necessary to implement a permit program for the district.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 623, Subchapter L.

§28.40. Purpose.

In accordance with Transportation Code, Chapter 623, Subchapter L, the commission may authorize the Victoria County Navigation District to issue permits for the movement of oversize or overweight vehicles carrying cargo on roads designated by Transportation Code, §623.232. This subchapter sets forth the requirements and procedures applicable to the issuance of permits by the Victoria County Navigation District for the movement of oversize and overweight vehicles.

§28.41. Definition.

In this subchapter, "district" means the Victoria County Navigation District.

§28.42. District's Powers and Duties.

(a) Authority to issue permits. The district may issue a permit and collect a fee for the movement within the district on the roads designated by Transportation Code, §623.232 of a vehicle or vehicle combination that exceeds the vehicle size or weight limits specified by Transportation Code, Chapter 621, Subchapters B and C, but does not exceed loaded dimensions of 12 feet wide, 16 feet high, and 110 feet long, and does not exceed 140,000 pounds gross weight.

(b) Surety bond. The department may require the district to post a surety bond in the amount of $500,000 for the reimbursement of the department for actual maintenance costs of roads designated by Transportation Code, §623.232 if revenue collected from permits issued under this subchapter is insufficient to pay for those costs and the district fails to reimburse the department for those costs.

(c) Verification of permits. The district shall provide law enforcement and department personnel access to any of the district's property to verify compliance with this subchapter by the district or another person.

(d) Training. The district shall provide or obtain any training necessary for personnel to issue permits under this subchapter. The department may provide assistance with training on request by the district.

(e) Accounting. The department shall develop accounting procedures related to permits issued under this subchapter with which the district must comply for revenue collections and any payment made to the department under subsection (i) of this section.

(f) Audits. The department may conduct audits annually or on direction by the executive director of all permit issuance activities of the district. To insure compliance with applicable law, audits at a minimum will include a review of all permits issued, financial transaction records related to permit issuance, and vehicle scale weight tickets and the monitoring of personnel issuing permits under this subchapter.

(g) Revocation of authority to issue permits. If the department determines as a result of an audit that the district is not complying with this subchapter or other applicable law, the executive director will issue a notice to the district allowing 30 days for the district to correct any non-compliance issue. If the department determines that, after that

30-day period, the district has not corrected the issue, the executive director may revoke the district's authority to issue permits under this subchapter. The district may appeal to the commission in writing the revocation of its authority under this subsection. If the district appeals the revocation, the district's authority to issue permits under this subchapter remains in effect until the commission makes a final decision on the appeal.

(h) Fees. Fees under this subchapter may be collected, deposited, and used only as provided by Transportation Code, §623.234. The district may determine acceptable methods of payment. All fees transmitted to the department must be in U.S. currency. On revocation of the district's authority to issue permits, termination of the maintenance contract entered into under subsection (i) of this section, or expiration of this subchapter, the district shall pay to the department all permit fees collected by the district, less allowable administrative costs.

(i) Maintenance contract. The district shall enter into a contract with the department for the maintenance of roads designated by Transportation Code, §623.232 for which a permit may be issued under this subchapter. The contract will cover routine maintenance, preventive maintenance, and total reconstruction of the roadway and bridge structures, as determined by the department to maintain the current level of service, and may include other types of maintenance.

(j) Reporting. The district shall provide monthly and annual reports to the department's Finance Division regarding all permits issued and all fees collected during the period covered by the report. The report must be in a format approved by the department.

§28.43. Permit Eligibility.

(a) Registration requirements. To be eligible for a permit under this subchapter:

(1) a vehicle or combination of vehicles must be registered under Transportation Code, Chapter 502; and

(2) the owner of the vehicle or combination of vehicles must be registered as a motor carrier under Transportation Code, Chapter 643 or 645.

(b) Prohibition for unpaid penalties. The district may not issue a permit under this subchapter:

(1) to a person or company that is prohibited under Transportation Code, §623.271 from being issued a permit; or

(2) for a vehicle that is prohibited under Transportation Code, §623.271 from being issued a permit.

§28.44. Permit Issuance Requirements and Procedures.

(a) Permit application. Application for a permit issued under this subchapter must be in a form approved by the department and at a minimum must include:

(1) the name of the applicant;

(2) the name of the driver of the vehicle in which the cargo is to be transported;

(3) a description of the kind of cargo to be transported;

(4) the kind and weight of each commodity to be transported;

(5) the maximum weight and dimensions of the proposed vehicle combination, including number of tires on each axle, tire size for each axle, distance between each axle measured from center of axle to center of axle, and the specific weight of each individual axle when loaded;

(6) the location where the cargo will be loaded; and

(7) the date or dates on which movement is requested.

(b) Permit form and contents. A permit issued under this subchapter must be in a form approved by the department and at a minimum must include all information required under Transportation Code, §623.235(a) and §623.236.

§28.45. Permit Weight Limits for Axles.

(a) Minimum axle group spacing. For an axle group to be permitted for maximum weight authorized under this section:

(1) an axle group must have a minimum spacing of four feet, measured from center of axle to center of axle, between each axle in the group; and

(2) two or more consecutive axle groups must have a minimum axle spacing of 12 feet, measured from center of the last axle of a group to center of the first axle of the immediately following group.

(b) Maximum permit weight. Maximum permit weight for an axle or axle group is the weight computed by multiplying 650 pounds times the total number of inches of the width of tires on the axle or group or the following applicable axle or axle group weight, whichever is less:

(1) single axle - 25,000 pounds;

(2) two-axle group - 46,000 pounds;

(3) three-axle group - 60,000 pounds;

(4) four-axle group - 70,000 pounds;

(5) five-axle group - 81,400 pounds; or

(6) trunnion axles - 60,000 pounds if:

(A) the trunnion configuration has two axles;

(B) there are a total of 16 tires for the trunnion configuration; and

(C) the trunnion axle, as shown in the following diagram, is 10 feet in width.

Figure: 43 TAC §28.45(b)(6)(C)

(c) Tire load rating. A permit issued under this subchapter does not authorize the vehicle to exceed manufacturer's tire load rating.

(d) Permits for vehicles exceeding permit weight limits. For a vehicle exceeding weight limits provided in this section, a person must apply directly to the Texas Department of Motor Vehicles for an oversize or overweight permit in accordance Transportation Code, Chapter 623.

§28.46. Movement Requirements and Restrictions.

(a) Carrying of permit. The original permit issued by the district must be carried in the permitted vehicle.

(b) Prohibition on movement with void permit. A permittee is prohibited from transporting an oversize or overweight load with a void permit. A permit is void if the applicant gives false or incorrect information. A permit becomes void when the permittee fails to comply with the restrictions or conditions stated in the permit or when the permittee changes or alters the information in the permit.

(c) Weather conditions or road work. Movement of a permitted vehicle is prohibited when:

(1) visibility is reduced to less than 2/10 of one mile;

(2) the road surface is hazardous due to weather conditions, such as rain, ice, sleet, or snow; or

(3) highway maintenance or construction work is being performed.

(d) Daylight and night movement restrictions. An oversize permitted vehicle may be moved only during daylight hours. A permitted vehicle that is overweight but not oversize may be moved at any time.

(e) Weight ticket requirement. Any vehicle issued a permit by the district must be weighed on scales that are capable of determining gross vehicle weights and individual axle loads and are certified by the Texas Department of Agriculture or accepted by the United Mexican States.

(f) Speed. The maximum speed for a permitted vehicle is set by Transportation Code, §623.237.

§28.47. Records.

The district shall maintain records that evidence compliance with this subchapter. Those records are subject to audit by department personnel.

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

Filed with the Office of the Secretary of State on June 29, 2012.

TRD-201203417
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: August 12, 2012
For further information, please call: (512) 463-8683

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WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 9. CONTRACT AND GRANT MANAGEMENT

SUBCHAPTER K. SMALL BUSINESS ENTERPRISE (SBE) PROGRAM

43 TAC §9.303

The Texas Department of Transportation withdraws the proposed new §9.303 which appeared in the April 13, 2012, issue of the *Texas Register* (37 TexReg 2584).

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Bob Jackson
General Counsel
Texas Department of Transportation
Effective date: June 29, 2012
For further information, please call: (512) 463-8683

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Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER S. WHOLESALE MARKETS

16 TAC §25.508

The Public Utility Commission of Texas (commission) adopts new §25.508, relating to High System-Wide Offer Cap in the Electric Reliability Council of Texas Power Region, with changes to the proposed text as published in the April 27, 2012, issue of the *Texas Register* (37 TexReg 2955). The rule increases the high system-wide offer cap (SWOC) applicable to resources in the Electric Reliability Council of Texas (ERCOT) market to ensure that the price signals in the ERCOT market are adequate to maintain continuous electric supply. This rule is a competition rule subject to judicial review as specified in Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (West 2007 and Supp. 2011) (PURA) §39.001(e). This new section is adopted under Project Number 37897.

The commission received comments on the proposed new section from Senators Rodney Ellis and Wendy Davis, Representatives Sylvester Turner and Rafael Anchia, Ambit Energy and of Stream Energy (Ambit and Stream), and Texas Christian University (TCU), Blue & Silver Energy Consulting LLC (Pro-Star), City of Austin (Austin Energy), City of Houston, CPS Energy (CPS), Consolidated Edison Solutions, Inc. (ConEd), Direct Energy LP (Direct Energy), Group of Competitive Texas Power Suppliers (CTPS), IPR-GDF SUEZ Energy North America Inc. (IPR-GDF SUEZ), William Leek, Lone Star Chapter of Sierra Club (Sierra Club), Luminant, MidAmerican Energy Company, NRG Energy (NRG), Odessa-Ector Power Partners (Odessa-Ector), Office of Public Utility Council (OPUC), Public Citizen, South Texas Electric Cooperative (STEC), Steering Committee of Cities Served by Oncor and the Texas Coalition for Affordable Power (Oncor Cities), and Texas Association for Energy Marketers (TEAM), Texas Competitive Power Advocates (TCPA), Texas Industrial Energy Consumers (TIEC), Texas Power LP Solutions (Texas Power), and TXU Energy.

Comments on §25.508

Sierra Club, William Leek, Public Citizen, TCU, MidAmerican Energy Group, OPUC, Pro-Star, the City of Houston, Oncor Cities, TIEC, STEC, and TEAM opposed the increase in the SWOC to $4,500/megawatt-hour (MWh). These commenters generally opposed the increase on the grounds that increasing the SWOC would increase electric prices for consumers even though resource adequacy improvements are not guaranteed by such offer cap increases. Sierra Club, Public Citizen, and the Oncor Cities noted changes to ERCOT protocols have already been implemented to address resource adequacy by mitigating price reversal during peak intervals, and cited the need to evaluate first whether these changes are sufficient to increase revenues for generators. TEAM noted that the market response to the actions already taken at ERCOT reduce the need to increase the SWOC for the summer of 2012. To this point, Oncor Cities further cautioned if the additional measure of increasing the SWOC is added to this list of measures to attract new investments by increasing generator revenues, an overcorrection could occur with added costs to consumers. Sierra Club and Public Citizen noted ERCOT's back-casted data analysis showed consumer price increases if SWOC were to be implemented. Finally, Sierra Club, Public Citizen, ConEd, and OPUC, argued that resource adequacy can be addressed by other measures such as increased energy efficiency and demand response, loads bidding into Security Constrained Economic Dispatch (SCED), distributed renewable generation, requiring 500 megawatts (MW) of non-wind renewable generation, improved building energy codes, and new services such as Emergency Response Services (ERS). TCU requested that the commission postpone or completely reconsider the increase in the price cap until a study is completed on the impact of the increase on consumers and the Texas economy, and then compare that impact against the known and measurable benefits the increase will bring. TCU also requested that the increased price caps be compared to other alternatives that would create the incentives for the development of new electricity generation in Texas.

Pro-Star expressed the belief that the lack of new generation build is reflective of current economic conditions and the low price of natural gas instead of any inherent pricing flaw in the ERCOT market design. Pro-Star noted that the proposed increase in the SWOC apparently incented at least 1,200 MWs of mothballed generation to return to the market. To this claim, STEC argued that the rule is not needed for this purpose, as ERCOT already has the power to secure such contracts without the proposed increase in the SWOC. Pro-Star expressed concern over whether increasing the SWOC to $4,500 would have the long-term effect of ensuring resource adequacy.

Senator Davis, Representative Turner, Sierra Club, Mr. Leek, MidAmercian, City of Houston, Oncor Cities, STEC, and TEAM generally expressed concern that raising the SWOC will not lead to greater investments in new generation, while Senator Ellis wanted to ensure that increasing the SWOC would achieve this goal. STEC further commented the SWOC increase to $4,500 will not accomplish its stated purpose of ensuring resource adequacy or incenting loads to voluntarily reduce their demand, because August 1 would be too soon for new generation to be

constructed or loads to significantly change their load reduction behavior during times of scarcity.

City of Houston voiced opposition to the proposed SWOC increase to $4,500/MWh on August 1, 2012 by claiming the commission's adoption of the proposed rule would not withstand judicial scrutiny. City of Houston stated that there is no evidence that increasing the SWOC to $4,500 will provide any benefits in regard to resource adequacy, will have an impact on future wholesale electricity prices, or will result in new generation or demand response. Furthermore, City of Houston commented the proposed rule offers no rationale in terms of implementing the $4,500 amount versus any other dollar amount increase. On these same topics, Senator Ellis and Representative Raphael Anchia, posed the question to the commission of whether or not any analysis has been conducted to determine if raising the SWOC to $4,500 would guarantee new investment in generation. Additionally, Senator Ellis and Representative Turner were concerned that there were no studies on the effect of increasing the SWOC on electricity rates for consumers. Representative Anchia also asked what methodology was implemented to derive the $4,500 amount and whether or not an analysis of cheaper alternative sources such as those noted above, namely, demand response, solar power, storage, or energy efficiency could be implemented versus raising the SWOC.

The City of Houston also noted the proposed rule was published before the release of the Brattle Group report. Their comments expressed the belief that stakeholders should have been provided time to review the implications of the Brattle Report before commenting on this rulemaking. At the very least, City of Houston stated increasing the SWOC should be based on a more coordinated approach under Project No. 40268, *PUC Rulemaking to Amend PUC SUBSTANTIVE. R. §25.505, Relating to Resource Adequacy in the Electric Reliability Council of Texas Power Region.*

TCPA, CPS, Odessa-Ector, Competitive Power Suppliers, NRG, Luminant and TXU Energy expressed support for the increase in the SWOC to $4,500 on August 1, of 2012. TCPA, Odessa-Ector, NRG, Luminant, and TXU stated that the short-term actions will demonstrate a commitment by the commission to ensure resource adequacy, and that this commitment will send a consistent and important message to investors. TCPA also recommended increasing the SWOC this August because scarcity situations also occur in the fall and spring, and increasing the SWOC this summer will ensure that increased scarcity pricing signals will be in place if a scarcity situation occurs. Odessa-Ector noted that the forward markets responded positively to changes brought about by commission action that positively affect both the near term and the long term forward energy markets, and that investors need a strong forward market to allow them to manage the risk of building new generation. CPS noted the current SWOC of $3,000/MWh does not provide the economic incentives required to ensure resource adequacy. CTPS indicated that on-peak prices have been too low to incent new investment and that increasing the SWOC this summer will send the appropriate market signal and provide regulatory clarity and will also motivate existing generation owners to contemplate expansion at existing facilities. CTPS indicated that increasing the SWOC to $4,500/MWh strikes the appropriate balance between price signals to stimulate new investment and potential market risks to generators and retailers. NRG and Luminant noted that the competitive market responds best when market reforms are implemented, and that simply signaling future SWOC increases does not have the same positive impact on the market as actual implementation. Odessa-Ector noted that increasing the peaker net margin (in conjunction with increasing the SWOC) would provide further support for the forward markets and hence, more investments in new generation.

CPS did acknowledge, however, the increase from $3,000/MWh to $4,500/MWh of the SWOC did have a possible drawback. CPS pointed out that if a generator cannot meet its obligation to provide power, it will be very costly to purchase energy from the market during a high-priced interval. CPS cited the February 2, 2011 event when generators suffered losses due to such needed last minute procurements. CPS noted if the SWOC was $4,500/MWh, such generator losses would be much more exacerbated. NRG acknowledged that increasing the SWOC will have an impact on hedging and collateral requirements. NRG believed that adequate market tools are available for market participants to manage the increase in real-time pricing, and that proposed NPRR 459 would allow ERCOT to address collateral issues in the short term before longer-term solutions can be developed.

Commission Response

The commission agrees with TCPA, CPS, Odessa-Ector, Competitive Power Suppliers NRG, Luminant and TXU Energy that the high SWOC should be increased to $4,500/MWh and MW per hour starting August 1, 2012, as provided for in the proposed rule. ERCOT's reserve margin has declined in recent years. In addition, ERCOT projections indicate that there is a substantial risk that the reserve margin will decline below ERCOT's target reserve margin of 13.75% absent additional generation investment or significant development of demand response. The commission is committed to ensuring that there is enough energy to meet the needs of Texans this summer and in the years to come. Therefore, the commission seeks to provide the proper price signals in the energy-only ERCOT market to incent the construction of new generation; to incent greater market participation by loads as load resources and through load reductions in response to price signals; and to help ensure that existing generation will remain available. Concerning the latter goal, a higher SWOC will make it less likely that older plants will see an insufficient opportunity to recover costs related to capital needs, operating expense, and an opportunity to earn a sufficient return and therefore shut down. Increasing the high SWOC will help achieve this goal by increasing the amount that resources may bid for energy and other ancillary services, which in turn may affect the market price in both ERCOT administered and bilateral markets.

The commission agrees with Oncor Cities, Austin Energy, Sierra Club and Public Citizen that a great deal of work has gone into implementing measures to mitigate price reversal during peak intervals and to incent energy efficiency, demand response, distributed renewable generation and emergency response service. The commission is currently evaluating changes to its energy efficiency rule in Project No. 39764, and is seeking to coordinate the demand response programs under that rule with demand response programs operated by ERCOT. The commission also adopted earlier this year in Project No. 39948 enhancements to ERCOT's emergency response service program, which allows ERCOT to deploy demand response from contracted loads in emergency situations. The commission also recently adopted rule amendments to further encourage the development of distributed generation, which were adopted in Project No. 39797 at the May 18, 2012 Open Meeting. Finally, the commission authorized ERCOT to conduct pilot projects, through a rule amendment adopted in Project No. 40150 at the May 18, 2012 Open

Meeting. ERCOT has already adopted a pilot project under this authority through which it will procure up to 150 MW of a new type of emergency response service beginning July 15 of this year. The commission views all these past and current projects as complementary to this rulemaking, and not as a substitute to this rulemaking.

The commission concludes that it must act quickly and decisively to address resource adequacy issues. Generation investment decisions require a lead time of several years before generation facilities can be built. While the commission believes that energy efficiency, demand response, distributed renewable generation, and emergency response service will play important roles in addressing resource adequacy, the commission does not believe that these measures are sufficient to ensure adequate electricity in ERCOT.

The commission has relied on, and will continue to rely on, the peaker net margin as an indication of whether the ERCOT market provides sufficient incentives to maintain existing generation and for construction of new generation. Sufficient levels of revenue, as indicated by the peaker net margin, provide the appropriate investment signals to generators. The back-cast evaluation provided by ERCOT shows that the previous protocol changes, along with increasing the high SWOC to $4,500/MWh, would have almost doubled the adjusted 2011 peaker net margin for the evaluated scenarios, indicating a much more favorable investment environment in ERCOT for generation, while increasing the per MWH load weighted price only approximately 25%. The commission notes that ERCOT's back-cast is based upon 2011 prices and weather. 2011 weather was extreme, with an unusually high number of scarcity pricing intervals caused by extreme cold and heat. These increases strike an appropriate balance between providing sufficient revenues to encourage generation investment while limiting the resulting price impacts on customers in the near term.

While the commission cannot guarantee the construction of new generation, a $4,500 SWOC will make ERCOT a more attractive market to maintain existing generation facilities and encourage future generation investment. The commission disagrees with Pro-Star that the lack of new generation is a reflection only of current market conditions. According to the Independent Market Monitor, since 2007, the peaker net margin reached levels sufficient to support new generation investment only in 2008 and 2011. The peaker net margin in 2008 was due to inefficient transmission congestion management, the potential for which has since been eliminated due to ERCOT's switch to a nodal market. The Independent Market Monitor identified the sufficient price level to support new peaker units as $80-$105 per kilowatt-year in past "State of the Market" reports, and this level was reached in the ERCOT back-cast analysis. Increasing the peaker net margin by increasing the SWOC will provide greater incentives to maintain current generation and to encourage the construction of new generation. While the back-cast evaluation of 2011 is reflective of an extremely hot year and a typical "hot" Texas summer will not produce as high of a peaker net margin, even ERCOT's "weather normalized" back-cast analysis excluding the extraordinary cold snap in February 2011 showed a substantial increase in the peaker net margin. That analysis suggested a net margin just sufficient to support construction of new peaker units, but insufficient to support other types of needed generation. On the other hand, the new high SWOC will likely indirectly result in higher prices to retail customers and, as discussed below, challenges for some Load Serving Entities (LSEs). The commission believes that the increase in the high SWOC resulting from this rule is an appropriate and important step to maintain resource adequacy while keeping the short-term adverse effects on LSEs and retail customers at a reasonable level.

While the commission agrees with STEC that ERCOT can contract with mothballed units to provide energy, that approach would provide only a temporary solution to a long-term issue. The commission disagrees with the City of Houston that the commission should have waited until the Brattle Report was released before proposing an increase to the high SWOC. This rulemaking is targeted at a specific action, raising the high SWOC, and the back-cast analysis provides sufficient basis to go forward with this action now. The commission also disagrees with the characterization that this rule is not being sufficiently coordinated with Project No. 40268. The commission approved the proposals of the two projects at the same Open Meeting, and increases in the high SWOC for future years will be addressed in Project No. 40268.

Appropriate Timing of SWOC

ConEd, Austin Energy, Mid-American, OPUC, City of Houston, TIEC, Ambit and Stream, Oncor Cities, Texas Power and TEAM do not support the timing of the proposed increase in the SWOC. These entities generally pointed out that market participants would not have sufficient time to respond to any impacts caused by increasing the SWOC. Sierra Club, Texas Power, ConEd, MidAmerican, OPUC, City of Houston, TIEC, Ambit and Stream, Oncor Cities, Austin Energy, and TEAM do not necessarily oppose an increase in the SWOC, but recommended that implementation be delayed to see if the previous protocol corrections are sufficient or to give market participants time to adjust to the market changes or to reduce the impact on existing contracts.

OPUC and Oncor Cities commented that implementing the change in the SWOC on August 1, 2012 is neither necessary nor warranted because of the availability of sufficient resource capacity for this summer, caused in part by the return of 2000 MW from mothballed status. Among other reasons offered by OPUC for its position were the assumption in ERCOT's resource assessment that the weather in 2012 summer would be less extreme than the 2011 summer; the need to allow the protocol changes and other-reliability-driven administrative initiatives implemented in late 2011 and early 2012 to "play out" this summer; the potential that recent commission action relating to emergency response service, energy storage, distributed generation, ERCOT pilot projects and energy efficiency rules could address the near-term resource adequacy concerns; the concern that market participants have insufficient time to adjust their risk strategies; and potential that Load Serving Entities (LSEs)/Retail Electric Providers (REPs) could interpret the rule change as a "change in law" and therefore break fixed-power contracts and pass the increased costs along to end-users. Oncor Cities commented that increasing the SWOC by August 1 will not incentivize the construction of generation this summer and that an increase in the SWOC this summer presents only the risk of higher prices this year, with no corresponding benefits. MidAmerican believed that addressing the long-term changes to the SWOC though a longer and more deliberate stakeholder process, with the advantage of incorporating the findings from the Brattle Group study would result in a more compelling signal to the market than a rushed rulemaking to raise the SWOC by August 1, 2012 as the appropriate long-term level for SWOC should involve a thorough quantitative analysis.

Austin Energy expressed concern that implementing the increase in SWOC in August would not only expose LSEs to

increased price volatility and potential for default which would affect all ERCOT participants, but also adequately hedged LSEs whom may find themselves undercapitalized to meet the credit requirements necessary to transact in the ERCOT market. MidAmerican Energy Company and Ambit and Stream expressed similar concerns. TIEC claimed that the failure to provide the market with sufficient opportunity to adjust to the proposed increase in SWOC by August 1, 2012 will (1) increase financial risk for all markets without providing sufficient time to manage the risks; (2) create uncertainty about pricing under current retail contracts, and (3) increase the risk of REP defaults, which could cause significant market uplifts and Provider of Last Resort (POLR) transitions during the volatile summer months. TEAM explained that the months of July and August are most commonly traded together as a summer block for hedging purposes and increasing the SWOC in the middle of a hedge would, therefore, disrupt hedging products and expose REPs and their customers to risk that would have otherwise been avoided. TEAM supports the implementation of gradual market adjustments that will generate sufficient price signals to incentivize the new generation needed by the growing ERCOT market while allowing market participants to plan and adjust their financial strategies accordingly.

TCPA, Odessa-Ector, CTPS, NRG, Luminant and TXU Energy, on the other hand, strongly supported the implementation of the higher SWOC on August 1, 2012. These entities argued that faster commission action will begin to align market outcomes with investor expectations given that it takes two to three years for most generation technologies to be built.

NRG, TCPA, Luminant and TXU Energy supported the proposal to increase the SWOC beginning August 1, 2012, arguing the market needs this early and strong signal to maintain incentives for current supply and encourage investment in generation and other resources going forward. CPS energy deferred to other market participants on the best time to implement a higher SWOC, from a contracting perspective but supported implementing the higher SWOC as quickly as practical. Luminant, NRG, and TIEC all pointed out that the timing for the end date of §25.508 must be modified in accordance with Commissioner Anderson's memo to clarify that the SWOC change in §25.508 would be in effect only until any amendment to the SWOC was implemented in Project No. 40268, versus the proposed rule language stating the $4,500 SWOC would be effective until May 31, 2013.

Commission Response

The commission has historically demonstrated a commitment to regulatory certainty and extended notice for changes in policy, especially ones that would significantly increase costs, and would not take action on short notice unless there is a compelling reason to do so. The commission is also committed to resource adequacy and has made changes when necessary to support resource adequacy. While the commission appreciates the comments of ConEd, Austin Energy, Mid-American, OPUC, City of Houston, Ambit and Stream, Oncor Cities, Texas Power and TEAM, who would prefer not to have the high SWOC increase on August 1, 2012, the commission concludes that the timing of the increase is necessary to ensure resource adequacy. As explained above, raising the high SWOC at this time is necessary not only to address the currently insufficient profit opportunities for the construction of new generation. It is also necessary to encourage at this time, in light of the declining reserve margin, greater market participation by loads as load resources and through load reductions in response to price signals, and to help ensure that existing generation will remain available.

The commission does not believe that the announcements that nearly 2,000 MW of mothballed units will return to service this summer eliminates the need for this rule. These announcements were made after this rule was proposed and after the commission extensively discussed increasing the high SWOC, and the commission believes that these signals to the market contributed to these units returning to service. If the commission did not adopt the rule's increase in the high SWOC, the owners of these units and other units would have less incentive to expend money to ensure that their units are available for use and less incentive to participate in the market if their units are available for use. In addition, there would be less incentive for demand-side participation in the market. The commission agrees with NRG, TCPA, Luminant, and TXU Energy that increasing the high SWOC provides a strong signal to the market to maintain incentives for current supply and encourage investment in generation and other resources going forward.

Although the increase in the high SWOC effective August 1, 2012 may increase credit requirements for LSEs and may make hedging more challenging, these potential downsides of implementing the increased high SWOC effective August 1, 2012 are outweighed by the benefits of doing so. LSEs should have sufficient access to capital to address any increased credit requirements and should have sufficient expertise to manage any hedging challenges. In 2009, the commission adopted a new §25.107 that substantially increased the financial requirements for REPs and required that they have expertise in energy commodity risk management.

The commission agrees with the comments from TIEC, NRG, and Luminant that the high SWOC set by this rule should end on the effective date of any amendment to the high SWOC in §25.505 that is effective after the effective date of this rule. The end date for the high SWOC established by this rule should coincide with any change to the high SWOC in §25.505, rather than be set at a fixed date. In Project No. 40268, the commission has proposed to change the high SWOC in §25.505 effective June 1, 2013. However, in adopting a change to the high SWOC in that project, the commission may change that date.

The commission posed one question for comment.

Question: The direct effect of the new section will be to allow resources to offer services in the ERCOT ancillary service auctions at higher prices. In turn, this direct effect is expected to increase revenue to resources, which will be paid for by LSEs including retail electric providers. Will the new section implicate the provisions of §25.475 that allow retail electric providers (REPs) to change rates in fixed-rate products for retail customers due to "changes resulting from federal, state or local laws that impose new or modified fees or costs on a REP that are beyond the REP's control?"

Public Citizen, Sierra Club and Oncor Cities stated that the lack of a clear answer to this question is one reason this rule should not be adopted. Oncor Cities highlighted the policy dilemma surrounding this issue and stated the commission is faced with the question of which is the preferable alternative this summer: a) permitting REPs to push a price increase down to their customers, even customers on fixed price contracts, or b) allowing many REPs to suffer the detriment of suddenly higher wholesale prices, including the possibility that some REPs may default as a result. Oncor Cities submitted that neither alternative is an ac-

ceptable outcome. Oncor Cities stated that whatever answers the commission arrives at, whether REPs are permitted to pass increased wholesale costs to their fixed-price customers or not, suggests that there are sound reasons for not taking any action in this project at all. City of Houston, Oncor Cities, and IPR-GDF SUEZ did not believe that this rule constitutes a "change in law" as contemplated in §25.475. Direct Energy states that the facts surrounding this project does not merit application of §25.475. IPR-GDF SUEZ, Oncor Cities and OPUC noted that §25.475 applies specifically to changes in federal, state, or local law and that a change to an administrative agency rule is not a federal, state or local law.

IPR-GDF SUEZ, Pro-Star and OPUC argued that the change does not impose a new cost or fee, nor does it modify any existing fee assessed neither by any governmental body nor by any transmission or distribution provider (TDSP). Direct Energy stated that the potential for changes to the SWOC has existed since at least 2005 when the commission discussed the appropriate scarcity pricing mechanism and eliminated the "shame" cap. IPR-GDF SUEZ stated that it is difficult to argue that the SWOC should be considered a "cost" as the SWOC is not itself a cost; it is a cap on the price at which power may be offered. Although raising the SWOC permits generators to charge a higher amount for power than under the previous rule, it does not necessarily impose a higher cost on REPs. OPUC argued that under the rules, when a REP ends up paying high spot market prices, those higher prices cannot be passed through to the fixed rate products and if the SWOC is increased, the only change that would occur is the degree to which the spot prices would increase, therefore under the current version of §25.475, the additional costs to REPs for the energy cannot be passed through.

OPUC, Direct Energy, Cities and Pro-Star opined that any increased cost is not "beyond the REPs control." Direct Energy stated that the negative impacts, if any, on longer term fixed price contracts are avoidable in a market where hedging all or a portion of sales is essential to prudent risk taking and practice. Pro-Star stated that the majority of any cost increases incurred by the REP are the result of business decisions made by the REP and not an increase in the SWOC. Pro-Star offered a methodology for measuring the potential impact of the increased SWOC on such ancillary services. Pro-Star stated if the SWOC increase is implemented, only the amounts derived from their calculation methodology should be allowed to be passed on to customers. OPUC also expressed concern that if the REPs are allowed to breach the customer fixed price contracts then customers will be forced to pay a higher price for the future and will also have lost money spent in the past for security they did not receive. If REPs do change the price to fixed price customers, OPUC would encourage REPs to provide those fixed price customers with 14 days' notice that their price will increase and allow those customers to switch providers without incurring termination penalties.

TIEC, Luminant, NRG, TXU and TEAM believed that increased costs should be allowed to be passed through to residential and small commercial customers on fixed price contracts. TIEC stated that the direct effect of this rule will be to increase the SWOC by 50% for both energy and ancillary service costs creating additional costs that were not considered when LSEs negotiated their current supply arrangements and would appear to implicate the change in law provisions. NRG stated that the commission's proposed rule creates the potential for increased costs to hedge and protect against 4,500/MWh prices or pay wholesale energy costs as high as $4,500/MWh.

NRG noted that the Texas Government Code §2001.003(6)(A) describes a Rule to mean "a state agency statement of general applicability that interprets or prescribes law or policy or describes the procedure or practice requirements of a state agency." TXU and Luminant agreed that the commission could reasonably interpret §25.475 to allow REPs to increase the price of existing fixed-rate contracts to the extent that REPs' actual costs increase due to an increase in the cost of wholesale power caused by the change in SWOC. Luminant and TXU stated that if the commission does allow these charges to be passed through on fixed price charges that the commission should indicate in its order approving this rule that REPs should be prepared to explain that any such increases are solely attributable to the increase in the SWOC. TEAM stated that the commission's rules, made with its direct and implied powers designated by the Legislature have the same power and effect as laws for the purposes of reliance by and enforcement on market participants. Therefore, TEAM argued, a change in the commission's rules raising the SWOC would be a change in law that could impose modified costs on a REP.

TEAM stated that the more difficult question is whether or not the increased costs are beyond the REP's control. TEAM stated that this is a fact question that must be resolved individually for each REP. Some REPs may have resources that allow them to adjust and control increased costs on a near-term basis through hedging or other market strategies while others may have undertaken different hedging strategies that were priced according to rules and associated market risk that applied at the time the contracts were entered into and therefore it would not be appropriate to determine the answer to this question as a "yes" or "no." Ambit and Stream indicated that there is an inadequate understanding of how retailers will measure, plan, and pass through to term customers the incremental costs related to changes in the SWOC and Power Balance Penalty Curve (PBPC).

While TXU agreed that changing the prices is permissible under the rule, it stated that changing the price of a fixed price contract would likely create a negative customer experience and would generally be inconsistent with TXU's business practices and its expectation and desire is to leave the residential and small-commercial fixed-rate contracts as-is.

Commission Response

While the commission was interested in viewpoints on whether an increase in the high SWOC implicates the referenced provisions in §25.475, the issue was not addressed in the proposed rule. The commission will carefully evaluate the issue in a contested case if a REP seeks to raise its prices to customers on the basis of the cited provisions and a formal complaint is brought by a customer or an enforcement action is brought by the commission's executive director. The commission concludes that this rule is necessary to address resource adequacy, and should therefore be adopted regardless of whether the rule implicates the cited provisions.

Power Balance Penalty Curve

Competitive Power Suppliers and the individual comments from NRG also suggested the power balance penalty curve (PBPC) should be increased along with the SWOC increase. Specifically, NRG suggested the PBPC should start at $500 and increase to the SWOC of $4,500 versus starting at the current $200 for a 1 MW power balance violation and increasing nonlinearly to the current SWOC of $3000. NRG suggested the PBPC should start at $500 and then move to the SWOC of $4,500 so as not

to interfere with competitive bids. Alternatively, TIEC suggested the slope of the PBPC should be lessened to allow various loads and generation to respond at certain points in reaching the peak of the PBPC. TIEC noted a PBPC that is too steep will result in the more expensive units being chosen by SCED.

Commission Response

The commission appreciates the comments of Competitive Power Suppliers, NRG and TIEC on the Power Balance Penalty Curve. However, the commission is not setting the level of the Power Balance Penalty Curve in this rule.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting this section, the commission makes modifications for the purpose of clarifying its intent.

This new section is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (West 2007 and Supplement 2011) (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically §35.004, which requires that the commission ensure that ancillary services necessary to facilitate the transmission of electric energy are available at reasonable prices with terms and conditions that are not unreasonably preferential, prejudicial, discriminatory, predatory or anticompetitive; PURA §39.001, which establishes the Legislative policy to protect the public interest during the transition to and in the establishment of a fully competitive electric power industry; §39.101, which establishes that customers are entitled to safe, reliable, and reasonably priced electricity, and gives the commission the authority to adopt and enforce rules to carry out these provisions; and §39.151, which grants the commission oversight and review authority over independent organizations such as ERCOT.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 35.004, 39.001 39.101, and 39.151.

§25.508. High System-Wide Offer Cap in the Electric Reliability Council of Texas Power Region.

Notwithstanding §25.505 of this title (relating to Resource Adequacy in the Electric Reliability Council of Texas Power Region), the high system-wide offer cap shall be $4,500 per megawatt-hour and $4,500 per megawatt per hour beginning on August 1, 2012 and ending on the effective date of any amendment to the high system-wide offer cap in §25.505 of this title that is effective after the effective date of this section.

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

Filed with the Office of the Secretary of State on June 29, 2012.

TRD-201203450
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Effective date: July 19, 2012
Proposal publication date: April 27, 2012
For further information, please call: (512) 936-7223

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 97. PLANNING AND ACCOUNTABILITY

SUBCHAPTER EE. ACCREDITATION STATUS, STANDARDS, AND SANCTIONS

19 TAC §97.1065, §97.1067

The Texas Education Agency adopts amendments to §97.1065 and §97.1067, concerning accreditation status, standards, and sanctions. The amendments are adopted without changes to the proposed text as published in the April 20, 2012, issue of the *Texas Register* (37 TexReg 2858) and will not be republished. Section 97.1065 addresses provisions relating to repurposing, alternative management, or campus closure. Section 97.1067 addresses provisions relating to alternative management of campuses. The adopted amendments implement the requirements of the Texas Education Code (TEC), §39.107, Reconstitution, Repurposing, Alternative Management, and Closure, as amended by Senate Bill (SB) 738, 82nd Texas Legislature, 2011, which establishes new requirements related to the implementation of campus sanctions under the TEC, §39.107(e). The adopted amendments also establish processes by which the commissioner may defer a sanction action ordered for certain campuses that have unacceptable performance for multiple years.

SB 738, 82nd Texas Legislature, 2011, amended the TEC, §39.107. Specifically, SB 738 requires the commissioner to adopt rules to address statutory changes that: 1) allow the parents of a majority of the students enrolled at a campus subject to a sanction of repurposing, alternative management, or closure under the TEC, §39.107(e), to petition the commissioner requesting a specific sanction; 2) require the commissioner to order the sanction requested by the parents unless the board of trustees of the district presents to the commissioner a written request for a different action, along with a written explanation of the basis for the board's request; and 3) allow the commissioner to order the sanction action requested by the board of trustees if the request differs from that of the parents. The adopted amendments to 19 TAC Chapter 97, Planning and Accountability, Subchapter EE, Accreditation Status, Standards, and Sanctions, ensure compliance with SB 738, as follows.

The adopted amendment to 19 TAC §97.1065, Repurposing, Alternative Management, or Campus Closure, implements the provisions of SB 738 related to campus sanctions by adding language to address new parent petition provisions. The adopted amendment establishes timelines and procedures for parents of a majority of the students enrolled at a campus subject to a sanction of repurposing, alternative campus management, or closure under the TEC, §39.107(e), to present to the commissioner a written petition requesting a specific sanction action. The adopted amendment establishes timelines and procedures for a district to determine whether a petition presented by parents was valid and eligible for submission to the commissioner and for the board of trustees of the district to present to the commissioner a written request that the commissioner order a specific sanction action other than the action requested by parents in a valid petition. The adopted amendment also specifies procedures and timelines for the commissioner to order the sanction action requested by parents in a valid petition or, under circumstances in which the board of trustees of a district requests a different sanction action, the action requested by the district. In

addition, the adopted amendment specifies the timeline for implementing a sanction action ordered by the commissioner and clarifies the authority to be retained by the commissioner when a campus subject to a sanction under the TEC, §39.107(e), is an open-enrollment charter school campus.

The adopted amendment also outlines a process by which a district could request that the commissioner defer a sanction action ordered for certain campuses with multiple years of unacceptable performance to allow the commissioner an opportunity to review the academic progress of the campus during the school year subsequent to the lowered rating.

The adopted amendment to 19 TAC §97.1067, Alternative Management of Campuses, updates references to §97.1065 in alignment with the amendment to that section.

The adopted amendments have the following procedural and reporting implications. A campus subject to sanctions under the TEC, §39.107(e), will have the opportunity to petition the commissioner for a specific sanction action. The adopted amendments establish procedures and timelines for parent petitions and for a district's review of such petitions to determine validity. If a petition is determined to be valid, the adopted amendments establish procedures for district submission of the valid petition to the commissioner and for district submission of a board request for a sanction action other than the action requested by the parents. In addition, the adopted amendments establish timelines for the submission of certain plans if repurposing of a campus is requested by either the parents or board of trustees and for the determination and implementation of the final sanction ordered by the commissioner.

The adopted amendments have the following locally maintained paperwork requirements. Districts will be required to maintain documentation related to acceptance, validation, and submission to the commissioner of a parent petition and any related activities undertaken by the district or its board of trustees related to a requested sanction.

The TEA determined that there is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal began April 20, 2012, and ended May 21, 2012. Following is a summary of public comments received and corresponding agency responses regarding the proposed amendments to 19 TAC Chapter 97, Planning and Accountability, Subchapter EE, Accreditation Status, Standards, and Sanctions.

Comment: Concerning proposed §97.1065(c)(1)(A), the Texas Charter Schools Association (TCSA) commented that the October 15 timeline identified by the commissioner for the submission of a parent petition would not afford parents the opportunity to collect the required signatures. The TCSA stated that, given the 2011 timelines related to the academic accountability release, parents would not know of a campus's final rating before they were required to submit the written petition. The TCSA recommended implementing a submission deadline for the written petition that is at a minimum 30 days after the final ratings are assigned.

Agency Response: The agency agrees in part and disagrees in part. While the agency acknowledges that, under previous accountability timelines, academic accountability ratings appeals generally were not complete until the end of October. However, under new House Bill (HB) 3 requirements reflected in the TEC, §39.054(a), in the future, the agency will be required to notify a campus that received an unacceptable performance rating for the preceding school year of a subsequent such designation on or before June 15. Under this newly established timeline, it is anticipated that the October 15 timeline will afford parents a submission deadline that is approximately 30 days after final ratings are assigned. However, the agency acknowledges that, as noted in the agency's HB 3 Transition Plan, the first cycle of ratings assigned under the new accountability system may not be published by June 15. During this initial period of transition, the agency will work directly and individually with any affected campuses to address and resolve any timing concerns.

Comment: Concerning proposed §97.1065(c)(1)(D), the TCSA commented that the language infers that, if a district superintendent fails to meet the December 1 agency submission deadline specified in rule, the petition will be considered invalid, therefore, taking it out of consideration by the commissioner. The TCSA further commented that untimely submission by the district would, in effect, penalize the parents and run contrary to SB 738's intent of allowing parents to have a role in determining sanctions applied to a public school campus under certain circumstances. The TCSA recommended implementing a process by which the written petition may be initially submitted not only to the district superintendent, but also to the agency, in an effort to ensure that a valid petition is considered and is not thrown out solely because the district did not submit the petition by the stated deadline.

Agency Response: The agency agrees in part and disagrees in part. While the agency agrees that SB 738 intended to provide parents with an opportunity to have a role in determining sanctions applied to a public school campus under certain circumstances, it does not agree that a change to the proposed rule language is necessary to address the concern regarding a possible late submission by a school district. Campuses that potentially are subject to the changes reflected in SB 738 requirements have been subject to sanctions and interventions under the TEC, Chapter 39, for a number of years. As such, the agency is in ongoing communications with both the district and the campus regarding intervention requirements. Under already-existing processes, the agency will be made aware of any parent petition that might be, or has been, delivered to a district for review and validation. Therefore, the agency has determined that it is not necessary to revise the rule at this time to ensure that the agency is notified of any potential parent petition. However, if, in the future, concerns arise related to timely district submissions, the agency will consider any appropriate rule revisions to address the identified issues.

Comment: Concerning proposed §97.1065(c)(2)(A), the TCSA stated that the proposed rules do not include a draft of the model forms referenced in the rule and requested that, in alignment with the Administrative Procedure Act (APA), the agency issue a draft of the form(s) through the rulemaking process by proposing an additional amendment to the rule.

Agency Response: The agency disagrees. While the agency intends to seek public input on any model forms used to facilitate the parent petition process, the agency does not agree that it is required to adopt the model forms in rule. Furthermore, while the rule requires that a petition include all information required by the agency as reflected in TEA model forms, it does not require that parents and districts use only the model form developed by the agency.

The amendments are adopted under the Texas Education Code (TEC), §39.107, which authorizes the commissioner to adopt rules necessary to implement campus reconstitution, repurposing, alternative management, and closure. TEC, §39.107(e-2), authorizes the commissioner to specify by rule the timelines and procedures to allow for parents of students on certain campuses subject to a required sanction under the TEC, §39.107(e), to petition the commissioner for a specific sanction action and to allow for the board of trustees of the district to request that the commissioner order a specific sanction action other than that requested by the parents.

The amendments implement the TEC, §39.107.

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

Filed with the Office of the Secretary of State on June 27, 2012.

TRD-201203397
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
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Proposal publication date: April 20, 2012
For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 3. TEXAS BOARD OF CHIROPRACTIC EXAMINERS

CHAPTER 75. RULES OF PRACTICE

22 TAC §75.2

The Texas Board of Chiropractic Examiners (Board) adopts an amendment to §75.2, concerning Proper Diligence and Efficient Practice of Chiropractic, without changes to the proposed text as published in the February 17, 2012, issue of the *Texas Register* (37 TexReg 846) and will not be republished. The amendment is adopted to specify the standard upon which this rule is based and to specify that a licensee's failure to refer a patient to an appropriate health care provider under certain circumstances constitutes a violation of this rule.

The Board has added subparagraph (F) under subsection (a)(1) to specify that a violation of this rule includes a licensee's failure to refer a patient to an appropriate health care provider when the licensee determines or should have determined that the patient requires a diagnosis or treatment that is outside the chiropractic scope of practice. This determination must be made within the chiropractic scope of practice. Additionally, the Board has added subparagraph (G) to subsection (a)(1) to specify that a violation of this rule includes a licensee's failure to refer a patient to an appropriate health care provider when the licensee determines or should have determined that the patient suffers from a condition within the chiropractic scope of practice, but requires a diagnosis or treatment exceeding that licensee's education, training, or experience. Previously, there was no explicit obligation imposed by the Board rules for a licensee to refer a patient to an appropriate health care provider in the above-mentioned situations. The Board believes that creating this explicit obligation is in the best interest of the public and the profession.

Finally, the Board has changed the standard listed in subsection (a)(1) to be used in determining whether a violation of this rule has occurred. Previously, this standard was the "minimal acceptable standards of practice of chiropractic." The Board felt that this was inadequate and was not reflective of the standard used in administrative hearings and civil litigation. Therefore, the Board changed this standard to the "generally accepted standards of care within the chiropractic profession in Texas."

Two comments were received by the Board during the comment period on the proposed amendment. The first commenter expressed concern that the new standard of "generally accepted standards of care within the chiropractic profession in Texas" is too ambiguous and is arbitrary. The Board disagrees. The new standard is in line with the standard applied in civil litigation and administrative hearings. Additionally, the commenter states that subsection (a)(1)(F) and (G) impose a duty on a doctor that should not exist. The Board disagrees. All doctors of chiropractic (DCs) have a duty to refer a patient who requires care from some other appropriate health care provider, whether because the condition requiring treatment is outside the chiropractic scope of practice or because the treating DC does not have the adequate education, training, or experience to treat that condition. This applies even when the doctor of chiropractic gives chiropractic care based upon a wellness model. If that DC knew or should have known that the patient suffered from a condition outside the chiropractic scope of practice or outside that DC's education, training, or experience, then the duty applies. No change was made in response to this comment.

The second commenter expressed multiple concerns. First, he expressed concern with the term "timely manner" being subjective. The Board feels that any more specificity with regards to "timely manner" is not appropriate, as each patient's situation is different based on all facts and circumstances surrounding that situation. Next, he expressed concern with the term "refer." He inquired whether this referred to an actual referral from the DC to another specialist or whether it was sufficient to supply the patient with a name and/or list of names of specialists. The Board feels that the treating DC can make an actual referral or can provide the patient with options, as long as the patient is informed that care is required from another appropriate health care provider. Third, he asked about situations where a patient has already been evaluated or treated for a condition outside the chiropractic scope of practice or outside that DC's education, training, or experience. He inquired about whether DCs can rely on a patient's word that he/she has sought said evaluation and/or treatment and whether DCs were required to refer a patient for a condition he/she did not wish to have evaluated or treated. The Board believes that a DC cannot force a patient to be treated, but the patient must be informed of the DC's referral of that patient to an appropriate health care provider and recommendation to be evaluated/treated. If a patient states that he/she has already been evaluated or treated for a certain condition, then the DC does not have to refer further, as long as it is documented that the condition is outside of the scope of practice or that DC's education, training, or experience, and that the patient was informed of such. Finally, the commenter asked about whether a DC with advanced training or specialty is able to diagnose and/or treat more conditions than a lesser trained DC and is thus held to a different standards? All DCs must diagnose and/or treat within the chiropractic scope of practice. If one DC has more training or education or experience than the other, then that higher level will be considered, but it does not allow that DC to diagnose or

treat outside the chiropractic scope of practice. No change was made in response to this comment.

The amendment is adopted under Texas Occupations Code §201.152 and §201.502. Section 201.152 authorizes the Board to adopt rules necessary to regulate the practice of chiropractic. Section 201.502 authorizes the Board to discipline licensees for failing to use proper diligence in the practice of chiropractic or for using gross inefficiency in the practice of chiropractic.

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

Filed with the Office of the Secretary of State on June 27, 2012.

TRD-201203379
Yvette Yarbrough
Executive Director
Texas Board of Chiropractic Examiners
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For further information, please call: (512) 305-6716

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CHAPTER 77. ADVERTISING AND PUBLIC COMMUNICATION

22 TAC §77.2

The Texas Board of Chiropractic Examiners (Board) adopts an amendment to §77.2, concerning Publicity, without changes to the proposed text as published in the February 10, 2012, issue of the *Texas Register* (37 TexReg 595). The rule will not be republished.

The amendment includes in subsection (a) a reference to §77.5, relating to misleading claims.

Additionally, the amendment removes the word "registered" from subsections (b) - (f), which allows the Board to regulate by this rule facilities operating without a current certificate of registration. Previously, the Board was restricted to regulating the public communications and advertising of "registered facilities" by this rule.

Also, the amendment adds subsection (h), requiring licensees or facilities to identify research studies relied upon in making public claims. This will allow the public greater access to information regarding claims made in advertisements and public communications.

The amendment also adds subsection (i), placing limitations on the advertisement of services as "free." The Board has received complaints in the past about services that were advertised as free, but then ultimately charged to the patient pursuant to "small print" or "loopholes." This amendment requires licensees and facilities to detail what services will be performed as part of the "free" service, whether those services are "free" or will require an additional charge, and whether a report of findings for an evaluation is included in the "free" service.

Finally, the Board adds subsection (j), which makes clear that §77.2 and §77.5 apply to any advertising, communications or telemarketing done by or on behalf of a licensee or facility. This is intended to allow the Board to regulate a licensee or facility pursuant to these rules, even though the actual advertisement, communication or telemarketing was not physically done by that licensee or facility, but instead by an employee, student or other agent.

No comments were received by the Board in response to the proposed amendment.

The amendment is adopted under Texas Occupations Code §201.152, relating to Rules, and §201.155, relating to Restrictions on Advertising. Section 201.152 authorizes the Board to adopt rules necessary to regulate the practice of chiropractic. Section 201.155 states that the Board may adopt rules restricting advertising to prohibit false, misleading or deceptive practices.

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

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Yvette Yarbrough
Executive Director
Texas Board of Chiropractic Examiners
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For further information, please call: (512) 305-6716

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CHAPTER 79. LICENSURE OF CERTAIN OUT-OF-STATE APPLICANTS

22 TAC §79.3

The Texas Board of Chiropractic Examiners (Board) adopts new §79.3, concerning General Requirements for Licensure of Certain Military Spouses, without changes to the proposed text as published in the April 6, 2012, issue of the *Texas Register* (37 TexReg 2301). The rule will not be republished.

The new rule allows an active duty military member's spouse who holds a chiropractic license in another jurisdiction and who meets the criteria outlined in the rule to obtain a Texas chiropractic license. The rule also affords some discretion to the Board and the Executive Director to allow certain applicants to demonstrate competency by alternative methods in order to meet the requirements for obtaining a license.

The Board received one comment on the proposed new rule. The commenter questioned why the Executive Director was allowed discretion in subsection (e). The language in subsection (e) comes from the language in Texas Occupations Code §55.004, the statute directing state agencies to develop a rule such as this. No change was made in response to this comment.

The new rule is adopted under Texas Occupations Code §55.004, relating to Alternative License Procedure for Military Spouse, and §201.152, relating to Rules. Section 55.004 directs state agencies who issue licenses to adopt rules for the issuance of the license to an applicant who is the spouse of a person serving on active duty as a member of the armed forces of the United States and: (1) holds a current license issued by another state that has licensing requirements that are substantially equivalent to the requirements for the license; or (2) within the five years preceding the application date held the license in this state that expired while the applicant lived in another state

for at least six months. Section 201.152 authorizes the Board to adopt rules necessary to regulate the practice of chiropractic.

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

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Yvette Yarbrough
Executive Director
Texas Board of Chiropractic Examiners
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Proposal publication date: April 6, 2012
For further information, please call: (512) 305-6716

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PART 11. TEXAS BOARD OF NURSING

CHAPTER 213. PRACTICE AND PROCEDURE

22 TAC §213.33

Introduction. The Texas Board of Nursing (Board) adopts amendments to §213.33(c), concerning Factors Considered for Imposition of Penalties/Sanctions. These amendments are adopted without changes to the proposed text published in the May 18, 2012, issue of the *Texas Register* (37 TexReg 3668) and will not be republished.

Reasoned Justification. The amendments to §213.33(c) are adopted under the authority of the Occupations Code §§301.151, 301.304, 301.452, 301.453, 301.4531,and 301.502 and are necessary to: (i) implement the requirements of House Bill (HB) 2975 and Senate Bill (SB) 1360, both enacted by the 82nd Legislature, R.S., effective September 1, 2011; and (ii) clarify the proper application of the mitigating factors enumerated in the existing subsection.

During the past legislative session, the Legislature passed companion bills, HB 2975 and SB 1360, addressing continuing education for physicians and nurses whose practice includes the treatment of tick-borne diseases. Pursuant to the legislation, license holders whose practice includes the treatment of tick-borne diseases are encouraged, but not required, to participate in continuing education relating to the treatment of tick-borne diseases during each two year licensing period. Under the bills' requirements, the Board is required to adopt rules that establish the content of the continuing education courses and identify the license holders who will be encouraged to complete the continuing education. Also subject to the bills' requirements, continuing education courses that represent an appropriate spectrum of relevant medical clinical treatment relating to tick-borne diseases must qualify as approved continuing education courses for license renewal. The legislation also requires the Board to consider, if relevant, a license holder's participation in a continuing education course meeting the Board's content requirements if the license holder is being investigated by the Board for his/her selection of clinical care for the treatment of tick-borne diseases and the license holder completed the continuing education course not more than two years prior to the beginning of the Board's investigation. In adopting its rules, the legislation also requires the Board to consult and cooperate with the Texas Medical Board, seek input from affected parties, and review relevant courses, including courses that have been approved in other states.

Consistent with the bills' mandate, the adopted amendments to §213.33(c) require an individual's completion of a continuing education course relating to the treatment of tick-borne disease to be considered as a potentially mitigating factor in an eligibility or disciplinary matter involving the individual's selection of clinical care for the treatment of tick-borne diseases, provided the individual completed the course no more than two years before the start of the Board's investigation. This amendment is consistent with the specific requirements of §301.304(c). The adopted amendments implementing the remaining requirements of HB 2975 and SB 1360 are published elsewhere in this issue of the *Texas Register.*

Section 213.33(c) prescribes the factors that must be utilized when determining the appropriate sanction in an eligibility or disciplinary matter. The factors prescribed by the rule must be used in conjunction with the Board's Disciplinary Matrix, and both aggravating factors and mitigating factors must be analyzed in determining the appropriate tier and sanction level of the Disciplinary Matrix for a particular violation or multiple violations of the Nursing Practice Act (Occupations Code Chapter 301) and/or Board rules. The adopted amendments clarify, however, that the mere existence of mitigating factors in a particular matter does not necessary mean that a dismissal of the matter is required or appropriate. Rather, the aggravating and mitigating factors in each matter must be carefully considered. The existence of appropriate mitigating factors may reduce the severity of the sanction in a particular matter, but it does not automatically or necessarily equate to a dismissal of the matter. Any presumption to the contrary is a misapplication of the Board's rule. The adopted amendments are designed to reiterate the appropriate application of the factors enumerated in §213.33(c) and to encourage consistent application of the Board's Disciplinary Matrix in all eligibility and disciplinary matters.

How the Sections Will Function. Adopted §213.33(c)(17) provides that an individual's participation in a continuing education course described in 22 TAC §216.3(f) (relating to Requirements) must be considered when determining the appropriate sanction in a matter where the individual is being investigated by the Board for the individual's selection of clinical care for the treatment of tick-borne diseases, provided the individual completed the course not more than two years before the start of the Board's investigation. Adopted §213.33(c)(18) renumbers the paragraphs correctly and states that the presence of mitigating factors does not constitute a requirement of dismissal of a violation of the Nursing Practice Act and/or Board rules.

Summary of Comments and Agency Response. The Board did not receive any comments on the proposal.

Statutory Authority. The amendments are adopted under the Occupations Code §§301.151, 301.304, 301.452, 301.453, 301.4531, and 301.502.

Section 301.151 authorizes the Board to adopt and enforce rules consistent with Chapter 301 and necessary to: (1) perform its duties and conduct proceedings before the Board; (2) regulate the practice of professional nursing and vocational nursing; (3) establish standards of professional conduct for license holders under Chapter 301; and (4) determine whether an act constitutes the practice of professional nursing or vocational nursing.

Section 301.304(a) states that, as part of the continuing education requirements under §301.303, a license holder whose prac-

tice includes the treatment of tick-borne diseases shall be encouraged to participate, during each two-year licensing period, in continuing education relating to the treatment of tick-borne diseases.

Section 301.304(b) states that the Board shall adopt rules to identify the license holders who are encouraged to complete continuing education under §301.304(a) and establish the content of that continuing education. In adopting rules, the Board shall seek input from affected parties and review relevant courses, including courses that have been approved in other states. Further, rules adopted under §301.304 must provide that continuing education courses representing an appropriate spectrum of relevant medical clinical treatment relating to tick-borne diseases qualify as approved continuing education courses for license renewal.

Section 301.304(c) states that, if relevant, the Board shall consider a license holder's participation in a continuing education course approved under §301.304(b) if: (i) the license holder is being investigated by the Board regarding the license holder's selection of clinical care for the treatment of tick-borne diseases; and (ii) the license holder completed the course not more than two years before the start of the investigation.

Section §301.304(d) states that the Board may adopt other rules to implement §301.304, including rules under §301.303(c) for the approval of education programs and providers.

Section 301.452(a) defines intemperate use as including practicing nursing or being on duty or on call while under the influence of alcohol or drugs.

Section 301.452(b) provides that a person is subject to denial of a license or to disciplinary action under Chapter 301, Subchapter J for: (i) a violation of Chapter 301, a rule or regulation not inconsistent with Chapter 301, or an order issued under Chapter 301; (ii) fraud or deceit in procuring or attempting to procure a license to practice professional nursing or vocational nursing; (iii) a conviction for, or placement on deferred adjudication community supervision or deferred disposition for, a felony or for a misdemeanor involving moral turpitude; (iv) conduct that results in the revocation of probation imposed because of conviction for a felony or for a misdemeanor involving moral turpitude; (v) use of a nursing license, diploma, or permit, or the transcript of such a document, that has been fraudulently purchased, issued, counterfeited, or materially altered; (vi) impersonating or acting as a proxy for another person in the licensing examination required under §301.253 or §301.255; (vii) directly or indirectly aiding or abetting an unlicensed person in connection with the unauthorized practice of nursing; (viii) revocation, suspension, or denial of, or any other action relating to, the person's license or privilege to practice nursing in another jurisdiction; (ix) intemperate use of alcohol or drugs that the Board determines endangers or could endanger a patient; (x) unprofessional or dishonorable conduct that, in the Board's opinion, is likely to deceive, defraud, or injure a patient or the public; (xi) adjudication of mental incompetency; (xii) lack of fitness to practice because of a mental or physical health condition that could result in injury to a patient or the public; or (xiii) failure to care adequately for a patient or to conform to the minimum standards of acceptable nursing practice in a manner that, in the Board's opinion, exposes a patient or other person unnecessarily to risk of harm.

Section 301.452(c) states that the Board may refuse to admit a person to a licensing examination for a ground described under §301.452(b).

Section 301.452(d) states that the Board by rule shall establish guidelines to ensure that any arrest information, in particular information on arrests in which criminal action was not proven or charges were not filed or adjudicated, that is received by the Board under §301.452 is used consistently, fairly, and only to the extent the underlying conduct relates to the practice of nursing.

Section 301.453(a) states that, if the Board determines that a person has committed an act listed in §301.452(b), the Board shall enter an order imposing one or more of the following: (i) denial of the person's application for a license, license renewal, or temporary permit; (ii) issuance of a written warning; (iii) administration of a public reprimand; (iv) limitation or restriction of the person's license, including: (A) limiting to or excluding from the person's practice one or more specified activities of nursing; or (B) stipulating periodic Board review; (v) suspension of the person's license; (vi) revocation of the person's license; or (vii) assessment of a fine.

Section 301.453(b) states that, in addition to or instead of an action under §301.453(a), the Board, by order, may require the person to: (i) submit to care, counseling, or treatment by a health provider designated by the Board as a condition for the issuance or renewal of a license; (ii) participate in a program of education or counseling prescribed by the Board, including a program of remedial education; (iii) practice for a specified period under the direction of a registered nurse or vocational nurse designated by the Board; or (iv) perform public service the Board considers appropriate.

Section 301.453(c) states that the Board may probate any penalty imposed on a nurse and may accept the voluntary surrender of a license. Further, the Board may not reinstate a surrendered license unless it determines that the person is competent to resume practice.

Section 301.453(d) states that, if the Board suspends, revokes, or accepts surrender of a license, the Board may impose conditions for reinstatement that the person must satisfy before the Board may issue an unrestricted license.

Section 301.4531(a) states that the Board by rule shall adopt a schedule of the disciplinary sanctions that the Board may impose under Chapter 301. In adopting the schedule of sanctions, the Board shall ensure that the severity of the sanction imposed is appropriate to the type of violation or conduct that is the basis for disciplinary action.

Section 301.4531(b) states that, in determining the appropriate disciplinary action, including the amount of any administrative penalty to assess, the Board shall consider: (i) whether the person: (A) is being disciplined for multiple violations of either Chapter 301 or a rule or order adopted under Chapter 301; or (B) has previously been the subject of disciplinary action by the Board and has previously complied with Board rules and Chapter 301; (ii) the seriousness of the violation; (iii) the threat to public safety; and (iv) any mitigating factors.

Section 301.4531(c) states that, in the case of a person described by: (i) §301.4531(b)(1)(A), the Board shall consider taking a more severe disciplinary action, including revocation of the person's license, than the disciplinary action that would be taken for a single violation; and (ii) §301.4531(b)(1)(B), the Board shall consider taking a more severe disciplinary action, including revocation of the person's license, than the disciplinary action that would be taken for a person who has not previously been the subject of disciplinary action by the Board.

Section 301.502(a) states that the administrative penalty may not exceed $5,000 for each violation. Each day a violation continues or occurs is a separate violation for purposes of imposing a penalty.

Section 301.502(b) states that the amount of the penalty shall be based on: (i) the seriousness of the violation, including: (A) the nature, circumstances, extent, and gravity of any prohibited acts; and (B) the hazard or potential hazard created to the health, safety, or economic welfare of the public; (ii) the economic harm to property or the environment caused by the violation; (iii) the history of previous violations; (iv) the amount necessary to deter a future violation; (v) efforts made to correct the violation; and (vi) any other matter that justice may require.

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

Filed with the Office of the Secretary of State on June 26, 2012.

TRD-201203364
Jena Abel
Assistant General Counsel
Texas Board of Nursing
Effective date: July 16, 2012
Proposal publication date: May 18, 2012
For further information, please call: (512) 305-6822

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CHAPTER 216. CONTINUING COMPETENCY

22 TAC §216.3

Introduction. The Texas Board of Nursing (Board) adopts amendments to §216.3, relating to Requirements. These amendments are adopted without changes to the proposed text published in the May 18, 2012, issue of the *Texas Register* (37 TexReg 3670) and will not be republished.

Reasoned Justification. These amendments are adopted under the authority of the Occupations Code §§301.151, 301.303, and 301.304 and are necessary to implement the requirements of House Bill (HB) 2975 and Senate Bill (SB) 1360, both enacted by the 82nd Legislature, R.S., effective September 1, 2011.

During the past legislative session, the Legislature passed companion bills, HB 2975 and SB 1360, addressing continuing education for physicians and nurses whose practice includes the treatment of tick-borne diseases. Pursuant to the legislation, license holders whose practice includes the treatment of tick-borne diseases are encouraged, but not required, to participate in continuing education relating to the treatment of tick-borne diseases during each two-year licensing period. Under the bills' requirements, the Board is required to adopt rules that establish the content of the continuing education courses and identify the license holders who will be encouraged to complete the continuing education. Also subject to the bills' requirements, continuing education courses that represent an appropriate spectrum of relevant medical clinical treatment relating to tick-borne diseases must qualify as approved continuing education courses for license renewal. The legislation also requires the Board to consider, if relevant, a license holder's participation in a continuing education course meeting the Board's content requirements if the license holder is being investigated by the Board for his/her selection of clinical care for the treatment of tick-borne diseases and the license holder completed the continuing education course not more than two years prior to the beginning of the Board's investigation. In adopting its rules, the legislation also requires the Board to consult and cooperate with the Texas Medical Board, seek input from affected parties, and review relevant courses, including courses that have been approved in other states.

Collaboration

The Board closely monitored the Texas Medical Board's implementation of HB 2975 and SB 1360 and routinely communicated with the Medical Board regarding the progress of its proposed rules. The Texas Medical Board formally proposed amendments to implement the requirements of the legislation in the March 9, 2012, issue of the *Texas Register* (37 TexReg 1639). In an effort to elicit stakeholder input prior to proposing its own rules, the Board provided copies of the rules proposed by the Texas Medical Board to several interested advanced practice registered nurse (APRN) advisory committee members and organizations and requested comment and feedback on the proposed rules. In response, the Board received only one written comment from an APRN, who supported the implementation of the legislation and reiterated that it is within the scope of a nurse practitioner to treat diseases for which she/he has specialized training. Further, because there are alternative standards of care for the treatment of tick-borne diseases, the APRN stated that it makes sense that patients should be allowed to choose their treatment protocol based upon an informed choice, just as they do with many other diseases. The Board also reviewed a variety of educational courses related to the treatment of tick-borne diseases and attempted to locate other nursing board's rules and regulations related to tick-borne diseases. The Board did not locate any other regulations related to tick-borne diseases, but did find several state and federal advisories related to the prevention, detection, and treatment of tick-borne diseases.

Adopted Amendments

The adopted amendments apply the legislation to APRNs whose practice includes the treatment of tick-borne diseases. Although registered nurses or vocational nurses may occasionally administer medications for the treatment of tick-borne diseases pursuant to a physician's order, APRNs are more likely to be involved in the regular diagnosis and treatment of individuals suffering from tick-borne diseases as part of their ongoing practice. Further, since the legislation also affects physicians whose practice includes the treatment of tick-borne diseases, the adopted amendments are intended to apply the legislation consistently among APRNs and their collaborating physicians. As such, and consistent with the legislation, APRNs whose practice includes the treatment of tick-borne diseases are encouraged to participate in continuing education relating to the treatment of tick-borne diseases. Further, the adopted amendments require that the continuing education courses contain information relevant to the treatment of the disease within the role and population focus area applicable to the APRN. This requirement is necessary to maintain the APRNs' appropriate scope of practice and to ensure that APRNs maintain an expertise that is relevant and applicable to their individual area of practice. This requirement is also consistent with the Board's current rules regarding a nurse's continuing competency. The adopted amendments, pursuant to the legislation's mandate, further permit continuing education courses representing a spectrum of relevant medical clinical treatment relating to tick-borne disease to qualify as approved continuing education courses. Finally, in recognizing that APRNs will consult and collaborate with physicians regarding the treatment of

tick-borne diseases, the adopted amendments permit APRNs to receive credit for the completion of continuing medical education related to the treatment of tick-borne diseases, provided the continuing medical education contains information that is appropriate and relevant to the role and population focus area of the APRN. This requirement provides APRNs the opportunity to explore additional sources of information related to the treatment of tick-borne diseases, while ensuring that the information appropriately relates to the APRNs' scope of practice. Other adopted amendments implementing the remaining requirements of HB 2975 and SB 1360 are published elsewhere in this issue of the *Texas Register.*

How the Section Will Function. Adopted §216.3(f) states that an APRN whose practice includes the treatment of tick-borne diseases is encouraged to participate in continuing education relating to the treatment of tick-borne diseases. The continuing education course(s) should contain information relevant to treatment of the disease within the role and population focus area applicable to the APRN and may represent a spectrum of relevant medical clinical treatment relating to tick-borne disease. Further, completion of continuing medical education in the treatment of tick-borne disease that meets the requirements of §216.3(f) shall be credited as continuing education under Chapter 216.

Summary of Comments and Agency Response. The Board did not receive any comments on the proposal.

Statutory Authority. The amendments are adopted under the Occupations Code §§301.151, 301.303, and 301.304.

Section 301.151 authorizes the Board to adopt and enforce rules consistent with Chapter 301 and necessary to: (1) perform its duties and conduct proceedings before the Board; (2) regulate the practice of professional nursing and vocational nursing; (3) establish standards of professional conduct for license holders under Chapter 301; and (4) determine whether an act constitutes the practice of professional nursing or vocational nursing.

Section 301.303(a) provides that the Board may recognize, prepare, or implement continuing competency programs for license holders under Chapter 301 and may require participation in continuing competency programs as a condition of renewal of a license. The programs may allow a license holder to demonstrate competency through various methods, including: (i) completion of targeted continuing education programs; and (ii) consideration of a license holder's professional portfolio, including certifications held by the license holder.

Section 301.303(b) states that the Board may not require participation in more than a total of 20 hours of continuing education in a two-year licensing period.

Section 301.303(c) states that, if the Board requires participation in continuing education programs as a condition of license renewal, the Board by rule shall establish a system for the approval of programs and providers of continuing education.

Section 301.303(e) states that the Board may adopt other rules as necessary to implement §301.303.

Section 301.303(f) provides that the Board may assess each program and provider under §301.303 a fee in an amount that is reasonable and necessary to defray the costs incurred in approving programs and providers.

Section 301.303(g) states that the Board by rule may establish guidelines for targeted continuing education under Chapter 301. The rules adopted under §301.303(g) must address: (i) the nurses who are required to complete the targeted continuing education program; (ii) the type of courses that satisfy the targeted continuing education requirement; (iii) the time in which a nurse is required to complete the targeted continuing education; (iv) the frequency with which a nurse is required to meet the targeted continuing education requirement; and (v) any other requirement considered necessary by the Board.

Section 301.304(a) states that, as part of the continuing education requirements under §301.303, a license holder whose practice includes the treatment of tick-borne diseases shall be encouraged to participate, during each two-year licensing period, in continuing education relating to the treatment of tick-borne diseases.

Section 301.304(b) states that the Board shall adopt rules to identify the license holders who are encouraged to complete continuing education under §301.304(a) and establish the content of that continuing education. In adopting rules, the Board shall seek input from affected parties and review relevant courses, including courses that have been approved in other states. Further, rules adopted under §301.304 must provide that continuing education courses representing an appropriate spectrum of relevant medical clinical treatment relating to tick-borne diseases qualify as approved continuing education courses for license renewal.

Section 301.304(c) states that, if relevant, the Board shall consider a license holder's participation in a continuing education course approved under §301.304(b) if: (i) the license holder is being investigated by the Board regarding the license holder's selection of clinical care for the treatment of tick-borne diseases; and (ii) the license holder completed the course not more than two years before the start of the investigation.

Section §301.304(d) states that the Board may adopt other rules to implement §301.304, including rules under §301.303(c) for the approval of education programs and providers.

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

Filed with the Office of the Secretary of State on June 26, 2012.

TRD-201203363
Jena Abel
Assistant General Counsel
Texas Board of Nursing
Effective date: July 16, 2012
Proposal publication date: May 18, 2012
For further information, please call: (512) 305-6822

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 1. MISCELLANEOUS PROVISIONS
SUBCHAPTER Y. ADVERSE LICENSING, LISTING, OR REGISTRATION DECISIONS

25 TAC §1.601

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts new §1.601, concerning adverse licensing, listing, or registration decisions, without changes to the proposed text as published in the February 3, 2012, issue of the *Texas Register* (37 TexReg 466) and, therefore, the section will not be republished.

BACKGROUND AND PURPOSE

Senate Bill 78, enacted during the 82nd Legislature, Regular Session, 2011, added Government Code, §§531.951 - 531.954 and requires certain Health and Human Services Commission agencies to capture, retain, and share information regarding adverse actions against regulated entities or persons seeking or renewing a license. This new law applies to the department, as well as the Department of Aging and Disability Services (DADS), and the Department of Family and Protective Services (DFPS). Each agency is required to create a monthly list of adverse actions that is shared with the other agencies. Under this law, an agency may take an adverse action against a licensee or applicant based on the information provided by the other agencies. The new rule implements the law by adding Subchapter Y.

Five regulatory programs administered by the department are affected by the new law that includes Youth Camps in 25 Texas Administrative Code (TAC) Chapter 265; Hospital Licensing in 25 TAC Chapter 133; Special Care Facilities in 25 TAC Chapter 125; Chemical Dependency Treatment Facilities in 25 TAC Chapter 448; and Private Psychiatric Hospitals in 25 TAC Chapter 134. Each program has a unique rule set; therefore, the most efficient way to implement the law is to amend the broad-scope 25 TAC Chapter 1, rather than amending five individual rule text chapters in 25 TAC. The requirements of the law are identical for all programs affected.

The new requirements include creating a record of final decisions for any adverse actions that result in denial, suspension, revocation or termination of a license. The department must provide the records on a monthly basis to DADS and DFPS; conversely, DADS and DFPS are required to provide such information to the department and to one another. The records of decisions and the relevant applications must be retained by the agencies for a period of 10 years from the anniversary date of the denial, suspension, revocation or termination. The new rule promotes efficient communication between the agencies and facilitates denial or termination of a license in circumstances that pose significant risk or harm to an individual in the care of the entity or person.

SECTION-BY-SECTION SUMMARY

Section 1.601(a) defines the scope of the subchapter with respect to the department and the five programs it administers that are subject to the rule. The programs are Youth Camps in Health and Safety Code, Chapter 141; Hospital Licensing in Health and Safety Code, Chapter 241; Special Care Facilities in Health and Safety Code, Chapter 248; Chemical Dependency Treatment Facilities in Health and Safety Code, Chapter 464; and Private Psychiatric Hospitals in Health and Safety Code, Chapter 577.

Section 1.601(b) describes the requirement to create, share, and retain records of decisions, which relate to denying, revoking, suspending, or terminating a license or registration (adverse action). The records that relate to adverse action must include: the name and address of the applicant; the name and address of each person named on the application; the name of each controlling person; a summary of the terms for which the adverse action was taken; and the period that the adverse action will be in effect. This subsection also includes the provisions for providing the monthly report and the 10-year retention period.

Section 1.601(c) describes how the department may deny an application for a license or renewal of a license, based on the adverse actions taken by the other agencies subject to the enabling statute. The license may be denied if the applicant, a person named on the application, or a controlling person of the entity or person seeking a license is listed by DADS or DFPS in a record as described in subsection (b) and the agency's action was based on an act or omission that resulted in physical or mental harm to an individual in the care of the applicant or person; a threat to the health, safety or well-being of an individual in the care of the applicant or person; or a determination by the agency that the applicant or person has committed an act or omission that renders the applicant unqualified to fulfill the obligations of the license or registration.

Section 1.601(d) requires an applicant to include with the application a written statement of the name of any person who is or will be a controlling person of the entity for which the license or registration is sought.

COMMENTS

The department, on behalf of the commission, did not receive any comments regarding the proposed rule during the comment period.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The new rule is authorized by Government Code, Chapter 531, which requires the Executive Commissioner of the Health and Human Services Commission to adopt a rule necessary to implement the adverse licensing, listing, or registration decisions; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

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

Filed with the Office of the Secretary of State on July 2, 2012.

TRD-201203468
Lisa Hernandez
General Counsel
Department of State Health Services
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Proposal publication date: February 3, 2012
For further information, please call: (512) 776-6972

CHAPTER 229. FOOD AND DRUG
SUBCHAPTER EE. COTTAGE FOOD PRODUCTION OPERATION

25 TAC §229.661

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts new §229.661, concerning the regulation of cottage food production operations, with changes to the proposed text as published in the January 27, 2012, issue of the *Texas Register* (37 TexReg 294).

BACKGROUND AND PURPOSE

The purpose of the new rule is to implement Senate Bill (SB) 81 of the 82nd Legislature, Regular Session, 2011, which amends Health and Safety Code, Chapter 437, relating to requirements for a cottage food production operation. The Executive Commissioner of the Health and Human Services Commission is directed in SB 81 to adopt a rule requiring a cottage food production operation to label all of the foods described in Health and Safety Code, §437.001(2-b)(A), that the operation sells to consumers.

A cottage food production operation is an individual who operates out of the individual's home; produces a baked good, a canned jam or jelly, or a dried herb or herb mix for sale at the person's home; has an annual gross income of $50,000 or less from the sale of foods; and sells the foods produced only directly to consumers.

SECTION-BY-SECTION SUMMARY

SB 81 states that a cottage food production operation is not a food service establishment for purposes of the Health and Safety Code, Chapter 437. This rule was developed under the authority of the Health Safety Code, §437.0193, which gives the Executive Commissioner rulemaking authority. The new rule provides definitions for cottage food production operations, labeling requirements, complaint database requirements, and sales location requirements.

New definitions in Health and Safety Code, §437.001, are added to incorporate terminology due to the enactment of SB 81 in §229.661(b).

The new definition of "baked good" in §229.661(b)(1) is added to specify the types of foods and products that are allowed to be produced by a cottage food production operation.

The new definition of "cottage food production operation" in §229.661(b)(2) is added to specify where a cottage food production operation may operate, what a cottage food production operation may produce, how much in annual gross income a cottage food production operation may earn, and to whom a cottage food production operation may sell its products.

The new definition of "department" in §229.661(b)(3), is added to specify the Department of State Health Services.

The new definition of "Executive Commissioner" in §229.661(b)(4) is added to specify the Executive Commissioner of the Health and Human Services Commission.

The new definition of "food establishment" in §229.661(b)(5) is added to specify types of food service operations that are considered to be food establishments, and to specify that a "cottage food production operation" is not a food establishment.

The new definition of "herbs" in §229.661(b)(6) is added to specify that the use of herbs is only for culinary purposes.

The new definition of "home" in §229.661(b)(7) is added to specify the meaning of the term home as a primary residence.

The new definition of "potentially hazardous food" in §229.661(b)(8) is added to clarify the types of foods that are not allowed to be produced by a cottage food production operation under Health and Safety Code, §437.0191, which exempts a cottage food production operation from being a food service establishment.

The new §229.661(c) is added to specify the department's responsibilities in reference to complaints as stated in Health and Safety Code, §437.0192.

The new §229.661(d) is added to specify labeling requirements for food items produced by a cottage food production operation, including the statement that the department does not inspect a cottage food production operation, in compliance with Health and Safety Code, §437.0193.

The new §229.661(e) is added to specify that a cottage food production operation is prohibited from selling its products through the Internet, in compliance with Health and Safety Code, §437.0194.

COMMENTS

A public hearing was held on February 2, 2012. The department received oral comments during the public hearing. The department also received written comments during the comment period. The department, on behalf of the commission, has fully considered all written and oral comments and has prepared responses to the comments received during the comment period. The commenters were individuals, associations, and/or groups, including the following: The Texas House of Representatives, The Senate of the State of Texas, Texas Medical Association, Texas Environmental Health Association, Texas State Food Safety and Defense Task Force, City of Plano Health Department, Dallas/Denton/Arlington Cake Clubs, and Texas Bakers Bill Group. The majority of the commenters were not against the rule in its entirety but recommended changes. Many commenters were in favor of the rule and recommended changes.

Comment: Concerning §229.661, commenters stated that the law is confusing and applies severe restrictions to other occasional and infrequent procedures, like non-profit groups.

Response: The commission disagrees with these comments. Section 229.661 does not address non-profit organizations. No change was made to the rule as a result of these comments.

Comment: Concerning §229.661(b)(2)(A), commenters were concerned about safety problems and other hazards by selling from a person's home. One commenter stated that it is an invitation to violent crime.

Response: Health and Safety Code, §437.001(2-b), defines a cottage food production operation as an individual operating out of the individual's home. The rule follows the definition in the statute. No change was made to the rule as a result of these comments.

Comment: Commenters requested that the definition for "food establishment" be deleted, especially the reference to "farmers' market" in §229.661(b)(5)(A)(i), except as it relates to a cottage food production operation.

Response: The commission disagrees with deleting the term "food establishment" because this term defines the reference to "food service establishment" in the Health and Safety Code, §437.0191. No change was made to the definition of "food establishment" in the rule as a result of these comments. The com-

mission agrees with deleting the term "farmers' market" as a type of food establishment. The term "farmers' market" was deleted in §229.661(b)(5)(A)(i) as a result of these comments.

Comment: Concerning §229.661(b)(8), commenters recommended that the department delete the definition for "potentially hazardous food," except as it applies to cottage food production operations.

Response: The commission disagrees with deleting the definition for "potentially hazardous food." Health and Safety Code, §437.001(2-a)-(2-b) describes a cottage food production operation as producing baked goods and defines a baked good as not including a potentially hazardous food item, as defined by the department rule. The definition for potentially hazardous food explains the criteria for determining which foods are potentially hazardous. No change was made to the rule as a result of these comments.

Comment: Concerning §229.661(d)(1)(A), commenters were concerned about safety problems and other hazards with informing people about the physical address of a cottage food production operation. One commenter stated that including the physical address of the bakers is un-American, is unethical, and would place bakers at risk of violence. Another commenter stated that the physical address on the label could cause safety problems and violate the rights of the citizen.

Response: Health and Safety Code, §437.0193, requires the Executive Commissioner to adopt rules requiring labels and requires labels to include the address of the cottage food production operation. The rule follows the requirement in the statute. No change was made to the rule as a result of these comments.

Comment: Concerning §229.661(d)(1)(B), commenters objected to the requirement to include "the common or usual name of the product and an adequately descriptive statement of identity."

Response: The commission amended §229.661(d)(1)(B) to require only "the common or usual name of the product" on the label. The commission has deleted the words "and an adequately descriptive statement of identity" as a result of these comments.

Comment: Concerning §229.661(d)(1)(C), commenters objected to the words, "if made from two or more ingredients, a list of ingredients in descending order of predominance by net weight, including a declaration of artificial color or flavor and chemical preservatives, if contained in the food" of the labeling requirements.

Response: The commission agrees and has deleted the words "made from two or more ingredients, a list of ingredients in descending order of predominance by net weight, including a declaration of artificial color or flavor and chemical preservatives, if contained in the food" from the rule.

Comment: Concerning §229.661(d)(1)(D), commenters objected to including "an accurate declaration of the net quantity of contents including metric measurements."

Response: The commission agrees and has deleted subparagraph (D), which stated "an accurate declaration of the net quantity of contents including metric measurements" from the rule text.

Comment: Concerning §229.661(d)(1)(E), commenters objected to the requirements for allergen labeling in compliance with the Food Allergen Labeling and Consumer Protection Act of 2004. Many comments stated that the U.S. Food and Drug Administration (FDA) exempts small businesses from complying with this requirement.

Response: The commission disagrees with these comments for public health reasons. Consumers should be informed of food containing ingredients that are known to be major food allergens, such as eggs, nuts, soy, peanuts, milk, or wheat. FDA exempts small business with a particular gross annual income from requirements regarding nutritional labeling. FDA does not exempt these businesses from requirements regarding listing ingredients. The commission has amended the proposed language in §229.661(d)(1)(E) as follows: "allergen labeling in compliance with the Food Allergen Labeling and Consumer Protection Act of 2004, Pub. L. No.108-282, Title II, 118. Stat. 905" has been deleted, and the following new language has been moved to §229.661(d)(1)(C) in the adopted rule, "if a food is made with a major food allergen, such as eggs, nuts, soy, peanuts, milk or wheat that ingredient must be listed on the label." Subsequent subparagraph (F) was renumbered to subparagraph (D).

Comment: Concerning §229.661(d)(1(F), some commenters stated the requirement for font size for labeling was unnecessary, complicated, and confusing.

Response: The commission believes that the disclaimer, "Made in home kitchen, food is not inspected by the Department of State Health Services or a local health department" must be clearly visible to consumers. The commission has deleted the words "in at least the equivalent of 11-point font and in a color that provides a clear contrast to the background" from the rule. However, the label must be legible.

Comment: Concerning §229.661(d)(1)(F), a commenter requested that the disclaimer be worded as "This food was made in a home kitchen, and has not been inspected by the Department of State Health Services or a local health department."

Response: The commission agrees and has amended the disclaimer.

Comment: Concerning §229.661(d)(2), commenters objected to the words "clearly" and "and printed with durable, permanent ink" because the requirement was unnecessary, complicated and confusing.

Response: The commission agrees and has deleted the words "clearly" and "and printed with durable, permanent ink" and now states "Labels must be legible."

Comment: Concerning §229.661(d)(2)(A) - (C), commenters objected to the labeling requirements.

Response: The commission agrees and has deleted subparagraph (A), "Ingredient statements shall be at 1/16 of an inch or larger;" subparagraph (B), "Ingredients shall include components of the ingredients;" and subparagraph (C), "Net quantity of contents shall be separated from other text on the label and must be located in the bottom third of the label."

Comment: Commenters objected to the proposed rule and recommended that the department withdraw the rule and publish a new rule that reflects the intent of the legislation.

Response: The commission disagrees with the recommendation to withdraw the proposed rule but agrees to amend the rule to reflect the intent of the legislation. The rule has been amended as described in this preamble to reflect the legislative intent.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The new rule is authorized under the Health and Safety Code, Chapter 437, which provides the Executive Commissioner of the Health and Human Services Commission with authority to adopt rules and guidelines relating to §437.0193, labeling requirements for cottage food production operations; and Government Code, §531.0055(e), and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

§229.661. Cottage Food Production Operations.

(a) Purpose. The purpose of this section is to implement Health and Safety Code, Chapter 437, related to cottage food production operations, which requires the department to adopt rules for labeling of foods produced by cottage food production operations.

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

(1) Baked good--A food item prepared by baking the item in an oven, which includes cookies, cakes, breads, Danishes, donuts, pastries, pies, and other items that are prepared by baking. A baked good does not include a potentially hazardous food (time/temperature control for safety foods).

(2) Cottage food production operation--An individual, operating out of the individual's home, who:

(A) produces a baked good, a canned jam or jelly, or a dried herb or herb mix for sale at the person's home;

(B) has an annual gross income of $50,000 or less from the sale of this food described by subparagraph (A) of this paragraph; and

(C) sells foods produced under subparagraph (A) of this paragraph only directly to consumers.

(3) Department--The Department of State Health Services.

(4) Executive Commissioner--The Executive Commissioner of the Health and Human Services Commission.

(5) Food establishment--

(A) Food establishment means an operation that stores, prepares, packages, serves, vends, or otherwise provides food for human consumption:

(i) such as a restaurant; retail food store; satellite or catered feeding location; catering operation if the operation provides food directly to a consumer or to a conveyance used to transport people; market; vending location; conveyance used to transport people; institution; or food bank; and

(ii) that relinquishes possession of food to a consumer directly, or indirectly through a delivery service such as home delivery of grocery orders or restaurant takeout orders, or delivery service that is provided by common carriers.

(B) Food establishment includes:

(i) an element of the operation such as a transportation vehicle or a central preparation facility that supplies a vending location or satellite feeding location unless the vending or feeding location is permitted by the regulatory authority; and

(ii) an operation that is conducted in a mobile, stationary, temporary, or permanent facility or location; where consumption is on or off the premises; and regardless of whether there is a charge for the food.

(C) Food establishment does not include:

(i) an establishment that offers only prepackaged foods that are not potentially hazardous (time/temperature control for safety) foods;

(ii) a produce stand that only offers whole, uncut fresh fruits and vegetables;

(iii) a food processing plant including those that are located on the premises of a food establishment;

(iv) a kitchen in a private home if only food that is not potentially hazardous (time/temperature control for safety) food is prepared for sale or service at a function such as a religious or charitable organization's bake sale if allowed by law;

(v) an area where food that is prepared as specified in clause (iv) of this subparagraph is sold or offered for human consumption;

(vi) a Bed and Breakfast Limited establishment as defined in §229.162 of this title (relating to Definitions) concerning food establishments;

(vii) a private home that receives catered or home-delivered food; or

(viii) a cottage food production operation.

(6) Herbs--Herbs are from the leafy green parts of a plant (either fresh or dried) used for culinary purposes and not for medicinal uses.

(7) Home--A primary residence that contains a kitchen and appliances designed for common residential usage.

(8) Potentially hazardous food (PHF) (time/temperature control for safety food (TCS))--

(A) Potentially hazardous food (time/temperature control for safety food) means a food that requires time/temperature control for safety to limit pathogenic microorganism growth or toxin formation.

(B) Potentially hazardous food (time/temperature control for safety food) includes:

(i) an animal food that is raw or heat-treated; a plant food that is heat-treated or consists of raw seed sprouts, cut melons, cut leafy greens, cut tomatoes or mixtures of cut tomatoes that are not modified in a way so that they are unable to support pathogenic microorganism growth or toxin formation, or garlic-in-oil mixtures that are not modified in a way so that they are unable to support pathogenic microorganism growth or toxin formation; and

(ii) except as specified in subparagraph (C)(iv) of this paragraph, a food that because of the interaction of its a_w and pH values is designated as Product Assessment required (PA) in Table A or B of this clause.

(I) Table A. Interaction of pH and a_w for control of spores in food heat-treated to destroy vegetative cells and subsequently packaged.
Figure: 25 TAC §229.661(b)(8)(B)(ii)(I)

(II) Table B. Interaction of pH and a_w for control of vegetative cells and spores in food not heat-treated or heat-treated but not packaged.
Figure: 25 TAC §229.661(b)(8)(B)(ii)(II)

(C) Potentially hazardous food (time/temperature control for safety food) does not include:

(i) an air-cooled hard-boiled egg with shell intact, or an egg with shell intact that is not hard-boiled, but has been pasteurized to destroy all viable salmonellae;

(ii) a food in an unopened hermetically sealed container that is commercially processed to achieve and maintain commercial sterility under conditions of non-refrigerated storage and distribution;

(iii) a food that because of its pH or a_w value, or interaction of a_w and pH values, is designated as a non-PHF/non-TCS food in Table A or B in subparagraph (B)(ii)(I) and (II) of this paragraph;

(iv) a food that is designated as PA in Table A or B in subparagraph (B)(ii)(I) and (II) of this paragraph and has undergone a Product Assessment showing that the growth or toxin formation of pathogenic microorganisms that are reasonably likely to occur in that food is precluded due to:

(I) intrinsic factors including added or natural characteristics of the food such as preservatives, antimicrobials, humectants, acidulants, or nutrients;

(II) extrinsic factors including environmental or operational factors that affect the food such as packaging, modified atmosphere such as reduced oxygen packaging, shelf life and use, or temperature range of storage and use; or

(III) a combination of intrinsic and extrinsic factors; or

(v) a food that does not support the growth or toxin formation of pathogenic microorganisms in accordance with one of the clauses (i) - (iv) of this subparagraph even though the food may contain a pathogenic microorganism or chemical or physical contaminant at a level sufficient to cause illness or injury.

(c) Complaints. The department shall maintain a record of a complaint made by a person against a cottage food production operation.

(d) Labeling requirements for cottage food production operations. All foods prepared by a cottage food production operation must be labeled.

(1) The label information shall include:

(A) the name and physical address of the cottage food production operation;

(B) the common or usual name of the product;

(C) if a food is made with a major food allergen, such as eggs, nuts, soy, peanuts, milk or wheat that ingredient must be listed on the label; and

(D) the following statement: "This food is made in a home kitchen and is not inspected by the Department of State Health Services or a local health department."

(2) Labels must be legible.

(e) Sales by cottage food production operations through Internet prohibited. A cottage food production operation may not sell any of the foods described in these rules through the Internet. No health claims may be made on any of the advertising medium of the finished products because they are conventional foods.

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

Filed with the Office of the Secretary of State on July 2, 2012.

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Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: July 22, 2012
Proposal publication date: January 27, 2012
For further information, please call: (512) 776-6972

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CHAPTER 265. GENERAL SANITATION
SUBCHAPTER N. CAMPUS PROGRAMS FOR MINORS

25 TAC §§265.401 - 265.405

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts new §§265.401 - 265.405, concerning sexual abuse and child molestation training and examination for employees of certain programs for minors operated by or held on campuses of institutions of higher education or private or independent institutions of higher education. Sections 265.402 - 265.404 are adopted with changes to the proposed text as published in the February 3, 2012, issue of the *Texas Register* (37 TexReg 471). Sections 265.401 and 265.405 are adopted without changes and, therefore, the sections will not be republished.

BACKGROUND AND PURPOSE

The new sections implement the legislative requirements of Senate Bill 1414, 82nd Legislature, Regular Session, 2011, codified at Education Code, Chapter 51, Subchapter Z, §51.976, Training and Examination Program for Employees of Campus Programs for Minors on Warning Signs of Sexual Abuse and Child Molestation.

SECTION-BY-SECTION SUMMARY

Section 265.401 establishes the scope and purpose of the rules. Section 265.402 defines terms used in this new subchapter. Section 265.403 imposes a requirement for all employees in a position involving contact with campers at a campus program for minors to successfully complete an approved training and examination program on sexual abuse and child molestation. Section 265.404 establishes criteria found in Health and Safety Code, §141.0095(e), Youth Camps, for a training and examination program on sexual abuse and child molestation, and requires a training and examination program on sexual abuse and child molestation to be approved by the department. Section 265.405 provides civil penalties and injunctive relief in accordance with Health and Safety Code, §141.015, for a person violating the

Education Code, §51.976 (Act), a rule, or an order adopted under the Act.

COMMENTS

The department, on behalf of the commission, has reviewed and prepared responses to the comments received regarding the proposed rules during the comment period, which the commission has reviewed and accepts. The commenters were individuals, associations, and/or groups, including the following: Praesidium Inc., The University of Texas at Austin, The University of Texas System, The University of Texas Health Science Center, Texas Tech University System, and The University of North Texas System. The commenters were not against the rules in their entirety; however, the commenters suggested recommendations for change as discussed in the summary of comments.

Comment: Concerning §265.402(5), several commenters had concerns that the definition of an employee could be construed as broad, vague or ambiguous.

Response: The commission agrees and the definition of an employee was reworded to "A person of any age who receives compensation for work or service at a campus program for minors."

Comment: Concerning §265.402(7), a commenter recommended revision to the definition of Program Operator so that "a person" would be replaced with "an individual or entity."

Response: The Government Code, §311.005 definition of "person" includes corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity. The commission disagrees with the change to the definition of Program Operator, but agrees to include the definition of "person" for clarification. The remaining paragraphs of the section were renumbered to accommodate the new definition.

Comment: Concerning §265.403(a), a commenter recommended the use of the term "employee" instead of "individual."

Response: The commission disagrees as the language currently reads "A program operator may not employ an individual in a position involving contact with campers at a campus program for minors," which clearly indicates the individual is an employee. No change was made as a result of this comment.

Comment: Concerning §265.403(a), a commenter recommended adding a provision to clarify that an individual who works at several different (or successive) camps sponsored or run by different institutions of higher education can easily transfer proof of having successfully completed the training program.

Response: The commission agrees but determined that the new provision would be more appropriate in §265.404 and a new §265.404(e) was added stating that "Training and examination program providers shall issue a certificate or similar record indicating successful completion of the program training to individuals who have successfully completed a campus program for minors training and examination program on sexual abuse and child molestation. For individuals employed by campus programs overseen, managed, operated or run by different institutions of higher education, such certificate, or similar record, shall be presumptive proof that the named individual has successfully completed the training required under these rules."

Comment: Concerning §265.403(b), a commenter recommended changing "who visits" to "whose attendance at the campus program for minors is."

Response: The commission agrees and this sentence was reworded to read "For purposes of this section, the term "contact with campers" does not include an employee acting as a guest speaker, an entertainer, or fulfilling any other role whose attendance at the campus program for minors is for a limited purpose or a limited time if the employee has no direct and unsupervised interaction with campers."

Comment: Concerning §265.403(c), several commenters recommended adding a provision that would clarify that campus personnel who may have incidental contact with campers while performing their jobs are exempted from the requirements.

Response: The commission agrees and a clarification was added to §265.403(c) that employees of the institution of higher education or private or independent institution of higher education who are not employees of the campus program for minors are not subject to the training and examination requirement of subsection (a). It was also clarified that when the institution of higher education or private or independent institution of higher education is itself the program operator, then its employees, agents, or contractors who have only limited or incidental contact with campers are not subject to the training and examination requirement.

Comment: Concerning §265.403(d)(2), several commenters recommended clarification that a scanned or other electronic record of completion is permissible.

Response: The commission agrees and the words "an electronic or paper" were added.

Comment: Concerning §265.404(a), commenters recommended revision to the training requirements not to address the need to minimize one-on-one contact between two minors, but rather to include more information on the risk of sexual activity between campers, steps to prevent sexual activity between campers, and how to respond if sexual activity between campers occurs.

Response: The commission agrees and the training requirements were added as new §265.404(a)(6).

Comment: Concerning §265.404(a)(5), a commenter recommended deleting the words "or between two minors."

Response: The commission agreed with a previous comment, and these words have been deleted.

Comment: Concerning §265.404(b), several commenters recommended the deletion of a minimum length for a training program.

Response: The commission disagreed, as a minimum of one hour was felt to be necessary to adequately cover all of the subjects required in §265.404(a). No change was made to this section of the rules.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The new sections are adopted under the Texas Education Code, §51.976, which authorizes the Executive Commissioner of the Health and Human Services Commission to adopt rules to implement the Training and Examination Program for Employees of

Campus Programs for Minors on Warning Signs of Sexual Abuse and Child Molestation; and by Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

§265.402. Definitions.

The following words and terms shall have the following meaning when used in this subchapter, unless the context indicates otherwise.

(1) Act--Texas Education Code, Chapter 51, Subchapter Z, §51.976, Training And Examination Program For Employees of Campus Programs For Minors on Warning Signs Of Sexual Abuse and Child Molestation.

(2) Camper--A minor, under the age of 18 years, who is attending a campus program for minors.

(3) Campus program for minors--A program that:

(A) is operated by or on the campus of an institution of higher education or a private or independent institution of higher education;

(B) offers recreational, athletic, religious, or educational activities for at least 20 campers who:

(i) are not enrolled at the institution;

(ii) attend or temporarily reside at the camp for all or part of at least four days; and

(C) is not a day camp or youth camp as defined by Texas Health and Safety Code, §141.002, or a facility or program required to be licensed by the Department of Family and Protective Services.

(4) Department--Department of State Health Services.

(5) Employee--A person of any age who receives compensation for work or service at a campus program for minors.

(6) Institution of higher education--Has the meaning assigned by Texas Education Code, §61.003.

(7) Person--Includes corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity.

(8) Private or independent institution of higher education--Has the meaning assigned by Texas Education Code, §61.003.

(9) Program operator--A person who owns, operates, or supervises a campus program for minors, regardless of whether it is operated on a for-profit or non-profit basis.

(10) Training and examination program on sexual abuse and child molestation--A program approved by the department under §265.404 of this title (relating to Training and Examination Program on Sexual Abuse and Child Molestation).

§265.403. Program Operators.

(a) A program operator may not employ an individual in a position involving contact with campers at a campus program for minors unless:

(1) the individual submits to the program operator or the campus program for minors has on file documentation verifying that within the preceding two years of the beginning date of employment, the individual successfully completed the required training and examination program on sexual abuse and child molestation; or

(2) the individual successfully completes during the individual's first five days of employment the required training and examination program on sexual abuse and child molestation.

(b) For purposes of this section, the term "contact with campers" does not include an employee acting as a guest speaker, an entertainer, or fulfilling any other role whose attendance at the campus program for minors is for a limited purpose or a limited time if the employee has no direct and unsupervised interaction with campers. A program operator may require training and an examination for visitors, including parents, if it chooses.

(c) Subsection (a) of this section does not apply to an individual who is a student enrolled at the institution of higher education or private or independent institution of higher education that operates the campus program for minors or at which the campus program is conducted and whose contact with campers is limited to a single class of short duration. The training and examination requirement in subsection (a) of this section does not apply if:

(1) employees of the institution of higher education or private or independent institution of higher education are not employees of the campus program for minors; or

(2) the institution of higher education or private or independent institution of higher education is the operator of the campus program for minors and its employees, agents, or contractors have only limited or incidental contact with campers.

(d) A program operator must:

(1) submit to the department on the form provided by the department and within five days of the start of the campus program for minors verification that each employee of the campus program for minors has complied with the requirements of this section; and

(2) retain in the operator's records an electronic or paper copy of the documentation required or issued in subsection (a) of this section for each employee until the second anniversary of the examination date.

(e) A person applying for or holding an employee position involving contact with campers at a campus program for minors must successfully complete the training and examination program on sexual abuse and child molestation during the applicable period prescribed in subsection (a) of this section.

§265.404. Training and Examination Program on Sexual Abuse and Child Molestation.

(a) A training and examination program on sexual abuse and child molestation must be approved by the department prior to being offered and shall at a minimum include training and an examination on:

(1) the definitions and effects of sexual abuse and child molestation;

(2) the typical patterns of behavior and methods of operation of child molesters and sex offenders that put children at risk;

(3) the warning signs and symptoms associated with sexual abuse or child molestation, recognition of the signs and symptoms, and the recommended methods of reporting suspected abuse;

(4) the recommended rules and procedures to implement to address, reduce, prevent, and report suspected sexual abuse or child molestation;

(5) the need to minimize one-on-one isolated encounters between an adult and a minor; and

(6) the risk of sexual activity between campers, steps to prevent sexual activity between campers, and how to respond if sexual activity between campers occurs.

(b) The training program shall last for a minimum of one hour and discuss each of the topics described in subsection (a) of this section.

(c) The examination shall consist of a minimum of 25 questions that cover each of the topics described in subsection (a) of this section.

(d) To successfully complete the training program, each employee must achieve a score of 70% or more correct on an individual examination. If the examination is taken on-line, the employee shall retain a certificate of completion indicating successful completion of the course.

(e) Training and examination program providers shall issue a certificate or similar record indicating successful completion of the program training to individuals who have successfully completed a campus program for minors training and examination program on sexual abuse and child molestation. For individuals employed by campus programs overseen, managed, operated or run by different institutions of higher education, such certificate, or similar record, shall be presumptive proof that the named individual has successfully completed the training required under these rules.

(f) Applicants for a training and examination program required to be approved in subsection (a) of this section shall pay a fee of $125 to cover the costs of the department's initial review and an additional $125 fee for each follow-up review of a training and examination program.

(g) Applications shall be made on forms provided by the department and fees shall be mailed to the Environmental and Sanitation Licensing Group, Department of State Health Services, Mail Code 2003, P.O. Box 149347, Austin, Texas 78714-9347. Application forms may be obtained by calling the Environmental and Sanitation Licensing Group at (512) 834-6600 or may be downloaded from http://www.dshs.state.tx.us/youthcamp/default.shtm.

(h) The department, at least every five years from the date of initial approval, shall review each training and examination program approved by the department to ensure the program continues to meet the criteria and guidelines established under this section.

(i) A program operator shall consider the costs of compliance with this section in determining any charges or fees imposed and collected for participation in the campus program for minors.

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

Filed with the Office of the Secretary of State on July 2, 2012.

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Lisa Hernandez
General Counsel
Department of State Health Services
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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 60. COMPLIANCE HISTORY

30 TAC §§60.1 - 60.3

The Texas Commission on Environmental Quality (TCEQ or commission) adopts amendments to §§60.1 - 60.3. Sections 60.1 - 60.3 are adopted *with changes* to the proposed text as published in the February 10, 2012, issue of the *Texas Register* (37 TexReg 622).

Background and Summary of the Factual Basis for the Adopted Rules

The commission adopts revisions to Chapter 60 to implement certain requirements of House Bill (HB) 2694, regarding compliance history. HB 2694, 82nd Legislature, 2011, §§4.01 - 4.05 and 4.07, amended Texas Water Code (TWC), Chapter 5, Subchapter Q, requiring the commission to make changes to the compliance history rule. The purpose of this adopted rulemaking is to allow the commission to use new standards instead of the existing uniform standard for evaluating and using compliance history. In addition, the adopted rulemaking modifies the components and formula of compliance history in order to provide a more accurate measure of regulated entities' performance and make compliance history a more effective regulatory tool.

HB 2912, 77th Legislature, 2001, §4.01, amended TWC, Chapter 5, by adding Subchapter Q, TWC, §5.753, that required the commission to "develop a uniform standard for evaluating compliance history." At the time, the process for measuring or comparing compliance history across the commission's programs for air, water, and waste was inconsistent. In addition to the traditional use of compliance history in permitting and enforcement decisions, this new performance-based regulation allowed the commission to use compliance history when determining eligibility for voluntary incentive programs. The idea behind these programs was to use compliance history to provide incentives for regulated entities to do more to protect the environment than law requires by making available benefits, such as regulatory flexibility and exemptions from some inspections. In late 2001 and early 2002, TCEQ held stakeholder meetings to develop this new system of compliance history. TCEQ interpreted the uniform standard to mean using an identical objective formula for all entities across all program areas. The compliance history system has remained unchanged since implementation.

In calculating an entity's compliance history classification, TCEQ currently assigns points for multiple components as well as points for a repeat violator classification that, when computed in an equation, produce a numerical score for each regulated entity. Generally, the lower the score, the better the classification. For instance, noncompliance issues, such as enforcement actions taken against a facility, adds points and proactive approaches towards compliance, such as participating in voluntary programs, subtracts points.

The commission currently recalculates compliance history scores annually based on information from the previous five years, and classifies regulated entities as poor, average, or high performers. HB 2912 also required the commission to assess the compliance history of entities for which it does not have compliance information. The commission classifies these entities as average by default.

Section 4.01 of HB 2694 amends TWC, §5.751 to add TWC, Chapter 32, and Texas Health and Safety Code (THSC), Chapter 375, regarding applicability. Persons and entities covered by those chapters will now be subject to the compliance history rule.

Section 4.04 of HB 2694 amends TWC, §5.753(a) to remove the requirement for a uniform standard for evaluating compliance history, and replaces the uniform standard with a standard that ensures consistency and may account for differences among regulated entities.

Section 4.04 of HB 2694 amends TWC, §5.753(b) to remove enforcement actions from other states and the federal government, except actions by the United States Environmental Protection Agency (EPA), as mandatory components of compliance history and to clarify that enforcement actions from the EPA are mandatory components to the extent readily available to the commission.

Section 4.04 of HB 2694 amends TWC, §5.753(d) to limit the inclusion of notices of violation (NOV) as a mandatory component of compliance history to NOVs one-year-old or less. In addition, the commission must include a prominently displayed statement emphasizing the NOV is only an allegation and not proof of an actual violation.

Section 4.04 of HB 2694 adds TWC, §5.753(d-1) to prohibit the commission from including a self-reported violation under Title V of the Federal Clean Air Act as an NOV for compliance history purposes, unless the commission issues a written NOV or the self-reported violation results in a final enforcement order or judgment.

Section 4.05 of HB 2694 amends TWC, §5.754(a) and (e) to clarify that the commission may, but is not required to, consider compliance history classifications when using compliance history in commission decisions regarding permitting, enforcement, announced inspections, and participation in innovative programs.

Section 4.05 of HB 2694 amends TWC, §5.754(b)(1) to rename the compliance history classifications from poor, average, and high performers to unsatisfactory, satisfactory, and high performers. The amendment clarifies that unsatisfactory performers perform below minimal acceptable performance standards established by the commission and that high performers have an above-satisfactory compliance record.

Section 4.05 of HB 2694 amends TWC, §5.754(b)(2) and (d) to allow the commission to establish a category of unclassified performers for which the commission does not have adequate compliance information about the site and to allow the commission to require a compliance inspection to determine an entity's eligibility for participation in a program that requires a high level of compliance.

Section 4.05 of HB 2694 amends TWC, §5.754(b)(3) to require the commission to consider both positive and negative factors related to the operation, size, and complexity of the site, including whether the site is subject to Title V of the Federal Clean Air Act.

Section 4.05 of HB 2694 amends TWC, §5.754(c)(2) to modify the classification of repeat violators. The commission must consider the size and complexity of the site at which the violations occurred, and limit consideration to violations of the same nature and same environmental media that occurred in the previous five years. The number of sites is no longer included as a criterion for repeat violator classification.

Section 4.05 of HB 2694 amends TWC, §5.754(c)(3) to require that compliance history classifications consider the size and complexity of the site, including whether the site is subject to Title V of the Federal Clean Air Act, and the potential for a violation at the site that is attributable to the nature and complexity of the site.

Section 4.05 of HB 2694 amends TWC, §5.754(h) to state that persons classified as unsatisfactory performers are no longer prohibited from receiving announced investigations.

Section 4.07 of HB 2694 adds TWC, §5.756(e) to require a quality assurance and control procedure, including a 30-day period for the owner or operator of the site to review and comment on the information, before compliance performance information about a site may be placed on the Internet.

Section by Section Discussion

§60.1, Compliance History

The adoption amends §60.1(a) by adding TWC, Chapter 32, and THSC, Chapter 375, as required by HB 2694.

The commission adopts revisions to §60.1(a)(6) and (7) to address compliance histories calculated under the existing rule and the adopted rule. HB 2694, §4.31, has a savings clause for the commission to continue to use its current standard. The commission will continue to use the version of the rule in effect at the time the compliance history classification was calculated in accordance with §60.1(b). For example, if an application for a permit is received by the executive director, then the version of Chapter 60 in effect at the time the application is received will be the version used for compliance history purposes. Therefore, the compliance history rating generated under the existing version of this chapter will remain in effect for any actions applicable under that chapter. The commission may consider new compliance history information as it deems necessary.

In the existing rule, the compliance period for NOVs is five years. The adoption amends §60.1(b) to change the compliance period for NOVs to one year except as used in adopted §60.2(f) for determination of repeat violator. The compliance period remains unchanged for all other compliance history components. In evaluating repeat violators, the commission will review a five-year period for NOVs. The commission reviews all major violations documented in approved investigations in the last five years and final enforcement actions issued in the last five years to determine if a repeat violator classification is warranted.

The adoption amends §60.1(c)(1), (3), (7), (9) and (13) to change the components of compliance history.

Section §60.1(c)(1) is being revised because HB 2694 provides that the commission is only required to include consent decrees or criminal convictions of the federal government unless they are readily available. In addition, "any final" was deleted in the proposed rule although there was no intent to change the meaning of this section. In response to comments and because only final enforcement orders can feasibly be included in this component of compliance history, adopted §60.1(c)(1), adds the words "any final" to the rule language.

The adoption amends §60.1(c)(3) to reflect the changes the legislature made to TWC, §5.754 regarding the readily available components to be considered in compliance history. The commission shall now consider enforcement orders, court judgments, consent decrees, and criminal convictions relating to environmental rules of the EPA that are readily available to the commission as a component of compliance history. This section has also been revised to remove from consideration enforcement orders, court judgments, and criminal convictions of other states as a component of compliance history in accordance

with HB 2694. In addition, "final" was deleted in the proposed rule although there was no intent to change the meaning of this section. In response to comments and because only final enforcement orders can feasibly be included in this component of compliance history, adopted §60.1(c)(3), adds the word "final" to the rule language.

The adoption amends §60.1(c)(7) regarding NOVs. Under the adoption, the components would include all written NOVs for a period of one year from the date of issuance for each NOV. NOVs will be considered for a five-year compliance period for determination of the repeat violator status. In the Compliance History Report, NOVs will be preceded with the statement, "A notice of violation represents a written allegation of a violation of a specific regulatory requirement from the commission to a regulated entity. A notice of violation is not a final enforcement action nor is it proof that a violation has actually occurred," as required by HB 2694. Information received by the commission as required by Title V of the Federal Clean Air Act (42 United States Code (USC), §7661 *et seq.)* may not be included as an NOV component of compliance history unless the executive director issues a written NOV. The executive director has historically evaluated deviation reports during an investigation prior to making a compliance determination. An NOV would only be issued for deviations if the executive director's staff documented a violation. This is the current practice of the executive director and will not change under these rules.

The adoption amends §60.1(c)(8) to add the phrase "and having received immunity" to this section to reflect the intent of the Texas Environmental, Health, and Safety Audit Privilege Act (Audit Act), 75th Legislature, 1997 (TEX. REV. CIV. STAT. ANN. art. 4447cc (Vernon's)). The adoption corrects a typographical error regarding the legislative session and year for the Audit Act and adds the citation to the statute. Under the Audit Act, immunity is only granted to violations that were properly disclosed and for which corrective action was undertaken in a reasonable amount of time. It is the commission's intent to ensure that corrective action has been undertaken before a violation is awarded self-audit points in the compliance history formula, as this is the commission's current practice.

The adoption amends §60.1(c)(9) relating to environmental management systems (EMS) to specify that the commission will consider an EMS approved under 30 TAC Chapter 90 as a positive component of compliance history.

The adoption deletes §60.1(c)(13) to remove the name and address of the staff person as a compliance history component from the rule language. While this information will continue to be on the Compliance History Report, it is not a compliance-related component of the compliance history.

Section 60.1(d) has remained unchanged. Change of ownership remains a component of compliance history and any change of ownership will be shown on the compliance history. Any previous NOVs or orders will be assessed against new owners for the applicable compliance period, which is consistent with how the rules have been applied by the commission in the past.

§60.2, Classification

The adoption amends §60.2(a)(1) - (3) to change the classification nomenclature from high, average, and poor performers to high, satisfactory, and unsatisfactory performers. Under the adoption, a high performer has an above-satisfactory compliance record. A satisfactory performer generally complies with environmental regulations. An unsatisfactory performer performs below minimal acceptable performance standards established by the commission. The change in nomenclature is present in §60.2(g)(2)(B) and (C), (3), (3)(A), (A)(iii), (B), (B)(i) and (ii), and §60.3(a)(2), (3), (3)(A) - (C), (6), (b), (c)(1), (d), (d)(3), and (e). This change has been applied throughout this section as applicable.

HB 2694 allows the commission to establish a category of unclassified performers, or regulated entities for which the commission does not have adequate compliance information about the site. The adoption amends §60.2(b) to change the current category from "average performer by default" to "unclassified." The commission considers any site that does not have compliance history points attributable to violation points, chronic excessive emissions points, repeat violator points, or self-audit points to be unclassified. Unclassified performers will include sites where the executive director may not have investigated the site in the last five years. The nomenclature change removes the implication that a regulated entity with no compliance information generally complies with environmental regulations.

The commission adopts §60.2(c). HB 2694 eliminates the commission's uniform standard for evaluating compliance history and allows the commission to account for differences among regulated entities. HB 2694 directs the commission to account for operation, complexity, and size of a site when determining compliance history. In order to more effectively compare regulated entities against those similarly situated, the adoption adds groupings based on the North American Industry Classifications System (NAICS). The executive director selected NAICS because it is a nationally recognized standard applicable to all industries and is currently information readily available to the commission. The executive director initially proposed to organize regulated entities by the following groups: 1) NAICS codes 44711 and 44719, Gas Stations with Convenience Stores and other Gas Stations; 2) NAICS code 32411, Oil and Petroleum Refineries; 3) NAICS code 211, Oil and Gas Extraction; 4) NAICS code 212, Mining; 5) NAICS code 325, Chemical Manufacturing; 6) NAICS code 2211, Electric Power Generation; 7) NAICS code 562212, Solid Waste Landfills; 8) NAICS code 22132, Sewage Treatment Facilities; 9) NAICS code 23, Construction; 10) NAICS code 3273, Cement and Concrete Product Manufacturing; 11) NAICS codes 5621,56221, 562213, 562219, Waste Management (excluding landfills); 12) NAICS code 11, Agriculture, Forestry, Fishing, and Hunting; 13) NAICS codes 486110 and 486210, Pipeline Transportation of Natural Gas, NAICS code 486910 Pipeline Transportation of Refined Petroleum Products, and NAICS code 486990 All Other Pipeline Transportation; and 14) All Other Regulated Entities. The commission added NAICS codes 486110, 486210, 486910, and 486990 in response to comments. Upon evaluation, the commission found that a large number of regulated entities had NAICS codes 486110, 486210, 486910, and 486990 as their primary business code.

The commission intends to use the groupings for reporting purposes at this time. For reporting purposes only, the sites would be grouped according to their reported primary NAICS group which reflects their primary business. The purpose of these groupings is to facilitate comparison of similarly situated regulated entities within the same industry. Any other use, such as formal ranking, a curve system, a stratified scoring formula, or classification point ranges based upon the groupings would be addressed through a future rulemaking. Any such rulemaking would not commence until sufficient and needed information has been compiled to determine how best to utilize the groupings.

The executive director recognizes that the use of NAICS codes is not an exact means to determine the complexity of a site, but that similar businesses may have similar levels of complexity. The executive director also recognizes that the current NAICS codes for some regulated entities are incorrect as reported to the commission. Therefore, other readily available information, such as complexity points gathered under adopted §60.2(e), may also be used for reporting purposes to group similarly complex entities.

The commission reletters existing §60.2(c) as adopted §60.2(d) due to the inclusion of adopted §60.2(c).

The commission adopts §60.2(e), concerning complexity points, to address the requirements of TWC, §5.754(b)(3), which states that the commission, in classifying a person's compliance history, must take into account both positive and negative factors related to the operation, size, and complexity of the site, including whether the site is subject to Title V of the Federal Clean Air Act (USC, §7661 *et seq.).* HB 2694 directs the commission to account for complexity and size for sites when determining compliance history. In addition, HB 2694 removed the number of facilities owned or operated by a person as a consideration for establishing criteria for classifying a repeat violator. The adopted rule removes existing §60.2(d)(3) relating to the number of sites in Texas owned or operated by a person. The commission recognizes that the compliance history of widely varying types of sites requires various means to determine overall complexity. In this adopted rule, the commission has broadened the scope of data used to determine a site's complexity. Although data available to the commission have improved significantly since the existing rule was written, the commission recognizes that the data still have limitations. The points assigned under adopted §60.2(e) are based upon criteria points found in existing §60.2(d). The rulemaking uses complexity points for all sites. The term "complexity points" includes program participation, size, small business and local government, and nonattainment points. Under the existing rules, complexity points refer to those points assigned based upon the types of permits at the site, which is now known as "program participation" points.

In adopted §60.2(e)(1), the commission will assign every site "program participation" points ranging from factors of four, three, two, or one, based generally upon the site's program authorizations. A site will receive points for each of its program authorizations. As required by HB 2694, Title V Federal Operating Permits have been added to the rule. Other program authorizations and registrations, that are not included in the existing rule, such as Standard Air permits, Edwards Aquifer authorizations, Enclosed Structures constructed over a closed Municipal Solid Waste (MSW) landfill permits and registrations, Industrial Hazardous Waste registrations, Radioactive Waste storage or processing licenses; Petroleum Storage Tank registrations, Stage II Vapor Recovery registrations, Sludge permits or registrations, MSW Type IV Arid Exempt (AE) permits and MSW Type IX permits, and Uranium licenses are to be added in adopted §60.2(e)(1).

Sites with permits and/or authorizations in the following program areas including: Radioactive Waste Disposal; Hazardous or Industrial Non-Hazardous Storage Processing or Disposal; MSW Type I; Prevention of Significant Deterioration (PSD); nonattainment New Source Review (NNSR); Phase I Municipal Separate Storm Sewer System; Texas Pollutant Discharge Elimination System (TPDES) or National Pollutant Discharge Elimination System (NPDES) Industrial or Municipal Major; and Underground Injection Control (UIC) Class I/III, will receive four points for each permit type issued to a person at a site. The commission added NNSR permits and moved UIC Class I/III to this section because they are of similar complexity of those permits listed in this section and in response to comments.

Sites with permits and/or authorizations in the following program areas including: MSW Type I AE and Type IV AE; MSW Type IV, V, or VI; and TPDES or NPDES Industrial or Municipal Minor, will receive three points for each permit type issued to a person at the site. Adopted §60.2(e)(1)(B)(iii) added MSW Type IV AE to the list of program participation points in response to comments and to clarify that MSW Type IV AE permits were not intended to be excluded from the rules. Also, this section was renumbered to account for UIC Class I/III permit being moved to §60.2(e)(1)(A).

Sites with permits and/or authorizations in the following program areas including: Title V Federal Operating Permits; New Source Review (NSR) individual permit; and any other individual site-specific water quality permit not referenced previously or any water quality general permit, will receive two points. The commission recognizes that Title V permits can be broken down into two categories, General Operating Permits (GOPs) and Site Operating Permits (SOPs). While SOPs are sometimes more complex than GOPs, the converse is also true. The commission evaluated the possibility of assigning different points for Title V GOPs and SOPs. However, in its analysis, the commission determined that whether or not a permit was a GOP or an SOP is not an accurate indicator of the level of complexity. For example, many similarly sized Gas Compressor Stations across the state are authorized under both GOPs and SOPs. For this reason, the commission will assign two program participation points for all Title V permits.

Other registrations and authorizations readily available to the executive director that are applicable to the compliance history rule including: Edwards Aquifer; Enclosed Structures constructed over a closed MSW landfill; Industrial Hazardous Waste Registrations; MSW Tire Registration; Radioactive Waste Storage and Processing; Petroleum Storage Tanks; Stage II Vapor Recovery; Sludge; Air Quality Standard Permits, Permit By Rules (PBRs) requiring submission of an application under 30 TAC Chapter 106; and Uranium licenses will receive one point. In response to comments, adopted §60.2(e)(1)(D)(x) adds MSW Type IX to the list of program participation points. The commission did not intend to exclude MSW Type IX from this section. PBRs that are registered or certified by the commission receive one program participation point. Recognizing that the names for forms used by the commission may change over time, adopted §60.2(e)(1)(D)(xi) replaces the phrase "a PI-7" to "an application." Medical Waste permit was deleted from §60.2(e)(1)(D)(iv) as it is already categorized as an MSW Type V authorization listed in §60.2(e)(1)(B). MSW Tire Registrations were moved from §60.2(e)(1)(B)(iv) to §60.2(e)(1)(D)(iv) because the commission determined that the level of complexity for this authorization is more similar to the other types of authorizations found under this subsection. Adopted §60.2.(e)(1)(d)(i) replaced the word "registration" with the word "authorization" to more accurately reflect the appropriate terminology used by the commission.

Adopted §60.2(e)(1)(D)(xiii) adds Air Quality Standard Permits to the list of program participation points in response to comments and to clarify that these permits were not intended to be excluded from the rules. The commission added Air Quality Standard Permits to §60.1(e)(1)(D) since these authorizations are reflective of

this level of complexity. Standard permits that are registered in the commission's central registry database are included in the program participation points section. Standard permits that are not captured by the commission's data systems will not receive program participation points. For example, Air Quality Standard Permits for Temporary Rock and Concrete Crushers ("Temporary Standard Permits") are not tracked by the commission's database and will not receive program participation points. The commission recognizes that, by their nature, these Temporary Standard Permits have a more limited environmental impact over a brief period of time, as compared with some of the other permit authorizations that are allocated program participation points, and therefore, will not receive complexity points for the operations of the site.

Under adopted §60.2(e)(2), the commission will assign points based upon the size of the site. Under the existing rule, size points are addressed under §60.2(d)(4). The commission recognizes that the point structure for size under the existing rule is limiting and does not account for a meaningful range of size for very complex sites. Under the existing rule, the points assigned to size for each media ranged from one to four points, which did not allow enough degree of separation between large sites and small sites. Under the adopted rule, the executive director has changed the points assigned to each media for size. One measure of size is the number of points of emission, discharge, or potential release to the environment at the site. Generally, each of these points or facilities requires authorization, which adds additional regulatory oversight and increased complexity. The commission currently has information on size through Facility Identification Numbers (FINs), Water Quality external outfalls, Underground and Aboveground Storage Tanks (USTs and ASTs), and Active Hazardous Waste Management Units (AHWMUs).

Under the adoption, the points assigned to the size factor for FINs will be calculated by multiplying the total number of FINs at a site by 0.02 and rounded up to the nearest whole number. The size factor for Water Quality external outfalls and AHWMUs will be based on the number of external outfalls and number of AHWMUs. A site with ten or more external outfalls or 50 or more AHWMUs will receive ten points. A site with at least five but fewer than ten external outfalls or at least 20 but fewer than 50 AHWMUs will receive five points. A site with at least two, but fewer than five external outfalls or at least ten but fewer than 20 AHWMUs will receive three points. A site with at least one external outfall or at least one, but fewer than ten AHWMUs will receive one point.

The commission adopts §60.2(e)(2)(D) to assign points to small entities. Small entities will be assigned three points to account for the complexity that arises from being a small entity. A small entity is defined as: a city with a population of less than 5,000; a county with a population of less than 25,000; or a small business. A small business is defined as any person, firm, or business, which employs, by direct payroll and/or through contract, fewer than 100 full-time employees. A business that is a wholly owned subsidiary of a corporation shall not qualify as a small business if the parent organization does not qualify as a small business. The definition of small entity comes from the TCEQ's Enforcement Standard Operating Procedures. The commission recognizes that size alone cannot account for the complexity that a small entity faces, and therefore adds a separate provision of size points for those entities.

The commission adopts §60.2(e)(2)(E) to address points for USTs and ASTs. Sites with 11 or more USTs will receive four points. Sites with between five and ten USTs and sites with more than 11 ASTs will receive three points. Sites with three to four USTs and sites with three to ten ASTs will receive two points. Sites with one to two USTs and/or ASTs will receive one point. The commission adopts added §60.2(e)(2)(E) in response to comments and to more adequately capture size points.

Adopted §60.2(e)(3) addresses points for sites located in nonattainment areas. Points for sites located in nonattainment areas are in §60.2(d)(5) under the existing rule and no changes are recommended. The commission continues to assign every site located in a nonattainment area one point.

HB 2694 requires changes to the way in which the commission evaluates repeat violators. Previously, in determining whether or not an entity was a repeat violator, the commission evaluated all major violations that occurred during the five-year compliance period. Under the adopted rule, in accordance with HB 2694, the commission will limit consideration to only those major violations that are of the same nature and the same environmental media that occurred in the preceding five years. The commission analyzed different methods to define "same nature." The commission defines same nature as violations that have the same root citation at the subsection level. For example, all rules under 30 TAC §334.50 (e.g. §334.50(a) or (b)(2)) are considered same nature. If a person is determined to be a repeat violator, the impact to the compliance history calculation remains the same as in the existing rule and 500 points will be added to the formula used to produce a compliance history score. If the person is not a repeat violator, then zero points will be added to the formula.

The adoption replaces the term "criteria points" with "complexity points" throughout §60.2(f).

The commission adopts §60.2(f)(1)(A) and (B), removing proposed §60.2(f)(1)(C) and replacing existing §60.2(d)(1)(A) - (C). In response to comments, adopted §60.2(f)(1)(A) and (B) revises the range of complexity points used to determine if a person is a repeat violator, simplifying the language. Under the adoption, a person is a repeat violator when: the site has had a major violation documented on at least two occasions and has less than a total of 15 complexity points or the site has had a major violation documented on at least three occasions and complexity points greater than 15. With the limitation to violations only of the same nature and same environmental media, the likelihood of a complex facility having four violations within a five-year period is limited. In order to ensure that the repeat violator classification serves as a meaningful deterrent to all regulated entities, the commission adopts a revised range of complexity points in §60.2(f)(1)(A) and (B).

The adoption moves "Repeat Violator Exemption" from existing §60.2(d)(6) to adopted §60.2(f)(2).

The adoption moves "Formula" from existing §60.2(e) to adopted §60.2(g).

The current formula used for calculating compliance history is:

Figure 1: 30 TAC Chapter 60--Preamble

The commission adopts the following revised formula:

Figure 2: 30 TAC Chapter 60--Preamble

The commission adopts §60.2(g)(1)(D) to incorporate a positive factor in the site's compliance history rating regarding compliance with orders. The site will receive the full amount of viola-

tion points attributable to an order for the first two years. Two years after the effective date of the order, if the entity is compliant with all ordering provisions and has resolved all violations, the points attributable to that order will be reduced. The reduction will be 25% for year three, 50% for year four, and 75% for year five. In adopted §60.2(g)(1)(D)(i) the commission added language in order to clarify that in the first two years violations points from an order will not receive any reduction and renumbered the subsequent paragraphs. The commission added the following language to §60.2(g)(1)(D)(i) "under two years old, the points associated with the violations in subparagraphs (A) - (C) of this paragraph will be multiplied by 1.0." The commission adopts this order reduction provision to encourage compliance and encourage maintaining compliance.

Adopted §60.2(g)(1)(E) and (F) amend the multipliers used to calculate points assigned to violations contained in NOVs. Under the adoption, major violations shall be multiplied by ten (currently five in the existing rule) and moderate violations shall be multiplied by four (currently three in the existing rule). The commission is adopting this change to ensure the weight of the violations is more appropriate. Minor violations remain the same.

Adopted §60.2(g)(1)(L) amends the multipliers used to calculate points assigned to violations disclosed as a result of an audit conducted under the Audit Act, as amended, and the site received immunity from an administrative or civil penalty for that violation(s). Under the adoption, major violations shall be multiplied by ten (currently five in the existing rule) and moderate violations shall be multiplied by four (currently three in the existing rule). The commission is adopting this change to ensure the weight of the violations is more appropriate. Minor violations remain the same.

The commission revised existing §60.2(e)(1)(L) to adopted §60.2(g)(1)(M) to reflect that only investigations that do not result in a documented violation will be considered. The number of investigations conducted during the compliance period that do not document any violations will be multiplied by 0.1, rounded up to the nearest whole number, and added to the number of complexity points in §60.2(e). Investigations that do not document any violations will be the only investigations considered in the compliance history formula. The executive director reviewed the investigations applicable to compliance history and determined that approximately 91% of all investigations do not result in documented violations. The commission determined that investigations that do not result in documented violations more accurately reflect a positive component of compliance history and the commission adopted this change to further encourage incentives for compliance. The commission will continue its current practice and will not include investigations that are the result of a complaint regardless of whether or not violations are documented. Adopted §60.2(g)(1)(M) added language to clarify that one point shall be used if no points exist in the denominator of the formula. The commission made this change to ensure that the formula does not inadvertently produce a site rating of zero due to lack of information.

The commission revised existing §60.2(e)(1)(M) to adopted §60.2(g)(1)(N) to incorporate the changes made to TWC, §5.755(b). An EMS is a way for sites to receive a reduction to their compliance history rating. The amount of reduction for implementing an active EMS has not changed and remains at 10%. The commission adopted additional incentives for entities that participate in other commission supported voluntary pollution reduction or early compliance programs. The commission adopts a reduction of 5% for each of the voluntary pollution reduction or early compliance programs applicable to a site. The maximum total of reduction available to an entity under adopted §60.2(g)(1)(N) is 25%: a 10% reduction is available for implementing an EMS and a 5% reduction is available for participating in other commission supported voluntary reduction or early compliance programs (5% each). The commission currently supports these programs: 1) Pollution Prevention Site Assistance; 2) Clean Texas Voluntary Pollution Reduction; 3) Compliance Commitment; and (4) Mercury Convenience Switch Recovery. The commission may add additional voluntary pollution reduction programs administered by the Small Business and Environmental Assistance Division or that division's successor designated as innovative by the executive director in accordance with Chapter 90. HB 2694 added THSC, Chapter 375 to the applicable chapters of the compliance history. As such and in accordance with THSC, §375.101, the commission added Mercury Convenience Switch Recovery program to the list of voluntary pollution reduction programs eligible for a 5% reduction. Under the Mercury Convenience Switch Recovery program, sites are required to submit an annual report by November 15 of every year. If the site meets the terms of the program, then the compliance history reduction will be assessed for the following year's compliance history rating. Eligibility for a reduction to a compliance history rating for participation in these voluntary pollution reduction programs will be evaluated annually and will only be available for sites currently participating in these programs.

Adopted §60.2(g)(2) changes the site rating ranges for each classification based on the adopted formula. A high performer is defined as having fewer than 0.10 points. A satisfactory performer is defined as having 0.10 points to 55 points. An unsatisfactory performer is defined as having more than 55 points. The commission reviewed the data available to it and determined that due to the changes in the compliance history formula, the site rating range for the unsatisfactory classification would have to be higher than the rating range for the previous poor performer classification. Specifically, the denominator was revised substantially to incorporate complexity points into the formula. Adding complexity points to the denominator required the amount of points attributable to investigations to be revised. Also, the multipliers for the violations points associated to NOVs were increased to reflect the appropriate weight for those violations. These changes to the formula required the commission to review and ultimately raise the site rating ranges for unsatisfactory performers.

The adoption amends existing §60.2(e)(3) to adopted §60.2(g)(3)(A) and (B)(i) and (ii) to correspond to the new point ranges in §60.2(g)(2). Adopted §60.2(g)(3)(A) states that the executive director may reclassify a site with 55 points based on the listed mitigating factors. Adopted §60.2(g)(3)(B)(i) and (ii) states that reclassification of a site under these clauses shall be applicable to a satisfactory performer with 55 points.

The adoption moves §60.2(f) in the existing rule to §60.2(h). Under the existing rule a person classification is assigned by averaging the site ratings of all the sites owned and/or operated by that person in the State of Texas. Under the adopted rule, the executive director will assign a classification to a person by adding the complexity weighted site ratings of all the sites owned and/or operated by that person in the State of Texas. Each site that a person is affiliated to will receive a point value based on the compliance history rating at the site, multiplied by the percentage of

complexity points that site represents of the person's total complexity points for all sites. This is depicted in the formula below.

Figure 3: 30 TAC Chapter 60--Preamble

Each of these calculated amounts will be added together to determine the person's compliance history rating.

The adoption moves existing §60.2(g), to §60.2(i). The adoption revises the notice of classification to incorporate changes to TWC, §5.756. Every September 1, the executive director calculates new person and site classification ratings for compliance history. The compliance history ratings are published on the commission's Web site 30 days after the completion of a quality assurance, quality control (QAQC) review period conducted by executive director's staff. The commission regulates over 220,000 sites, some of which have more than one owner or operator. The executive director will only conduct a QAQC review of compliance history calculations where the person or site has a rating above zero. A QAQC review will not be conducted on persons or sites who rank unclassified or have a rating of zero. TWC, §5.756 included a 30-day period for the owner or operator of the site to review and comment on the information. The executive director has historically conducted a QAQC review of the data provided and will continue to do so.

During the QAQC review, owners or operators who wish to review and comment on their compliance history information must submit a Compliance History Review Form (CHRF). The CHRF must be submitted by August 15 of each year and must be resubmitted annually to the commission. The executive director is exploring ways to simplify this process, including the development of a secure, web-based method that would allow owners and operators, or their designee, to complete the CHRF, review only their own compliance history and to submit comments to the commission all online. Regardless of the method developed for this process, for security purposes, the commission will ask that regulated entities designate one representative that will be granted access to the secure, online compliance history information. The designated representative will be able to share the information with others within their organization. The executive director will publish a press release on the commission's Web site on or about July 15 to remind the regulated community of the compliance history QAQC review period and will outline the process to be used. The commission will send a response to the requestors as soon as possible after September 1 of each year. The response to the CHRF will include the site, person and repeat violator classifications, the points for the components used, grouping for the site, and the amount of complexity points for a site. The requestors will have 30 days to review the information. Should the requestor identify changes that need to be made to the compliance history information contained in the response, the commission encourages the requestor to notify the executive director as soon as possible so the executive director can evaluate the requested changes. At the conclusion of the 30-day QAQC review period, the information contained in the response will be made available to the public.

A person may file an appeal of the classification in accordance with adopted §60.3(e). The commission will post on the commission's Web site the compliance history rating for a person and site on or about November 1 of each year. The commission will still allow for an owner or operator of the regulated entity to submit a correction request, in accordance with adopted §60.3(f) at any time for review by executive director's staff.

§60.3, Use of Compliance History

This section describes activities the commission may take if a site is classified as an unsatisfactory performer or a satisfactory performer with 45 points or more. The commission revised §60.3(a)(3)(C) to correct an error in the citation from §305.65(8) to the appropriate citation of §305.65(9). Language in adopted §60.3(b)(3) reflects changes in HB 2694 which provides flexibility to the commission in conducting investigations announced or unannounced.

The adoption amends §60.3(e) and (4). Section 60.3(e) is amended to state that a person or site classification may be appealed only if the person or site is classified as either an unsatisfactory performer, repeat violator, or a satisfactory performer with 45 points or more. The existing rule states that 30 points or more are needed to appeal. The change is necessary based on the adopted changes to the compliance history formula. The commission added repeat violators to the section because repeat violators may face the same additional scrutiny and regulatory restrictions that are assessed against unsatisfactory performers. Section 60.3(e)(4) is amended to state that any replies to an appeal must be filed no later than 15 days after the filing of the appeal to provide the commission with a more reasonable amount of time to reply. The existing rule provides ten days.

Final Regulatory Impact Analysis

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from exposure and that may adversely affect in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because the rulemaking merely adds the new requirements relating to the components of compliance history. The commission has determined that the adopted rulemaking does not fall under the definition of a "major environmental rule" because the adopted amendments are primarily designed to clarify the existing regulatory requirements and implement the statutory provisions. The primary purpose of the adopted rulemaking is to implement HB 2694, 82nd Legislature, 2011, §§4.01 - 4.05 and 4.07, which amended TWC, Chapter 5, Subchapter Q, requiring changes to the compliance history rule. The adopted rulemaking revises the standards for use and evaluation of compliance history.

Furthermore, the adopted rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225(a), only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability requirements because this rulemaking: 1) does not exceed any standard set by federal law; 2) does not exceed the requirements of state law; 3) does not exceed a requirement of a delegation agreement or contract be-

tween the state and an agency or representative of the federal government to implement any state and federal program; and 4) is not adopted solely under the general powers of the agency, but rather under specific authorizing statutes as referenced in the Statutory Authority section of this preamble.

Takings Impact Assessment

The commission evaluated the adopted rules and performed an assessment of whether these adopted rules constitute a takings under Texas Government Code, Chapter 2007. The specific purpose of the rules is to implement the statutory provisions of TWC, §§5.751 - 5.754 and 5.756. The adopted rules provide for standards for evaluating and using compliance history.

Promulgation and enforcement of the adopted amendments would constitute neither a statutory nor a constitutional taking of private real property. Specifically, the adopted regulations do not affect a landowner's rights in real property because the clarification in the rulemaking does not burden (constitutionally) nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would exist in the absence of the adopted clarification of the regulations. In other words, there are no burdens imposed on private real property under this rulemaking because they only establish a new procedural mechanism for compliance history. Therefore, the adopted rules do not have any impact on the use or enjoyment of private real property, and there would be no reduction in value of property as a result of this rulemaking.

Consistency with the Coastal Management Program

The commission reviewed the adopted rulemaking and found that the adoption is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.,* and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the adopted rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the adopted rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the rules include: 31 TAC §501.12(1), to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); 31 TAC §501.12(2), to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone; 31 TAC §501.12(3), to minimize loss of human life and property due to the impairment and loss of protective features of CNRAs; 31 TAC §501.12(5), to balance the benefits from economic development and multiple human uses of the coastal zone, the benefits from protecting, preserving, restoring, and enhancing CNRAs, the benefits from minimizing loss of human life and property, and the benefits from public access to and enjoyment of the coastal zone; 31 TAC §501.12(6), to coordinate agency and subdivision decision-making affecting CNRAs by establishing clear, objective policies for the management of CNRAs; 31 TAC §501.12(7), to make agency and subdivision decision-making affecting CNRAs efficient by identifying and addressing duplication and conflicts among local, state, and federal regulatory and other programs for the management of CNRAs; and 31 TAC §501.12(8), to make agency and subdivision decision-making affecting CNRAs more effective by employing the most comprehensive, accurate, and reliable information and scientific data available and by developing, distributing for public comment, and maintaining a coordinated, publicly accessible geographic information system of maps of the coastal zone and CNRAs at the earliest possible date. The commission has reviewed these rules for consistency with applicable goals of the CMP and determined that the rules are consistent with the intent of the applicable goals and will not result in any significant adverse effect to CNRAs.

CMP policies applicable to the adopted rules include: 31 TAC §501.19, Construction and Operation of Solid Waste Treatment, Storage, and Disposal Facilities; 31 TAC §501.20, Prevention, Response, and Remediation of Oil Spills; 31 TAC §501.21, Discharge of Municipal and Industrial Wastewater to Coastal Waters; 31 TAC §501.22, Nonpoint Source (NPS) Water Pollution; 31 TAC §501.23, Development in Critical Areas; 31 TAC §501.25, Dredging and Dredged Material Disposal and Placement; 31 TAC §501.28, Development Within Coastal Barrier Resource System Units and Otherwise Protected Areas on Coastal Barriers; and 31 TAC §501.32, Emission of Air Pollutants. This rulemaking does not relax existing standards for issuing permits related to the construction and operation of solid waste treatment, storage, and disposal facilities in the coastal zone or for governing the prevention of, response to, and remediation of coastal oil spills. This rulemaking does not relax existing commission rules and regulations governing the discharge of municipal and industrial wastewater to coastal waters, nor does it affect the requirement that the agency consult with the Department of State Health Services regarding wastewater discharges that could significantly adversely affect oyster reefs. This rulemaking does not relax the existing requirements that state agencies and subdivisions with the authority to manage NPS pollution cooperate in the development and implementation of a coordinated program to reduce NPS pollution in order to restore and protect coastal waters. Further, it does not relax existing requirements applicable: to areas with the potential to develop agricultural or silvicultural NPS water quality problems; to on-site disposal systems; to USTs; or to TPDES permits for storm water discharges. This rulemaking does not relax the standards related to dredging, the discharge of dredge material, compensatory mitigation, and authorization of development in critical areas or to dredging, the discharge, disposal, and placement of dredged material, compensatory mitigation, and the authorization of development in critical areas. This rulemaking does not relax existing standards for issuing permits related to development of infrastructure within Coastal Barrier Resource System Units and Otherwise Protected Areas. Rather, the intent of the rulemaking is to increase compliance with existing standards and rule requirements. This rulemaking has been conducted consistent with the THSC, Chapter 382. Promulgation and enforcement of these rules will not violate (exceed) any standards identified in the applicable CMP goals and policies.

As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed the rulemaking for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the rulemaking is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of CNRAs (31 TAC §501.12(l)). The CMP policy applicable to this rulemaking is the policy (31 TAC §501.32) that commission rules comply with federal regulations in 40 Code of Federal Regula-

tions (CFR) to protect and enhance air quality in the coastal area (31 TAC §501.32).

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments on the consistency of this rulemaking were received.

Public Comment

The commission held a public hearing on March 6, 2012. The comment period closed on March 23, 2012. The commission received comments from State Representatives Lon Burnam, Ron Reynolds, Ruth Jones McClendon, Alma Allen, Scott Hochberg, Rafael Anchia, Jessica Farrar, and Carol Alvarado (Representatives); Allergy and Asthma Center of Corpus Christi (AACCC); Alliance for a Clean Texas (ACT); Association of Electric Companies of Texas, Inc. (AECT); Birch, Becker & Moorman, LLP (BBM); Clean Economy Coalition (Clean Economy); Clean Economy Coalition of Corpus Christi (Clean Economy Corpus Christi); Harris County Pollution Control Services Department (PCS); League of Women Voters of the Austin Area (League); Medina County Environmental Action Association (MCEAA); National Solid Wastes Management Association (NSWMA); Northern Arlington Ambience (NA Ambience); Public Citizen; SEED Coalition; Sierra Club Lone Star Chapter (Sierra Club); South Central Texas Network; TCEQ Office of Public Interest (OPIC); Texas Association of Business (TAB); Texas Chapter of the Solid Waste Association of North America (TxSWANA); Texas Chemical Council (TCC); Texas Industry Project (TIP); Texas Oil and Gas Association (TXOGA); Texas Organizing Project (TOP); Texas Pipeline Association (TPA); Turning Point Ranch; Waste Management of Texas, Inc. (WM); Westchester Association of Homeowners (Westchester); and over 300 individuals.

Response to Comments

Preamble

AECT commented that it supported the commission's inclusion of the language on Compliance History Reports stating that an NOV represents a written allegation of a violation of a specific regulatory requirement and is not a final enforcement action, nor proof that a violation actually occurred.

The commission appreciates the positive comment in support of the rules. No changes were made to the proposed rules in response to this comment.

General

TAB and one individual supported the proposed rules.

The commission appreciates the positive comment in support of the rules. No changes were made to the proposed rules in response to these comments.

MCEAA, Turning Point Ranch, and nine individuals commented in general opposition to the proposed rules citing reduced standards and weakened enforcement. Specifically, the comments included, but were not limited to, air pollution, disclosure of chemicals used in hydraulic fracturing, pollution related health concerns, the commission's enforcement process, and the quality of the environment in general. SEED Coalition commented at the public hearing that the compliance history rules should be "tightened up and not relaxed."

The commission responds that, while it appreciates the concerns raised by the commenters, the comments are outside the scope of this rulemaking. The commission determines a regulated entity's and a person's compliance history and uses the rating for regulatory decisions, such as denying permits or adding permit conditions, and enhancing administrative penalties. The commission responds this rulemaking does not limit or weaken the commission's enforcement authority or ability to assess penalties for violations of commission rules. No changes were made to the proposed rules in response to these comments.

Public Citizen requested a reasoned justification for the proposed changes to the rules.

The commission has provided justification for the changes to the rules in the preamble and in the Response to Comments section. HB 2694 required rulemaking to implement changes to the compliance history program to provide a more accurate measure of regulated entities' performance and make compliance history a more effective regulatory tool. No changes were made to the proposed rules in response to this comment.

Representatives, Public Citizen, Sierra Club, Westchester, NA Ambience, and 232 individuals commented that the commission should have provided more information to the public during the rulemaking, such as an analysis of how the proposed rules would apply to the regulated community. Representatives added that the commission refused to comply with requests to publish a database providing hypothetical classifications of entities based on the new formula until four days before the comment period closed and then it was lacking in crucial information. Public Citizen stated at the public hearing that the commission "knowingly obstructed our attempts to gain insight on the proposed compliance history ratings." NA Ambience stated that the commission should provide the "calculations of the State's 100 largest polluters as well as those of selected representative smaller polluters."

The commission responds that hypothetical compliance history scores for all sites and persons were provided in a searchable portable document format (PDF) on February 29, 2012, on the commission's Web site and the comment period was extended until March 23, 2012. Due to computer programming limitations during rule development, the individual scores provided did not reflect all aspects of the formula as proposed. Rather, the scores represented approximate numbers using a simplified model with several limitations, including: 1) the scores were generated using applicable compliance-history data from September 1, 2006 - August 31, 2011; not the data that will be used to calculate scores under the proposed rules, 2) the scores did not accurately reduce points for compliance with administrative orders because the simplified model did not take into consideration compliance with the order, therefore, entities that have not yet achieved compliance with an order received a reduction under the simplified model that is not warranted, 3) points awarded for "small entities" are not completely reflective of the proposed rules because the simplified model allocated points for small businesses but did not allocate points for small cities and counties, and 4) reductions for voluntary programs are not completely reflective of the proposed rules, because if an entity has multiple voluntary programs, the simplified model did not accurately apply reductions for all programs. The commission received an additional request for the database to be provided in a sortable format. The commission needed to do additional programming to develop the requested format. On March 15, 2012, the commission notified the requestor that the requested format would be provided after the document was created. An Excel spreadsheet version of the database was provided on March 19, 2012, as soon as it was

completed. No changes were made to the proposed rules in response to these comments.

Representatives, Public Citizen, MCEAA, the League, TOP, and 260 individuals commented that holding one public hearing at 10:00 a.m. in Austin did not give citizens enough of an opportunity to give feedback on the proposed rules and that additional public hearings should be held. Representatives added that at least three, but preferably five, additional hearings should be held. Public Citizen and one individual added that possible sites should include Port Arthur, Houston, Dallas, Texas City, Galveston, and Corpus Christi.

The commission responds that opportunity was given to provide comments orally or in writing at a stakeholder meeting on September 22, 2011, orally or in writing during the March 6, 2012, public hearing, and in writing until the end of the comment period. All comments, whether provided orally at a hearing or in writing, are given equal weight. Attendance at a hearing is not necessary to participate in the rule making process or to provide comments. No changes were made to the proposed rules in response to these comments.

TIP, Public Citizen, and TOP commented that the comment period should be extended past March 12, 2012. Additionally, Representatives, MCEAA, and five individuals requested that the comment period be extended past March 23, 2012.

The original comment period was from February 10 to March 12, 2012. Based on requests from the public and regulated community, the comment period was extended until March 23, 2012, to receive additional written comments. No changes were made to the proposed rules in response to these comments.

§60.1(b)

TPA commented that it supports the proposed revisions concerning the compliance period for NOVs.

The commission appreciates the positive comment in support of the rules. No changes were made to the proposed rules in response to this comment.

PCS and one individual commented in opposition to the one-year limitation of NOVs. In addition, PCS commented that the use of NOVs is too narrow and should be expanded to include at least five years.

The commission responds that HB 2694 limited the use of NOVs as a component of compliance history for a period not to exceed one year. No changes were made to the proposed rules in response to these comments.

TIP, TXOGA, and TCC commented that NOVs more than a year old should not be included in the repeat violator calculation because it is contrary to legislative intent.

The commission respectfully disagrees with these comments. HB 2694 amended TWC, §5.753 to limit the inclusion of NOVs as a mandatory component of compliance history to a period not to exceed one year from the date of issuance of the NOV. The commission has revised proposed §60.1(c) in accordance with this statutory provision. HB 2694 also amended TWC, §5.754 to provide that the commission must consider "violations of the same nature and the same environmental media that occurred in the preceding five years" in the repeat violator classification. To harmonize these two provisions and give effect to both, the commission has interpreted TWC, §5.754 to mean that all violations of the same nature and same environmental media must be considered by the commission for the preceding five-year period when classifying a person as a repeat violator. A review of the five-year compliance period for all violations is necessary to obtain an accurate picture of the compliance record for each site. In evaluating repeat violators, the commission will review a five-year period for NOVs. The commission reviews all major violations documented in approved investigations in the last five years and final enforcement actions issued in the last five years to determine if a repeat violator classification is warranted. No changes were made to the proposed rules in response to these comments.

§60.1(c)(1)

BBM commented that the word "final" should be reinserted into the rule or at a minimum that the preamble to the final rules should note that the deletion does not change the current meaning of §60.1(c)(1). TIP and TXOGA commented that the word "final" should be retained and that the commission did not provide an explanation for the change. TIP and TXOGA believe only final orders should be counted.

The commission agrees that the words "any final" should precede "enforcement order" in §60.1(c)(1) and (3). The deletion of the words "any final" was not intended to change the meaning of the provision, but rather was an attempt to match the language of the statutory provision. Since only final enforcement orders can be feasibly included in this component of compliance history, the commission has determined that this interpretation is consistent with legislative intent. Changes were made to the proposed rules in response to this comment.

§60.1(c)(3)

PCS commented that the first clause of proposed §60.1(c)(3) is vague and suggests that the commission clarify when enforcement actions from the EPA are mandatory components of compliance history.

The commission responds that HB 2694 gave the commission flexibility in gathering enforcement orders, court judgments, consent decrees, and criminal convictions relating to violations of EPA's rules. This flexibility is needed because the commission is reliant on the information being provided by EPA. No changes were made to the proposed rules in response to this comment.

§60.1(d)

TPA commented that it opposes the inclusion of prior enforcement actions in a new owner's compliance history.

The commission responds that prior enforcement actions will be included as a compliance history component despite a change of ownership. This is consistent with how compliance history has been applied by the commission in past decisions. Consideration of all enforcement actions at a site for the full five-year compliance period, even if the site changes ownership, is necessary to obtain an accurate picture of the site's compliance record. A new owner will receive both the positive and negative components associated to the site in its compliance history calculation to ensure that an unsatisfactory performer cannot drop this negative rating by simply changing company names. The commission recognizes that a negative compliance history classification may deter a responsible company from taking on a site with compliance issues; however, the commission has the ability to use a mitigating factor to encourage this action. Under §60.2(g)(3), a person who has a high or satisfactory rating who purchases a site with an unsatisfactory rating may enter into a compliance agreement to correct any issues of noncompliance at a site and request a mitigating factor be applied to revise the site rating of

the purchased site from unsatisfactory to satisfactory. This mitigating factor allows the commission to encourage compliance and improvement of site conditions at an unsatisfactory site without undue burden on a person's compliance history rating. No changes were made to the proposed rules in response to this comment.

§60.2(c)

AECT, TXOGA, and Turning Point Ranch commented that they support the proposed groupings by NAICS codes.

The commission appreciates the positive comments in support of the rules. No changes were made to the proposed rules in response to these comments.

TCC requested clarification on how the commission will define the term "site." Specifically, TCC asks whether "site" means "regulated entity."

The commission responds that the term "site," means all regulated units, facilities, equipment, structures, or sources at one street address or location that are owned or operated by the same person. Site includes any property identified in the permit or used in connection with the regulated activity at the same street address or location. A "site" for a portable regulated unit or facility is any location where the unit or facility is or has operated. The term "regulated entity" is often synonymous with the term "site." No changes were made to the proposed rules in response to this comment.

TCC requested that the commission provide a "streamlined process to allow regulated entities to correct NAICS code assignments in Central Registry."

The commission responds that this comment is outside the scope of this rulemaking. The commission currently has processes in place that allow the regulated community to make changes to NAICS codes through the Central Registry Program. No changes were made to the proposed rules in response to this comment.

BBM, TCC, and TPA requested clarification concerning the use of the proposed industry groupings in the rule. TCC specifically commented that the classification is too broad and may not always reflect the activities that occur at a given site and asked if there is any flexibility. TPA commented that it opposed the use of a curved ranking system, where the commission would rank regulated entities against each other within industry grouping. TPA also stated that if the commission intends to use a curved ranking system, it must initiate a new rulemaking. In addition to its general comments in support of the proposed groupings based on NAICS codes, TXOGA commented that it encouraged the commission to monitor implementation of the compliance history rules to ensure that the groupings results in equity and to revisit the rules if the groupings did not achieve fairness in practice.

The commission responds that the groupings will be used as a reporting tool to group together sites with the same NAICS. The purpose of these groupings is to facilitate comparison of similarly situated regulated entities within the same industry. Any other use, such as formal ranking, a curve system, a stratified scoring formula, or classification point ranges based upon the groupings would be addressed through future rulemaking. Any such rulemaking would not commence until sufficient and needed information has been complied to determine how to best utilize the groupings. The commission recognizes that the use of NAICS codes is not an exact measure of complexity of a site, but responds that comparing businesses by industry is an effective way to compare regulated entities to those similarly situated. The executive director selected NAICS because it is a nationally recognized standard applicable to all industries and is currently information readily available to the commission. For reporting purposes, the sites would be grouped according to their reported primary NAICS group which reflects their primary business. No changes were made to the proposed rules in response to these comments.

TPA suggested that an additional designation under the NAICS system be included as an industry grouping under the rule. Specifically, TPA suggests that transmission pipelines and related facilities would not fall under any of the NAICS code groupings included in the proposed rule, but rather would be included in the "all others" grouping.

The commission agrees with this comment and the following NAICS codes are included to the groupings referenced in §60.2(c): 486110, 486210, 486910, and 486990. No changes were made to the rule in response to this comment.

TIP commented that the groupings should be removed from the rule because the use of NAICS codes to group regulated entities serves no purpose and would not be a good use of agency resources.

The commission respectfully disagrees with this comment. The use of groupings allows the commission to more effectively compare regulated entities to those similarly situated. The purpose of these groupings is to facilitate comparison of similarly situated regulated entities within the same industry. Any other use, such as formal ranking, a curve system, a stratified scoring formula, or classification point ranges based upon the groupings would be addressed through future rulemaking. Any such rulemaking would not commence until sufficient and needed information has been complied to determine how to best utilize the groupings. No changes were made to the proposed rules in response to this comment.

NSWMA commented that the commission should delete the use of the NAICS for groupings and questioned the use of NAICS to initially classify the complexity of sites and stated the commission should use the complexity points proposed in the rules.

The commission respectfully disagrees with this comment. Although the commission notes that the proposed rules do not use groupings to establish different scoring formulas based on NAICS code, the proposed groups allow the commission to more effectively compare regulated entities to those similarly situated. Furthermore, the commission also notes that NAICS codes are not a measure of complexity. No changes were made to the proposed rules in response to this comment.

§60.2(e)

AECT and TPA commented that they support the measuring of complexity of sites. TXOGA commented that it appreciates the commission's calculation of complexity points in order to account for both positive and negative factors.

The commission appreciates the positive comments in support of the rules. No changes were made to the proposed rules in response to these comments.

TXOGA stated that it is difficult to predict whether the new complexity point calculation will achieve legislative intent that large complex manufacturing sites were being fairly evaluated. TXOGA commented that it encourages the commission to evaluate the impact of the changes to the formula on large complex sites

and to monitor implementation to ensure that the desired results are achieved in practice.

The commission appreciates this comment. No changes were made to the proposed rules in response to this comment.

TCC requested an explanation on how the commission determined the allocation of complexity points for each category.

The commission responds that the structure of criteria points utilized in the existing rule was used as the baseline for complexity points. The commission evaluated the types of permit authorizations for various sites in different media to determine program participation points. The program participation points awarded to each type of permit authorization were based on the permit complexity and corresponding level of regulation. The commission looked at various elements to determine size of a site and requested specific comments from the public on what elements to consider for size points. The commission endeavored to capture readily available data in each program area that would relate to operations. The commission also recognizes that size alone cannot account for the complexity that a small entity faces and added points for that reason. Sites in nonattainment areas were allotted one point as it was previously allotted one point under criteria points. Although location is not necessarily a measure of complexity, the commission recognizes that sites in nonattainment areas often have more regulations to comply with. Details for each individual section can be found in the Section by Section Discussion for Program Participation Points and Size Points. No changes were made to the proposed rule in response to this comment.

TxSWANA commented at the public hearing that its members are concerned about whether complexity points will be properly allocated to sites with co-located facilities.

The commission responds that complexity points are allocated to the site appropriately. Complexity points are assigned to the regulated entity number for all activities that take place at a site. No changes were made to the proposed rules in response to this comment.

§60.2(e)(1)

TCC commented that the commission should move Title V, all NSR including NNSR and PSD permits, and Resource Conservation and Recovery Act (RCRA) authorizations including Class I UIC permits, thus giving each of these authorizations four complexity points. TCC further commented that Title V permits should receive the highest level of program participation points in order to satisfy legislative intent.

The commission evaluated these authorizations to determine appropriate placement for allocation of program participation points. The commission recognizes that Title V permits can be broken down into two categories, GOPs and SOPs. While SOPs are often times more complex than GOPs, the converse is often true. The commission evaluated the possibility of assigning different points for Title V GOPs and SOPs. However, in its analysis, the commission determined that whether or not a permit was a GOP or an SOP is not an accurate indicator of the level of complexity. For example, many similarly sized Gas Compressor Stations across the state are authorized under both GOPs and SOPs. For this reason, the commission will assign two program participation points for all Title V permits. The commission respectfully disagrees that it was the legislature's intent to deem Title V facilities as the most complex because the majority of Title V sources in Texas are the less-complex GOPs. Title V permitted sites may also receive program participation points for NNSR permits, PSD permits, NSR permits, standard permits, and PBRs.

The commission agrees that NNSR permits should receive four program participation points because these permits are similar to PSD permits. Under the proposed rule, PSD permits already receive four program participation points in §60.2(e)(1)(A)(iv). RCRA authorizations require compliance with specific control and operational requirements and are consequently given the higher number of four participation points. The commission responds that some RCRA authorizations can obtain four complexity points under §60.2(e)(1)(A)(ii). The commission moved UIC Class I/III permits to this section because these permits are comparable to RCRA permits, which require significant geological and hydrological assessment. The following changes were made to the proposed rule in response to this comment: §60.2(e)(1)(A) was changed to include NNSR permits and to add UIC Class I/III permits.

BBM and TCC commented that PBRs should be given more points, rather than the one currently allocated under the proposed rule. TCC explained that PBRs should be given more program participation points because they are subject to Title V Reasonable Inquiry and the commission should not exclude those that do not require the submission of the PI-7. In addition, BBM requested clarification as to why PBRs were given one program participation point in the proposed compliance history formula.

The commission respectfully disagrees with these comments, in part. The commission responds that PBRs are just above *de minimis* in the hierarchy of air permit authorizations. Sites authorized under PBRs have fewer emissions, have fewer requirements, and are, therefore, less complex than those sources requiring other types of authorization. Whether an authorization is subject to Title V Reasonable Inquiry does not justify an increase in program participation points. The commission evaluated the types of permits listed under each point value and found that PBRs were more similar to the types of authorization found in §60.2(e)(1)(D). The commission has no way to track PBRs that are not registered with the commission through the submission of an application, and therefore, must limit program participation points to only those registered. The following change was made to the proposed rule in response to these comments: The commission removed the phrase "a PI-7" from the rule and replaced it with "an application" to ensure that any change to the form name does not impact the points allotted to PBRs in this section.

TCC commented that the commission should revise the phrase "each permit type" in §60.2(e)(1)(A) - (D) to account for all permits at site and replace that phrase with "number of permits."

The commission respectfully disagrees with this comment. The commission has determined that the type of permit authorization is an adequate measure of complexity. If the commission was to give a point for every permit at a site then those points alone would overwhelm the formula to such a degree that every area of the formula would have to be revised. An unintended consequence to this proposed change could result in permit splitting, which is a practice that the commission does not wish to encourage. No changes were made to the proposed rules in response to this comment.

TCC noted that a typo exists in §60.2(e)(1)(C) and that a dash should replace the "and" in the proposed rule.

The commission responds that it appreciates this comment and made this typographical correction.

TCC requested clarification of the language "or utilized by the person at a site. . ." used in §60.2(e)(1)(C) and (D).

The commission responds that an example of this situation would be when some of the authorizations found in these subparagraphs might be used by a person that is not the owner of the site. Specifically, Person A might be the owner of a convenience store with USTs, while Person B is the operator of the site. Person B might be the person that registers the UST. Similarly, at a construction site, Person M might own the site, while Person S is operating at the site and might obtain a stormwater permit for construction activity. No changes were made to the proposed rule in response to this comment.

TIP and TXOGA commented that the complexity points in the rule do not adequately or accurately account for complexity as outlined in the HB 2694. In addition, TIP, TXOGA, and TCC commented that standard permits and general permits that have identifiers should be assigned complexity points in §60.2(e)(1)(D)(xiii) and (xiv). BBM and NSWMA commented that the commission should add Air Standard Permits to §60.2(e)(1)(C) so that these permits would receive two program participation points.

In response to these comments, the commission reviewed all program areas to determine if data were readily available to better define the complexity of sites. The commission made the following changes.

Under §60.2(e)(1)(A), the commission added NNSR permits and moved UIC Class I/III permits to receive four points since these permits are similar to PSD and RCRA permits in this section.

The commission moved MSW Tire Registrations after a review of this authorization and determined Tire Registration more closely reflected the level of permits in §60.2(e)(1)(D). The commission added MSW Type IX to §60.2(e)(1)(D) as it was determined this is the appropriate amount of program participation points for that authorization.

The commission added Air Quality Standard Permits to §60.2(e)(1)(D) since these authorizations are reflective of this level of complexity. The commission responds that standard permits that are captured in the commission's central registry database are included in the program participation points section. The commission responds that standard permits are just above *de minimis* in the hierarchy of air permit authorizations. Sites authorized under standard permits have fewer emissions, have fewer requirements, and are, therefore, less complex than those sources requiring other types of authorization. These permits receive one program participation point. Standard permits that are not captured by the commission's data systems will not receive program participation points. The example given by BBM was the lack of complexity points for Air Quality Standard Permit for a Temporary Rock and Concrete Crusher ("Temporary Standard Permit"). The Temporary Standard Permits are not complex, do not require permit application review, and the authorization is meant to expire after relatively short intervals of time due to the ever changing nature of the business. The commission recognizes that, by their nature, these Temporary Standard Permits have a more limited environmental impact over a brief period of time, as compared with some of the other permit authorizations that are allocated program participation points, and therefore, will not receive complexity points for the operations of the site.

BBM commented that the commission interpretation of identical language regarding water quality general permits is contradictory to proposed §60.2(e)(1)(D)(x). In the past "water quality general permits" included stormwater general permits, such as Multi-Sector General Permit and construction general permits which got two points, now they only get one point. BBM noted that no functional difference exists between the storm water general permits and other water quality general permits for purposes of allocating complexity points.

The commission agrees with this comment. The following changes were made to the proposed rule in response to this comment: the commission removed "Stormwater permit" from §60.2(e)(1)(D)(x) from the proposed rule because it is included under §60.2(e)(1)(C)(iii).

NSWMA commented that each program and activity should be counted under program participation points, including amendments or modifications to permits. NSWMA commented that additional activity at a site (through amendment, modifications, or any other type of authorization) would lead to increased compliance requirements and opportunities for violations and is subjected to increased enforcement opportunities. NSWMA stated that the higher number of compliance requirements, the more complex the operations, and the higher the complexity points for program participation should be.

The commission respectfully disagrees with this comment. Modifications or amendments to permits might increase regulatory requirements but might also reduce the number of regulatory requirements. The commission currently has no mechanism to measure the amount and type of regulatory change made from modifications or amendments for purposes of determining complexity. It would not be practically feasible for the commission to track these revisions to permits. The type of program participation points for permits at a site adequately addresses the complexity values for each site. No changes were made to the proposed rules in response to this comment.

WM and NSWMA commented that program participation points should be awarded to Type IX waste authorizations. In addition, WM commented that Type IV AE authorizations should be distinguished in the proposed rule similar to the way Type I and Type I AE are distinguished in the proposed rule. Specifically, WM recommended Type IX registrations should receive the same number of program participation points as MSW Type IV, V, VII, or VIII facilities. WM went on to state that all waste "types" and the terminology designated under 30 TAC §330.5 should be used in this rule to avoid ambiguity and potential confusion.

The commission agrees with the essence of this comment, however respectfully disagrees with the number of points an MSW Type IX would receive. The following changes were made to the proposed rule in response to these comments. The commission added MSW Type IV AE to §60.2(e)(1)(B) and MSW Type IX to §60.2(e)(1)(D)(x). An MSW Type IX facility is less complex than an MSW Type I AE, IV, V, or VI facility and equivalent in complexity to those authorizations listed under §60.2(e)(1)(D). Therefore, the most appropriate category for MSW Type IX authorizations is under §60.2(e)(1)(D) and these authorizations have been added to §60.2(e)(1)(D)(x). The commission used common terminology to reference MSW Type VII and Type VIII permit authorizations in the proposed rule. MSW Type VII permit authorizations are more commonly known as sludge registrations or permits found in §60.2(e)(1)(D)(viii) and MSW Type VIII permit authorizations are more commonly known as Tire Registrations found in §60.2(e)(1)(D)(iv). The commission has not made a change

to the proposed rule regarding the terminology used for MSW Type VII and MSW Type VIII permit authorizations in response to these comments.

ACT, Sierra Club, and one individual suggested that the commission should reduce the amount of complexity points allocated to each authorization, citing concerns that it will be difficult for large, complex facilities to ever be classified as unsatisfactory performers. ACT noted that the proposed rule includes complexity points in the denominator of the formula and maintains that this structure makes it "virtually impossible for large, complex facilities to ever get an 'unsatisfactory' rating." ACT suggested that the commission retain the formula as proposed, but reduce the number of complexity points allocated to each authorization, permit, or license.

The commission respectfully disagrees with these comments. As demonstrated by test data provided to the public, the proposed compliance history formula can result in sites with high complexity points being classified as unsatisfactory performers. The commission reviewed the amount of complexity points available to all facilities and determined the values assigned are appropriate and reflective of a site's operations. No changes were made to the proposed rules in response to these comments.

§60.2(e)(2)

WM and NSWMA commented that the commission should assign size points to waste facilities for groundwater monitoring wells, gas probes and extraction wells, landfill gas monitoring pings and probes, leachate sumps, external water quality outfalls, including monitored storm water outfalls, and discrete nonhazardous waste disposal cells. NSWMA also commented that the executive director should use the permit application, including the site plans, to determine size points.

The commission responds that while the commission agrees that it would be appropriate to include some of these proposed measures of size for waste facilities, there are no suitable measures that are currently tracked in the commission's data systems. Information included in facility operating plans and pollution prevention plans, as well as numbers of groundwater monitoring wells, gas probes and extraction wells, and leachate sumps are not readily available in existing data systems. The commission also responds that it is not feasible to include the content of permit applications and site plans in determining size points. The commission reviewed the amount of complexity points available to all facilities and determined the values assigned are appropriate and reflective of a site's operations. No changes were made to the proposed rules in response to these comments.

AECT supported proposed §60.2(e)(2)(A), particularly using the number of FINs as an indicator of size.

The commission appreciates the positive comment in support of the rules. No changes were made to the proposed rules in response to this comment.

TCC requested clarification on how the commission will define the term "site."

The commission responds that the term "site," means all regulated units, facilities, equipment, structures, or sources at one street address or location that are owned or operated by the same person. Site includes any property identified in the permit or used in connection with the regulated activity at the same street address or location. A "site" for a portable regulated unit or facility is any location where the unit or facility is or has operated. The term "regulated entity" is often synonymous with the term "site." No changes were made to the proposed rules in response to this comment.

§60.2(e)(2)(A)

TCC requested clarification on how the commission will determine the total number of FINs at a site. TCC suggested that a FIN to every pollutant at the facility and suggests an evaluation for determining FINs {(FINs x pollutant) + monitors}. TIP and TXOGA commented that the commission should use total emission point numbers (EPNs) at a facility instead of FINs because EPNs more accurately reflect the size of a facility and they are more relevant because they are actual compliance points in a permit.

The commission appreciates, but respectfully disagrees with this comment. The total number of FINs at a site is determined by using data that is self-reported to the commission by the regulated community. Annually, sites that meet the reporting criteria in the commission's emissions inventory rule (30 TAC §101.10), submit their emissions inventory data, including the number of FINs, to the commission. This information is either submitted manually or electronically to the commission and is compiled in the State of Texas Air Reporting System (STARS). The FIN data is extracted from STARS. The commission evaluated other suggested means to gather data to represent the size of a facility, including pollutants emitted, monitors, and EPNs. The commission recognizes that all of these data points have value and appreciates the suggested comments. At this time, the commission does not have a viable mechanism for incorporating data regarding pollutants emitted from a site into the calculation of the formula. In response to these comments, the commission evaluated the use of EPNs and monitors for size complexity points. The commission respectfully disagrees with the use of monitors as a factor in determining size. Monitors are more representative of the size of specific equipment and requirements of certain rules, rather than a measure of a site's overall size. Facilities may be piped in a wide-array of methods having one FIN connected to several EPNs, having one FIN connected to one EPN, having several FINs connected to a single EPN, etc. Based on 2010 emissions data and counting FINs and EPNs with non-zero reported emissions, there are approximately 51,310 FINs and 48,079 EPNs in the state. While FINs and EPNs are comparable, the commission determined that using FINs as a means to represent size is a better overall representation of a site's size than using other recommended data sets as FINs are the source of emissions No changes were made to the proposed rules in response to these comments.

BBM commented that the rules disproportionately affect smaller businesses in a negative manner and specifically those that are considered not complex under the proposed version of the rule. BBM stated that it is easier for "non-complex" sites to be classified as unsatisfactory performers and more difficult to recover a satisfactory classification. Furthermore, BBM commented that the definition of small entity points is limited and does not adequately address the negative implications of the compliance history rating formula for non-complex sites.

The commission responds that complexity points for small business and local governments are awarded three complexity points; this point value is appropriately equivalent to moderately complex program participation point values. Typically sites with higher complexity points will have a greater likelihood for investigations and, therefore, a greater likelihood that violations will be documented. The commission has provided avenues available to all sites to improve their compliance history rating

(Order Reduction points, Audit Act points, etc.). No changes were made to the proposed rule in response to this comment.

§60.2(e)(3)

TCC stated that additional size points should be assigned to facilities that are located in nonattainment areas.

The commission respectfully disagrees with this comment. While being located in a nonattainment area may bring additional regulatory responsibilities, this does not have a direct correlation to size points. Being located in a nonattainment area is captured in program participation points and nonattainment points under complexity points. No changes were made to the proposed rules in response to this comment.

§60.2(f)

TPA commented that a company that is "working with TCEQ to demonstrate compliance in an Agreed Order" should not be put into the repeat violator category but should rather be allowed to demonstrate how it is working toward compliance.

The commission respectfully disagrees with this comment. The commission accounts for compliance with Agreed Orders through the addition of adopted §60.2(g)(1)(D). While a reduction in the weight that violations have as a component of an entity's compliance history may be appropriate as the entity demonstrates compliance, the repeat violator classification is intended to review all major violations at the site limited to the same nature and environmental media in the preceding five years. Compliance with an order is not a justification to remove a violation from the commission's purview while it considers the repeat violator classification. No changes were made to the proposed rule in response to this comment.

§60.2(f)(1)(A) - (C)

Representatives, Westchester, NA Ambience, ACT, Sierra Club, and 252 individuals commented that the complexity point allocation makes it difficult for any complex or large facility to ever be classified as a repeat violator. ACT also suggested to revise the amount of complexity points needed to trigger the repeat violator classification. Specifically referring to §60.2(f)(1)(B), ACT commented that large industrial facilities or major entities will easily reach the 25-point complexity point threshold, which provides that major violations must be documented on at least three occasions to trigger the repeat violator status. ACT suggested the number of violations needed to trigger the repeat violator classification could be changed and the complexity point thresholds in §60.2(f)(1)(A) and (B) could be raised, to 25 and 100 points, respectively. NA Ambience also stated that the threshold for complexity points should be raised.

The commission agrees with this comment in part. The commission used the structure and ranges in the proposed rule based on values that were more reflective of the existing criteria points. Those values and ranges are not appropriate given the changes based on complexity points. Complexity points are much broader in range and scope. The proposed rule did not take this into consideration and maintained the same range of points based on criteria points. Furthermore, HB 2694 limits the violations that count toward the repeat violator classification to only those violations that are of the same nature and same environmental media. With these changes, the likelihood of a complex facility having four violations of the same nature and same environmental media within a five-year period is limited. Considering the impact of these changes and after further analysis, the commission revised the point ranges to ensure the repeat violator classification serves as a meaningful deterrent for all regulated entities. The commission eliminated the subparagraph requiring four or more violations. The commission revised the complexity point ranges for those with at least two violations from less than 9 complexity points to less than 15 complexity points based on a review of the range and scope of complexity points. The following changes were made to the proposed rule in response to these comments. Adopted §60.2(f)(1)(A) was revised to provide that a person is a repeat violator at a site when "the site has had a major violation(s) documented on at least two occasions and has less than a total of 15 complexity points." Adopted §60.2(f)(1)(B) was revised to provide that a person is a repeat violator at a site when "the site has had a major violation(s) documented on at least three occasions." Proposed §60.2(f)(1)(C) was removed from the adopted rule.

TCC commented that the commission should delete the phrase ranging from 0 to 8 in subsection (f)(1)(A) because it is unnecessary. TCC further recommended replacing this with the phrase 9 to 24 in subsection (f)(1)(B) with "but greater than 8."

The commission responds that this change is no longer necessary given the changes to this subsection of the rule. No changes were made in the proposed rule in response to this comment.

TPA supported the proposed revision to §60.2(f)(1) that limit applicable violations to those of the same nature and same environmental media, stating "it is appropriate that the term "repeat violator" be limited to one who engages in violations that are similar in kind during the relevant time period."

The commission appreciates the positive comment in support of the rules. No changes were made to the rule in response to this comment.

NSWMA, BBM, TCC, TIP, TxOGA, and TPA commented that additional clarification is needed as to how the commission defines same nature. TCC suggested that the commission change the proposed definition of same nature to "same nature is defined as violations from the same unit that have the same root cause and the same root citation at the lowest subsection level." Additionally, BBM, NSWMA, and TPA commented that they were concerned about the use of violations of the same root citation at the subsection level in determining repeat violator status due to broad range of violations that could result under certain rule subsections. TPA suggested that the commission ensure that the repeat violator provision be applied to those regulated entities that have repeatedly violated the same environmental regulations. TPA further stated that repeat violator classification should not occur because of "mere mechanical interpretation" of the root citation at the subsection level and that the repeat violator classification does not result from different steps in the enforcement process. TIP and TXOGA commented that definition of same nature needs to be narrowed because the proposed definition could result in all violations of broad regulatory provisions being considered "same nature" and thus, repeat violations. As an example, TIP and TXOGA pointed out that all violations of a flexible permit are cited as violations of 30 TAC §116.715(a). TIP and TXOGA requested that the commission provide a more specific definition of "same nature" and provided an example of a more "precise" definition of same nature that would include violations that involve the same equipment as the same root cause of the violation.

ACT commented that it was concerned that using the root citation at the subsection level to determine whether multiple violations of the "same nature" have occurred will not be accurate.

NSWMA commented that it questions the definition of repeat violator and the proposed use of subsequent major violations under the same "root" regulatory section. NSWMA commented that the use of major violations of the same root regulatory section should be used as a "first screen" that creates a presumption of repeat violator classification which then leads to additional staff review to ensure that the violations were of the same nature and same environmental media.

The commission respectfully disagrees with these comments. The commission responds that in order to make a repeat violator classification, millions of data sets must be reviewed. To accomplish this review in an efficient and timely manner, the commission must rely on its data systems. The commission reviewed multiple processes and data sets to address this issue and determined that using the subsection level of the rules to determine repeat violator classification was the best approach. If violations are identified as being repeat violations, but a person believes that they are not repeat violations, several levels of review are available to both the agency and the regulated community. The commission rules allow a QAQC procedure which can address this issue. The commission rules also allow that correction requests can be submitted to the commission at any time. In addition, adopted §60.3(e) allows those persons and sites classified as repeat violators to file an appeal. The commission defined same nature as root subsection level because the commission data systems were capable of this review. The commission evaluated other methods of defining same nature but found the constraints of the data systems would not allow that at this time. If using the subsection citation to a particular rule pulls in violations of very broad regulatory requirements, such as §281.25 then the commission can "flag" those rules for extra consideration before the repeat violator classification is made. The commission will review the efficiency of the data systems and determine if any citations need additional review. No changes were made in the proposed rules in response to these comments.

NSWMA and TPA requested clarification on how the commission defines same environmental media. ACT commented that the term "same environmental media" is vague and suggests that the commission define the term in §60.2(f)(1). Public Citizen provided a comment that the proposed rules did not specify clearly what a violation of the same environment media is and how it is determined for repeat violator. Public Citizen further questioned if a "benzene leak is volatized at one point and liquid at another, is it the same media?"

The commission responds that using the root citation at the subsection level for defining what violations are of the same nature also results in classification of violation by media, since that is how the commission's rules are organized. The same environmental media is defined as the program area code that is assigned to the violation or authorization due to the constraints of the data systems. No changes were made to the rules in response to these comments.

BBM supported the revisions to this portion of the rule and suggests adding "of the same nature and same environmental media" to the §60.2(f)(1)(A) - (C) after "violation(s)" to ensure the intent of the statute is met.

The commission appreciates the support of this portion of the rule but respectfully disagrees with the suggested language. The proposed rule includes the terms "violations of the same nature and the same environmental media" under §60.2(f)(1) to reflect the statutory intent. No changes were made in the proposed rule in response to this comment.

TPA commented that it is concerned with the potential that different steps of the enforcement process will be counted as separate violations that would trigger the repeat violator provision. TPA provided an example with a NOV and an Agreed Order that "concern the same root cause event" may be counted as separate violations on a regulated entities' compliance history resulting in a repeat violator classification.

The commission respectfully disagrees with this comment. If a violation is documented through different steps of the enforcement process then it should potentially trigger the repeat violator classification. The purpose of an NOV is to put the regulated entity on notice that an area of non-compliance was found during an investigation and provides a timeframe to correct the violation. If the violation is not corrected within the timeframe stated in the NOV and results in formal enforcement through an Agreed Order, then the repeat violator classification is appropriate. No changes were made to the proposed rules in response to this comment.

PCS recommended that the repeat violator classification should not be limited to major violations only, stating that many instances of repeat or chronic non-compliance situations do not involve major violations.

The commission respectfully disagrees with this comment. The commission determined that only major violations, as defined under §60.2(d)(1), are appropriate to include in determining whether the repeat violator classification applies. The repeat violator classification has a significant impact on the compliance history score, and, therefore, should be reserved for violations that the commission has determined to be major. Although not included in the determination of repeat violator classification, moderate and minor violations are included as components in the compliance history formula and the points associated with these types of violations as defined in §60.2(g)(1)(B) and (C) will be used when calculating an entity's compliance history score. No changes were made to the proposed rules in response to this comment.

§60.2(f)(2)

Representatives, South Central Texas, Clean Economy, Clean Economy Corpus Christi, NA Ambience, Westchester, MECAA, Sierra Club, Public Citizen, ACT, and 271 individuals commented that §60.2(f)(2) allows the executive director to "pardon polluters" by adjusting the repeat violator classification without any criteria or review. In addition, ACT stated that the exclusion of specific criteria in this section undermines the consistent application of the compliance history program and that this "non-transparent clemency" provision creates the opportunity for personal preference or political persuasion to influence the repeat violator classification. ACT suggested that §60.2(f)(2) should state that "{t}he executive director shall designate a person as a repeat violator as provided in this subsection."

The commission respectfully disagrees with this comment. The executive director must have discretion to review violations that may result in a repeat violator classification, due to the substantial impact that this provision can have on a site's compliance history score. This discretion has always been considered a necessary tool in evaluating whether the repeat violator classification is warranted; however, the executive director has used it spar-

ingly over the last ten years. The commission adopted this provision because it is concerned with the potential for unintended consequences resulting from being designated as a repeat violator. The commission is particularly concerned that violations that occurred prior to the effective date of this rule could result in a person being designated as a repeat violator at a site, without any ability to consider the specific circumstances surrounding the violations. The commission has determined that this exception is appropriate because some of the more punitive aspects of the rule apply when the repeat violator classification is made. However, the commission expects the executive director to be stringent. Furthermore, HB 2694 limits the violations which the commission can consider when determining whether repeat violator classification applies to "violations of the same nature and same environmental media." Given this limitation, the commission recognizes without this discretion, a rigid unjustifiable application could occur. No changes were made to the proposed rule in response to these comments.

§60.2(g)(1)(D)

TPA and BBM supported the proposed provisions that would incorporate compliance with orders as a positive factor in a site's compliance history. BBM also stated that it believes the classification will be more accurate for a site on a year-to-year basis.

The commission appreciates the positive comment in support of the rules. No changes were made to the proposed rules in response to these comments.

TCC commented that changes to order reduction paragraph §60.2(g)(1)(D) should be made. Specifically it suggested that §60.2(g)(1)(D)(i) state that "under two years old the points associated with the violations in subparagraphs (A) - (C) of this paragraph will be multiplied by 1.0" and that the following paragraphs should be renumbered accordingly.

The commission agrees with this comment. The commission intended to give full weight to the violations in orders for two years. The reduction points to orders will only be possible if the ordering provisions have been met and two years have passed. The following changes were made to the rule: under §60.2(g)(1)(D)(i) the following language was added: "under two years old, the points associated with the violations in subparagraphs (A) - (C) of this paragraph will be multiplied by 1.o." The additional clause in this section required the subsequent clauses to be renumbered from clauses (i) - (iii) to clauses (ii) - (iv).

§60.2(g)(1)(E) and (F)

TCC, TIP, and TXOGA commented that the increase in the multipliers for NOVs is contrary to legislative intent because the legislature recognized that NOVs are unproven allegations and should not have the same impact. The intent was to reduce the impact of NOVs. In addition, TCC did not agree with the increase of multipliers in §60.2(g)(1)(E) and (F). TCC suggested that the commission leave the multipliers at previous levels.

The commission respectfully disagrees with these comments. The commission proposed this change to ensure the weight of the violations is more appropriate. In the existing rule, the weight of the violations, and the distinction between major, moderate, and minor violations, was not appropriate to truly reflect the impact of the violations. While the legislature directed the commission to use NOVs that are a year old or less, the legislature did not comment on the amount of points or weight to be given to NOVs. The comparison between the existing compliance history formula and the proposed compliance history formula cannot be taken on a one-for-one basis. There are too many distinctions between the two formulas to make this basic comparison. No changes were made to the proposed rule in response to these comments.

§60.2(g)(1)(K)

TCC suggested that allotting 500 points to repeat violators is punitive especially in light of the reduced points of investigations. TCC requested that the commission assign a lesser point value for repeat violators.

The commission respectfully disagrees with this comment. The commission set this value as a deterrent to repeat violations. The reduction of points for investigations is offset by the addition of complexity points and is addressed in §60.2(g)(1)(M). No changes were made to the proposed rules in response to this comment.

§60.2(g)(1)(L)

TCC did not agree with increasing the violation multipliers in §60.2(g)(1)(L)(ii)(I) and (II). TCC suggested leaving the multipliers at previous levels. TIP and TXOGA commented that the multipliers for violations reported under the Audit Act should not be increased. TIP and TXOGA recommended using the existing levels, saying the change is not justified, and it would have the harmful effect of reducing an incentive to conduct an audit.

The commission responds that the increase in the multipliers for points associated to notices and violations disclosed under the Audit Act provide an additional reduction in violation points and the multipliers were changed to coincide with the amount of points increased for violations found in NOVs. No changes were made to the proposed rule in response to this comment.

§60.2(g)(1)(M)

BBM, TIP, TCC, and TXOGA commented that the number of investigations is an important part of the current compliance history rating formula and help account for size and complexity because they are the driving forces behind the quantity of investigations performed at a facility. BBM, TIP, TCC, and TXOGA requested that all investigations be counted and that the formula should not exclude those investigations that document violations. BBM, TIP, TCC, and TXOGA requested that the commission should not multiply the number of investigation by 0.1 but use the previous standard in the old rule. TIP and TXOGA commented that the commission did not provide a reason in the preamble for why it chose to use a multiplier and that the use of a multiplier is contrary to legislative intent to "more fairly rate the compliance history of larger, more complex, facilities" because the multiplier will have a much greater impact on larger number of investigations.

The commission respectfully disagrees with these comments. The commission limited the number of investigations to only those investigations that do not document a violation because the commission determined that these investigations are a better indication of compliance. Investigations are an indicator of the degree of oversight that the commission undertakes which does increase for more complex facilities, but investigations are not necessarily the only indicators of size and complexity. Additionally, with the addition of complexity points to the denominator, it was necessary to reduce the points attributable to investigations in order to equalize complexity points and investigation points in the compliance history formula. No changes were made to the proposed rules in response to these comments.

BBM commented that site assessments for temporary rock and concrete crushers should be counted as compliance investigation under the rule. BBM encouraged the commission to interpret the phrase "investigations" broadly.

The commission respectfully disagrees with this comment. Site assessments for temporary rock and concrete crushers and other similar permitting actions are not conducted with the intent of evaluating compliance. The commission conducts site assessments to assess the information provided in applications prior to the start of operations. No changes were made to the proposed rule in response to this comment.

PCS opposed the exclusion of investigations which result from citizen complaints. PCS also suggested that investigations and enforcement actions from local regulatory agencies should be included in the compliance history calculation.

The commission respectfully disagrees with this comment. The commission does not count investigations that result from citizen complaints in the compliance history formula because the number of investigations acts as a positive influence of the compliance history score. The commission recognizes that the potential exists for inadvertent inflation that could result from multiple complaints from the public for the same issue. In addition, the potential would exist for an unscrupulous entity to affect its compliance history score by complaint investigations conducted at its site. Additionally, the commission has no existing system in place to feasibly capture investigations conducted by local regulatory entities when determining compliance history. No changes were made to the proposed rules in response to this comment.

§60.2(g)(1)(N)

Representatives, South Central Texas Network, NA Ambience, Sierra Club, Westchester, League, and 262 individuals commented that polluters will improve their compliance history score by signing up for supplemental programs, regardless of effectiveness and without measured returns for measured results. NA Ambience further stated that the benefits from these programs should only apply when they produce measurable results and the benefits received from these programs be in direct proportion to the results.

The commission respectfully disagrees with these comments. The four identified voluntary pollution reduction programs require that a standard be met in order to be eligible for the credit. The Pollution Prevention Site Assistance program provides technical assistance to reduce pollution. In order for a site to be eligible for benefits the company must report annually for up to three years on projects undertaken to reduce pollution. The Clean Texas Voluntary Pollution Reduction program requires that companies not be unsatisfactory performers and set three-year beyond-compliance commitments. In order to be eligible for the program the entities must report annually on the progress of those commitments. The Compliance Commitment program requires that the entity demonstrate that they are in 100% compliance. The commission added Mercury Convenience Switch Recovery program to the list of voluntary pollution reduction programs eligible for a 5% reduction. Under the Mercury Convenience Switch Recovery program, sites remove mercury convenience switches from vehicles and send them to an approved processing facility where the mercury will be recycled. These sites are required to submit an annual report by November 15 of every year with the number of switches removed from eligible vehicles and the number of eligible vehicles processed at the site. Eligibility for a reduction to compliance history rating for participation in these voluntary pollution reduction programs will be evaluated annually and will only be available for sites currently participating in these programs. In order to participate in any one of these programs the agency must take an action to allow participation. No changes were made to the rules in response to these comments.

ACT, NA Ambience, Sierra Club, Westchester, and five individuals commented that this provision gives polluters overly generous discounts for participating in environmental management and other pollution prevention programs. Furthermore, ACT stated that a 25% reduction in a compliance history score is too great a benefit for "mere participation in voluntary programs." ACT and Sierra Club commented that the cumulative percent discount that a regulated entity may receive through participating in voluntary pollution prevention programs should be reduced. Specifically, ACT commented that the maximum allowable reduction under this proposed section should be 20%, rather than the proposed 25%.

The commission disagrees with these comments. The commission has determined that a possible 25% reduction from early compliance, participation in voluntary pollution reduction programs, and receiving certification of an EMS is a positive benefit to the environment and incentivizes compliance. These programs encourage compliance with the commission rules and the commission supports the application of a reduction for these programs. HB 2694 directed the commission to include both positive and negative factors when considering a site's compliance history. In response, the commission added voluntary program points as a positive factor in a site's compliance history score. EMS and voluntary pollution prevention programs are indications of positive operations undertaken at a site. No changes were made to the proposed rules in response to these comments.

ACT stated that since the results of various EMS and voluntary pollution reduction programs differ, they should not be rewarded identically.

The commission respectfully disagrees with this comment. EMS receives a 10% reduction while voluntary pollution reduction programs receive 5%. No changes were made to the proposed rules in response to this comment.

ACT provided suggested rule language for changes to §60.2(g)(1)(N). After the first sentence of §60.2(g)(1)(N), ACT suggests including this provision: "If, however, either due to third party auditing or the required assessment of the EMS it is found the program is not sufficiently meeting the goals established in the EMS, then the entity is not eligible to receive the 10% discount." ACT proposed language for §60.2(g)(1)(N): "To receive this additional discount however, the person must submit a certified description of how participation in the program led to actual, demonstrated environmental and compliance benefits."

The commission respectfully disagrees with this comment. The commission responds that it is rare that a third party certification of an EMS is removed but the auditor does have the ability to revoke the certification. Only entities with an EMS that meets the requirements under Chapter 90 will be eligible for the 10% credit. Proposed revisions to Chapter 90 would require that entities seeking incentives for an EMS must have been certified to a recognized EMS by an independent third party. Additionally, a reassessment is required at least every three years. The commission responds that while none of the four voluntary pollution reduction programs identified require a "certified description of .

. . benefits," each program requires that a standard be met in order to be eligible for the credit. The Pollution Prevention Site Assistance program provides technical assistance to reduce pollution. In order for a site to be eligible for benefits, the company must report annually for up to three years on projects undertaken to reduce pollution. The Clean Texas Voluntary Pollution Reduction program requires that companies not be poor performers and set three-year beyond-compliance commitments. In order to be eligible for the program, the entities must report annually on the progress of those commitments. The Compliance Commitment program requires that the entity demonstrate that they are in 100% compliance. In order to participate in any one of these programs, the agency must take an action to allow participation. The commission added Mercury Convenience Switch Recovery program to the list of voluntary pollution reduction programs eligible for a 5% reduction. Under the Mercury Convenience Switch Recovery program, sites remove mercury convenience switches from vehicles and send them to an approved processing facility where the mercury will be recycled. These sites are required to submit an annual report by November 15 of every year with the number of switches removed from eligible vehicles and the number of eligible vehicles processed at the site. Eligibility for a reduction to compliance history rating for participation in these voluntary pollution reduction programs will be evaluated annually and will only be available for sites currently participating in these programs. Based on these programs' requirements, the proposed language is unnecessary. No changes were made to the proposed rule in response to this comment.

TCC requested 0.5 points for other EMS and Responsible Care or International Organization for Standardization (ISO) programs.

The commission respectfully disagrees with this comment. These types of EMS and Responsible Care or ISO programs are not reported to the commission and therefore should not be considered in the compliance history formula. However, the commission does allow for these EMS programs to be considered as a mitigating factor for unsatisfactory performers. No changes were made in response to this comment.

§60.2(g)(2)

The commission received many comments regarding the compliance history point range for unsatisfactory performers. Representatives, South Central Texas Network, Clean Economy, Clean Economy Corpus Christi, NA Ambience, MCEAA, Westchester, TOP and 281 individuals also commented that increased compliance history leniency will cut the percentage of companies considered unsatisfactory from 5% to 3% without reducing an ounce of pollution and that the compliance standards should be raised, not made less effective by changing the unsatisfactory rating cutoff and raising the compliance history threshold was a way of pardoning the polluters.

OPIC generally supported the rules but commented that the thresholds for classification in proposed §60.2(g)(2) undermine the incentives and deterrents in the compliance history classification system. OPIC commented that the test run of the proposed formula showed a significant change in the percentages of regulated entities falling into higher classifications without improving compliance or benefiting the environment through voluntary measures. OPIC recommended that the commission revise proposed §60.2(g)(2)(B) and (C) to maintain the current rule's threshold of 45 points for determining unsatisfactory performers.

ACT opposed the changes to the point ranges in §60.2(g)(2)(B) and (C). ACT stated "{b}y moving the threshold for what constitutes an unsatisfactory performer from 45 points to 55 points, ACT maintains that the commission passes thousands of entities from unsatisfactory to average and does nothing to increase compliance." ACT commented that it believes that this change weakens the compliance history program. ACT urged the commission to reduce the threshold back to 45 points.

Sierra Club commented at the public hearing that the "threshold" should be moved back to 40 points and in written comments stated that the commission "raise the classification threshold to move "from one category to another - as suggested by ACT's comments."

NA Ambience suggested that the threshold for unsatisfactory performers be lowered to 35 points.

The commission responds that the proposed unsatisfactory rating threshold was set at 55 points based on an evaluation of the proposed compliance history formula. Although the commission used the structure of the previous version of the compliance history formula as guidance for the proposed compliance history formula, it is important to note that the two formulas are not directly comparable.

NOVs were a substantial component of the compliance history violation points under the existing rule. However, HB 2694 limits the use of NOVs as a component of compliance history to one year. In addition to this and other changes required by HB 2694, the formula has also been changed in several significant ways. For example, the divisor is substantially different which results in fundamental differences in the formula. In the existing rule, criteria points were only used in determining whether a site was a repeat violator. In the proposed rule, complexity points, an analogous, but broader concept than criteria points, are a direct component of the compliance history formula. Thus, one cannot make a direct comparison between the old formula and the new formula any more than one can make a direct comparison between criteria points and complexity points. Additionally, investigations are included in a drastically different manner under the proposed rules than in the existing rules. First, only those investigations that do not result in documentation of violations are included in the formula. Second, these investigations are multiplied by 0.1, reducing their cumulative impact on a site's score. These changes to the compliance history formula made it necessary to reevaluate the range of points necessary to trigger an unsatisfactory performer classification. The commission has determined the site rating point range of 55 points or greater is appropriate for unsatisfactory performers. No changes were made to the proposed rule in response to these comments.

§60.2(g)(2)(A)

OPIC commented that the proposed classification breakdown results in potentially dubious classifications and undermines the incentives and deterrents in the compliance history classification system. OPIC noted that the proposed formula continues to allow entities with violations to achieve a high classification, particularly if the site has high complexity points. OPIC commented that only entities with clean records of no violations within a five-year review period should have the ability to obtain a high classification and recommended the commission revise §60.2(g)(2)(A) to change the site rating range for high performer to zero.

The commission appreciates, but respectfully disagrees with this comment. Defining a high performer as a site that has no record of violations within the five-year review period would provide un-

due weight to minor violations and could potentially discourage compliance. The commission, by allowing a point range from zero to 0.10 for a site to be classified as a high performer, provides an incentive for a site to work towards and maintain compliance. No changes were made to the proposed rules in response to this comment.

§60.2(g)(3)(A) and (B)

Representatives, South Central Texas, Clean Economy, Clean Economy Corpus Christi, NA Ambience, Westchester, MCEAA, Sierra Club, Public Citizen, ACT, and 271 individuals commented that the executive director will be able to "pardon polluters" at his discretion instead of adhering to a standard protocol. Representatives added that expanding the executive director's discretion in compliance history scoring would serve to increase the very "vagaries" of the existing formula and that there would be no record of the decision in the annual report released by the agency. Representatives and ACT also stated that the rules do not establish parameters for entity self-audits, an oversight that allows the executive director to completely reclassify an unsatisfactory site for voluntarily reporting a violation. ACT is concerned with this portion of the rule because it allows the executive director to reclassify a site based on a certain voluntary disclosure of a violation. While ACT noted that "honest self-auditing should be encouraged," it suggests providing "immunity from the negative consequences associated with the violation . . ." is sufficient to incent voluntary reporting. ACT is troubled that the executive director could reclassify a site, which could essentially forgive the entity of violations that exceed the severity of the violation that was voluntarily reported.

The commission responds that the compliance history rules apply to a wide range of regulated entities with varying sizes and complexities. The commission recognizes that a rule of such broad application may create situations where unique factual circumstances may warrant the exercise of mitigating factors. The commission has not expanded the executive director's discretion under these rules. The language has been part of the compliance history rules from the beginning. The commission has determined that the use of mitigating factors requires the exercise of discretion and consideration of site- or person-specific factors by the executive director because of widely varying factual circumstances. Because the factual circumstances surrounding other types of mitigating factors will vary from case to case, this discretionary approach is important so that the issues related to each mitigating factor can be sufficiently evaluated for its relative importance and impact. The commission has determined that having a mitigating factor for violations self-reported to the commission is valuable because it recognizes that a site may perform other kinds of audits or self-evaluations that may be similar to environmental audits and provide the same benefits to the community. However, these audits or self-evaluations do not have the same conditions and requirements as environmental audits conducted under the Audit Act, and thus are appropriate as a mitigating factor. No changes were made to the proposed rules in response to these comments.

§60.2(h)

TCC requested that the commission provide an explanation why this change was made. It has been TCC's understanding that each site has its own compliance history rating.

The commission responds that HB 2694 directed the commission to take size and complexity into account when determining a person's compliance history. The commission reviewed the formula for classifying a person rating under the existing rule and determined that the existing calculation did not adequately take size and complexity of sites into consideration. Under the existing rule, a person's classification is determined by averaging the site ratings of all the sites owned and/or operated by that person in the State of Texas. Under the adopted rule, the executive director will assign a classification to a person by adding the complexity weighted site ratings of all the sites owned and/or operated by that person in the State of Texas. Under the adopted rule, complexity includes the size of sites. Each site that a person is affiliated to will receive a point value based on the compliance history rating at the site multiplied by the percentage of complexity points that site represents of the person's total complexity points for all sites. The commission has determined that this calculation more accurately reflects a person's classification by taking into account the complexity of each site. No changes were made to the proposed rule in response to this comment.

§60.2(i)

AECT and TPA supported the proposed QAQC period.

The commission appreciates the positive comments in support of the rules. No changes were made to the proposed rules in response to these comments.

TCC commented that clarifying language should be added to this subsection of rule and suggested language. "The pending clarification shall undergo a quality assurance, quality control review period. An owner or operator of a site may review the pending compliance history rating upon request by submitting a CHRF to the commission with 14 calendar days of the notice."

The commission responds that its intent is to provide the regulated community sufficient time to submit a CHRF. A public notice will be posted to the agency's Web site on or about July 15 reminding the regulated community that a CHRF must be submitted to the agency by August 15. Additionally, the commission intends to utilize an automated, web-based interface for this CHRF process which will further increase its efficiency. Utilizing this automated interface, the commission has determined that the amount of time provided to the regulated community to submit a CHRF is sufficient. No changes were made to the proposed rule in response to this comment.

BBM commented that the system proposed by the commission is unwieldy and places a hardship on the regulated entity and the commission. BBM requested that the commission amend §60.2(i) to only require an entity to submit the CHRF once to reduce the paper work or alternatively, utilize an online system. In addition, BBM also requested that the commission revise this procedure to require all unsatisfactory performers receive notice of the pending compliance history rating regardless of whether they filed a CHRF.

The commission respectfully disagrees with this comment. The commission recognizes that many changes take place during a year that would impact the desire to conduct a review or staffing changes may occur. It is imperative that the entity submit a CHRF annually to ensure that a person currently with the entity receives the requested information and that the information goes to the appropriate person. The commission is working on developing an online system to streamline the process, however, if an online process cannot be utilized by a regulated entity, then the system outlined in the rule will govern the process for which the regulated entity can participate in the QAQC process. No changes were made to the proposed rule in response to this comment.

BBM suggested that the commission allow for an appeal procedure for pending compliance history ratings for unsatisfactory performers and that the pending rating would not be posted until the appeal process has run its course.

The commission respectfully disagrees with this comment. The commission needs to have the compliance history scores public and usable for agency actions. To stay the release of the compliance history scores for the duration of an appeals process which could last anywhere from 45 days to years is unreasonable. No changes were made to the proposed rules in response to this comment.

TIP and TXOGA commented that the commission should provide more detail regarding what information will be provided in response to the CHRF. TIP and TXOGA also stated that the rules appear to place the burden on the owner and operator.

The commission responds that the compliance history score, components that went into the compliance history score, the complexity score, repeat violator classification, and grouping information will be provided in response to the CHRF. The commission agrees that the rules do place the burden on the owner and operator to request this information but HB 2694 only allows the owner and operator to access this information. No changes were made to the proposed rules in response to these comments.

§60.3(a)

BBM commented that unsatisfactory sites should be able to obtain air standard permits and/or storm water general permits but require additional unannounced compliance investigations.

The commission determined that this comment is outside the scope of this rulemaking. The determination to authorize facilities under air general permits or water permits is addressed by specific programs and their governing rules. No changes were made to the proposed rules in response to this comment.

§60.3(d)

One individual commented that the proposed rules do not prohibit unsatisfactory performers from participating in innovative programs and from receiving regulatory flexibility.

The commission respectfully disagrees with this comment. Under §60.3(d), an unsatisfactory performer is prohibited from participating in regulatory flexible programs at the site and is also prohibited from receiving additional regulatory incentives under an EMS. No changes were made to the proposed rules in response to this comment.

§60.3(e) and (4)

NSWMA commented that right of an appeal should not be limited to unsatisfactory performers or satisfactory performers with 45 points of higher. NSWMA commented that facilities that receive a repeat violator classification should also have the opportunity to appeal.

The commission agrees with this comment in part. Entities that have been classified as repeat violators will have the ability to recommend changes during the QAQC process and have the ability to submit a correction request if they believe a repeat violator classification is not warranted. However, the commission recognizes that repeat violators may face the same additional scrutiny and regulatory restrictions that are assessed against unsatisfactory performers. Therefore, the commission has determined that persons classified as repeat violators should have the right to appeal. However, the right of an appeal is limited to unsatisfactory performers, repeat violators, and satisfactory performers with 45 points or higher because the executive director has a limited amount of time to review and address appeals under the rule, and removing this limitation may result in the submission of an unmanageable amount of appeals to the executive director. The following changes were made to the proposed rule in response to this comment: adopted §60.3(e) was revised to include repeat violators in the list of those eligible for an appeal of their compliance history classifications.

TxSWANA represented a suggestion of one of its members that there should be a way to correct compliance history scores other than the 30 days after the compliance history scores are released.

The commission responds that the rules allow for a site to submit a correction request and corrections to compliance history information can be made at any time. No changes were made to the proposed rules in response to this comment.

TIP and TXOGA commented that any threshold to allowing appeals is a fundamentally flawed approach and a company should have a right to an appeal to correct errors. TIP and TXOGA commented that at a minimum the commission should not increase the point threshold from 30 to 45 to file an appeal.

The commission respectfully disagrees with these comments. The commission has the correction request provision in the rule, under §60.3(f), to allow a person to correct errors regardless of the compliance history score. The appeals process is reserved for sites and persons that are classified as unsatisfactory, repeat violator, or satisfactory with 45 points or higher because the appeals process is a time sensitive process. Unsatisfactory performers and repeat violators receive additional oversight and regulatory restriction by the commission and providing an avenue for them to supply additional information to the executive director to appeal the unsatisfactory classification is warranted. The commission added repeat violator to adopted §60.3(e). No changes were made to the proposed rule in response to these comments.

Statutory Authority

House Bill 2694 granted rulemaking authority to the commission under Texas Water Code (TWC), §5.754 to establish a set of standards for the classification and use of compliance history. The amendments are adopted under Texas Health and Safety Code (THSC), §361.017 and §361.024, which provide the commission with authority to adopt rules necessary to carry out its power and duties under the Texas Solid Waste Disposal Act; THSC, §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; and THSC, §401.051, which provides the commission with authority to adopt rules and guidelines relating to the control of sources of radiation under the Texas Radiation Control Act. The amendments are also authorized under TWC, §5.103, which provides the commission with authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; and TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule.

The adopted amendments implement TWC, §§5.751 - 5.754 and 5.756, relating to the standard for evaluating compliance history.

§60.1. Compliance History.

(a) Applicability. The provisions of this chapter are applicable to all persons subject to the requirements of Texas Water Code (TWC), Chapters 26, 27, and 32 and Texas Health and Safety Code (THSC), Chapters 361, 375, 382, and 401.

(1) Specifically, the agency will utilize compliance history when making decisions regarding:

(A) the issuance, renewal, amendment, modification, denial, suspension, or revocation of a permit;

(B) enforcement;

(C) the use of announced investigations; and

(D) participation in innovative programs.

(2) For purposes of this chapter, the term "permit" means licenses, certificates, registrations, approvals, permits by rule, standard permits, or other forms of authorization.

(3) With respect to authorizations, this chapter only applies to forms of authorization, including temporary authorizations, that require some level of notification to the agency, and which, after receipt by the agency, requires the agency to make a substantive review of and approval or disapproval of the authorization required in the notification or submittal. For the purposes of this rule, "substantive review of and approval or disapproval" means action by the agency to determine, prior to issuance of the requested authorization, and based on the notification or other submittal, whether the person making the notification has satisfied statutory or regulatory criteria that are prerequisites to issuance of such authorization. The term "substantive review or response" does not include confirmation of receipt of a submittal.

(4) Notwithstanding paragraphs (2) and (3) of this subsection, this chapter does not apply to certain permit actions such as:

(A) voluntary permit revocations;

(B) minor amendments and nonsubstantive corrections to permits;

(C) Texas pollutant discharge elimination system and underground injection control minor permit modifications;

(D) Class 1 solid waste modifications, except for changes in ownership;

(E) municipal solid waste Class I modifications, except for temporary authorizations and municipal solid waste Class I modifications requiring public notice;

(F) permit alterations;

(G) administrative revisions; and

(H) air quality new source review permit amendments which meet the criteria of §39.402(a)(3)(A) - (C) and (5)(A) - (C) of this title (relating to Applicability to Air Quality Permits and Permit Amendments) and minor permit revisions under Chapter 122 of this title (relating to Federal Operating Permits Program).

(5) Further, this chapter does not apply to occupational licensing programs under the jurisdiction of the commission.

(6) Not later than September 1, 2012, the executive director shall develop compliance histories with the components specified in this chapter. Prior to September 1, 2012, the executive director shall continue in effect the standards and use of compliance history for any action (permitting, enforcement, or otherwise) that were in effect before September 1, 2012.

(7) Beginning September 1, 2012, this chapter shall apply to the use of compliance history in agency decisions relating to:

(A) applications submitted on or after this date for the issuance, amendment, modification, or renewal of permits;

(B) inspections and flexible permitting;

(C) a proceeding that is initiated or an action that is brought on or after this date for the suspension or revocation of a permit or the imposition of a penalty in a matter under the jurisdiction of the commission; and

(D) applications submitted on or after this date for other forms of authorization, or participation in an innovative program, except for flexible permitting.

(8) If a motion for reconsideration or a motion to overturn is filed under §50.39 or §50.139 of this title (relating to Motion for Reconsideration; and Motion to Overturn Executive Director's Decision) with respect to any of the actions listed in paragraph (4) of this subsection, and is set for commission agenda, a compliance history shall be prepared by the executive director and filed with the Office of the Chief Clerk no later than six days before the Motion is considered on the commission agenda.

(b) Compliance period. The compliance history period includes the five years prior to the date the permit application is received by the executive director; the five-year period preceding the date of initiating an enforcement action with an initial enforcement settlement offer or the filing date of an Executive Director's Preliminary Report, whichever occurs first; for purposes of determining whether an announced investigation is appropriate, the five-year period preceding an investigation; or the five years prior to the date the application for participation in an innovative program is received by the executive director. The compliance history period may be extended beyond the date the application for the permit or participation in an innovative program is received by the executive director, up through completion of review of the application. Except as used in §60.2(f) of this title (relating to Classification) for determination of repeat violator, notices of violation may only be used as a component of compliance history for a period not to exceed one year from the date of issuance.

(c) Components. The compliance history shall include multimedia compliance-related information about a person, specific to the site which is under review, as well as other sites which are owned or operated by the same person. The components are:

(1) any final enforcement orders, court judgments, and criminal convictions of this state relating to compliance with applicable legal requirements under the jurisdiction of the commission. "Applicable legal requirement" means an environmental law, regulation, permit, order, consent decree, or other requirement;

(2) notwithstanding any other provision of the TWC, orders developed under TWC, §7.070 and approved by the commission on or after February 1, 2002;

(3) to the extent readily available to the executive director, final enforcement orders, court judgments, consent decrees, and criminal convictions relating to violations of environmental rules of the United States Environmental Protection Agency;

(4) chronic excessive emissions events. For purposes of this chapter, the term "emissions event" is the same as defined in THSC, §382.0215(a);

(5) any information required by law or any compliance-related requirement necessary to maintain federal program authorization;

(6) the dates of investigations;

(7) all written notices of violation for a period not to exceed one year from the date of issuance of each notice of violation, including

written notification of a violation from a regulated person, issued on or after September 1, 1999, except for those administratively determined to be without merit;

(8) the date of letters notifying the executive director of an intended audit conducted and any violations disclosed and having received immunity under the Texas Environmental, Health, and Safety Audit Privilege Act (Audit Act), 75th Legislature, 1997, TEX. REV. CIV. STAT. ANN. art. 4447cc (Vernon's);

(9) an environmental management system approved under Chapter 90 of this title (relating to Innovative Programs), if any, used for environmental compliance;

(10) any voluntary on-site compliance assessments conducted by the executive director under a special assistance program;

(11) participation in a voluntary pollution reduction program; and

(12) a description of early compliance with or offer of a product that meets future state or federal government environmental requirements.

(d) Change in ownership. In addition to the requirements in subsections (b) and (c) of this section, if ownership of the site changed during the five-year compliance period, a distinction of compliance history of the site under each owner during that five-year period shall be made. Specifically, for any part of the compliance period that involves a previous owner, the compliance history will include only the site under review. For the purposes of this rule, a change in operator shall be considered a change in ownership if the operator is a co-permittee.

§60.2. Classification.

(a) Classifications. Beginning September 1, 2002, the executive director shall evaluate the compliance history of each site and classify each site and person as needed for the actions listed in §60.1(a)(1) of this title (relating to Compliance History). On September 1, 2003, and annually thereafter, the executive director shall evaluate the compliance history of each site, and classify each site and person. For the purposes of classification in this chapter, and except with regard to portable units, "site" means all regulated units, facilities, equipment, structures, or sources at one street address or location that are owned or operated by the same person. Site includes any property identified in the permit or used in connection with the regulated activity at the same street address or location. A "site" for a portable regulated unit or facility is any location where the unit or facility is or has operated. Each site and person shall be classified as:

(1) a high performer, which has an above-satisfactory compliance record;

(2) a satisfactory performer, which generally complies with environmental regulations; or

(3) an unsatisfactory performer, which performs below minimal acceptable performance standards established by the commission.

(b) Inadequate information. For purposes of this rule, "inadequate information" shall be defined as no compliance information. If there is no compliance information about the site at the time the executive director develops the compliance history classification, then the classification shall be designated as "unclassified." The executive director may conduct an investigation to develop a compliance history.

(c) Groupings. Sites will be divided into groupings based on North American Industry Classifications Systems (NAICS) codes or other information available to the executive director.

(d) Major, moderate, and minor violations. In classifying a site's compliance history, the executive director shall determine whether a documented violation of an applicable legal requirement is of major, moderate, or minor significance.

(1) Major violations are:

(A) a violation of a commission enforcement order, court order, or consent decree;

(B) operating without required authorization or using a facility that does not possess required authorization;

(C) an unauthorized release, emission, or discharge of pollutants that caused, or occurred at levels or volumes sufficient to cause, adverse effects on human health, safety, or the environment;

(D) falsification of data, documents, or reports; and

(E) any violation included in a criminal conviction, which required the prosecutor to prove a culpable mental state or a level of intent to secure the conviction.

(2) Moderate violations are:

(A) complete or substantial failure to monitor, analyze, or test a release, emission, or discharge, as required by a commission rule or permit;

(B) complete or substantial failure to submit or maintain records, as required by a commission rule or permit;

(C) not having an operator whose level of license, certification, or other authorization is adequate to meet applicable rule requirements;

(D) any unauthorized release, emission, or discharge of pollutants that is not classified as a major violation;

(E) complete or substantial failure to conduct a unit or facility inspection, as required by a commission rule or permit;

(F) any violation included in a criminal conviction, for a strict liability offense, in which the statute plainly dispenses with any intent element needed to be proven to secure the conviction; and

(G) maintaining or operating regulated units, facilities, equipment, structures, or sources in a manner that could cause an unauthorized or noncompliant release, emission, or discharge of pollutants.

(3) Minor violations are:

(A) performing most, but not all, of a monitoring or testing requirement, including required unit or facility inspections;

(B) performing most, but not all, of an analysis or waste characterization requirement;

(C) performing most, but not all, of a requirement addressing the submittal or maintenance of required data, documents, notifications, plans, or reports; and

(D) maintaining or operating regulated units, facilities, equipment, structures, or sources in a manner not otherwise classified as moderate.

(e) Complexity Points. All sites classified shall have complexity points as follows:

(1) Program Participation Points. A site shall be assigned Program Participation Points based upon its types of authorizations, as follows:

(A) four points for each permit type listed in clauses (i) - (viii) of this subparagraph issued to a person at a site:

(i) Radioactive Waste Disposal;

(ii) Hazardous or Industrial Non-Hazardous Storage Processing or Disposal;

(iii) Municipal Solid Waste Type I;

(iv) Prevention of Significant Deterioration;

(v) Phase I--Municipal Separate Storm Sewer System;

(vi) Texas Pollutant Discharge Elimination System (TPDES) or National Pollutant Discharge Elimination System (NPDES) Industrial or Municipal Major;

(vii) Nonattainment New Source Review; and

(viii) Underground Injection Control Class I/III;

(B) three points for each type of authorization listed in clauses (i) - (iv) of this subparagraph issued to a person at a site:

(i) Municipal Solid Waste Type I AE;

(ii) Municipal Solid Waste Type IV, V, or VI;

(iii) Municipal Solid Waste Type IV AE; and

(iv) TPDES or NPDES Industrial or Municipal Minor;

(C) two points for each permit type listed in clauses (i) - (iii) of this subparagraph issued to a person at a site or utilized by a person at a site:

(i) Title V Federal Operating Permit;

(ii) New Source Review individual permit; and

(iii) any other individual site-specific water quality permit not referenced in subparagraph (A) or (B) of this paragraph or any water quality general permit;

(D) one point for each type of authorization listed in clauses (i) - (xiii) of this subparagraph issued to a person at a site or utilized by a person at a site:

(i) Edwards Aquifer authorization;

(ii) Enclosed Structure permit or registration relating to the use of land over a closed Municipal Solid Waste landfill;

(iii) Industrial Hazardous Waste registration;

(iv) Municipal Solid Waste Tire Registrations;

(v) Other types of Municipal Solid Waste permits or registrations not listed in subparagraphs (A) - (C) of this paragraph;

(vi) Petroleum Storage Tank registration;

(vii) Radioactive Waste Storage or Processing license;

(viii) Sludge registration or permit;

(ix) Stage II Vapor Recovery registration;

(x) Municipal Solid Waste Type IX;

(xi) Permit by Rule requiring submission of an application under Chapter 106 of this title (relating to Permits by Rule);

(xii) Uranium license; and

(xiii) Air Quality Standard Permits.

(2) Size. Every site shall be assigned points based upon size as determined by the following:

(A) Facility Identification Numbers (FINs): The total number of FINS at a site will be multiplied by 0.02 and rounded up to the nearest whole number.

(B) Water Quality external outfalls:

(i) 10 points for a site with ten or more external outfalls;

(ii) 5 points for a site with at least five, but fewer than ten, external outfalls;

(iii) 3 points for sites with at least two, but fewer than five, external outfalls; and

(iv) 1 point for sites with one external outfall;

(C) Active Hazardous Waste Management Units (AHWMUs):

(i) 10 points for sites with 50 or more AHWMUs;

(ii) 5 points for sites with at least 20, but fewer than 50, AHWMUs;

(iii) 3 points for sites with at least ten, but fewer than 20, AHWMUs; and

(iv) 1 point for sites with at least one but fewer than ten AHWMUs.

(D) Small Entities shall receive 3 points. A small entity is defined as: a city with a population of less than 5,000; a county with a population of less than 25,000; or a small business. A small business is defined as any person, firm, or business which employs, by direct payroll and/or through contract, fewer than 100 full-time employees. A business that is a wholly owned subsidiary of a corporation shall not qualify as a small business if the parent organization does not qualify as a small business.

(E) Underground Storage Tanks (USTs) and Aboveground Storage Tanks (ASTs):

(i) 4 points for sites with 11 or more USTs;

(ii) 3 points for sites with five to ten USTs;

(iii) 3 points for sites with more than 11 ASTs;

(iv) 2 points for sites with three to four USTs;

(v) 2 points for sites with three to ten, ASTs;

(vi) 1 point for sites with one to two USTs; and

(vii) 1 point for sites with one to two ASTs.

(3) Nonattainment area points. Every site located in a nonattainment area shall be assigned 1 point.

(4) The subtotals from paragraphs (1) - (3) of this subsection shall be summed.

(f) Repeat violator.

(1) Repeat violator criteria. A person may be classified as a repeat violator at a site when, on multiple, separate occasions, major violations of the same nature and the same environmental media occurs during the preceding five-year compliance period as provided in subparagraphs (A) and (B) of this paragraph. Same nature is defined as violations that have the same root citation at the subsection level. For example, all rules under §334.50 of this title (relating to Release Detection) (e.g. §334.50(a) or (b)(2) of this title) would be considered same nature. The total complexity points for a site equals the sum of points assigned to a specific site in subsection (e) of this section. A person is a repeat violator at a site when:

(A) the site has had a major violation(s) documented on at least two occasions and has less than a total of 15 complexity points; or

(B) the site has had a major violation(s) documented on at least three occasions.

(2) Repeat violator exemption. The executive director shall designate a person as a repeat violator as provided in this subsection, unless the executive director determines the nature of the violations and the conditions leading to the violations do not warrant the designation.

(g) Formula. The executive director shall determine a site rating based upon the following method.

(1) Site rating. For the time period reviewed, the following calculations shall be performed based upon the compliance history at the site.

(A) The number of major violations contained in:

(i) any adjudicated final court judgments and default judgments, shall be multiplied by 160;

(ii) any non-adjudicated final court judgments or consent decrees without a denial of liability shall be multiplied by 140;

(iii) any non-adjudicated final court judgments or consent decrees containing a denial of liability, adjudicated final enforcement orders, and default orders, shall be multiplied by 120;

(iv) any final prohibitory emergency orders issued by the commission shall be multiplied by 120;

(v) any agreed final enforcement orders without a denial of liability shall be multiplied by 100; and

(vi) any agreed final enforcement orders containing a denial of liability shall be multiplied by 80.

(B) The number of moderate violations contained in:

(i) any adjudicated final court judgments and default judgments shall be multiplied by 115;

(ii) any non-adjudicated final court judgments or consent decrees without a denial of liability shall be multiplied by 95;

(iii) any non-adjudicated final court judgments or consent decrees containing a denial of liability, adjudicated final enforcement orders, and default orders, shall be multiplied by 75;

(iv) any agreed final enforcement orders without a denial of liability shall be multiplied by 60; and

(v) any agreed final enforcement orders containing a denial of liability shall be multiplied by 45.

(C) The number of minor violations contained in:

(i) any adjudicated final court judgments and default judgments shall be multiplied by 45;

(ii) any non-adjudicated final court judgments or consent decrees without a denial of liability shall be multiplied by 35;

(iii) any non-adjudicated final court judgments or consent decrees containing a denial of liability, adjudicated final enforcement orders, and default orders, shall be multiplied by 25;

(iv) any agreed final enforcement orders without a denial of liability shall be multiplied by 20; and

(v) any agreed final enforcement orders containing a denial of liability shall be multiplied by 15.

(D) The total number of points assigned for all resolved violations in subparagraphs (A) - (C) of this paragraph will be reduced based on achievement of compliance with all ordering provisions. For the first two years after the effective date of the enforcement order(s), court judgment(s), consent decree(s), and criminal conviction(s), the site will receive the total number of points assigned for violations in subparagraphs (A) - (C) of this paragraph. If all violations in subparagraphs (A) - (C) of this paragraph are resolved and compliance with all ordering provisions is achieved, for each enforcement order(s), court judgment(s), consent decree(s), and criminal conviction(s):

(i) under two years old, the points associated with the violations in subparagraphs (A) - (C) of this paragraph will be multiplied by 1.0;

(ii) over two years old, the points associated with the violations in subparagraphs (A) - (C) of this paragraph will be multiplied by 0.75;

(iii) over three years old, the points associated with the violations in subparagraphs (A) - (C) of this paragraph will be multiplied by 0.50; and

(iv) over four years old, the points associated with the violations in subparagraphs (A) - (C) of this paragraph will be multiplied by 0.25.

(E) The number of major violations contained in any notices of violation shall be multiplied by 10.

(F) The number of moderate violations contained in any notices of violation shall be multiplied by 4.

(G) The number of minor violations contained in any notices of violation shall be multiplied by 1.

(H) The number of counts in all criminal convictions:

(i) under Texas Water Code (TWC), §§7.145, 7.152, 7.153, 7.162(a)(1) - (5), 7.163(a)(1) - (3), 7.164, 7.168 - 7.170, 7.176, 7.182, 7.183, and all felony convictions under the Texas Penal Code, TWC, Texas Health and Safety Code (THSC), or the United States Code (USC) shall be multiplied by 500; and

(ii) under TWC, §§7.147 - 7.151, 7.154, 7.157, 7.159, 7.160, 7.162(a)(6) - (8), 7.163(a)(4), 7.165 - 7.167, 7.171, 7.177 - 7.181, and all misdemeanor convictions under the Texas Penal Code, TWC, THSC, or the USC shall be multiplied by 250.

(I) The number of chronic excessive emissions events shall be multiplied by 100.

(J) The subtotals from subparagraphs (A) - (I) of this paragraph shall be summed.

(K) If the person is a repeat violator as determined under subsection (f) of this section, then 500 points shall be added to the total in subparagraph (J) of this paragraph. If the person is not a repeat violator as determined under subsection (f) of this section, then zero points shall be added to the total in subparagraph (J) of this paragraph.

(L) If the total in subparagraph (K) of this paragraph is greater than zero, then:

(i) subtract 1 point from the total in subparagraph (K) of this paragraph for each notice of an intended audit conducted under the Audit Act submitted to the agency during the compliance period; or

(ii) if a violation(s) was disclosed as a result of an audit conducted under the Texas Environmental, Health, and Safety Audit Privilege Act, (Audit Act), 75th Legislature, 1997, TEX. REV.

CIV. STAT. ANN. art. 4447cc (Vernon's); as amended, and the site received immunity from an administrative or civil penalty for that violation(s) by the agency, then the following number(s) shall be subtracted from the total in subparagraph (K) of this paragraph:

(I) the number of major violations multiplied by 10;

(II) the number of moderate violations multiplied by 4; and

(III) the number of minor violations multiplied by 1.

(M) The result of the calculations in subparagraphs (J) - (L) of this paragraph shall be divided by the number of investigations conducted during the compliance period multiplied by 0.1 plus the number of complexity points in subsection (e) of this section. If a site does not have any investigation points and the subtotal from subsection (e)(1) - (3) of this section equals zero, then one default point shall be used. Investigations that do not document any violations will be the only ones counted in the compliance history formula. The number of investigations multiplied by 0.1 shall be rounded up to the nearest whole number. If the value is less than zero, then the site rating shall be assigned a value of zero. For the purposes of this chapter, an investigation is a review or evaluation of information by the executive director or executive director's staff or agent regarding the compliance status of a site, excluding those investigations initiated by citizen complaints. An investigation, for the purposes of this chapter, may take the form of a site assessment, file or record review, compliance investigation, or other review or evaluation of information.

(N) If the person receives certification of an environmental management system (EMS) under Chapter 90 of this title (relating to Innovative Programs) and has implemented the EMS at the site for more than one year, then multiply the result in subparagraph (M) of this paragraph by 0.90, which is (1 - 0.10) and this is the maximum reduction that can be received for an EMS. If the person receives credit for a voluntary pollution reduction program or for early compliance, then multiply the result in subparagraph (M) of this paragraph by 0.95, which is (1 - 0.05). The maximum reduction that a site's compliance history may be reduced through voluntary pollution reduction programs in this subparagraph is 0.85, which is (1 - 0.15). If site participates in both EMS and voluntary pollution reduction programs then the maximum reduction that a site's compliance history may be reduced through EMS and voluntary programs in this subparagraph is 0.75, which is (1 - 0.10 - 0.15).

(2) Point ranges. The executive director shall assign the site a classification based upon the compliance history and application of the formula in paragraph (1) of this subsection to determine a site rating, utilizing the following site rating ranges for each classification:

(A) fewer than 0.10 points--high performer;

(B) 0.10 points to 55 points--satisfactory performer; and

(C) more than 55 points--unsatisfactory performer.

(3) Mitigating factors. The executive director shall evaluate mitigating factors for a site classified as an unsatisfactory performer.

(A) The executive director may reclassify the site from unsatisfactory to satisfactory performer with 55 points based upon the following mitigating factors:

(i) other compliance history components included in §60.1(c)(10) - (12) of this title;

(ii) implementation of an EMS not certified under Chapter 90 of this title at a site for more than one year;

(iii) a person, all of whose other sites have a high or satisfactory performer classification, purchased a site with an unsatisfactory performer classification or became permitted to operate a site with an unsatisfactory performer classification if the person entered into a compliance agreement with the executive director regarding actions to be taken to bring the site into compliance prior to the effective date of this rule; and

(iv) voluntarily reporting a violation to the executive director that is not otherwise required to be reported and that is not reported under the Audit Act, or that is reported under the Audit Act but is not granted immunity from an administrative or civil penalty for that violation(s) by the agency.

(B) When a person, all of whose other sites have a high or satisfactory performer classification, purchased a site with an unsatisfactory performer classification or became permitted to operate a site with an unsatisfactory performer classification and the person contemporaneously entered into a compliance agreement with the executive director regarding actions to be taken to bring the site into compliance, the executive director:

(i) shall reclassify the site from unsatisfactory performer to satisfactory performer with 55 points until such time as the next annual compliance history classification is performed; and

(ii) may, at the time of subsequent compliance history classifications, reclassify the site from unsatisfactory performer to satisfactory performer with 55 points based upon the executive director's evaluation of the person's compliance with the terms of the compliance agreement.

(h) Person classification. The executive director shall assign a classification to a person by adding the complexity weighted site ratings of all the sites owned and/or operated by that person in the State of Texas. Each site that a person is affiliated to will receive a point value based on the compliance history rating at the site multiplied by the percentage of complexity points that site represents of the person's total complexity points for all sites. Each of these calculated amounts will be added together to determine the person's compliance history rating.

(i) Notice of classifications. Notice of person and site classifications shall be posted on the commission's website after 30 days from the completion of the classification. The notice of classification shall undergo a quality assurance, quality control review period. An owner or operator of a site may review the pending compliance history rating upon request by submitting a Compliance History Review Form to the commission by August 15 each year.

§60.3. Use of Compliance History.

(a) Permitting.

(1) Permit actions subject to compliance history review. For permit actions subject to compliance history review identified in §60.1(a) of this title (relating to Compliance History), the agency shall consider compliance history when preparing draft permits and when deciding whether to issue, renew, amend, modify, deny, suspend, or revoke a permit by evaluating the person's:

(A) site-specific compliance history and classification; and

(B) aggregate compliance history and classification, especially considering patterns of environmental compliance.

(2) Review of permit application. In the review of any application for a new, amended, modified, or renewed permit, the exec-

utive director or commission may require permit conditions or provisions to address an applicant's compliance history. Unsatisfactory performers are subject to any additional oversight necessary to improve environmental compliance.

(3) Unsatisfactory performers and repeat violators.

(A) If a site is classified as an unsatisfactory performer, the agency shall:

(i) deny or suspend a person's authority relating to that site to discharge under a general permit issued under Chapter 205 of this title (relating to General Permits for Waste Discharges); and

(ii) deny a permit relating to that site for, or renewal of, a flexible permit under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification).

(B) If a site is classified as an unsatisfactory performer, upon application for a permit, permit renewal, modification, or amendment relating to that site, the agency may take the following actions, including:

(i) deny or amend a solid waste management facility permit;

(ii) deny an original or renewal solid waste management facility permit; or

(iii) hold a hearing on an air permit amendment, modification, or renewal, and, as a result of the hearing, deny, amend, or modify the permit.

(C) If a site is classified as an unsatisfactory performer or repeat violator and the agency determines that a person's compliance history raises an issue regarding the person's ability to comply with a material term of its hazardous waste management facility permit, then the agency shall provide an opportunity to request a contested case hearing for applications meeting the criteria in §305.65(9) of this title (relating to Renewal).

(D) Upon application for permit renewal or amendment, the commission may deny, modify, or amend a permit of a repeat violator.

(E) The commission shall deny an application for permit or permit amendment when the person has an unacceptable compliance history based on violations constituting a recurring pattern of conduct that demonstrates a consistent disregard for the regulatory process, including a failure to make a timely and substantial attempt to correct the violation(s). This includes violation of provisions in commission orders or court injunctions, judgments, or decrees designed to protect human health or the environment.

(4) Additional use of compliance history.

(A) The commission may consider compliance history when:

(i) evaluating an application to renew or amend a permit under Texas Water Code (TWC), Chapter 26;

(ii) considering the issuance, amendment, or renewal of a preconstruction permit, under Texas Health and Safety Code (THSC), Chapter 382; and

(iii) making a determination whether to grant, deny, revoke, suspend, or restrict a license or registration under THSC, Chapter 401.

(B) The commission shall consider compliance history when:

(i) considering the issuance, amendment, or renewal of a permit to discharge effluent comprised primarily of sewage or municipal waste;

(ii) considering if the use or installation of an injection well for the disposal of hazardous waste is in the public interest under TWC, Chapter 27;

(iii) determining whether and under which conditions a preconstruction permit should be renewed; and

(iv) making a licensing decision on an application to process or dispose of low-level radioactive waste from other persons.

(5) Revocation or suspension of a permit. Compliance history classifications shall be used in commission decisions relating to the revocation or suspension of a permit.

(6) Repeat violator permit revocation. In addition to the grounds for revocation or suspension under TWC, §7.302 and §7.303, the commission may revoke a permit of a repeat violator if classified as an unsatisfactory performer, or for cause, including:

(A) a criminal conviction classified as major under §60.2(d)(1)(E) of this title (relating to Classification);

(B) an unauthorized release, emission, or discharge of pollutants classified as major under §60.2(d)(1)(C) of this title;

(C) repeatedly operating without required authorization; or

(D) documented falsification.

(b) Investigations. If a site is classified as an unsatisfactory performer, then the agency:

(1) may provide technical assistance to the person to improve the person's compliance with applicable legal requirements;

(2) may increase the number of investigations performed at the site; and

(3) may perform any investigations unannounced.

(c) Enforcement. For enforcement decisions, the commission may address compliance history and repeat violator issues through both penalty assessment and technical requirements.

(1) Unsatisfactory performers are subject to any additional oversight necessary to improve environmental compliance.

(2) The commission shall consider compliance history classification when assessing an administrative penalty.

(3) The commission shall enhance an administrative penalty assessed on a repeat violator.

(d) Participation in innovative programs. If the site is classified as an unsatisfactory performer, then the agency:

(1) may recommend technical assistance; or

(2) may provide assistance or oversight in development of an environmental management system (EMS) and require specific environmental reporting to the agency as part of the EMS; and

(3) shall prohibit that person from participating in the regulatory flexibility program at that site. In addition, an unsatisfactory performer is prohibited from receiving additional regulatory incentives under its EMS until its compliance history classification has improved to at least a satisfactory performer.

(e) Appeal of classification. A person or site classification may be appealed only if the person or site is classified as either an unsatis-

factory performer, a repeat violator, or a satisfactory performer with 45 points or more. An appeal under this subsection shall be subject to the following procedures.

(1) An appeal shall be filed with the executive director no later than 45 days after notice of the classification is posted on the commission's website.

(2) An appeal shall state the grounds for the appeal and the specific relief sought. The appeal must demonstrate that if the specific relief sought is granted, a change in site or person classification will result. The appeal must also include all documentation and argument in support of the appeal.

(3) Upon filing, the appellant shall serve a copy of the appeal including all supporting documentation by certified mail, return receipt requested, as provided in subparagraphs (A) and (B) of this paragraph.

(A) If an appeal of a person's classification is filed by a person other than the person classified, a copy shall be served on the person classified.

(B) If an appeal of a site classification is filed by a person other than the permit holder(s) or the owner of the classified site, a copy shall be served on the owner and permit holder (if different) of the classified site.

(4) Any replies to an appeal must be filed no later than 15 days after the filing of the appeal.

(5) In response to a timely filed appeal and any replies, the executive director may affirm or modify the classification.

(6) The executive director shall mail notice of his decision to affirm or modify the classification to the appellant, any person filing a reply, and the persons identified in paragraph (3)(A) and (B) of this subsection no later than 60 days after the filing of the appeal. An appeal is automatically denied on the 61st day after the filing of the appeal unless the executive director mails notice of his decision before that day.

(7) The executive director's decision is effective and for purposes of judicial review, constitutes final and appealable commission action on the date the executive director mails notice of his decision or the date the appeal is automatically denied.

(8) During the pendency of an appeal to the executive director or judicial review of the executive director's decision under this subsection, the agency shall not, for the person or site for which the classification is under appeal or judicial review:

(A) conduct an announced investigation;

(B) grant or renew a flexible permit under THSC, Chapter 382;

(C) allow participation in the regulatory flexibility program under TWC, §5.758; or

(D) grant authority to discharge under a general permit under TWC, §26.040(h).

(f) Corrections of classifications. The executive director, on his own motion or the request of any person, at any time may correct any clerical errors in person or site classifications. If a person classification is corrected, the executive director shall notify the person whose classification has been corrected. If a site classification is corrected, the executive director shall notify the site owner and permit holder (if different). If the correction results in a change to a classification that is subject to appeal under subsection (e) of this section, then an appeal may be filed no later than 45 days after posting of the correction on the commission's website. Clerical errors under this section include typographical errors and mathematical errors.

(g) Compliance history evidence. Any party in a contested case hearing may submit information pertaining to a person's compliance history, including the underlying components of classifications, subject to the requirements of §80.127 of this title (relating to Evidence). A person or site classification itself shall not be a contested issue in a permitting or enforcement hearing.

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

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Kathleen C. Decker
Director, Litigation Division
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For further information, please call: (512) 239-2548

CHAPTER 90. INNOVATIVE PROGRAMS

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the repeal of §§90.1, 90.2, 90.10, 90.12, 90.14, 90.16, 90.18, 90.20, 90.30, 90.32, 90.34, 90.36, 90.38, 90.40, 90.42, 90.44, 90.50, 90.52, 90.54, 90.56, 90.58, 90.60, 90.62, 90.64, 90.66, 90.68, 90.70, and 90.72; and new §§90.1 - 90.3, 90.10 - 90.16, 90.20 - 90.24, 90.30, and 90.31.

New §§90.2, 90.13, and 90.16 are adopted *with changes* to the proposed text as published in the February 10, 2012, issue of the *Texas Register* (37 TexReg 637). The repeals and new §§90.1, 90.3, 90.10 - 90.12, 90.14, 90.15, 90.20 - 90.24, 90.30, and 90.31 are adopted *without changes* to the proposal and will not be republished.

Background and Summary of the Factual Basis for the Adopted Rules

As required by House Bill (HB) 2694, Article 4, §§4.01, 4.06, and 4.08, 82nd Legislature, 2011, the adopted rules are offered to implement incentive based programs under a statutory Strategically Directed Regulatory Structure, including Regulatory Flexibility Orders (RFOs), and Environmental Management Systems (EMS) requiring the repeal, reorganization, and amendments to the existing rules under Chapter 90.

The adopted rulemaking implements HB 2694, Article 4, §§4.01, 4.06, and 4.08, which amend Texas Water Code (TWC), §§5.751, 5.755, and 5.758. The amendments to the TWC changed the standard for TCEQ to manage its environmental incentives and innovative programs. Therefore, TCEQ is consolidating and reorganizing the rules regarding these environmental incentives and innovative programs into a single subchapter, deleting duplicative requirements on applicants and the agency. Additional amendments to the rule are intended to provide clarity and remove unnecessary restrictions on the TCEQ's ability to issue RFOs and to recognize EMS.

Section by Section Discussion

In order to remove duplicative and unnecessary restrictions, the adopted rulemaking reorganizes and clarifies the incentive programs into single new Subchapter A, Incentive Programs, which is derived from the consolidation of repealed Subchapter A, Purpose, Applicability, and Eligibility; Subchapter B, General Provisions; Subchapter C, Regulatory Incentives for Using Environmental Management Systems; and Subchapter D, Strategically Directed Regulatory Structure. The references to classification are deleted as required by HB 2694, §4.06.

§90.1, Purpose

Adopted new §90.1 establishes that the purpose of the chapter is to implement TWC, §§5.755, 5.758, and 5.127. New §90.1 consolidates the purpose statements from repealed §90.1 and §90.50.

§90.2, Applicability

Adopted new §90.2 consolidates the applicability from repealed Subchapters A and D and is adopted with changes. In addition to other statutory chapters listed, TWC, Chapter 32 and Texas Health and Safety Code (THSC), Chapter 375 were added in accordance with changes to TWC, §5.751. New §90.2 lists regulatory activities from applicable statutory chapters that create the incentive program rules offered in adopted Chapter 90. Specifically, subsurface area drip disposal systems under TWC, Chapter 32 and removal of convenience switches under THSC, Chapter 375 will now be eligible for consideration under these programs.

In response to comment, the term "radioactive material" is changed to "radioactive substance."

§90.3, Definitions

Adopted new §90.3 consolidates the definition sections from repealed §90.30 and §90.58. Definitions are adopted to provide meaning to the terms: applicable legal requirement, certified, enhanced environmental performance, environmental aspect, environmental impact, environmental management system, independent assessor, innovative program, maximum environmental benefit, permit, public participation, region, site, strategically directed regulatory structure, and voluntary measure. Definitions for applicable legal requirement, environmental management system, innovative program, permit, region, and strategically directed regulatory structure are derived from statute.

§90.10, Strategically Directed Regulatory Structure

Adopted new §90.10 clarifies that the Strategically Directed Regulatory Structure is a statutorily required structure to provide incentives for enhanced environmental performance as required by TWC, §5.755. Adopted new §90.10 creates a regulatory framework for innovative programs that provide incentives for enhanced environmental performance.

§90.11, Eligibility

Adopted new §90.11 specifies the eligibility requirements for participation in innovative programs under the Strategically Directed Regulatory Structure. The executive director will review compliance history as part of the application process and consistent with 30 TAC Chapter 60 and applicable provisions of TWC, Chapter 5.

§90.12, Incentives

Adopted new §90.12 specifies the criteria that the executive director will use when determining whether to provide an incentive for participation in innovative programs.

§90.13, Application for Incentives

Adopted new §90.13 outlines the requirements a person must follow to apply for a regulatory incentive and is adopted with changes. It allows incentives to be requested through participation in one of the listed programs and outlines the minimum information and demonstrations required by the application.

In response to comments, the commission adds the requirement that the executive director make any extensions to the record-keeping time frame in writing and specify the reason for increasing the time frame.

§90.14, Review by Executive Director Required

Adopted new §90.14 specifies that a person receiving incentives must submit a progress report to the executive director every two years and lists the requirements of the progress report. It requires that incentive be terminated for failure to provide enhanced environmental performance. It requires a person to give the executive director notice if the person terminates use of the incentives.

§90.15, Termination of Regulatory Incentives Under the Strategically Directed Regulatory Structure

Adopted new §90.15 offers procedures allowing either the recipient of the incentives or the executive director to terminate the incentives or to require a new permit, permit amendment, or other authorization necessary to achieve regulatory compliance. It also provides time lines for achieving compliance with requirements for which incentives were provided.

§90.16, Public Notice, Comment, and Hearing

Adopted new §90.16 consolidates the Public Notice, Comment, and Hearing sections from repealed §90.16 and §90.70 and is adopted with changes. It requires public participation in the form of public notice, comment, and hearings as a threshold requirement for applicants to receive regulatory incentives. It provides minimum requirements for exemptions from regulations that do not require public notice, public comment, and public hearing. For example, incentives provided under an approved EMS are exempt from requirements of this section. If no exemption applies, the applicant must use the process required by the regulations from which the applicant is seeking exemption.

In response to comments, the commission makes the following clarifying changes. Under §90.16(a) the statement "with specific notice, comment, and hearing requirements" should be removed and should have referred to subsections (b) and (c) not subsections (c) and (d). It is important to note that regardless of whether notice is required under subsection (b) or (c) the minimum standards in subsection (d) shall apply.

§90.20, Regulatory Flexibility

Adopted new §90.20 clarifies that an RFO may exempt an applicant from a requirement or rule by applying an alternative method or standard. It also clarifies violations of an order is equivalent to a violation of the exempted rule or requirement.

§90.21, Application for a Regulatory Flexibility Order

Adopted new §90.21 details the necessary components of an application for an RFO. HB 2694, §4.08 states that alternatives will now be as protective rather than more protective than the current method or standard. The provisions allowing for a cost recovery agreement moved from repealed §90.12 to new §90.21(b)(7) and no longer rely on the rates established in 30 TAC Chapter 333, Subchapter A.

§90.22, Commission Action on an Application

Adopted new §90.22 describes that commission action should comply with application and other authorizations processing rules found at 30 TAC Chapter 50, Subchapter B and clarifies the additional components the commission can consider in making a decision as well as provisions to be included in an order.

§90.23, Amendment/Renewal

Adopted new §90.23 details the requirements for submitting an amendment or renewal request for an RFO and the effect of an existing RFO while it is undergoing timely renewal.

§90.24, Termination

Adopted new §90.24 details the procedures for terminating an RFO by the recipient or the commission, including an opportunity for a show cause hearing.

§90.30, Minimum Standards for Environmental Management Systems

Adopted new §90.30 details the minimum requirements of an EMS implementation of which may allow for eligibility for incentives. It includes a new requirement that the EMS be certified by an independent third party.

§90.31, Review of Incentive Applications for Environmental Management Systems

Adopted new §90.31 outlines the process for review by the executive director. It clarifies that public notice, comment, and hearing are not required for incentives provided for EMS and that the executive director will maintain a list of incentives available.

Draft Regulatory Impact Analysis Determination

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. Furthermore, it does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Although these rules are adopted to protect the environment and reduce the risk to human health from environmental exposure, they would not be a major environmental rule because they would not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

Furthermore, the adopted rules do not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). The rules would not exceed a standard set by federal law because standards in the adopted rules are in accordance with the corresponding federal regulations, and they do not exceed an express requirement of state law. The adopted rules do not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program. The rulemaking adopts rules under specific state law (TWC, §§5.127, 5.131, 5.755, and 5.758). Finally, this rulemaking is not being adopted on an emergency basis either to protect the environment or to reduce risks to human health from environmental exposure.

Takings Impact Assessment

In accordance with Texas Government Code, §2007.043, the commission has prepared a takings impact assessment for the adopted rules. The following is a summary of that assessment. The specific purpose of the adopted rules is to streamline the TCEQ's EMS program and other incentives relating to RFOs. Promulgation and enforcement of the adopted rules would not affect private property mainly because it would not require anyone to do anything; everything it adopts is strictly voluntary. The adopted standards are not more stringent than existing standards as the 2011 legislation requires that the program be as protective of the environment and the public health as the method or standard prescribed by the statute or commission rule that would otherwise apply; and not inconsistent with federal law. For these reasons, the adopted rules would not be a burden to private real property and would not constitute a taking under Texas Government Code, Chapter 2007. The adopted rules would not affect a landowner's rights in private real property.

Consistency with the Coastal Management Program

The commission reviewed the adopted rulemaking and found that the adoption is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.,* and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the adopted rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the adopted rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the adopted rules include: 1) to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas; and 2) to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone.

CMP policies applicable to the adopted rules include 31 TAC §§501.19, 501.21 - 501.23, 501.25 and 501.32. These policies govern permit conditions for which regulatory flexibility could be sought from the commission. However, the adopted amendments to the Regulatory Flexibility Program would still require that alternative methods adopted be as protective of the environment as the method or standard prescribed.

These rules implement programs designed in most cases to encourage enhanced benefits to the environment. The rules provide incentives to applicants in exchange for benefits to the environment. The Strategically Directed Regulatory Structure and EMS programs encourage entities to go beyond compliance in managing environmental concerns. The Regulatory Flexibility Program will be used to identify alternative methods of compliance that provide a clear benefit to the environment and may not be inconsistent with federal law.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because the adopted rules are consistent with these CMP goals and policies, because these rules do not create or have a direct or significant adverse effect on any coastal natural resource areas, and because the adopted rules are voluntary, encourage innovative approaches to environmental compliance and alternative methods must be as protective of the environment as the prescribed method or standard.

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received on the CMP.

Public Comment

The public comment period closed on March 12, 2012. The commission received comments from the Texas Chemical Council (TCC), the Texas Industry Project (TIP), and the Lone Star Chapter of the Sierra Club (Sierra Club).

Response to Comments

General Comments

All commenters expressed general support for the revisions.

The commission appreciates these comments. No changes have been made in response to these comments.

TCC requested a streamlined process for providing incentives for EMSs to entities implementing Responsible Care Management System and ISO 14001.

The commission appreciates these comments and adopts new §90.30 and §90.31 to enable streamlined processing. The commission has taken the specific EMSs suggested by TCC into its consideration for future processing of applications on a case-by-case basis. No changes have been made in response to this comment.

TIP supports the changes made to the minimum standards for an EMS and believes the changes should make EMS a more viable tool.

The commission agrees with this comment. No changes have been made to the rule in response to this comment.

Comments by Rule Section

§90.2, Applicability

Sierra Club suggested that "and special nuclear" be added between "radioactive" and "materials."

The commission appreciates the comment. In assessing the terms radioactive material and radioactive substance, the executive director notes that special nuclear material is referenced as part of the definition of radioactive substance in THSC, §401.003. Therefore, the executive director revised subsection (a)(8) to replace the term "material" with "substance." However, subsection (c) will not be revised as the term "materials" is consistent with TWC, §5.758(g).

§90.11, Eligibility

Sierra Club suggested adding an exclusion for persons with an unsatisfactory compliance history rating.

The commission appreciates this comment. An unsatisfactory compliance history rating impacts review of Chapter 90 applications in two different ways. For most applications for participation under Chapter 90, the executive director will withhold review of applicants with unsatisfactory compliance history ratings as they will be ineligible for consideration until such time as their ratings improve. In accordance with TWC, §5.127 relating to EMS, an entity will be allowed to participate and receive a compliance history credit. However, an entity with an unsatisfactory compliance history rating will be prohibited from receiving any additional incentives under its EMS, consistent with Chapter 60. No change was made as a result of the comment.

TIP commented that the repealed rules contained two different time periods for ineligibility starting from a civil judgment against the applicant in an environmental lawsuit. TIP points out that no reason was provided for consolidation to the longer five-year restriction of ineligibility. TIP offers a shorter three-year term of ineligibility be adopted and suggests a limiting term "environmental" be added to clarify that the judgment relates to an environmental matter brought by an attorney general.

The commission appreciates TIP's comments and offers the following additional explanation for the extended five-year term of ineligibility. Pursuant to TWC, §5.753 and Chapter 60, Chapter 90 has been proposed with terms and conditions consistent with the current §60.1(b), as these environmental actions also appear on compliance history reports for five years. No changes were made to the rule in response to these comments.

§90.12, Incentives

Sierra Club suggested deleting subsection (b) because the language is too wide open in the discretion it gives the executive director.

The commission respectfully disagrees. In order to meet the intent of the statutes authorizing the innovative programs the executive director requires flexibility. TWC, §5.755(b)(2) states that *"any* voluntary measures undertaken by the person to improve environmental quality" shall be offered incentives (emphasis added). The statutory language presents the opportunity for an expanded view of these voluntary measures to improve environmental quality. No change was made as a result of the comment.

TIP commented that "on-site technical assistance" and "consideration of a person's implementation of an EMS regarding a specific site in scheduling and conducting compliance inspections" were omitted from the list of incentives and recommends that both be retained.

The commission appreciates the support for the two requested incentives. These incentives were listed under §90.34 of the repealed rule. Under adopted §90.31(e) the executive director will maintain a separate list of incentives available to a person whose EMS is eligible to receive incentives, which may include a number of considerations. No changes were made to the rule in response to the comment.

§90.13, Application for Incentives

TIP sought specificity in §90.13(g) regarding how long to keep records and the process for extending the term beyond the required three years.

The commission appreciates the comment. The commission could consider an extension of recordkeeping and grant the extension in writing. The applicant can independently and voluntarily keep records beyond three years as consistent with the applicant's business practices without seeking permission from the executive director.

TIP commented that as proposed, §90.13(g) omits the express requirement that an extension of deadlines by the executive director be in writing. TIP requests that, in order to promote clarity and consistency, TCEQ retain the requirement that the executive director make any extensions in writing.

The commission appreciates these comments and agrees that the executive director's granting of an extension should be in writing and should include a reason for the extension of a dead-

line. As to recordkeeping and retention time frames, the rule has been changed to address these changes.

§90.14, Review by Executive Director Required

Sierra Club suggested revising subsection (a) to increase the progress report frequency from every two years to every year.

The commission respectfully disagrees. The innovative programs are intended to provide incentives for participation and not to increase reporting requirements. The commission would expect that substantive and material changes in aspects of a recipient's innovative programs would be promptly reported as necessary. No change was made as a result of the comment.

§90.16, Public Notice, Comment, and Hearing

TIP commented that proposed §90.16(a), (c), and (d) appear to be inconsistent. If the inconsistency is in error, TIP recommends that it be corrected.

The commission recognizes the inconsistency. Under §90.16(a) the statement "with specific notice, comment, and hearing requirements" should be removed and should have referred to subsections (b) and (c) not subsections (c) and (d). It is important to note that regardless of whether notice is required under subsection (b) or (c), the minimum standards in subsection (d) shall apply. The rule has been changed to address this comment.

§90.21, Application for a Regulatory Flexibility Order

Sierra Club suggested adding a specific provision of at least a yearly progress report to the implementation schedule.

The commission respectfully disagrees. The programs are intended to provide incentives for participation and not to increase reporting requirements. The commission would expect that substantive and material changes in aspects of a recipient's incentive or innovative programs would be promptly reported as necessary. This provision is instruction for the applicant and in no way binds the commission's order. No change was made as a result of the comment.

Sierra Club suggested the application fee should at a minimum be $2,000.

The commission respectfully disagrees. The rule specifically authorizes the executive director to execute a cost recovery agreement only to recover any costs associated with processing a more complex application. It would be unfair and potentially discriminatory to charge such a high application fee for a routine and simple application and may reduce the number of requests and impact the statutory intent of the program. No change was made as a result of the comment.

§90.31, Review of Incentive Applications for Environmental Management Systems

Sierra Club suggested changing the reassessment time frame from every three years to every year or at least every two years. Please note that although Sierra Club referenced §90.30; the review period is actually found at §90.31, and the executive director responds to this comment here.

The commission respectfully disagrees. The commission is relying on the standard practices of the recognized EMS registrars. Three years is the most common time frame for independent third party assessments. No change was made as a result of this comment.

SUBCHAPTER A. PURPOSE, APPLICABILITY, AND ELIGIBILITY

30 TAC §90.1, §90.2

Statutory Authority

The repeals are adopted under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103 and §5.105, which provide the commission with authority to adopt rules; and specific statutory authorization for these repeals is derived from TWC, §5.127, and amended TWC, §§5.751, 5.755, and 5.758, which together require the commission to promulgate rules that establish a regulatory process that encourages the use of a variety of innovative and alternative programs, such as environmental management systems; and includes regulatory flexibility orders and other incentives for regulated entities. The adopted repeals also relate to the incentives the commission will use to encourage the use of strategically directed regulatory structure to provide incentives and regulatory flexibility to issue exemption orders for those same regulated entities. TWC, §5.122, delegates to the executive director the commission's authority to act on an application or other request to issue, renew, reopen, transfer, amend, extend, withdraw, revoke, terminate, or modify a permit, license, certificate, registration or other authorization, or approval. Finally, these repeals are also adopted under Texas Government Code, §2001.006, which provides state agencies the authority to adopt rules or take other administrative action that the agency deems necessary to implement legislation.

The adopted repeals are offered to implement House Bill 2694, 82nd Legislature, 2011, Article 4, §§4.01, 4.06, and 4.08, which created the revisions to compliance and enforcement programs, including amendments to TWC, §§5.751, 5.755, and 5.758.

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

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SUBCHAPTER B. GENERAL PROVISIONS

30 TAC §§90.10, 90.12, 90.14, 90.16, 90.18, 90.20

Statutory Authority

The repeals are adopted under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103 and §5.105, which provide the commission with authority to adopt rules; and specific statutory authorization for these repeals is derived from

TWC, §5.127, and amended TWC, §§5.751, 5.755, and 5.758, which together require the commission to promulgate rules that establish a regulatory process that encourages the use of a variety of innovative and alternative programs, such as environmental management systems; and includes regulatory flexibility orders and other incentives for regulated entities. The adopted repeals also relate to the incentives the commission will use to encourage the use of strategically directed regulatory structure to provide incentives and regulatory flexibility to issue exemption orders for those same regulated entities. TWC, §5.122, delegates to the executive director the commission's authority to act on an application or other request to issue, renew, reopen, transfer, amend, extend, withdraw, revoke, terminate, or modify a permit, license, certificate, registration or other authorization, or approval. Finally, these repeals are also adopted under Texas Government Code, §2001.006, which provides state agencies the authority to adopt rules or take other administrative action that the agency deems necessary to implement legislation.

The adopted repeals are offered to implement House Bill 2694, 82nd Legislature, 2011, Article 4, §§4.01, 4.06, and 4.08, which created the revisions to compliance and enforcement programs including amendments to TWC, §§5.751, 5.755, and 5.758.

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For further information, please call: (512) 239-0779

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SUBCHAPTER C. REGULATORY INCENTIVES FOR USING ENVIRONMENTAL MANAGEMENT SYSTEMS

30 TAC §§90.30, 90.32, 90.34, 90.36, 90.38, 90.40, 90.42, 90.44

Statutory Authority

The repeals are adopted under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103 and §5.105, which provide the commission with authority to adopt rules; and specific statutory authorization for these repeals is derived from TWC, §5.127, and amended TWC, §§5.751, 5.755, and 5.758, which together require the commission to promulgate rules that establish a regulatory process that encourages the use of a variety of innovative and alternative programs, such as environmental management systems; and includes regulatory flexibility orders and other incentives for regulated entities. The adopted repeals also relate to the incentives the commission will use to encourage the use of strategically directed regulatory structure to provide incentives and regulatory flexibility to issue exemption orders for those same regulated entities. TWC, §5.122, delegates to the executive director the commission's authority to act on an application or other request to issue, renew, reopen, transfer, amend, extend, withdraw, revoke, terminate, or modify a permit, license, certificate, registration or other authorization, or approval. Finally, these repeals are also adopted under Texas Government Code, §2001.006, which provides state agencies the authority to adopt rules or take other administrative action that the agency deems necessary to implement legislation.

The adopted repeals are offered to implement House Bill 2694, 82nd Legislature, 2011, Article 4, §§4.01, 4.06, and 4.08, which created the revisions to compliance and enforcement programs including amendments to TWC, §§5.751, 5.755, and 5.758.

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

Filed with the Office of the Secretary of State on June 29, 2012.

TRD-201203433
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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Proposal publication date: February 10, 2012
For further information, please call: (512) 239-0779

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SUBCHAPTER D. STRATEGICALLY DIRECTED REGULATORY STRUCTURE

30 TAC §§90.50, 90.52, 90.54, 90.56, 90.58, 90.60, 90.62, 90.64, 90.66, 90.68, 90.70, 90.72

Statutory Authority

The repeals are adopted under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103 and §5.105, which provide the commission with authority to adopt rules; and specific statutory authorization for these repeals is derived from TWC, §5.127, and amended TWC, §§5.751, 5.755, and 5.758, which together require the commission to promulgate rules that establish a regulatory process that encourages the use of a variety of innovative and alternative programs, such as environmental management systems; and includes regulatory flexibility orders and other incentives for regulated entities. The adopted repeals also relate to the incentives the commission will use to encourage the use of strategically directed regulatory structure to provide incentives and regulatory flexibility to issue exemption orders for those same regulated entities. TWC, §5.122, delegates to the executive director the commission's authority to act on an application or other request to issue, renew, reopen, transfer, amend, extend, withdraw, revoke, terminate, or modify a permit, license, certificate, registration or other authorization, or approval. Finally, these repeals are also adopted under Texas Government Code, §2001.006, which provides state agencies the authority to adopt rules or take other administrative action that the agency deems necessary to implement legislation.

The adopted repeals are offered to implement House Bill 2694, 82nd Legislature, 2011, Article 4, §§4.01, 4.06, and 4.08, which created the revisions to compliance and enforcement programs including amendments to TWC, §§5.751, 5.755, and 5.758.

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

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Robert Martinez
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SUBCHAPTER A. INCENTIVE PROGRAMS

30 TAC §§90.1 - 90.3, 90.10 - 90.16, 90.20 - 90.24, 90.30, 90.31

Statutory Authority

The new rules are adopted under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103 and §5.105, which provide the commission with authority to adopt rules; and specific statutory authorization for these proposed new rules is derived from TWC, §5.127, and amended TWC, §§5.751, 5.755, and 5.758, which together require the commission to promulgate rules that establish a regulatory process that encourages the use of a variety of innovative and alternative programs, such as environmental management systems; and includes regulatory flexibility orders and other incentives for regulated entities. The adopted new rules also relate to the incentives the commission will use to encourage the use of strategically directed regulatory structure to provide incentives and regulatory flexibility to issue exemption orders for those same regulated entities. TWC, §5.122, delegates to the executive director the commission's authority to act on an application or other request to issue, renew, reopen, transfer, amend, extend, withdraw, revoke, terminate, or modify a permit, license, certificate, registration or other authorization, or approval. Finally, these new rules are also adopted under Texas Government Code, §2001.006, which provides state agencies the authority to adopt rules or take other administrative action that the agency deems necessary to implement legislation.

The adopted new rules are offered to implement House Bill 2694, 82nd Legislature, 2011, Article 4, §§4.01, 4.06, and 4.08, which created the revisions to compliance and enforcement programs, including amendments to TWC, §§5.751, 5.755, and 5.758.

§90.2. Applicability.

(a) The provisions of this subchapter are applicable to all persons subject to the requirements of Texas Water Code (TWC), Chapters 26, 27, and 32; and Texas Health and Safety Code (THSC), Chapters 361, 375, 382, and 401. The applicable regulatory activities include, but are not limited to:

(1) discharges to surface water and groundwater regulated under TWC, Chapter 26;

(2) petroleum storage tanks regulated under TWC, Chapter 26;

(3) disposal of waste by underground injection regulated under TWC, Chapter 27;

(4) systems for subsurface area drip disposal regulated under TWC, Chapter 32;

(5) management and disposal of industrial solid waste, hazardous waste, or municipal solid waste (including composting, sewage sludge, and water treatment sludge) regulated under THSC, Chapter 361;

(6) removal of convenience switches and the convenience switch recovery program under THSC, Chapter 375;

(7) emission sources of air contaminants regulated under THSC, Chapter 382; and

(8) management and disposal of radioactive substances regulated under THSC, Chapter 401.

(b) This subchapter does not apply to occupational licensing programs or other programs specifically exempted by statute.

(c) Regulatory Flexibility Orders shall not authorize exemptions to statutes or regulations for storing, handling, processing, or disposing of low-level radioactive materials.

§90.13. Application for Incentives.

(a) A person who applies to the executive director for a regulatory flexibility project or to use an environmental management system under this chapter, or for a flexible permit under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) or another program designated as innovative under Texas Water Code (TWC), §5.752(2), does not need to submit another application under this section's requirements, unless the person requests an additional incentive not available to the person in the program in which the person is already participating or applying to participate. Compliance with this requirement does not relieve the person from complying with all other applicable legal requirements.

(b) If a person seeks incentives under this section that are not available under specific innovative programs designated in this chapter, Chapter 116 of this title, or other programs designated as innovative under TWC, §5.752(2), the person must submit an application to the executive director to receive incentives available under this section. Within 30 days after receipt of an application under this section, the executive director shall mail written notification informing the person that the application is administratively complete or that it is deficient.

(1) If the application is deficient, the notification shall specify the deficiencies, and allow the person 30 days from the date of the notice to provide the requested information. If the person does not submit an adequate response within the allotted time, the application will be returned without further action by the executive director.

(2) Additional technical information may be requested within 60 days after issuance of an administrative completeness letter. If the person does not provide the requested technical information within 30 days after the date of the request, the application will be returned without further action by the executive director.

(3) If an application is returned under paragraph (1) or (2) of this subsection, the person may file a new application at any time.

(4) The person may request in writing that the executive director allow additional time for a person to submit information regarding the person's application to use an innovative program or to request an incentive.

(c) In making a determination of eligibility, the executive director shall review the application submitted under this section, as well as the person's and site's compliance history.

(d) An application for participation in the strategically directed regulatory structure must, at a minimum, include:

(1) a narrative summary of the proposal or project, including the specific statutes or commission rules under which participation is being sought;

(2) a specific reference to the appropriate permit provision or citation to a regulation if the person's request is to modify an existing state or federal regulatory requirement;

(3) a detailed explanation, including a demonstration as appropriate, that the proposal or project is:

(A) more protective of the environment and the public health than the method or standard prescribed by the statute or commission rules that would otherwise apply; and

(B) not inconsistent with federal law, including any requirement for a federally approved or authorized program;

(4) a description of any public participation component associated with the proposal or project;

(5) where appropriate, a project schedule which includes a proposal for monitoring, recordkeeping, and/or reporting of environmental performance and compliance;

(6) any documented results from the project or estimates of future project outcomes demonstrating that the project produces a measurable environmental improvement that enhances environmental performance;

(7) an explanation of how the project will be consistent with the needed outcome/regional plan if the applicant chooses a project that will address a regional environmental issue identified in the agency's strategic plan, as amended; and

(8) any necessary additional information as determined by the executive director.

(e) The application must be signed and must certify that all information is true, accurate, and complete to the best of the signatory's knowledge.

(f) An original and two copies of the signed application shall be submitted to the executive director for review, and one additional copy shall be submitted to the appropriate regional office for the region in which the site is located.

(g) A person whose application is approved by the executive director must maintain records and other supporting information to show that voluntary environmental measures associated with incentives approved by the executive director are being carried out and are resulting in enhanced environmental performance. All records and data shall be retained at the site and/or shall be readily available for review by an agency representative or any local air pollution control program with jurisdiction for a period of three years after the date of any record or sample, measurement, report, application, or certification. Upon the written direction of the executive director specifying the reason for the extension, this period shall be extended.

§90.16. Public Notice, Comment, and Hearing.

(a) Applicants for participation in innovative programs shall follow the requirements under subsections (b) and (c) of this section, unless the applicant is only requesting additional incentives under this chapter.

(b) If an applicant for incentives under this chapter requests an exemption from a statute or commission rule, the applicant shall comply with all public notice, comment, and hearing requirements associated with the statute or commission rule for which the applicant is seeking an exemption, except as provided in subsection (c) of this section.

(c) If the specific innovative program or statute or commission rule for which an applicant is seeking an exemption does not require public notice or an opportunity for comment, the following requirements shall apply.

(1) The applicant shall publish notice of the application at least once in a newspaper of general circulation in the county where the facility or site requesting incentives is located or proposed to be located. The notice shall be published within 30 days after the application is determined to be administratively complete. Notice under this section shall not be published in a font size smaller than that normally used in the newspaper's classified advertising section.

(2) The executive director shall accept public comment for 30 days after the last publication of the notice of application.

(d) Notice under this section shall include, at a minimum:

(1) a brief description of the proposal and of the business conducted at the facility or activity described in the application;

(2) a brief description of the incentive(s) or regulatory flexibility requested;

(3) the name and address of the applicant and, if different, the location of the facility for which incentives or regulatory flexibility under this chapter are sought;

(4) the name and address of the agency;

(5) the name, address, and telephone number of an agency contact person from whom interested persons may obtain further information;

(6) a brief description of the public comment procedures and the time and place of any public meeting or public hearing; and

(7) the date by which comments or requests for hearing must be received by the executive director.

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

Filed with the Office of the Secretary of State on June 29, 2012.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-0779

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 55. LAW ENFORCEMENT

SUBCHAPTER F. FLOATING CABINS

31 TAC §55.202

The Texas Parks and Wildlife Commission, in a duly noticed meeting on May 24, 2012, adopted an amendment to §55.202, concerning Period of Validity; Renewal and Transfer of Permits, without changes to the proposed text as published in the April 20, 2012, issue of the *Texas Register* (37 TexReg 2867).

Under Parks and Wildlife Code, §32.051, a person may not own, maintain, or use a floating cabin in the public coastal water of this state unless a permit has been issued by the department under the provisions of Parks and Wildlife Code, Chapter 32. Under current rule, the department may renew a floating cabin permit if the permittee has met all statutory and regulatory requirements and has submitted an application for renewal prior to expiration date of the current permit. A permit that is not renewed within 90 days of expiration is not eligible for renewal and the floating cabin for which the permit was issued is subject to removal at the owner's expense.

Under the current rules, when there are multiple owners of a single floating cabin, the department issues a floating cabin permit to one of the owners as the primary permittee and lists other owners on the permit. Currently, renewal notices and other correspondence from the department are sent only to the primary permittee. As a result, there are instances in which an owner who is not the primary permittee may be unaware of the status of the permit and therefore unable to take steps to renew the permit and prevent the permit from becoming ineligible for renewal.

To address this situation, the rule as adopted requires all owners of a permitted floating cabin to be treated as permittees for purposes of the notification requirements of the section. In addition, the rule implements a process to allow any owner/permittee listed on a floating cabin permit to seek an informal internal review if the department has acted to not renew the permit as a result of the department not receiving a timely permit renewal application. If a review is requested, the decision to not renew the permit is reviewed by a panel of senior department managers. The process allows the department to renew a permit in light of extenuating circumstances.

Specifically, the amendment replaces the term "owner" with the term "permittee" throughout the rule and locates all renewal provisions in a single section. The amendment also removes a reference to a date that is no longer germane and sets the deadline for submission of renewal materials at 90 days from the date the permit expires, rather than before the expiration date. The department reasons that the current provision is confusing, since it stipulates that permits will be renewed only if renewal materials are submitted prior to the expiration date of the permit, yet provides another 90 days from the expiration date for renewal. The department believes it is less confusing to provide a single deadline.

The amendment also alters current subsection (d) to provide that the department will notify each permittee by certified mail in the event a floating cabin permit expires and becomes ineligible for renewal. The amendment also stipulates that a request for review of a late permit renewal must be received by the department within 10 working days after the mailing of the nonrenewal notification by the department and adds new paragraphs (1) - (3) to create a panel of senior managers to review late renewal applications for which a review is requested. The amendment allows a permittee whose permit has expired and become ineligible for renewal to have the permit expiration reviewed. The 10-day limit was chosen because by the time a floating cabin permit has become ineligible, at least 90 days have passed since the expiration of the permit, during which time the department has normally attempted several times to contact all of the permittees listed on a permit. The department believes that 10 days is sufficient as a last-chance opportunity for a permittee to reconcile the status of a permit with the department.

The amendment also alters the title of the section to reference the fact that it stipulates the period of validity of a permit.

The rule as adopted will function by streamlining the notification and renewal processes for floating cabin permits and by creating a mechanism for review of agency decisions concerning determinations of ineligibility status for floating cabin permit renewals.

The department received one comment opposing adoption of the proposed rule. The commenter stated that the department should not regulate floating cabins and that funds spent on administration of the floating cabin permit program would be better spent on state parks. The department disagrees with the comments and responds that the department is required by Parks and Wildlife Code, Chapter 32, to issue floating cabin permits and administer the program. The department also notes that Chapter 32 requires revenue from floating cabin permit fees to be deposited in the Game, Fish, and Water Safety Account and by statute it cannot be spent on state parks (Parks and Wildlife Code, §32.055(c), §11.033). No changes were made as a result of the comment.

The department received one comment supporting adoption of the proposed rule.

No groups or associations commented in favor of or opposition to adoption of the proposed amendment.

The amendment is adopted under the authority of Parks and Wildlife Code, §32.005, which allows the commission to adopt rules to implement the provisions of the floating cabin statute.

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

Filed with the Office of the Secretary of State on June 25, 2012.

TRD-201203362
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Effective date: July 15, 2012
Proposal publication date: April 20, 2012
For further information, please call: (512) 389-4775

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 15. DRIVER LICENSE RULES

SUBCHAPTER J. DRIVER RESPONSIBILITY PROGRAM

37 TAC §§15.161 - 15.166

The Texas Department of Public Safety (the department) adopts amendments to §15.161 and §15.162 and new §§15.163 - 15.166, concerning Driver Responsibility Program. These sections are adopted without changes to the proposed text as published in the May 11, 2012, issue of the *Texas Register* (37 TexReg 3522) and will not be republished.

The adoption of this proposal is necessary to reorganize existing language, improve the clarity of Subchapter J, and is required by House Bill 2730 enacted during the 81st Legislative Session and House Bill 588 and House Bill 2851 enacted during the 82nd Legislative Session. The statutory changes required by these bills were effective September 1, 2011.

The amendments to §15.161, concerning General Information, are adopted to conform to the statutory changes of House Bill 2730. Texas Transportation Code, §§708.056, 708.151 and 708.159 were amended to allow the department to reduce points; extend the period before payment is required after the notification of the surcharge assessment; and allow for advance payment of all three years of surcharges; respectively.

Texas Transportation Code, Chapter 708 requires an individual to be assessed a surcharge annually during a 36-month period. The statute was revised to provide an individual the ability to pay all three years in advance. This requires the department to assess all three years up front and discontinue annual surcharge notices. Currently, an individual receives one notice and has 30 days to comply with the surcharge before suspension action. The adopted revisions provide an individual more time to comply before driving privileges are suspended. Furthermore, the adopted revisions allow the department the ability to reduce points accumulated on an individual's record, as required by statutory amendment.

The amendments to §15.162, concerning Surcharge Payments, are adopted to conform to the statutory changes of House Bill 2730 and House Bill 588. Texas Transportation Code, §708.153 and §708.154 were amended to require the costs associated with credit card payments to be paid by the customer and extend the monthly installment agreement periods for payment respectively. Currently, an individual has a limited number of months to pay, which results in higher monthly installment payment amounts. The adopted revision increases the time an individual has to pay and reduces the overall monthly payment amount. The revision for credit card payments was implemented as an operating process in 2010, and any individual paying by credit card also pays associated costs. The language for payments due on the 29th, 30th or 31st of each month is removed as those days are not assigned as due dates.

New §15.163, concerning Military Deployment Deferral Program, is adopted to conform to the statutory changes of House Bill 2851. Texas Transportation Code, §708.106 was added to allow the department to defer payment for active duty military deployed outside the continental United States. Currently, there is not a process available to delay payments for deployed United States Armed Forces personnel. The adopted revision provides a deferral period to allow deployed military personnel to remain in compliance with the law.

New §15.164, concerning Amnesty Program, is the original language from former §15.163(a) and has been moved to reorganize and improve the clarity of Subchapter J. Other than deleting the words amnesty program from the beginning of the section no changes have been made to the original text.

New §15.165, concerning Incentive Program, incorporates language added to Texas Transportation Code, §708.157 by HB 588 which requires the implementation of the department's incentive program. The adopted revisions allow for immediate implementation of the incentive program. The language was also revised to reduce it to one program and streamline the process to match the advance payment revisions in §15.162.

The incentive program will apply only to individuals who are living above 125% and below 300% of the poverty level and pay a one-time reduced amount in full. In 2010, it was estimated that 39% of individuals would be eligible for the incentive program. The estimated fees waived annually would be approximately $23 million. The 2010 estimate is consistent with current department projections under the new adopted rules. The department does not anticipate a revenue gain or loss with the other rule revisions as the changes do not significantly impact the overall process.

New §15.166, concerning Indigency Program, is the original language from former §15.163(c) and has been moved to reorganize and improve the clarity of Subchapter J. Other than deleting the words indigency program from the beginning of the section no changes have been made to the original text.

No comments were received regarding the adoption of these amendments and new sections.

These amendments and new sections are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Transportation Code, Chapter 708, §§708.056, 708.105, 708.106, 708.151, 708.153, 708.154, 708.157 and 708.159.

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

Filed with the Office of the Secretary of State on June 28, 2012.

TRD-201203401
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Effective date: July 18, 2012
Proposal publication date: May 11, 2012
For further information, please call: (512) 424-5848

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37 TAC §15.163

The Texas Department of Public Safety (the department) adopts the repeal of §15.163, concerning Amnesty, Incentive and Indigency Programs. This repeal is adopted without changes to the proposal as published in the May 11, 2012, issue of the *Texas Register* (37 TexReg 3525) and will not be republished.

The repeal of this section is adopted simultaneously with amendments to §15.161 and §15.162 and new §§15.163 - 15.166 and is necessary to reorganize existing language and improve the clarity of Subchapter J.

No comments were received regarding the adoption of this repeal.

This repeal is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the

department's work, and Transportation Code, Chapter 708, §§708.056, 708.105, 708.106, 708.151, 708.153, 708.154, 708.157 and 708.159.

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

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D. Phillip Adkins
General Counsel
Texas Department of Public Safety
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For further information, please call: (512) 424-5848

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CHAPTER 25. SAFETY RESPONSIBILITY REGULATIONS

37 TAC §25.7

The Texas Department of Public Safety (the department) adopts amendments to §25.7, concerning Self-Insurance. This section is adopted without changes to the proposed text as published in the May 11, 2012, issue of the *Texas Register* (37 TexReg 3526) and will not be republished.

The adopted amendments are necessary to change the liability amount for self-insurance to conform to the minimum liability amounts reflected in Transportation Code, §601.072. The liability limits for motor vehicle insurance coverage increased to $30,000 for bodily injury to or death of one person in one crash, $60,000 for bodily injury to or death of two or more persons in one crash and $25,000 for damage to or destruction of property of others in one crash effective January 1, 2011.

No comments were received regarding the adoption of these amendments.

These amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Transportation Code, §601.072.

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

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D. Phillip Adkins
General Counsel
Texas Department of Public Safety
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For further information, please call: (512) 424-5848

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 9. CONTRACT AND GRANT MANAGEMENT

The Texas Department of Transportation (department) adopts the repeal of §§9.50 - 9.57, concerning Business Opportunity Programs, in its entirety and simultaneously adopts new Subchapter J, Disadvantaged Business Enterprise (DBE) Program, §§9.200 - 9.242; Subchapter K, Small Business Enterprise (SBE) Program, §§9.300 - 9.302 and §§9.304 - 9.333; and Subchapter L, Historically Underutilized Business (HUB) Program, §§9.350 - 9.367. The repeal of §§9.50 - 9.57 and new §§9.200 - 9.207, 9.209 - 9.211, 9.213 - 9.219, 9.221, 9.223 - 9.226, 9.229 - 9.232, 9.234, 9.236 - 9.242, 9.300, 9.302, 9.304 - 9.317, 9.319 - 9.321, 9.323 - 9.329, 9.332, 9.333, and 9.350 - 9.367 are adopted without changes to the proposed text as published in the April 13, 2012, issue of the *Texas Register* (37 TexReg 2584) and will not be republished. New §§9.208, 9.212, 9.220, 9.222, 9.227, 9.228, 9.233, 9.235, 9.301, 9.318, 9.322, 9.330, and 9.331 are adopted with changes to the proposed text as published in the April 13, 2012, issue of the *Texas Register* (37 TexReg 2584). Proposed new §9.303 is withdrawn in this issue of the *Texas Register.*

EXPLANATION OF ADOPTED REPEALS AND NEW SECTIONS

Transportation Code, §201.702, entitled "Disadvantaged Business Program," requires the department to establish a business opportunities program to assist disadvantaged businesses. This program includes: setting goals for the awarding of state and federally funded contracts to disadvantaged businesses; making sure that disadvantaged businesses have full access to the department's contract bidding process; informing the businesses about the process; offering businesses assistance concerning the process; and identifying barriers to the businesses' participation in the process.

The department previously developed rules establishing a business opportunities program, consisting of the Disadvantaged Business Enterprise (DBE) Program, the Historically Underutilized Business (HUB) Program, and the Small Business Enterprise (SBE) Program, to perform its statutory duty under Transportation Code, §201.702, and satisfy federal regulatory requirements as a condition of receiving federal funds.

The DBE program is a federal program established under 49 Code of Federal Regulations (C.F.R.) Part 26, which sets out the requirements for a state to follow in setting participation goals and assuring that disadvantaged businesses have equal access to contracts paid with federal funds from the U.S. Department of Transportation. The HUB program is a state program established under Government Code, Chapter 2161 that is managed by the state comptroller and the purpose of which is to promote full and equal procurement opportunities for small minority- and women-owned businesses. The SBE program is a program established by the department under Transportation Code, §201.702 to assist small disadvantage businesses in the specialized areas of highway construction and maintenance.

To provide clarity and delineation between the various related programs, the department is repealing Subchapter D (§§9.50 - 9.57) in its entirety and adopting new Subchapter J (§§9.200 - 9.242), concerning the DBE program, Subchapter K (§§9.300 - 9.302 and §§9.304 - 9.333), concerning the SBE program, and Subchapter L (§§9.350 - 9.367), concerning the HUB program. The structure of the rules has been changed to make the department's operations relating to the DBE, HUB, and SBE programs

more easily understandable. In addition, several wording and grammatical revisions have been incorporated for clarification. The following section by section analysis for each new subchapter more specifically explains the substantive revisions that will appear in the new subchapters and sections.

New Subchapter J provides rules relating to the department's federally required DBE program, which applies to all contracts funded in whole or in part with federal funds. Existing rules relating to the DBE program are contained in §9.53. As a recipient of federal funds, the department must implement a DBE program in accordance with 49 C.F.R. Part 26. The adopted new sections provide clarity, address revisions to the federal regulations, and refine the language to be consistent with the interpretation of 49 C.F.R. Part 26.

New §9.200, Purpose of Subchapter; Applicability of Program, explains that the purpose of Subchapter J is to implement the existing DBE program to comply with Transportation Code, §201.702, and 49 C.F.R. Part 26. The section also explains that the DBE program applies only to department contracts and purchases funded with federal money from the U.S. Department of Transportation. Information in the new section is contained in existing §9.50.

New §9.201, Policy, outlines the department's policy related to the DBE program. Existing §9.52 states the department's policy for the DBE, HUB, and SBE programs. New §9.201 restates the policy information for only the DBE program.

New §9.202, Definitions, provides definitions for terms associated with the department's DBE program. In this new section, certain definitions have been added or revised from existing §9.51 to provide clarification and consistency with those definitions described in 49 C.F.R. §26.5.

New §9.203, Program Administration, replaces existing §9.53(a) and outlines the administration of the department's DBE program and the responsibilities of the department DBE Liaison Officer in accordance with 49 C.F.R. §26.25. New §9.203 also provides that the DBE Liaison can delegate the day-to-day operation of the DBE program.

New §9.204, Discriminatory Actions Prohibited, outlines prohibited discriminatory actions associated with the department's DBE program and contracting activities in accordance with 49 C.F.R. §26.7.

New §9.205, Department Information, outlines required DBE information the department will maintain in an appropriate database in accordance with 49 C.F.R. §26.11.

New §9.206, Contract Assurances Provisions, outlines the contract assurance statements that must be included in each financial assistance agreement with the U.S. Department of Transportation, and in each contract involving federal funds, at all tiers, in accordance with 49 C.F.R. §26.13. New §9.206 replaces existing §9.53(e) and is revised to comply with federal regulations relating to required contract provisions.

New §9.207, Use of Financial Institutions, outlines the criteria for the use of financial institutions owned by socially and economically disadvantaged individuals in accordance with 49 C.F.R. §26.27.

New §9.208, Payment; Prompt Payment; Joint Checks, replaces existing §9.53(e)(8) and (9) and adds language regarding the department's joint check policy. This new section outlines provisions for timely subcontractor payments, including written provisions that must be incorporated into each contract, subcontract, or material purchase agreement involving federal funds in accordance with 49 C.F.R. §26.29. This new section also provides requirements for the use of joint checks. The department acknowledges that joint checks are a customary practice in the construction industry. However, to ensure compliance with commercially useful function requirements the section sets out specific requirements for the use of joint checks.

New §9.209, DBE Directory, replaces existing §9.53(d)(12) and outlines the requirements pertaining to the department's DBE directory in accordance with 49 C.F.R. §26.31.

New §9.210, Overconcentration of DBEs, outlines the steps the department must take to address the overconcentration of DBEs in defined types of work in accordance with 49 C.F.R. §26.33.

New §9.211, Business Development Program, provides for the administration of a DBE business development and supportive service program in accordance with 23 C.F.R. Part 230, Subpart B.

New §9.212, Monitoring and Enforcement, provides the process used by the department to monitor and enforce contract DBE requirements, including verification procedures to ensure that work committed to DBE subcontractors at contract award is honored by the prime contractor in accordance with 49 C.F.R. §26.37. This section also provides for the designation of District Disadvantaged Business Enterprise Coordinators for each of the department's districts, development of District DBE Coordinator standard operating procedures, and annual district DBE program compliance audits to be conducted by the department. New §9.212 provides greater detail about department monitoring and enforcement methodology than existing §9.53(e)(5)(B), which addresses department on-site reviews in determining whether DBE subcontractors perform a commercially useful function, and existing §9.56, Contract Compliance, which addresses overall contract compliance requirements for the DBE, HUB, and SBE programs combined.

New §§9.213 - 9.220 replaces existing §9.53(b)(1). These new sections outline the methodology used by the department to establish an annual overall DBE Goal in accordance with 49 C.F.R. §26.45 and §26.51. New §9.213, Overall DBE Goal, describes the basis and criteria for establishing the department's overall annual DBE goal. New §9.214, Proposed Overall Goal, outlines the process the department uses to consult with stakeholders regarding the establishment of the department's overall annual DBE goal. New §9.215, Public Participation in Establishing Overall Goal, outlines the steps used to invite public involvement in establishing the overall annual DBE goal. New §9.216, Setting Overall Goal, states that the department will establish the overall annual DBE goal after considering public comment. New §9.217, Submission of Overall Goal, describes the process by which the department will submit the proposed DBE goal, and related methodology, to the appropriate U.S. Department of Transportation Operating Administration for approval. New §9.218, Review by Operating Administration (OA), describes the approval and goal adjustment process associated with the U.S. Department of Transportation Operating Administration's review. New §9.219, Interim Steps, outlines the steps employed by the department in establishing interim DBE goals pending U.S. Department of Transportation Operating Administration approval of the department's overall annual DBE goal. New §9.220, Use of Race-neutral Means, outlines the methodology and process used by the department in satisfying DBE goals through race-neutral means. These new sections comply with federal regula-

tions and provide greater detail regarding the department's overall annual goal establishment process than the existing rule.

New §§9.221 - 9.225 replaces existing §9.53(b)(2). These new sections outline the methodology used by the department to establish contract specific goals. New §9.221, Establishment of Contract Goals, describes the basis and criteria for establishing the department's contract specific DBE goals. New §9.222, Adjustment of Contract Goals, describes the process used by the department to adjust contract specific goals if a determination is made that the overall annual DBE goal will be exceeded. This section also includes the process for how construction contract change orders will affect a contract specific DBE goal. New §9.223, Prohibition on Use of Contract Goals, describes those conditions under which the department will not set contract specific goals. New §9.224, Reduction on Use of Contract Goals, describes the process used in reducing contract specific goals in specified circumstances. New §9.225, Maintaining and Reporting Data on Contract Goals, outlines the maintenance and reporting of data associated with contract specific DBE goals. These new sections comply with 49 C.F.R. §26.51(d) - (g) and provide greater detail regarding the department's contract specific goal establishment process than the existing rule.

New §§9.226 - 9.229 replaces existing §9.53(c), (e)(2)(B), and (e)(7). These new sections outline the good faith effort procedures that must be followed by successful bidders when contract specific goals are established in accordance with 49 C.F.R. §26.53. New §9.226, Contract Goal Good Faith Efforts, provides information regarding good faith effort to meet applicable contract goal requirements. New §9.227, Information from Bidders, outlines the good faith effort information required from bidders submitting bids on department contracts. New §9.228, Reconsideration of the Department's Good Faith Efforts Determination before the Execution of the Contract, outlines the process employed by the department when a bidder requests a reconsideration of the department's decision in those instances when a determination is made that the bidder failed to satisfy the good faith effort requirements associated for the contract. New §9.229, DBE Substitutions and Terminations, provides criteria whereby the department will review and approve contractor requests for DBE subcontractor substitutions and terminations. These new sections comply with 49 C.F.R. §26.53 and provide greater detail regarding contractor good faith efforts than the existing rule.

New §9.230, Labor-only Subcontracts, provides for the contractor's option to use DBE subcontractors that provide labor only services as stipulated in the contractual agreement between the prime contractor and subcontractor.

New §9.231, Computing Work Performed by DBE, replaces existing §9.53(e)(4) and provides information concerning the eligibility of work that may be counted towards a DBE contract specific goal in accordance with 49 C.F.R. §26.55. The section also provides the criteria concerning the consideration of DBE subcontractor work for computation of goal credit. This section addresses fees and services charged by a DBE performing a bona fide service, requirements concerning the cost associated with supplies and materials and DBE subcontracting, and joint venture limitations. Existing §9.53(e)(4) simply refers to the federal regulation concerning credit for expenditures to DBEs.

New §9.232, Commercially Useful Function, replaces existing §9.53(e)(5) and provides detailed information regarding the criteria involved in the performance of a commercially useful function. The section also outlines the criteria used by the department to determine if a DBE subcontractor is performing a commercially useful function in accordance with 49 C.F.R. §26.55.

New §9.233, Commercially Useful Function by DBE Trucking Firm, applies specifically to DBE trucking firms. This section is similar to new §9.232 in outlining the criteria used by the department to determine if a DBE trucking firm is performing a commercially useful function in accordance with 49 C.F.R. §26.55.

New §9.234, Counting Materials or Supplies Provided by DBE Manufacturer or Regular Dealer, replaces existing §9.53(e)(4) and applies specifically to DBE material suppliers. Existing §9.53(e)(4) simply refers to federal regulation concerning credit for expenditures to DBEs. This new section provides information regarding the criteria concerning the computation of DBE goal credit in accordance with 49 C.F.R. §26.55. This section provides information regarding the criteria in determining whether a DBE material is a manufacturer or a regular dealer, and the associated factors used to determine goal credit satisfaction for both manufacturers and regular dealers.

New §9.235, Limitations on Amounts Counted toward DBE Goals, replaces existing §9.53(e)(4) and outlines those situations that may limit the DBE goal credit in accordance with 49 C.F.R. §26.55. Specifically, this section addresses those instances when a subcontractor or material supplier is not certified, or whose certification as a DBE is no longer valid.

New §9.236, Reporting of DBE Participation, replaces existing §9.53(e)(3) and outlines criteria used by the department to report DBE participation to the appropriate U.S. Department of Transportation Operating Administration.

New §9.237, Determination of Noncompliance; Sanctions, provides the process for how the department will determine compliance with DBE contract requirement, the available sanctions, and notify the contractor. The sanctions include participation in DBE outreach and mentor programs that are not available sanctions under the existing rules. The department believes that use of sanctions that benefit the DBE program will help increase awareness and involvement. These new sanction will also allow the department more flexibility in matching the severity of the violation with an appropriate sanction.

New §9.238, Reconsideration of the Department's Noncompliance Determination, provides the reconsideration process. The process provides the contractor an opportunity to have a noncompliance determination or the particular sanction reviewed by a person not involved in the original decision. This process streamlines the existing reconsideration and appeal process and allows the final determination to be made at the end of the contract.

New §9.239, Submission of Program Changes to Operating Administration (OA), provides the procedure used by the department to request approval of significant DBE program revisions from the appropriate U.S. Department of Transportation Operating Administration.

New §9.240, Certification of DBEs, replaces existing §9.53(d) and provides information regarding the DBE certification process under the Texas Unified Certification Program (TUCP). The TUCP establishes standard operating procedures that must be followed by all members regarding the certification process for DBEs. The department is a member of the TUCP by memorandum of agreement. Existing §9.53(d) provides detailed information specific to the department's process in certifying firms as DBEs before the development of the TUCP. New §9.240

refers to the TUCP as established and approved by the U.S. Department of Transportation. Information regarding the TUCP is available on the department's website at www.txdot.gov.

New §9.242, Complaint Process; Review, replaces existing §9.57 regarding filing a complaint with the department or U.S. DOT. The section details the process of review for complaints and the available remedies.

New Subchapter K provides rules relating to the department's SBE Program, which applies to construction and maintenance contracts funded entirely with state and local funds or federally funded project in which a DBE goal is not provided. Existing rules specific to the SBE program are contained in §9.55. The department previously developed the SBE program to assist small businesses in the highly specialized fields of highway construction and maintenance. The department's SBE program is open to all small businesses that meet the required size limitations and applies only to highway construction and maintenance contracts.

New §9.300, Policy, explains the purpose of this subchapter, which involves implementing the existing SBE program to comply with Transportation Code, §201.702. Existing §9.52 addressed department policy for the department's DBE, HUB, and SBE programs combined. New §9.300 provides policy information relative to the SBE program as previously contained at existing §9.52.

New §9.301, Applicability of Program, states that the department's SBE program applies to all department highway construction and maintenance contracts that are funded entirely with state and local funds or federally funded projects that do not receive a DBE goal.

New §9.302, Definitions, provides definitions for terms associated with the department's SBE program. Some definitions have been added to those provided by existing §9.51 and others have been added to provide clarification and consistency within the adopted new rules.

New §§9.304 - 9.309 replace existing §9.55(d), SBE certification, and provide for the SBE certification process.

New §9.304, Eligibility for Certification, prescribes the SBE certification eligibility criteria, which primarily involve a business's qualifying ownership interest and annual gross receipts, including those gross receipts of any affiliate firms.

New §9.305, Application for SBE Certification, sets out the application process. A business certified as a DBE by the department under 43 TAC Chapter 9, Subchapter J, or a firm certified as a HUB under 34 TAC Chapter 20 does not have to submit an application for consideration as a SBE but may be required by the department to submit any information necessary to demonstrate qualification as an SBE.

New §9.306, Reapplication after Withdrawal of Application, provides that a business that withdraws its application may subsequently reapply for SBE certification.

New §9.307, Review and Evaluation of Certification Application, prescribes the process for the department to receive and review of SBE certification applications.

New §9.308, Certification Decision, establishes the procedures for the department to make SBE certification decisions. If certification is denied, the department has to provide the applicant with the reasons for denial.

New §9.309, Certification Period; Recertification, provides that SBE certification is valid for three years. The section provides that the process for recertification as an SBE is the same as the initial application.

New §9.310, Applicant's Answer to Denial Notice, replaces existing §9.55(d)(6)(C) and states the process that a firm denied SBE certification may use to resolve eligibility of the deficiencies associated with the certification denial decision issued by the department.

New §9.311, Certification Challenges, replaces existing §9.55(d)(7)(A) and describes the process for a person to challenge the eligibility of a business either certified as an SBE by the department or seeking certification, as well as the process employed by the department in reviewing SBE certification challenges. To the extent allowed by law, the department will keep the identity of the challenger confidential unless authorized otherwise by the challenger.

New §9.312, Department Challenges, replaces existing §9.55(d)(7)(B) and provides the procedures to be used if the department receives information that provides reasonable cause to question a business's eligibility to be certified as a SBE.

New §9.313, SBE Directory, replaces existing §9.55(d)(8) and references the SBE directory that will be maintained and made available by the department.

New §9.314, SBE Overall Goals, replaces existing §9.55(b)(1) and provides that the executive director will establish overall annual SBE goals and that the department will make good faith efforts to meet or exceed the annual goal.

New §9.315, Contract Goals, addresses the process involved in assigning individual contract SBE goals as necessary to satisfy the established overall annual SBE goals. Subsection (c) provides that only work performed by an SBE can count towards the goal.

New §9.316, Contractor Representative, replaces existing §9.56(b) as it relates to the SBE program. The section requires a contractor to designate an employee to serve as the SBE contact person during the contract. The representative's responsibilities include submitting reports, maintaining records, and documenting good faith efforts to use SBEs.

New §9.317, Contract Provisions for SBE Requirements, replaces existing §9.55(c) and requires that applicable contracts contain provisions stating the SBE requirements applicable to the contract.

New §9.318, Payment; Prompt Payment; Joint Checks, adds language to the SBE program to make it consistent with the DBE program. This new section outlines provisions for timely subcontractor payments, including written provisions that must be incorporated into each contract, subcontract, or material purchase agreement. This new section also provides requirements for the use of joint checks. The department acknowledges that joint checks are a customary practice in the construction industry.

New §9.319 and §9.320 replace existing §9.55(c)(2) and provide a contractor's SBE contractual obligations regarding the SBE commitment and related good faith effort requirements associated with contract specific SBE goals. New §9.319, Contractor's Commitment Agreement, sets out the specific SBE commitment agreement components, and new §9.320, Contractor's Good Faith Efforts, and specifies the components required of a

contractor to demonstrate that good faith efforts were made to satisfy the SBE goal or obtain SBE participation.

New §9.321, Subcontracting, replaces existing §9.55(c)(5), in part, and specifies the subcontracting requirements and limitations applicable to SBE subcontractors.

New §9.322, Leases, replaces existing §9.55(c)(5)(C) and provides the limitations and requirements associated with the leasing of equipment by a SBE subcontractor.

New §9.323, Withholding or Reducing Payments, replaces existing §9.56(c) as it relates to the SBE program. The section prohibits a contractor from withholding or reducing payments to a SBE subcontractor without a reason that is recognized as a standard industry practice.

New §9.324, SBE Subcontractor Termination, replaces existing §9.56(e) as it relates to the SBE program and prohibits a contractor from terminating a SBE subcontractor that was submitted on a commitment agreement for a contract with an assigned goal without the consent of the department. The language tracks the requirements of new §9.229 to maintain consistency between the SBE and DBE programs and to meet the federal small business requirements.

New §9.325, Performance, replaces existing §9.56(d) as it relates to the SBE program and requires that SBE contractors and subcontractors comply with the terms of the contract or subcontract.

New §9.326, Contractor Reports, replaces existing §9.55(c)(3) and specifies the contractor reporting obligations associated with the SBE program. This section addresses periodic and final reports as outlined in the applicable contract.

New §9.327, Contractor Records, replaces existing §9.56(f) as it relates to the SBE program and prescribes the contractor's retention requirements for documents associated with the contract.

New §9.328, Credits for Expenditures, replaces existing §9.55(c)(4) and provides that a contractor receives credit for all payments made to an SBE for work performed and costs incurred under the contract, including subcontracted work.

New §9.329, Monitoring of Contract Compliance, replaces existing §9.56(a) as it relates to the SBE program and provides that the department will monitor compliance of a contract by reviewing reports and on-site visits.

New §9.330 and §9.331 replace existing §9.57 as it relates to the SBE program and provide the process and procedures involved in the submittal, review, and investigation of complaints related to the SBE program.

New §9.330, Complaints, provides the process a person must use to submit to the department a complaint for a violation of the SBE program. The section does not apply to complaints associated with purchase contracts or discrimination complaints against employees of the department.

New §9.331, Review and Investigation of Complaints, prescribes the process used by the department in the review and investigation of any complaint received related to an SBE program violation.

New §9.332, Determination of Noncompliance; Sanctions, replaces existing §9.56(g) and (h) as it relates to the SBE program and sets out department actions that will be taken if it is determined that a contractor has not complied with the contract SBE requirements. Subsection (b) includes the possibility for declaring a default if a responder does not provide the required SBE information as specified in the contract's special provisions. Subsection (d) provides the types of sanctions available for noncompliance. These sanctions include written, reprimand, damages, contract termination, and any other remedy authorized by law.

New §9.333, Reconsideration of the Department's Noncompliance Determination, also replaces existing §9.56(g) as it relates to the SBE program and describes the process for reconsideration of the department's decision or to challenge the proscribed sanction. The section sets out the timeline for requesting the reconsideration for both respondents and contractors. The section provides for the appeal process, allowing the department the authority to schedule an in-person hearing if the department feels a hearing is necessary.

New Subchapter L provides rules relating to the department's HUB Program, which applies to contracts, exclusive of construction and maintenance contracts, and purchases funded entirely with state and local funds. Existing rules specific to the HUB program are contained in §9.54. The department's HUB program is modeled on, and where practicable, consistent with the state Historically Underutilized Business Program described in Government Code, Chapter 2161 and procedures set forth at 34 TAC §§20.10 et seq.

New §9.350, Policy, explains the purpose of this subchapter, which involves implementing the existing HUB program to comply with Transportation Code, §201.702, and is intended to be consistent where practicable with Government Code, Chapter 2161. Existing §9.52 addressed department policy for the department's DBE, HUB, and SBE programs combined. New §9.350 provides policy information relative to the HUB program as contained in existing §9.52.

New §9.351, Application of Subchapter, replaces existing §9.54(a) and explains the applicability of the department's HUB program to certain department contracts and purchases.

New §9.352, Definitions, provides definitions for terms associated with the department's HUB program. In this new section, certain definitions have been added or revised from existing §9.51 to provide clarification and consistency with statutory revisions concerning the statewide HUB program as administered by the Comptroller of Public Accounts.

New §9.353, Certification of HUBs, replaces existing §9.54(d) and provides procedural information and criteria regarding the HUB certification process.

New §9.354, HUB Overall Goals, replaces existing §9.54(b)(1) and provides information regarding overall annual HUB goals. Overall annual HUB goals are established by the executive director in compliance with Government Code §2161.002 and 34 TAC §20.13 (relating to Statewide Annual HUB Utilization Goals).

New §9.355, Contract Goals, replaces existing §9.54(b)(2) and provides information regarding contract specific HUB goals. Contract specific goals will be assigned as necessary in order to meet the overall annual HUB goal. This section also provides that if a contract specific goal is not set but there are HUB subcontracting opportunities, the responders may be required by the department to provide a HUB plan.

New §§9.356 - 9.362 reorganize and replace existing §9.54(c) relating to contractor obligations.

New §9.356, HUB Plan, outlines the requirements associated with the HUB plan to be submitted by businesses responding to

an invitation to bid, or request for proposal, involving more than $100,000 and having subcontracting opportunities, as a condition of award. Failure to include the required HUB plan with a response will result in the rejection of the bid by the department. The section specifies the required components of the HUB plan. The section includes an exemption for building contracts that are based on the low bid procurement process. The section also provides for reporting variances for professional services contracts such as engineering, surveying, and architecture to allow for the procurement process for those types of contracts.

New §9.357, Good Faith Efforts Documentation, provides information regarding the good faith effort requirements when a contractor is not subcontracting any portion of the contract, unable to obtain HUB participation, or unable to meet HUB participation goals, including contract goals. The section replaces existing §9.54(c)(1)(C) and (3)(B) and adds new language to comply with provisions of the statewide HUB program.

New §9.358, Required Contract Provisions, replaces existing §9.54(c) and requires that contracts contain the HUB requirements applicable to the contract.

New §9.359, Changes to and Monitoring of HUB Plan, provides that the department must approve any changes to the HUB plan. The section also contains the process and procedure for the department to monitor the HUB plans submitted by respondents. Additionally, the section provides information concerning the various possible consequences should a respondent fail to implement their HUB plan in good faith.

New §9.360, HUB Commitment Agreement, specifies the terms of a HUB commitment agreement that is required, in addition to the HUB plan, as a condition of award when a specific HUB contract goal is assigned.

New §9.361, Reporting, contains the various contractor reporting obligations associated with the HUB program. This section addresses periodic and final reports as contained in the applicable contract.

New §9.362, Credit for HUB Expenditures, provides information concerning HUB subcontractor payments for goal credit.

New §9.363, Monitoring of Contractor Compliance, provides that the department will monitor compliance of a contract by reviewing reports and on-site visits. The section reorganizes existing §9.56, relating to department procedures in monitoring contractor compliance with HUB program requirements, as it relates to the HUB program.

New §9.364 and §9.365 reorganize and replace existing §9.57, relating to the submission of HUB complaints to the department and its investigation of those complaints.

New §9.364, Complaints, provides the process to be used by an aggrieved person to submit a claim to the department for review and consideration. The section does not apply to complaints associated with purchase contracts or discrimination complaints against employees of the department.

New §9.365, Review and Investigation of Complaints, prescribes the process and procedures used by the department in its review and investigation of complaints received under new §9.364.

New §9.366, Determination of Noncompliance; Sanctions, states the actions the department will take if it determines that a contractor has not complied with the HUB contracting requirements. The section describes the sanctions that may be imposed by the department on contractors found not to be in compliance of their HUB requirements and lists factors that will be considered by the department in determining the sanctions to be imposed. This section also provides that the department will notify the contractor within 10 days of making the determination.

New §9.367, Reconsideration of the Department's Noncompliance Determination, replaces existing §9.56(h) and §9.57(d) as they relate to the HUB program. The section prescribes the procedures that a person must follow to appeal a noncompliance determination imposed under new §9.366 and the process to be followed by the department in receiving and considering such a request.

COMMENTS

On May 9, 2012, the department held a public hearing regarding these rules. Oral comments at the hearing were received from Kay Turner, Megatronics International Corporation (MIC); Alayne Johnson, All Points Inspection Services, Inc (APIS); Renee Watson, Bexar County Small, Minority, and Women-owned Business Enterprise (SMWBE); Jerry Jackson; and Georgia Noel, Arizpe Architects and Engineers (Arizpe). The department also received written comments from Roger Albert, Associated General Contractors of Texas (AGC); Britanie Olvera, Building Integrity & Total Quality (B.I.T.); Mario L. Carlin, Mario Carlin Management, LLC. (MCM); and Laura K. Culin, Austin Lumber Company, Inc. (ALC). Jim Wyatt, Texas Association of African American Chambers of Commerce (TAAACC) and Kevin Kennedy, Kennedy Consulting - Innovative (KCI) provided comments at the public hearing and submitted written comments.

Comment: TAAACC, KCI, AGC, B.I.T., MCM, and ALC all raised issues regarding the placing of the DBE/SBE/HUB program in the Office of Civil Rights (OCR). The issues raised were that being included in OCR sends the wrong message to participants in the program, that DBE/SBE/HUB are procurement programs not civil rights issues and whether OCR would have the funding, resources, and authority necessary to oversee the programs. In addition, the AGC recommended the department create a separate office focused exclusively on DBE/SBE/HUB programs.

Response: The scope of the rules does not address the organizational structure of the department. However, to provide the department administration with the flexibility to make organizational structure changes, all references to the Office of Civil Rights have been removed from these rules. This has resulted in changes to §§9.212, 9.330, and 9.331 and the withdrawal of proposed §9.303 as unnecessary. In addition, §9.303 is withdrawn as it pertained to administration of the SBE program by the department's Office of Civil Rights (OCR). Since all references to OCR are removed due to comments, the proposed new section is obsolete and is, therefore, withdrawn.

Comment: KCI commented on §9.301 and argued the rule changes do not establish a race-neutral small business set-aside for professional service contracts as required by 49 C.F.R. §26.39.

Response: The department disagrees as set asides are prohibited according to 49 C.F.R. §26.43 and is making no changes to the rules based on this comment. In regards to the 49 C.F.R. §26.39 requirement, the department must include a federal SBE component as a part of the department's DBE program. One element of the federal SBE program component is to place a federal SBE goal on projects where a DBE goal is not justified. The language of §9.301, as proposed, allows SBE participation in federally funded projects that did not receive a DBE goal.

Comment: KCI commented on §9.301 and argued that the HUB program relating to professional service contracts conflicts with 49 C.F.R. §26.39.

Response: The department disagrees. The HUB program is a state program and is not subject to 49 C.F.R. §26.39 or any other aspects of the federal DBE program.

Comment: KCI and APIS commented on §9.301 and requested that the SBE rules be modified to include professional service contracts.

Response: The department disagrees. The state SBE program does not apply to professional services contracts. However, as stated in the response to a preceding comment on §9.301 related to the requirements of 49 C.F.R. §26.39, the department must include a federal SBE component as a part of the department's DBE program. The federal SBE component applies to professional services and §9.301 is changed, accordingly, to exclude federally funded projects in which a DBE goal is provided from the application of the Small Business Enterprise program.

Comment: KCI and APIS commented on §9.301 and requested SBE/HUB participation goals be combined into a single goal.

Response: The department disagrees. Federal and state laws vary greatly with regards to how credit towards contract goals can be counted and how the agency must report goal achievement.

Comment: AGC commented on §9.212(a) and (c) stating the rules are insufficient in details pertaining to whom responsibilities ultimately fall to regarding monitoring and enforcement of the DBE provisions. AGC requests decision making be handled and determined by the project's district engineer or designee.

Response: The department disagrees. Project monitoring is done throughout the project by various staff. The district engineer is responsible for all aspects of the project, including monitoring and enforcement, and coordinates decisions related to the DBE program with the DBE staff who must also be involved in the process. The department believes that combining both project and program staff in decisions will achieve more consistent enforcement throughout the state. The section is consistent with the language and intent of 49 C.F.R. Part 26.

Comment: AGC commented on §9.237(a) and (b) and recommends that decisions involving extreme sanctions should be made by a panel consisting of an impartial district engineer (or designee), the director of the DBE program, and a member of the department's executive team that has substantive knowledge of the DBE program and those decisions should be appealable to the department's executive director.

Response: The department disagrees that a panel is necessary to issue sanctions for a DBE violation. The parties involved in monitoring the contract will be included in making the sanction determinations. It is this staff that has the understanding of the issues necessary to make the initial finding and sanction decision. A prime who disagrees with the sanction can request a reconsideration of the determination. This reconsideration will be conducted by an administrative level employee who was not involved in the original decision.

Comment: AGC commented on the definition of "work" in §9.208(a)(2) and §9.318(a)(2). It argues that the terms "location" and "approved by the department" are irrelevant to the prompt payment requirements of the DBE/SBE programs and it requested they be removed.

Response: The department disagrees. The term "location" and "approved" are relevant to the prompt pay provisions. For the purposes of §9.208 and §9.318, the term "subcontractor" includes suppliers and the term "work" includes materials provided by suppliers at a location approved by the department. "Approved" is relevant as it pertains to the completion of a contractor's and subcontractor's work and whether approved by the department for payment.

Comment: AGC commented on §9.208(f)(6) and §9.318(f)(6) regarding joint checks. It argues that the two-year limitation is not adequate because some projects are longer than two years. AGC disagrees with the time limitation and recommends allowing the agreement to exist for the term of the contract and subject to review by the department every two years.

Response: The department agrees in part. Once the use of joint checks is approved for a particular contract, the joint check agreement should be approved for the life of the contract. The paragraphs limiting approval for two years have been deleted and subsequent paragraphs in each subsection have been renumbered. The department referenced the two years to indicate the department would review a DBE's use of joint checks to determine if the DBE has made a reasonable effort to obtain credit with suppliers. This requirement is met by other language in the rules.

Comment: AGC commented on §9.208(f)(2) and §9.318(f)(2) regarding joint checks. It argues that determining whether "the subcontractor earns a profit from the material purchased" is difficult to administer and imposes a higher industry standard on the DBE/SBE. The AGC recommends deletion of this requirement.

Response: The department disagrees that the requirement imposes a higher industry standard on the DBE. In cases where joint checks have been utilized, the DBE receives the price the supplier provided to the prime contractor. Without allowing the sharing of prices between prime and DBE, the supplier might not grant the DBE the more economical price. The fact that the determination might be difficult for the prime contractor does not eliminate the need to establish that the DBE was performing a commercially useful function in its inclusion in the purchasing process.

Comment: AGC commented on §9.214(b) regarding the DBE goal and believes the three-year goal assignment is not conducive to the ultimate goal of the program of creating a business atmosphere that needs no race-conscious requirements. AGC recommends race-conscious goals be reviewed and amended every year the overall goal is exceeded.

Response: The department disagrees. Federal regulations, 49 C.F.R. §26.45, require the department to set a DBE goal every three years. The department will continue to monitor the goal and can submit goal modifications to the appropriate Operating Administration within the three-year goal period.

Comment: AGC disagrees with the requirement in §9.222(c) regarding increasing a contract goal due to a change order. AGC argues that this action could force a contractor to break or terminate existing purchase orders and subcontracts issued in good faith. AGC recommends the department revise the language to state the goals "may" be increased in the event a change order adds "new scope" to the project.

Response: The department disagrees in part. The department disagrees that rules require a change in an assigned contract DBE goal based on a change order. The assigned contract goal

is set as a percentage of the dollar amount of the contract and a change order will not modify the original assigned goal percentage. The language in the rule states that the original goal applies to the value of the change order. However, the department did not intend for all change orders to affect the DBE participation. For example, if the change order increases the dollar amount of a line item of work that was not subcontracted to a DBE, then the change order will not impact the DBE participation. However, if the change order impacts a line of work that was originally committed to a DBE or is a line item not included in the original contract (new scope), then the overall DBE participation will also be increased. Therefore, the department has changed the language to state that "the increased contract value may become subject to these same goal requirements."

Comment: AGC commented on §9.227(b)(2) regarding good faith effort documentation. AGC argues that the use of "all" for good faith efforts in "all necessary and reasonable steps referenced in the federal Appendix A," is misleading and may result in a misinterpretation of the rules. AGC recommends the word "all" be removed to align with the intent of Appendix A.

Response: The department agrees. Appendix A is not intended to be a mandatory checklist, nor is it intended to be an exclusive or exhaustive list. The language will be revised to "the bidder took the types of action that may be considered as good faith efforts as referenced in 49 C.F.R. Part 26" to reflect this interpretation.

Comment: AGC believes the time limits in §9.228(f) regarding the timing of the reconsideration hearing are unreasonable. AGC argues that requiring a meeting within 20 days of the date of notice can be as little as 10 days from the time of the appeal request. AGC recommends amending the language to "meeting will be held within 20 days of the date of appeal, unless otherwise mutually agreed upon."

Response: The department agrees in part and is modifying the rule. The department agrees that it may be difficult to schedule a hearing within 10 days, therefore, the language is amended to provide a hearing within 30 days of the hearing request. The department does not agree to allow the date to be extended past this 30-day period. The review will be conducted prior to the award of the contract. To extend the time indefinitely could result in the delay of needed construction and maintenance projects.

Comment: AGC commented that the §9.229(c) and §9.324(c) requirement of a five-day notice for termination is unreasonable for time sensitive work. AGC recommends a contractor be able to provide written documentation of attempts to contact a DBE/SBE in order to address immediate impacts to the progress of a project.

Response: The department disagrees. New federal regulations require the department to provide the notice and termination provisions outlined in the rules. The department does not have the authority to decrease the five-day limit under the DBE program. For consistency the department has carried this federal DBE requirement to the state's SBE program. This will allow the SBE program to apply to the federally funded projects that do not receive a DBE goal as well as the state funded SBE projects. It will also allow for the same procedures and processes for all parties regardless of the type of funding used for the project.

Comment: AGC argues that §9.233(c) and §9.315 do not include the currently approved FHWA equivalent match for DBEs that control an equal value of non-DBE truckers. AGC recommends that language be added.

Response: The department agrees that FHWA allows additional truck hauling match. The department adds the following language to §9.233 and §9.322: "The DBE that leases trucks from a non-DBE is entitled to credit for the total value of transportation services provided by non-DBE lessees, not to exceed the value of transportation services provided by the DBE-owned trucks on the contract. Additional participation by non-DBE lessees receive credit only for the fee or commission the DBE receives as a result of the lease arrangement."

Comment: AGC recommends clarifying the word "contract" as being a "subcontract" in §9.235(a).

Response: The department agrees. Clarification will be added that borrows language from the current DBE Provision 1966 contact provision. "Only DBE firms certified at the time of execution of the contract, subcontract, or purchase order, as appropriate, are eligible for DBE goal participation."

Comment: AGC recommends adding the statement to §9.235 that race-neutral DBEs or DBE work and payments in excess of the original goal may be used for substitution purposes.

Response: The department agrees in part that some DBE work and payments may be used in goal credit calculations. Elements of this comment are currently a part of the department's practice but were not specifically stated in the rules. The department adds language to the rule to specify that payment made to a DBE that was not on the original commitment may be counted toward the contract goal if that DBE was certified as a DBE before the execution of the subcontract and has performed a CUF.

Comment: AGC recommends adding language to §9.235 that provides federal rules allowance in that a contractor is excused from the portion of the goal remaining after a DBE is decertified.

Response: The department agrees with the comment but does not agree that it requires a change to the rule language if the comment is referencing the overall contract goal or the individual DBE commitment amount. The current DBE procedure allows the prime to continue to receive goal credit for a DBE that is decertified after subcontract execution as long as the DBE continues to perform a CUF. The prime is not penalized and, thus, there is no need to excuse the portion of the goal remaining. The rule indicates that the department will not count the work by the decertified DBE towards the overall state DBE goal.

Comment: AGC argues the authority for the decision of varying degrees of sanctions needs clarification in §9.237(a) and (b) and §9.332(a) and (b). AGC believes that the district engineer should retain the authority for project level decisions but, with regard to due course of appeal, only the appropriate level of administration should have termination and debarment authority.

Response: The department disagrees. The rules establish that the "department" will make the sanction determination and this will allow all appropriate department staff involved in the contract to participate in the sanction determination. This will include the relevant district engineer and the DBE liaison officer. In addition, the reconsideration process of §9.238 provides that an employee that holds a senior leadership position will be included in the review of the sanction. Current policy and procedures provide that the executive director is the decision maker in cases where termination and/or debarment are considered. This process is handled outside of the DBE program under the general contract procedures.

Comment: AGC commented on §9.301 regarding funding applicability being unclear. AGC states that in 43 TAC Chapter

9, Subchapter J, projects with federal funds are subject to the provisions whereas in §9.301 the rules are subject to projects not subject to 43 TAC Chapter 9, Subchapter J. AGC recommends adding a statement, in accordance with US DOT rules, that the SBE rules are applicable to federally funded projects without DBE goals.

Response: The department agrees that the language could be restated to provide more clarity and has included language to state that the SBE program applies to federally funded projects in which a DBE goal is not provided.

Comment: AGC argues §9.318(a)(4) defines "contractor" for this section as a subcontractor that contracts work to another tier of subcontractors and this definition is inconsistent and confusing with the term "contractor" in other portions of the proposed rules. AGC recommends deletion of those portions or further clarification.

Response: The department disagrees with this comment. The different extended definition of contractor, which applies only in this section, is needed to fully implement the payment, prompt payment, and joint check provisions. All contractors, whether the prime contractor or a subcontractor, that further subcontract must meet the requirements of this section.

Comment: The AGC argues §9.318 broadens the scope of prompt payment, joint checks, and retainage to all SBE projects whether they contain federal funds or not. AGC recommends language be included to specify the portions of federal law specific to prompt payment, joint checks, and retainage apply only to SBE projects with federal money.

Response: The department disagrees. To increase opportunities to SBEs, afford all SBEs working on department contracts the same level of commitment by the department while working on contracts, and to be as efficient as possible in the administration of the program, the department has broadened the scope of the state SBE program to include joint checks and prompt pay and retainage on state funded SBE projects. There is a state prompt pay requirement and the department has written these rules to meet the requirements of both the state and federal provisions. Joint checks, prompt pay, and retainage also apply to the federal SBE program element of the DBE program as contracts that have a federal SBE goal must also meet the same requirements as contracts that are assigned a DBE goal. The department has elected to run the state SBE program corollary to the federal DBE program where applicable to allow for increased opportunities for small businesses and to assist with the ease of program administration.

Comment: AGC argues that the provisions of §9.325 are US DOT based and not specifically related to the SBE program. AGC believes the department's contract provisions address performance for the contract.

Response: The department disagrees. Although §9.325 are US DOT requirements of the DBE program, the department has revised the rules to assure that these provisions not only apply to the federal SBE program component but are also a requirement of the state SBE program. The department has elected to run the state SBE program parallel to the federal DBE program, where applicable, to allow for increased opportunities for small businesses and to assist with the ease of program administration.

Comment: SMWBE recommends further definition of "entity," "TxDOT," and "the department" in §§9.200 - 9.242, 9.300 - 9.333, and 9.350 - 9.367. SMWBE believes this is necessary because the "department" could also reference a local government provider.

Response: The department disagrees with the comment. The DBE/HUB/SBE rules are addressing administrative procedures that the department will follow. All references to the department are meant to mean only the Texas Department of Transportation and in each subchapter "department" is defined to mean the Texas Department of Transportation. Other organizations that adopt the department's DBE program will do so through an agreement with the department that will define and clarify definitions of the individual entity. Organizations through the signed agreement adopt the department's DBE program and not the department's rules.

Comment: SMWBE argues that FHWA, FTA, and FAA funding sources are used inconsistently throughout §§9.200 - 9.242, 9.300 - 9.333, and 9.350 - 9.367.

Response: The department disagrees. The program is administered by the three US DOT administrations (i.e., FHWA, FTA, and FAA) with the Federal Highway Administration (FHWA) maintaining a significant stewardship role for the program administered by the department. FTA and FAA are referenced where applicable and references are made to the Operating Administration, which is defined as FTA, FAA, or FHWA, as appropriate.

Comment: SMWBE argues there is confusion in the implementation at the local government level and recommends §9.202(7) further clarify "appropriate flexibility to entities" and state how it applies to entities implementing a DBE program and providing DBE opportunities.

Response: The department disagrees. This comment references the department's policy and objectives, which are to work in partnership with industry stakeholders to provide alternatives that are efficient and flexible to meet the needs of DBEs as well as the mutual interest of parties involved where possible. This language is in the spirit of 49 C.F.R. §26.1(g), which allows some degree of flexibility for recipients to administer the DBE program.

Comment: SMWBE requests further clarification in §9.202 regarding definitions to "department," "division," and "executive director."

Response: The department disagrees. The rules are guidelines and requirements for the departments DBE/SBE/HUB programs. Once a local government adopts the department's DBE program the contract special provision will reflect local government reference as well as monitoring entities and their roles.

Comment: SMWBE requests further clarification in §9.205 regarding the referenced bidders list provided on the TUCP website. SMWBE requests that the department disseminate to all members of the TUCP information that the directory is available in an electronic format accessible to the public at no cost.

Response: The department disagrees that a change to the language is required. The department provides the DBE directory online, at no cost. The department feels that this database provides the information requested by the commenter.

Comment: SMWBE appreciates the clarification the department has given to the FHWA regarding the ability to have one consistent master database of DBEs for the State of Texas.

Response: The department agrees that one master DBE database will be beneficial to the program.

Comment: SMWBE requests further clarification in §9.208(b) regarding "retainage" and how that relates to administering the program at a local government level.

Response: The department declines to make the requested addition. The department's administrative rules will not address the administration of the DBE program at the local level. Local government entities may adopt the department's DBE program, however, that does not mean that the entity is adopting the department's rules. The department's rules lay out how the department will administer its federally approved DBE program and may be used as guidance by local government entities, however, those entities may adopt administrative procedures as to how the program will be coordinated at the local level.

Comment: SMWBE argues that because the department collects payment reports and certified payrolls, the amount paid to the DBEs should be included as a part of compliance in §9.212(b).

Response: The department disagrees. If the comment is referencing the department's monitoring and enforcement process and the collection of data related to monthly payment reports on the departments contracts, this is administratively impossible at this time. Further, the verification of DBE payment is an internal process and the department has identified internal procedures to verify payment and those are specified in the DBE SOP.

Comment: SMWBE recommends further clarification of Small Business Rules in 43 TAC Chapter 9, Subchapter K with regard to the HUB rules and certification reciprocity.

Response: The department disagrees. Subchapter K relates to the reciprocity between the department and the State Comptroller's Office regarding certification procedures between the two state agencies. The process and procedures between the two agencies are identified in an MOU between the department and the Comptroller of Public Accounts.

Comment: SMWBE recommends the same language that is included in §9.320 regarding documentation of good faith be included in §9.227(b).

Response: The department disagrees. The department has elected to execute elements of 49 C.F.R. Part 26, Appendix A in reference to §9.320 of the SBE program for ease of program administration. However, the department rules will not be changed to add additional considerations to 43 TAC Chapter 9, Subchapter K as 49 C.F.R. Part 26, Appendix A provides good faith effort guidelines for the DBE program. Those guidelines are required by federal law and cannot be changed.

Comment: Mr. Jackson argues that performing compliance reconsideration at the end of a contract does not work per 49 C.F.R. §26.39.

Response: The department does not understand how monitoring performance at the end of the contract has any bearing on 49 C.F.R. §26.39 regarding fostering small business participation, and has no response for this comment.

Comment: Mr. Jackson commented that professional participation in the SBE program does exist.

Response: The comment is unclear but if the intent was to add professional services to the federal SBE program component of the DBE program in accordance with 49 C.F.R. §26.39, then the department agrees and has made this change per the request of other commenters.

Comment: Mr. Jackson argued the SBE program does not differentiate between the SBE program required by FHWA or U.S. DOT, which he states are both totally different programs.

Response: The department disagrees. The SBE program for both federal and state funded projects will fall under 43 TAC Chapter 9, Subchapter K, the SBE program rules.

Comment: TAAACC and MCM favor the contract compliance monitoring changes in the proposed rules. They believe the changes are going in the right direction.

Response: The department agrees that these rule changes will improve these programs.

Comment: MIC and APIS favor the complaint process changes in the proposed rules.

Response: The department agrees that a well defined complaint process will improve the program.

Comment: AGC favors joint checks driven by the supplier and the DBE/SBE.

Response: The department agrees that the new joint check provisions address input from outside parties.

Comment: Arizpe commented that it receives solicitations for services it does not provide and is not clear who could take this complaint.

Response: This comment is outside the scope of the rules and cannot be addressed by a change in these rules.

Comment: Arizpe is concerned that the department certification requires a password to change every 45 days.

Response: This comment is outside the scope of the rules and cannot be addressed by a change in these rules.

Comment: Arizpe recommends the department solicitations be posted in one resource.

Response: This comment is outside the scope of the rules and cannot be addressed by a change in these rules.

In addition to the changes made in response to comments, §9.220 is changed by adding a reference to DBEs in subsection (b)(2), (3), and (4). Those references were inadvertently left out of the proposed section.

SUBCHAPTER D. BUSINESS OPPORTUNITY PROGRAMS

43 TAC §§9.50 - 9.57

STATUTORY AUTHORITY

The repeals are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §201.702, and 49 C.F.R. Part 26, which require the department to establish a program to give disadvantaged businesses full access to the department's contract bidding process.

CROSS REFERENCE TO STATUTE

Transportation Code, §201.702.

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

Filed with the Office of the Secretary of State on June 29, 2012.

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Bob Jackson
General Counsel
Texas Department of Transportation
Effective date: September 1, 2012
Proposal publication date: April 13, 2012
For further information, please call: (512) 463-8683

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SUBCHAPTER J. DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM

43 TAC §§9.200 - 9.242

STATUTORY AUTHORITY

The new sections are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §201.702, and 49 C.F.R. Part 26, which require the department to establish a program to give disadvantaged businesses full access to the department's contract bidding process.

CROSS REFERENCE TO STATUTE

Transportation Code, §201.702.

§9.208. Payment; Prompt Payment; Joint Checks.

(a) For the purposes of this section:

(1) "subcontractor" includes a supplier;

(2) "work" includes materials that are provided by a supplier at a location approved by the department;

(3) "satisfactory completion" occurs when:

(A) the subcontractor has fulfilled the contract requirements of both the department and the subcontract for the subcontracted work, including the submittal of all information required by the specifications or by the department and including any vegetative establishment, testing, maintenance, and performance of other work that is the responsibility of the subcontractor; and

(B) the work done by the subcontractor has been inspected, approved, and paid for by the department; and

(4) "contractor" refers to a subcontractor that contracts work to another tier of subcontractors.

(b) The department will not withhold retainage on a contract executed and administered by the department. A contractor that withholds retainage on a subcontractor's work shall pay that retainage in full within 10 days after the date of satisfactory completion of all of the subcontractor's work.

(c) Each DOT-assisted contract, subcontract, or material purchase agreement must include provisions that substantively provide that:

(1) within 10 days after the date that the contractor receives payment for work performed by a subcontractor, the contractor will pay the subcontractor for the work performed; and

(2) the contractor will pay to a subcontractor any retainage on the subcontractor's work within 10 days after the date of satisfactory completion of all of the subcontractor's work.

(d) The inspection and approval of work done by the subcontractor for determining substantial completion does not eliminate the contractor's responsibilities for all of the work, as defined in the contract.

(e) The department may pursue actions against a contractor, including withholding of estimates and suspending the work, for noncompliance with the subcontract requirements of this section on receipt of written notice with sufficient details showing the subcontractor has complied with the subcontractor's obligations, as described in the contract.

(f) Based on the department's assessment of the construction industry usage of joint check agreements between contractors and subcontractors working on federal-aid construction projects, the department has implemented procedures for the use of joint checks on the DBE contracts executed and administered by the department. The department will accept the use of a joint check issued by a contractor to a subcontractor and its supplier but only if:

(1) the contractor does not require the subcontractor to use a supplier specified by the contractor or to use the contractor's negotiated unit price;

(2) the subcontractor earns a profit from the material purchased;

(3) the subcontractor, not the contractor, negotiates the quantities, price, and delivery of the materials;

(4) the contractor issuing the check acts solely as a guarantor;

(5) the subcontractor signs the joint check and releases it to the material supplier, not to the contractor;

(6) the subcontractor is responsible both to furnish and install the material;

(7) the subcontractor has applied for a line of credit with the supplier and was either denied credit or denied a sufficient increase in its line of credit;

(8) the supplier is not the contractor or an affiliate of the contractor; and

(9) the subcontractor's account with the supplier is in the subcontractor's name alone.

(g) The department will conduct prompt pay audits and prompt pay verifications to monitor compliance with this section.

§9.212. Monitoring and Enforcement.

(a) The department will monitor and enforce contract requirements and verify that work committed to DBEs at contract award is actually performed by the DBEs.

(b) The department will keep a current total of payments to DBE firms for work committed to the firms at the time of contract award and compare the amounts to the amounts committed to DBE firms.

(c) The department will designate a District Disadvantaged Business Enterprise Coordinator for each of the department's districts. The coordinator will monitor and enforce DBE contract requirements in the district for which the coordinator is designated. The department will develop, disseminate, and update as appropriate, standard operating procedures to be followed by the coordinators.

(d) The department will develop, disseminate, and perform an annual district DBE Program compliance audit on districts, prime contractors, local governments, and other entities that are recipients of federal funds, that have adopted the department's DBE Program, or that

assist with the administration of various components of the DBE Program.

(e) The department will notify DOT and any appropriate state or federal agency of any false, fraudulent, or dishonest conduct in connection with the DBE Program.

§9.220. Use of Race-neutral Means.

(a) The department will meet as much of its overall goal as feasible by using race-neutral means of facilitating DBE participation.

(b) Race-neutral means include:

(1) arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE and other small business participation;

(2) providing assistance to DBEs and other small businesses in overcoming limitations such as the inability to obtain bonding or financing;

(3) providing technical assistance and other services to DBEs and other small businesses;

(4) carrying out information and communications programs on contracting procedures and specific contract opportunities to ensure the inclusion of DBEs and other small businesses;

(5) implementing a supportive services program to develop and improve immediate and long-term business management, record keeping, and financial and accounting capability for DBEs and other small businesses;

(6) providing services to help DBEs, and other small businesses, improve long-term development, increase opportunities to participate in a variety of kinds of work, handle increasingly significant projects, and achieve eventual self-sufficiency;

(7) establishing a program to assist new, start-up firms, particularly in fields in which DBE participation has historically been low;

(8) ensuring distribution of the DBE directory to the widest feasible number of potential contractors; and

(9) assisting DBEs and other small businesses in developing their capability to use emerging technology and conduct business through electronic media.

§9.222. Adjustment of Contract Goals.

(a) If the department determines that the overall goal will be exceeded, the department will reduce or eliminate the use of contract goals for the remainder of the fiscal year to the extent necessary to ensure that the use of contract goals does not result in exceeding the overall goal.

(b) If the department determines that it will not meet the overall goal, the department will make appropriate modifications in the use of race-neutral or race-conscious means to meet the overall goal.

(c) If a contract change order increases the contract value of a contract that includes federal funding, the increased contract value may become subject to these same goal requirements applicable to the original contract value, requiring an increase in the total DBE participation for the contract.

§9.227. Information from Bidders.

(a) Before the execution of a contract, the apparent successful bidder must submit to the department:

(1) the names and addresses of each subcontractor, identifying DBEs that will participate in the contract;

(2) a description of the work that each DBE will perform;

(3) the dollar amount of the participation of each DBE;

(4) written documentation of the bidder's commitment to use each DBE subcontractor whose participation the bidder submits to meet a contract goal;

(5) written confirmation from each DBE that it is participating in the contract as provided in the bidder's commitment; and

(6) if the contract goal is not met by DBE commitments, evidence of the bidder's good faith efforts to obtain DBE participation to meet the contract goal.

(b) Each bidder shall document the bidder's good faith efforts to obtain commitment to meet the contract goal. Good faith efforts are shown if the bidder documents that:

(1) sufficient DBE participation has been obtained to meet the contract goal; or

(2) the bidder took the types of action that may be considered as good faith efforts as referenced in 49 C.F.R. Part 26, Appendix A, to obtain the commitments to meet the contract goal even though the bidder did not succeed in obtaining sufficient DBE participation to meet the contract goal.

(c) If the bidder to whom the contract is conditionally awarded refuses, neglects, or fails to obtain the commitments to meet the DBE goal or to comply with good faith efforts requirements, the proposal guaranty filed with the bid is forfeited to the department.

§9.228. Reconsideration of the Department's Good Faith Efforts Determination before the Execution of the Contract.

(a) If the department determines that a bidder failed to satisfy the good faith efforts requirements before the execution of the contract, the department will notify the bidder of the failure and will give the bidder an opportunity for administrative reconsideration.

(b) The bidder must request an administrative reconsideration of that determination within 10 days of the date of receipt of the notice provided under subsection (a) of this section.

(c) If a reconsideration request is timely received, the reconsideration decision will be made by the department's DBE liaison officer or, if the DBE liaison officer took part in the original determination that the bidder failed to satisfy the good faith effort requirements, a department employee who holds a senior leadership position of the department and reports directly to the executive director, who did not take part in the original determination, and who is appointed by the executive director to make the reconsideration decision.

(d) The bidder may provide written documentation or argument concerning whether the assigned DBE contract goal was met or whether adequate good faith efforts were made to meet the contract goal.

(e) The DBE liaison or other department employee making the reconsideration determination may request a meeting with the bidder to discuss whether the goal commitments were met or whether adequate good faith efforts were made to obtain the commitments to meet the contract goal.

(f) The meeting must be held within 30 days of the date of the request submitted under subsection (b) of this section. If the bidder is unavailable to meet during the 30-day period, the reconsideration decision will be made on the written information provided by the bidder.

(g) The department will provide to the bidder a written decision that explains the basis for finding that the bidder did or did not

meet the contract goal or make adequate good faith efforts to meet the contract goal within 30 days of the date of the notice issued in subsection (a) of this section.

(h) The reconsideration decision is final and is not administratively appealed to DOT.

§9.233. Commercially Useful Function by DBE Trucking Firm.

(a) A DBE trucking firm is considered to perform a CUF if the DBE:

(1) is responsible for the management and supervision of the entire trucking operation for its part of the contract and is not part of a contrived arrangement for the purpose of meeting DBE goals; and

(2) owns and operates at least one fully licensed, insured, and operational truck used on the contract.

(b) A DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs.

(c) A DBE that leases trucks from another DBE, including an owner-operator who is certified as a DBE, receives credit for the total value of the transportation services provided on the contract using the leased trucks.

(d) The DBE that leases trucks from a non-DBE is entitled to credit for the total value of transportation services provided by non-DBE lessees, not to exceed the value of transportation services provided by the DBE-owned trucks on the contract. Additional participation by non-DBE lessees receive credit only for the fee or commission the DBE receives as a result of the lease arrangement.

(e) If a DBE trucking firm enters into a lease for one or more trucks, the lease must provide that the DBE has control of the truck. A leased truck may be used, with the consent of the DBE, for work for a person other than the DBE during the term of the lease. A leased truck must display the name and identification number of the DBE.

§9.235. Limitations on Amounts Counted toward DBE Goals.

(a) Only DBE firms certified at the time of execution of the contract, subcontract, or purchase order, as appropriate, are eligible for DBE goal participation.

(b) Work performed on a contract by a firm after it has ceased to be certified as a DBE will not be counted toward the overall annual DBE goal.

(c) Participation by a DBE on a contract will not be counted toward DBE goals until the amount of the participation has been paid to the DBE.

(d) Payments made to a DBE that was not on the original commitment may be counted toward the contract goal if that DBE was certified as a DBE before the execution of the subcontract and has performed a CUF.

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

Filed with the Office of the Secretary of State on June 29, 2012.

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Bob Jackson
General Counsel
Texas Department of Transportation
Effective date: September 1, 2012
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For further information, please call: (512) 463-8683

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SUBCHAPTER K. SMALL BUSINESS ENTERPRISE (SBE) PROGRAM

43 TAC §§9.300 - 9.302, 9.304 - 9.333

STATUTORY AUTHORITY

The new sections are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §201.702, and 49 C.F.R. Part 26, which require the department to establish a program to give disadvantaged businesses full access to the department's contract bidding process.

CROSS REFERENCE TO STATUTE

Transportation Code, §201.702.

§9.301. Applicability of Program.

The Small Business Enterprise program applies to all highway construction and maintenance contracts that are funded entirely with state and local funds and all federally funded projects in which a DBE goal is not provided.

§9.318. Payment; Prompt Payment; Joint Checks.

(a) For the purposes of this section:

(1) "subcontractor" includes a supplier;

(2) "work" includes materials that are provided by a supplier at a location approved by the department;

(3) "satisfactory completion" occurs when:

(A) the subcontractor has fulfilled the contract requirements of both the department and the subcontract for the subcontracted work, including the submittal of all information required by the specifications or by the department and including any vegetative establishment, testing, maintenance, and performance of other work that is the responsibility of the subcontractor; and

(B) the work done by the subcontractor has been inspected, approved, and paid for by the department; and

(4) "contractor" refers to a subcontractor that contracts work to another tier of subcontractors.

(b) The department will not withhold retainage on a contract executed and administered by the department. A contractor that withholds retainage on a subcontractor's work shall pay that retainage in full within 10 days after the date of satisfactory completion of all of the subcontractor's work.

(c) Each contract, subcontract, or material purchase agreement must include provisions that substantively provide that:

(1) within 10 days after the date that the contractor receives payment for work performed by a subcontractor, the contractor will pay the subcontractor for the work performed; and

(2) the contractor will pay to a subcontractor any retainage on the subcontractor's work within 10 days after the date of satisfactory completion of all of the subcontractor's work.

(d) The inspection and approval of work done by the subcontractor for determining substantial completion does not eliminate the contractor's responsibilities for all of the work, as defined in the contract.

(e) The department may pursue actions against a contractor, including withholding of estimates and suspending the work, for noncompliance with the subcontract requirements of this section on receipt of written notice with sufficient details showing the subcontractor has complied with the subcontractor's obligations, as described in the contract.

(f) Based on the department's assessment of the construction industry usage of joint check agreements between contractors and subcontractors working on federal-aid construction projects, the department has implemented procedures for the use of joint checks on the SBE contracts executed and administered by the department. The department will accept the use of a joint check issued by a contractor to a subcontractor and its supplier but only if:

(1) the contractor does not require the subcontractor to use a supplier specified by the contractor or to use the contractor's negotiated unit price;

(2) the subcontractor earns a profit from the material purchased;

(3) the subcontractor, not the contractor, negotiates the quantities, price, and delivery of the materials;

(4) the contractor issuing the check acts solely as a guarantor;

(5) the subcontractor signs the joint check and releases it to the supplier, not the contractor;

(6) the subcontractor is responsible both to furnish and install the material;

(7) the subcontractor has applied for a line of credit with the supplier and was either denied credit or denied a sufficient increase in its line of credit;

(8) the supplier is not the contractor or an affiliate of the contractor; and

(9) the subcontractor's account with the supplier is in the subcontractor's name alone.

(g) The department will conduct prompt pay audits and prompt pay verifications to monitor compliance with this section.

§9.322. Leases.

(a) An SBE may lease equipment consistent with standard industry practice.

(b) The SBE must provide the operator of the leased equipment and must be responsible for all applicable payroll and labor compliance requirements.

(c) The SBE that leases trucks from a non-SBE is entitled to credit for the total value of transportation services provided by non-SBE lessees, not to exceed the value of transportation services provided by the SBE-owned trucks on the contract. Additional participation by non-SBE lessees receive credit only for the fee or commission the SBE receives as a result of the lease arrangement.

§9.330. Complaints.

(a) This section does not apply to:

(1) a subcontractor's claim for additional payments or time extensions; or

(2) a discrimination complaint made against a department employee, which is handled in accordance with the department's Human Resources Manual.

(b) A complaint alleging a violation of the SBE program, including a claim of discrimination, may be filed by:

(1) an aggrieved person; or

(2) a person on behalf of another person or a specific class of individuals.

(c) The complaint must in writing and must be sent to the department within 90 days after the date that:

(1) the alleged discrimination or violation of the SBE program occurred; or

(2) a continuing course of conduct in violation of the SBE program was discovered.

§9.331. Review and Investigation of Complaints.

(a) The department will review each complaint filed under §9.330 of this subchapter (relating to Complaints) and will notify the complainant that the department has determined that:

(1) an investigation is warranted; or

(2) that an investigation is not necessary and the reasons for that determination.

(b) If the complaint is made against a specific division, the executive director will appoint another division or office of the department to review and investigate the complaint.

(c) The reviewing entity will forward the written findings to the complainant and respondent.

(d) If the finding confirms the complaint, the reviewing entity will meet with the complainant and respondent to discuss a conciliation agreement.

(e) If the parties concur, the reviewing entity will prepare a conciliation agreement for execution and will monitor the agreement to completion.

(f) If the parties do not agree to a conciliation agreement, the director of the reviewing entity will make a decision regarding corrective action needed and monitor the corrective action, if any.

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

Filed with the Office of the Secretary of State on June 29, 2012.

TRD-201203420
Bob Jackson
General Counsel
Texas Department of Transportation
Effective date: September 1, 2012
Proposal publication date: April 13, 2012
For further information, please call: (512) 463-8683

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SUBCHAPTER L. HISTORICALLY UNDERUTILIZED BUSINESS (HUB) PROGRAM

43 TAC §§9.350 - 9.367

STATUTORY AUTHORITY

The new sections are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission

with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §201.702, and 49 C.F.R. Part 26, which require the department to establish a program to give disadvantaged businesses full access to the department's contract bidding process.

CROSS REFERENCE TO STATUTE

Transportation Code, §201.702.

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

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Bob Jackson
General Counsel
Texas Department of Transportation
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For further information, please call: (512) 463-8683

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SUBCHAPTER I. DESIGN-BUILD CONTRACTS

43 TAC §9.152, §9.153

The Texas Department of Transportation (department) adopts amendments to §9.152 and §9.153, concerning Design-Build Contracts. The amendments to §9.152 and §9.153 are adopted with changes to the proposed text as published in the May 11, 2012, issue of the *Texas Register* (37 TexReg 3527) and will be republished.

EXPLANATION OF ADOPTED AMENDMENTS

The department's own experience, and that of other agencies, establishes that evaluating contractor performance periodically during the term of a contract and discussing the results with contractors is a powerful motivator for contractors to maintain high quality performance or improve inadequate performance, and is one of the most important tools available for ensuring good contractor performance.

Past performance information is an important tool for use in future evaluations of qualifications and proposals, and in the award of design-build contracts. The use of past performance as an evaluation factor in the contract award process is instrumental in making "best value" selections. It enables the department to better predict the quality of future work.

These amendments provide for the department's periodic evaluation of a contractor's performance under a design-build contract, and of the contractor's major team members, consultants, and subcontractors. The amendments also provide for the consideration of the results of those evaluations and other evaluations of past performance in the evaluation of qualifications statements submitted in response to a request for qualifications, and proposals submitted in response to a request for proposals. Past performance under other contracts determined by the department to be relevant to the project being delivered under the prospective agreement is an important indicator of a proposer's ability to perform the prospective agreement successfully.

Amendments to §9.152 provide that the department will evaluate the performance of a private entity that enters into a design-build contract, and will evaluate the performance of the private entity's major team members, consultants, and subcontractors. Evaluations will be conducted annually at twelve month intervals during the term of the design-build contract, upon termination of the design-build contract, and when the department determines that work is materially behind schedule or not being performed according to the requirements of the design-build contract. Optional evaluations may be conducted as provided in the design-build contract. Acts or omissions that are the subject of a good faith dispute will not be considered.

After a performance evaluation is conducted, and for at least 30 days before the evaluation becomes final and is used by the department, the department will provide for review and comment a copy of the performance evaluation report to the entity being evaluated and, if that entity is a consultant or subcontractor, to the entity that entered into the design-build contract. The department will consider and take into account any submitted comments in finalizing the performance evaluation report.

Amendments to §9.153 provide that the department will consider the results of performance evaluations conducted by the department under §9.152 and 43 TAC §27.3 (concerning Comprehensive Development Agreements) determined by the department to be relevant to the project, the results of other performance evaluations determined by the department to be relevant to the project, and other objective criteria that the department considers appropriate in the evaluation of qualifications statements submitted in response to a request for qualifications, and in the evaluation of proposals for a design-build contract.

COMMENTS

Comments were received from the Texas Association of Business (TAB).

Comment: TAB commented that they are encouraged by the department's recognition that objective performance review is an important part of the process of future evaluation of contracts and development agreements. They believe the private sector plays a critical role in future infrastructure development in Texas and that any new regulations must serve to further encourage private sector participation and fair and open competition toward innovative delivery of greatly needed transportation resources and traffic congestion relief. TAB commented that they trust that the department shares their belief in an objective review process that ensures fair competition and the highest and best use of taxpayer dollars. TAB stated that their comments are intended to make clear to the public that changes proposed to be made to the competitive procurement process will only enhance the effective and efficient use of their resources in advancing our transportation needs and support the mutual goal of a factual, objective, and transparent process that promotes participation by qualified contractors and developers. TAB strongly supports the clear and objective standards and criteria that must be a part of any improved evaluation process.

Response: The department agrees that these rules must further encourage private sector participation and fair and open competition toward the delivery of greatly needed transportation projects. Performance evaluations conducted by the department under these rules will be conducted in an objective and transparent manner, using objective criteria, and with consideration of any comments on the evaluation submitted by the entity being evaluated.

Comment: TAB commented that the department should evaluate the relevant performance of the private entity that enters into a design build contract, and of the private entity's major team members, consultants, and subcontractors, all based on the objective criteria specified in §9.152(p).

Response: The department agrees that evaluations should be limited to major team members, consultants, and subcontractors, and has made that change to §9.152. All performance of the private entity may be relevant to an evaluation. Performance evaluations conducted by the department under these rules will be conducted in an objective and transparent manner, using objective criteria. Section 9.152 has been amended to clarify that the evaluations will be conducted in accordance with the requirements of §9.152(p).

Comment: TAB commented that evaluations that are not annual evaluations or conducted at the end of the contract should be limited to circumstances when the department determines that work is materially behind schedule or not being performed substantially according to the material requirements of the design-build contract.

Response: The department agrees that evaluations should be conducted only when the work is materially behind schedule and has made that change. The department does not believe that performing work substantially in accordance with material requirements of the contract is sufficient to prevent the department from conducting an evaluation if deemed necessary, and has not made those changes.

Comment: TAB commented that all evaluations conducted pursuant to §9.152(p) should be based on and limited to objective, verifiable criteria that are material indicators of performance substantially in accordance with the material terms of the design-build contract, and provides examples of such criteria.

Response: The department agrees that performance evaluations should be conducted in an objective and transparent manner, using objective criteria, but does not believe it is necessary to state that in §9.152.

Comment: TAB commented that performance evaluations should not consider acts or omissions that are the subject of a good faith dispute.

Response: The department agrees and has made that change.

Comment: TAB commented that the department should provide an entity being evaluated a period of at least 30 days to review and comment on the performance evaluation before the evaluation becomes final and is used by the department. TAB commented that the department should reasonably consider and take into account any submitted comments before the department finalizes the performance evaluation report.

Response: The department has amended §9.152 to provide a review and comment period of at least 30 days and to commit to consider and take into account any submitted comments.

Comment: TAB commented that the relevant final results of performance evaluations should be provided to the entity being evaluated.

Response: The department agrees that final evaluation reports should be provided to the entity that was evaluated and has made that change.

Comment: TAB commented that only the relevant final results of performance evaluations conducted by the department under §9.152 and §27.3 and other objective criteria should be considered by the department in the evaluation of qualifications submittals and proposals, and that the department should not consider the results of other performance evaluations determined by the department to be relevant to the project.

Response: The department agrees that all performance evaluations considered should be determined by the department to be relevant to the project being procured, and has made that change. The department disagrees with the notion that other performance evaluations determined by the department to be relevant to the project should not be considered. Performance under contracts other than design-build contracts and comprehensive development agreements is also important in predicting the quality of future work under the prospective design-build contract.

Comment: TAB commented that the department's consideration of the relevant final results of performance evaluations in the evaluation of qualification submittals and proposals should be evenhanded, objective, and transparent and should take into account and give credit for not only good performance but also performance that materially deviates from the requirements of the design-build contract, all when measured against specified objective criteria.

Response: The department agrees that performance evaluations should be conducted in an objective and transparent manner, using objective criteria, but does not believe it is necessary to state that in §9.152.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 223, Subchapter F.

§9.152. General Rules for Design-Build Contracts.

(a) Applicability. The rules in this subchapter address the manner by which the department intends to evaluate submissions received from private entities in response to requests for qualifications and requests for proposals issued by the department.

(b) Reservation of rights. The department reserves all rights available to it by law in administering this subchapter, including without limitation the right in its sole discretion to:

(1) withdraw a request for qualifications or a request for proposals at any time, and issue a new request;

(2) reject any and all qualifications submittals or proposals at any time;

(3) terminate evaluation of any and all qualifications submittals or proposals at any time;

(4) suspend, discontinue, or terminate negotiations with any proposer at any time prior to the actual authorized execution of a design-build contract by all parties;

(5) negotiate with a proposer without being bound by any provision in its proposal;

(6) negotiate with a proposer to include aspects of unsuccessful proposals for that project in the design-build contract;

(7) request or obtain additional information about any proposal from any source;

(8) modify, issue addenda to, or cancel any request for qualifications or request for proposals;

(9) waive deficiencies in a qualifications submittal or proposal, accept and review a non-conforming qualifications submittal or proposal, or permit clarifications or supplements to a qualifications submittal or proposal; or

(10) revise, supplement, or make substitutions for all or any part of this subchapter.

(c) Costs incurred by proposers. Except as provided in §9.153(f) of this subchapter (relating to Solicitation of Proposals), under no circumstances will the state, the department, or any of their agents, representatives, consultants, directors, officers, or employees be liable for, or otherwise obligated to reimburse, the costs incurred by proposers, whether or not selected for negotiations, in developing proposals or in negotiating agreements.

(d) Department information. Any and all information the department makes available to proposers shall be as a convenience to the proposer and without representation or warranty of any kind except as may be expressly specified in the request for qualifications or request for proposals. Proposers may not rely upon any oral responses to inquiries.

(e) Procedure for communications. If a proposer has a question or request for clarification regarding this subchapter or any request for qualifications or request for proposals issued by the department, the proposer shall submit the question or request for clarification in writing to the person responsible for receiving those submissions, as designated in the request for qualifications or request for proposals, and the department will provide the responses in writing. The proposer shall also comply with any other provisions in the request for qualifications or request for proposals regulating communications.

(f) Compliance with rules. In submitting any proposal, the proposer shall be deemed to have unconditionally and irrevocably consented and agreed to the foregoing provisions and all other provisions of this subchapter.

(g) Proposer information submitted to department. All qualifications submittals or proposals submitted to the department become the property of the department and may be subject to the Public Information Act, Government Code, Chapter 552. Proposers should familiarize themselves with the provisions of the Public Information Act. In no event shall the state, the department, or any of their agents, representatives, consultants, directors, officers, or employees be liable to a proposer for the disclosure of all or a portion of a proposal submitted under this subchapter. Except as otherwise expressly specified in the request for qualifications or request for proposals, if the department receives a request for public disclosure of all or any portion of a qualifications submittal or proposal, the department will notify the applicable proposer of the request and inform that proposer that it has an opportunity to assert, in writing, a claimed exception under the Public Information Act or other applicable law within the time period specified in the department's notice and allowed under the Public Information Act. If a proposer has special concerns about information it desires to make available to the department, but which it believes constitutes a trade secret, proprietary information or other information excepted from disclosure, the proposer should specifically and conspicuously designate that information as such in its qualifications submittal or proposal. The proposer's designation shall not be dispositive of the trade secret, proprietary, or exempted nature of the information so designated.

(h) Sufficiency of proposal. All proposals, whether solicited or unsolicited, should be as thorough and detailed as possible so that the department may properly evaluate the potential feasibility of the proposed project as well as the capabilities of the proposer and its team members to provide the proposed services and complete the proposed project.

(i) Project studies. Studies that the department deems necessary as to route designation, civil engineering, environmental compliance, and any other matters will be assigned, conducted, and paid for as negotiated between the department and the successful proposer and set forth in the design-build contract.

(j) Proposer's additional responsibilities. The department, in its sole discretion, may authorize the successful proposer to seek licensing, permitting, approvals, and participation required from other governmental entities and private parties, subject to such oversight and review by the department as specified in the design-build contract.

(k) Proposer's work on environmental review of eligible project. The department may solicit proposals in which the proposer is responsible for providing assistance in the environmental review and clearance of an eligible project, including the provision of technical assistance and technical studies to the department or its environmental consultant relating to the environmental review and clearance of the proposed project. The environmental review and the documentation of that review shall at all times be conducted as directed by the department and subject to the oversight of the department, and shall comply with all requirements of state and federal law, applicable federal regulations, and the National Environmental Policy Act (42 U.S.C. §4321 et seq.), if applicable, including but not limited to the study of alternatives to the proposed project and any proposed alignments, procedural requirements, and the completion of any and all environmental documents required to be completed by the department and any federal agency acting as a lead agency. The department:

(1) shall determine the scope of work to be performed by the private entity or its consultants or subcontractors;

(2) shall specify the level of design and other information to be provided by the private entity or its consultants or subcontractors; and

(3) shall independently review any studies and conclusions reached by the private entity or its consultants or subcontractors before their inclusion in an environmental document.

(l) Effect of environmental requirements on design-build contract. Completion of the environmental review, including obtaining approvals required under the National Environmental Policy Act, is required before the private entity may be authorized to conduct and complete the final design and start construction of a project. Additionally, all applicable state and federal environmental permits and approvals must be obtained before the private entity may start construction of the portion of a project requiring the permit or approval. Unless and until that occurs, the department is not bound to any further development of the project. The department, and any federal agency acting as a lead agency, may select an alternative other than the one in the proposed project, including the "no-build" alternative. A design-build contract shall provide that the agreement will be modified as necessary to address requirements in the final environmental documents, and shall provide that the agreement may be terminated if the "no-build" alternative is selected or if another alternative is selected that is incompatible with the requirements of the agreement.

(m) Public meetings and hearings. All public meetings or hearings required to be held under applicable law or regulation will be

directed and overseen by the department, with participation by such other parties as it deems appropriate.

(n) Additional matters. Any matter not specifically addressed in this subchapter that pertains to the construction, expansion, extension, related capital maintenance, rehabilitation, alteration, or repair of a highway project pursuant to this subchapter, shall be deemed to be within the primary purview of the commission, and all decisions pertaining thereto, whether or not addressed in this subchapter, shall be as determined by the commission, subject to the provisions of applicable law.

(o) Performance and payment security. The department shall require a private entity entering into a design-build contract to provide a performance and payment bond or an alternative form of security, or a combination of bonds and other forms of security, in an amount equal to the cost of constructing the project, unless the department determines that it is impracticable for a private entity to provide security in that amount, in which case the department will set the amount of security. The security will be in the amount that, in the department's sole determination, is sufficient to ensure the proper performance of the agreement, and to protect the department and payment bond beneficiaries supplying labor or materials to the private entity or a subcontractor of the private entity. Bonds and alternate forms of security shall be in the form and contain the provisions required in the request for proposals or the design-build contract, with such changes or modifications as the department determines to be in the best interest of the state. In addition to, or in lieu of, performance and payment bonds, the department may require:

(1) a cashier's check drawn on a federally insured financial institution, and drawn to the order of the department;

(2) United States bonds or notes, accompanied by a duly executed power of attorney and agreement authorizing the collection or sale of the bonds or notes in the event of the default of the private entity or a subcontractor of the private entity, or such other act or event that, under the terms of the design-build contract, would allow the department to draw upon or access that security;

(3) an irrevocable letter of credit issued or confirmed by a financial institution to the benefit of the department, meeting the credit rating and other requirements prescribed by the department, and providing coverage for a period of at least one year following final acceptance of the project or, if there is a warranty period, at least one year following completion of the warranty period;

(4) an irrevocable letter signed by a guarantor meeting the net worth or other financial requirements prescribed in the request for proposals or design-build contract, and which guarantees, to the extent required under the request for proposals or design-build contract, the full and prompt payment and performance when due of the private entity's obligations under the design-build contract; or

(5) any other form of security deemed suitable by the department.

(p) Performance evaluations. The department will evaluate the performance of a private entity that enters into a design-build contract, and will evaluate the performance of the private entity's major team members, consultants, and subcontractors, in accordance with the requirements of this subsection. Evaluations will be conducted annually at twelve month intervals during the term of the design-build contract, upon termination of the design-build contract, and when the department determines that work is materially behind schedule or not being performed according to the requirements of the design-build contract. Optional evaluations may be conducted as provided in the design-build contract. Acts or omissions that are the subject of a good faith dispute will not be considered. After a performance evaluation is conducted, and for at least 30 days before the evaluation becomes final and is used by the department, the department will provide for review and comment a copy of the performance evaluation report to the entity being evaluated and, if that entity is a consultant or subcontractor, to the entity that entered into the design-build contract. The department will consider and take into account any submitted comments before the department finalizes the performance evaluation report. The results of performance evaluations will be provided to the entity that was evaluated and may be used in the evaluation of qualifications submittals and proposals submitted under §9.153 of this subchapter and §27.4 of this title (relating to Solicited Proposals) by proposers that include the major team members, consultants, and subcontractors evaluated.

§9.153. Solicitation of Proposals.

(a) Request for qualifications - notice. If authorized by the commission to issue a request for qualifications for a highway project, the department will set forth the basic criteria for qualifications, experience, technical competence and ability to develop the project, and such other information as the department considers relevant or necessary in the request for qualifications. The department will publish notice advertising the issuance of the request for qualifications in the *Texas Register* and will post the notice and the request for qualifications on the department's Internet website. The department may also elect to furnish the request for qualifications to businesses in the private sector that the department otherwise believes might be interested and qualified to participate in the project that is the subject of the request for qualifications.

(b) Request for qualifications - content. At its sole option, the department may elect to furnish conceptual designs, fundamental details, technical studies and reports or detailed plans of the proposed project in the request for qualifications, and may request conceptual approaches to bringing the project to fruition. A request for qualifications must include:

(1) information regarding the proposed project's location, scope, and limits;

(2) information regarding funding that may be available for the project;

(3) criteria that will be used to evaluate the qualifications submittals;

(4) the relative weight to be given to the criteria;

(5) the deadline by which qualifications submittals must be received by the department; and

(6) any other information the department considers relevant or necessary.

(c) Request for qualifications - evaluation. The department, after evaluating the qualification submittals received in response to a request for qualifications, will identify and approve a "short-list" that is composed of those entities that are considered most qualified to submit detailed proposals for a proposed project. In evaluating the qualification submittals, the department will consider the results of performance evaluations conducted by the department under §9.152 of this subchapter (relating to General Rules for Design-Build Contracts) and §27.3 of this title (relating to General Rules for Private Involvement) determined by the department to be relevant to the project, the results of other performance evaluations determined by the department to be relevant to the project, and other objective evaluation criteria that the department considers relevant to the project, including a proposer's qualifications, experience, technical competence, and ability to develop the project, and that may include the private entity's financial condition, management stability, staffing, and organizational structure. The department

may interview entities responding to a request for qualifications. The department shall short-list at least two private entities to submit proposals, but may not short-list more private entities than the number of private entities designated in the request for qualifications if a maximum number is designated. The department shall advise each entity providing a qualifications submittal whether it is on the short-list of qualified entities.

(d) Requests for proposals. If authorized by the commission, the department will issue a request for proposals from all private entities qualified for the short-list, consisting of the submission of detailed documentation regarding the project. A request for proposals must include:

(1) information on the overall project goals;

(2) publicly available cost estimates for the design-build portion of the project;

(3) materials specifications;

(4) special material requirements;

(5) a schematic design approximately 30 percent complete;

(6) known utilities;

(7) quality assurance and quality control requirements;

(8) the location of relevant structures;

(9) notice of any rules or goals adopted by the department relating to awarding contracts to disadvantaged business enterprises or small business enterprises;

(10) available geotechnical or other information related to the project;

(11) the status of any environmental review of the project;

(12) detailed instructions for preparing the technical proposal, including a description of the form and level of completeness of drawings expected;

(13) the relative weighting of the technical and cost proposals and the formula by which the proposals will be evaluated and ranked, which must allocate at least 70 percent of weighting to the cost proposal;

(14) the criteria to be used in evaluating the technical proposals, and the relative weighting of those criteria;

(15) the proposed form of design-build contract; and

(16) any other information the department considers relevant or necessary.

(e) Request for proposals - submittal requirements. The request for proposals must require the submission of a sealed technical proposal and a separate sealed cost proposal no later than the 180th day after the issuance of the request for proposals, and that provide information relating to:

(1) the feasibility of developing the project as proposed;

(2) the proposed solutions to anticipated problems;

(3) the ability of the proposer to meet schedules;

(4) the engineering design proposed;

(5) the cost of delivering the project;

(6) the estimated number of days required to complete the project; and

(7) any other information requested by the department.

(f) Requests for proposals - payment for work product. The request for proposals shall stipulate an amount of money, as authorized under Transportation Code, §223.249, that the department will pay to an unsuccessful proposer that submits a proposal that is responsive to the requirements of the request for proposals. The commission shall approve the amount of the payment to be stipulated in the request for proposals, which must be a minimum of twenty-five hundredths of one percent of the contract amount. The request for proposals shall provide for the payment of a partial amount in the event the procurement is terminated. In determining the amount of the payment, the commission shall consider:

(1) the effect of a payment on the department's ability to attract meaningful proposals and to generate competition;

(2) the work product expected to be included in the proposal and the anticipated value of that work product; and

(3) the costs anticipated to be incurred by a private entity in preparing a proposal.

(g) Request for proposals - evaluation. The proposals will be evaluated by the department based on the results of performance evaluations conducted by the department under §9.152 of this subchapter and §27.3 of this title determined by the department to be relevant to the project, the results of other performance evaluations determined by the department to be relevant to the project, and other objective evaluation criteria the department deems appropriate for the project, including those criteria deemed appropriate by the department to maximize the overall performance of the project and the resulting benefits to the state. Specific evaluation criteria and requests for pertinent information will be set forth in the request for proposals. The department shall first open, evaluate, and score each responsive technical proposal, and shall subsequently open, evaluate, and score the cost proposals from proposers that submitted a responsive technical proposal and assign points on the basis of the weighting specified in the request for proposals.

(h) Apparent best value proposal. Based on the evaluation using the evaluation criteria described under subsection (g) of this section and set forth in the request for proposals, the department will rank all proposals that are complete, responsive to the request for proposals, and in conformance with the requirements of this subchapter, in accordance with the formula provided in the request for proposals. The department may select the private entity whose proposal offers the apparent best value to the department.

(i) Selection of entity. The department shall submit a recommendation to the commission regarding approval of the proposal determined to provide the apparent best value to the department. The commission may approve or disapprove the recommendation, and if approved, will award the design-build contract to the apparent best value proposer. Award may be subject to the successful completion of negotiations, any necessary federal action, execution by the executive director of the design-build contract, and satisfaction of such other conditions that are identified in the request for proposals or by the commission. The proposers will be notified in writing of the department's rankings. The department shall also make the rankings available to the public.

(j) Negotiations with selected entity. If authorized by the commission, the department will attempt to negotiate a design-build contract with the apparent best value proposer. If a design-build contract satisfactory to the department cannot be negotiated with that proposer, or if, in the course of negotiations, it appears that the proposal will not provide the department with the overall best value, the department will formally and in writing end negotiations with that proposer and, in its sole discretion, either:

(1) reject all proposals;

(2) modify the request for proposals and begin again the submission of proposals; or

(3) proceed to the next most highly ranked proposal and attempt to negotiate a design-build contract with that entity in accordance with this paragraph.

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

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General Counsel
Texas Department of Transportation
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For further information, please call: (512) 463-8683

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CHAPTER 27. TOLL PROJECTS
SUBCHAPTER A. COMPREHENSIVE DEVELOPMENT AGREEMENTS

43 TAC §27.3, §27.4

The Texas Department of Transportation (department) adopts amendments to §27.3, General Rules for Private Involvement, and §27.4, Solicited Proposals, both concerning Comprehensive Development Agreements. The amendments to §27.3 and §27.4 are adopted with changes to the proposed text as published in the May 11, 2012, issue of the *Texas Register* (37 TexReg 3559).

EXPLANATION OF ADOPTED AMENDMENTS

The department's own experience, and that of other agencies, establishes that evaluating developer performance periodically during the term of an agreement and discussing the results with developers is a powerful motivator for developers to maintain high quality performance or improve inadequate performance, and is one of the most important tools available for ensuring good developer performance.

Past performance information is an important tool for use in future evaluations of qualifications and proposals, and in the award of comprehensive development agreements. The use of past performance as an evaluation factor in the contract award process is instrumental in making "best value" selections. It enables the department to better predict the quality of future work.

These amendments provide for the department's periodic evaluation of a developer's performance under a comprehensive development agreement, and of the developer's major team members, consultants, and subcontractors. The amendments also provide for the consideration of the results of those evaluations and other evaluations of past performance in the evaluation of qualifications statements submitted in response to a request for qualifications, and proposals submitted in response to a request for proposals. Past performance under other contracts determined by the department to be relevant to the project being delivered under the prospective agreement is an important indicator of a proposer's ability to perform the prospective agreement successfully.

Amendments to §27.3 provide that the department will evaluate the performance of a private entity that enters into a comprehensive development agreement, and will evaluate the performance of the private entity's major team members, consultants, and subcontractors. Evaluations will be conducted annually at twelve month intervals during the term of the comprehensive development agreement, upon termination of the comprehensive development agreement, and when the department determines that work is materially behind schedule or not being performed according to the requirements of the comprehensive development agreement. Optional evaluations may be conducted as provided in the comprehensive development agreement. Acts or omissions that are the subject of a good faith dispute will not be considered.

After a performance evaluation is conducted, and for at least 30 days before the evaluation becomes final and is used by the department, the department will provide for review and comment a copy of the performance evaluation report to the entity being evaluated and, if that entity is a consultant or subcontractor, to the entity that entered into the comprehensive development agreement. The department will consider and take into account any submitted comments in finalizing the performance evaluation report.

Amendments to §27.4 provide that the department will consider the results of performance evaluations conducted by the department under §27.3 and 43 TAC §9.152 (concerning Design-Build Contracts) determined by the department to be relevant to the project, the results of other performance evaluations determined by the department to be relevant to the project, and other objective criteria that the department considers appropriate in the evaluation of qualifications statements submitted in response to a request for qualifications, and in the evaluation of proposals for a comprehensive development agreement.

COMMENTS

Comments were received from the Texas Association of Business (TAB).

Comment: TAB commented that they are encouraged by the department's recognition that objective performance review is an important part of the process of future evaluation of contracts and development agreements. They believe the private sector plays a critical role in future infrastructure development in Texas and that any new regulations must serve to further encourage private sector participation and fair and open competition toward innovative delivery of greatly needed transportation resources and traffic congestion relief. TAB commented that they trust that the department shares their belief in an objective review process that ensures fair competition and the highest and best use of taxpayer dollars. TAB stated that their comments are intended to make clear to the public that changes proposed to be made to the competitive procurement process will only enhance the effective and efficient use of their resources in advancing our transportation needs and support the mutual goal of a factual, objective, and transparent process that promotes participation by qualified contractors and developers. TAB strongly supports the clear and objective standards and criteria that must be a part of any improved evaluation process.

Response: The department agrees that these rules must further encourage private sector participation and fair and open competition toward the delivery of greatly needed transportation

projects. Performance evaluations conducted by the department under these rules will be conducted in an objective and transparent manner, using objective criteria, and with consideration of any comments on the evaluation submitted by the entity being evaluated.

Comment: TAB commented that the department should evaluate the relevant performance of the private entity that enters into a comprehensive development agreement, and of the private entity's major team members, consultants, and subcontractors, all based on the objective criteria specified in §27.3(q).

Response: The department agrees that evaluations should be limited to major team members, consultants, and subcontractors, and has made that change to §27.3. All performance of the private entity may be relevant to an evaluation. Performance evaluations conducted by the department under these rules will be conducted in an objective and transparent manner, using objective criteria. Section 27.3 has been amended to clarify that the evaluations will be conducted in accordance with the requirements of §27.3(q).

Comment: TAB commented that evaluations that are not annual evaluations or conducted at the end of the agreement should be limited to circumstances when the department determines that work is materially behind schedule or not being performed substantially according to the material requirements of the comprehensive development agreement.

Response: The department agrees that evaluations should be conducted only when the work is materially behind schedule and has made that change. The department does not believe that performing work substantially in accordance with material requirements of the agreement is sufficient to prevent the department from conducting an evaluation if deemed necessary, and has not made those changes.

Comment: TAB commented that all evaluations conducted pursuant to §27.3(q) should be based upon and limited to objective, verifiable criteria that are material indicators of performance substantially in accordance with the material terms of the comprehensive development agreement, and provides examples of such criteria.

Response: The department agrees that performance evaluations should be conducted in an objective and transparent manner, using objective criteria, but does not believe it is necessary to state that in §27.3.

Comment: TAB commented that performance evaluations should not consider acts or omissions that are the subject of a good faith dispute.

Response: The department agrees and has made that change.

Comment: TAB commented that the department should provide an entity being evaluated a period of at least 30 days to review and comment on the performance evaluation before the evaluation becomes final and is used by the department. TAB commented that the department should reasonably consider and take into account any submitted comments before the department finalizes the performance evaluation report.

Response: The department has amended §27.3 to provide a review and comment period of at least 30 days and to commit to consider and take into account any submitted comments.

Comment: TAB commented that the relevant final results of performance evaluations should be provided to the entity being evaluated.

Response: The department agrees that final evaluation reports should be provided to the entity that was evaluated and has made that change.

Comment: TAB commented that only the relevant final results of performance evaluations conducted by the department under §27.3 and §9.152 and other objective criteria should be considered by the department in the evaluation of qualifications submittals and proposals, and that the department should not consider the results of other performance evaluations determined by the department to be relevant to the project.

Response: The department agrees that all performance evaluations considered should be determined by the department to be relevant to the project being procured, and has made that change. The department disagrees with the notion that other performance evaluations determined by the department to be relevant to the project should not be considered. Performance under contracts other than comprehensive development agreements and design-build contracts is also important in predicting the quality of future work under the prospective comprehensive development agreement.

Comment: TAB commented that the department's consideration of the relevant final results of performance evaluations in the evaluation of qualification submittals and proposals should be evenhanded, objective, and transparent and should take into account and give credit for not only good performance but also performance that materially deviates from the requirements of the comprehensive development agreement, all when measured against specified objective criteria.

Response: The department agrees that performance evaluations should be conducted in an objective and transparent manner, using objective criteria, but does not believe it is necessary to state that in §27.3.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §223.209, which requires the commission to adopt rules, procedures, and guidelines governing selection of a developer for a comprehensive development agreement and negotiations to promote fairness, obtain private participants in projects, and promote confidence among those participants.

CROSS REFERENCE TO STATUTE

Transportation Code, §223.209.

§27.3. General Rules for Private Involvement.

(a) Solicited and unsolicited proposals. The rules in this subchapter address the manner by which the department intends to evaluate submissions received from private entities in response to requests for qualifications and proposals issued by the department, as well as unsolicited proposals received by the department.

(b) Reservation of rights. The department reserves all rights available to it by law in administering these rules, including without limitation the right in its sole discretion to:

(1) withdraw a request for qualifications or a request for proposals at any time, and issue a new request;

(2) reject any and all qualifications submittals or proposals, whether solicited or unsolicited, at any time;

(3) terminate evaluation of any and all qualifications submittals or proposals, whether solicited or unsolicited, at any time;

(4) issue a request for qualifications relating to a project described in an unsolicited proposal after the rejection or termination of the evaluation of the proposal and any competing proposals;

(5) suspend, discontinue, or terminate comprehensive development agreement negotiations with any proposer at any time prior to the actual authorized execution of such agreement by all parties;

(6) negotiate with a proposer without being bound by any provision in its proposal, whether solicited or unsolicited;

(7) negotiate with a proposer to include aspects of unsuccessful proposals for that project in the comprehensive development agreement;

(8) request or obtain additional information about any proposal from any source;

(9) modify, issue addenda to, or cancel any request for qualifications or request for proposals;

(10) waive deficiencies in a qualifications submittal or proposal, accept and review a non-conforming qualifications submittal or proposal, or permit clarifications or supplements to a qualifications submittal or proposal;

(11) revise, supplement, or make substitutions for all or any part of these rules; or

(12) retain or return all or any portion of the fees required to be paid by proposers under this subchapter, as provided in subsection (h) of this section.

(c) Costs incurred by proposers. Except as provided in §27.4(f) of this subchapter (relating to Solicited Proposals), under no circumstances will the state, the department, or any of their agents, representatives, consultants, directors, officers, or employees be liable for, or otherwise obligated to, reimburse the costs incurred by proposers, whether or not selected for negotiations, in developing solicited or unsolicited proposals or in negotiating agreements.

(d) Department information. Any and all information the department makes available to proposers shall be as a convenience to the proposer and without representation or warranty of any kind except as may be expressly specified in the request for qualifications or request for proposals. Proposers may not rely upon any oral responses to inquiries.

(e) Procedure for communications. If a proposer has a question or request for clarification regarding these rules or any request for qualifications or request for proposals issued by the department, the proposer shall submit the question or request for clarification in writing to the person responsible for receiving those submissions, as designated in the request for qualifications or request for proposals, and the department will provide the responses in writing. The proposer shall also comply with any other provisions in the request for qualifications or request for proposals regulating communications.

(f) Compliance with rules. In submitting any proposal, the proposer shall be deemed to have unconditionally and irrevocably consented and agreed to the foregoing provisions and all other provisions of this subchapter.

(g) Proposer information submitted to department. All qualifications submittals or proposals submitted to the department become the property of the department and may be, except as provided by Transportation Code, §223.204, subject to the Public Information Act, Government Code, Chapter 552. Proposers should familiarize themselves with the provisions of Transportation Code, §223.204 and the Public Information Act. In no event shall the state, the department, or any of their agents, representatives, consultants, directors, officers, or employees be liable to a proposer for the disclosure of all or a portion of a proposal submitted under this subchapter. If the department receives a request for public disclosure of all or any portion of a proposal, the department will notify the applicable proposer of the request and inform such proposer that it has an opportunity to assert, in writing, a claimed exception under the Public Information Act or other applicable law within the time period specified in the department's notice and allowed under the Public Information Act. If a proposer has special concerns about information it desires to make available to the department, but which it believes constitutes a trade secret, proprietary information or other information excepted from disclosure, the proposer should specifically and conspicuously designate that information as such in its proposal. The proposer's designation shall not be dispositive of the trade secret, proprietary, or exempted nature of the information so designated.

(h) Proposal review fee. A nonnegotiable proposal review fee shall be required for any unsolicited proposal submitted under this subchapter and applied by the department to offset the cost of processing and reviewing the proposal. An unsolicited proposal for a project in the department's unified transportation program must be accompanied by a proposal review fee of $5,000. An unsolicited proposal for a project that is not in the department's unified transportation program must be accompanied by a proposal review fee of $10,000. The executive director may approve a proposal review fee for a particular project in a lower amount. In approving a lower fee, the executive director shall consider the complexity of the project. Failure to submit the required proposal review fee shall bar the department's consideration of the applicable proposal. All fees shall be submitted in the form of a cashier's check made payable to the department. A proposal review fee that is submitted with a proposal for a project that is not an eligible project, or that the department is not otherwise legally authorized to accept shall be returned to the proposer. All other proposal review fees are nonrefundable.

(i) Sufficiency of proposal. All proposals, whether solicited or unsolicited, should be as thorough and detailed as possible so that the department may properly evaluate the potential feasibility of the proposed project as well as the capabilities of the proposer and its team members to provide the proposed services and complete the proposed project.

(j) Project studies. Studies that the department deems necessary as to route designation, civil engineering, traffic and revenue, environmental compliance, and any other matters will be assigned, conducted, and paid for as negotiated between the department and the successful proposer and set forth in the comprehensive development agreement or in any separate contract for consultant services. Unless otherwise provided in the request for proposals, the department will favor proposals in which the costs for studies will be advanced by the private entity, particularly if the advance is at the private entity's risk. The department may elect to pay, in whole or in part, the costs for such studies in its sole discretion. The department may require that the financial plan for each proposal provide for reimbursement of all related expenses incurred by the department, as well as any department study funds utilized in connection with the project.

(k) Proposer's additional responsibilities. The department, in its sole discretion, may authorize the successful proposer to seek licensing, permitting, approvals, and participation required from other governmental entities and private parties, subject to such oversight and review by the department as specified in the comprehensive development agreement or in any separate contract for consultant services.

(l) Proposer's work on environmental review of eligible project. The department may solicit proposals or accept unsolicited proposals in which the proposer is responsible for providing assistance in the environmental review and clearance of an eligible project, including the preparation of environmental impact assessments and analyses and the provision of technical assistance and technical studies to the department or its environmental consultant relating to the environmental review and clearance of the proposed project. The environmental review and the documentation of that review shall at all times be conducted as directed by the department and subject to the oversight of the department, and shall comply with all requirements of state and federal law, applicable federal regulations, and the National Environmental Policy Act (42 U.S.C. §4321 et seq.), if applicable, including but not limited to the study of alternatives to the proposed project and any proposed alignments, procedural requirements, and the completion of any and all environmental documents required to be completed by the department and any federal agency acting as a lead agency. The department:

(1) shall determine the scope of work to be performed by the private entity or its consultants or subcontractors;

(2) shall specify the level of design, alternatives to be reviewed, impacts to consider, and other information to be provided by the private entity or its consultants or subcontractors; and

(3) shall independently review any studies and conclusions reached by the private entity or its consultants or subcontractors before their inclusion in an environmental document.

(m) Effect of environmental requirements on comprehensive development agreement. Completion of the environmental review is required before the private entity may be authorized to conduct and complete the final design and start construction of a project. Additionally, all applicable state and federal environmental permits and approvals must be obtained before the private entity may start construction of the portion of a project requiring the permit or approval. Unless and until that occurs, the department is not bound to any further development of the project. The department, and any federal agency acting as a lead agency, may select an alternative other than the one in the proposed project, including the "no-build" alternative. A comprehensive development agreement shall provide that the agreement will be modified as necessary to address requirements in the final environmental documents, and shall provide that the agreement may be terminated if the "no-build" alternative is selected or if another alternative is selected that is incompatible with the requirements of the agreement.

(n) Public meetings and hearings. All public meetings or hearings required to be held pursuant to applicable law or regulation will be directed and overseen by the department, with participation by such other parties as it deems appropriate.

(o) Additional matters. Any matter not specifically addressed in this subchapter which pertains to the acquisition, design, development, financing, construction, reconstruction, extension, expansion, maintenance, or operation of an eligible project pursuant to this subchapter, shall be deemed to be within the primary purview of the commission, and all decisions pertaining thereto, whether or not addressed in this subchapter, shall be as determined by the commission, subject to the provisions of applicable law.

(p) Performance and payment security. The department shall require a private entity entering into a comprehensive development agreement to provide a performance and payment bond or an alternative form of security in an amount that, in the department's sole determination, is sufficient to ensure the proper performance of the agreement, and to protect the department and payment bond beneficiaries supplying labor or materials to the private entity or a subcontractor of the private entity. Bonds and alternate forms of security shall be in the form and contain the provisions required in the request for proposals or the comprehensive development agreement, with such changes or modifications as the department determines to be in the best interest of the state. In addition to, or in lieu of, performance and payment bonds, the department may require:

(1) a cashier's check drawn on a federally insured financial institution, and drawn to the order of the department;

(2) United States bonds or notes, accompanied by a duly executed power of attorney and agreement authorizing the collection or sale of the bonds or notes in the event of the default of the private entity or a subcontractor of the private entity, or such other act or event that, under the terms of the comprehensive development agreement, would allow the department to draw upon or access such security;

(3) an irrevocable letter of credit issued or confirmed by a financial institution to the benefit of the department, meeting the credit rating and other requirements prescribed by the department, and providing coverage for a period of at least one year following final acceptance of the project and completion of any warranty period;

(4) an irrevocable letter signed by a guarantor meeting the net worth or other financial requirements prescribed in the request for proposals or comprehensive development agreement, and which guarantees, to the extent required under the request for proposals or comprehensive development agreement, the full and prompt payment and performance when due of the private entity's obligations under the comprehensive development agreement and other documents and agreements executed by the private entity in connection with the comprehensive development agreement; or

(5) any other form of security deemed suitable by the department.

(q) Performance evaluations. The department will evaluate the performance of a private entity that enters into a comprehensive development agreement, and will evaluate the performance of the private entity's major team members, consultants, and subcontractors, in accordance with the requirements of this subsection. Evaluations will be conducted annually at twelve month intervals during the term of the comprehensive development agreement, upon termination of the comprehensive development agreement, and when the department determines that work is materially behind schedule or not being performed according to the requirements of the comprehensive development agreement. Optional evaluations may be conducted as provided in the comprehensive development agreement. Acts or omissions that are the subject of a good faith dispute will not be considered. After a performance evaluation is conducted, and for at least 30 days before the evaluation becomes final and is used by the department, the department will provide for review and comment a copy of the performance evaluation report to the entity being evaluated and, if that entity is a consultant or subcontractor, to the entity that entered into the comprehensive development agreement. The department will consider and take into account any submitted comments in finalizing the performance evaluation report. The results of performance evaluations will be provided to the entity that was evaluated and may be used in the evaluation of qualifications submittals and proposals under §27.4 of this subchapter and §9.153 of this title (relating to Solicitation of Proposals) by proposers that include the major team members, consultants, and subcontractors evaluated.

§27.4. Solicited Proposals.

(a) Applicability. If the department develops a concept for private participation in an eligible project, it will solicit participation in accordance with the requirements of this section.

(b) Request for qualifications - notice. If authorized by the commission to issue a request for qualifications for an eligible project, the department will set forth the basic criteria for professional experience, technical competence, and capability to complete a proposed project, and such other information as the department considers relevant or necessary in the request for qualifications and will publish it at a minimum in the *Texas Register* and in one or more newspapers of general circulation in this state. The department may also elect to furnish the request for qualifications to businesses in the private sector that the department otherwise believes might be interested and qualified to participate in the project which is the subject of the request for qualifications.

(c) Request for qualifications - content. At its sole option, the department may elect to furnish conceptual designs, fundamental details, technical studies and reports or detailed plans of the proposed project in the request for qualifications. The request for qualifications may request one or more conceptual approaches to bring the project to fruition.

(d) Request for qualifications - evaluation. The department, after evaluating the qualification submittals received in response to a request for qualifications, will identify and approve a "short-list" that is composed of those entities that are considered most qualified to submit detailed proposals for a proposed project. In evaluating the qualification submittals, the department will consider the results of performance evaluations conducted by the department under §27.3 of this subchapter (relating to General Rules for Private Involvement) and §9.152 of this title (relating to General Rules for Design-Build Contracts) determined by the department to be relevant to the project, the results of other performance evaluations determined by the department to be relevant to the project, and other objective evaluation criteria that the department considers relevant to the project, which may include the private entity's financial condition, management stability, technical capability, experience, staffing, and organizational structure. The request for qualifications will include the criteria used to evaluate the qualification submittals and the relative weight given to the criteria. The department shall advise each entity providing a qualification submittal whether it is on the short-list of qualified entities.

(e) Requests for proposals. If authorized by the commission, the department will issue a request for proposals from all private entities qualified for the short-list, consisting of the submission of detailed documentation regarding the project. The request for proposals may require the submission of additional information relating to:

(1) the proposer's qualifications and demonstrated technical competence;

(2) the feasibility of developing the project as proposed;

(3) detailed engineering or architectural designs;

(4) the proposer's ability to meet schedules;

(5) a detailed financial plan, including costing methodology, cost proposals, and project financing approach; or

(6) any other information the department considers relevant or necessary.

(f) Requests for proposals - payment for work product. The request for proposals may stipulate an amount of money, as authorized under Transportation Code, §223.203(m), that the department will pay to an unsuccessful proposer that submits a detailed proposal that is responsive to the requirements of the request for proposals. The commission shall approve the amount of the payment to be stipulated in the request for proposals. In determining whether to approve a payment, the commission shall consider:

(1) the effect of a payment on the department's ability to attract meaningful proposals and to generate competition;

(2) the work product expected to be included in the proposal and the anticipated value of that work product; and

(3) the costs anticipated to be incurred by a private entity in preparing a proposal.

(g) Joint proposal by private entity and environmental consultant. If the department solicits proposals in which an entity affiliated with the proposing private entity will act as the department's environmental consultant for an eligible project, the request for proposals may require the submission of a consolidated joint proposal from the private entity and the environmental consultant or subcontractor that results in a comprehensive development agreement and separate contract for environmental services.

(h) Detailed proposal evaluation criteria. The proposals will be evaluated by the department based on the results of performance evaluations conducted by the department under §27.3 of this subchapter and §9.152 of this title determined by the department to be relevant to the project, the results of other performance evaluations determined by the department to be relevant to the project, and other objective evaluation criteria the department deems appropriate for the project, which may include the reasonableness of any financial plan submitted by a proposer, the reasonableness of the project schedule, reasonableness of assumptions (including those related to ownership, legal liability, law enforcement, and operation and maintenance of the project), forecasts, financial exposure and benefit to the department, compatibility with other planned or existing transportation facilities, likelihood of obtaining necessary approvals and other support, cost and pricing, toll rates and projected usage, scheduling, environmental impact, manpower availability, use of technology, governmental liaison, and project coordination, with attention to efficiency, quality of finished product and such other criteria, including conformity with department policies, guidelines and standards, as may be deemed appropriate by the department to maximize the overall performance of the project and the resulting benefits to the state. Specific evaluation criteria and requests for pertinent information will be set forth in the request for proposals.

(i) Apparent best value proposal. Based on the evaluation and the evaluation criteria described under subsection (h) of this section and set forth in the request for proposals, the department will rank all proposals that are complete, responsive to the request for proposals, and in conformance with the requirements of this subchapter, and may select the private entity whose proposal offers the apparent best value to the department. If the request for proposals provides for a consolidated joint proposal to be submitted for a separate environmental consultant contract as well as the comprehensive development agreement, the request for proposals shall specify how the two parts of the proposal will be evaluated in making the overall best value determination.

(j) Selection of entity. The department shall submit a recommendation to the commission regarding approval of the proposal determined to provide the apparent best value to the department. The commission may approve or disapprove the recommendation, and if approved, will award the comprehensive development agreement to the apparent best value proposer. Award may be subject to the successful completion of negotiations, any necessary federal action, execution by the executive director of the comprehensive development agreement, and satisfaction of such other conditions that are identified in the request for proposals or by the commission. The proposers will be notified in writing of the department's rankings. The department shall also make the rankings available to the public.

(k) Negotiations with selected entity. If authorized by the commission, the department will attempt to negotiate a comprehen-

sive development agreement with the apparent best value proposer to design, develop, construct, finance, reconstruct, extend, expand, maintain, or operate the project and (if included in the request for proposals) an environmental consultant contract. If a comprehensive development agreement satisfactory to the department cannot be negotiated with that proposer, or if, in the course of negotiations, it appears that the proposal will not provide the department with the overall best value, the department will formally end negotiations with that proposer and, in its sole discretion, either:

(1) reject all proposals;

(2) modify the request for proposals and begin again the submission of proposals; or

(3) proceed to the next most highly ranked proposal and attempt to negotiate a comprehensive development agreement with that entity in accordance with this paragraph.

(l) Negotiations with environmental consultant. If an environmental consultant contract satisfactory to the department cannot be negotiated with the selected consultant, the department may elect to terminate negotiations and proceed with the negotiation of the comprehensive development agreement only.

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

Filed with the Office of the Secretary of State on June 29, 2012.

TRD-201203422
Bob Jackson
General Counsel
Texas Department of Transportation
Effective date: July 19, 2012
Proposal publication date: May 11, 2012
For further information, please call: (512) 463-8683

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SUBCHAPTER H. DETERMINATION OF TERMS FOR CERTAIN TOLL PROJECTS

43 TAC §27.92

The Texas Department of Transportation (department) adopts amendments to §27.92, concerning Determination of Terms for Certain Toll Projects. The amendments to §27.92 are adopted without changes to the proposed text as published in the May 11, 2012, issue of the *Texas Register* (37 TexReg 3563) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

Transportation Code, §228.013, which was added by Senate Bill 1420, 82nd Legislature, Regular Session, 2011, requires, for certain department toll projects in which a private entity has a financial interest in the project's performance, that the distribution of the project's financial risk, the method of financing for the project, and the tolling structure and methodology be determined by a committee comprised of representatives from the department, any local toll project entity for the area in which the project is located, the applicable metropolitan planning organization, and each municipality or county that provides revenue or right of way for the project. Section 27.92(b), Financial Terms, provides the requirements for the formation and membership of the committee. Under the current rules, there is no restriction on whom an entity with appointment powers may appoint as the entity's representative on the committee. If an entity appoints a consultant to serve on the committee as the entity's representative, the consultant's membership presents a potential conflict of interest, or the appearance of a conflict of interest, because it presents a situation in which the consultant may have a significant financial or personal interest, or the consultant's firm may have a significant financial interest, in the results of a determination made by the committee that could affect the consultant's decision on a matter before the committee. The resulting potential or apparent conflict of interest could put the integrity of the process in question.

The amendments to §27.92(b) resolve the issue by requiring a committee member to be an elected official or a full-time employee of the entity that appoints the member. This change prohibits the service of a consultant on the committee which eliminates the potential or apparent conflict of interest. Removing the potential conflict helps preserve the integrity of the process for making financial decisions about the affected department toll projects and promotes fairness and enhances confidence in the process.

COMMENTS

No comments on the proposed amendments were received.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §223.209, which requires the commission to adopt rules, procedures, and guidelines governing selection of a developer for a comprehensive development agreement and negotiations to promote fairness, obtain private participants in projects, and promote confidence among those participants.

CROSS REFERENCE TO STATUTE

Transportation Code, §223.209 and §228.013.

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

Filed with the Office of the Secretary of State on June 29, 2012.

TRD-201203423
Bob Jackson
General Counsel
Texas Department of Transportation
Effective date: July 19, 2012
Proposal publication date: May 11, 2012
For further information, please call: (512) 463-8683

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PART 9. NORTH TEXAS TOLLWAY AUTHORITY

CHAPTER 201. PROCUREMENT OF GOODS AND SERVICES AND DISPOSITION OF PROPERTY

The North Texas Tollway Authority (NTTA) adopts the repeal of 43 TAC Chapter 201, including Subchapter A, §§201.1 - 201.13, concerning Procurements; Subchapter B, §§201.20 - 201.25, concerning Appendices; and Subchapter C, §201.30, concern-

ing Definitions, without changes to the proposal published in the May 25, 2012, issue of the *Texas Register* (37 TexReg 3790). The repealed sections will not be republished.

Shortly after the adoption of Chapter 201, the NTTA's governing statute, Transportation Code, Chapter 366, was amended to allow the NTTA to pass regulations by publishing the rules in a newspaper of general circulation in the area in which the NTTA is located. Under new §366.033(b), the NTTA is no longer required to publish rules in the *Texas Register* or Texas Administrative Code. The NTTA has since promulgated a new procurement policy, following the procedures outlined in current §366.033(b). The rules in Chapter 201 are now outdated and therefore are repealed.

The repeal was developed pursuant to Transportation Code, Title 6, Subtitle G, Chapter 366, §366.033(j), which authorizes the NTTA to adopt written procedures governing its procurement of goods and services.

The repeal was approved by the NTTA Board of Directors, by Resolution No. 12-64, in furtherance of its responsibility to adopt rules for the regulation of the NTTA's affairs and the conduct of its business.

No comments were received concerning the proposal. The comment period ended June 25, 2012.

SUBCHAPTER A. PROCUREMENTS

43 TAC §§201.1 - 201.13

STATUTORY AUTHORITY

The repeals are adopted under Transportation Code, Title 6, Subtitle G, Chapter 366, §366.033(j), which authorizes the NTTA to adopt written procedures governing its procurement of goods and services that are consistent with general laws applicable to the Authority.

CROSS REFERENCE TO STATUTE

Transportation Code, §366.033; Transportation Code, §366.184; Transportation Code, §366.185; Local Government Code, Chapter 271; Local Government Code, Chapter 272; Government Code, Chapter 791; Government Code, Chapter 2252; and Government Code, Chapter 2258.

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

Filed with the Office of the Secretary of State on June 26, 2012.

TRD-201203372
Bob Schell
Assistant Director of General Counsel
North Texas Tollway Authority
Effective date: July 16, 2012
Proposal publication date: May 25, 2012
For further information, please call: (214) 461-2043

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SUBCHAPTER B. APPENDICES

43 TAC §§201.20 - 201.25

STATUTORY AUTHORITY

The repeals are adopted under Transportation Code, Title 6, Subtitle G, Chapter 366, §366.033(j), which authorizes the NTTA to adopt written procedures governing its procurement of goods and services that are consistent with general laws applicable to the Authority.

CROSS REFERENCE TO STATUTE

Transportation Code, §366.033; Transportation Code, §366.184; Transportation Code, §366.185; Local Government Code, Chapter 271; Local Government Code, Chapter 272; Government Code, Chapter 791; Government Code, Chapter 2252; and Government Code, Chapter 2258.

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

Filed with the Office of the Secretary of State on June 26, 2012.

TRD-201203373
Bob Schell
Assistant Director of General Counsel
North Texas Tollway Authority
Effective date: July 16, 2012
Proposal publication date: May 25, 2012
For further information, please call: (214) 461-2043

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SUBCHAPTER C. DEFINITIONS

43 TAC §201.30

STATUTORY AUTHORITY

The repeal is adopted under Transportation Code, Title 6, Subtitle G, Chapter 366, §366.033(j), which authorizes the NTTA to adopt written procedures governing its procurement of goods and services that are consistent with general laws applicable to the Authority.

CROSS REFERENCE TO STATUTE

Transportation Code, §366.033; Transportation Code, §366.184; Transportation Code, §366.185; Local Government Code, Chapter 271; Local Government Code, Chapter 272; Government Code, Chapter 791; Government Code, Chapter 2252; and Government Code, Chapter 2258.

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

Filed with the Office of the Secretary of State on June 26, 2012.

TRD-201203374
Bob Schell
Assistant Director of General Counsel
North Texas Tollway Authority
Effective date: July 16, 2012
Proposal publication date: May 25, 2012
For further information, please call: (214) 461-2043

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REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

Texas Board of Pardons and Paroles

Title 37, Part 5

Under the 1997 General Appropriations Act, Article IX, Section 167, Review of Agency Rules, the Texas Board of Pardons and Paroles files this notice of intent to review and consider for readoption, revision, or repeal Texas Administrative Code, Title 37, Part 5, Chapter 143 (Executive Clemency), Subchapter B (Conditional Pardon), Subchapter C (Reprieve), Subchapter D (Reprieve of Execution), Subchapter E (Commutation of Sentence), Subchapter F (Remission of Fines and Forfeitures), and Subchapter G (Restoration of Driver's License); and Chapter 145 (Parole).

The Board undertakes its review pursuant to Government Code, §2001.039. The Board will accept comments for 30 days following the publication of this notice in the *Texas Register* and will assess whether the reasons for adopting the sections under review continue to exist. Proposed changes to the rules as a result of the rule review will be published in the Proposed Rules section of the *Texas Register.* The proposed rules will be open for public comment prior to final adoption by the Board, in accordance with the requirements of the Administrative Procedure Act, Government Code, Chapter 2001.

Any questions or written comments pertaining to this notice of intention to review should for the next 30-day comment period be directed to Bettie Wells, General Counsel, Texas Board of Pardons and Paroles, 209 W. 14th Street, Suite 500, Austin, Texas 78701 or by e-mail to bettie.wells@tdcj.state.tx.us.

TRD-201203456
Bettie Wells
General Counsel
Texas Board of Pardons and Paroles
Filed: July 2, 2012

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Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 25 TAC §229.661(b)(8)(B)(ii)(I)

Table A. Interaction of pH and a_w for control of spores in food heat-treated to destroy vegetative cells and subsequently packaged

a_w values	pH values		
	4.6 or less	> 4.6 - 5.6	> 5.6
≤0.92	non-PHF*/non-TCS food**	non-PHF/non-TCS food	non-PHF/non-TCS food
>0.92 - 0.95	non-PHF/non-TCS food	non-PHF/non-TCS food	PA***
>0.95	non-PHF/non-TCS food	PA	PA

* PHF means Potentially Hazardous Food
** TCS food means Time/Temperature Control for Safety Food
*** PA means Product Assessment required

Figure: 25 TAC §229.661(b)(8)(B)(ii)(II)

Table B. Interaction of pH and a_w for control of vegetative cells and spores in food not heat-treated or heat-treated but not packaged

a_w values	pH values			
	<4.2	4.2 - 4.6	>4.6 - 5.0	>5.0
<0.88	non-PHF*/non-TCS food**	non-PHF/non-TCS food	non-PHF/non-TCS food	non-PHF/non-TCS food
0.88 - 0.90	non-PHF/non-TCS food	non-PHF/non-TCS food	non-PHF/non-TCS food	PA***
>0.90 - 0.92	non-PHF/non-TCS food	non-PHF/non-TCS food	PA	PA
>0.92	non-PHF/non-TCS food	PA	PA	PA

* PHF means Potentially Hazardous Food
** TCS food means Time/Temperature Control for Safety Food
*** PA means Product Assessment required

Figure 1: 30 TAC Chapter 60--Preamble

Existing Formula for Site Ratings

$$\frac{\text{(Violation Points) + (Chronic Excessive Emissions Events Points) + (Repeat Violator Points) - (Self-Audit Points)}}{\text{(Investigations + 1)}} \times \text{(0.9 for Environmental Management System)}$$

Figure 2: 30 TAC Chapter 60--Preamble

Adopted Formula for Site Ratings

$$\frac{\text{(Violation Points) + (Chronic Excessive Emissions Events Points) + (Repeat Violator Points) - (Self-Audit Points)}}{\text{(No. of Investigations x 0.1) + (Complexity Points)}} \times \text{(Voluntary Program Points) } \textit{(If applicable)}$$

Figure 3: 30 TAC Chapter 60--Preamble

$$\text{Site \#1 Compliance History Rating} \times \frac{\text{Complexity Points for Site \#1}}{\text{Sum of all complexity points for all sites associated to the person}}$$

Figure: 30 TAC §285.33(c)(2)(A)(iii)

$L = (0.6A-2W)/(W+2)$

Where:

A = minimum absorptive area calculated with no flow reduction; and

W = width of excavation

Figure: 30 TAC §285.33(c)(2)(A)(iv)

$L = (0.75A-2W)/(W+2)$

Where:

A = minimum absorptive area calculated with no flow reduction; and

W = width of excavation

Figure: 30 TAC §285.90(3)

Figure 3. Sample Testing and Reporting Record.

This testing and reporting record shall be completed, signed, and dated after each maintenance check and test. One copy shall be retained by the maintenance provider performing the maintenance. The second copy shall be sent to the local permitting authority and the third copy shall be sent to the system owner.

1. Required frequency of maintenance check and tests - (daily, weekly, monthly, quarterly, every 4 months).
Actual date of test: _____

2. System inspection:

Property Address:_____

Permit Number:_____

Person Performing Inspection: _____

_____
(Signature of Licensed Maintenance Provider)

Company Name (if applicable): _____

Company physical address: _____

Company Telephone: _____

Inspected Item	**Operational**	**Inoperative**
Aerators		
Filters		
Irrigation Pumps		
Recirculation Pumps		
Sludge Condition		
Disinfection Device		
Chlorine Supply		
Electrical Circuits		
Distribution System		
Sprayfield Vegetation/Seeding (if applicable)		
Other as Noted		

3. Repairs to system (list all components replaced): _____

_____

4. Access ports secured after the maintenance and inspection activities were completed
Yes ☐ No ☐

If not secured, explain: _____

_____

5. Tests required and results:

Test	Required Yes ☐ No ☐	Results mg/l, mpn/100 ml, or trace	Test Method
BOD (Grab)			
TSS (Grab)			
Cl_2 (Grab)			
Fecal Coliform			

6. Date(s) responded to owner complaints during reporting period (attach copy of complaint and findings): _____

_____

7. General comments or recommendations: _____

_____

Figure: 30 TAC §285.91(2)

SEPTIC TANK MINIMUM LIQUID CAPACITY

A. Determine the applicable wastewater usage rate (Q) in TABLE III of 30 TAC Chapter 285.

B. Calculate the minimum septic tank volume (V) as follows:

1. For Q equal to or less than 250 gal/day:
   V = 750 gallons

2. For Q greater than or equal to 251 gal/day but less than or equal to 350 gal/day:
   V = 1000 gallons

3. For Q greater than or equal to 351 gal/day but less than or equal to 500 gal/day:
   V = 1250 gallons

4. For Q greater than or equal to 501 gal/day but less than or equal to 1000 gal/day:
   V = 2.5 Q

5. For Q greater than or equal to 1001 gal/day:
   V= 1,750 + 0.75Q

AEROBIC TREATMENT UNIT SIZING FOR SINGLE FAMILY RESIDENCES, COMBINED FLOWS FROM SINGLE FAMILY RESIDENCES, OR MULTI-UNIT RESIDENTIAL DEVELOPMENTS

Number of bedrooms/living area of home	Minimum Aerobic Tank Treatment Capacity (gallons per day per residential unit)
Three bedrooms and < 2,501 sq. ft. or Less than three bedrooms and 1,500 < sq. ft. < 2,501	360
Four bedrooms and < 3,501 sq. ft. or Less than four bedrooms and 2,500 < sq. ft. < 3,501	480
Five bedrooms and < 4,501 sq. ft. or Less than five bedrooms and 3,500 < sq. ft. < 4,501	600
Six bedrooms and < 5,501 sq. ft. or Less than six bedrooms and 4,500 < sq. ft. < 5,501	720
Seven bedrooms and < 7,001 sq. ft. or Less than seven bedrooms and 5,500 < sq. ft. < 7,001	840
Eight bedrooms and < 8,501 sq. ft. or Less than eight bedrooms and 7,000 < sq. ft. < 8501	960

Nine bedrooms and < 10,001 sq. ft. or Less than nine bedrooms and 8,500 < sq. ft. < 10,001	1,080
Ten bedrooms and < 11,501 sq. ft. or Less than ten bedrooms and 10,000 < sq. ft. < 11,501	1,200
For each additional bedroom above ten or 1,500 additional square feet of living area above 11,500	120

Figure: 30 TAC §285.91(10)

Table X. Minimum Required Separation Distances for On-Site Sewage Facilities.

	TO					
FROM	Tanks	Soil Absorption Systems, & Unlined ET Beds	Lined Evapotranspiration Beds	Sewer Pipe With Watertight Joints	Surface Application (Edge of Spray Area)	Drip Irrigation
Public Water Wells[2]	50	150	150	50	150	150
Public Water Supply Lines[2]	10	10	10	10	10	10
Wells and Underground Cisterns	50	100	50	20	100	100
Private Water Line	10	10	5	10[5] except at connection to structure	No separation distances	10
Wells Completed in accordance with 16 TAC §76.1000(a)(1)	50	50	50	20	50	50
Streams, Ponds, Lakes, Rivers, Creeks (Measured From Normal Pool Elevation and Water Level); Salt	50	75 LPD with secondary treatment & disinfection -	50	20	50	25 when $R_a < 0.1$ 75 when $R_a > 0.1$ (With Secondary Treatment & Disinfection - 50)

Water Bodies (High Tide Only); Retention Ponds/Basin (Spillway elevation)		50				
Foundations, Buildings, Surface Improvements, Property Lines, Swimming Pools, and Other Structures	5	5	5	5 Pipe may run beneath driveways and sidewalks or up to surface improvements if it is Schedule 80 pipe or sleeved in Schedule 40 pipe Pipe containing secondary effluent has no setbacks from building foundations	No Separation Distances Except: Property lines - 20[6] Swimming Pools - 25	No Separation Distances Except[4]: Property Lines - 5
Underground Easements	1	1	1	1	May spray to edge of easement, but not into. Sprinkler heads must be 1 feet from easement edge	1
Overhead Easements	1 No setbacks if permission is	1 No setbacks if permission is	1 No setbacks if permission is granted by	1 No setbacks if permission is	1 No setbacks if permission is	1 No setbacks if permission is

	granted by easement holder	granted by easement holder	easement holder	granted by easement holder	granted by easement holder	granted by easement holder
Slopes Where Seeps may Occur and detention ponds	5	25	5	10	10	10 when R_a< 0.1 25 when R_a>0.1
Edwards Aquifer Recharge Features (See Chapter 213 of this title relating to Edwards Aquifer)[3]	50	150	50	50	150	100 when R_a< 0.1 150 when R_a>0.1

[1] All distances measured in feet, unless otherwise indicated.

[2] For additional information or revisions to these separation distances, see Chapter 290 of this title (relating to Public Drinking Water).

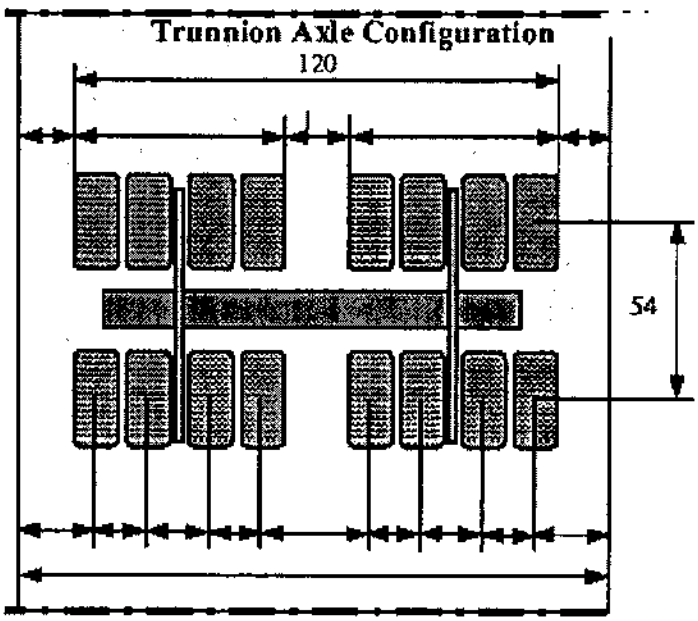
[3] No OSSF may be installed closer than 75 feet from the banks of the Nueces, Dry Frio, Frio, or Sabinal Rivers downstream from the northern Uvalde County line to the recharge zone.

[4] Drip irrigation lines may not be placed under foundations.

[5] Private water line/wastewater line crossings should be treated as public water line crossings, see Chapter 290 of this title (relating to Public Drinking Water).

[6] Separation distance may be reduced to 10 feet when sprinkler operation is controlled by commercial timer. See §285.33(d)(2)(G)(i).

Figure: 43 TAC §28.45(b)(6)(C)



The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Texas State Affordable Housing Corporation

Notice of the Implementation of a 2012B Qualified Mortgage Credit Certificate Program

The Texas State Affordable Housing Corporation (the "Corporation"), a nonprofit corporation organized under the laws of the State of Texas (the "Program Area"), is implementing a qualified mortgage credit certificate program (the "Program") within the Program Area to assist eligible purchasers. A Mortgage Credit Certificate ("MCC") is an instrument designed to assist persons better afford home ownership. The MCC Program allows first-time homebuyers an annual federal income tax credit equal to the lesser of $2,000 or the credit rate for the MCC multiplied by the amount of interest paid by the holder on a home mortgage loan during each year that they occupy the home as their principal residence.

An eligible purchaser of a residence located within a Program Area may apply to the Corporation for an MCC through a participating lender of his or her choice at the time of purchasing a principal residence and obtaining a mortgage loan from a participating lender.

To be an eligible purchaser to receive an MCC, a purchaser must meet the following criteria:

(1) Be one of the following:

(a) A person living in Texas whose annual household income does not exceed 80% Area Median Family Income (AMFI);

(b) A full-time Texas classroom teacher, teacher's aide, school librarian, school nurse, school counselor, or an allied health or nursing faculty member whose annual family income does not exceed 100% of AMFI (for families of two persons or less) or 115% of AMFI (for families of three or more persons); or

(c) A full-time paid fire fighter, peace officer, corrections officer, juvenile corrections officer, county jailer, EMS personnel, or public security officer, working in the State of Texas whose annual family income does not exceed 100% of AMFI (for families of two persons or less) or 115% of AMFI (for families of three or more persons).

Visit www.tsahc.org for a more complete description of the maximum income limits.

(2) The applicant for the MCC cannot have had an ownership interest in his or her principal residence during the three-year period ending on the date the mortgage loan is obtained.

(3) The applicant must intend to occupy the residence with respect to which the MCC is obtained as his or her principal residence within 60 days after the MCC is issued. The MCC issued to an applicant will be revoked if the residence to which the MCC relates ceases to be occupied by the applicant as his or her principal residence.

(4) The MCC cannot be issued to an applicant in conjunction with the replacement or refinancing of an existing mortgage loan. The MCC can, however, be obtained in conjunction with the replacement of a construction period or bridge loan having a term of less than 24 months.

(5) Federal law imposes limitations on the purchase price of homes financed under the program. These limitations are periodically adjusted. Visit www.tsahc.org to view the current maximum purchase prices allowed. Two-family, three-family and four-family residences are also eligible, provided that one of the units will be occupied by the mortgagor as his or her principal residence and that the residence was first occupied for residential purposes at least five years prior to the closing of the mortgage.

Anyone receiving an MCC and selling his or her residence within nine years of the issuance of the MCC may be required to return all or a portion of the tax credit received in connection therewith to the Internal Revenue Service.

To defray the costs of implementing the Program, the Corporation will charge applicants a compliance fee, plus an MCC issuance fee equal to one percent of the amount of such person's loan.

The Corporation strongly encourages anyone who believes that he or she qualifies for an MCC to apply at the offices of a participating lender. For more information regarding the Program and its restrictions, including a list of current participating lenders, please contact the Paige Omohundro, Homeownership Finance Manager, at (888) 638-3555 or by email at pomohundro@tsahc.org.

TRD-201203439
David Long
President
Texas State Affordable Housing Corporation
Filed: June 29, 2012

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Office of the Attorney General

Notice of Settlement of a Texas Water Code Enforcement Action

Notice is hereby given by the State of Texas of the following proposed resolution of an environmental enforcement lawsuit under the Texas Water Code. Before the State may settle a judicial enforcement action under the Texas Water Code, the State shall permit the public to comment in writing on the proposed judgment. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed agreed judgment if the comments disclose facts or considerations that indicate that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Texas Water Code.

Case Title and Court: *Harris County, Texas and the State of Texas acting on behalf of the Texas Commission on Environmental Quality v. Johnny Mouser, Lisa Mouser, and Mouser Container Service, Inc.,* Cause No. 2011-41246, in the 152nd Judicial District Court, Harris County, Texas.

Nature of Defendant's Operations: Defendants have violated environmental laws and regulations by processing and storing large quantities of Municipal Solid Waste in Harris County, Texas, without authorization.

Proposed Agreed Judgment: The Agreed Final Judgment and Permanent Injunction orders Defendants Mouser Container Services, Inc., Johnny Mouser, and Lisa Mouser to pay $40,000 in civil penalties, to

be divided equally between Harris County and the State of Texas. In addition, the Defendant will pay $2,750 in attorney's fees to the State of Texas.

For a complete description of the proposed settlement, the complete proposed Agreed Final Judgment and Permanent Injunction should be reviewed. Requests for copies of the judgment, and written comments on the proposed settlement, should be directed to Anthony W. Benedict, Assistant Attorney General, Office of the Texas Attorney General, P.O. Box 12548, Austin, Texas 78711-2548, (512) 463-2012, facsimile (512) 320-0911. Written comments must be received within 30 days of publication of this notice to be considered.

TRD-201203399
Katherine Cary
General Counsel
Office of the Attorney General
Filed: June 27, 2012

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Camino Real Regional Mobility Authority

Notice of Intent to Issue Request for Proposals for Toll System Integration and Maintenance

The Camino Real Regional Mobility Authority ("CRRMA") a political subdivision of the State of Texas, is soliciting proposals from firms with toll collection systems expertise interested in providing the CRRMA with toll systems integration and maintenance services for use on the Loop 375 César Chávez - Border Highway Managed Lanes Project (the "Managed Lanes") located in El Paso, Texas.

CRRMA intends to issue a Request for Proposals ("RFP") to procure Toll System Integration and Maintenance services for the Managed Lanes. The RFP will be available on or about July 27, 2012. Copies may be obtained from the CRRMA website at www.crrma.org. Periodic updates, addenda, and clarifications will be posted on the CRRMA website and interested parties are responsible for monitoring the website accordingly. Final proposals must be received by the Camino Real Regional Mobility Authority, 2 Civic Center Plaza, 9th Floor, El Paso, Texas 79901 by 4:00 p.m., M.D.T., September 13, 2012, to be eligible for consideration. Each proposal will be evaluated based on the criteria and process set forth in the RFP. The final selection of a toll systems integrator, if any, will be made by the CRRMA Board of Directors.

Questions concerning this RFP should be submitted in writing to Camino Real Regional Mobility Authority, 2 Civic Center Plaza, 9th Floor, El Paso, Texas 79901, Attn: Raymond Telles or via email to tellesrl@crrma.org. All deadlines for submission of questions are included in the RFP.

TRD-201203494
Raymond Telles
Executive Director
Camino Real Regional Mobility Authority
Filed: July 3, 2012

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.005, and 303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 07/09/12 - 07/15/12 is 18% for Consumer[1]/Agricultural/Commercial[2] credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 07/09/12 - 07/15/12 is 18% for Commercial over $250,000.

The monthly ceiling as prescribed by §303.005[3] for the period of 07/01/12 - 07/31/12 is 18% for Consumer/Agricultural/Commercial credit through $250,000.

The monthly ceiling as prescribed by §303.005 for the period of 07/01/12 - 07/31/12 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

[3]For variable rate commercial transactions only.

TRD-201203492
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: July 3, 2012

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Employees Retirement System of Texas

Contract Award Announcement

This contract award notice is being filed by the Employees Retirement System of Texas (Physical Address: 200 E. 18th Street, Austin, Texas 78701; Mailing Address: P.O. Box 13207, Austin, Texas 78711-3207; ATTN: Chris Wood, ERS Purchasing Team Lead) in relation to contracts awarded with regard to Request for Proposal for Co-Sourced Internal Audit Services; Requisition No. 327-94620-120413. Contracts have been awarded to the following:

CliftonLarsonAllen LLP, 11044 Research Boulevard, Suite C-500, Austin, Texas 78759

Weaver and Tidwell, LLP, 1601 S. Mopac Expressway, Suite D-250, Austin, Texas 78746

The cost of the above contracts is estimated to be approximately $378,200.

TRD-201203480
Paula A. Jones
General Counsel and Chief Compliance Officer
Employees Retirement System of Texas
Filed: July 2, 2012

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Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. TWC, §7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. TWC, §7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is August 13, 2012. TWC, §7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a

comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-2545 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be received by 5:00 p.m. on August 13, 2012. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, TWC, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing.**

(1) COMPANY: Addison Enterprises, Incorporated dba Diamond D and dba Minit Mart; DOCKET NUMBER: 2012-0275-PST-E; IDENTIFIER: RN101649762 (Facility 1) and RN101650885 (Facility 2); LOCATION: Crandall and Midlothian, Kaufman and Ellis County; TYPE OF FACILITY: convenience stores with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and (2) and TWC, §26.3475(a) and (c)(1), by failing to monitor the underground storage tanks (USTs) for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring) and also by failing to provide proper release detection for the product piping associated with the UST system; PENALTY: $5,274; ENFORCEMENT COORDINATOR: David Carney, (512) 239-2583; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: All Seasons Center LLC dba All Season 8; DOCKET NUMBER: 2012-0488-PST-E; IDENTIFIER: RN104395975; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.10(b), by failing to maintain underground storage tank (UST) records and making them immediately available for review upon request by agency personnel; and 30 TAC §334.50(b)(1)(A) and (2) and TWC, §26.3475(a) and (c)(1), by failing to monitor the USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring) and also by failing to provide proper release detection for the pressurized piping associated with the UST system; PENALTY: $3,632; ENFORCEMENT COORDINATOR: Keith Frank, (512) 239-1203; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(3) COMPANY: Amphenol Steward Enterprises, Incorporated dba Steward Cable; DOCKET NUMBER: 2011-2122-PWS-E; IDENTIFIER: RN105736722; LOCATION: Midland, Midland County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.110(e)(4)(A) and (f)(3), by failing to submit a Disinfectant Level Quarterly Operating Report to the executive director each quarter by the tenth day of the month following the end of each quarter; and 30 TAC §290.109(c)(2)(A)(i) and §290.122(c)(2)(B) and Texas Health and Safety Code, §341.033(d), by failing to collect routine distribution water samples for coliform analysis for the months of August 2009 - July 2011, and also by failing to provide public notification of the failure to collect routine samples for the months of August 2009 - June 2011; PENALTY: $8,700; ENFORCEMENT COORDINATOR: Katy Schumann, (512) 239-2602; REGIONAL OFFICE: 9900 West IH 20, Suite 100, Midland, Texas 79706, (432) 570-1359.

(4) COMPANY: ASAD TRADING, INCORPORATED dba Mobberly Mart; DOCKET NUMBER: 2012-0369-PST; IDENTIFIER: RN102063385; LOCATION: Longview, Gregg County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to renew a previously issued underground storage tank (UST) delivery certificate by submitting a properly completed UST registration and self-certification form at least 30 days before the expiration date; 30 TAC §334.8(c)(5)(A)(i) and TWC, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the USTs; 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs; and 30 TAC §334.50(b)(1)(A) and (2) and TWC, §26.3475(a) and (c)(1), by failing to monitor the USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring), and also by failing to provide release detection for the piping associated with the USTs; PENALTY: $7,518; ENFORCEMENT COORDINATOR: Jill Russell, (512) 239-4564; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(5) COMPANY: BECK's TEXAS TIRE TERMINAL, INCORPORATED; DOCKET NUMBER: 2012-0467-MSW-E; IDENTIFIER: RN103075958; LOCATION: Burleson, Tarrant County; TYPE OF FACILITY: tire transport and resale; RULE VIOLATED: 30 TAC §328.52(a), by failing to comply with local codes and ordinances; 30 TAC §328.56(d)(3), by failing to sort, mark, classify, and arrange in an organized manner good used tires for sale to consumers; 30 TAC §328.56(d)(2), by failing to obtain a scrap tire storage site registration for the facility prior to storing more than 500 used or scrap tires on the ground or 2,000 used or scrap tires in trailers, or in enclosed or lockable containers; 30 TAC §328.57(e), by failing to submit annual reports to the executive director each calendar year regarding transport of scrap tires; and 30 TAC §328.58(b) and (f), by failing to record all required information on the manifest and maintain the originals of manifests, work orders, invoices or other documentation used to support activities related to the accumulation, handling, and shipment of used or scrap tires; PENALTY: $23,026; ENFORCEMENT COORDINATOR: Mike Pace, (817) 588-5933; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(6) COMPANY: BOMBAY SEASONS, INCORPORATED dba Pete's Corner Store; DOCKET NUMBER: 2012-0221-PST-E; IDENTIFIER: RN102015807; LOCATION: Bryan, Brazos County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tanks for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); 30 TAC §334.72(3)(B), by failing to report a suspected release to the TCEQ within 24 hours of the discovery; and 30 TAC §334.74, by failing to investigate a suspected release of regulated substances within 30 days of discovery; PENALTY: $8,600; ENFORCEMENT COORDINATOR: Judy Kluge, (817) 588-5825; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(7) COMPANY: CEMEX Construction Materials South, LLC; DOCKET NUMBER: 2012-0443-AIR-E; IDENTIFIER: RN102605375; LOCATION: New Braunfels, Comal County; TYPE OF FACILITY: cement manufacturing plant; RULE VIOLATED: 30 TAC §§101.20(3), 116.115(b)(2)(F) and (c), and 122.143(4), New Source Review Permit Numbers 6048 and PSDTX74M1, Special Conditions Number 1, Federal Operating Permit Number O1126, Special Terms and Conditions 1.A., and Texas Health and Safety Code,

§382.085(b), by failing to comply with the hourly allowable emissions rate; PENALTY: $5,500; ENFORCEMENT COORDINATOR: Trina Grieco, (210) 403-4006; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(8) COMPANY: Chevron Phillips Chemical Company LP; DOCKET NUMBER: 2012-0455-AIR-E; IDENTIFIER: RN103919817; LOCATION: Baytown, Harris County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: Federal Operating Permit Number O2115, Special Terms and Conditions Number 8, New Source Review Permit Number 2462C, Special Conditions Number 1, 30 TAC §116.715(a) and §122.143(4), and Texas Health and Safety Code, §382.085(b), by failing to prevent unauthorized emissions. Since this emissions event could have been avoided through better maintenance practices, the respondent is precluded from asserting an affirmative defense under 30 TAC §101.222; PENALTY: $25,000; Supplemental Environmental Project offset amount of $12,500 applied to Houston Regional Monitoring Corporation (HRMC) - HRMC Houston Area Air Monitoring; ENFORCEMENT COORDINATOR: Rebecca Johnson, (361) 825-3423; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(9) COMPANY: Chwiki Corporation dba Panther Market; DOCKET NUMBER: 2012-0374-PST-E; IDENTIFIER: RN101557254; LOCATION: Duncanville, Dallas County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for taking corrective action and compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of the petroleum underground storage tanks (USTs); and 30 TAC §334.10(b)(1)(B), by failing to maintain UST records and making them immediately available for inspection upon request by agency personnel; PENALTY: $5,309; ENFORCEMENT COORDINATOR: Michaelle Sherlock, (210) 403-4076; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(10) COMPANY: City of Houston and BSL GOLF CORPORATION; DOCKET NUMBER: 2012-0652-PST-E; IDENTIFIER: RN102397031; LOCATION: Houston, Harris County; TYPE OF FACILITY: fleet refueling operation; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and (2) and TWC, §26.3475(b) and (c)(1), by failing to monitor the underground storage tanks (USTs) for releases at a frequency of at least once per month (not to exceed 35 days between each monitoring), and also by failing to provide proper release detection for the suction piping associated with the USTs; PENALTY: $2,500; ENFORCEMENT COORDINATOR: Michaelle Sherlock, (210) 403-4076; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(11) COMPANY: Cliffside Guest House, L.L.C.; DOCKET NUMBER: 2012-0189-PWS-E; IDENTIFIER: RN105292841; LOCATION: New Braunfels, Comal County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.109(c)(3)(A)(ii) and (4)(B), by failing to collect one raw groundwater source *escherichia coli* sample from the facility's well within 24 hours of notification of a distribution total coliform-positive sample and also by failing to collect a set of repeat distribution coliform samples within 24 hours of being notified of a total coliform-positive result for a routine distribution coliform sample collected during the months of August and September 2011; 30 TAC §290.109(c)(2)(F), by failing to collect at least five distribution coliform samples the month following a total coliform-positive sample result for the month of September 2011; and 30 TAC §290.106(e), by failing to provide the results of quarterly nitrate sampling to the executive director; PENALTY: $1,556; ENFORCEMENT COORDINATOR: Stephen Thompson, (512) 239-2558; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(12) COMPANY: Davis, Thomas W.; DOCKET NUMBER: 2012-1142-WOC-E; IDENTIFIER: RN103963328; LOCATION: Royse City, Rockwall County; TYPE OF FACILITY: individual; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: $175; ENFORCEMENT COORDINATOR: Heather Podlipny, (512) 239-2603; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(13) COMPANY: DuraTherm, Incorporated; DOCKET NUMBER: 2012-0236-MLM-E; IDENTIFIER: RN100890235; LOCATION: San Leon, Galveston County; TYPE OF FACILITY: waste treatment, storage, and disposal; RULE VIOLATED: 30 TAC §335.2(b) and Industrial Hazardous Waste (IHW) Permit Number 50355, Provision Numbers IV-A and IV-B, by failing to prevent the acceptance of a shipment of unauthorized hazardous waste at the facility; 30 TAC §335.152(a)(8) and §305.125 and 40 Code Of Federal Regulations (CFR) §264.193(e)(1)(iii) and IHW Permit Number 50355, Provision Numbers II-C-2-h and V-B-3, by failing to maintain secondary containment free of gaps and cracks; 30 TAC §335.6(c) and IHW Permit Number 50355, Provision Number II-C-1-h, by failing to update the facility's Notice of Registration regarding waste management activities; 30 TAC §335.152(a)(4) and 40 CFR §262.20 and IHW Permit Number 50355, Provision Number II-C-1-h, by failing to use a new manifest for rejected wastes; 30 TAC §335.69(a)(1)(A) and §335.112(a) and 40 CFR §262.34(c)(1)(i) and §265.173(a) and IHW Permit Number 50355, Provision Number II-C-1, by failing to maintain hazardous waste containers in a container storage area closed except when adding or removing wastes; 30 TAC §335.9(a)(1)(G), by failing to maintain records of hazardous and industrial solid waste activities; 30 TAC §335.112(a)(21) and §335.152(a)(19) and 40 CFR §264.1089(b) and §265.1090(b), by failing to record inspections of the air emission control equipment; and 30 TAC §324.12(2) and 40 CFR §279.51 and §279.73 by failing to obtain a used oil registration and Environmental Protection Agency Identification Number prior to conducting used oil activities; PENALTY: $37,233; Supplemental Environmental Project offset amount of $14,893 applied to Galveston Bay Foundation - Marsh Mania; ENFORCEMENT COORDINATOR: Mike Pace, (817) 588-5933; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(14) COMPANY: E. R. Carpenter, L.P.; DOCKET NUMBER: 2012-0784-AIR-E; IDENTIFIER: RN100210830; LOCATION: Pasadena, Harris County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §116.115(c) and §122.143(4), Permit Number 4757, Special Conditions (SC) Number 11.C., Federal Operating Permit (FOP) Number O1443, Special Terms and Conditions Number 10, and Texas Health and Safety Code (THSC), §382.085(b), by failing to prevent visible emissions from the flare from exceeding a total of five minutes during any two consecutive hours; and 30 TAC §§101.20(2), 116.115(c), and 122.143(4), 40 Code of Federal Regulations §63.1434(a) and §63.163(b)(1), Permit Number 4757, SC Number 2, FOP Number O1443, General Terms and Conditions, and THSC, §382.085(b), by failing to conduct monthly Leak Detection and Repair monitoring on pumps in Hazardous Air Pollutant service; PENALTY: $7,465; ENFORCEMENT COORDINATOR: Kimberly Morales, (713) 422-8938; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(15) COMPANY: EAST BENGAL CORPORATION dba Bengal Food Store; DOCKET NUMBER: 2012-0493-PST-E; IDENTIFIER: RN101565653; LOCATION: Dallas, Dallas County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by

failing to monitor the underground storage tanks (USTs) for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); and 30 TAC §334.10(b), by failing to maintain all UST records and making them immediately available for inspection upon request by agency personnel; PENALTY: $2,695; ENFORCEMENT COORDINATOR: Steven Van Landingham, (512) 239-5717; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(16) COMPANY: Fashion A. Jarvis dba Fashion's Country Store; DOCKET NUMBER: 2012-0102-PST-E; IDENTIFIER: RN101738631; LOCATION: Newton, Newton County; TYPE OF FACILITY: former gasoline dispensing; RULE VIOLATED: 30 TAC §37.867(a) and §334.54(b)(2), (c)(1) and (2), (d)(2) and TWC, §26.3475(c)(1) and (d), by failing to secure the underground storage tank (UST) system to prevent tampering or vandalism (the fill ports for tanks 1 - 4 were unsecured); by failing to provide corrosion protection for the temporarily out-of-service (TOOS) UST system; by failing to monitor for releases a UST system that has not been emptied of all regulated substances at the time it was temporarily removed from service; by failing to ensure that residue from stored regulated substances which remained in the TOOS UST system did not exceed 2.5 centimeters, or one inch; and also by failing to empty tanks, as defined in 30 TAC §334.54(d), within 90 days after previous financial assurance coverage terminated; and 30 TAC §334.48(b), by failing to operate, maintain, and manage a UST system in accordance with accepted industry practices; PENALTY: $5,100; ENFORCEMENT COORDINATOR: Trina Grieco, (210) 403-4006; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(17) COMPANY: Harris County; DOCKET NUMBER: 2012-0491-PST-E; IDENTIFIER: RN102357845; LOCATION: Houston, Harris County; TYPE OF FACILITY: fleet refueling facility with two underground storage tanks (USTs); RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and (2) and TWC, §26.3475(a) and (c)(1), by failing to monitor the USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring) and also by failing to provide release detection for the piping associated with the USTs; PENALTY: $2,250; Supplemental Environmental Project offset amount of $1,800 applied to Galveston Bay Foundation - Marsh Mania; ENFORCEMENT COORDINATOR: Katy Schumann, (512) 239-2602; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(18) COMPANY: Herlinda G. Cantu; DOCKET NUMBER: 2011-2202-EAQ-E; IDENTIFIER: RN106251366; LOCATION: San Antonio, Bexar County; TYPE OF FACILITY: commercial real estate property; RULE VIOLATED: 30 TAC §213.4(a)(1), by failing to obtain approval of a Water Pollution Abatement Plan prior to commencing construction of a regulated activity over the Edwards Aquifer Recharge Zone; PENALTY: $8,100; ENFORCEMENT COORDINATOR: Jeremy Escobar, (361) 825-3422; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(19) COMPANY: LeTourneau Technologies Drilling Systems, Incorporated; DOCKET NUMBER: 2012-0588-AIR-E; IDENTIFIER: RN104348339; LOCATION: Houston, Harris County; TYPE OF FACILITY: oilfield equipment fabrication plant; RULE VIOLATED: 30 TAC §122.143(4) and §122.146(2), Texas Health and Safety Code, §382.085(b), and Federal Operating Permit Number O3341, General Terms and Conditions, by failing to submit the Permit Compliance Certification within 30 days from the end of the certification period; PENALTY: $1,625; ENFORCEMENT COORDINATOR: Heather Podlipny, (512) 239-2603; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(20) COMPANY: Lim Hang dba Jon's Mini-Mart; DOCKET NUMBER: 2012-0313-PST-E; IDENTIFIER: RN102237815; LOCATION: Sulphur Springs, Hopkins County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(2) and TWC, §26.3475(a), by failing to provide proper release detection for the piping associated with the underground storage tank system; PENALTY: $2,005; ENFORCEMENT COORDINATOR: Audra Benoit, (409) 899-8799; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(21) COMPANY: MCCRAW OIL COMPANY, INCORPORATED; DOCKET NUMBER: 2012-0013-PST-E; IDENTIFIER: RN100530724; LOCATION: Bonham, Fannin County; TYPE OF FACILITY: non-retail gasoline storage; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tanks for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $2,500; ENFORCEMENT COORDINATOR: Jill Russell, (512) 239-4564; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(22) COMPANY: MOSIK, INCORPORATED dba Eldridge Chevron; DOCKET NUMBER: 2012-0278-PST-E; IDENTIFIER: RN102517158; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tanks (USTs) for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); and 30 TAC §334.10(b), by failing to maintain the UST records and making them immediately available for inspection upon request by agency personnel; PENALTY: $9,711; ENFORCEMENT COORDINATOR: Elvia Maske, (512) 239-0789; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(23) COMPANY: Overton Stop & Save, Incorporated; DOCKET NUMBER: 2012-0080-PST-E; IDENTIFIER: RN101633808; LOCATION: Dallas, Dallas County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tank for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $2,250; ENFORCEMENT COORDINATOR: Jennifer Graves, (956) 430-6023; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(24) COMPANY: PURI INVESTMENTS, L.L.C. dba AS Bellaire Foodmart; DOCKET NUMBER: 2011-1934-PST-E; IDENTIFIER: RN102005485; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(2) and TWC, §26.3475(a), by failing to provide release detection for the piping associated with the underground storage tanks; PENALTY: $2,004; ENFORCEMENT COORDINATOR: Thomas Greimel, P.G., (512) 239-5690; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(25) COMPANY: Samin Enterprises, Incorporated dba Rowlett Shell; DOCKET NUMBER: 2012-0643-PST-E; IDENTIFIER: RN101570729; LOCATION: Rowlett, Dallas County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.49(a)(1) and TWC, §26.3475(d), by failing to provide proper corrosion protection for the underground storage tank system; PENALTY: $4,500; ENFORCEMENT COORDINATOR: Jeremy Escobar, (361) 825-3422; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(26) COMPANY: SFN Texas, Incorporated dba Corner Market 1; DOCKET NUMBER: 2012-0662-PST-E; IDENTIFIER: RN102240512; LOCATION: Jacksonville, Cherokee County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.49(a)(1) and TWC, §26.3475(d), by failing to provide proper corrosion protection for the underground storage tank system; PENALTY: $1,875; ENFORCEMENT COORDINATOR: Thane Barkley, (512) 239-2552; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(27) COMPANY: SPAR SALES, INCORPORATED dba Prime Travel Stop; DOCKET NUMBER: 2012-0045-PST-E; IDENTIFIER: RN101569788; LOCATION: Waxahachie, Ellis County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and (2), and TWC, §26.3475(a) and (c)(1), by failing to monitor the underground storage tanks (USTs) for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring), and also by failing to provide release detection for the piping associated with the USTs; PENALTY: $2,629; ENFORCEMENT COORDINATOR: Wallace Myers, (512) 239-6580; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(28) COMPANY: Texas Department of Transportation; DOCKET NUMBER: 2012-0109-PST-E; IDENTIFIER: RN102144136; LOCATION: Mexia, Limestone County; TYPE OF FACILITY: fleet refueling; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tanks for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $2,500; Supplemental Environmental Project offset amount of $2,000 applied to Railroad Commission of Texas, Alternative Fuels Clean School Bus Replacement Program; ENFORCEMENT COORDINATOR: David Carney, (512) 239-2583; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(29) COMPANY: Young, Monte T; DOCKET NUMBER: 2012-1158-WOC-E; IDENTIFIER: RN103307302; LOCATION: Olney, Young County; TYPE OF FACILITY: individual; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: $175; ENFORCEMENT COORDINATOR: Heather Podlipny, (512) 239-2603; REGIONAL OFFICE: 1977 Industrial Blvd., Abilene, Texas 79602-7833, (325) 698-9674.

(30) COMPANY: ZS Quick Stop, Incorporated dba Nassau Food Mart; DOCKET NUMBER: 2012-0562-PST-E; IDENTIFIER: RN101852721; LOCATION: San Antonio, Bexar County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.49(a)(1) and TWC, §26.3475(d), by failing to provide proper corrosion protection for the underground storage tank (UST) system; and 30 TAC §334.50(b)(2) and TWC, §26.3475(a), by failing to provide proper release detection for the product piping associated with the UST system; PENALTY: $4,258; ENFORCEMENT COORDINATOR: David Carney, (512) 239-2583; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

TRD-201203442
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: June 29, 2012

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Notice of Public Hearing on Proposed Revisions to 30 TAC Chapter 30

The Texas Commission on Environmental Quality (TCEQ or Commission) will conduct a public hearing to receive testimony regarding proposed revisions to 30 Texas Administrative Code (TAC) Chapter 30, Occupational Licenses and Registrations, §30.387 and §30.402, under the requirements of Texas Water Code, §§5.102, 5.103, 5.105, 37.002, 37.003, and 37.008; Texas Health and Safety Code, §§341.003, 341.034, and 341.0315; and Texas Government Code, Chapter 2001, Subchapter B.

The proposed rulemaking would amend the 30 TAC Chapter 30, rules relating to definitions, by defining a Military Operator-in-training and clarifying the existing definition of an Operator-in-training.

Additionally, the proposed rules would amend the 30 TAC Chapter 30, rules relating to exemptions, to allow active military personnel who have successfully completed the Bioenvironmental Engineering Apprentice (BEA) or equivalent military training, as determined by the executive director, to collect microbiological samples and determine disinfection residuals at military facilities' water distribution systems, without holding a TCEQ issued public water system operator license.

The commission will hold a public hearing on this proposal in Austin on July 26, 2012, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802. Requests should be made as far in advance as possible.

Written comments may be submitted to Bruce McAnally, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.texas.gov/rules/ecomments/*. File size restrictions may apply to comments being submitted via the *eComments* system. All comments should reference Rule Project Number 2012-024-030-WS. The comment period closes August 13, 2012. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.texas.gov/nav/rules/propose_adopt.html*. For further information, please contact Terry Thompson, Occupational Licensing Section, (512) 239-6095.

TRD-201203426
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: June 29, 2012

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Notice of Public Hearing on Proposed Revisions to 30 TAC Chapter 285

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed revisions to 30 Texas Administrative Code (TAC) Chapter 285, On-site Sewage Facilities, §§285.3 - 285.6, 285.32 - 285.35, 285.90, and 285.91, under the requirements of Texas Government Code, Chapter 2001, Subchapter B.

The proposed rulemaking would update the rule requirements in the rule to remove the requirements for drainage easements; clarify that a permit and an approved plan is required to construct, alter, repair, ex-

tend, or operate an On-Site Sewage Facility; exempt subdivisions when one tract is divided into two five-acre or larger tracts from submitting planning materials; allow the repair or alteration of existing cluster systems; update tank sizing requirements; update formulas for leaching chambers; add language relating to new or replacement disinfection devices; add equalization tank requirements; clarify what constitutes an emergency repair; and update figures and tables.

The commission is seeking comments related to the efficiency of NSF certified disinfection devices and the impacts of transitioning to the mandatory use of such devices by requiring the use of NSF certified disinfection devices in on-site sewage facilities after a specified date. The commission specifically requests comments on the efficiency of disinfection devices, the cost of disinfection devices to the consumer, and an appropriate effective date.

The commission will hold a public hearing on this proposal in Austin on August 6, 2012 at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802. Requests should be made as far in advance as possible.

Written comments may be submitted to Charlotte Horn, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.texas.gov/rules/ecomments/.* File size restrictions may apply to comments being submitted via the *eComments* system. All comments should reference Rule Project Number 2012-023-285-CE. The comment period closes August 13, 2012. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.texas.gov/nav/rules/propose_adopt.html.* For further information, please contact Candy Garrett, Program Support Section, (512) 239-1457.

TRD-201203438
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: June 29, 2012

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Notice of Public Hearing on Proposed Revisions to 30 TAC Chapter 288

The Texas Commission on Environmental Quality (TCEQ or Commission) will conduct a public hearing to receive testimony regarding proposed revisions to 30 Texas Administrative Code (TAC) Chapter 288, Water Conservation Plans, Drought Contingency Plans, Guidelines and Requirements, §§288.1 - 288.5, under the requirements of Texas Government Code, Chapter 2001, Subchapter B.

The proposed rulemaking would implement Senate Bill (SB) 181 and SB 660, 82nd Legislature, 2011, to require entities that submit water conservation plans to the Texas Water Development Board (TWDB) and the TCEQ to implement sector-based reporting measures for water use. The proposed rulemaking would also require the TWDB and the TCEQ, in consultation with the Water Conservation Advisory Council, to develop a uniform methodology and guidance for calculating water use and conservation.

The commission will hold a public hearing on this proposal in Austin on August 7, 2012, at 10:00 a.m., in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802. Requests should be made as far in advance as possible.

Written comments may be submitted to Bruce McAnally, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.texas.gov/rules/ecomments/.* File size restrictions may apply to comments being submitted via the *eComments* system. All comments should reference Rule Project Number 2011-058-288-OW. The comment period closes August 13, 2012. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.texas.gov/nav/rules/propose_adopt.html.* For further information, please contact Scott Swanson, Water Rights Permitting/Availability Unit, (512) 239-0703.

TRD-201203428
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: June 29, 2012

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Notice of Public Hearing on a Proposed Revision to the State Implementation Plan

The Texas Commission on Environmental Quality (TCEQ) will conduct a public hearing to receive testimony regarding the proposed Federal Clean Air Act (FCAA), Section 110(a)(1) and (2) Infrastructure and Transport State Implementation Plan (SIP) Revision for the 2010 Nitrogen Dioxide (NO_2) National Ambient Air Quality Standard (NAAQS).

The proposed SIP revision documents how the infrastructure and transport elements listed in FCAA, Section 110(a) are currently addressed in the Texas SIP. The SIP revision would outline the requirements of FCAA, Section 110(a)(2)(A) - (M) and the Texas provisions supporting the requirements. These infrastructure requirements include basic program elements such as enforceable emission limitations and control measures, air quality monitoring and modeling, a permitting program, adequate funding and personnel, authority under state law to carry out the plan, emissions reporting, emergency powers, public participation, and fee collection. The interstate transport requirements include a discussion of NO_2 transport and a demonstration showing that Texas does not contribute significantly to nonattainment or interfere with maintenance of the 2010 NO_2 NAAQS in another state. (Non-rule Project Number 2012-016-SIP-NR)

A public hearing on this proposal will be held in Austin on August 1, 2012, at 10:00 a.m. The public hearing will be held in the TCEQ Austin headquarters at 12100 Park 35 Circle, Building E, Room 201S. The hearing will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the

hearing. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, TCEQ staff members will be available to discuss the proposal 30 minutes before the hearing.

Persons planning to attend the hearing who have special communication or other accommodation needs should contact Margaret Earnest, Air Quality Division, at (512) 239-4581. Requests should be made as far in advance as possible.

Comments may be submitted to Margaret Earnest, MC 206, SIP Team, Chief Engineer's Office, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-6188. Electronic comments may be submitted at *http://www5.tceq.texas.gov/rules/ecomments.* File size restrictions may apply to comments being submitted electronically. All comments should reference the "Proposed Federal Clean Air Act Section 110(a)(1) and (2) Infrastructure and Transport State Implementation Plan Revision for the 2010 Nitrogen Dioxide National Ambient Air Quality Standard" and Project Number 2012-016-SIP-NR. The comment period closes August 6, 2012. Copies of the proposed SIP revision can be obtained from the TCEQ's Web site at *http://www.tceq.texas.gov/airquality/sip/criteria-pollutants/sip-no2.* For additional information regarding the proposed SIP revision, please contact Margaret Earnest, Air Quality Division, at (512) 239-4581.

TRD-201203453
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: July 2, 2012

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Notice of Public Hearing on a Proposed Revision to the State Implementation Plan

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding the proposed Beaumont-Port Arthur (BPA) Attainment Area On-Road Mobile Source Emissions Inventory and Motor Vehicle Emissions Budget (MVEB) Update State Implementation Plan (SIP) Revision.

The proposed BPA SIP revision would update the Eight-Hour Ozone Redesignation Request and Maintenance Plan for the BPA Ozone Nonattainment Area that was adopted by the commission on December 10, 2008, and approved by the United States Environmental Protection Agency (EPA) effective November 19, 2010. On-road mobile source emissions inventories and MVEBs would be updated based on the EPA's latest mobile source emissions estimation model, Motor Vehicle Emission Simulator, which was released on March 2, 2010. (SIP Project Number 2012-005-SIP-NR)

A public hearing on this proposal will be held in Beaumont on August 1, 2012, at 6:00 p.m. The public hearing will be held in the Homer E. Nagel Conference Room of the South East Texas Regional Planning Commission at 2210 Eastex Freeway. The hearing will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the hearing. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes before the hearing.

Persons planning to attend the hearing who have special communication or other accommodation needs should contact Jamie Zech, Air Quality Division, at (512) 239-3935. Requests should be made as far in advance as possible.

Comments may be submitted to Jamie Zech, MC 206, State Implementation Plan Team, Chief Engineer's Office, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-6188. Electronic comments may be submitted at *http://www5.tceq.texas.gov/rules/ecomments.* File size restrictions may apply to comments being submitted electronically. All comments should reference the "Beaumont-Port Arthur Attainment Area On-Road Mobile Source Emissions Inventory and Motor Vehicle Emissions Budget Update State Implementation Plan Revision" and Project Number 2012-005-SIP-NR. The comment period closes August 3, 2012. Copies of the proposed SIP revision and associated appendix can be obtained from the commission's Web site at *http://www.tceq.texas.gov/airquality/sip/bpa/bpa-latest-ozone.* For additional information regarding the proposed SIP revision, please contact Jamie Zech, Air Quality Division, at (512) 239-3935.

TRD-201203454
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: July 2, 2012

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Notice of Public Meeting and Proposed Amendment and Reissuance General Permit Number WDWG010000

The Texas Commission on Environmental Quality (TCEQ) proposes to amend and reissue the Class I Underground Injection Control (UIC) General Permit Number WDWG010000 authorizing the use of a Class I injection well to dispose of nonhazardous brine from a desalination operation or nonhazardous drinking water treatment residuals (DWTR). The proposed general permit (GP) applies to the entire state of Texas. This GP is authorized by Texas Water Code, §27.025.

PROPOSED AMENDED GENERAL PERMIT. The executive director has prepared a draft amended GP that authorizes the use of a Class I injection well to dispose of nonhazardous brine from a desalination operation or nonhazardous DWTR. The amendments of this existing GP would incorporate standards for disposal of nonhazardous DWTR that contain naturally occurring radioactive material (NORM) into a salt cavern in horizontally bedded or non-domal salt. These standards require the owner or operator to attain a performance standard to prevent the movement of fluids that would result in the pollution of an underground source of drinking water. The executive director proposes to require regulated facilities to submit a Notice of Intent to obtain authorization for injection. A Radioactive Materials License is required for disposal of DWTR containing NORM that does not meet an exempted level for its radiological content. The proposed changes to the GP are included in the proposed GP and described in the fact sheet.

The executive director has reviewed this action for consistency with the goals and policies of the Texas Coastal Management Program (CMP) according to Coastal Coordination Council (CCC) regulations and has determined that the action is consistent with applicable CMP goals and policies.

A copy of the proposed amended GP and fact sheet are available for viewing and copying at the TCEQ Office of the Chief Clerk located at the TCEQ's Austin office, at 12100 Park 35 Circle, Building F. These documents are also available at the TCEQ's 16 regional offices and on the TCEQ Web site at http://www.tceq.texas.gov/assets/public/permitting/waste/uic/Amended_UIC_GP.pdf

PUBLIC COMMENT AND PUBLIC MEETING. You may submit public comments about this GP in writing or orally at the public meeting held by the TCEQ. The purpose of a public meeting is to provide an opportunity to submit comments and to ask questions about the GP.

A public meeting is not a contested case hearing. The public comment period will end at the conclusion of the public meeting. The public meeting will be held as follows: 2:00 p.m., August 14, 2012, TCEQ, 12100 Park 35 Circle, Building E, Room 201S, Austin, Texas 78753.

Written public comments must be received by the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087 or electronically at www.tceq.texas.gov/about/comments.html by the end of the public comment period on August 14, 2012.

APPROVAL PROCESS. After the comment period, the executive director will consider all the public comments and prepare a written response. The response will be filed with the TCEQ Office of the Chief Clerk at least ten days before the scheduled commission meeting at which the commission will consider approval of the GP. The commission will consider all public comments in making its decision and will either adopt the executive director's response or prepare its own response to the comments. The commission will issue its written response to the public comments on the GP at the same time the commission issues or denies the GP. A copy of the issued GP and response to comments will be made available to the public for inspection at the agency's Austin and regional offices. A notice of the commissioners' action on the proposed GP and a copy of its response to comments will be mailed to each person who made a comment. Also, a notice of the commission's action on the proposed GP and the text of its response to comments will be published in the *Texas Register*.

MAILING LIST. In addition to submitting public comments, you may ask to be placed on a mailing list to receive future public notices mailed by the Office of the Chief Clerk. You may request to be added to: (1) the mailing list for this specific GP; (2) the permanent mailing list for a specific county; or both. Clearly specify which list(s) to which you wish to be added and send your request to the TCEQ Office of the Chief Clerk at the address listed previously. Unless you otherwise specify, you will be included only on the mailing list for this specific GP.

INFORMATION. If you need more information about the proposed permit or the permitting process, please call the TCEQ Public Education Program, toll free, at 1-800-687-4040. General information about the TCEQ can be found at our Web site at http://www.tceq.texas.gov/.

Further information may also be obtained by calling Kathryn Flegal at (512) 239-6890.

Si desea información en español, puede llamar 1-800-687-4040.

TRD-201203490
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: July 3, 2012

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Notice of Water Quality Applications

The following notices were issued on June 22, 2012 through June 29, 2012.

The following require the applicants to publish notice in a newspaper. Public comments, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

INFORMATION SECTION

INVISTA SARL, which operates a chemicals and plastics manufacturing facility, has applied for a renewal of Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0000476000, which authorizes the discharge of non-contact cooling water, utility wastewaters, water treatment wastes, non-process area storm water and previously monitored effluent (process wastewater, treated domestic wastewater, treated groundwater, and process area storm water) at a daily average flow not to exceed 21.8 MGD via Outfall 001; non-process area storm water, authorized non-storm water discharges, hydrostatic test water, and excess overflow from Outfall 001 on an intermittent and flow variable basis via Outfall 002; non-process area storm water, MSGP authorized storm water from captured facilities, post first flush storm water, authorized non-storm water discharges, steam condensate, hydrostatic test water, and non-contact cooling water on an intermittent and flow variable basis via Outfall 003; and process area storm water, authorized non-storm water discharges, steam condensate, and hydrostatic test water on an intermittent and flow variable basis via Outfalls 005 and 006. The proposed permit authorizes the discharge of non-contact cooling water, utility wastewaters, water treatment wastes, non-process area storm water and previously monitored effluent (process wastewater, treated domestic wastewater, treated groundwater, and process area storm water) at a daily average flow not to exceed 21.8 MGD via Outfall 001; non-process area storm water, authorized non-storm water discharges, hydrostatic test water, and excess overflow from Outfall 001 on an intermittent and flow variable basis via Outfall 002; non-process area storm water, MSGP authorized storm water from captured facilities, post first flush storm water, authorized non-storm water discharges, steam condensate, hydrostatic test water, and non-contact cooling water on an intermittent and flow variable basis via Outfall 003; and process area storm water, authorized non-storm water discharges, steam condensate, hydrostatic test water; and non-process area storm water on an intermittent and flow variable basis via Outfalls 005 and 006. The facility is located one mile west of the intersection of Farm-to-Market Road 1686 and Farm-to-Market Road 404, approximately 8 miles south of the City of Victoria, Victoria County, Texas 77905.

PILGRIM'S PRIDE CORPORATION which operates Pilgrim's Pride Swift Hatchery, a poultry hatchery, has applied to the Texas Commission on Environmental Quality (TCEQ) for a new permit, proposed Permit No. WQ0004970000, to authorize the disposal of treated hatchery process wastewater and treated domestic wastewater at a daily average flow not exceed 21,000 gallons per day and a daily maximum flow not to exceed 40,000 gallons per day via land application by irrigation of 2.6 acres of Bermuda Grass and Winter Rye. This permit will not authorize a discharge of pollutants into water in the State.

VILLAGE FARMS LP which operates Village Farms Texas Division, a hydroponic greenhouse industry that produces and markets produce, has applied for a new permit, draft Permit No. WQ0004973000, to authorize the disposal of reverse osmosis (RO) system reject water and fertilized irrigation water at an annual average flow not to exceed 86,000 gallons per day via irrigation of 158 acres of coastal Bermuda grass during the warm season and winter wheat during the cool season. This permit will not authorize a discharge of pollutants into water in the State. The facility is located on Highway 17, approximately four miles south of Fort Davis, Jeff Davis County, Texas 79734. The disposal site is located approximately 7,100 feet west-southwest of the intersection of Highway 17 and Highway 166 in Jeff Davis County, Texas.

US DEPARTMENT OF THE ARMY AND DAY AND ZIMMERMANN LONE STAR LLC which operate a high explosives demolition operation at the former Lone Star Army Ammunition Plant, have applied for a new permit, draft TPDES Permit No. WQ0004978000, to authorize the discharge of storm water runoff and steam condensate on an intermittent and flow variable basis via Outfall 005. This discharge was previously permitted under TPDES Permit No. WQ0002263000

which expired on January 1, 2011. The facility is located adjacent to U.S. Highway 82 at the intersection of U.S. Highway 82 and State Route 74, Bowie County, Texas 75505.

If you need more information about these permit applications or the permitting process, please call the TCEQ Public Education Program, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.TCEQ.texas.gov. Si desea información en español, puede llamar al 1-800-687-4040.

BROOKSHIRE MUNICIPAL WATER DISTRICT has applied for a renewal of TPDES Permit No. WQ0010001001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 970,000 gallons per day. The facility is located at 3502 10th Street, immediately south of the intersection of Interstate Highway 10 and approximately 500 feet west of Brookshire Creek in Waller County, Texas 77423.

CITY OF CUSHING has applied for a renewal of TPDES Permit No. WQ0010437001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 81,000 gallons per day. The facility is located approximately 200 feet south of the intersection of Fourth Street and Spruce Avenue, in the City of Cushing in Nacogdoches County, Texas 75760.

BAYVIEW MUNICIPAL UTILITY DISTRICT has applied for a renewal of TPDES Permit No. WQ0010770001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 900,000 gallons per day. The facility is located at 3206 State Highway 146, approximately 1,200 feet west of State Highway 146 and 5,500 feet north of the intersection of Farm-to-Market Road 646 and State Highway 146 in Galveston County, Texas 77573.

PORT TERMINAL RAILROAD ASSOCIATION has applied for a renewal of TPDES Permit No. WQ0011773001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 8,750 gallons per day. The facility is located at 7299 Clinton Drive, inside the North Railroad Yard, approximately 400 feet east of North Wayside Drive and 600 feet north of Clinton Drive, approximately 4.5 miles due east of the downtown Houston Central Business District in Harris County, Texas 77020.

FORT BEND COUNTY MUNICIPAL UTILITY DISTRICT NO 30 has applied for a renewal of TPDES Permit No. WQ0012068001 which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,500,000 gallons per day. The facility is located at 7530 Tetela Drive, approximately 2.5 miles west of the intersection of State Highway 6 and Beechnut Street in Fort Bend County, Texas 77083.

CONROE RESORT UTILITIES LLC has applied for a renewal of TPDES Permit No. WQ0012493001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 500,000 gallons per day. The facility is located approximately 3.5 miles east of the intersection of Farm-to-Market Road 149 and Farm-to-Market Road 1097, Montgomery County, Texas 77356.

BRUNI RURAL WATER SUPPLY CORPORATION has applied for a renewal of TPDES Permit No. WQ0013924001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 62,500 gallons per day. The facility is located at the east end of 16th Street, approximately one mile northeast of the intersection of State Highway 359 and Farm-to-Market Road 2050 in the Community of Bruni in Webb County, Texas 78344.

ANGELINA WATER SUPPLY CORPORATION has applied for a renewal of TPDES Permit No. WQ0014128001, which authorizes the discharge of treated filter backwash effluent from a water treatment plant at a daily average flow not to exceed 12,500 gallons per day. The facility is located at 6820 Farm-to-Market Road 326, on the east side of Farm-to-Market Road 326, approximately 1-3/4 miles south of U.S. Highway 69 and the Community of Homer in Angelina County, Texas 75901.

CHAPPELL HILL SERVICE COMPANY LLC has applied for a new permit, proposed TPDES Permit No. WQ0015031001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 400,000 gallons per day. The facility will be located approximately 0.25 mile north and 0.35 mile east of the intersection of Farm-to-Market Road 1155 and Highway 290 in Washington County, Texas 77426.

MARTIN PRODUCT SALES LLC which operates the South Houston Plant, has applied for a renewal of TPDES Permit No. WQ0001058000, which authorizes the discharge of utility wastewater and stormwater at a daily average flow not to exceed 60,000 gallons per day, and a daily maximum flow not to exceed 175,000 gallons per day via Outfall 001. The facility is located at 300 Christi Place, approximately 500 feet southeast of the intersection of State Highway 3 and College Street, in the City of South Houston, Harris County, Texas 77587. The Executive Director has reviewed this action for consistency with the goals and policies of the Texas Coastal Management Program (CMP) in accordance with the regulations of the Coastal Coordination Council (CCC) and has determined that the action is consistent with the applicable CMP goals and policies.

PANOLA BETHANY WATER SUPPLY CORPORATION has applied for a new permit, proposed TPDES Permit No. WQ0015033001, to authorize the discharge of treated filter backwash effluent from a water treatment plant at a daily average flow not to exceed 3,000 gallons per day. The facility is located on U.S. Highway 79, between the Cities of Panola and Bethany, 3,000 feet west of the Louisiana-Texas state line in Panola County, Texas 75639.

The following do not require publication in a newspaper. Written comments or requests for a public meeting may be submitted to the Office of the Chief Clerk, at the address provided in the information section above, WITHIN 30 DAYS OF THE ISSUED DATE OF THE NOTICE.

CITY OF GRUVER has applied for a minor amendment to the TPDES Permit No. WQ0010751001 to authorize the use of an accredited laboratory that has obtained a variance from the maximum holding time for bacteria from EPA Region 6 pursuant to 40 CFR §136.3(e). The existing permit authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 200,000 gallons per day. The facility is located approximately 0.6 mile west of State Highway 15 and approximately 0.8 mile east of State Highway 136, southeast of the City of Gruver in Hansford County, Texas 79040.

TRD-201203488
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: July 3, 2012

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Revised Notice of Minor Amendment Radioactive Material License Number R04100

APPLICATION. Waste Control Specialists LLC (WCS) applied to the Texas Commission on Environmental Quality (TCEQ) for an administrative amendment to Radioactive Material License R04100 on May 15, 2012 and supplemental materials on May 18, 2012, in addition to various other submissions in 2010 and 2011. Radioactive Material License R04100 authorizes commercial disposal of

low-level radioactive waste. WCS currently conducts a variety of waste management services at its site in Andrews County, Texas and is the licensed operator of the Compact Waste Disposal Facility (CWF) and Federal Facility Waste Facility (FWF) for commercial and federal low-level radioactive waste disposal. The land disposal facility for low-level radioactive waste disposal is located at 9998 State Highway 176 West in Andrews County, Texas. After further review, the Executive Director has determined that this request is a minor amendment. The amendment to the license is as follows. License Conditions (LC) 46.C and 143 are amended to correct and add additional information to various classifications of existing waste streams authorized for disposal, which does not result in a change in the concentration limits of the wastes to be received. Attachment B footnote 17 revises effluent concentration limits. Attachment C Sections 3.0 and 8.0 of the Waste Acceptance Criteria were revised to add citations and other conforming corrections necessitated by rulemaking relating to 30 Texas Administrative Code Chapter 336. The following link to an electronic map of the facility's general location is provided as a public courtesy and is not part of the application or notice: http://www.tceq.texas.gov/assets/public/hb610/index.html?lat=32.4425&lng=-103.063055&zoom=13&type=. For an exact location, refer to the application. The TCEQ Executive Director has completed the technical review of the amendment application and supporting documents and has prepared a draft license. The draft license, if approved, would refine and add detail to the conditions under which the land disposal facility must operate with regard to existing authorized receipt of wastes and does not change the type or concentration limits of wastes to be received. The Executive Director has made a preliminary decision that this license, if issued, meets all statutory and regulatory requirements. The license amendment application with supporting documents, the Executive Director's technical summary, and the amended draft license are available for viewing and copying at the TCEQ's central office in Austin, Texas and at the Andrews Public Library in Andrews, Texas.

PUBLIC COMMENT/PUBLIC MEETING. The purpose of a public meeting is to provide the opportunity to submit comments or to ask questions about the application. The TCEQ holds a public meeting if the Executive Director determines that there is a significant degree of public interest in the applications or if requested by a local legislator. A public meeting is not a contested case hearing. After the deadline for submitting public comments, the Executive Director will consider all timely comments and prepare a response to all relevant and material, or significant public comments.

EXECUTIVE DIRECTOR ACTION. The application is subject to Commission rules which direct the Executive Director to act on behalf of the Commission and provide authority to the Executive Director to issue final approval of the application for amendment after consideration of all timely comments submitted on the application.

MAILING LIST. If you submit public comments or a request for reconsideration of the Executive Director's decision, you will be added to the mailing list for this specific application to receive future public notices mailed by the Office of the Chief Clerk. In addition, you may request to be placed on: (1) the permanent mailing list for a specific applicant name and license or permit number; and/or (2) the mailing list for a specific county. If you wish to be placed on the permanent and/or the county mailing list, clearly specify which list(s) and send your request to TCEQ Office of the Chief Clerk at the address below.

All written public comments and requests must be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087 or electronically at www.tceq.texas.gov/about/comments.html within 10 days from the date of this notice or 10 days from the date of publication in the *Texas Register,* whichever is later.

AGENCY CONTACTS AND INFORMATION. If you need more information about this license application or the licensing process, please call the TCEQ Public Education Program, toll free, at 1-800-687-4040. Si desea información en español, puede llamar al 1-800-687-4040. General information about the TCEQ can be found at our web site at www.TCEQ.texas.gov. Further information may also be obtained from WCS at the address stated above or by calling Mr. Scott Kirk at (432) 525-8500.

TRD-201203489
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: July 3, 2012

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Texas Ethics Commission

List of Late Filers

Listed below are the names of filers from the Texas Ethics Commission who did not file reports or failed to pay penalty fines for late reports in reference to the listed filing deadline. If you have any questions, you may contact Robbie Douglas at (512) 463-5780.

Deadline: Personal Financial Statement due March 7, 2012

Victor E. Leal, 600 S. Tyler, Amarillo, Texas 79101

Deadline: Personal Financial Statement due April 30, 2012

Virginia Hermosa Boissonneault, 9104 Colberg Dr., Austin, Texas 78749

Andy M. Chatham, 9804 Spirehaven Ln., Dallas, Texas 75238

Louis A. Cortes, 7555 Hwy. 87 E., China Grove, Texas 78263

Leslie Bingham Escareno, 7 Medical Dr., Brownsville, Texas 78250

Morris E. Foster, P.O. Box 97, Salado, Texas 76571

John C. Morris, 701 Center Ridge Dr. #211, Austin, Texas 78753

James Neale, 1901 N. Akard, Ste. 220, Dallas, Texas 75201

Ann G. Pauli, 1006 Madeline Dr., El Paso, Texas 79902

Jeff Sandford, 819 N. State Line Ave., Texarkana, Texas 75501

Suzanne H. Wooten, 2100 Bloomdale, McKinney, Texas 75071

Deadline: 30-Day Pre-Election Report due April 30, 2012

Leslie A. Gower, 712 Walnut, McAllen, Texas 78501

Deadline: Monthly Report due May 7, 2012

Gina M. Gabriano, 5040 Lorraine Dr., Frisco, Texas 75034

TRD-201203408
David A. Reisman
Executive Director
Texas Ethics Commission
Filed: June 28, 2012

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Texas Facilities Commission

Request for Proposals #303-3-20342

The Texas Facilities Commission (TFC), on behalf of the Texas Health and Human Services Commission, the Department of Family and Protective Services, the Department of State Health Services, the Department of Assistive and Rehabilitative Services, and the Department of

Aging and Disability Services, announces the issuance of Request for Proposals (RFP) #303-3-20342. TFC seeks a five or ten year lease of approximately 12,500 square feet of office space in Uvalde, Uvalde County, Texas.

The deadline for questions is July 23, 2012 and the deadline for proposals is July 30, 2012 at 3:00 p.m. The award date is September 1, 2012. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of an RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting the Regional Leasing Assistant, Evelyn Esquivel, at (512) 463-6494. A copy of the RFP may be downloaded from the Electronic State Business Daily at *http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=101223*.

TRD-201203466
Kay Molina
General Counsel
Texas Facilities Commission
Filed: July 2, 2012

♦ ♦ ♦

Texas Funeral Service Commission

Correction of Error

The Texas Funeral Service Commission adopted an amendment to 22 TAC §203.7, concerning Price Disclosure, in the June 29, 2012, issue of the *Texas Register* (37 TexReg 4935). On page 4938, a misspelling occurs in the rule text. In §203.7(b)(8), the word "case" should be "cash". The corrected paragraph reads as follows:

"(8) Logos. If a funeral provider's graphically illustrated logo or a bold listing of the logo is included in an obituary, the funeral provider shall list separately the additional cost, if any, related to the inclusion of such logo in the cash advance portion of the statement of goods and services."

TRD-201203441

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General Land Office

Notice of Approval of Coastal Boundary Survey

Pursuant to §33.136 of the Texas Natural Resources Code, notice is hereby given that Jerry Patterson, Commissioner of the General Land Office, approved a coastal boundary survey described as follows:

A Coastal Boundary Survey, dated April 4, 2012, by Nedra Foster, Licensed State Land Surveyor, delineating the littoral boundary of a portion of the W. G. Jackson Survey, Abstract 680, same line being the right or south bank of the Neches River, situated approximately 1.7 miles westerly (upstream) from State Highway 87, Jefferson County, Texas.

This survey is intended to provide pre-project baseline information related to an erosion response activity on coastal public lands. An owner of uplands adjoining the project area is entitled to continue to exercise littoral rights possessed prior to the commencement of the erosion response activity, but may not claim any additional land as a result of accretion, reliction, or avulsion resulting from the erosion response activity.

For a copy of this survey or more information on this matter, contact Bill O'Hara, Director of the Survey Division, Texas General Land Office, by phone at (512) 463-5223, email bill.o'hara@glo.texas.gov, or fax (512) 475-5619.

TRD-201203404
Larry L. Laine
Chief Clerk, Deputy Land Commissioner
General Land Office
Filed: June 28, 2012

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Texas Health and Human Services Commission

Public Notice

The Texas Health and Human Services Commission announces its intent to submit transmittal number 12-028 to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act.

The proposed amendment implements Social Security Act §§1902(a)(4), 1902(a)(6), and 1903, which prohibit Medicaid from paying for hospital care-acquired conditions and certain other provider-preventable conditions.

Texas Medicaid will no longer pay a hospital for certain health care-acquired conditions that were not present at the time the patient was admitted to the hospital and that is a preventable condition as defined by the Centers for Medicare and Medicaid Services. No fiscal impact information is available at this time because the state has not begun the implementation process. The proposed amendment is effective September 1, 2013.

To obtain copies of the proposed amendment, interested parties may contact Brian Dees by mail at the Health and Human Services Commission, P.O. Box 13247, Mail Code H-100, Austin, Texas 78711; by telephone at (512) 491-1165; by facsimile at (512) 491-1382; or by e-mail at brian.dees@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-201203443
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: June 29, 2012

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Public Notice

The Texas Health and Human Services Commission announces its intent to submit transmittal number 12-029 to the Texas State Plan for Medical Assistance under Title XIX of the Social Security Act.

The proposed amendment requests a delay in implementation date of its Recovery Audit Contractor (RAC) program. The State expects that the program will be implemented by September 1, 2012. The amendment is effective June 1, 2012.

To obtain copies of the proposed amendment, interested parties may contact Deborah Keyser by mail at HHSC, P.O. Box 13247, Mail Code H-390, Austin, Texas 78711; by telephone at (512) 491-1865; by facsimile at (512) 491-1957; or by e-mail at deborah.keyser@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-201203444

Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: June 29, 2012

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Public Notice

The Texas Health and Human Services Commission announces its intent to submit transmittal number 12-027 to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act.

The proposed amendment is a technical change that removes audiologists from the "Other Practitioners' Services" page in the state plan as this page is reserved for licensed practitioners not covered elsewhere in federal regulations. The amendment also clarifies that audiologists may provide hearing evaluations and furnish hearing aids. The requested effective date for the proposed amendment is June 1, 2012.

To obtain copies of the proposed amendment, interested parties may contact Brian Dees by mail at the Health and Human Services Commission, P.O. Box 13247, Mail Code H-100, Austin, Texas 78711; by telephone at (512) 491-1165; by facsimile at (512) 491-1382; or by e-mail at brian.dees@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-201203445
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: June 29, 2012

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Public Notice

The Texas Health and Human Services Commission announces its intent to submit transmittal number 12-026 to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act.

The proposed amendment documents the State's intent to implement an asset verification system for the purpose of determining or redetermining Medicaid eligibility for aged, blind, and disabled Medicaid applicants and recipients and demonstrates the State's compliance with §1940 of the Social Security Act. We are submitting this amendment in accordance with the submission timeline detailed in Dallas Regional Medical Services Letter number 09-001. In accordance with this letter, the State requests an effective date of September 1, 2012. However, the State does not expect to implement the provisions outlined in this submission until after that date.

To obtain copies of the proposed amendment, interested parties may contact John Stockton by mail at the Health and Human Services Commission, P.O. Box 13247, Mail Code H-100, Austin, Texas 78711; by telephone at (512) 206-4764; by facsimile at (512) 206-5211; or by e-mail at john.stockton@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-201203446
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: June 29, 2012

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Texas Lottery Commission

Instant Game Number 1450 "Lucky Gems Bingo"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1450 is "LUCKY GEMS BINGO". The play style is "bingo".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1450 shall be $2.00 per ticket.

1.2 Definitions in Instant Game No. 1450.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: B01, B02, B03, B04, B05, B06, B07, B08, B09, B10, B11, B12, B13, B14, B15, I16, I17, I18, I19, I20, I21, I22, I23, I24, I25, I26, I27, I28, I29, I30, N31, N32, N33, N34, N35, N36, N37, N38, N39, N40, N41, N42, N43, N44, N45, G46, G47, G48, G49, G50, G51, G52, G53, G54, G55, G56, G57, G58, G59, G60, O61, O62, O63, O64, O65, O66, O67, O68, O69, O70, O71, O72, O73, O74, O75, 01, 02, 03, 04, 05, 06, 07, 08, 09, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, FREE, GEM SYMBOL AND DIAMOND SYMBOL.

D. Play Symbol Caption - the small printed material appearing below each Play Symbol which explains the Play Symbol. One and only one of these Play Symbol Captions appears under each Play Symbol and each is printed in caption font in black ink in positive. Crossword and Bingo style games do not typically have play symbol captions. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1450 - 1.2D

PLAY SYMBOL	CAPTION
B01	
B02	
B03	
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B06	
B07	
B08	
B09	
B10	
B11	
B12	
B13	
B14	
B15	
I16	
I17	
I18	
I19	
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FREE	
GEM SYMBOL	
DIAMOND SYMBOL	

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There is a boxed four (4) digit Security Number placed randomly within the Serial Number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $2.00, $3.00, $4.00, $5.00, $6.00, $9.00, $10.00, $15.00 or $20.00.

G. Mid-Tier Prize - A prize of $30.00, $50.00, $100 or $500.

H. High-Tier Prize - A prize of $1,000 or $30,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) Bar Code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The Bar Code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1450), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 125 within each pack. The format will be: 1450-0000001-001.

K. Pack - A pack of "LUCKY GEMS BINGO" Instant Game tickets contains 125 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). Ticket 001 will be shown on the front of the pack; the back of ticket 125 will be revealed on the back of the pack. There will be no breaks between the tickets in a pack. Every other book will reverse i.e., reverse order will be: the back of ticket 001 will be shown on the front of the pack and the front of ticket 125 will be shown on the back of the pack.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "LUCKY GEMS BINGO" Instant Game No. 1450 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule, §401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "LUCKY GEMS BINGO" Instant Game is determined once the latex on the ticket is scratched off to expose 130 (one hundred thirty) play symbols. For the game BINGO, the player must scratch off the CALLER'S CARD area to reveal 24 (twenty-four) Bingo Numbers and 6 (six) Bonus Numbers. The player must scratch all the Bingo Numbers on CARDS 1 through 4 that match the Bingo Numbers and Bonus Numbers on the CALLER'S CARD. Each "CARD" has a corresponding prize legend. Players win by matching those same numbers on the four Player's Cards. If the player finds a diagonal, vertical or horizontal straight line, the four corners of the card, or an "X" pattern, the player wins a prize according to the legend of the corresponding prize card. Examples of play: If a player matches all bingo numbers plus the FREE Space in a complete horizontal, vertical or diagonal line pattern in any one card, the player wins prize according to the legend of the corresponding prize card. If the player matches all bingo numbers in all four (4) corners pattern in any one card, the player wins prize according to the legend of the corresponding prize card. If the player matches all bingo numbers plus FREE Space to make a complete "X" pattern in any one card, the player wins prize according to the legend of the corresponding prize card. BONUS PLAY: The "gem" play symbol and the "diamond" play symbol on the 4 CARDS can be used as Free Spaces to complete a winning pattern. If a WINNING combination includes a "gem" play symbol, the player wins DOUBLE the prize for that game. If a WINNING combination includes a "diamond" play symbol, the player wins TRIPLE the prize for that game. No portion of the Display Printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game Ticket, all of the following requirements must be met:

1. Exactly 130 (one hundred thirty) Play Symbols must appear under the Latex Overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, and each Play Symbol must agree with its Play Symbol Caption; Crossword and Bingo style games do not typically have play symbol captions.

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 130 (one hundred thirty) Play Symbols under the Latex Overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 130 (one hundred thirty) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 130 (one hundred thirty) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The Display Printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game Ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. A ticket will win as indicated by the prize structure.

B. A ticket can win up to four times and only once per Card.

C. Adjacent tickets in a pack will not have identical patterns.

D. There will never be more than one win on a single BINGO CARD.

E. No duplicate numbers will appear on the CALLER'S CARD and BONUS NUMBERS.

F. No duplicate numbers will appear on each individual BINGO CARD.

G. The DIAMOND symbol will not appear in the same position as another DIAMOND symbol on another CARD on the same ticket.

H. The GEM symbol will not appear in the same position as another GEM symbol on another CARD on the same ticket.

I. Consecutive non-winning tickets within a pack will not have identical patterns.

J. Only the highest prize won per card will be paid.

K. Each CALLER'S CARD will have a minimum of four (4) and a maximum of six (6) numbers from each range per letter. The BONUS NUMBERS will have a minimum of one (1) and a maximum of two (2) numbers for each range per letter.

L. The number range used for each letter will be as follows: B: 01-15, I: 16-30, N: 31-45, G: 46-60, O: 61-75.

M. The GEM symbol and the DIAMOND symbol will appear on every card.

N. The GEM symbol and the DIAMOND symbol will never appear in the same horizontal, vertical or diagonal line (5 consecutive positions) on the same CARD.

O. The GEM symbol and the DIAMOND symbol will never appear in a corner position of a CARD.

P. The GEM symbol and the DIAMOND symbol will never appear in one of the positions within the "X" pattern on a CARD.

Q. Each BINGO CARD on the same ticket must be unique.

R. The 24 CALLER'S CARD numbers and 6 BONUS NUMBERS will match 35 to 55 numbers per ticket (not including the FREE spaces).

S. The majority of the tickets will have unique configurations.

T. A GEM symbol within a WINNING combination wins DOUBLE the prize for that combination, as per the prize structure.

U. A DIAMOND symbol within a WINNING combination wins TRIPLE the prize for that combination, as per the prize structure.

2.3 Procedure for Claiming Prizes.

A. To claim a "LUCKY GEMS BINGO" Instant Game prize of $2.00, $3.00, $4.00, $5.00, $6.00, $9.00, $10.00, $15.00, $20.00, $30.00, $50.00, $100 or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required to pay a $30.00, $50.00, $100 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and 2.3.C of these Game Procedures.

B. To claim a "LUCKY GEMS BINGO" Instant Game prize of $1,000 or $30,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification.

When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "LUCKY GEMS BINGO" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The Texas Lottery is not responsible for tickets lost in the mail. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct:

1. a sufficient amount from the winnings of a prize winner who has been finally determined to be:

a. delinquent in the payment of a tax or other money to a state agency and that delinquency is reported to the Comptroller under Government Code §403.055;

b. in default on a loan made under Chapter 52, Education Code; or

c. in default on a loan guaranteed under Chapter 57, Education Code; and

2. delinquent child support payments from the winnings of a prize winner in the amount of the delinquency as determined by a court or a Title IV-D agency under Chapter 231, Family Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize under $600 from the "LUCKY GEMS BINGO" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of $600 or more from the "LUCKY GEMS BINGO" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any rights to a prize that is not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game Ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game Ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game Tickets and shall not be required to pay on a lost or stolen Instant Game Ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 30,000,000 tickets in the Instant Game No. 1450. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1450 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$2	2,640,000	11.36
$3	960,000	31.25
$4	480,000	62.50
$5	780,000	38.46
$6	720,000	41.67
$9	360,000	83.33
$10	300,000	100.00
$15	360,000	83.33
$20	180,000	166.67
$30	40,625	738.46
$50	24,375	1,230.77
$100	13,750	2,181.82
$500	2,250	13,333.33
$1,000	65	461,538.46
$30,000	15	2,000,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.
**The overall odds of winning a prize are 1 in 4.37. The individual odds of winning for a particular prize level may vary based on sales, distribution, and number of prized claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1450 without advance notice, at which point no further tickets in that game may be sold. The determination of the closing date and reasons for closing will be made in accordance with the instant game closing procedures and the Instant Game Rules. See 16 TAC §401.302(j).

6.0 Governing Law. In purchasing an Instant Game Ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1450, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-201203486
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: July 3, 2012

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Instant Game Number 1465 "Cash on the Spot"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1465 is "CASH ON THE SPOT". The play style is "key number match".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1465 shall be $1.00 per ticket.

1.2 Definitions in Instant Game No. 1465.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible play symbols are: STAR SYMBOL, MUSIC SYMBOL, ANCHOR SYMBOL, BIKE SYMBOL, BOMB SYMBOL, BONE SYMBOL, FOOTPRINTS SYMBOL, LIPS SYMBOL, MOON SYMBOL, RAINBOW SYMBOL, HORSE SYMBOL, GLASSES SYMBOL, BALLOON SYMBOL, $1.00, $2.00, $4.00, $5.00, $10.00, $20.00, $40.00, $100 and $500.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1465 - 1.2D

PLAY SYMBOL	CAPTION
STAR SYMBOL	STAR
MUSIC SYMBOL	MUSIC
ANCHOR SYMBOL	ANCHOR
BIKE SYMBOL	BIKE
BOMB SYMBOL	BOMB
BONE SYMBOL	BONE
FOOTPRINTS SYMBOL	PRINTS
LIPS SYMBOL	KISS
MOON SYMBOL	MOON
RAINBOW SYMBOL	RAINBOW
HORSE SYMBOL	HORSE
GLASSES SYMBOL	GLASSES
BALLOON SYMBOL	BALLOON
$1.00	ONE$
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$40.00	FORTY
$100	ONE HUND
$500	FIV HUND

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There is a boxed four (4) digit Security Number placed randomly within the Serial Number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $1.00, $2.00, $4.00, $5.00, $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $40.00, $100 or $500.

H. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) Bar Code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The Bar Code appears on the back of the ticket.

I. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1465), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 150 within each pack. The format will be: 1465-0000001-001.

J. Pack - A pack of "CASH ON THE SPOT" Instant Game tickets contains 150 tickets, packed in plastic shrink-wrapping and fanfolded in pages of five (5). Tickets 001 to 005 will be on the top page; tickets 006 to 010 on the next page; etc.; and tickets 146 to 150 will be on the last page with backs exposed. Ticket 001 will be folded over so the front of ticket 001 and 010 will be exposed.

K. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

L. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "CASH ON THE SPOT" Instant Game No. 1465 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule, §401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "CASH ON THE SPOT" Instant Game is determined once the latex on the ticket is scratched off to expose 7 (seven) play symbols. If a player reveals a prize amount play symbol, the player wins that amount. No portion of the Display Printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game Ticket, all of the following requirements must be met:

1. Exactly 7 (seven) Play Symbols must appear under the Latex Overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 7 (seven) Play Symbols under the Latex Overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 7 (seven) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 7 (seven) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The Display Printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game Ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets in a pack will not have identical play data, spot for spot.

B. No duplicate non-winning play symbols on a ticket.

C. Winning play symbols will only appear on intended winning tickets as dictated by the prize structure.

2.3 Procedure for Claiming Prizes.

A. To claim a "CASH ON THE SPOT" Instant Game prize of $1.00, $2.00, $4.00, $5.00, $10.00, $20.00, $40.00, $100 or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $40.00, $100 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B of these Game Procedures.

B. As an alternative method of claiming a "CASH ON THE SPOT" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The Texas Lottery is not responsible for tickets lost in the mail. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct:

1. a sufficient amount from the winnings of a prize winner who has been finally determined to be:

a. delinquent in the payment of a tax or other money to a state agency and that delinquency is reported to the Comptroller under Government Code §403.055;

b. in default on a loan made under Chapter 52, Education Code; or

c. in default on a loan guaranteed under Chapter 57, Education Code; and

2. delinquent child support payments from the winnings of a prize winner in the amount of the delinquency as determined by a court or a Title IV-D agency under Chapter 231, Family Code.

D. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.C of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize under $600 from the "CASH ON THE SPOT" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any rights to a prize that is not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.7 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game Ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game Ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game Tickets and shall not be required to pay on a lost or stolen Instant Game Ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 11,040,000 tickets in the Instant Game No. 1465. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1465 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$1	956,800	11.54
$2	956,800	11.54
$4	257,600	42.86
$5	110,400	100.00
$10	73,600	150.00
$20	28,060	393.44
$40	13,800	800.00
$100	920	12,000.00
$500	460	24,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.60. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1465 without advance notice, at which point no further tickets in that game may be sold. The determination of the closing date and reasons for closing will be made in accordance with the instant game closing procedures and the Instant Game Rules. See 16 TAC §401.302(j).

6.0 Governing Law. In purchasing an Instant Game Ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1465, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-201203474

Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: July 2, 2012

♦ ♦ ♦

Instant Game Number 1466 "Merry Millions"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1466 is "MERRY MILLIONS". The play style is "key number match".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1466 shall be $20.00 per ticket.

1.2 Definitions in Instant Game No. 1466.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, $20.00, $25.00, $40.00, $50.00, $100, $200, $500, $1,000, $10,000, and $ONE MILL.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1466 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
25	TWFV
26	TWSX
27	TWSV
28	TWET
29	TWNI
30	TRTY
31	TRON
32	TRTO
33	TRTH
34	TRFR
35	TRFV
36	TRSX
37	TRSV
38	TRET
39	TRNI
40	FRTY
$20.00	TWENTY
$25.00	TWY FIV
$40.00	FORTY
$50.00	FIFTY
$100	ONE HUND
$200	TWO HUND

$500	FIV HUND
$1,000	ONE THOU
$10,000	10 THOU
$ONE MILL	ONE MIL

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There is a boxed four (4) digit Security Number placed randomly within the Serial Number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $20.00.

G. Mid-Tier Prize - A prize of $50.00, $100, $200 or $500.

H. High Tier Prize - A prize of $1,000, $10,000 or $1,000,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) Bar Code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The Bar Code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1466), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 025 within each pack. The format will be: 1466-0000001-001.

K. Pack - A pack of "MERRY MILLIONS" Instant Game tickets contains 25 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The packs will alternate. One will show the front of ticket 001 and back of 025 while the other fold will show the back of ticket 001 and front of 025.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "MERRY MILLIONS" Instant Game No. 1466 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule, §401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "MERRY MILLIONS" Instant Game is determined once the latex on the ticket is scratched off to expose 52 (fifty-two) play symbols. The player scratches the entire play area. If a player matches any of YOUR NUMBERS play symbols to any of the MERRY NUMBERS play symbols, the player wins the PRIZE for that number. No portion of the Display Printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game Ticket, all of the following requirements must be met:

1. Exactly 52 (fifty-two) Play Symbols must appear under the Latex Overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 52 (fifty-two) Play Symbols under the Latex Overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 52 (fifty-two) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 52 (fifty-two) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The Display Printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game Ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets in a pack will not have identical play data, spot for spot.

B. No duplicate MERRY NUMBERS play symbols on a ticket.

C. No duplicate non-winning YOUR NUMBERS play symbols on a ticket.

D. No prize amount in a non-winning spot will correspond with the YOUR NUMBERS play symbol (i.e., 20 and $20).

E. Non-winning prize symbols will not match winning prize symbols on a ticket.

F. No more than five matching non-winning prize symbols on a ticket.

G. The top prize will appear on every ticket unless otherwise restricted.

2.3 Procedure for Claiming Prizes.

A. To claim a "MERRY MILLIONS" Instant Game prize of $20.00, $50.00, $100, $200 or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $50.00, $100, $200 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B of these Game Procedures.

B. To claim a "MERRY MILLIONS" Instant Game prize of $1,000, $10,000 or $1,000,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "MERRY MILLIONS" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The Texas Lottery is not responsible for tickets lost in the mail. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct:

1. a sufficient amount from the winnings of a prize winner who has been finally determined to be:

a. delinquent in the payment of a tax or other money to a state agency and that delinquency is reported to the Comptroller under Government Code §403.055;

b. in default on a loan made under Chapter 52, Education Code; or

c. in default on a loan guaranteed under Chapter 57, Education Code; and

2. delinquent child support payments from the winnings of a prize winner in the amount of the delinquency as determined by a court or a Title IV-D agency under Chapter 231, Family Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.C of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize under $600 from the "MERRY MILLIONS" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of $600 or more from the "MERRY MILLIONS" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any rights to a prize that is not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game Ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game Ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game Tickets and shall not be required to pay on a lost or stolen Instant Game Ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 2,520,000 tickets in the Instant Game No. 1466. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1466 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$20	428,400	5.88
$50	352,800	7.14
$100	44,100	57.14
$200	5,250	480.00
$500	1,008	2,500.00
$1,000	430	5,860.47
$10,000	20	126,000.00
$1,000,000	5	504,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.03. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1466 without advance notice, at which point no further tickets in that game may be sold. The determination of the closing date and reasons for closing will be made in accordance with the instant game closing procedures and the Instant Game Rules. See 16 TAC §401.302(j).

6.0 Governing Law. In purchasing an Instant Game Ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1466, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-201203475
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: July 2, 2012

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Texas Low-Level Radioactive Waste Disposal Compact Commission

Notice of Receipt of Application for Importation of Waste

Please take notice that, pursuant to Texas Low-Level Radioactive Waste Disposal Compact Commission rule 31 TAC §675.23, the Compact Commission has received an application for and a proposed agreement for import for disposal of low-level radioactive waste from:

Philotechnics, Ltd.

201 Renovare Boulevard

Oak Ridge, Tennessee 37830

The application is being placed on the Compact Commission web site, www.tllrwdcc.org, where it will be available for inspection and copying.

Comments on the application are due to be received within twenty-five (25) days or by July 27, 2012. Comments should be mailed to:

Texas Low-Level Radioactive Waste Disposal Compact Commission

3616 Far West Blvd., Suite 117 #294

Austin, Texas 78731

Comments may also be submitted via email to: administration@tllrwdcc.org.

TRD-201203473

Robert Wilson
Chairman
Texas Low-Level Radioactive Waste Disposal Compact Commission
Filed: July 2, 2012

♦ ♦ ♦

Texas Medical Board

Correction of Error

The Texas Medical Board adopted new 22 TAC §§198.1 - 198.3 in the June 29, 2012, issue of the *Texas Register* (37 TexReg 4929). On page 4929, the name of the chapter, "Unlicensed Practice," is incorrect and reflects the old topic of Chapter 198 rules. The correct name of the new chapter is "Standards for Use of Investigational Agents."

TRD-201203485

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Public Utility Commission of Texas

Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on June 27, 2012, to amend a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of GTE Southwest, Inc. d/b/a Verizon Southwest to Amend Its State-Issued Certificate of Franchise Authority; to add City Boundary of the Town of Dish, Project Number 40510.

Verizon Southwest seeks to amend its State-Issued Certificate of Franchise Authority to include portions of the Town of Dish as shown on the maps attached to the application.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) (800) 735-2989. All inquiries should reference Project Number 40510.

TRD-201203448
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: June 29, 2012

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Notice of Application for Service Area Exception

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on June 28, 2012, for an amendment to certificated service area for a service area exception within Gaines County, Texas.

Docket Style and Number: Application of Southwestern Public Service Company to Amend a Certificate of Convenience and Necessity for Electric Service Area Exception within Gaines County. Docket Number 40514.

The Application: Southwestern Public Service Company (SPS) filed an application for a service area boundary exception to allow SPS to provide service to a specific customer located within the certificated service area of Lea County Electric Cooperative, Inc. (LCEC). LCEC has provided an affidavit of relinquishment for the proposed change.

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas no later than July 23, 2012, by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) (800) 735-2989. All comments should reference Docket Number 40514.

TRD-201203449
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: June 29, 2012

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Notice of Application to Amend a Certificate of Convenience and Necessity for a Proposed Transmission Line

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on June 26, 2012, to amend a certificate of convenience and necessity for a proposed transmission line in Mitchell County, Texas.

Docket Style and Number: Application of Sharyland Utilities, L.P. to Amend its Certificate of Convenience and Necessity for the Colorado City to Barber Lake 138-kV Transmission Line in Mitchell County, Docket Number 40484.

The Application: The application of Sharyland Utilities, L.P. (Sharyland) for a proposed transmission line is designated the Colorado City to Barber Lake 138-kV transmission line project. The facilities include construction of a new 138-kV single-circuit transmission line from Sharyland's existing Colorado City Substation to Oncor Electric Delivery Company LLC's planned Barber Lake Breaker Station. The total estimated cost for the project ranges from approximately $2,660,000 to $3,448,000 depending on the route chosen. The proposed project is presented with 18 alternate routes. The lengths of the eighteen alternative routes range from 2.08 miles to 3.13 miles. The commission may approve any of the routes or route segments presented in the application.

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll-free at (888) 782-8477. The deadline for intervention in this proceeding is August 10, 2012. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) (800) 735-2989. All comments should reference Docket Number 40484.

TRD-201203447
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: June 29, 2012

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Notice of Application to Relinquish a Service Provider Certificate of Operating Authority

On June 29, 2012, UTEX Communications Corp. filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority Number 60368. On March 3, 2010, UTEX Communications Corp. filed a Chapter 11 bank-

ruptcy case and continued business operations. Subsequently, by order of the Bankruptcy Court entered on March 5, 2012, the case was converted to Chapter 7 and all customers were notified that UTEX Communications Corp. would no longer be providing services effective May 29, 2012. All customers are now being served by other carriers and UTEX Communications Corp. no longer has any business operations.

The Application: Application of UTEX Communications Corp. to Relinquish Service Provider Certificate of Operating Authority, Docket Number 40515.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by telephone at (512) 936-7120 or toll-free at 1-888-782-8477 no later than July 20, 2012. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll-free at 1-800-735-2989. All comments should reference Docket Number 40515.

TRD-201203476
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: July 2, 2012

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Notice of Intent to Implement a Minor Rate Change Pursuant to P.U.C. Substantive Rule §26.171

Notice is given to the public of Livingston Telephone Company's (Livingston Telephone or the Applicant) application filed with the Public Utility Commission of Texas (commission) on June 29, 2012, for approval of a minor rate change pursuant to P.U.C. Substantive Rule §26.171.

Tariff Control Title and Number: Notice by Livingston Telephone Company to Implement a Minor Rate Change Pursuant to Substantive Rule §26.171, Tariff Control Number 40520.

The Application: Livingston Telephone filed an application to implement revisions to its Customer Services Tariff to increase the monthly rates for the residential 1-Party and 4-Party Local Exchange Access Line rates and the business Local Exchange Access Line rates for 1-Party, Rotary Key Trunk, and PBX Trunk. The proposed effective date for the rate changes is August 1, 2012. The estimated annual revenue increase recognized by the Applicant is $57,780.96 or less than 1.46% of the Applicant's gross annual intrastate revenues. Livingston Telephone has 4,805 access lines (residence and business) in service in the state of Texas.

If the commission receives a complaint(s) relating to this application signed by 5% of the affected local service customers to which this application applies by July 23, 2012, the application will be docketed. The 5% limitation will be calculated based upon the total number of customers of record as of the calendar month preceding the commission's receipt of the complaint(s).

Persons wishing to comment on this application should contact the Public Utility Commission of Texas by July 23, 2012. Requests to intervene should be filed with the commission's Filing Clerk at P.O. Box 13326, Austin, Texas 78711-3326, or you may call the commission at (512) 936-7120 or toll-free 1-800-735-2989. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Tariff Control Number 40520.

TRD-201203477
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: July 2, 2012

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Texas Council on Purchasing from People with Disabilities

Request for Comment Regarding the Management Fee Rate Charged by TIBH Industries, Inc.

Notice is hereby given that the Texas Council on Purchasing from People with Disabilities (Council) will review and make a decision on the management fee rate charged by the central nonprofit agency, TIBH Industries, Inc. (TIBH), for its services to the community rehabilitation programs for Fiscal Year 2013 as required by §122.019(e) of the Texas Human Resources Code. This review will be conducted at the Council's meeting on Friday, September 21, 2012. The Council's meeting will be held at the San Antonio Lighthouse for the Blind, 2305 Roosevelt Avenue, San Antonio, Texas. TIBH has requested that the Council set the management fee rate at 6% of the sales price for products, 6% of the contract price for services and 5% for Temporary Services. The Council seeks public comment on the management fee rate request of TIBH as required by §122.030(a) - (b) of the Texas Human Resources Code.

Comments should be submitted in writing on or before Friday, August 31, 2012 to Kelvin Moore of the Texas Council on Purchasing from People with Disabilities, 111 E. 17th Street, Austin, Texas 78711.

For all other questions or comments, contact the Council at (512) 463-3244. In addition, hearing and speech-impaired individuals with text telephones (TTY) may also contact the Council at (800) 531-5441.

TRD-201203472
David Duncan
Deputy General Counsel
Texas Council on Purchasing from People with Disabilities
Filed: July 2, 2012

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Request for Comment Regarding the Services Performed by TIBH Industries, Inc.

Notice is hereby given that the Texas Council on Purchasing from People with Disabilities (Council) intends to review the services provided by the central nonprofit agency, TIBH Industries, Inc. (TIBH), for Fiscal Year 2012 as required by §122.019(c) of the Texas Human Resources Code. As required by that section, the Council will review the performance of TIBH to determine whether that agency's performance complies with the Council's contractual specifications. This review will be considered at the next Council meeting on Friday, September 21, 2012. The Council's meeting will be held at the San Antonio Lighthouse for the Blind, 2305 Roosevelt Avenue, San Antonio, Texas. The Council requests that interested parties submit comments regarding the services of TIBH in its operation of the State Use Program, under §122.019(a) - (b) of the Texas Human Resources Code.

Comments should be submitted in writing on or before Friday, August 31, 2012 to Kelvin Moore of the Texas Council on Purchasing from People with Disabilities, 111 E. 17th Street, Austin, Texas 78711.

For all other questions or comments, contact the Council at (512) 436-3244. In addition, hearing and speech-impaired individuals with text telephones (TTY) may also contact the Council at (800) 531-5441.

TRD-201203470

David Duncan
Deputy General Counsel
Texas Council on Purchasing from People with Disabilities
Filed: July 2, 2012

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Rio Grande Council of Governments

Request for Proposals: Hazard Mitigation

The Rio Grande Council of Governments, based in El Paso, Texas, is requesting proposals from a qualified consultant firm to perform planning services in connection with the required update to its Comprehensive Regional Multi-Jurisdictional Hazard Mitigation Action Plan.

Proposals must be received at its office located at 1100 N. Stanton, Suite 610, El Paso, Texas 79902 by July 20, 2012 no later than 12:00 p.m. MDT. Proposal packets may be obtained at www.riocog.org or by calling (915) 533-0998.

TRD-201203398
Annette Gutierrez
Executive Director
Rio Grande Council of Governments
Filed: June 27, 2012

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Texas Veterans Commission

Request for Applications Concerning the Texas Veterans Commission Fund for Veterans' Assistance Grant Program

Filing Authority. The availability of grant funds is authorized by Texas Government Code, §434.017.

Eligible Applicants. The Texas Veterans Commission (TVC) is requesting applications from organizations eligible to apply for grant funding. Eligible applicants are units of local government, IRS Code §501(c)(19) Posts or Organizations of Past or Present Members of the Armed Forces, IRS Code §501(c)(3) private nonprofit corporations authorized to conduct business in Texas, Texas chapters of IRS Code §501(c)(4) veterans service organizations, and nonprofit organizations authorized to do business in Texas with experience providing services to veterans.

Description. The purpose of this solicitation is to receive applications proposing projects that meet the needs of veterans and their families. These needs include, but are not limited to: emergency financial assistance; transportation services; family and/or individual counseling for Post-Traumatic Stress Disorder (PTSD) and Traumatic Brain Injury (TBI); employment, training/job placement assistance; housing assistance; family and child services; non-criminal legal services; development of professional services networks; and enhancement or improvement of veterans' assistance programs, including veterans' representation and counseling. Grant funds must be used to supplement, not supplant, existing funds and/or services.

Dates of Project. The projected start date for these grants is January 1, 2013 with an ending date of December 31, 2013. TVC will require periodic performance and expenditure reports.

Project Amount. For this solicitation, the minimum grant award will be $5,000. The maximum grant award will be $500,000. This project is funded 100% from state funds.

Selection Criteria. Applications will be initially evaluated by TVC staff. Eligible applicants will be reviewed and considered by the Fund for Veterans' Assistance (FVA) Advisory Committee. The FVA Advisory Committee will prepare a funding recommendation to be presented to the Commission for action. The Commission makes the final funding decisions based upon the FVA Advisory Committee's funding recommendation. Applications must address all requirements of the application to be considered for funding.

TVC is not obligated to approve an application, provide funds, or endorse any application submitted in response to this solicitation. This solicitation does not commit TVC to pay any costs before an application is approved and a grant agreement is signed. This issuance does not obligate TVC to award a grant or pay any costs incurred in preparing a response.

Requesting the Materials Needed to Complete an Application. All information needed to respond to this solicitation will be posted to the TVC website at *http://www.tvc.texas.gov* on or about Friday, July 13, 2012.

Further Information. In order to assure that no prospective applicant may obtain a competitive advantage because of acquisition of information unknown to other prospective applicants, any and all questions must be submitted via email to *grants@tvc.texas.gov.* All questions and the written answers will be posted on the TVC website in the format of Frequently Asked Questions (FAQs).

Deadline for Receipt of an Application. Applications must be received by TVC no later than 5:00 p.m. (Central Time), Tuesday, August 7, 2012, to be considered eligible for funding.

TRD-201203484
Sarah Tillman
Acting Director, Fund for Veterans' Assistance
Texas Veterans Commission
Filed: July 2, 2012

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Request for Applications Concerning the Texas Veterans Commission Housing4TexasHeroes Program

Filing Authority. The availability of grant funds is authorized by an Act effective June 17, 2011, 82nd Legislature, 1st Called Session, House Bill 1, Article VII, Rider 19, Page VII-7, and Texas Government Code, §434.017.

Eligible Applicants. The Texas Veterans Commission (TVC) is requesting applications from organizations eligible to apply for grant funding. Eligible applicants are units of local government, IRS Code §501(c)(19) Posts or Organizations of Past or Present Members of the Armed Forces, IRS Code §501(c)(3) private nonprofit corporations authorized to conduct business in Texas, Texas chapters of IRS Code §501(c)(4) veterans service organizations, and nonprofit organizations authorized to do business in Texas with experience providing rental assistance, temporary housing, and home building or housing modification for disabled veterans.

Description. The purpose of this solicitation is to receive applications proposing projects that meet the needs of veterans and their families. These needs are housing assistance for homeless or low income veterans and their dependents, housing assistance for dependents of veterans who are undergoing long term treatment at a facility in Texas, and housing construction or housing modification for disabled veterans. Grant funds must be used to supplement, not supplant, existing funds and/or services. This is a reimbursement only grant program.

Dates of Project. The projected start date for grants awarded under this solicitation is January 1, 2013 with an ending date of December 31, 2013. TVC will require periodic performance and expenditure reports for both grant types.

Project Amount. For this solicitation, a limited amount of funding of approximately $300,000 is available. The minimum grant award will be $5,000. This project is funded 100% from state funds.

Selection Criteria. Applications will be initially evaluated by TVC staff. Eligible applicants will be reviewed and considered by the Fund for Veterans' Assistance (FVA) Advisory Committee. The FVA Advisory Committee will prepare a funding recommendation to be presented to the Commission for action. The Commission makes the final funding decisions based upon the FVA Advisory Committee's funding recommendation. Applications must address all requirements of the application to be considered for funding.

TVC is not obligated to approve an application, provide funds, or endorse any application submitted in response to this solicitation. This solicitation does not commit TVC to pay any costs before an application is approved and a grant agreement is signed. This issuance does not obligate TVC to award a grant or pay any costs incurred in preparing a response.

Requesting the Materials Needed to Complete an Application. All information needed to respond to this solicitation will be posted to the TVC website at *http://www.tvc.texas.gov* on or about Friday, July 13, 2012.

Further Information. In order to assure that no prospective applicant may obtain a competitive advantage because of acquisition of information unknown to other prospective applicants, any and all questions must be submitted via email to *grants@tvc.texas.gov.* Questions and the written answers may be posted on the TVC website in the format of Frequently Asked Questions (FAQs).

Deadline for Receipt of an Application. Applications must be received by TVC no later than 5:00 p.m. (Central Time), Tuesday, August 7, 2012, to be considered eligible for funding.

TRD-201203483
Sarah Tillman
Acting Director, Fund for Veterans' Assistance
Texas Veterans Commission
Filed: July 2, 2012

How to Use the Texas Register

Information Available: The 14 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 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.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

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

Review of Agency Rules - notices of state agency rules review.

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 36 (2011) is cited as follows: 36 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 "36 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 36 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 at: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the internet. For website information, call the Texas Register at (512) 463-5561.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac.

The following companies also provide complete copies of the TAC: Lexis-Nexis (800-356-6548), and West Publishing Company (800-328-9352).

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

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

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Index of Rules***. The *Index of Rules* is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register***. If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with the ***Texas Register*** page number and a notation indicating the type of filing (emergency, proposed, withdrawn, or adopted) as shown in the following example.

TITLE 1. ADMINISTRATION
Part 4. Office of the Secretary of State
Chapter 91. Texas Register
40 TAC §3.704.....950 *(P)*